"A Stranger in the Promised Land?" The Non-Resident Accident Victim and the Québec No-Fault Plan

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All the Canadian provinces and territories have now adopted some form of no-fault insurance for road accidents.[1] But the plans in effect in the common law provinces are intended only to supplement tort recovery, not to replace it.[2] The no-fault insured's traditional tort rights are not affected except to the extent necessary to prevent double recovery and motorists must continue to carry traditional liability insurance against the risk of civil suit. In contrast to these so-called "add-on" plans, the *Automobile Insurance Act*[3] of Québec implements a "pure" no-fault system.[4] Under the Act — which has been in effect for nearly a decade now — the road accident victim's right to sue for bodily injury is abolished totally.[5] Substituted is a comprehensive no-fault compensation plan[6] paid for primarily by Québec motorists[7] and administered by a governmental authority called *la Régie de l'assurance automobile du Québec*, (hereafter *la Régie*).[8]

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[1]No-fault auto insurance is compulsory everywhere except Newfoundland where it may be purchased optionally. For a general description of the Canadian plans, see Craig Brown, *No-fault Automobile Insurance in Canada* (Toronto: Carswell, 1988).

[2]See generally R. Bird, "No Fault Insurance: Are Section B Benefits a Viable Alternative?" in this issue at 165.

[3]*Lois sur l'assurance-automobile*, L.Q. 1978, c. 68, L.R.Q. c. A-25 (hereafter *L.A.A.*)

[4]See generally C. Belleau, "L'experience de l'assurance automobile sans egard a la responabilite au Québec" in this issue at 151.

[5]*L.A.A.*, art. 4. In totally abolishing the right to sue, the Québec plan is unique not just in Canada but in North America. Some American states, however, have enacted "partial" no-fault plans which typically eliminate tort actions except for very serious injury: see text accompanying note 33, *infra*.

[6]*L.A.A.*, arts 3 & 4.

[7]See generally *L.A.A.*, part V.

[8]*L.A.A.*, art. 1(25).

The implementation of a pure no-fault system in Québec has brought a new conflict of laws dimension to the interjurisdictional automobile accident. Suppose an accident involves a Québec motorist and a motorist from one of the common law provinces — New Brunswick, for instance. For the Québec motorist, compensation poses no problem: she can simply collect no-fault benefits directly from *la Régie*. But the no-fault protection afforded under an "add-on" plan of the type in effect in New Brunswick is typically modest: the New Brunswicker's right to compensation still depends primarily on her ability to sue the wrongdoer. To allow a civil action against the Québec motorist would, of course, conflict with Québec's basic reform objectives — to immunize its motorists from civil responsibility in exchange for the perceived advantages of universal no-fault protection. But to preclude the action would be unfair in that it would leave the New Brunswicker without an adequate remedy.

The drafters of the Québec Act did not ignore the interjurisdictional dilemma. The Act sets out detailed provisions governing the rights and obligations of non-residents travelling in Québec and Québec residents travelling out of province. Part I of this presentation outlines and evaluates the solutions that were chosen.

The operation of the Québec plan at the conflict of laws level is not, however, controlled solely by Québec law. Litigation involving Québec motorists can arise and has arisen before the courts in other jurisdictions. Part II looks at the extent to which the interjurisdictional features of the Québec Act have proved effective in light of the reported cases thus far.

Subject only to constitutional constraints, the legislature of a province is always free to amend its own compensation laws in response to a fundamental change in the reparations philosophy of a sister province. Since the Québec plan was implemented, a number of provinces — following the execution of bilateral agreements with *la Regie* — have made special provisions in their automobile insurance laws to cover their residents when travelling in Québec. Part III focuses on the impact of these changes and suggests an alternative approach which might better accommodate the continuing concerns of the common law provinces.

Part I: The Conflict of Laws Features of the Québec Plan

Accidents Outside Québec

All owners of automobiles operated in Québec are still required to maintain third party liability insurance — purchased from a private insurer — for travel elsewhere in North America.[9] The policy must provide indemnity up to the minimum financial requirements imposed by the insurance laws of the state or province where the accident occurs. Thus Québec motorists are intended to remain financially responsible and responsive defendants in a civil action arising out of an out-of-province accident. This is not surprising. Any attempt by Québec to immunize its motorists from civil liability for accidents abroad would have been constitutionally suspect and ineffective as a

[9] *L.A.A.*, arts 84 & 85.

practical matter. There is, however, *one* change from the *status quo ante*: plaintiffs no longer have the option of pursuing their civil claims against Québec motorists in the Québec courts.[10] This restriction does not, however, significantly prejudice the out-of-province victim: the courts in all provinces have ample jurisdiction over domestic torts; and the Québec motorist's liability insurer is obligated in any event, to respond to any claim against its insured by a third party.

In the converse case where it is the Québec resident who sustains injury in an out-of-province accident, the position is somewhat more complex. Although Québec residents may claim no-fault benefits for accidents that occur anywhere in North America,[11] this does not mean that motorists in other jurisdictions — and their insurers — are meant to be relieved from all civil liability if they have the good fortune to negligently injure a Québecer. In the first place, *la Régie* is subrogated — to the extent of its no-fault award — to any civil right of action which the claimant may have under the *lex loci delicti* against a non-resident motorist.[12] Moreover, the claimant may retain any excess damages recoverable in such an action. [13]

Accidents in Québec

Québec motorists are no longer obligated to carry liability insurance for in-province accidents even if non-residents are involved. The victim's only remedy — at least under Québec law — is a claim to *la Régie*. The entitlement criterion for non-residents, however, differs from that for Québec residents: whereas Québec residents are entitled to compensation on a no-fault basis,[14] non-residents may recover only to the extent that they were not responsible for the accident in which their injuries were suffered.[15] If they were partly at fault, they suffer a proportionate reduction in their award. If they were wholly at fault, they recover nothing. In "the case of a disagreement between *la Regie* and the victim with regard to [her] responsibility, the victim's recourse is submitted to the courts."[16]

A fault approach also has been maintained for non-residents on the liability side. Although the victim herself can no longer sue, *la Régie* has a subrogated right of action against non-resident motorists[17] (and their liability insurers)[18] to recover any no-fault benefits paid as a result of an accident caused by their fault.

