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The American Motorist in Canada

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all[56] cases of tax litigation except for items raised under the doctrine of equitable recoupment and where new matter is raised by the Commissioner in the tax court. It would seem, in order to be consistent, that if the Commissioner raises "new matter" in the form of an untimely offset in a refund suit he should have the burden of proving it as well. Our tax structure is based upon a self assessing system, yet we reward, with a lighter burden of proof, the man who refuses to pay his taxes and litigates his grievances in the tax court, and penalize, with a heavier burden of proof, the man who pays his taxes on time and sues for refund in the court of claims or the district courts.

RICHARD M. JOHNSON

THE AMERICAN MOTORIST IN CANADA

Every year the Canadian highways are used by thousands of Americans enjoying the recreational and vacation areas to the north. Vehicular traffic, composed of private as well as commercial vehicles, uses Canadian routes daily as a short cut between the northeastern and midwestern United States. This international travel is further facilitated by the reciprocal waiver of the requirement for a passport or visa when crossing the border between the two countries.[1] Inevitably, a certain number of American motorists will be involved in motor vehicle accidents in Canada. The following is an attempt to present some of the legal problems arising from such accidents and to provide an analytical framework for solving these problems.

Because of the breadth of this undertaking, it necessarily will deal in general terms, sacrificing the detail that is desired in considering each of the issues. However, this comment will collect and cite references where this detail will be found, and serve as a touchstone for a more extensive analysis of any particular factual situation.

In treating this subject the scope has been limited to the jurisdictions of New York State and the Province of Ontario. These jurisdictions will serve as a model for factual situations involving two other jurisdictions in the United States and Canada respectively.[2]

When an American motorist has been involved in an automobile accident in Canada, a resulting law suit will take one of three possible forms: American Plaintiff v. American Defendant, Canadian Plaintiff v. American Defendant, or American Plaintiff v. Canadian Defendant.[3] In each of these situations the party

56. Except where Congress has specifically allocated the burden of proof; see note 6 *supra*.

1. Immigration and Nationality Act § 212(d)(4)(B), 66 Stat. 191 (1952).
2. The Canadian provinces are common law provinces with the exception of Quebec, which has retained a civil law system.
3. Cross claims and counter claims will be disregarded for the purpose of this analysis, since they are merely combinations of these categories.

other than the American motorist may be either another motorist, a pedestrian, or a guest passenger. This Comment will not attempt to analyze and evaluate each of the factual permutations which may arise[4] but rather will treat each situation in general terms, highlighting some of the more common factual situations resulting in civil liability. The problems in the criminal area arising out of the operation of motor vehicles will also be discussed.

A CONTRAST OF THE JUDICIAL STRUCTURES OF THE UNITED STATES AND CANADA

While in the United States all the governmental powers are derived from and limited by the United States Constitution, in Canada the British North America Act, an 1867 statute of the British Parliament,[5] is the sole charter determining the respective powers of Canada and the provinces.[6] Both the American and Canadian documents establish federal systems, distributing powers between the states or provinces and their federal governments, so that each is a separate legal unit. In contrast to the 10th Amendment of the United States Constitution, which states that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people", the residual powers in Canada not expressly given to the provinces are reserved in Canada.[7] The judicial structure of Canada is very similar to that of the United States. Each Canadian province has its own system of courts; however, with the exceptions of the Exchequer Court of Canada[8] and the Admiralty Court,[9] there is no Canadian counterpart to the lower federal court system of the United States.[10] The Supreme Court of Canada[11] is essentially a provincial appellate tribunal,[12] and there is no general federal common law applied by the Court.[13] The federal statutory law enacted by the Canadian Parliament is part of the law of each province and initially applied by the provincial courts.[14] Although the Supreme Court's decision is only binding in the province where the case originated, the Court has been instrumental in establishing uniformity among the common law provinces. Even

4. See, *e.g.*, Brownlie & Webb, *Contributory Negligence and the Rule in Phillips v. Eyre*, 40 Can. B. Rev. 79 (1962).

5. 30 & 31 Vict., c. 3.

6. See generally Laskin, Canadian Constitutional Law (2d ed. 1960); Varcoe, The Distribution of Legislative Power in Canada (1954).

7. Castel, Private International Law 5 (1960) [hereinafter cited as Castel].

8. See Exchequer Court Act, Can. Rev. Stat. c. 98 (1952), as amended [1953] Can. Stat. c. 30, s. 25 [1957], Can. Stat. c. 24 [1960-61], Can. Stat. c. 38 [1964], Can. Stat. c. 14. The court deals with claims by or against the Crown in the right of Canada.

9. See Admiralty Act, Can. Rev. Stat. c. 1 (1952), as amended [1963] Can. Stat. c. 19.

10. See Judicial Code of 1948 §§ 1-2680, 62 Stat. 869, 28 U.S.C. §§ 1-2680 (1964).

11. See Supreme Court Act, Can. Rev. Stat. c. 259 (1952), as amended Can. Rev. Stat. c. 335 (1952), [1956] Can. Stat. c. 48.

12. Cavarzon, *The Jurisdiction of the Supreme Court of Canada: Its Development and Effect on the Role of the Court*, 3 Osgoode Hall L.J. 431 (1965).

13. Castel 74.

14. *Ibid.*

in the Province of Quebec, a civil law jurisdiction, the unifying influence of the Supreme Court has been felt.[15]

Article VI of the New York State Constitution establishes the system of courts for the state and defines their jurisdiction, as does the Ontario Judicature Act[16] for the Province of Ontario. In New York the Court of Appeals is the highest state court and is vested solely with appellate jurisdiction.[17] The Supreme Court of New York has general original jurisdiction[18] and an appellate division with intermediate appellate jurisdiction.[19] The Supreme Court of Ontario, composed of the High Court of Justice (a court of general jurisdiction), and the Court of Appeal (the highest appellate court in the Province),[20] is comparable to the New York Supreme Court and Court of Appeals. The Ontario County and District Courts[21] and the Ontario Division Courts[22] are courts of limited jurisdiction similar to the County Courts[23] and the Town, Village and City Courts[24] in New York State. Generally, in Ontario automobile accident disputes are litigated before a judge and a jury of six members,[25] while in New York the parties may elect to have a six or twelve member jury.[26]

WHICH FORUMS ARE AVAILABLE?—THE JURISDICTIONAL ISSUE

There are three possible forums for litigation involving an American motorist in Canada—the Ontario or the New York state or federal courts. In Canada, as in the United States, the requirements for the exercise of jurisdiction are considered "procedural" and therefore are controlled by the law of the forum.[27] The courts in the common law provinces approach the question of jurisdiction in the same manner as the courts in the United States. In either country, assuming the court has jurisdiction over the subject matter—a tort claim arising out of the automobile accident—the courts look to the nature of the claim to find a basis for the exercise of jurisdiction. If the claim seeks to impose a personal obligation upon the defendant, it is an in personam claim, and both the New York state and federal courts as well as the Ontario courts recognize physical presence or domicile in the state or province at the commencement of the proceedings as a sufficient basis for the exercise of in personam jurisdiction.[28] The New York long arm statute, CPLR section 302 provides in part that the court has a sufficient basis for in personam jurisdiction over a non-domiciliary defendant who "transacts any business within the state . . ."

