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ASSESSMENT OF LIABILTIY AND DAMAGES IN PERSONAL INJURY CASES ARISING FROM ACCIDENTS IN OVERSEAS HOTELS – WHAT EVERY HOTEL OWNER SHOULD KNOW ABOUT THEIR EXPOSURE.

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INTRODUCTION

Every year, millions of Canadians flock to hotels and resorts throughout the world in search of an escape from the familiar. Canadians spend well over three hundred million nights abroad each year. It is not surprising that considering the amount of time spent outside of

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Canada, some of these tourists and business travellers will become involved in accidents and will sustain injuries while on the premises of foreign hotels and resorts.

When bringing lawsuits against the hotel owners and operators, these injured persons will oftentimes choose to do so in their home provinces in Canada, as opposed to the countries in which their accidents occurred. In doing so, they are no doubt seeking the greater peace of mind that comes with a legal system that is convenient and familiar. Moreover, courts of the various jurisdictions in Canada are perceived as better fora for pursuing awards in personal injury lawsuits. It is not an overstatement to suggest that the area of personal injury litigation is extremely well-developed in North America by comparison to many other jurisdictions around the world. In other words, a plaintiff in a personal action in Canada or the U.S. can reasonably expect a considerably higher damage award than he or she would have received had they brought the same lawsuit elsewhere.

Owners and operators of non-Canadian hotels, who are named as defendants in a personal injury lawsuit commenced in a Canadian jurisdiction, may find themselves in unfamiliar territory, and with greater exposure to financial liability than they are used to. This paper discusses how Canadian courts will evaluate liability and damages in such lawsuits, with a particular focus on courts in the Province of Ontario.

JURISDICTIONAL DEFENCES

A defendant who maintains that a Canadian court does not have jurisdiction over the subject of an action or over the defendant may make a motion under the rules of the various

jurisdictions in Canada to have the lawsuit dismissed for want of jurisdiction. Jurisdiction will be assumed by a Canadian court where (a) the foreign defendant is physically present in the Canadian jurisdiction at the time of service of the claim; (b) where the defendant attorns either by agreement or by taking steps to defend the action or (c) where the Court finds that there is a "real and substantial connection" between the subject matter of the claim and a Canadian jurisdiction.

In *Club Resorts Ltd. v. Van Breda*[4] , the Supreme Court of Canada solidified the test for determining whether a Canadian court has jurisdiction over a particular defence or the subject matter of a lawsuit. The Supreme Court of Canada heard two separate cases involving injuries arising from accidents that occurred while the plaintiffs were on vacation in Cuba. Both lawsuits were brought in Ontario against a number of parties, including the operators of the resorts. The resorts sought to stay the proceedings commenced in Ontario, arguing that the Ontario court lacked jurisdiction and that the Cuban court would be a more appropriate forum to hear the disputes. They relied on the legal principle of *forum non* conveniens, which allows courts to dismiss a case where another forum (i.e. a court in another jurisdiction) is much better suited to hear the case.

The Supreme Court of Canada held that whether or not the Canadian court ought to assume jurisdiction of a dispute hinges on whether the plaintiff is able to establish a real and substantial connection between the subject matter of the litigation on the one hand and the defendant and the provincial courts in Canada where the action is commenced on the other. The

[4] *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17

Supreme Court of Canada endorsed a framework for the "real and substantial connection test" with reference to four presumptive connecting factors which, *prima facie*, entitle the Canadian court to assume jurisdiction over a dispute:

(a) the defendant is domiciled or resident in the Canadian province;

(b) the defendant carries on business in the Canadian province;

(c) the tort was committed in one of the Canadian provinces; and

(d) a contract connected with the dispute was made in a Canadian province.

The above list is not exhaustive. The Supreme Court held that, over time, courts may identify new factors which also presumptively entitle a court to assume jurisdiction. In identifying new presumptive factors, a court should look to connections that give rise to a relationship with the forum that is similar in nature to the ones which result from the above-listed factors. The considerations to be taken into account in this analysis include the following:

(a) similarity of the connecting factor with the recognized presumptive connecting factor;

(b) treatment of the connecting factor in the case law;

(c) treatment of the connecting factor in statute law; and

(d) treatment of the connecting factor in the private international law of the other legal systems with a shared commitment to order, fairness and comity.

The burden of establishing a presumptive connecting factor is on the plaintiff, and the court may not assume jurisdiction unless one of the connecting factors is established. Even where a recognized connective factor appears to apply, the presumption of jurisdiction is rebuttable.