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[10] *Szeto* v. *La Federation Compagnie d'Assurance du Canada* (1985) 16 C.C.L.T. 62 (Que. C.A.)

[11] *L.A.A.*, art. 7

[12] *L.A.A.*, art. 6. Is an insurer's right of subrogation against the wrongdoer responsible for its insured's losses governed by the law of the jurisdiction under which the payment was made (here, Québec law) and not by the law governing the tort action itself? For a discussion, see *La Regie de l'assurance automobile du Québec* v. *Brown* (N.B.Q.B., judgment pending).

[13] *L.A.A.*, art. 7.

[14] *L.A.A.*, art. 3.

[15] *L.A.A.*, art. 8.

[16] *Ibid.*

[17] *L.A.A.*, art. 9.

[18] Under *L.A.A.*, art. 9, *la Régie*'s subrogation right extends to "any person liable for compensation of bodily injury caused in the...accident by such non-resident."

One exception does exist: where the accident occurs in Québec, the owner, the driver and the passenger of a vehicle registered in Québec are deemed to reside in that province.[19] Like *de facto* Québec residents, they are entitled to benefits on a no-fault basis and are immunized from any liability to *la Régie* for accidents caused by their negligence.

The Denial of Equal No-Fault Protection to Non-Residents

The "discriminatory" treatment accorded visitors gave rise to criticism and confusion from abroad when the Québec plan was first implemented.[20] Indeed, one province — New Brunswick — went so far as to enact what surely must be an unprecedented piece of retaliatory legislation. If non-residents were to be denied the equal protection and benefit of Québec's compensation laws when visiting Québec, then Québec residents would be treated in like fashion when visiting New Brunswick. The *Motor Vehicle Act* of that province was amended to provide that in a civil action arising out of a motor vehicle accident in New Brunswick, the right of recovery of a non-resident was to be no greater than that enjoyed by a New Brunswick resident injured in an accident in the non-resident's home jurisdiction.[21] Although the provision does not mention Québec expressly — it is drafted in neutral language — it was interpreted as a "legislative prod"[22] to Québec to eliminate the "discriminatory" elements inherent in its new compensation laws.

But surely Québec's refusal to extend equal no-fault protection to non-residents in itself is not objectionable. After all, the compensation fund administered by *la Régie* is financed by the assessment of compulsory levies on Québec automobile owners and drivers. Why should visitors injured in an out-of-province vehicle be entitled to participate in that fund when they have not contributed directly or indirectly to it?

It is true that in a tort recovery jurisdiction the compensation of accident victims also is paid for by resident motorists through a system of compulsory automobile insurance. But in this case, insurance is not the compensation mechanism itself; rather, it is a response to the primary compensation mechanism — the civil negligence action. Thus the insurance is structured to provide indemnity to resident motorists for their legal liability to accident victims rather than to provide indemnity to victims directly. The victim's right to benefit from the insurance fund does not depend on whether she herself has contributed to it but whether the wrongdoer has. In other words, the relevant "connecting factor" for insurance purposes in a fault as opposed to a no-fault system is not the residence of the injured motorist but that of the wrongdoer.By retaining fault principles for visitors, Québec was able to offer them a remedy *and* preserve the

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[19] *L.A.A.*, art. 6.

[20] See generally: "Québec No-Fault Causing Problems for Ontario Agents" *Canadian Insurance* (March 1978) 227; "The Problems of Québec Insurance and the Visitors Who Drive in Québec" *Canadian Insurance* (November 1978) 18.

[21] R.S.N.B. 1973, c. M-17, s. 266(2), as am. S.N.B. 1978, c. 39, s. 17.

[22] *Canadian Insurance* (November 1978), *supra*, note 20 at 20.

financial integrity of its new compensation regime.[23] *La Régie*'s subrogated right of civil action means that out-of-province motorists are compelled to contribute to the no-fault fund — albeit only after the fact — through their liability insurance. Moneys can be recouped in this fashion, of course, only in cases where the visitor is at fault for the accident. It was thus necessary to retain fault principles on the entitlement side as well if payments in and out of the plan by visitors were to be roughly counter-balanced.

The Québec plan is not unique in excluding non-residents from no-fault coverage even when injured in-province. Consider the entitlement criteria under the add-on plans in the common law provinces. The persons covered under the no-fault portion of a New Brunswick owner's policy, for instance, include the nominal insured and her family, those injured while occupants in the insured's vehicle and those struck by it.[24] The scope of coverage under the Québec plan is somewhat broader: since the plan is publicly administered, it is unnecessary to tie coverage to a particular insurer and in fact all Québec residents are covered even if injured while driving or riding in an out-of-province vehicle.[25] As regards non-residents, however, both plans have a similarly "discriminatory" impact. Under both, a visitor injured while driving or riding in an out-of-province vehicle is excluded, whatever the place of the accident. Her no-fault remedy is seen as the concern of her home jurisdiction or of the jurisdiction in which the vehicle in which she was injured is garaged and insured. Her only remedy under the law of the place of the accident as such depends on fault principles (except that under Québec law, *la Regie* has been substituted as the party liable to be sued by the victim and as the party entitled to sue, as the case may be.)

Although the point does not seem to have been argued before a Canadian court, no-fault legislation — to the extent it excludes non-residents from protection — has been challenged in the American courts under the equal protection clause of the Federal Constitution. In general,such challenges have not succeeded.[26] The creation, based on residency, of two classes of accident victims — one with no-fault rights and immunities and one whose rights and obligations depend on traditional fault principles — does not constitute "invidious discrimination." Rather, the classification is rationally related to the legitimate governmental interest of preventing no-fault benefits from going to those who have not contributed to the system.

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[23]Some no-fault proposals attempt to impose the financial burden of no-fault protection on non-resident motorists by engrafting a no-fault benefits obligation, in accordance with domestic standards, on the insurance policy covering an out-of-province vehicle when the vehicle is driven in-province. See, for instance, the proposal of the Ontario Law Reform Commission, *Report on Motor Vehicle Accident Compensation* at 91 (Ontario: 1973). But this approach is open to constitutional challenge except perhaps where the relevant insurance company also does business in the no-fault jurisdiction. In any event, Québec's decision to adopt a publicly-administered no-fault plan rendered this solution unworkable.

[24]See Bird, *supra* at note 2.