15. *Id.* at 75.
16. Rev. Stat. Ont. c. 197 (1960).
17. N.Y. Const. art. VI, § 3 (1894) as amended 1961.
18. N.Y. Const. art. VI, § 7 (1894) as amended 1961.
19. N.Y. Const. art. VI, § 4 (1894) as amended 1961.
20. The Judicature Act, Rev. Stat. Ont. c. 197, s. 3 (1960).
21. The County Courts Act, Rev. Stat. Ont. c. 76 (1960).
22. The Division Courts Act, Rev. Stat. Ont. c. 110 (1960).
23. N.Y. Const. art. VI, § 11 (1894) as amended 1961.
24. N.Y. Const. art. VI, § 17 (1894) as amended 1961.
25. The Judicature Act, Rev. Stat. Ont. c. 197, s. 61 (1960).
26. N.Y. CPLR § 4104.
27. See Castel 80; Restatement, Conflict of Laws § 585 (1934).
28. See Castel 234; Goodrich & Scoles, Conflict of Laws § 73 (4th ed. 1964).

where the cause of action arises out of that business.[29] There is no corresponding provision in the Supreme Court of Ontario Rules of Practice and Procedure. However, both New York[30] and Ontario[31] do have provisions for the exercise of in personam jurisdiction where the action is founded on a tort committed within the state or province[32] but the provisions have been narrowly interpreted by their respective courts.[33]

In both Ontario and New York if the defendant has property of value within the jurisdiction of the court, this property may be seized, attached or garnished by the plaintiff; the court may then exert quasi in rem jurisdiction, and the plaintiff may seek to enforce a personal claim against the defendant by applying the proceeds to the satisfaction of that claim.[34] It should be noted that the defendant's liability is determined only with respect to his rights in the property, and hence the defendant may still be found liable for the excess of the unsatisfied claim in another action.

The defendant also may submit to the jurisdiction of the courts by conduct, as in the case where he voluntarily appears to defend on the merits of the case.[35] Generally an appearance to protect property within the jurisdiction is voluntary.[36] With respect to notice, the Ontario courts require personal service unless such personal service cannot be made,[37] as is the rule in the New York[38] and federal courts.[39] Hence the problem presented in *Boivin v. Talcott*[40] is not

29. § 302. Personal jurisdiction by acts of non-domiciliaries
(a) Acts which are the basis of jurisdiction. A court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, as to a cause of action arising from any of the acts enumerated in this section, in the same manner as if he were a domiciliary of the state, if, in person or through an agent, he:
1. transacts any business within the state; or
2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
3. owns, uses or possesses any real property situated within the state.
30. N.Y. CPLR § 302(a)(2). See note 29 *supra.*
31. Ont. Rev. Reg. reg. 396, r. 25 (1960).
25.-(1) Service out of Ontario of a writ of summons or notice of writ may be allowed,
. . .
(h) where the action is founded on a tort committed within Ontario. . . .
32. The Ontario courts define the place of the tort as the place where the wrongful act or omission from which the damage flows actually took place. Anderson v. Nobels Explosive Co., 12 Ont. L.R. 644 (Div. Ct. 1906). The New York courts, on the other hand, generally define the place of the tort as the place where the injury occurred. Homburger, *The Reach of New York's Long-Arm Statute: Today and Tomorrow,* 15 Buffalo L. Rev. 61, 65 (1965).
33. See Castel 248; Homburger, *supra* note 32.
34. See Castel 157; Goodrich & Scoles, *op. cit. supra* note 28, § 69.
35. See Castel 238; Ehrenzweig, Conflict of Laws 89-90 (2d ed. 1962).
36. See Castel 239; Homburger & Laufer, *Appearance and Jurisdictional Motions in New York,* 14 Buffalo L. Rev. 374 (1965).
37. Ont. Rev. Reg. reg. 396, rr. 16, 30 (1960). *Cf.* The Highway Traffic Act, Ont. Rev. Stat. c. 172, s. 107 (1960) providing for service on non-resident motorists.
38. N.Y. CPLR § 308.
39. Fed. R. Civ. P. 4(d).
40. 102 F. Supp. 979 (N.D. Ohio 1951). *Cf.* Castel 269. There is no due process clause in the British North America Act which requires that sufficient notice be given to the defendant.

present. In that case the federal district court refused to enforce a judgment against an Ohio resident rendered by a Quebec court arising out of an automobile accident in Quebec. Although service of process was obtained in accordance with the Quebec Code of Civil Procedure by both publication in Quebec and delivery of a copy of the complaint to the defendant in Ohio, the court held that the Quebec court did not have jurisdiction which was based on a non-resident motorist statute. The court reasoned that since notice by personal service was not mandatory under the laws of Quebec but within the discretion of the court, even though the defendant had notice by personal service, the constitutional requirements of due process were not met.

Assuming the court has full jurisdiction, the court may still refuse to exercise it through the use of the corrective doctrine of forum non conveniens. In Ontario, when there is personal service within the province, there has been a reluctance on the part of the court to decline jurisdiction. This is so even where the action arose outside the province between non-residents, and the defendant was amenable to process in at least two forums.[41] When there is an attempt to serve a non-resident outside of Ontario, the granting of the order allowing such service as authorized by statute[42] is left to judicial discretion.[43] The judicial officers have limited the exercise of jurisdiction primarily by considerations of convenience.[44] With respect to torts committed within the Province of Ontario, courts order service outside the Province only if the case is substantially connected with Ontario.[45]

The American courts have used the doctrine of forum non conveniens more readily than have the Canadian courts.[46] New York courts will ordinarily decline jurisdiction in tort actions between non-residents while granting an absolute jurisdictional right to and against residents.[47] Where an action is brought against an American defendant by a foreign plaintiff in a federal court, there is no discernible trend in the case law with respect to the refusal to exercise jurisdiction.[48] In both the New York state and federal courts where dismissal would force an American plaintiff into the court of a foreign country, forum non conveniens will ordinarily not be applied.[49]

When an action is brought in Ontario on a cause of action for which a suit has been brought and is pending between the same parties in the United States, an order may be made staying all Ontario proceedings until the court is offered satisfactory proof that the foreign action has been determined or

41. Castel 251.
42. Ont. Rev. Reg. reg. 396, r. 25 (1960).
43. Castel 250.
44. See, *e.g.*, Lawrence v. Lawrence [1953], Ont. Weekly N. 124 (High Ct. 1952).
45. Jenner v. Sun Oil Co. [1952], Ont. 240 [1952], 2 D.L.R. 526, 16 Can. Pat. R. 87 (High Ct.).
46. Castel 251.
47. Ehrenzweig, *op. cit. supra* note 35, at 122 n.5.
48. See *id.* at 126.
49. *Id.* at 126.

discontinued.[50] The court will examine each case very carefully and order the stay only where it is convinced that to do otherwise would be detrimental to the defendant without any substantial advantage to the plaintiff. Mere hardship or inconvenience is ordinarily not sufficient.[51] The court is also given the power to enjoin a party from instituting or continuing proceedings in a foreign country.[52] The injunction will be refused when there is no evidence of an abuse of the process of the foreign court, and all matters raised in support of the injunction can be raised by way of a defense in the foreign action.[53]

Where an action is pending in a New York state or federal court as well as in an Ontario court, the American courts generally refuse to grant a stay in its proceedings *pendente lite* in favor of the foreign proceedings.[54]

In summary, consider the following general situations:

American Plaintiff v. American Defendant—If the action is brought in a New York state or federal court, the New York domicile of the defendant provides a jurisdictional basis which the courts may choose to exercise over the defendant. These courts would probably refuse to invoke the doctrine of forum non conveniens since there is no inconvenience to either party. If the action is brought in Ontario, the courts would have to look to statutes authorizing exercise of in personam jurisdiction. The commission of a tortious act within the province would satisfy this requirement of a jurisdictional basis. This is assuming the defendant has no property within the province enabling the court to exercise quasi in rem jurisdiction. By the judicial regulation of service outside the province, the court would probably refuse to allow service due to the inconvenience to both non-resident parties as well as to the court,[55] although if the jurisdiction is based on personal service within Ontario, the court would probably choose to exercise jurisdiction over the defendant.

