Extending American Products Liability Jurisprudence to Canadian Plaintiffs – Lessons from a Seven Year Battle

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Introduction

While Canada and the United States share a legal heritage grounded in the principles of English common law, a host of procedural and substantive differences exist between the judicial systems of the two nations. As economic activity, tourism and other contacts between the two countries has expanded in recent years, a growing number of prospective clients face legal issues which implicate "cross-border" concerns. When approached by a plaintiff whose interests may reach across the international border, an understanding of the subtle differences between the American and Canadian legal systems is critical. A working knowledge of the areas in which the two systems diverge – especially in the fields of tort law – can increase the likelihood that the law most favorable to your client's interests are applied to the facts presented.

Products liability law is one subspecies in the tort field where this maxim holds particularly true. While products liability litigation in Canada is governed by traditional principles of negligence, the American system has generally adopted a "strict liability" approach to injuries caused by defective products – an approach which focuses more on the product itself, and less on the manufacturer's knowledge or intent at the time the product was made. The American approach holds significant advantages for an injured plaintiff – provided that the plaintiff can first convince an American court to apply American law to its case. But when a Canadian plaintiff is injured by an American-manufactured product, how do the courts determine where the trial should be held, and which country's law to apply? Do American courts look merely to the law of the place where the injury occurred for answers, or are other factors important as well? Could a Canadian injured in Canada by an American-made product seek redress in U.S. courts, under U.S. law?

Many of these questions were addressed in *Tepei v. Uniroyal Goodrich Tire Company, et. al.*, a products liability and personal injury action for six British Columbia plaintiffs which my firm recently brought to judgment in Washington state. Arising out of an October 1996 tire blowout and rollover accident on Interstate 5 in southwest Washington, the *Tepei* case took over seven years to conclude – in large part because of the wrangling between the parties over whether Washington or British Columbia law should apply to the product liability claims alleged against the tire manufacturer. At the conclusion of an eight week trial on April 23, 2004,

the Lewis County, Washington jury awarded $9.1m US in damages to the six plaintiffs – a verdict which the *Vancouver Sun* reported as the largest judgment ever entered against an ICBC-insured driver for negligence. While the jury ultimately concluded that the driver's negligence was the sole cause of the plaintiffs' injuries, the *Tepei* case offers its most important lessons for future B.C. plaintiffs who find themselves injured by American products, and illustrates how thorough knowledge of the laws on both sides of the border is essential to maximizing your client's recovery whenever United States law is implicated in litigation.

Facts of the Case

On October 27, 1996, the Tepei family was involved in a single vehicle accident when the right rear tire on their 1991 Toyota Previa minivan blew out approximately 10 miles south of Chehalis, Washington. The Tepeis – father Peter, mother Dina, and six children – emigrated to Canada from Romania in 1983. Originally settling in Ontario, the family eventually migrated west to Port Coquitlam to be closer to relatives in Oregon and Washington. The Tepeis made regular trips to the Portland area to visit their extended family, and were returning from a wedding in Portland on the day of the accident. Peter was driving the vehicle, with Dina in the front passenger seat, their two daughters Angelica and Camelia in the middle bench seat, and their three sons Adrian, Ben and Dan in the rear of the van. The only member of the Tepei family not in the car on the day of the accident was the family's oldest son, Christian. Tragically, Christian had been involved in an auto accident in 1995 which rendered him a paraplegic, making long-distance travel difficult.

Heading north from the Portland area, Peter Tepei noticed on two occasions that his minivan appeared to be "running rough" – but he assumed that the car's handling had something to do with the pavement, and the problem quickly passed. As the vehicle reached milepost 67 on Interstate 5, both driver and passengers heard a loud bang, followed by repetitive noises coming from the right rear wheel well of the vehicle. Peter, who had worked as a truck driver both in Romania and Canada, soon suspected that the noise was coming from his tire. He maintained control of the vehicle for approximately 15 to 20 seconds after first recognizing there was a problem, but was unable to get to the shoulder of the road or significantly slow his vehicle on account of adjacent traffic on the highway. The right rear tire eventually suffered a catastrophic loss of air pressure, causing Peter to lose control of the vehicle approximately three seconds after the final blowout occurred. The Previa flipped over the median barrier of the highway, eventually coming to rest upside-down in the southbound lanes of Interstate 5. Adrian, Angelica Ben and Camelia were

ejected from the vehicle, while the other family members remained inside the van. Amazingly, all family members survived the collision.