[25]*L.A.A.*, art. 3.

[26]See, for example, *Cyr* v. *Farias*, 327 N.E. 2d 890 (Mass. Sup. Ct. 1975); *Gersten* v. *Blackwell*, 314 N.W. 2d 64527(Mich. Ct. App. 1982). For general discussions, see 7 *Am Jur* 2d at 474 *et seq.*; G.J. Siedel, "The Constitutionality of No-Fault Insurance: the Courts Speak" (1976-77) 26 *Drake L. Rev.* 794; J.F. Ghent, Annotation, "Validity and Construction of 'No-Fault" Automobile Insurance Plans" 42 A.L.R. 3d 229.

Quite apart from financial considerations, to base no-fault entitlement on residency in the enacting jurisdiction is defensible in principle.[27] After all, unlike a compensation system governed by fault principles, a no-fault system is concerned only with compensation, not also with redressing wrongs or deterring careless conduct. Why then should the fact that the accident occurred within the enacting jurisdiction be relevant in deciding the scope of coverage? It is the place where the victim lives, works and to which she will return, not where her injuries happen to be suffered, that has the paramount obligation to protect her against the social and economic repercussions of personal injury.

Limiting Visitors to the No-Fault Scale of "Damages"

To deny no-fault protection to non-residents under an add-on type of no-fault plan does not leave them any worse off than if the plan had never been enacted since tort recovery is not affected in any event. But under the Québec plan the non-resident's right to compensation, though governed by fault principles, is limited to the no-fault scale of indemnity. Admittedly, the indemnities available from the *Régie* are far more generous than the modest benefits typically prescribed under an add-on plan.[28] Nevertheless, they fall well below what a plaintiff in a civil action could expect to recover as damages, especially in cases of serious injury. The income replacement indemnity, for instance, was designed to be adequate for only 85% of the Québec population; high earners are expected to purchase excess protection from a private insurer. Most significantly, the maximum indemnity awardable for intangible losses — pain, suffering, loss of amenities and the like — was set initially at $28,000 in 1977, though it has increased with inflation to a present value of about $37,000. Although Québec residents are subjected to these same restrictions, they receive the countervailing benefits of compensation on a no-fault basis, immunity from civil liability and a speedier settlement process, uncomplicated by the issue of culpability. For non-residents, this trade-off is absent. Instead, they are subjected, in effect, to the worst aspects of the tort and no-fault compensation worlds. It is this feature — rather than simply the denial of equal no-fault protection — which no doubt was most responsible for the criticisms leveled from abroad against the Québec plan.

New Brunswick's amendment to its *Motor Vehicle Act* may therefore strike one as "just desserts."[29] Why should Québec residents not be restricted to the no-fault measure of damages in tort actions in New Brunswick if New Brunswick residents injured in Québec are to be so limited in claims against *la Régie*? The two situations, however, are not perfectly parallel. In the first place the New Brunswick motorist travelling in Québec is at least protected under Québec law from any civil liability to *la Régie* for damages in excess of the no-fault measure of indemnity in instances where she is at fault for the accident. Under the New Brunswick *Motor Vehicle Act* approach,

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[27]See P.J. Kozyris, "No-Fault Automobile Insurance and the Conflict of Laws — Cutting the Gordian Knot Home-Style" (1972) 2 *Duke L.J.* 331 esp. at 354-67. See also M.G. Bair, "Limited Automobile Accident Insurance and Choice of Law" (1973) 19 *McGill L.J.* 284.

[28]For a detailed description of Québec no-fault benefits, see Belleau, *supra*, note 4; for a description of the benefits available under the various Canadian "add-on" no-fault plans, see Brown, *supra* at note 1, and Bird, *supra* at note 2.

[29]See text, *supra* at note 21.

this counterbalance is absent: the Québec motorist remains civilly liable for the full tort measure of damages for accidents in New Brunswick caused by her negligence yet has now been restricted to the no-fault measure of recovery where she is innocent of fault.[30]

More importantly, the limits imposed by Québec on the non-resident's quantum of recovery are justified in view of its interest in ensuring the integrity and effectiveness of its reform objectives at the domestic level. In order to preserve the traditional right of visitors to sue for full civil damages for injuries sustained in-province, it would have been necessary for Québec to limit the statutory bar on civil action to its own residents.[31] Where visitors were involved, Québec motorists would have had to continue to purchase traditional liability insurance for in-province accidents and would have continued to remain vulnerable to civil action in the Québec courts. A retention of the traditional civil liability system to even this limited extent would thus have compromised Québec's desire to reduce litigation and to simplify its automobile accident laws by removing jurisdiction over the assessment of compensation from the courts to an administrative tribunal. Most significantly, the prospect of non-residents continuing to recover generous damage awards in the courts, while local accident victims were restricted to the statutory benefits prescribed by *la Régie*, would hardly have been calculated to promote a peaceful domestic transition to no-fault values. In short, the price of interjurisdictional harmony would have been domestic disharmony.

It is considerations of this kind which persuaded the Massachusetts court in *Cyr* v. *Farias*[32] to uphold the validity of the limitations imposed on tort recovery by that State's no-fault plan against challenge by a non-resident accident victim. The Massachusetts no-fault plan — like those in place in several other American states[33] — represents a compromise between the retention of full tort rights and their complete abolition. All economic losses are compensated up to generous limits on a no-fault basis. But the right to pursue relief in tort for non-pecuniary loss — pain, suffering and the like — is abolished except in cases of death or very serious injuries. As under the Québec plan, non-residents are excluded from no-fault protection but are still subjected to the restrictions imposed on the recovery of general damages in tort. It was argued in *Cyr* that to deny non-residents the right to sue for pain and suffering impinged on the due process and equal protection guarantees under the United States Constitution because it was not offset by personal injury protection on a no-fault basis. The challenge was not successful. The court observed firstly that while the non-resident's right to sue for intangible loss was limited when she was non-negligent, she was protected from

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[30]See C. Walsh, Case Comment on *Morin* v. *Faucher*, "Restrictions on Tort Recovery by Non-Resident Automobile Accident Victims — New Brunswick's Response to Québec No-Fault" (1984), 55 N.B.R. (2d) 443. And see *La Regie de l'assurance automobile du Québec* v. *Brown* (N.B.Q.B., judgment pending).