Canadian Plaintiff v. American Defendant—If the action is brought in a New York state or federal court, the requirement of an in personam jurisdictional basis is satisfied by the defendant's domicile within the state. In this situation the New York courts would probably decline to exercise the doctrine of forum non conveniens and exercise their jurisdiction over the defendant, while in the federal courts it is uncertain whether they would refuse to exercise their jurisdiction. If the action is brought in an Ontario court, the court must have an adequate basis in order to exercise in personam or quasi in rem jurisdiction. If jurisdiction is based on personal service within the province, the Ontario courts are reluctant to decline to exercise their jurisdiction; however,

50. The Judicature Act, Rev. Stat. Ont. c. 197, s. 21 (1960).
51. Castel 252.
52. The Judicature Act, Rev. Stat. Ont. c. 197, s. 15(6) (1960).
53. Castel 252-53.
54. Ehrenzweig, *op. cit. supra* note 35, at 127-30.
55. *But see* Anderson v. Thomas [1935], Ont. Weekly N. 228 [1935], 3 D.L.R. 286 (High Ct.). "The defendant urges that the preponderance of convenience and expense should be considered, but here neither of these factors is so unusual or exceptional as to warrant any interference by the Court in permitting the plaintiffs to exercise their right to have the case tried by the courts of Ontario." *Id.* at 230, [1935] 3 D.L.R. at 288.

if service is required outside the province, the court may be persuaded not to allow such service by considerations of inconvenience.

American Plaintiff v. Canadian Defendant—In this situation the New York and federal courts must look to factors other than domicile upon which to justify the exercise of jurisdiction. If such jurisdictional basis is found, the court will probably exercise jurisdiction, for the New York and federal courts are reluctant to force an American plaintiff into a foreign court. The Ontario courts would be able to exercise jurisdiction over the Canadian defendant on the basis of domicile, and would probably so exercise their power since the Ontario courts generally are not reluctant to decline to assert the doctrine of forum non conveniens where service has been made within the province.

WHICH LAW SHOULD THE COURT APPLY?—THE CONFLICT OF LAWS ISSUE

The Canadian courts have followed the English choice of law rules and the defendant's liability is determined by the law of the forum provided his conduct was also unlawful by the law of the place of the tort.[56] Hence, any defense allowable under the lex fori is available although it is not allowable under the lex loci delicti. The problem then becomes defining the place of the tort. The Ontario courts hold that the locus delicti is where the wrongful act or omission from which the damage flows actually took place.[57] Therefore, when an automobile accident has taken place in Canada, the Canadian courts apply the law of the forum. Even where the tortious act occurred outside Ontario, for example, the negligent manufacture or repair of the automobile, the Ontario courts will apply the Ontario law, assuming the wrong is unlawful under both Ontario law and the law of the locus delicti.

In 1963 the New York Court of Appeals in *Babcock v. Jackson*[58] upset the traditional choice of law rule that the law of the place of the tort[59] governs the substantive[60] rights of the parties in any action arising out of that tort. Since that time the area has been developing[61] and it now appears that the lex loci delicti rule has been altered by *Babcock*, to the extent that the New York courts will not apply the foreign law where the contacts of the parties with that jurisdiction are so slight and tenuous that it could not be said that

56. See generally Castel 215-22; Harper, *Tort Cases in the Conflict of Laws*, 33 Can. B. Rev. 1155 (1955); Richardson, *Problems in Conflict of Laws Relating to Automobiles*, 13 Can. B. Rev. 201 (1935); Schmitthoff, *Torts Committed Abroad*, 27 Can. B. Rev. 816 (1949). This rule has been severely critized as a choice of law rule for as applied it is actually a limit on the exercise of jurisdiction by the court and then subsequently presents a problem of the proper law to apply. See Spence, *Conflict of Laws in Automobile Negligence Cases*, 27 Can. B. Rev. 661 (1949); Comment, *Rule in Phillips v. Eyre—Choice of Law or Jurisdiction*, 1 Alberta L. Rev. 232 (1955-61).

57. Anderson v. Nobels Explosive Co., 12 Ont. L. R. 644 (Div. Ct. 1906). A different rule is applied by the New York courts, see note 32 *supra*.

58. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743, 95 A.L.R.2d 1 (1963).

59. See note 32 *supra*.

60. See generally Ehrenzweig, *op. cit. supra* note 35, at 354-58.

61. See, *e.g.*, Long v. Pan American World Airways, 17 N.Y.2d 337, 213 N.E.2d 796, 266 N.Y.S.2d 513 (1965); Dym v. Gordon, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).

the parties had any expectation or intent that law would or should govern their rights.[62] Since the qualitative and quantitative characteristics of these contacts are uncertain, each particular factual situation presented by the accident involving the American motorist in Canada must be viewed in light of the *Babcock* case law as it develops.

RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

Initially, it should be noted that in the United States judgments of sister states are not "foreign judgments" in the same sense as judgments of foreign countries. There is an express constitutional mandate in the full faith and credit clause for the recognition and enforcement of sister state judgments, but this recognition does not extend to judgments of foreign countries.[63] Since the British North America Act of 1867 (the Canadian Constitution) lacks language comparable to the full faith and credit clause, provincial courts usually make no distinction between judgments rendered in foreign countries and judgments rendered in other provinces.[64]

In both Canada and the United States, the effect to be given judgments of foreign countries is almost exclusively determined by judge-made law. In the United States, ever since *Klaxon Co. v. Stentor Elec. Mfg. Co.*[65] decided that conflict of laws rules are to be treated as substantive law, state law controls the effect given to foreign judgments.[66] In Canada each province is similarly free to refuse to recognize American judgments.[67]

The consensus is that both American and Canadian courts generally grant full recognition and binding effect to final foreign judgments.[68] In the United States, the rationale advanced for recognizing foreign judgments must be viewed in light of the history and development of the full recognition afforded foreign judgments. Comity, occasionally identified with reciprocity, provided an uncertain standard because it left enforceability of the decision to the discretion of the court. A more definite explanation was found in the theory which interpreted the foreign judgment as creating a legal obligation which deserved recognition abroad. Recently, this theory has been vying for popularity with the doctrine that the principles underlying res judicata also determine the effect to be given foreign judgments, that there be an end to litigation, that both

62. See generally Comment, *The New York Choice of Law Rule: Babcock v. Jackson Applied*, 32 Brooklyn L. Rev. 143 (1965).

63. *Cf.* 28 U.S.C. § 1738 (1964).

64. Castel 258; Nadelmann, *Enforcement of Foreign Judgments in Canada*, 38 Can. B. Rev. 68 (1960).

65. 313 U.S. 487 (1941).