The Tepeis had purchased the Toyota Previa in February of 1996 from a used car lot in Port Moody. The right rear tire on the vehicle was a Uniroyal Tiger Paw XTM, which had been manufactured at Uniroyal's Ardmore, Oklahoma plant in October of 1990. Uniroyal had since been purchased by Michelin North America, meaning that Michelin would be subject to successor liability for any injuries proven to be caused by Uniroyal's product. The tire in question had been on the vehicle at the time the Tepeis purchased it, and still had approximately 20 percent of its usable tread remaining. It was unknown whether the tire was original issue equipment for the Previa, or if it had been purchased after-market by the van's previous owner.

The immediate injuries sustained by the family members in the collision were severe. Adrian suffered a broken collarbone and collapsed lung, as well as a closed head injury. Angelica sustained multiple compound fractures to her thoracic and anterior vertebrae. Ben had a severe compound fracture to his right elbow, while Dan presented with a T-11 transverse process fracture. Remarkably, despite being ejected, Camelia Tepei was the least injured member of the family, sustaining only lacerations and facial scars, while Dina Tepei suffered soft tissue neck and back injury along with the severe emotional distress caused by witnessing the horrific trauma sustained by five of her six children.

As time passed, some of the family members recovered, while others found themselves suffering from after-effects of the collision which were not immediately apparent at the scene. Both Dina and Camelia's injuries resolved with modest medical treatment, although the emotional trauma caused by the accident remained. Angelica spent twelve days in the hospital post-accident, and developed chronic back pain which significantly limited her daily activities. Ben's elbow fracture did not heal properly, leading to three months in the hospital, significant connective tissue and bone loss, and a permanently withered dominant arm/forearm. Adrian, who spent several days in the hospital post-collision, was later found to have sustained frontal lobe damage as a result of his head injury, leading to memory loss and aggression control problems.

Of all the family members, Dan Tepei's situation was most tragic. A gregarious, outgoing person before the accident, Dan became withdrawn and increasingly forgetful in the months following the collision. His co-workers noticed an immediate change in his behavior – eventually leading his employer to let him go from his job as a stone cutter, citing safety concerns. Approximately six months after the collision, Dan was

institutionalized as a result of increasingly violent outbursts and erratic behavior. He was eventually diagnosed as suffering from a schizophrenia-like psychosis, which his family and medical providers attributed to a head injury sustained in the collision.

My Initial Involvement in the Case

Shortly after their accident, the Tepeis retained Matt Fahey of Epstein Wood in Vancouver to pursue claims for injuries against their father's ICBC policy, in his capacity as driver of the vehicle. ICBC's initial investigation, in turn, suggested that the tire itself might be partially or wholly at fault for causing the accident. Early in its claims investigation, ICBC retained William Max Nonamaker, a tire failure analyst from Akron, Ohio with years of experience inside and outside the tire industry. Mr. Nonamaker's initial evaluation of the remnants of the Tepeis' right rear tire suggested that the tire may have had a foreign substance manufactured into the body of the tire itself, which he felt might have contributed to the belt separation and blowout that eventually occurred. Since the Tepeis' case would need to be pursued in Washington state, either as a predicate to asserting an underinsured motorist claim under the Insurance (Motor Vehicle) Act, or as an independent action against the American manufacturer of the tire, Matt Fahey approached me about assisting him with prosecution of the action in Washington state. As one of a limited number of attorneys cross-licensed in both British Columbia and Washington, my firm was uniquely situated to join with Mr. Fahey and the Tepeis in navigating the thickets of Canadian and American law that this case was certain to pass through on its way to final judgment.

The Loan Agreement

One of the first issues that the parties needed to confront was the role that Peter Tepei would play in the case. As the driver of the vehicle in which his family was traveling, Peter was an essential defendant in any action we would file on behalf of the family. Likewise, a judgment against Peter would have to be obtained before the family could proceed with an underinsured action against ICBC – an action I was certain would follow any lawsuit, given the severity of the plaintiffs' injuries and Peter's $200,000 CDN liability limits under his own ICBC policy.

Washington law gave us added incentive to retain Peter as a defendant through to judgment in the action. Washington's compensatory damages scheme permits "fault-free" plaintiffs to hold multiple defendants jointly and severally liable for all injuries caused. If the plaintiffs settled with Peter prior to trial, his share of liability would be forever extinguished by the settlement – preventing us from having a chance of collecting Peter's share of any damages

against the tire manufacturer, in the event that both parties were found to have shared fault for the collision.

Still, as a family member, Peter's interests were not entirely adverse to those of the plaintiffs. He knew better than anyone the extent to which his family had suffered, and wanted to see his family receive fair compensation for their injuries. Further, Peter expressed a strong belief that the tire was primarily at fault for the accident, and wished to have an opportunity to exonerate himself through the litigation process.

