



# Positioning the Win:

*From Intake to the Courthouse Steps*

Friday 25 April 2014

Vancouver BC

## Intake Checklist for Cross-Border Cases: *Four Questions to Consider*

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# INTAKE CHECKLIST FOR CROSS-BORDER CASES: FOUR QUESTIONS TO CONSIDER

## Question #1: Is anybody dead?

Wrongful death cases are a very different animal in the United States than they are in Canada. The availability of uncapped non-pecuniary awards, survivability of punitive damage claims and the ability of a decedent's estate to claim for expected future earnings are just three of the myriad ways in which American remedies for fatality negligence can differ from those offered by the *Family Compensation Act* and its provincial analogues. A claim worth only funeral and burial expenses in British Columbia could be pursued as a seven-figure claim just across the border in Washington state.

One lesser known wrinkle is that some of these same differences can arise between the remedies offered for wrongful death as between the Canadian provinces themselves. For example, while BC's *Wills, Estates and Succession Act* prohibits an estate from making a claim for a decedent's lost future earnings, such claims are allowed in fatality actions brought in the Northwest Territories and Nunavut.<sup>1</sup> Likewise, punitive damage claims may survive to a decedent's estate in Ontario, while they cannot in B.C.<sup>2</sup>

Any cross-border case involving a fatality implicates complex issues and demands a careful analysis of the costs and benefits posed by each jurisdiction implicated in the case. Tread cautiously, and consider retaining co-counsel familiar with the laws and strategies in play.

## Question #2: Are all of the likely parties from the same jurisdiction?

If your potential case involves a single-car MVA in the U.S. (Canadian passenger suing Canadian driver), or any scenario where Canadian A injures Canadian B while both are in the U.S. (perhaps whilst shopping in Bellingham for discount cheese?), you have an uphill battle ahead. As a former employee of a firm in Seattle that handled ICBC defence for large-loss American crashes, I can confirm that ICBC will be happy to let you file your claim in the United States (and absorb your own costs and disbursements) if the claim is a small or modest one. But if the claim is substantial, and the quantum assessment under U.S. law would work in your favour - be prepared to find yourself on the receiving end of a *forum non conveniens* motion.<sup>3</sup> Ostensibly filed for the convenience of the parties and the court, the true purpose of such a motion is to ensure that Canadian law applies to the Canadian parties - resulting in a lower recovery for the plaintiff.

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<sup>1</sup> Compare B.C.'s *Act* at §150(4)(b) with the decisions in *Paneak Estate v. Caron Estate*, 2006 NUCA 4 and *Tilson Estate v. Summit Air Charters, Ltd.*, 2007 NWTCA 1.

<sup>2</sup> Compare *Plester v. Wawanesa Mutual Insurance Co.*, 2006 O.J. No. 2139 (S.C.) and *Allen Estate v. Co-Operators Life Insurance Co.*, 1999 BCCA 35.

<sup>3</sup> Two examples of cases where this strategy was successful include *Hill v. Jawanda Transport Ltd.*, 96 Wn. App. 537, 983 P.2d 666 (1999) (Canadian driver struck by Canadian trucker), and *Klotz v. Dekhoda*, 134 Wn. App. 261, 141 P.3d 67 (2006) (single car fatality crash involving Canadian nationals).

What allows this strategy to work in British Columbia is a regrettable trial level decision from 2001 holding that torts occurring between two B.C. residents in the United States constitute an exception from the general Canadian rule that the law of the place of injury controls the rights and responsibilities of the parties.<sup>4</sup> While challenges to these doctrines (on both sides of the border) remain viable in the right case, they raise substantial barriers to full recovery and require detailed attention from counsel.

On the flip side of the equation, if you are approached by American A who was injured in Canada by American B, and wants to pursue an action here, American B's insurer may be surprised to learn they have an obligation to "top up" insurance coverage to meet Canadian provincial minimums.<sup>5</sup> Again, the point is that any case where the parties are all from one locale and the injury occurred *somewhere else* raise their own unique problems and often require specialized assistance to sort through.....

### **Question #3: What's the case worth?**

Obviously, valuing the client's claim under familiar British Columbia principles is a first step. Is this primarily a non-pecc claim with a few weeks of wage loss - or are future capacity or future care losses implicated as well? Smaller cases may be better/more cost effectively tried by local counsel in the foreign jurisdiction, with the Canadian lawyer playing a background role in ordering medical records, ensuring the Part 7 benefits issues are attended to, etc. The larger the claim, the larger the role you will be playing in the litigation - even if it requires foreign counsel for trial. Adjust your fee sharing arrangements accordingly.

It also helps to attempt to alternatively value the claim *as if the law of other interested jurisdictions applied*. Doing so allows you to ask the cost-benefit questions about whether suing somewhere else is worth the hassle and expense of doing so.

You may require assistance to do this - or perhaps not. A little online legal research can go a long way in helping you make that initial call as to whether available damages are vastly different between jurisdictions in Canada....or between Canada and a U.S. locale. Remember to consider liability and comparative defences as well as damages. For example, if a case is likely to attract a 20% damage reduction in B.C. because the client wasn't wearing a seatbelt....and you know that your U.S. jurisdiction holds the evidence of seatbelt non-use is inadmissible in its courts<sup>6</sup>.....that defence affects comparative case value, and should be taken into consideration.

### **Question # 4: Who's gonna pay?**

Many decisions about forum selection end up revolving around the issue of where the money to satisfy the judgment is coming from. In B.C., this essentially means asking yourself "Is this a

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<sup>4</sup> See *Wong v. Wei*, [1999] B.C.J. No. 768 (S.C.)

<sup>5</sup> For the most recent appellate affirmation

<sup>6</sup> Montana is one state where such a rule is in force. See Mont. Code § 61-13-106 (2012).

REAL out of province case.....or is it an UMP/UM claim?” For example, third party insurance limits in many U.S. jurisdictions are outrageously modest by Canadian standards - and as many as one driver in six in Washington state may be driving illegally without any insurance at all.<sup>7</sup> If you have a Canadian client who has suffered catastrophic injury in the U.S., but the lone American defendant is a 20-something part-time day labourer driving a 1986 Honda Civic....it may be reasonable to assume that you’ll exhaust the defendant’s ability to pay any judgment quite quickly. In such cases, a quick settlement for policy limits coupled with a “no-asset” declaration from the defendant may be sufficient to convince ICBC to consent to your starting an UMP claim here, even though final judgment was not rendered on the U.S. crash.

The extent to which litigation may proceed *outside* British Columbia may also impact your decision to retain outside counsel - and whom to choose. Is your job as Canadian counsel going to be more of a supporting role, assisting an American counterpart with obtaining local medical records and treatment reports for use in a U.S. trial? Or is American counsel simply “on deck” to serve as a local agent in the event you can’t negotiate small limits settlement with an obstinate U.S. insurer before returning to Canada to file underinsurance proceedings? The key factor to consider in all the above scenarios is “Where’s the bulk of this action going to take place for this client?” Following the money - where it’s located and who’s likely to pay it - usually makes the answer to this question clear.

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<sup>7</sup> See <http://wainsurance.blogspot.ca/2010/02/percentage-of-uninsured-motorists-by.html>