66. *But see* Reese, *The Status in This Country of Judgments Rendered Abroad*, 50 Colum. L. Rev. 783 (1950) stating that this is an open question.

67. Castel 259.

68. Castel 257-58; Kulzer, *Recognition of Foreign Judgments: A Summary of Developments in the United States and Western Europe*, 1964 Proceedings, A.B.A., Section of Int'l and Comp. Law 245.

parties be bound by the decision, and that matters once tried shall be considered forever settled between the parties.[69]

The Canadian courts generally will recognize a foreign judgment on the basis of comity or on the theory of a legal obligation.[70] The Canadian courts have not adopted the principle of reciprocity as a basis for recognition of foreign judgments,[71] whereas in the American courts the doctrine was adopted but early discarded.[72]

In both the United States and Canada, the most important requirement for enforcement of a foreign judgment is that the judgment must have been pronounced by a court having jurisdiction. Naturally, the rendering court must have had jurisdiction under its law in order to have a final judgment. However, neither the New York nor Ontario courts will recognize this final judgment unless the rendering court also had jurisdiction under the law of the forum.[73]

Both the New York and Ontario courts also require that the foreign judgment be final and dispose of the case on its merits, that the judgment was not procured by extrinsic fraud, that the proceeding was conducted in accordance with the forum's standards of natural justice, and that granting effect to the judgment would not be against public policy.[74]

In both New York and Ontario, contrary to the rules with respect to domestic judgments, there is no merger of the original claim in the foreign judgment.[75] Hence a plaintiff seeking to enforce abroad may sue either on the judgment itself or in the original claim. However, where the defendant was victorious abroad, he may invoke the foreign judgment as a bar. In practice the plaintiff's option is of slight importance for if the action is brought again on the original claim, the foreign judgment may be invoked as conclusive of the issues involved.[76]

In both the United States and Canada uniform legislation in the area of enforcement of foreign judgments has had many advocates,[77] however the legislatures have not been quick to respond. In the United States the Uniform

69. See generally Reese, *supra* note 66; Smit & Miller, International Co-operation in Civil Litigation—A Report on Practices and Procedures Prevailing in the United States 28-32 (1961).

70. Castel 259.

71. See Kennedy, *Recognition of Judgments In Personam: The Meaning of Reciprocity*, 35 Can. B. Rev. 123 (1957).

72. See Smit & Miller, *op. cit. supra* note 69, at 30-31.

73. Castel 261; Smit & Miller, *op. cit. supra* note 69, at 33. *Cf.* Castel 265. Canadian courts do not recognize as internationally valid the jurisdiction of foreign courts exercised over non-resident individuals performing particular acts or carrying on business within the territorial limits and where the cause of action arose out of such acts or business, although the courts themselves may exercise a similar jurisdiction over non-residents.

74. See generally Castel 267-76; Smit & Miller, *op. cit. supra* note 69, at 32-38.

75. Castel 274-76; Smit & Miller, *op. cit. supra* note 69, at 38-39. See, *e.g.*, Oilcakes and Oilseeds Trading Co. v. Sinason-Teicher Inter American Grain Corp., 8 N.Y.2d 852, 168 N.E.2d 708, 203 N.Y.S.2d 904 (1960).

76. Smit & Miller, *op. cit. supra* note 69, at 38-39.

77. See, *e.g.*, Castel 286; Kulzer, *supra* note 68; Nadelmann, *supra* note 64.

Enforcement of Judgments Act of 1948 has been enacted in only eight states, however this Act does not apply to judgments rendered in foreign countries.[78] In 1962 the Uniform Foreign Money-Judgments Recognition Act was adopted,[79] and in the following year was enacted into law by Illinois and Maryland.[80] The Act does apply to judgments rendered in foreign countries and it remains to be seen whether it will be widely accepted.

A similar evolution has taken place in Canada. The Uniform Reciprocal Enforcement of Judgments Act of 1924 was limited only to judgments of other provinces; however, contrary to the American Uniform Enforcement of Judgments Act, reciprocity was a requirement.[81] In 1933 a Uniform Foreign Judgments Act was proposed which applied to provinces and foreign countries alike, but this Act has only been enacted in Saskatchewan and New Brunswick.[82] Then, in 1958, a new Reciprocal Enforcement of Judgments Act was adopted which is similar to the old Act but also applies to judgments of foreign countries on a reciprocal basis.[83]

Perhaps in the near future uniform legislation will be used to facilitate the enforcement of foreign judgments of the American states and the Canadian provinces.

Reparation of Injury

The method of compensating automobile accident injury victims can be divided into two categories—tort and non-tort. Essentially, tort recovery includes any recovery from the other person involved in the accident, his insurer or an unsatisfied judgment fund. Non-tort recovery includes any recovery from the victim's own insurance, or from government welfare programs.[84]

Tort Recovery—In Ontario, as well as in New York, almost all judgments against negligent drivers are paid by insurance companies. Although liability insurance is not compulsory in Ontario as it is in New York,[85] in practice it is estimated that 98 per cent of all motor vehicles in Ontario are covered by liability insurance.[86] As in New York,[87] minimum standards of liability insur-

78. Nadelmann, *supra* note 64, at 86.

79. National Conf. of Commissioners on Uniform State Laws, [1962] Handbook 132. For Act as adopted, see *id.* at 242.

80. See National Conf. of Commissioners on Uniform State Laws, [1963] Handbook 246. See generally Kulzer, *supra* note 68, at 250-51.

81. Castel 277-78. See generally Nadelmann, *supra* note 64.

82. Castel 280; Nadelmann, *supra* note 64, at 75-76.

83. Castel 280-86; Nadelmann, *supra* note 64, at 79-83.

84. See generally Conard, Morgan, Pratt, Voltz & Bombaugh, Automobile Accident Costs and Payments 28-40 (1964) [hereinafter cited as Mich. Study]; Linden, The Report of the Osgoode Hall Study on Compensation for Victims of Automobile Accidents ch. II, pp. 1-2 (1965) [hereinafter cited as Osgoode Hall Study].

85. N.Y. Vehicle and Traffic Law § 341.

86. Osgoode Hall Study ch. IV, p. 10. Compare Mich. Study 42, estimating that in 1960, 85% of the civilian population of the United States was covered by automobile liability insurance.

87. See N.Y. Vehicle and Traffic Law § 345.

ance are prescribed by statute.[88] In Ontario the minimum statutory liability is 35,000 dollars inclusive[89] whereas in New York the minimum requirement is 10,000 dollars for bodily injury or death of one person, 20,000 dollars for bodily injury or death of two or more persons in the same accident, and 5,000 dollars for property damage in the same accident.[90] In both New York and Ontario there are statutory requirements that the policy apply to the operation of the motor vehicle in both Canada and the United States.[91]

Both Ontario and New York require the policy coverage extend to any other person driving the automobile with the consent of the owner.[92] However, in New York there is no mandatory insurance coverage for death or injury to the insured's spouse or damage to the spouse's property,[93] while in Ontario there is no tort liability at all between husband and wife.[94] Under conflict of laws principles, generally the place of contracting governs the interpretation of coverage provisions.[95]

In both Ontario and New York, if a driver is not able to secure insurance for himself, he may apply to the Assigned Risk Plan. The New York and Ontario plans are similar in that the insurance companies themselves have established the plan to provide coverage to persons considered to be poor insurance risks.[96]

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88. The Insurance Act, Rev. Stat. Ont. c. 190, ss. 213-26 (1960), as amended [1961-62] Ont. Stat. c. 63, s. 5.

