

# A Tamer Tort Law: The Canada-U.S. Divide

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Tort law in its traditional forms has been under attack from a variety of perspectives for several decades. On the one hand, enormous damage awards are said to drive up the costs of engaging in certain socially useful activities—such as providing certain types of medical care or innovative products—to the point that those activities are driven out the market. On the other hand, critics charge that the tort system does a poor job of providing compensation to the vast majority of people who have suffered injuries. As such, the tort system is often characterized as an unjust lottery: a small number of plaintiffs receive unjustifiably large awards for non-pecuniary losses and punitive damages, while many others are denied even a modicum of compensation to pay for necessary medical care.

Our purpose in this article is not to contribute to the expansive empirical literature on whether or to what extent there is truly a “crisis” in tort law,<sup>1</sup> nor is it to argue in favor of or

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<sup>1</sup> Many commentators have questioned whether there really is a “crisis” in tort law. See, e.g., Deborah Jones Merritt and Kathryn Ann Barry, *Is the Tort System in Crisis? New Empirical Evidence*, 60 *Ohio St. L.J.* 315 (1999) (finding low recovery rates and damages in medical malpractice and products liability cases); David A. Hyman and Charles Silver, *Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid*, 59 *Vand. L. Rev.* 1085

against the replacement of the tort system in whole or in part with various no-fault compensation schemes.<sup>2</sup> Rather, starting from the assumption that the social cost of contemporary American tort law is higher than is desirable, our intention here is to provide a comparison between the reasonably similar tort regimes of the United States and Canada, with the goal of suggesting more modest reforms to lower the direct costs of the tort system.

While both American and Canadian tort regimes share broad substantive and procedural similarities, Canadian tort law has historically been more conservative in a variety of respects, where by conservative we simply mean that Canadian tort law is relatively less favorable to plaintiffs. Perhaps for this reason, there has been much less of a public debate over a tort law

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(2006) (meta-analysis of other empirical work on medical malpractice suits, strongly contesting, inter alia, the claims that Americans are exceptionally litigious, that frivolous lawsuits are extremely common, and that damages are random and typically overcompensate plaintiffs); John T. Nockelby, *How to Manufacture a Crisis: Evaluating Empirical Claims Behind "Tort Reform,"* 86 *Or. L. Rev.* 533 (2007) (finding that there is no evidence for the existence of a litigation crisis, in that filing rates in tort cases are dropping, and taking inflation into account, median damage awards are declining).

<sup>2</sup> For a more detailed overview of no-fault systems than the present paper permits, see Michael Trebilcock and Paul-Erik Veel, *No Fault Accident Compensation Systems*, in Jennifer Arlen, (ed.), *Research Handbook on the Economics of Torts* (forthcoming).

“crisis” in Canada than in the United States.<sup>3</sup> Thus an understanding of the Canadian tort system and how it differs from its American counterpart is useful, as it provides a potential model for a somewhat more conservative tort law regime which nonetheless is broadly similar to the current structure of American tort law.

*Canada and America Compared: Is There less of a Tort Crisis in Canada?*

The conventional wisdom is that Canada suffers from less of a “crisis” in tort law than does the United States. Without attempting to define precisely what it means for there to be a “crisis” in tort law, there does seem to be some, albeit limited, empirical support that the direct costs of the tort system are lower in Canada than in the United States.

First, there appears to be some empirical support that there is less tort litigation in Canada than the United States. A variety of empirical findings suggest that while the number of medical malpractice claims and the severity of the claims have increased over time in both Canada and the United States, absolute numbers of such claims are still lower in Canada than in the United States.<sup>4</sup> Moreover, it appears that insurance premiums for doctors are lower in Canada than in

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<sup>3</sup> Indeed, Canadians have historically seen themselves as being less litigious than their American counterparts. See, e.g. Herbert M. Kritzer, *Fee Arrangements and Fee Shifting: Lessons from the Experience in Ontario*, 47 *Law & Contemp. Probs.* 125, 129 (1984).

<sup>4</sup> See Patricia M. Danzon, *The ‘Crisis’ in Medical Malpractice: A Comparison of Trends in the United States, Canada, the United Kingdom and Australia*, 18 *L. Med & Health Care* 48 (1990); Michael Trebilcock, Donald N. Dewees and David G. Duff, *The Medical Malpractice Explosion:*

the United States.<sup>5</sup> Similarly, the amount of products liability litigation in the United States has historically dwarfed such litigation in other jurisdictions.<sup>6</sup> Consistent with these findings, Kritzer, Bogart, and Vidmar find that, in the aftermath of injury, Americans are more likely to bring legal claims than are residents of Ontario.<sup>7</sup> In the paper on Comparative Litigation Rates by Ramseyer and Rasmusen in this volume, the authors report that for the year ending 2009, 1,450 general civil cases were filed in Canada per 100,000 people, compared to 5,806 in the U.S.

Second, there also appears empirical support for the proposition, which depends in part on but is broader than the first proposition, that the direct cost of tort litigation is higher in the United States than it is in Canada. The empirical evidence suggests, for example, that the size of damages awards and various insurance premiums both increased more quickly and reached a

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An Empirical Assessment of Trends, Determinants and Impacts, 17 *Melbourne University L. Rev.* 539 (1990).