In July of 1999, prior to filing suit in this action, the plaintiffs, Peter Tepei and ICBC reached an agreement which provided some immediate financial and strategic benefits to the plaintiffs while ensuring that any eventual damages awared would be governed by Washington's joint and several liability laws. The plaintiffs received $150,000 CDN from Peter Tepei, paid by ICBC out of the partial proceeds of Peter Tepei's Autoplan coverage. In exchange for this payment, which was defined by the parties as an 'advance loan' and not a settlement, the plaintiffs agreed not to execute any judgment against Peter obtained in the Washington state action beyond his $200,000 CDN policy limits. The parties further agreed that Peter's counsel would assist the plaintiffs in the prosecution of claims against the tire manufacturer, and established a pro-rata repayment of ICBC's legal fees incurred in Peter's defense in the event that the parties succeeded in establishing liability on the part of Michelin (Uniroyal's successor-in-interest). Finally, the parties agreed that the loan agreement in no way impaired the ability of the plaintiffs to pursue an UIM claim against ICBC in the event of a judgment entered solely against Peter Tepei.

The "loan agreement" provided several tangible benefits to the plaintiffs. It provided some immediate financial benefit to my clients – funds which were used both to satisfy uncompensated expenses arising from the accident, and to defray some of the costs of what we expected would be costly litigation against Michelin regarding the tire's role in the accident. The agreement also provided a framework for the position that Peter Tepei and his counsel would play in respect to the litigation – establishing that while Peter would contest his own liability for the collision, he would join us in aggressively pursuing a case against Michelin, and would not challenge the damages claims asserted by the plaintiffs. Most importantly, the fact that Peter Tepei left $50,000 CDN in liability "on the table" to be determined in the Washington action ensured that Peter would remain in the action through to judgment and preserve joint and several liability with Michelin in the event of a plaintiff verdict (an assumption that Michelin later challenged, as you will see). Shortly after negotiating the loan agreement, the plaintiffs filed their complaint in Lewis County, Washington

Superior Court, alleging negligence claims against Peter Tepei and strict liability defective products claims against Uniroyal/Michelin.

The First Hurdle – Michelin's Attempt to Dismiss the Case to British Columbia under the Doctrine of Forum Non Conveniens

From the outset, it became clear to us that Michelin intended to contest our allegations of defective manufacture and design with every legal means available. Initial discovery began during the year 2000, but did not progress rapidly (in large part due to the fact that several of the plaintiffs had yet to reach a point of medical stability where the full extent of their claims could be evaluated by the parties). Michelin retained outside counsel in Los Angeles to take the lead in managing the litigation. In addition, the manufacturer retained the law firm of Perkins Coie in Seattle to assist them in addressing the cross-border issues implicated by a Canadian family suing a U.S. manufacturer for a U.S. accident. Perkins Coie is perhaps best known in the Seattle legal community for its relationship with the Boeing Corporation, which has faced numerous product liability lawsuits brought by foreign nationals in the U.S. courts over the years. The appearance of Perkins Coie as co-counsel suggested that Michelin intended to contest U.S. jurisdiction and the applicability of U.S. law to our accident – despite the fact that the accident had occurred in Washington, and the Uniroyal Tiger Paw was designed and manufactured in the United States.

In February of 2001, Michelin filed a motion in Lewis County seeking to have our lawsuit dismissed to British Columbia under the doctrine of *forum non conveniens*. As in Canada, courts in the United States are vested with discretionary power to decline jurisdiction over any case where the interests of justice and convenience would be strongly favored by removal to an alternative forum. However, the American courts have developed a framework for balancing the factors for and against FNC dismissal which varies from the Canadian approach.

The seminal *forum non conveniens* case outlining the American approach, Gulf Oil Corp. v. Gilbert[1] ,requires that a defendant seeking FNC dismissal first establish that an adequate alternative forum exists for the action to be heard. The "adequate alternative" test is generally an easy threshold for a defendant to cross. A forum may be considered "adequate" for FNC purposes even if it offers drastically reduced compensation to an injured plaintiff, or bars certain elements of a plaintiff's claims. So long as "the remedy provided by the alternative forum is [not] so clearly inadequate or unsatisfactory that it is no remedy at all"[2], the "adequate forum" prong of Gulf Oil is generally satisfied.