[31]This was the approach in fact taken under the no-fault plan recently enacted by the Northern Territory in Australia. It was also the approach initially advocated by P.J. Kozyris, *supra*, note 27 at 389-91, but he later modified his views: P.J. Kozyris, "No-Fault Insurance and the Conflict of Laws — An Interim Update" [1973] 4 *Duke L.J.* 1009 at 1029-30.

[32]*Supra* at note 26.

[33]For a general review of American no-fault legislation, see 7 *Am. Jur.* 2d at ss 340 ff. More than a decade ago, the Insurance Bureau of Canada proposed a similar alternative to the retention of full tort rights for accident victims. The I.B.C. "Vari-Plan" was rejected by all provinces. A plan of this type has been reconsidered more recently, however, in British Columbia: *Report by the Automobile Accident Compensation Committee* (British Columbia: Automobile Accident Compensation Committee, 1983).

comparable claims where she has been negligent. But more significantly, if non-residents were to be allowed to recover damages for pain and suffering, they would end up with a greater right of recovery than that available to Massachusetts residents. The fact that residents were entitled to recover benefits on a no-fault basis was not a relevant distinction: their rights arose out of a system of first party insurance paid for by Massachusetts motorists through their insurance premiums. Because Massachusetts did not choose to provide, free of charge, no-fault benefits to injured visitors was not a reason for concluding that it must allow them to recover full tort damages in cases where its own residents were limited to the no-fault measure of compensation.

Part II: The Availability of a Tort Remedy Outside Québec

Existing Conflict of Laws Principles

The discussion until now has assumed that the nature and quantum of compensation available to visitors injured in Québec is controlled by Québec law. But since the Québec plan was implemented, non-residents injured in Québec accidents occasionally have sought to recover full tort compensation by suing in their home courts.[34] In most of the reported cases so far,the defendant was a co-resident of the litigation forum or at least resident in another tort recovery jurisdiction.[35] Some cases, however, have involved actions against Québec motorists.[36] One might have supposed that in this situation, jurisdiction would pose an insurmountable preliminary obstacle since it will not be practical normally to serve the Québec motorist locally. Moreover, since Québec motorists are no longer required to carry liability insurance for accidents in Québec, there will normally not be an insurer obligated to respond to the claim on behalf of the defendant.[37] The service *ex juris* rules in effect in the common law provinces have proved to be sufficiently open-ended, however, to support the assertion of jurisdiction against Québec motorists in at least some circumstances.[38]

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[34]Attempts also have been made (unsuccessfully) by *Québec residents* to sue non-resident motorists in their home courts for injuries sustained in an accident in Québec: see *Blais* v. *Deyo*, 461 N.Y.S. 2d 471 (Sup. Ct. 1983); *Eades* v. *Hamilton* (1985), 13 C.C.L.I. 65 (Ont. Dist. Ct).

[35]*Guerin* v. *Proulx* (1982), 37 O.R. (2d) 559 (Co. Ct.); *Perron* v. *Parise* (1983), 44 N.B.R. (2d) 409 (Q.B.); *Lewis* v. *Leigh* (1986), 26 D.L.R. (4th) 442 (Ont. C.A.); *Nevader* v. *Deyo*, 489 N.Y.S. 2d 420 (Sup. Ct. 1985); *O'Connor* v. *O'Connor*, 492 A. 2d 207 (Conn. App. Ct.).

[36]*Going* v. *Reid Bros.* (1982), 35 O.R. (2d) 201 (H.C.); *Ang* v. *Trach* (1987), 57 O.R. (2d) 300 (H.C.); *Bouchard* v. *La Saux* 48 O.R. (2d) 279 (H.C.).

[37]In two cases to date, however, the Québec motorist was operating a vehicle registered and insured in the litigation forum at the time of the accident so this difficulty was overcome: *Going* v. *Reid Bros.*, *supra* at note 36; *Eades* v. *Hamilton*, *supra* at note 34. See the discussion in the text, *infra* on the influence which this factor should have on the plaintiff's success.

[38]Under the Rules of Court in force in both of the provinces which border Québec, service *ex juris* is authorized in cases where the plaintiff suffers damage in the province arising from a tort wherever committed: *N.B. Rules of Court*, R. 19.02(i); *Ontario Rules of Practice*, R. 17.02(h). In Ontario, the rule has been interpreted to authorize service against a non-resident motorist for an out-of-province accident so long as the Ontario plaintiff suffers pain and suffering, incurs medical or other expenses or otherwise suffers damage upon returning to Ontario. For applications of this rule to allow service *ex juris* against a Québec motorist, see *Bouchard* v. *La Saux*; *Ang* v. *Trach*, *supra* at note 36. The service *ex juris* rules in force in most jurisdictions also permit service on any foreign defendant who is a necessary or proper party to an action commenced against a local defendant. This category also has been relied on to justify service on a Québec motorist in multi-party accidents involving both a non-resident and a Québec defendant: see, for example, *Ang* v. *Trach*.

The availability of jurisdiction in itself is not usually enough to ensure the application of local law. But where the action is based on a tort which occurs outside the jurisdiction, the conflict of laws approach is atypical. Here, the law of the litigation forum generally *is* applied by Canadian courts, provided the plaintiff can first satisfy the English common law rules first formulated in *Phillips* v. *Eyre*,[39] *viz*, show that the defendant's conduct: (1) would have been actionable if it had occurred in the forum; and (2) that it was not justifiable under the law of the place where it occurred. It is the second of these rules which is the relevant one here and one that is easily satisfied where the defendant is not a Québec motorist since negligence on the part of visiting motorists is still civilly actionable under Québec law even if only at the instance of *la Régie*. But the *Phillips* v. *Eyre* formula has not proved to be an obstacle even in actions against Québec motorists. In *McLean* v. *Pettigrew*,[40] the Supreme Court of Canada — adhering to the then current English view[41] — interpreted the phrase "unjustifiable" in the second rule to require only that the defendant's act be subject to some legal sanction under the *lex loci delicti*, whether or not it was civilly actionable thereunder. The *Québec Highway Safety Code* contains the usual omnibus prohibition against careless operation of a motor vehicle on a highway.[42] Accordingly, any negligence on the part of a Québec motorist can still be, and has been, regarded as "unjustifiable" under Québec law as that phrase is understood under *McLean* v. *Pettigrew*.