<sup>5</sup> Janelle Guirguis-Blake et al., *The US Medical Liability System: Evidence for Legislative Reform*, 4 *Annals of Family Medicine* 240 (2006); Canadian Medical Protective Association, *Fee Schedule for 2011*, available online at <http://www.cmpa-acpm.ca/cmpapd04/docs/membership/fees/2011cal-e.pdf>.

<sup>6</sup> Gary Schwartz, "Product Liability and Medical Malpractice in a Comparative Context," in Peter Huber and Robert Litan (eds.), *The Liability Maze: The Impact of Liability Law on Safety and Innovation* 28-80 at 46-51 (1991).

<sup>7</sup> Herbert M. Kritzer, W. A. Bogart, Neil Vidmar, *The Aftermath of Injury: Cultural Factors in Compensation Seeking in Canada and the United States*, 25 *Law and Soc. Rev.* 499 (1991).

higher level in the United States than in Canada between the 1960s and 1980s.<sup>8</sup> Thus, if the crisis in tort law is that direct costs of the tort system are too high, it seems reasonable to conclude that there is less of a tort law crisis in Canada than the United States.

### *Canada and America Compared: Liability Standards*

In most domains, liability standards are similar in Canada and the United States. For the most part, both tort regimes require a finding of negligence by the defendant, in the sense that he has fallen below an expected standard of care, before he will be found liable for damages.<sup>9</sup> Both regimes also impose liability without any finding of fault for certain classes of wrongs. For example, both regimes impose strict liability for damages caused by inherently dangerous goods.<sup>10</sup>

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<sup>8</sup> See the discussions of the empirical evidence in Michael Trebilcock, *The Social Insurance-Deterrence Dilemma*, 24 *San Diego L. Rev.* 929, 933-936, 942-948 (1987); Michael Trebilcock, Donald N. Dewees and David G. Duff, *The Medical Malpractice Explosion: An Empirical Assessment of Trends, Determinants and Impacts*, 17 *Melbourne University L. Rev.* 539, 542-543 (1990).

<sup>9</sup> Importantly, regulatory pre-emption or compliance in Canada is not absolute. Non-compliance with regulatory requirements is probative of but not determinative of a finding of negligence. See *The Queen (Can.) v. Saskatchewan Wheat Board*, [1983] 1 S.C.R. 205.

<sup>10</sup> *Rylands v. Fletcher*, [1868] L.R. 3 H.L. 1.

However, Canadian and American tort regimes diverge in the area of products liability law. The dominant rule among American jurisdictions is that liability for damages caused by defective products is strict.<sup>11</sup> By contrast, in most Canadian provinces, manufacturer's product liability is still predicated on proof of negligence.<sup>12</sup>

Like American law, Canadian law recognizes the difficulty plaintiffs face in such cases of actually proving that the manufacturer was negligent. However, rather than responding to this problem by adopting a standard of strict liability in the domain of products liability, Canadian courts apply a reformed version of the doctrine of *res ipsa loquitor*.<sup>13</sup> Under this doctrine, the defendant is subject to a tactical burden to demonstrate that it acted in accordance with the requisite standard of care once the plaintiff demonstrates that the object which caused the harm was under the exclusive control of the defendant. Thus it remains open to a manufacturer to avoid liability by demonstrating that reasonable care was used in the manufacture or design of the product and in warning of risks associated with its use. Canadian law thereby recognizes the

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<sup>11</sup> Restatement (Second) of Torts § 402A. See also the discussion in Stuart M. Speiser, Charles F. Krause, and Alfred W. Gans, *The American Law of Torts*, 18.27 (2003). Over 40 jurisdictions have explicitly adopted strict liability. See Speiser, *id.* at 18.28.

<sup>12</sup> Allen M. Linden, *Canadian Tort Law* 585 (2001). However, Saskatchewan, New Brunswick, and Quebec have adopted some form of strict liability for injuries caused by defective products. See Consumer Protection Act, S.S. 1996 c. C-30, s. 64; Consumer Product Warranty and Liability Act, S.N.B. 1978, c. C-18.1, s. 27(1); Consumer Protection Act, R.S.Q. c. P-40.1, s. 53.

<sup>13</sup> *Fontaine v. British Columbia (Official Administrator)*, [1998] 1 S.C.R. 424.

evidentiary difficulties faced by plaintiffs in products liability cases, yet responds to this difficulty through an evidentiary rather than a substantive solution.

Canadian and American product liability laws also differ in terms of the interaction between product liability and workers' compensation schemes. In both Canada and the United States, in systems where workers' compensation schemes are present, tort claims against workers' employers are generally barred. However, American workers' compensation schemes do not preclude injured workers from suing third parties, such as manufacturers of defective products that injure them in the workplace. By contrast, Canadian schemes often foreclose tort claims by injured workers against not only their employers but also against many third parties in return for no-fault workers' compensation benefits.<sup>14</sup> The Canadian model may be preferable to the American model in this respect, as many product liability claims are removed from the court system, but workers are still compensated for their injuries.

### *Canada and America Compared: Quantum Rules*

#### *A. Non-Pecuniary Losses*

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<sup>14</sup> For example, in Ontario, a worker employed by a "Schedule 1" employer (in certain designated industries) is not entitled to commence an action against his own employer and also against any other Schedule 1 employers. See Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, Sched. A, s. 28.