Once an adequate alternative forum has been established, the Gulf Oil decision directs a court to consider a host of "private and public interest factors" which the court must balance in determining whether it should exercise its discretion and dismiss the case. "Private interest" factors tend to involve matters specific to the litigation itself such as

- the relative ease of access to sources of proof
- availability of compulsory process for unwilling witnesses
- the cost of obtaining the attendance of witnesses in the alternative forum
- the need for a view of the scene where the events giving rise to the litigation occurred, and
- "all other practical problems that [would] make trial of a case easy, expeditious and inexpensive"

In contrast, "public interest" factors implicate broader policy concerns relevant to the fora at issue, including

- the congestion of court dockets in the proposed fora
- the risk of imposing jury duty on people of a community with no significant relation to the litigation
- the local interest in having localized controversies decided at home, and
- the preference for holding trial in the forum whose law is most likely to apply to the issues presented in the litigation.[3]

The Gulf Oil factors, which were first endorsed and employed by the Washington Supreme Court in 1976[4], encourage the trial court to conduct a complex balancing of competing interests – which inevitably lead to fact-specific decisions arising out of the reported cases. While the discretionary nature of the doctrine and the strong preference of the American courts to respect a plaintiff's choice of forum certainly worked in my clients' favour, Michelin was able to find ample fodder from which to craft an argument in favor of FNC dismissal to British Columbia, where both liability and damages law would work strongly in Michelin's favor.

To enhance their chances of securing a dismissal, Michelin offered to waive any defense they would possess under the British Columbia statute of limitations were the case dismissed to Canada. The litigation was filed in Washington within its three year statute of limitations for tort actions, but after the two year statute had expired in British Columbia. Wisely, Michelin recognized that a dismissal to Canada which ended in an outright dismissal on statute of limitations grounds would deprive the plaintiffs of any remedy at all – thus bringing into question whether B.C.

would function as an "adequate alternative forum" for the case.

Michelin's primary argument in favor of dismissal was the fact that since the plaintiffs were British Columbia residents, who returned home to British Columbia following the accident, the vast majority of the evidence pertaining to the plaintiffs' damages claims would be found in British Columbia. Michelin contended that this fact established that trial in B.C. would be cheaper and easier to conduct. Michelin also raised the spectre of possible witnesses who had testimony unfavorable to the plaintiff which would lay beyond the jurisdiction and subpoena power of the Washington courts. Trial in Washington, Michelin argued, would create an unequal playing field – the plaintiffs could convince friendly, favorable witnesses to travel to Washington to testify, while Michelin would be thwarted in obtaining the testimony of unfavorable yet uncooperative Canadian witnesses.

Michelin also argued that the "public interest" factors weighed heavily in favour of dismissal. They argued that a Lewis County jury had no significant interest in determining the compensation to which Canadian nationals would be entitled, and that the presence of both Canadian plaintiffs and defendants in the case mitigated strongly in favour of removal to British Columbia. Finally, Michelin presumed that since the trial court would undoubtedly apply B.C. law to the resolution of this action, justice and convenience compelled that the trial be held in B.C., rather than requiring a Washington court to interpret and apply foreign law to decide the case.

In response, the plaintiffs argued that Michelin's offer to waive the statute of limitations defense did not guarantee that a B.C. court would accept jurisdiction over the case. Discovery had established that while Michelin was licensed to do business in Washington, it conducted no business activities in British Columbia. Significant questions regarding personal jurisdiction and statute of limitations concerns remained, raising the possibility that B.C. might not accept the case – thus failing to satisfy the "adequate alternative" prong of the Gulf Oil test.

The plaintiffs were joined by defendant Peter Tepei in arguing that the "public and private interest factors" failed to justify disturbing the plaintiffs' choice of a Washington forum. Both parties in opposition pointed out that liability as well as damages were contested in this action – and that virtually all evidence and witnesses relevant to the liability claims would be found in the United States. We also established, by way of affidavits, that there were liability and damages witnesses located in the U.S. who would be substantially inconvenienced by a trial in Canada – or, correspondingly, that B.C. witnesses known to have relevant information were able and willing to travel to Washington for trial. We challenged

Michelin's assumption that B.C. law would ever apply to an action arising out of a Washington accident and implicating a United States corporate defendant (an issue ultimately left for resolution on another day). Finally, defendant Tepei turned Michelin's argument regarding the availability of witnesses on its head by proving that Washington had far greater procedural flexibility than British Columbia in crafting ways to obtain testimony from unwilling foreign witnesses. Defendant Tepei offered to drop its objection to FNC dismissal and have the case tried in Canada – provided that Michelin agree to waive its liability defenses as well any statute of limitations argument, and conduct only a damages trial in British Columbia. Needless to say, Michelin did not accept its co-defendant's offer.

After exhaustive briefing and oral argument between the parties, Lewis County Superior Court Judge David Draper denied Michelin's motion to dismiss in May of 2001. We had established the right to have our action heard in Washington state, and had overcome the first roadblock to getting our case in the courtroom door.