The Prospects for Reform: Actions Against Another Non-Resident Motorist

Phillips v. *Eyre* has attracted more scholarly and judicial criticism over the years than any other common law principle that one can think of offhand. The formula was rejected early on by the American courts in favour of the *lex loci delicti*.[43] Even in England, the controlling influence of the *lex fori* has been modified considerably by reinterpreting the second rule to require that, in general, the defendant's conduct also be civilly actionable between the same parties under the *lex loci delicti*.[44]

The *results* achieved under the traditional Canadian approach are not, however, always considered objectionable. In fact, most commentators[45] and courts[46] positively

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[39](1870), L.R. 6 Q.B. 1.

[40][1945] S.C.R. 62.

[41]The English view, in turn, was based on *Machado* v. *Fontes* [1897] 2 Q.B. 231 (C.A.), since overruled by a majority in the House of Lords (Lords Hodson, Guest and Wilberforce) in *Boys* v. *Chaplin*, [1969] 2 All E.R. 1085 (H.L.).

[42]Under s. 83 of the *Highway Safety Code*, R.S.Q. 1977, c. C-24, anyone who drives an automobile without due caution and prudence commits an offense and is subject to a fine with imprisonment in default.

[43]In most American states today, however, the application of the *lex loci delicti* is presumptive only and may be displaced by the law of some other state which has a more significant relationship with the occurrence or the parties: see, for example, *Babcock* v. *Jackson*, 191 N.E. 2d 279 (N.Y. Ct. App. 1963) for a seminal application of the more flexible approach; see further *infra* at note 47.

[44]*Boys* v. *Chaplin*, *supra* at note 41. This statement of the English position in fact reflects only the position adopted by Lord Wilberforce. But his judgement, more or less by default in the absence of any clear majority ratio, is generally taken to express what *Boys* v. *Chaplin* decided.

[45]See, for example, J. Swan, "The Canadian Constitution, Federalism and the Conflict of Laws" (1985) 63 *Can. Bar Rev.* 271 at 313.

[46]See for example *Lewis* v. *Leigh* (1986), 12 O.A.C. 113 at 120 (C.A.).

favour the application of the *lex fori* so as to allow full tort recovery in actions arising out of Québec accidents in cases where both plaintiff and defendant are forum residents; so also where the defendant is resident in another jurisdiction whose domestic law allows full tort recovery. In this situation, it is argued, application of forum law neither prejudices the defendant nor impinges on the interests of the jurisdiction where the accident occurred. The litigation, after all, will take place outside Québec and the plaintiff's losses will be paid by the defendant's liability insurer, not the defendant personally. Indeed, from *la Régie*'s perspective, it is likely preferable that non-residents should settle their rights and obligations *inter se* in their home courts. *La Régie* is then relieved of the task of having to respond to the victim's claim and then pursue reimbursement from the defendant's insurer. Moreover, the same result would obtain even if the traditional Canadian approach were recast along American or English lines. The conflict of laws principles applied by the courts in both countries allow much greater scope to the *lex loci delicti* only in general; in cases where all litigants are resident in the forum, they incorporate sufficient flexibility so as to permit application of the *lex fori*.[47]

But however persuasive these considerations in general, permitting non-residents to sue in tort at home may not be defensible in every situation where the alleged wrongdoer is also a non-resident. Suppose, for instance, that at the time of the accident the defendant was driving a vehicle registered in Québec. Unless she owns a vehicle registered in one of the common law provinces, she may not be insured against the consequences of civil liability: the insurance obligation usually is imposed only on car owners, not also drivers. Under Québec law, the problem does not arise because the Québec Act deems a visiting driver to be a Québec resident when operating a Québec vehicle.[48] Thus, she is not vulnerable to a subrogated civil action by *la Régie* for the consequences of her negligence. But under the ordinary common law approach the meaning of any connecting factor used in a conflicts rule — such as residency — is determined in accordance with *lex fori* concepts.

And what effect any payments claimed by a non-resident victim from *la Régie* prior to pursuing a tort action in her home forum? Double recovery will be prevented since *la Régie* is subrogated — to the extent of its award — to the victim's right of action against a non-resident motorist.[49] But the impact of any statutory or contractual payments on the recipient's right to sue in tort at all is usually determined by the law governing the payment, not the law governing the tort action.[50] In this respect, the Québec Act states that the benefits provided thereunder are to be in lieu of *all* other rights of recovery of the victim. Admittedly, it is possible to construe this wording as restricted to the rights and remedies available to the victim under Québec law, not under the compensation laws of other jurisdictions. Moreover, forum policy perhaps

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[47] *Boys* v. *Chaplin*, *supra* at note 41; *Nevader* v. *Deyo*, *supra* at note 35; and generally, *supra* at note 43. A few American states, however, have retained the *lex loci delicti* as an exclusive choice of law rule rather than a mere presumptive rule: thus in *O'Connor* v. *O'Connor*, *supra* at note 35, the Connecticut court declined to entertain a tort action between Connecticut residents arising out of a motor vehicle accident in Québec.

[48] *Supra* at note 19.

[49] *Supra* at note 17; see *Nevader* v. *Deyo*, *supra* at note 35.

[50] See, for example, *Scott* v. *American Airlines, Inc.*, [1944] 3 D.L.R. 27 (Ont. H.C.).

should permit a second award since it furthers its interest in ensuring full tort compensation for innocent accident victims and since double recovery does not pose a problem. But the matter cannot be regarded as beyond dispute for it is forum policy as well to discourage a multiplicity of proceedings in two forums. An equally attractive interpretation, therefore, might well be to regard the plaintiff as having made a conclusive election in favour of her rights under Québec law by choosing to claim benefits from *la Régie* in the first instance.