Reform-minded academics and policy-makers have paid significant attention to the damages for non-pecuniary losses, such as pain and suffering and wrongful death. Such damages are necessarily difficult to translate into pecuniary terms in a just and consistent manner, and have often been extremely large. While both Canada and the United States have sought to cap non-pecuniary damages, the route travelled has been very different.

The Canadian experience with caps on non-pecuniary damages is largely a function of judicial innovation. In a trilogy of cases in the late 1970s, the Supreme Court of Canada limited claims for non-pecuniary losses for personal injuries to \$100,000, indexed to inflation, largely out of a concern for the social cost of high non-pecuniary damages awards.<sup>15</sup> As of 2007, this cap sat at roughly \$310,000.<sup>16</sup> While the Supreme Court of Canada referred to this cap as a “rough upper limit,” this amount has functioned in practice as an absolute cap on the quantum of non-pecuniary damage awards. While individual provinces remain free to modify or abrogate this cap, no province has in fact done so.

The American experience with caps on non-pecuniary damages has been radically different. First, rather than being products of judicial creation, caps on non-pecuniary damages in the United States have been the exclusive creation of state legislatures.<sup>17</sup> Indeed, far from

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<sup>15</sup> *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Thornton v. Prince George School District No. 57*, [1978] 2 S.C.R. 267; *Arnold v. Teno*, [1978] 2 S.C.R. 287.

<sup>16</sup> Jamie Cassels and Elizabeth Adjin-Tetty, *Remedies: The Law of Damages* 170 (2d ed. 2008).

<sup>17</sup> See e.g. Cal. Civ. Code. § 3333.2 (non-pecuniary damages in medical malpractice cases capped at \$250,000); Idaho Code § 6-1603 (\$250,000 cap, adjusted to inflation, on non-pecuniary damages in personal injury and wrongful death cases).

supporting the creation of caps on non-pecuniary damages, courts in a number of states have found them to be unconstitutional.<sup>18</sup> Second, rather than extending to all tort claims as in Canada, many of the caps on non-pecuniary damages enacted by state legislatures have been confined to certain types of claims, such as medical malpractice claims.<sup>19</sup> Third, while the Canadian caps are nation-wide, the American caps have all been enacted at the state level. While Congress has considered imposing a federal cap on non-pecuniary claims in medical malpractice cases,<sup>20</sup> none of these efforts have thus far resulted in legislation.

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<sup>18</sup> A majority of courts have upheld caps on non-pecuniary damages as constitutional. See, e.g., *Prendergast v. Nelson*, N.W.2d 657 (Neb. 1977); *Johnson v. St. Vincent Hospital, Inc.* 404 N.E.2d 585 (Ind. 1980); *Fein v. Permanente Medical Group*, 695 P.2d 665 (Cal. 1985). However, some courts have held such caps to be unconstitutional on the basis of provisions in state constitutions. See, e.g., *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978); *Morris v. Savoy*, 576 N.E.2d 765 (Ohio 1991); *Moore v. Mobile Infirmary Ass'n*, 592 So.2d 156 (Ala. 1991); *Best v. Taylor Machine Works, Inc.*, 689 N.E.2d 1057 (Ill. 1997). By contrast, Canadian courts have upheld as constitutional even extremely low caps for non-pecuniary damages. For example, in *Morrow v. Zhang*, 2009 ABCA 215, the Alberta Court of Appeal upheld as constitutional a cap of \$4,000 on non-pecuniary damages for minor injuries arising from motor vehicle accidents.

<sup>19</sup> Carly N. Kelly and Michelle N. Mello, *Are Medical Malpractice Damages Caps Constitutional? An Overview of State Litigation*, 33 *J. Law, Medicine & Ethics* 515 (2005).

<sup>20</sup> In the early 2000s, the House of Representatives passed a number of bills which would have imposed limits on non-pecuniary damages in medical malpractice cases, but those legislative efforts never passed the Senate. See, e.g., *Help Efficient, Accessible, Low-Cost Timely*

The empirical research on the effects of caps on damages has yielded mixed conclusions. While some have found that caps lower payouts,<sup>21</sup> others have suggested that such caps actually increase economic damages, such that there is no significant overall difference in damages with or without caps.<sup>22</sup> Moreover, some authors have theorized that because caps on non-pecuniary damages weaken the deterrent function of tort law, such caps may actually lead to increases in claims.<sup>23</sup>

There has also been some controversy about whether caps reduce the “defensive medicine” of wasteful medical tests and procedures ordered by doctors who are overly concerned about litigation. Intuitively, one would expect this, and some research has confirmed this view.<sup>24</sup> However, Sloan and Shadle find that the enactment of caps on damages did not significantly

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Healthcare (HEALTH) Act of 2003, H.R. 5; Patients First Act of 2003, S. 11; Help Efficient, Accessible, Low-Cost Timely Healthcare (HEALTH) Act of 2004, H.R. 4280, 108<sup>th</sup> Cong.

<sup>21</sup> David A. Hyman, Bernard Black, Charles Silver and William M. Sage, Estimating the Effect of Damages Caps in Medical Malpractice Cases: Evidence from Texas, 1 J. Legal Analysis 355 (2009).

<sup>22</sup> Catherine M. Sharkey, Unintended Consequences of Medical Malpractice Damages Caps, 80 NYU L. Rev. 391 (2005).