Ongoing Discovery Issues – Locating Experts and Establishing a Product as "Unreasonably Dangerous"

As 2001 progressed into 2002, the pace of discovery in the case gradually increased. As you can imagine, presenting the claims of any one of these plaintiffs alone would have involved significant effort in locating medical experts, deposing relevant treatment providers, presenting the client for defense medical exams and in turn deposing defense experts, establishing future wage losses and the plaintiff's level of ongoing disability and the like. The *Tepei* case implicated all of these issues, multiplied by a factor of six – and this before we even addressed the daunting task of proving our defective product claims against Michelin. While the pre-trial preparations for the damages side of the case presented problems common to any complex personal injury case, presentation of the product liability claims against Michelin posed challenges unique to the Washington law which governed the claims.

Unlike Canadian law, which recognizes an action for defective design or manufacture of a product grounded in negligence principles, the Washington Products Liability Act holds a manufacturer "strictly liable" for such defects. In a strict liability claim under the WPLA, a plaintiff must instead prove that a product was "unreasonably dangerous" in design or manufacture, and that it caused harm to the plaintiff – no evidence of negligence on the part of the manufacturer is required.[5] A product is considered "unreasonably dangerous" in manufacture if the product deviates in some material way from the design specifications for the product, or from identical units of the same product,

at the time it leaves the manufacturer's control.[6] A product can be found "unreasonably dangerous" in design if it is found to be unsafe to an extent beyond the contemplation of the ordinary consumer.[7] Alternatively, a product can be "unreasonably dangerous" in design if "the likelihood that the product would cause the claimant's harm or similar harms, and the seriousness of those harms, outweighed the burden on the manufacturer to design a product that would have prevented those harms".[8] The WPLA framework – with its focus on consumer expectation and the condition of the product, as opposed to the knowledge or intent of the manufacturer – offers obvious advantages to a plaintiff when compared with the Canadian negligence approach. Our goal was to develop evidence and expert testimony that satisfied these tests.

While the "contamination in manufacture" theory advanced by defendant Tepei's tire expert would undoubtedly offer assistance to the plaintiffs, we were eager to open a second line of attack on Michelin independent of this approach, preferably with regards to tire design issues. Our initial research into tire design and safety issues suggested that tire tread separations in the United States were a recurring problem throughout the industry – but we initially found no consensus as to whether a defect in this tire's design might explain its catastrophic failure.

Not surprisingly, discovery responses from Michelin provided little help to our efforts. Cooperation between the plaintiffs and defendant Tepei with respect to tire issues allowed us to compare documents and share discovery tactics, which enabled us to establish that Michelin had received complaints of tread separation problems with the Tiger Paw XTM in the years surrounding the manufacture of our tire. However, Michelin's corporate "document retention" policies operated more like "document destruction" policies in practice – providing the company with plausible grounds for denying the existence of documents related to many past complaints, even some which were destroyed following the initiation of our lawsuit. The absence of documents pertaining to the 1990 manufacturing specifications for the Tiger Paw XTM (which Michelin blamed in part on a 1995 tornado at their Oklahoma plant) posed significant challenges to our efforts to prevail on a manufacturing defect theory, as we lacked critical evidence to establish whether the tire in question deviated from specifications. We confronted dead ends and evasive, incomplete answers at every turn, which led us to gradually turn our focus more to the design defect allegations in our complaint.

Unlike manufacturing defect claims, which rely on product information in the manufacturer's sole control, a design defect claim under Washington law can

be proven by establishing that the harms caused could have been mitigated through reliance on an alternative design. Our research suggested that one solution to tread separation problems which had been widely employed in Europe was to cover the tire's steel belts with a thin coating of nylon prior to encasing them in the rubber body of the tire. These nylon cap plies act as a type of "shrink wrap", holding the belts in place while also creating a more solid bond between the layers of belts and the interior of the tire. But while nylon cap plies are common design features of European tires, they have only recently begun to gain wider acceptance in North America. We wondered if a design incorporating nylon cap plies would have prevented the belt separation and blowout in our case, and decided to turn to a European expert for the answers.

The plaintiffs retained Richard J. Grogan, a former tire engineer with Dunlop now working as a forensic tire consultant in the United Kingdom, and asked him to analyze the remnants of the Tepei tire to assess whether design or manufacturing defects might have contributed to the 1996 accident. Utilizing forensic tire failure techniques including x-rays of the tire's internal components, Grogan concluded that the tire had significant deviation or separation in the placement of the tire's steel belts when compared with the companion tire taken from the left rear of the Tepei vehicle. Grogan felt that the separation found in the subject tire was likely the result of improper alignment of the belts during the manufacturing process, and that the use of nylon cap technology would likely have prevented the separation from progressing to the point where a blowout would occur. Grogan's design and manufacturing defect testimony complemented the contamination theory presented by defendant Tepei, and left us feeling confident that we had a chance to establish a defective product claim under Washington law – provided that Washington law applied to these claims.