89. [1961-62] Ont. Stat. c. 63, s. 5, provides in part:

218.-(1) Every owner's policy and driver's policy shall insure, in respect of any one accident, to the limit of at least $35,000, exclusive of interest and costs, against loss or damage resulting from bodily injury to or death of one or more persons and loss of or damage to property.

(2) Where in any one accident liability results from bodily injury or death and loss of or damage to property,

(a) claims arising out of bodily injury or death have priority to an amount of $30,000 over claims arising out of loss of or damage to property; and

(b) claims arising out of or damage to property have priority to an amount of $5,000 over claims arising out of bodily injury or death.

90. N.Y. Vehicle and Traffic Law § 341, provides:

341. Amount of proof required

Proof of financial responsibility shall mean proof of ability to respond in damages for liability thereafter incurred, arising out of the ownership, maintenance or use of a motor vehicle, in the amount of ten thousand dollars because of bodily injury to or death to any one person, and subject to said limit respecting one person, in the amount of twenty thousand dollars because of bodily injury to or death of two or more persons in any one accident, and in the amount of five thousand dollars because of injury to or destruction of property in any one accident. Such proof in such amounts shall be furnished for each motor vehicle registered by such person.

91. The Insurance Act, Rev. Stat. Ont. c. 190, s. 213(1)(a) (1960); N.Y. Vehicle and Traffic Law § 345(b)(3).

92. The Insurance Act, Rev. Stat. Ont. c. 190, s. 213(1) (1960); N.Y. Vehicle and Traffic Law § 345(b)(2).

93. N.Y. Vehicle and Traffic Law § 388(4).

94. See p. 643 *infra.*

95. See generally Faude, *Conflict of Laws in Automobile Insurance*, 29 Can. B. Rev. 266 (1951).

96. See generally Osgoode Hall Study ch. IV, p. 11; N.Y. Joint Legis. Comm. on Ins. Rates and Regulations, 1961 Report [N.Y. Legis. Doc. 1961, No. 81] pp. 44-52.

In Ontario a person injured by an uninsured or unidentified driver is not left without recompense, for he may apply to the Motor Vehicle Accident Claims Fund and recover limited damages for death or personal injury and, in the case of an uninsured driver, for economic damage also.[97] Under the Ontario Act the maximum recovery is 35,000 dollars.[98] In 1959, a similar fund was established in New York[99] providing for a maximum recovery of 10,000/20,000 dollars for damages caused by death or bodily injury due to uninsured and unidentified motor vehicles.[100] Procedurally the funds are strikingly similar. The funds are restricted to accidents occurring within their respective jurisdictions, and both funds provide recourse to non-residents only when the non-resident's home jurisdiction provides recourse of a "substantially similar character" to residents of the forum jurisdiction.[101] It appears that more than the existence of a similar fund is necessary to satisfy this reciprocity provision.[102] Payments from both funds to non-residents are limited to those who have recovered final, unsatisfied judgments in the courts of the forum jurisdiction.

Non-Tort Recovery—By the end of 1964, 98.7 per cent of the eligible residents of Ontario were covered by hospital insurance under the government operated Hospital Services Commission Act.[103] For certain groups such as employee units of 15 or more the plan is mandatory, while other persons may voluntarily enroll. Since the Commission is entitled to recover from the defendant for the cost of hospital services rendered the injured victim, the Commission is a party to most automobile cases commenced in Ontario.[104]

In addition, it is estimated that in 1965, 75 per cent of the Ontario population was covered by privately operated medical plans.[105] A similar

97. Motor Vehicle Accident Claims Act, [1961-62] Ont. Stat. c. 84, as amended [1964] Ont. Stat. c. 66, [1965] Ont. Stat. c. 75.

98. Motor Vehicle Accident Claims Act, [1961-62] Ont. Stat. c. 84, s. 22. [1961-62] Ont. Stat. c. 84, s. 5(1), disallows payments for less than $50.

99. Motor Vehicle Accident Indemnification Corporation Law, N.Y. Ins. Law §§ 600-26 (Supp. 1965).

100. N.Y. Ins. Law § 610 (Supp. 1965).

101. Motor Vehicle Accident Claims Act, [1961-62] Ont. Stat. c. 84, s. 23(2); N.Y. Ins. Law § 601(b)(2) (Supp. 1965).

102. See Beane v. Hie, [1957] Ont. Weekly N. 56, 7 D.L.R.2d 135 (High Ct.) (Massachusetts compulsory insurance system with all its omissions and available defenses did not offer recourse of a substantially similar character to that provided by the Ontario fund); White v. MVAIC, 39 Misc. 2d 678, 241 N.Y.S.2d 566 (Sup. Ct. 1963) (Although the Ontario fund is similar in purpose and protection to the New York fund, since the Ontario guest statute would preclude a New York guest from recovering in Ontario for an accident in Ontario involving a non-Ontario owner or driver, the Ontario fund does not afford substantially similar recourse to New York residents). See generally Ward, *National and International Problems in Substantial Similarity*, 9 Buffalo L. Rev. 283 (1960).

103. Ont. Rev. Stat. c. 176 (1960), as amended [1961-62] Ont. Stat. c. 55, [1962-63] Ont. Stat. c. 58, [1965] Ont. Stat. c. 49; Osgoode Hall Study ch. VI, p. 1.

104. Osgoode Hall Study ch. VI, p. 2.

105. Osgoode Hall Study ch. VI, p. 6. A federal medical insurance plan has recently been enacted in Ontario and will take effect in July 1966. It is anticipated that it will be as widely accepted as the Hospital Services Commission Act. Ontario Medical Services Insurance Plan, [1965] Ont. Stat. c. 70.

percentage of people are covered by private medical insurance in the United States.[106]

Another primary source of non-tort recovery in automobile accidents is workmen's compensation. Both New York and Canada have extensive workman's compensation programs based on a principle of strict liability.[107] Other sources of non-tort recovery in the United States and Canada are collision insurance, life insurance and disability pensions.

Recently, in Ontario it has been proposed to supplement the traditional fault-liability system of compensating persons injured by automobile accidents with a system similar to workman's compensation plans that would provide limited benefits for bodily injury or death of any occupant of an automobile and for any pedestrians struck by that automobile, regardless of fault. This "Ontario Plan" would be funded by requiring additional accident insurance coverage as a mandatory part of all standard automobile policies sold by insurance companies in Ontario.[108]

Tort and Non-Tort Recovery: Effectiveness in Practice

The success of tort and non-tort recovery in compensating injuries has recently been evaluated in both the United States and Ontario. These independent studies conducted by the University of Michigan Law School and the Osgoode Hall Law School are strikingly similar in analysis and it is interesting to contrast the effectiveness of the United States and Ontario systems of reparation on the basis of these studies.[109]

The percentage of persons injured and obtaining some recovery was significantly greater in Ontario than in Michigan. This was true overall, as well as with respect to persons having tort recovery, and non-tort recovery.[110] The large percentage of the Ontario population covered by the Ontario Hospital Services Commission Act helps to explain the difference in the non-tort category. It is interesting to note that in Ontario, where gratuitous passengers are precluded from recovery by statute, they fared the worst of all persons

106. Mich. Study 42 (73%). The effect of the recently enacted Medicare Program in the United States upon non-tort recoveries from automobile injuries is yet to be seen.