<sup>23</sup> Claudia M. Landeo, Maxim Nikitin, and Scott Baker, Deterrence, Lawsuits, and Litigation Outcomes under Court Errors, 23 J. Law, Econ. & Org. 57 (2010).

<sup>24</sup> Daniel Kessler and Mark McClellan, Do Doctors Practice Defensive Medicine?, 111 Q. J. Econ. 353 (1996).

impact Medicare payouts for various procedures.<sup>25</sup> Unfortunately, there does not appear to be any similar empirical research on the effect of the Supreme Court of Canada's judicially-imposed cap in the late 1970s.

### *B. Punitive Damages*

Tort reformers have also sought to limit punitive damages, because of concerns about both the quantum and the inconsistency of such damages. While there has been some degree of convergence between the two countries, punitive damages awards in the United States still tend to be much larger than those in Canada.<sup>26</sup>

American rules regarding punitive damages vary sharply across states. In some states, punitive damages are prohibited except where explicitly allowed by statute, while in others they are legislatively capped, either at an absolute maximum or at a particular multiple of compensatory damages.<sup>27</sup> However, in most jurisdictions, punitive damages can properly be

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<sup>25</sup> Frank A. Sloan and John H. Shadle, Is There Empirical Evidence for 'Defensive Medicine'? A Reassessment, 28 J. Health Econ. 481 (2009)

<sup>26</sup> For a more detailed discussion of the differences in the treatment of punitive damages in Canada, England and the United States, see Bruce Chapman and Michael Trebilcock, Punitive Damages: Divergence in Search of a Rationale, 40 Alabama L. Rev. 741 (1989).

<sup>27</sup> See the discussion in *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008). There have been occasional cases where state courts have struck down certain forms state legislation to limit punitive damages. See, e.g., *Kirk v. Denver Pub. Co.*, 818 P.2d 262 (Colo. 1991) (holding

awarded to further the goals of retribution and deterrence where a defendant's conduct has been "outrageous" or "deplorable." In such cases, the quantum of punitive damages is generally determined by a jury, with appellate courts reviewing jury awards on a fairly deferential standard, sometimes characterized as reasonableness<sup>28</sup> and sometimes as an abuse of discretion.<sup>29</sup>

Beyond simply reviewing juries' punitive damages awards for reasonableness, the U.S. Supreme Court has held that the Eighth Amendment to the Constitution of the United States, which is incorporated against the states via the Fourteenth Amendment, places a constitutional limit on the magnitude of punitive damages. Specifically, the Supreme Court has held that the Eighth Amendment prohibits awards of punitive damages which are "grossly excessive." This in turn will depend on (1) the degree of the defendant's reprehensibility or culpability; (2) the relationship between the penalty and the harm to the victim caused by the defendant's actions; and (3) the sanctions imposed in other cases for comparable misconduct. On this basis, the U.S. Supreme Court held in *BMW v. Gore* that a jury award of \$2,000,000 in punitive damages for a plaintiff who found out that a new car he bought had been repainted and for which he received \$4,000 in compensatory damages was grossly excessive.<sup>30</sup> However, in other cases, sizeable

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unconstitutional a Colorado statute that required one-third of exemplary damages awards to be paid to the state); *Henderson By and Through Hartsfield v. Alabama Power Co.*, 627 So. 2d 878 (Ala. 1993).

<sup>28</sup> *Exxon Shipping Co. v. Baker*, supra note 27.

<sup>29</sup> *Cooperman Industries Inc. v. Leatherman Tool Group Inc.*, 532 U.S. 424 (2001).

<sup>30</sup> *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *Cooperman Industries Inc. v. Leatherman Tool Group Inc.*, 532 U.S. 424 (2001).

punitive damages awards been found to withstand constitutional scrutiny on the “grossly excessive” standard. For example, in *TXO Production*, the Supreme Court upheld as constitutional a punitive damages award for \$10,000,000 where actual damages were only \$19,000.<sup>31</sup>

Leaving aside constitutional considerations, the Supreme Court has recently signaled a desire to curb what it views as excessive punitive damages awards. In *Exxon Shipping Co.*, an admiralty case, the majority of the Supreme Court found that a jury award of \$5 billion in punitive damages was inappropriate.<sup>32</sup> Rather, it held that a one-to-one ratio of compensatory to punitive damages was appropriate, and therefore lowered the punitive damages award to roughly \$500 million. While this result was not reached as a matter of constitutional law and is therefore not directly binding on state courts as such, it does signal the U.S. Supreme Court’s preference for restraint in the size of punitive damages awards.

The contemporary Canadian law of punitive damages shares a similar normative foundation. As in most jurisdictions in the United States, but unlike in England, punitive damages are not reserved for restricted classes of cases.<sup>33</sup> Punitive damages can be awarded in

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<sup>31</sup> *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993).

<sup>32</sup> *Exxon Shipping Co. v. Baker*, supra note 27.