The Second Hurdle – Michelin's Attempt to Apply British Columbia Law to a Washington action

The fact that Judge Draper had rejected Michelin's plea to dismiss this action to British Columbia in 2001 had not foreclosed the possibility that Michelin would later return requesting that the court apply British Columbia law to some or all of the claims alleged in the lawsuit. While the "public interest" balancing test employed by American courts in *forum non conveniens* analysis suggests that consideration should be given to holding trial in the jurisdiction whose law will apply to the facts, Washington case law had previously made clear that a choice-of-law analysis is not formally part of the FNC inquiry.[9] Further, while decisions on *forum non conveniens* dismissals are only reviewed by the Washington appellate courts for an abuse of trial court discretion, determinations of whether foreign law should apply to a case are treated as

summary judgment motions, and reviewed *de novo* by any appellate court.[10] We had long expected that Michelin's failed attempt to dismiss our case to British Columbia would not be their last attempt to limit their exposure by asserting Canada's interests in this case. In May of 2003 – some two years after the FNC ruling, and a scarce three months before our scheduled trial date, Michelin filed a motion to apply British Columbia law to our action before Judge Richard Brosey, who had assumed responsibility for the case from Judge Draper.

Curiously, the same 1976 case which established Washington's approval of the Gulf Oil approach to *forum non conveniens* analysis also provided the framework Washington courts use to address choice-of-law problems.[11] Unlike British Columbia, which generally continues its adherence to the principle of *lex loci delecti* (the law of the place of injury governs the action), Washington follows the "most significant relationship" approach to choice-of-law analysis. Utilizing a framework derived from the American Law Institute's Restatement (Second) of Conflict of Laws, the Washington approach requires the trial court to balance a host of factors to determine whether a jurisdiction other than the forum has a "more significant relationship" to the issues addressed in the suit, such that the foreign jurisdiction's law should be applied. The primary tests for evaluating the nature and quality of contacts are established at Restatement § 6 and §145, both of which were expressly adopted by the Washington Supreme Court. §6 compels the reviewing court to balance the interests of the affected jurisdictions through the consideration of issues including

- the needs of the interstate and international systems;
- the relevant policies of the forum;
- the relevant policies of other interested states and the relevant interests of those states in the determination of the particular issue;
- the protection of justified expectations;
- the basic policies underlying the particular field of law;
- certainty, predictability and uniformity of result; and
- ease in the determination and application of the law to be applied.[12]

While the factors identified in §6 provide a broad framework of general considerations to guide a court's conflicts analysis, Restatement § 145 offers the specific contacts a court should consider in putting the principles expressed in §6 into practice, including

- the place where the injury occurred;
- the place where the conduct causing the injury occurred;

- the domicil, residence, nationality, place of incorporation and place of business of the parties; and
- the place where the relationship, if any, between the parties is centered.[13]

In its motion, Michelin asked the trial court to apply British Columbia law in three broad areas. First, Michelin sought application of Canada's "rough upper limit" to any award of noneconomic damages made to the plaintiffs (as opposed to Washington law, which places no limit on noneconomic damages awards). Next, Michelin asked that British Columbia's negligence based product liability laws govern the action, in lieu of the "strict liability" approach mandated by the Washington Product Liability Act. Finally, Michelin argued that British Columbia's approach of permitting evidence of seat-belt nonuse to establish comparative negligence should apply to the case, rather than the Washington procedural and substantive rules which bar the use of such evidence by a defendant to mitigate the plaintiff's damages.

Michelin centered much of its argument on the fact that the place of injury was the *only* factor under the Restatement test which argued in favor of the application of Washington law. They relied extensively on commentary within the Restatement and case law from around the United States (much of it arising in the context of airline crash cases) which stood for the proposition that when the place of injury is *fortuitous*, its relative importance in the choice of law inquiry should be diminished. As Michelin saw it, our case was about Canadian residents suing a Canadian resident and a United States corporation (which neither manufactured nor designed its products in Washington) for injuries arising out of a relationship which was clearly centered in British Columbia, where the Tepei vehicle was licensed and maintained. How could Washington possibly have an interest in this case "more significant" than that of British Columbia?