107. Workmen's Compensation Act, Ont. Rev. Stat. c. 437 (1960), as amended [1962-63] Ont. Stat. c. 145, [1964] Ont. Stat. c. 124, [1965] Ont. Stat. c. 142; N.Y. Workmen's Comp. Law §§ 1-401.

108. Osgoode Hall Study ch. I, pp. 3-6. *Cf.* In re Opinion of the Justices, 87 N.H. 492, 179 Atl. 344, 110 A.L.R. 819 (1933). Person injured by motor vehicle had election to proceed against uninsured defendant before a commission or a court with the commission's awards to be paid from a fund. *Held,* unconstitutional delegation of judicial power.

109. Mich. Study (Major portion based on Michigan automobile accidents); Osgoode Hall Study (Based on York County, Ontario automobile accidents). See also Franklin, Chanin & Mark, *Accidents, Money and the Law: A Study of the Economy of Personal Injury Litigation,* 61 Colum. L. Rev. 1 (1961); Morris & Paul, *The Financial Impact of Automobile Accidents,* 110 U. Pa. L. Rev. 913 (1962).

110. See Mich. Study 146-48; Osgoode Hall Study chs. VII, IX. Of the persons injured:

	Osgoode Hall Study	Mich. Study
Persons having some tort recovery	42.9%	37%
Persons having some non-tort recovery	86.2%	53%
Persons who recover nothing	5.3%	23%

injured.[111] Both studies found that the smaller the loss, the larger was the percentage of compensation of the loss.[112] In the serious injury cases, both studies found that approximately 47 per cent of the persons were fully compensated.[113] Hence it appears that although more persons were compensated in Ontario, the compensation was distributed very unevenly in both systems, but the distributions were somewhat similar, with the minor injuries receiving fuller compensation than the more serious injuries.

Both studies reflect that 99 per cent of automobile injury cases are settled by negotiation rather than litigation.[114] One of the reasons for this is the delay in the courts. Overall, the delay in settlement was much more pronounced in Michigan than in Ontario.[115] However, the studies show that the delay in settling serious injury cases is greater in Ontario than in Michigan.[116] Both studies indicated that the bulk of cases are settled with three years from the time of injury.[117]

The role of lawyers was somewhat greater in Michigan than in Ontario;[118] however, both reports found that consultation was more prevalent where there was a higher loss.[119] It is interesting to note that in the serious cases both studies indicated about 16 per cent of those consulting lawyers did not retain counsel.[120]

Both reports also considered the attitudes of the persons compensated,[121] reflecting the belief that it is important that victims feel that society has dealt fairly with them, and that this will affect their future behavior as well as offer an insight into the system of reparation which statistics cannot provide. Both studies found that the relationship between recovery and loss has a strong influence on final attitude toward the system of recovery. Persons with larger net losses, generally the persons with larger initial losses, were more discontented.[122] It is also interesting to note that a substantial percentage of victims were displeased with their attorney's handling of the case at some point in the litigation.[123]

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111. Osgoode Hall Study ch. IX, p. 3.
112. Mich. Study 6; Osgoode Hall Study ch. IX, p. 4.
113. Mich. Study 178; Osgoode Hall Study ch. IX, p. 10. The general level of the dollar amount of the verdicts is believed to be much greater in New York than in Ontario. One explanation for this is the greater publicity in the news media given to the amount of the verdicts in New York than Ontario.
114. Mich. Study 3; Osgoode Hall Study ch. IX, p. 7.
115. *Compare* Mich. Study 243 (20% of all cases settled within one year), *with* Osgoode Hall Study ch. IX, p. 5 (73.5% of all cases settled within one year).
116. *Compare* Mich. Study 222 (58% of all serious injury cases settled within one year), *with* Osgoode Hall Study ch. V, p. 5 (41.3% of all serious injury cases settled within one year).
117. Mich. Study 243, Osgoode Hall Study ch. V, p. 6.
118. *Compare* Mich. Study 223 (lawyer consulted in 63% of serious injury cases), *with* Osgoode Hall Study ch. V, p. 14 (lawyer consulted in 51.1% of serious injury cases).
119. See Mich. Study 223; Osgoode Hall Study ch. V, p. 14.
120. Mich. Study 225-26; Osgoode Hall Study ch. V, p. 14.
121. See Mich. Study 256-321; Osgoode Hall Study ch. VIII.
122. Mich. Study 275; Osgoode Hall Study ch. IX, p. 12.
123. Mich. Study 9; Osgoode Hall Study ch. IX, p. 12.

In summary, consider the following general situations:

American Plaintiff v. American Defendant—If the action is brought in an Ontario court, the plaintiff has a better chance of tort recovery; however the amount of the verdict will probably be lower than if the action was brought in New York. Assuming the defendant is a New York driver, he is probably covered by liability insurance with at least 10,000/20,000/5,000 dollars coverage, which is compulsory in New York. The applicability of the policy when the automobile is driven in Canada is mandatory by New York statute and under choice of law rules the policy is generally interpreted using New York law. If the plaintiff was injured by an uninsured or hit and run driver, since the accident occurred in Ontario, the plaintiff has no recourse to MVAIC and, if he obtains his final judgment in the New York courts, he cannot use it to gain recourse to the Canadian fund. However, if the plaintiff obtains a final judgment in Ontario, he may have recourse to the Ontario fund if he can satisfy the reciprocity requirements.

Canadian Plaintiff v. American Defendant—Although the plaintiff's chances of recovery are greater in Ontario than in the United States, the percentage of his injury which is compensated depends upon the extent of his injuries—the less the injury the greater the percentage of recovery. The amount of the verdict will probably be larger if the action is brought in New York. The New York defendant must be insured with a minimum coverage of 10,000/20,000/5,000 dollars and the policy must contain a provision of applicability in Canada under New York law. Regardless of where the action is brought, New York law will probably be used in interpreting the coverage provisions of the policy. Generally, the delay between injury and settlement is shorter in Ontario. Since the accident occurred in Ontario, the Canadian plaintiff has no recourse to MVAIC. However, he will have recourse to the Ontario fund if he obtains a final judgment in an Ontario court, whereas if he obtains a final judgment in New York, he will be denied recourse to the Ontario fund. The Canadian plaintiff is probably enrolled in the Hospital Services Commission Plan, so the Commission may also be a party to the action and seeking indemnification.

American Plaintiff v. Canadian Defendant—The defendant is probably covered by liability insurance although it is not compulsory in Canada. By statute, the minimum coverage is 35,000 dollars inclusive. The plaintiff will have a better chance of recovery in tort in Ontario than in the United States although the amount may not be as high as in the United States; and if he brings the action in Ontario and obtains a final judgment, he may, if necessary, have recourse to the Ontario fund. However, there is a serious problem of whether he can satisfy the Ontario reciprocity requirements. Since the accident occurred in Ontario, the plaintiff has no recourse to the New York fund. In addition, there generally is less delay between injury and settlement in Ontario.