<sup>33</sup> The dominant American and Canadian approach to punitive damages can be contrasted with that employed in England. There, the House of Lords held in *Rookes v Barnard* [1964] A.C. 1129 that punitive damages can only properly be awarded in three classes of cases: 1) where there was oppressive, arbitrary or unconstitutional action taken by servants of the government; 2)

Canada in order to further deterrence, retribution, and denunciation, and they can only be awarded where there has been “high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behavior.”<sup>34</sup>

However, beyond these conceptual similarities, punitive damages are in general much less widely awarded in Canada than they are in the United States. Unlike the United States, punitive damages in Canada are typically awarded in cases of intentional torts, and rarely awarded in negligence or products liability cases.<sup>35</sup> In addition, the Supreme Court of Canada has held that in cases tried by a jury, the trial judge’s charge should inform the jury that “[p]unitive damages are very much the exception rather than the rule.”<sup>36</sup> Moreover, “[p]unitive damages are awarded *only* where compensatory damages, which to some extent are punitive, are insufficient to accomplish” the objectives of retribution, deterrence, and denunciation.<sup>37</sup>

Additionally, appellate review of punitive damages is much stricter in Canada than it is in the United States. The Supreme Court of Canada has held that appellate courts have much greater scope and discretion in reviewing punitive damages than they do with respect to other types of general damages.<sup>38</sup> Under Canadian law, the test to be applied by appellate courts in

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where the defendant’s conduct was calculated to make a profit for himself; and 3) where a statute expressly authorizes the awarding of punitive damages.

<sup>34</sup> *Whiten v. Pilot Insurance Co.*, 2002 S.C.C. 18, [2002] 1 S.C.R. 595 at para. 94.

<sup>35</sup> *Cassels and Adjin-Tetty*, *supra* note 166, at 288-290.

<sup>36</sup> *Whiten*, *supra* note 34, at para. 94.

<sup>37</sup> *Id.* (emphasis in the original).

<sup>38</sup> *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 197.

reviewing punitive damages awards is to ask “whether a reasonable jury, properly instructed, could have concluded that an award in that amount, and no less, was rationally required to punish the defendant’s misconduct.”<sup>39</sup>

Whether for these reasons or for others, punitive damages awards are generally much smaller in Canada than the United States. A 1991 Ontario Law Commission Study of punitive damages awards found few awards greater than \$50,000. While the quantum of punitive damages awards has risen since that time, even today there have been only a handful of Canadian awards exceeding a million dollars at any level of court. While the Supreme Court of Canada upheld a punitive damages award of \$1,000,000 in *Whiten*<sup>40</sup> and \$800,000 in *Hill*,<sup>41</sup> such awards have been rare and have only been awarded in exceptionally egregious circumstances.

While public attention in America focuses on the enormous punitive damages awards of the type seen in the *Exxon Valdez* litigation, many have argued that such awards are relatively rare. One empirical study found that juries rarely award punitive damages, especially in cases which have arguably attracted the most public attention and debate, such as medical malpractice and products liability.<sup>42</sup>

### ***Canada and America Compared: Procedural Rules***

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<sup>39</sup> Whiten, supra note 34, at para. 107.

<sup>40</sup> Id.

<sup>41</sup> Hill, supra note 388.

<sup>42</sup> Theodore Eisenberg, John Geordt, Brian Ostrom, David Rottman & Martin T. Wells, The Predictability of Punitive Damages, 26 J. Legal Stud. 623 (1997).

Beyond the substantive rules discussed above, procedural rules also play a significant role in the relatively lower prevalence and social costs of tort litigation in Canada.

*A. Civil Juries*

One noteworthy procedural difference between tort suits in Canada and the United States is the availability and prevalence of jury trials in civil cases. Because civil juries are perceived to have a predilection for excessive damage awards, jury trials are sometimes thought to contribute to the tort crisis in the United States.

In the United States, the right to a jury trial in a large range of civil cases is afforded constitutional protection. Under the Seventh Amendment to the United States Constitution, plaintiffs claiming damages are guaranteed a right to a jury trial. While the Seventh Amendment applies only to federal claims and is not incorporated against the states, a number of state constitutions also contain a right to trial by jury in civil cases.

By contrast, there is no constitutional right to a trial by jury in civil cases in Canada. In Ontario, tort claims for damages can be tried by a jury at the request of either party,<sup>43</sup> but the trial judge retains the discretion to order that an action proceed without a jury.<sup>44</sup> Jury trials are also

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<sup>43</sup> Courts of Justice Act, R.S.O. 1990, c. C.43, at s. 108(1); Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 47.

<sup>44</sup> Courts of Justice Act, *id.* at s. 108(3).

generally not permissible where equitable relief is claimed<sup>45</sup> or where a claim is brought against the government.<sup>46</sup> Even in situations where a claim could be tried by a jury, jury trials are still relatively rare.

If juries make larger damages awards than do judges sitting alone, the relatively restricted use of jury trials in Canada may help explain the relative absence of a tort crisis in Canada. However, whether juries do systematically award higher damages than do judges sitting alone is not clear. One study found little difference in the way juries and judges award punitive damages.<sup>47</sup> However, Hersch and Viscusi reach the opposite conclusion, finding instead that juries are more likely than judges sitting alone to award punitive damages, and that they also do so at higher levels than judges.<sup>48</sup>

#### *B. Costs*

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<sup>45</sup> *Id.* at s. 108(2).

<sup>46</sup> Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50 at s. 26; Proceedings against the Crown Act, R.S.O. 1990 c. P.27, s. 11.

<sup>47</sup> Theodore Eisenberg, Neil LaFountain, Brian Ostrom, David Rottman & Martin T. Wells, Juries, Judges, and Punitive Damages: An Empirical Study, 87 *Cornell L. Rev.* 743 (2001-02).