The Prospects for Reform: Actions Against Québec Motorists

Whatever the position regarding non-resident defendants,reform is thought to be imperative to the extent that the traditional Canadian approach also leads to the imposition of civil liability against Québec motorists.[51] To apply forum law rather than the law of the place of the accident in this situation conflicts with the reasonable expectations of uninsured Québec motorists and undermines Québec's legitimate interest in immunizing its motorists from civil liability as part of a larger legislative policy aimed at ensuring comprehensive no-fault protection for its residents. Indeed, it is argued that a refusal to defer to the *lex loci delicti* where Québec motorists are concerned is "constitutionally suspect."[52] A province, after all, should not be able to accomplish indirectly through the common law conflict of laws process what would be constitutionally incompetent (on extraterritorial grounds) the legislature of that province to do directly: subject the resident of another jurisdiction to a civil liability under local law in respect of conduct which bears no relationship to the enacting jurisdiction other than the fact (normally fortuitous in the motor vehicle accident context) that the plaintiff resides there.

The courts have been well aware of the potential injustice which an indiscriminate application of the *Phillips* v. *Eyre* rules may occasion in this context and of the overall need for reform in this area. Trial courts have been reluctant to alter the traditional approach on their own accord, however, seeing reform as the province of either the appellate courts or the legislature.[53] But in the only actions arising out of an accident in Québec to reach the appellate level so far, none of the parties were Québec residents[54] and the Court saw no immediate need to respond to the call for reform: "[o]n the facts of the cases before us, the rule in *McLean* v. *Pettigrew*, is just a rule and should be applied."[55] The court did indicate, however, that should a case come before it involving a Québec motorist, the call for reform in all likelihood would be heeded.[56] Accordingly, little long-term reliance can or should be placed on the cases to date in which non-residents have succeeded in securing a tort judgement against Québec drivers for accidents in Québec.

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[51] J. Swan, *supra* at note 45, esp. 297-99; N. Rafferty, Case Comment on *Going* v. *Reid Bros.*, "Tort Liability and the Conflict of Laws" (1982), 19 C.C.L.T. 247; B. Schwartz, "Choice of Law in Torts — One More Time for the Road" (1983) 12 *Man. L.J.* 175; see also *Ang* v. *Trach*, *supra* at note 36; *Lewis* v. *Leigh*, *supra* at note 35

[52] J. Swan, *supra*, note 45 at 299-301.

[53] See for example *Going* v. *Reid Bros.* and *Ang* v. *Trach*, *supra* at note 36.

[54] *Lewis* v. *Leigh*, *supra* at note 35.

[55] *Ibid.* at 120.

[56] *Ibid.* at 122.

In most cases, of course, any judgement obtained against a Québec motorist will not be worth much as a practical matter in any event. The defendant is not likely to own any assets in the judgement forum and the Québec courts are unlikely to authorize enforcement of the judgement of another province which directly violates its own legislature's policy.

Enforceability would not pose an obstacle, however, if the Québec motorist were operating a vehicle registered and insured in one of the common law provinces at the time of the accident. The plaintiff would then would be entitled to indemnity under the owner's liability policy for the amount of any tort judgement obtained against the Québec motorist. This situation actually arose in several cases to date.[57] But it is at least open to argument whether — under a reformed choice of law approach — the registration and insurance of the defendant's vehicle in the forum would be seen as a sufficient additional contact to justify the application of forum law. It is true that as a practical matter, the "true question at stake" in such a suit is a forum resident's claim for payment of her alleged damages by a forum insurer.[58] But what if the damages obtained by the plaintiff against the Québec motorist exceed the amount of the owner's liability insurance coverage; the Québec motorist would be liable personally for the excess. Moreover, the forum's compulsory liability insurance laws are not intended to create liability but to protect motorists against a liability otherwise and independently imposed by law.

Even if the Québec driver should be relieved of civil liability in this situation, what about the forum *owner* of the vehicle? All the common law provinces have enacted legislation imposing a vicarious liability on the owner of a motor vehicle for negligence in its operation by any person driving it with his consent. In an Ontario case[59] arising out of a Québec accident, it was assumed that the Ontario owner would indeed owe an independent liability under the Ontario version of this legislation. But it seems not to have been argued that the application of the statute is subject to the *Phillips* v. *Eyre* formula. The point *was* argued successfully in a later case,[60] and the action against the Ontario owner dismissed on the basis that he was not civilly liable or subject to any other vicarious legal sanction under Québec law for the negligent conduct of the Québec driver. The plaintiff in that case, however, was also a Québec resident and the court was understandably disinclined to award a tort remedy. Where the plaintiff is a forum resident, it may still be open to argue that the forum statute should be interpreted as intended to have a direct application to the facts. On the other hand, surely the legislative policy favouring the imposition of a vicarious liability on an insured owner is to protect plaintiffs against the risk of injury by an uninsured and impecunious tortfeasor, not to protect them against the risk of negligence for which the driver is otherwise not legally responsible.

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[57] *Supra* at note 37.

[58] See for example *O'Connor* v. *Lee-Hy Paving Corp.*, 579 F. 2d 194 (2nd Cir. 1978) where forum tort law was applied on this reasoning.

[59] *Going* v. *Reid Bros.*, *supra* at note 36.

[60] *Eades* v. *Hamilton*, *supra* at note 34.

Part III: Legislative Reform

The Legislative Reform Vehicle: Reciprocal Interjurisdictional Agreement

To date, the jurisprudence from the common law provinces on the Québec Act leads to only one firm conclusion: the rights and liabilities of non-residents involved in accidents in Québec are not controlled solely by Québec law. But in precisely which circumstances a tort remedy in another forum offers a viable alternative has not yet been clarified; nor will it be until a good many more cases have passed through the trial and appellate levels. Ultimately, however, a long-term resolution of the problems involved here is not to be found in the judicial arena. What is at issue is not an isolated dispute between individual litigants but a conflict in the insurance structures and compensation philosophies of the jurisdictions to which the litigants are attached. What is needed is legislative intervention and it is to the possibilities in this vein that the remainder of this presentation is directed.

Admittedly, a unilateral modification by the legislatures of other provinces in the rights and remedies of their residents injured in Québec accidents would not be cost-effective so long as their residents remain obligated in turn to reimburse the Québec plan for the costs of accidents caused by their negligence. On the Québec side, *la Régie* is not likely to give up its subrogated right of recoupment voluntarily. This, after all, is its only means of financing a remedy for visitors. And that a remedy should remain available under Québec law to injured visitors is desirable not only in the interests of interjurisdictional comity but also in view of Québec's own self-interest in continuing to attract business and recreational traffic to the province.