ONTARIO CIVIL LIABILITY AND THE AMERICAN MOTORIST

In Ontario, as in New York, civil liability is derived from the English Common Law. The tort system is based upon the principle of shifting the loss from the person injured to the person at fault for the injury. To determine whether the defendant is at fault the tort law has developed an objective standard of the reasonable man rather than a subjective standard of moral wrongdoing. Deviation from this standard is considered negligent conduct.[124]

In determining negligent conduct, the court may adopt a statute as its standard.[125] It appears that in Ontario once it has been found that the defendant committed a breach of a duty imposed by statute and that the breach was the proximate cause of the plaintiff's injuries, the defendant is prima facie liable for the damage without regard to whether the plaintiff was within the class of persons intended by the legislature to be protected by the statute.[126] However, it is uncertain what burden the defendant must meet to discharge his liability. Perhaps the liability is absolute and cannot be overcome, or perhaps he may be allowed to show that no reasonable man could have avoided the consequences and thereby escape liability.[127]

At common law, the contributory negligence of the plaintiff barred any recovery from the negligent defendant. Hence if the plaintiff's negligence, no matter how slight, contributed to the accident, the plaintiff was denied recovery. This is still the law in New York and most United States jurisdictions.[128] The common law judges created the device of "last clear chance" in order to assist the plaintiff and soften the effect of this harsh rule.[129] Ontario has dealt with this problem by legislation and allows a comparison of the negligence of the plaintiff and the defendant.[130] Hence the negligent plaintiff may get some recovery since damages are apportioned in proportion to degree of negligence. Oddly enough, the doctrine of last clear chance has survived this

124. See generally Prosser, Torts (3d ed. 1964). In both Ontario and New York, the common law rule that death of the plaintiff or defendant extinguished the cause of action has been expressly overturned by statute. N.Y. Deced. Est. Law 118, 119; The Trustees Act, Rev. Stat. Ont. c. 408, ss. 38(1),(2) (1960).

125. Prosser, *op. cit. supra* note 124, at 191-205.

126. Sterling Trusts Corp. v. Postma and Little, [1965] Sup. Ct. R. 324, 48 D.L.R.2d 423. *Contra*, Falsetto v. Brown, [1933] Ont. 645, [1933] 3 D.L.R. 545 (Ct. App.).

127. Sterling Trusts Corp. v. Postma and Little, *supra* note 126. It appears in New York that if a motor vehicle statute was designed to protect a definite class of persons of which the plaintiff is a member, and the violation of the statute was a proximate cause of the damages, the violation of that statute is negligence per se. Generally the violation of an ordinance is treated as evidence of negligence. Martin v. Herzog, 228 N.Y. 164, 126 N.E. 814 (1920).

128. Prosser, *op. cit. supra* note 124, at 426.

129. See *id.* at 438; MacIntyre, *The Rationale of Last Clear Chance*, 53 Harv. L. Rev. 1225 (1940), reprinted in 18 Can. B. Rev. 665 (1940).

130. The Negligence Act, Rev. Stat. Ont. c. 261, s. 4 (1960) which provides:

> 4. In any action for damages that is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff that contributed to the damages, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.

comparative negligence legislation.[131] In Ontario the burden of proof is on the defendant to prove the plaintiff's negligence,[132] whereas in New York the plaintiff must prove his freedom from fault in order to recover.[133]

Under section 106 of the Ontario Highway Traffic Act,[134] the burden of proof which normally rests with the plaintiff that the loss or damage occurred through the negligence of the defendant is shifted to the defendant. Hence, where the plaintiff has shown that the loss was sustained by reason of a motor vehicle on the highway, the owner or driver must prove that the loss did not arise through the negligence of the owner or driver. The statute creates a rebuttable presumption of negligence.[135] This section is limited in that it does not apply to an accident between two motor vehicles or an action brought by a passenger for injuries sustained by him as a passenger.[136] It is primarily an aid to pedestrians and bicyclists but is also used in actions to recover for property damage.[137]

In Ontario, as in New York,[138] the owner of a motor vehicle is liable for loss or damage sustained by any person's negligent use of the motor vehicle unless it was driven or used without the owner's consent. The burden of proof is on the owner to show it was driven or used without his consent—express or implied.[139]

In New York, a driver owes his gratuitous passenger a duty to ordinary and reasonable care. The guest takes the car as it is, and the driver has only to warn the guest of hidden defects of which he has knowledge.[140] In Ontario, on the other hand, the gratuitous passenger is completely deprived of a civil action against his host driver and against the owner by statute.[141] Judicial reaction to this guest statute over the past thirty years has somewhat limited

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131. See MacIntyre, *supra* note 129.
132. 15 Can. Encyc. Dig. (Ont.) 447 (2d ed. 1957).
133. Fitzpatrick v. International Ry., 252 N.Y. 127, 169 N.E. 112, 68 A.L.R. 801 (1929). *But see* N.Y. Deced. Est. Law § 119 placing the burden of pleading and proving contributory negligence of the decedent in survival actions upon the defendant.
134. Rev. Stat. Ont. c. 172, s. 106 (1960).
135. See generally Horsley, Manual of Motor Vehicle Law 307-21 (1963).
136. Rev. Stat. Ont. c. 172, s. 106(2) (1960).
137. Osgoode Hall Study ch. IV, p. 5.
138. See N.Y. Vehicle and Traffic Law § 388(1).
139. The Highway Traffic Act, Rev. Stat. Ont. c. 172, s. 105(1) (1960). See generally Horsley, *op. cit. supra* note 135, at 275-87; Brown & Ball, *Section 105: Highway Traffic Act*, 2 Osgoode Hall L.J. 322-27 (1962). *Cf.* The Criminal Code, [1953-54] Can. Stat. c. 51, s. 281, which provides:

> 281. Every one who, without the consent of the owner, takes a motor vehicle with intent to drive it or cause it to be driven or used is guilty of an offence punishable on summary conviction.

140. Higgins v. Mason, 255 N.Y. 104, 174 N.E. 77 (1930).
141. The Highway Traffic Act, Rev. Stat. Ont. c. 172, s. 105(2) (1960), which provides:

> (2) Notwithstanding subsection 1 [providing for liability of owner when motor vehicle used with his consent], the owner or driver of a motor vehicle, other than a vehicle operated in the business of carrying passengers for compensation, is not liable for any loss or damage resulting from bodily injury to, or the death of any person being carried in, or upon, or entering, or getting on to, or alighting from the motor vehicle.

the scope of its operation. The recent trend has been to construe "business of carrying passengers for compensation" as broadly as possible.[142] This statute does not bar an action brought by a passenger against the third party, for example, another driver. However, under the Negligence Act, the negligence of the host driver is imputed to the passenger and hence may diminish or bar the passenger's recovery.[143] Under section 2(3) of the Negligence Act the negligence of the plaintiff's spouse is imputed to the plaintiff, hence if the plaintiff's passenger is his spouse, the negligence of the spouse-passenger is imputed to the plaintiff-driver, and hence may bar the action.

In Ontario a husband or wife is not entitled to sue the other for a tort.[144] However, a recent case limited this rule to personal injuries and held the wife entitled to claim against her husband for damage to her car.[145] In New York, interspousal immunity was overcome by statute and the spouse's action is allowed for injury to person or property.[146] It appears that in Ontario, under conflict of laws rules, the law of the forum determines who may sue and be sued.[147] In New York the general rule has been that interspousal immunity is treated as a question of substantive law; however, in light of *Babcock v. Jackson*,[148] this may be overturned in favor of the law of the forum.[149]

ONTARIO CRIMINAL LIABILITY AND THE AMERICAN MOTORIST

The common law distinction between felonies and misdemeanors has been abolished in Canada and crimes are designated simply as indictable offenses and offenses.[150] Whereas indictable offenses are prosecuted by indictments, offenses are tried by "summary conviction." Summary conviction is simply a statutory procedure for trying certain criminal cases in Canada.[151] All motor vehicle offenses under the Ontario Highway Traffic Act and municipal by-laws are tried in the summary conviction court. Motor vehicle offenses under the

142. See Horsley, *op. cit. supra* note 135, at 291-99; Brown & Ball, *supra* note 139, at 327-32; Comment, *Term in Contract of Employment with Baby-sitter to Provide Safe Carriage*, 40 Can. B. Rev. 284 (1962).