<sup>48</sup> Joni Hersch and Kip Viscusi, Punitive Damages: How Judges and Juries Perform, 33 *J. Legal Stud.* 1 (2004).

Another area of divergence between the two countries is in the rules relating to the payment of the costs of legal proceedings.<sup>49</sup> Such rules have received significant attention as a possible source of the perceived difference in litigiousness between the United States and the rest of the world. However, as discussed below, the actual impact of these rules remains unclear.

The standard American rule for most proceedings and most jurisdictions is that each party bears their own costs (the so-called no-way cost rule).<sup>50</sup> By contrast, the default costs rule under Anglo-Canadian law is the two-way cost rule, under which the losing party is required to

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<sup>49</sup> In this paper, we focus exclusively on the rules governing when parties are required to bear opposing parties' costs. There are, of course, other differences, both historic and current, in the ways in which lawsuits are funded between Canada and the United States. Perhaps most notable among these differences is that contingency fees, long permissible in the United States and even in many other Canadian provinces, were prohibited until late 2002 in Ontario. Contingency fees were permitted with the enactment of the Justice Statute Law Amendment Act, 2002, S.O. 2002, c. 24 - Bill 213, Schedule A (Amendment to the Solicitor's Act).

<sup>50</sup> There are certain notable exceptions to this rule even in the United States. For example, the standard rule in Alaska is that the loser pays the winner's costs (the so-called two-way cost rule). See Alaska Rules of Civil Procedure, Rule 82. Additionally, there are a variety of statutes which allow courts to order losing parties to pay the winning parties' costs. See, e.g., 42 U.S.C. 1988 (providing for the payment of attorney's fees for successful litigants under federal civil rights law). However, for most claims, the default rule in the United States remains that each party bears their own costs.

pay a substantial fraction of the winning party's legal costs.<sup>51</sup> While this general principle is the starting point, Ontario law provides judges with significant flexibility as to the quantum of cost awards and even whether such awards should be made at all.<sup>52</sup>

Ontario's cost rules are designed to encourage parties to settle lawsuits before trial. Under a mechanism commonly known as Rule 49 offers to settle, parties who refuse certain settlement offers may be saddled with higher cost awards. Rule 49.10 of the Ontario Rules of Civil Procedure provides that where a party rejects an offer to settle made at least seven days before trial that is not withdrawn before the trial begins, the party making the offer is entitled to partial indemnity costs to the date of the offer and substantial indemnity costs thereafter.<sup>53</sup> This provides the parties with incentives to make early offers to settle and to accept such offers.

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<sup>51</sup> The general principle that losing parties should pay the winning parties' costs is not limited to Anglo-Canadian law, but rather is a feature of most similar legal systems. The general American rule that each party bears their own legal fees is quite exceptional. See W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why is the United States the "Odd Man Out" In How It Pays Its Lawyers?*, 16 *Ariz. J. Int'l & Comp. L.* 361 (1999).

<sup>52</sup> See the factors listed in Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 57.01.

<sup>53</sup> *Id.* at r. 49.10.

While certain American jurisdictions do have in place similar rules,<sup>54</sup> these rules have generally been so weak as to prove largely ineffective.<sup>55</sup>

While the law of costs differs significantly between Canada and the United States, it remains somewhat unclear whether costs rules have a significant impact in practice on litigation costs and the cost of litigation overall. It is commonly argued that the Anglo-Canadian rule discourages high risk litigation, because of the prospect of having to pay the other side's costs, while the U.S. rule may encourage more speculative tort claims. Indeed, in a 1984 study, Kritzer found that Canadians viewed fee-shifting provisions as a major reason for their perception that they are generally less litigious than Americans.<sup>56</sup> Similarly, it has also been argued that fee-shifting rules increase the likelihood of settlement prior to trial.

However, despite both the conventional wisdom as well as significant theorizing as to the effects that cost awards ought to have,<sup>57</sup> the empirical evidence finding such effects is limited. In

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<sup>54</sup> See, e.g., FRCP Rule 68.

<sup>55</sup> For a recent analysis of the empirical effects of the relatively robust offer-of-judgment rule in New Jersey, see Albert Yoon and Thomas Baker, *A Market Solution to Civil Litigation?: An Empirical Study of Offer-of-Judgment Rules*, 59 *Vand. L. Rev.* 155 (2006).

<sup>56</sup> Herbert M. Kritzer, *Fee Arrangements and Fee Shifting: Lessons from the Experience in Ontario*, 47 *Law & Contemp. Probs.* 125 (1984).

<sup>57</sup> Thomas D. Rowe, Jr., *Predicting the Effects of Attorney Fee Shifting*, 47 *Law and Contemp. Probs.* 139 (1984); Jennifer F. Reinganum and Louis L. Wilde, *Settlement, Litigation, and the Allocation of Litigation Costs*, 17 *RAND J. Econ.* 557 (1986); Robert D. Cooter and Daniel L.

an empirical analysis of the effect of a fee-shifting statute in constitutional litigation in the United States, Schwab and Eisenberg find that the fee-shifting statute has had very little effect on constitutional tort litigation.<sup>58</sup> Although the empirical research is not entirely unequivocal, there seems to be little conclusive evidence that fee-shifting regimes increase the likelihood of settlement.<sup>59</sup> Additionally, as Kritzer notes, many countries that do require losing parties to pay the winning parties' legal costs, such as Germany and Sweden, actually have higher litigation rates than does the United States.<sup>60</sup> At the very least, this latter fact suggests that any popular perception that fee shifting rules play an overwhelming role in determining rates of litigation is unwarranted.