Bilateral or reciprocal legislative reform is a real possibility, however, and one which the drafters of the Québec Act expressly contemplated: under the Act, *la Régie* is obligated to compensate a non-resident accident victim to the extent that she is not responsible for the accident only "unless otherwise agreed between *la Régie* and the competent authorities of the place of residence of such victim."[61]

The Existing Interjurisdictional Agreements

In the decade since the Act was implemented, agreements in fact have been executed between *la Régie* and several of the common law provinces, beginning with Ontario.[62] The Ontario agreement resulted largely from lobbying by insurers in that province who saw the new regime as prejudicial to their own interests. Previously, they had been able

[61] *L.A.A.*, art. 8.

[62] Agreements have been concluded with Ontario, Manitoba, Alberta, Nova Scotia and Prince Edward Island to date. The texts of the Ontario, Manitoba and Alberta agreements with *la Régie* are reproduced as Annex A, at 77-79 in L. Perret, "Le regime de 'No-Fault' integral de la nouvelle loi sur l'assurance-automobile" in F.M. Steel & S. Rodgers-Magnet, eds, *Issues in Tort Law* (Toronto: Carswell, 1983) 51. For examples of the implementing legislation, see the *Insurance Act*, R.S.O. 1980, c. 218, Sched. C., subsection 2, Part III; Man. Reg. 48/79 amending Reg. 333/74 as am. Reg. 43/77 under the *Manitoba Public Insurance Corporation Act*, 1974, c. 58. See also B. Giroux, Comment, "Insurance — Automobile — Ontario-Québec Automobile Insurance Agreement" (1979) 57 *Can. Bar Rev.* 379. Agreements also have been concluded between *la Regie* and a number of American no-fault jurisdictions but the discussion here is limited to the Canadian agreements.

to settle the issues of relative fault and the quantum of liability of their insureds, whether from Québec or Ontario, informally and according to the relatively flexible principles of tort and delict. With the advent of the new Québec regime, however, control over the settlement process on the Québec side passed from the hands of private insurers to *la Régie*, a public body administering a relatively rigid statutory scheme of benefits. Thus it was as much because of their loss of control over the settlement process in cases where their insureds were alleged to have been at fault for accidents in Québec, as out of a concern with the "discriminatory" impact of the plan on the compensation rights of visitors, that Ontario insurers called on their government to negotiate a new deal with Québec.[63]

Under the resulting agreement — subsequently implemented by an amendment to the Ontario Insurance Act[64] — Ontario automobile insurers became obligated to increase the no-fault protection available to Ontario residents under the no-fault portion of an Ontario automobile owner's policy to the same level of benefits enjoyed by Québec residents in claims to *la Régie*. The categories of no-fault insureds under the Ontario plan are the same as those under the "add-on" plans in effect in other provinces, such as New Brunswick, where auto insurance is privately underwritten: the nominal insured and her family, passengers injured while riding in the insured's vehicle and those struck by it. Accordingly, those injured while driving or occupying a vehicle registered and insured in another province are excluded from the new protection (unless they happen to own a vehicle registered and insured in Ontario and are therefore insured directly themselves); as before, they are restricted to a claim to *la Regie* for benefits on a fault basis. Visitors who own, drive or who are injured as occupants of a vehicle registered in Québec continue to be deemed resident in Québec and remain entitled, as before, to claim benefits from *la Régie* on a no-fault basis.[65]

In return for Ontario insurers having assumed the primary financial burden of compensating Ontario residents for injuries suffered in accidents in Québec, *la Régie* has waived its subrogated right of action against Ontario motorists who are insured under an auto insurance policy issued in that province. Since both Ontario no-fault insurance coverage *and* residency in Ontario are the criteria of entitlement under the agreements, however, *la Régie* has retained its subrogated right of action against Ontario insurers in cases where the driver of the Ontario vehicle is not a resident of that province. Otherwise, it would have no means of recouping benefits paid out to such persons.

The agreements subsequently entered into with three other common law provinces are substantially identical.[66] The scope of the coverage under the Manitoba agreement with *la Régie*, however, is somewhat broader.[67] Since insurance is publicly underwrit-

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[63]Letter from a representative of the Insurance Bureau of Canada to the author.

[64]*Supra* at note 62.

[65]*L.A.A.*, art. 6 thus remains operative.

[66]*Supra* at note 62.

[67]*Ibid.*

ten in that province, it is unnecessary to link no-fault insurance protection to a particular insurer. This enabled coverage to be extended to all Manitoba residents injured in a Québec accident, regardless of the jurisdiction in which the vehicle involved was registered and insured. *La Régie* is responsible in the first instance, however, to compensate on a no-fault basis those Manitoba residents injured in a vehicle not insured in Manitoba; it may then claim reimbursement from the Manitoba Public Insurance Corporation less any amounts recovered by way of subrogation.

To the extent they apply, the agreements are advantageous to Québec: *la Régie* has been relieved of the need to respond to claims by injured visitors thus protected and to pursue subrogated actions against negligent non-resident motorists thus insured. They also benefit insurers and insureds in the participating provinces; the former have regained control over the settlement process for accidents in Québec and the latter now are able to deal with their own insurers at home rather than having to make their claim to *la Régie* in Québec. Finally, compensation in accordance with the Québec scheme of benefits is now available to insured visitors on a no-fault basis, eliminating the "discriminatory" element which provoked so much criticism from the insurance industry outside Québec.

Unlike the Québec Act, however, the legislation implementing the result of the agreements reached with *la Régie* in the relevent common law provinces does not stipulate that the expanded no-fault protection now available for accidents in Québec is to replace all other rights and remedies to which the no-fault insured would otherwise be entitled. Because of this omission, The Ontario Court of Appeal has held that the legislation, by itself, does not preclude an Ontario no-fault insured from suing civilly to recover any excess losses.[68] Thus, even where they apply, the agreements have not eliminated the lack of consistency and clarity in the law governing the rights and liabilities of visitors to Québec. As a practical matter, of course, those injured by the fault of an uninsured Québec motorist will be limited to their no-fault remedy (albeit that the agreements — in remaining silent on the question of residual tort recourse — have done nothing to discourage attempts to hale Québec motorists into court in other provinces in any event[69]). But unless *McLean* v. *Pettigrew* is altered, those who have the good fortune (if they must be hurt at all), to be injured by the fault of another co-resident, retain their right to claim full tort damages from the latter's insurer in addition to gaining the right to enhanced no-fault protection from their own insurers.