143. Rev. Stat. Ont. c. 261, s. 2(2) (1960). See generally Brown & Ball, *supra* note 139, at 332-34.

144. The Married Women's Property Act, Rev. Stat. Ont. c. 229, s. 7 (1960).

145. Laxton (or Ulrich) v. Ulrich, [1964] 1 Ont. 193, 41 D.L.R.2d 476 (Ct. App.).

146. N.Y. Gen. Obligations Law § 3-313. *But see* N.Y. Vehicle and Traffic Law § 388(4). Spouse not included in compulsory insurance coverage.

147. Castel 81.

148. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743, 95 A.L.R.2d 1 (1963). See p. 632 *supra*.

149. See Keller v. Greyhound Corp., 41 Misc. 2d 255, 244 N.Y.S.2d 882 (Sup. Ct. 1963).

150. Shannon, Motor Vehicle Offences and the Summary Conviction Court 1 (1964). This text is a comprehensive survey of the Ontario Criminal Law with respect to summary motor vehicle offenses. Since the book covers the jurisdiction, procedure, and rules of evidence of the summary conviction court, as well as the motor vehicle offenses handled by the court, its scope is very broad and it is an invaluable reference.

151. The Criminal Code, [1953-54] Can. Stat. c. 51, ss. 692-744, as amended [1958] Can. Stat. c. 18, ss. 1-2, [1959] Can. Stat. c. 41, ss. 31, 33-37, [1960-61] Can. Stat. c. 43, ss. 41-45. See also The Summary Convictions Act, Rev. Stat. Ont. c. 387 (1960), as amended [1961-62] Ont. Stat. c. 134, [1964] Ont. Stat. c. 113, [1965] Ont. Stat. c. 127.

Criminal Code of Canada may be tried in this manner at the election of the Crown.[152]

Criminal negligence in the operation of a motor vehicle is a crime in Ontario under section 221(1) of the Criminal Code of Canada.[153] Section 221(4) has been recently added to the Code and is a "dangerous driving" provision.[154] This section has been interpreted as requiring a lesser degree of recklessness than in section 221(1) but still more than necessary in a civil action.[155]

The Code also provides for criminal sanctions when driving while intoxicated[156] or driving while ability is impaired by alcohol or drugs.[157] In connection with these provisions under section 224(4) the driver in Canada is under no obligation to submit to any chemical analysis of a sample of blood, urine, breath or other bodily substance; and evidence of refusal to submit is inadmissible. However, these tests are not treated similarly to confessions, and submission to the test need not be voluntary.[158]

Prior to 1964, under section 157 of the Ontario Highway Traffic Act, conviction for violation of certain provisions of that Act required impounding the motor vehicle. That section has been amended and impounding the motor vehicle is no longer mandatory but left to the discretion of the judge or magistrate.[159]

If the American motorist has been given a summons for a criminal offense in Canada but has not been arrested, required to post bail, or had his car impounded, and he is presently at home in the United States, the only manner by which he can be subjected to the criminal laws of Canada is by extradition,[160] since foreign penal judgments are not enforceable in Canada or in the United

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152. See generally Shannon, *op. cit. supra* note 150, at 2. Generally, it is believed that the penalties handed down by the Ontario courts are much more severe than the penalties handed down by the New York courts for similar offenses. It is also believed that the offenses are prosecuted more rigorously in Ontario than in New York and there is much less "bargained justice" with respect to accepting guilty pleas to lesser offenses in Ontario.

153. [1953-54] Can. Stat. c. 51, s. 221(1), which provides:

221. (1) Every one who is criminally negligent in the operation of a motor vehicle is guilty of
(a) an indictable offence and is liable to imprisonment for five years, or
(b) an offense punished on summary conviction.

154. [1960-61] Can. Stat. c. 43, s. 3, which provides:

(4) Every one who drives a motor vehicle on a street, road, highway or other public place in a manner that is dangerous to the public, having regard to all the circumstances including the nature, condition and use of such place and the amount of traffic that at the time is or might reasonably be expected to be on such place, is guilty of
(a) an indictable offence and is liable to imprisonment for two years, or
(b) an offence punishable on summary conviction.

155. See Crankshaw's Criminal Code of Canada s. 221(4) (Supp. 1965). See generally Macdonald, *Careless, Negligent, Reckless, Operation of Motor Vehicles*, 6 Can. B. J. 122 (1963).

156. [1953-54] Can. Stat. c. 51, s. 222.

157. [1953-54] Can. Stat. c. 51, s. 223.

158. See Shannon, *op. cit. supra* note 150, at 394.

159. [1964] Ont. Stat. c. 38, s. 17.

160. See generally LaForest, Extradition To and From Canada (1961).

States.[161] States have always maintained the right to grant asylum to foreign fugitives unless such action conflicted with treaty obligations.[162] The treaty provisions for extradition between the United States and Canada are limited to defined offenses; and it appears that there is no traffic offense, indictable or otherwise, which is covered by treaty.[163] Hence the fugitive American motorist is secure from Canadian criminal prosecution so long as he remains in the United States.

In Conclusion

It appears that the American motorist meets a strikingly similar legal analysis by the courts of both Ontario and New York. The law applied is also similar; however, as has been shown, there are differences. Perhaps one reason for this similarity is the mutual foundation of the New York and Ontario legal systems in the English Common Law. However, the differences in the civil and criminal law of the two jurisdictions may result in different consequences to the American motorist, regardless of whether he is a plaintiff or a defendant.

This Comment has pointed out some of these major differences which are found in common motor vehicle situations. The footnotes have collected many sources and hopefully may serve as a spring-board into the particular factual situation confronting the practitioner. It is only by an awareness of these differences that the case of the American motorist in Canada can be handled to the American motorist's best advantage.

Arthur A. Russ, Jr.

COMPENSATION FOR VICTIMS OF CRIME—SOME PRACTICAL CONSIDERATIONS

> The compensation of the victims of crime embodies a concept new to American law. However, changes in our attitudes toward the criminal and law enforcement . . . make it necessary to revise our attitude toward the victim of crime. We have taught our people to leave law enforcement to our police and our courts. We are now seeking to insure fully that all those arrested on criminal charges are given every right guaranteed to them under our constitution. However, so far we have given no consideration to the law-abiding citizen, who despite the best efforts of our over-worked police, incurs personal injuries in a criminal attack.
>
> —Senator Ralph W. Yarborough[1]

161. See Castel 269; Harper, *Tort Cases in the Conflict of Laws*, 33 Can. B. Rev. 1155, 1158-59 (1955).
162. LaForest, *op. cit. supra* note 160, at 16.
163. See *id.* at 172-82.

1. Letter by Senator Yarborough to the Buffalo Law Review, July 27, 1965.