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Rubinfeld, *Economic Analysis of Legal Disputes and their Resolution*, 27 *J. Econ. Lit.* 1067 (1989).

<sup>58</sup> Stewart J. Schwab and Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 *Cornell L. Rev.* 719 (1987-1988).

<sup>59</sup> For studies finding no evidence that fee-shifting encourages settlement, see Gary M. Fournier & Thomas W. Zuehlke, *Litigation and Settlement: An Empirical Approach*, 71 *Rev. Econ. & Stat.* 189 (1989). However, for evidence to the contrary, see Don L. Coursey & Linda R. Stanley, *Pretrial Bargaining Behavior Within the Shadow of the Law: Theory and Experimental Evidence*, 8 *Int'l Rev. L. & Econ.* 161 (1988) (experimental laboratory evidence finding that the Anglo-Canadian rules makes individuals more likely to settle than does the American rule).

<sup>60</sup> Herbert M. Kritzer, *Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?*, 80 *Tex. L. Rev.* 1943 (2001-2002).

### *C. Class Actions*

One set of procedural rules which has a significant impact on the ability of plaintiffs to bring tort claims is the rules governing the availability of class actions. This is an area in which Canada and America have historically differed significantly but have increasingly converged in recent years.

Class actions in Canada are of a relatively recent vintage. The first jurisdiction in Canada to allow U.S.-type class proceedings was Quebec, which enacted legislation permitting class proceedings in 1978. In 1992, Ontario became the next province to provide for class actions. Class actions are now permitted in all jurisdictions in Canada.

While the rules governing the availability of class actions are substantially similar to those rules under American law, there are some minor differences. For example, while the requirement under rule 23(b)(3) that common issues predominate amongst class members applies to many American class actions,<sup>61</sup> this is not a strict requirement for maintaining a class action in Canada. Under most Canadian statutes, the question of whether common issues predominate over individual issues is merely a factor for the court to consider in determining whether a class proceeding would be a preferable form of proceeding.<sup>62</sup> Thus, in certain respects, it is actually

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<sup>61</sup> FRCP, Rule 23(b).

<sup>62</sup> Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 5; Class Proceedings Act, R.S.B.C. 1996, c. 50, s.4.

easier to have a class action certified in Canada than in the United States, although in general the rules governing certification are substantially quite similar.

Notwithstanding these similarities, class actions are much less common in Canada than they are in the United States. This may be a function of the relatively recent origins of class actions in Canada, of the other differences in legal rules described in this paper, or of some other factor entirely.

#### *D. Discovery*

Discovery rules permit a party to request information from an opposing party. While broad discover rules may not systematically favor one party over another, they almost certainly raise the costs of litigation for both parties in the United States.

In the United States, a party's right to engage in discovery is quite broad. Under the Federal Rules of Civil Procedure, parties must provide the opposing side with all documents "regarding any nonprivileged matter that is relevant to any party's claim or defence."<sup>63</sup> Additionally, the Rules give parties the opportunity to depose a number of individuals in an oral examination. Under Rule 30, subject to certain exceptions, a party is entitled to take 10 depositions without having to seek leave of the court to take additional depositions.<sup>64</sup>

Canadian discovery rules are more limited in scope. With respect to documentary discovery, Canadian rules are relatively similar, though not identical, to American rules. For

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<sup>63</sup> FRCP, Rule 26(b)(1).

<sup>64</sup> FRCP, Rule 30.

example, the Ontario *Rules of Civil Procedure* provide that parties must produce for inspection every document that is not privileged and that is relevant to any matter in issue in an action.<sup>65</sup> However, Ontario rules relating to oral discovery are much more limited than are corresponding American rules. As a general matter, the only individuals who may be examined orally are parties to the suit who are adverse in interest.<sup>66</sup> Where a corporation may be examined for discovery, the examining party has the right to examine one director, officer, or employee of the corporation.<sup>67</sup> Additional individuals may be examined under certain circumstances, but the circumstances when additional oral examinations are permitted are tightly circumscribed.<sup>68</sup> Moreover, as of January 1, 2010, parties are limited to a total of seven hours of examination for discovery, regardless of the number of parties or other persons to be examined, except in cases where the parties consent or with the leave of the court.<sup>69</sup>

Additionally, Ontario has recently taken steps to further limit the scope and expense of all forms of discovery. On January 1, 2010, a proportionality requirement in discovery came into effect which empowers a court to consider a variety of factors: the time and cost of answering the question or producing the document; whether answering the question or producing the document would cause the person undue prejudice or interfere with the orderly progress of the action; whether the information is available from another source; and whether an order would

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<sup>65</sup> Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 30.02.

<sup>66</sup> Id. at r. 31.03(1).

<sup>67</sup> Id. at r. 31.03(2).

<sup>68</sup> Id. at r. 31.03.

<sup>69</sup> Id. at r. 31.05.1.

require an excessive volume of documents to be produced.<sup>70</sup> This represents an attempt to further limit the scope of discovery, but the practical impact of the rule remains to be seen.