Moreover, the agreements do not address the real concern of traditional tort recovery jurisdictions with the new Québec regime — which is not the denial of equal no-fault protection to injured visitors — but the contrast between the no-fault level of indemnity and the more generous tort measure of damages. Instead, they generate a fresh discriminatory impact, this time among no-fault insureds in the relevant provinces. Substantially increased no-fault benefits are provided on the basis simply that the insured happened to suffer injury in the province of Québec and regardless of whether or not tort recourse also is precluded.

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[68] *Lewis* v. *Leigh*, *supra* at note 35.

[69] *Ang* v. *Trach*, *supra* at note 36.

An Alternative Bilateral Solution

In responding to the conflict of laws dilemma created by the advent of a pure no-fault regime in Québec, the path of reform taken by other jurisdictions need not have involved internalization of Québec no-fault compensation standards. After all, this solution was seen as desirable only because the abolition of civil liability by Québec renders it unjust — and ultimately futile — to subject the uninsured Québec motorist to a tort action in another forum. Where the motorist at fault also is a non-resident, the visitor's right to sue for full tort compensation in her home forum can remain unimpaired, as we have seen.

The problem of compensation which arises because of a financially unresponsive tortfeasor is not, however, a novel one for tort recovery jurisdictions. It is this problem which prompted the development of a standard form of insurance already in common use in New Brunswick and elsewhere — the S.E.F. No. 44 Family Protection Endorsement ("the Uninsured Motorist Endorsement").[70] The purpose of this endorsement is to give the same protection to persons injured by the negligence of an uninsured or underinsured motorist as they would have had if the motorist had been insured under a third party liability policy equivalent to that held by the victim. The victim is entitled to recover any shortfall *from her own insurer* provided she can establish that the other party was legally liable for her injuries according to ordinary principles of civil negligence. The endorsement sets out detailed procedures for determining, as between insured and insurer, the issues of the legal liability of the third party and the quantum of damages.

As presently drafted, the S.E.F. No. 44 endorsement does not cover an insured for injury suffered in an accident in Québec. Recovery depends upon proof of the *legal* liability of the uninsured motorist: clause 8 of the endorsement expressly stipulates that the issue of liability is to be decided in accordance with the law of the province where the accident occurred; only the question of quantum is governed by the law of the province under which the policy was issued. To remove all doubt on the matter, it is now stipulated expressly that the "endorsement does *not* apply to an accident occurring in the Province of Québec for which compensation is payable under the *Automobile Insurance Act* of Québec or by virtue of an agreement referred to in that Act."

Nonetheless, the Family Protection endorsement (and equivalent forms of insurance coverage) demonstrate that it is possible to marry a system of compensation based on

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[70] A version of this endorsement is reproduced by A. Bisset-Johnson, "Personal Injuries in Canadian Motor Vehicle Insurance Policies and the Conflict of Laws: An Introductory Foray" (1987) 11 *Dalhousie L.J.* 21 at 25. This form of coverage is a compulsory ingredient in every motor vehicle liability policy issued in Ontario: *The Insurance Act*, R.S.O. 1980, c. 218, s. 231. Under the public insurance plans in effect in Manitoba, Saskatchewan and British Columbia, any person who would have a cause of action against the driver or owner of an uninsured motor vehicle arising out of an in-province automobile accident may make application to the government underwriter for payment of his damages to the maximum liability limits in force in the province. See, e.g., the *Automobile Accident Insurance Act*, 1978, c. A-35, s. 54. Similar protection is afforded in other provinces, through government-administered unsatisfied judgement funds: see, e.g., the *Motor Vehicle Act*, R.S.N.B. 1973, c. M-17, ss 317 *et seq.* Insureds in these provinces have the option of purchasing the S.E.F. No. 44 endorsement from a private liability insurer. This has the advantage of permitting recovery up to the liability limits of the insured's own policy and of a speedier settlement.

the common law negligence action with first party insurance recovery. A similar concept could be incorporated into a bilateral agreement between the common law provinces and *la Régie* to cover cases where an insured is injured when visiting Québec in an accident caused by the alleged negligence of a Québec motorist.[71] If the scope of the coverage were expanded to include the same categories of persons entitled to enhanced no-fault protection for accidents in Québec under the existing bilateral arrangements, full tort-scale indemnity could be made available to most visitors injured in a Québec accident caused by the fault of a Québec motorist. Any remaining gaps (e.g., non-residents injured in an accident while driving or riding in a Québec vehicle) could be resolved through an assigned claims plan. Non-residents injured by the negligence of another non-resident motorist could continue, as they do now, to recover full tort-scale compensation from the wrongdoer's insurer.

A compulsory "no-fault motorist liability endorsement" to the standard automobile insurance policy would cost no more than the traditional liability insurance system does in general. *La Régie*, as we have seen, is quite willing to surrender its subrogated right of recovery against non-resident motorists provided that insurers in other provinces are willing to assume the financial burden of compensating their insureds when they are injured in accidents in Québec. As under the present agreements, the moneys saved by out-of-province insurers in no longer having to respond to subrogated claims by *la Régie* would offset the increased costs of their having assumed the legal and financial burden of compensating their own insureds for injuries caused by the negligence of Québec motorists.

This alternative approach, it is suggested, would offer all of the advantages achieved under the existing bilateral arrangements and more. It would still permit *la Régie* to remit non-residents to their home legal system for compensation and relieve it of the necessity to pursue subrogated claims against them when they are at fault. It would still return control over the settlement process for accidents in Québec caused by non-residents to liability insurers in the motorist's home province and permit victims to return home to pursue their compensation rights. But it also would allow *all* visitors to Québec from any of the common law provinces to retain their traditional tort rights and remedies *without* having to subject Québec motorists to civil liability for accidents in Québec brought about by their negligence.

[71] When updating my work-in-progress in this area for the purposes of this symposium presentation, I came across an article proposing the equivalent solution (albeit in the domestic context rather than to solve the conflicts dilemma): J. O'Connell & R.H. Joost, "Giving Motorists a Choice Between Fault and No-Fault Insurance" (1986) 72 *Va. L. Rev.* 61.