Michelin also suggested that principles of international comity worked in favour of the application of British Columbia law. Noting that any judgment obtained against defendant Tepei would be paid out of his liability policy held by ICBC, Michelin insisted that Washington residents had no interest in seeing its law applied to a "wholly Canadian" dispute. Michelin also asserted that Canada's decision to adopt a negligence-based framework for product liability litigation was the result of carefully crafted policy choices designed to protect manufacturers against product liability exposure, and that Canada's policy choices should be respected in an action brought by Canadian plaintiffs and implicating a Canadian co-defendant.

Michelin's motion struck at the heart of many of the procedural and substantive

advantages of Washington law which we wished to retain for our clients. Again, we were assisted by co-defendant Tepei in opposing Michelin's motion. We pointed out that, despite the "advance loan" agreement between the plaintiffs and defendant Tepei, there were still two defendants in this litigation – and only one of these was a Canadian national. We distinguished Michelin's cases suggesting the location of our accident was fortuitous in the same way that an airline crash might be – noting that the only "fortuitous" thing about the accident was the fact that no Washington residents were injured when the Tepei vehicle flipped over onto the southbound lanes of Interstate 5. We noted that, with respect to defendant Tepei's negligence, the "conduct causing injury" likely occurred in Washington as well (negligent driving), and that with respect to product defect claims, any "conduct" on Michelin's part certainly could not have occurred in British Columbia, as it conducted no business here. Further, we noted that courts around the United States utilizing the Restatement's "most significant relationship" approach had often applied U.S. law to product liability claims brought by Canadians – even claims arising out of injuries which occurred in Canada.[14] Surely, we reasoned, Washington law should apply to an action against a U.S. corporation arising out of injuries which occurred in the forum state.

We also aggressively challenged Michelin's contention that Canadian interests would be offended by the application of Washington law to this case. We argued against the illogic of applying British Columbia's evidentiary rules regarding seat-belt nonuse to a Washington case, drawing the analogy to a British Columbia resident who committed a crime in Washington expecting that the B.C. criminal system would follow him as he traveled. We noted that British Columbia's interests expressed through the "rough upper limit" would hardly be offended if a foreign corporation were found liable to Canadian residents for an accident occurring outside of Canada in sums beyond those limits, and noted that Washington law avoided setting such limits as a means of deterrence as well as compensation. Finally, we challenged the notion that Michelin sought to avail itself of Canadian products liability law when it conducted no business in British Columbia, and thus could not possibly have been within the class of defendants the law meant to protect by adopting a negligence rather than a "strict liability" approach for product defects.

In the end, the judge had changed, but the court's balancing of the relevant factors did not. Michelin's motion to apply British Columbia law was denied as to all three issues that they raised. The court specifically noted in its decision that it viewed the case as a suit between Canadian nationals against a United States corporation from the standpoint of Michelin, and that in that context British Columbia did not have a

more significant interest than Washington in seeing its law applied to any of the issues.

Michelin's tenacity in continuing to litigate this issue following Judge Brosey's ruling provides some indication of the importance the choice-of-law decision had on the overall conduct of our case. The legal wrangling over these issues and the time required by all parties to research and brief the arguments resulted in a postponement of the trial until March 2004. Following Judge Brosey's September 2003 ruling, Michelin moved for immediate review of Judge Brosey's decision. It also asked Judge Brosey to "certify" the decision for immediate review – in effect, putting the court's stamp on the notion that the decision involved unsettled questions of Washington law upon which reasonable minds could differ, and that immediate review would accelerate the ultimate termination of the litigation. Judge Brosey agreed to do so, in the interests of avoiding any scenario where our case would be retried due to an error of law. In turn, we contested Michelin's appeal for discretionary review, and convinced a commissioner of the Washington Court of Appeals that immediate review was unjustified, and that Judge Brosey's decision was sound. Michelin finally played the last card in its hand, asking a three-judge panel of the appellate court to hold an emergency hearing to overturn the commissioner's decision, and accept immediate review of the choice-of-law rulings. On the Friday before our trial was set to begin, we received word that the three-judge panel had denied Michelin's final emergency request. We had cleared all the "cross-border" legal hurdles set up by the Michelin team, and proceeded to trial in Lewis County under Washington law.

Conclusion

As mentioned in our introduction, after eight weeks of testimony, argument and deliberations, the jury returned a sizeable verdict against defendant Tepei, but found that Michelin was not liable for either defective design or manufacture in the production of the Tiger Paw XTM. All our forethought and successes on the legal arguments underpinning the Tepeis' right to pursue a products liability action in Washington under Washington law were, in the end, undone by circumstances related more to the credibility of our experts than the fundamental merits of our arguments. The "contamination in manufacture" claim asserted by defendant Tepei and his expert Max Nonamaker unraveled when, in mid-trial, the court ordered an independent lab to conduct destructive testing of the subject tire. The results of the testing indicated that the "foreign substance" identified by Nonamaker in his examination had not been manufactured into the tire, but was instead insect segments which had contaminated the exterior of the tire after its manufacture.