#### *E. Notice Pleading*

Differences in pleading rules between the United States and Canada also have significant implications for the scope of discovery. While the United States employs, for the most part, a system of notice pleading which does not require that plaintiffs in their statement of claim provide the facts that support of the action,<sup>71</sup> Canada relies on a system of fact pleading. Under Canadian rules, the plaintiff must plead sufficient facts which, if true, would be sufficient to sustain a cause of action.<sup>72</sup> This means that while discovery in the United States is a broad and open-ended exercise to learn the facts which could sustain a particular cause of action, discovery in Canada is generally limited to obtaining evidentiary support for facts already pleaded. Fact pleading also discourages fishing expeditions in which plaintiffs commence an action without any evidence of wrongdoing to back it up.

#### *F. Judicial Appointments*

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<sup>70</sup> *Id.* at r. 29.2.

<sup>71</sup> FRCP, Rule 8(a)(2). See also *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

<sup>72</sup> Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 21.01(1)(b).

Finally, it is worth noting that all superior court judges in Canada—the judges who deal with all tort claims above a very minor amount—are federally-appointed. No Canadian judges are elected or subject to appointments with a subsequent re-election, as is the case with most state-court judges in the U.S., nor are any superior court judges appointed by provincial legislatures or executives. This imposes a degree of consistency between judges in all jurisdictions and obviates any meaningful ability for plaintiffs to forum-shop for sympathetic judges. This may be another distinguishing factor in judicial determinations of liability or the quantum of damages in tort cases.

### ***Conclusion***

For the reasons discussed above, it seems reasonable to conclude that the differences in substance and procedure between Canadian and American tort law constitute part of the explanation why the direct costs of tort law are lower in Canada than in the United States. To the extent that the crisis in American tort law is an over-abundance of frivolous or vexation litigation or unreasonably high damages awards, Canadian tort law can serve as an example of a broadly similar system which has tamed many of the excesses that are apparent in American tort law. The less plaintiff-friendly Canadian tort system demonstrates that, rather than rejecting the tort system entirely in favor of one or more no-fault compensation systems, the excesses of American tort law can be curbed by incremental reforms which nonetheless preserve the essential features of the tort system.

However, we posit this conclusion with several caveats. First, as we suggested above, the prescription that American tort law should look to the relatively less plaintiff-friendly Canadian tort law in order to ameliorate the “crisis” in American tort law is only tenable if the crisis in American tort law is really a crisis of too much rather than too little litigation.<sup>73</sup>

Second, even assuming that the crisis in tort law is that too many frivolous claims are being litigated and that damages awards are too large and too random, it is by no means apparent that the optimal system is a reformed, less plaintiff-friendly tort system along the lines of the Canadian model. Indeed, it may be that no-fault systems would be preferable in a variety of respects to both the Canadian and American tort systems, at least in the domain of certain classes of accidents, and we make no claims about the relative performance of no-fault systems as compared to the tort system here.<sup>74</sup> Our suggestion that American scholars and tort reformers could look to the Canadian model of tort law will only have appeal for those who believe that the essential features of the tort system should be preserved.

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<sup>73</sup> To the extent that the problem in tort law is actually that too few claims are being litigated, as some claim, see Richard L. Abel, *The Real Tort Crisis—Too Few Claims*, 48 *Ohio St. L. J.* 443 (1987), many (though not necessarily all) of the possible reforms suggested by this paper would be counterproductive.

<sup>74</sup> For such an evaluation, see Michael Trebilcock and Paul-Erik Veel, *No Fault Accident Compensation Systems*, in Jennifer Arlen (ed.), *Research Handbook on the Economics of Torts* (forthcoming); Don Dewees, David Duff, and Michael Trebilcock, *Exploring the Domain of Accident Law: Taking the Facts Seriously* ch. 7 (1996).

Third, while we have outlined the Canadian system as a system that has lower direct costs, we are reluctant to reach conclusions about the relative social welfare effects of each of the tort systems. While the Canadian system may entail fewer direct social costs, it may be that the increased direct costs of the American tort regime actually achieve a preferable outcome in terms of social welfare by achieving a more socially optimal level of deterrence. Moreover, while we have no reason at present to believe that a suboptimal level of deterrence is achieved by Canadian law, it is entirely possible that a proper level of deterrence is achieved in Canada either a) because the Canadian system is free-riding on the deterrence effects of the U.S. tort system, given the integrated nature of the two economies, or b) because Canada is willing to rely more on direct regulatory interventions to reduce the incidence of accidents, while the United States relies more heavily on the tort system. For these reasons, it is exceptionally difficult to ascertain the welfare effects that would be occasioned by the United States adopting a more “Canadian” tort system. While the theoretical bases for making such a judgment are reasonably well developed, additional empirical research is necessary to reach a determinate conclusion.

Notwithstanding these caveats, there are compelling reasons for supposing that the passive judicial role and undisciplined adversarial process often found in the United States are neither an efficient nor a fair method of adjudicating disputes.<sup>75</sup> In these contexts, a more proactive, inquisitional judicial role and a more disciplined adversarial process have many social

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<sup>75</sup> Michael Trebilcock and Lisa Austin, *The Limit of Full Court Press: Of Blood and Mergers*, 48 U. Toronto L.J. 1 (1998).

virtues. In this respect, Gordon Tullock's book, *Trials on Trial*,<sup>76</sup> deserves more sympathetic attention that it has hitherto received.

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<sup>76</sup> Gordon Tullock, *Trials on Trial* (1980).