Unfortunately, the plaintiffs' defective design claims were also compromised as a result of problems with expert credibility. Approximately three weeks prior to trial, the parties learned that Richard Grogan had been held in contempt of court in an ongoing California case in which he was serving as an expert. The court entered findings that Grogan had violated a prior court order against destructive testing of an incident tire in his possession, and then proceeded to deny the incident under oath until confronted by the contradictory statements of the lawyer who had retained him. While Grogan undertook no such testing of the Tepeis' tire, and the issue was merely collateral to Grogan's overall credibility, the effect this disclosure had on the jury was devastating to the plaintiffs' claims against Michelin. When the jury was polled following the case, it was evident that the "double whammy" of the destructive testing results and the Grogan disclosures dealt a fatal blow to the parties' chances of prevailing in their claims against Michelin.

The plaintiffs' defective manufacturing claims were also hampered by the reluctance of the trial court to allow the jury to hear evidence of Michelin's destruction of documents pertinent to the tire's specification, or of other lawsuits or claims involving other tread separation incidents involving the Tiger Paw XTM. When our firm conducted mock jury focus groups in Lewis County prior to trial, it was clear that prospective jurors found Michelin's document retention policies unreasonable, and were inclined to infer Michelin's culpability from its failure to produce documents related to the tire's specifications, or evidence of similar consumer complaints regarding the tire. The jury empaneled to hear this case heard little of this evidence. Judge Brosey excluded much of the testimony regarding document destruction and similar defect complaints from evidence, and ultimately rejected the plaintiffs' request for a jury instruction which would have permitted the jury to infer that missing evidence in Michelin's possession would have been damaging to Michelin's defense.

Despite the significant verdict we obtained for our clients against the driver (a verdict which will be partially satisfied by way of an UIM claim against ICBC in British Columbia), *Tepei v. Uniroyal* is perhaps most instructive for the lessons it teaches regarding those claims which did not ultimately succeed. The pre-trial legal maneuvering between the parties and Michelin over *forum non conveniens* and choice-of-law issues suggest that while U.S. corporate defendants will aggressively contest the efforts of Canadian plaintiffs to seek redress for injuries caused by defective American products, the American courts are generally open to such claims for relief. In Washington, as well as in the majority of states around the U.S. which have abandoned the *lex loci delecti* approach

to choice-of-law issues, it is likely that a Canadian plaintiff who chooses to sue an American manufacturer in a state with some connection to the product in question would find the courts willing to entertain both jurisdiction over the case and the application of the American forum's products liability law – irrespective of where the injury to the plaintiff actually took place. Indeed, many of the cases relied upon by Michelin in its attempt to suggest the place of the *Tepei* accident was "fortuitous" could be turned against a corporate defendant, supporting the argument that an injury occurring in Canada "could have occurred anywhere" as a result of the defective product's release into the stream of commerce. Such an approach would likely favour the application of the law from where the product was manufactured or designed, thus increasing the likelihood that a Canadian plaintiff's product liability suit could be tried under the more liberal "strict liability" approach, as opposed to the more conservative negligence-based system adopted by the Canadian courts. From our perspective, the enduring lesson of *Tepei* is that when a client's case implicates the laws of two or more jurisdictions, familiarity with the nuances of each jurisdiction's unique body of precedent and procedures is essential to ensuring that the law most favorable to your client is the law ultimately applied to your case.

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[1] 330 U.S. 501 (1947).
[2] Piper Aircraft v. Reyno, 454 U.S. 235, 254 (1981).
[3] Gulf Oil, 330 U.S. at 508-09.
[4] *See* Johnson v. Spider Staging Corp., 87 Wn.2d 577, 555 P.2d 997.
[5] *See generally* RCW 7.72 et. seq., and the cases interpreting same.
[6] RCW 7.72.030(2)(a).
[7] RCW 7.72.030(3).
[8] RCW 7.72.030(1)(a).
[9] *See* Meyers v. Boeing Co., 115 Wn.2d 123, 133 at n.6, 794 P.2d 1272(1990).
[10] *See* Washington Civil Rule 9(k)(3).
[11] *See* Johnson, *footnote 4, supra.*
[12] Restatement(Second) of Conflict of Laws §6(2).
[13] Restatement(Second) of Conflict of Laws §145(2).
[14] *E.g., see* Kozoway v. Massey-Ferguson, Inc., 722 F. Supp. 641 (D. Colo. 1989).