Every jurisdictional challenge will, therefore, involve the careful analysis of the above-mentioned four presumptive connecting factors.

EVALUATING LIABILITY

Where a Canadian court rules that it ought to assume jurisdiction to proceed with a lawsuit against a hotel owner or operator from another country, it is then responsible for determining whether the hotel owner or operator is liable to the plaintiff.

Common sense and sound business practice dictate that the hotels and resorts operated in a particular destination ought to be operated according to the standards set by the laws of the jurisdiction in which the properties are located. In other words, it makes sense that a resort in the Dominican Republic should be built and operated pursuant to the laws of the Dominican Republic, and resort in Spain be built and operated pursuant to the laws of Spain. Whereas it is common for the operators of a particular resort to exceed the local standards with respect to areas such as food and premises safety, environmental protection or labour standards, nevertheless the operators of such facilities are obliged to conduct their affairs in accordance with the local laws. Since the hotels and resorts host guests from all over the world, it would be unreasonable to expect that they operate their affairs in compliance with the legal regimes of every country from where their guests originate. Occupier liability laws may be different in Canada, the United States, the members of the European Union, Russia, or the Dominican Republic. Whereas the common thread with respect to the standard of care which the hotel owes the tourist is that the premises should be maintained up to a reasonable standard, what that actually means is subject to a complex set of rules and customs, unique to each jurisdiction.

Consequently, it only makes sense that whereas the Dominican resorts are operated up to the standard established by the Dominican law, the Spanish resorts are operated up to the standard established by the Spanish law, etc. There is an expectation at law, therefore, that any tort claims arising from incidents which occur at the hotel should be resolved in accordance with the local law of the jurisdiction where the hotel is located. This principle, known as *lex loci delicti commissi* – meaning the law of the place where the tort was committed – is enshrined in the common law of Canada. Generally speaking, therefore, it is common ground that when accidents do happen, the owners and operators of the resort will have to establish that they met whatever standard of care is in place in the jurisdiction where the hotel or resort is operated.

The leading case in Canada on the application of the *lex loci delicti* principle is *Tolofson v. Jensen; Lucas (Litigatin Guardian of) v. Gagnon*[5] by the Supreme Court of Canada. The Supreme Court stated that the test for determining the application of foreign law involves the characterization of whether the proposed law is substantive or procedural. Substantive rights of parties to a lawsuit are to be governed by the law of the jurisdiction where the tort was committed, while matters of procedure are to be governed by the law of the forum in which the lawsuit is proceeding. Substantive law creates rights and obligations and is concerned with the ends which the administration of justice seeks to attain, whereas procedural law is the vehicle providing the means and instruments by which those ends are attained.

[5] *Tolofson v. Jensen; Lucas (Litigatin Guardian of) v. Gagnon*, [1994] 3 S.C.R. 1022

The Court stated that "the purpose of substantive/procedural classification is to determine which rules will make the machinery of the forum court run smoothly as distinguished from those determinative of the rights of both parties".

In occupier's liability cases, an owner or operator of a hotel will have various duties toward persons entering the hotel's premises and have various obligations to maintain a certain standard of care. It is a breach of these duties and obligations that give rise to the rights of a party who was injured on the premises to recover from the hotel owner or operator. As discussed earlier, these duties and obligations will be based on the law of the jurisdiction in which the hotel is located.

In *Tolofson*, the Supreme Court noted that a Canadian court could have discretion to depart from the absolute application of the *lex loci delicti* rule in international litigation when there are circumstances in which such application would work an injustice. However, it was imagined that there were only a few cases where such an exception would be necessary. Unfortunately, no guidance was provided for determining what constituted an injustice. Following *Tolofson*, various Canadian cases attempted to broaden the discretion, and used the substantive law of its own jurisdiction (as opposed to the jurisdiction where the tort occurred) when all parties in an action were resident in the same jurisdiction as the court. However, the Court of Appeal for Ontario in *Wong v. Lee*[6], narrowed the discretion afforded, and confirmed that it was to be used only in exceptional cases to address injustice.

[6] *Wong v. Lee*, [2002] O.J. No. 885

In the case of *Long v. Dundee Resort et al.*[7], the plaintiff was a minor (i.e. under the age of 18 years) and a member of the Ontario Alpine Ski Team. He left Ontario and went to Colorado with his coaches and other team members to train. He sustained serious personal injuries when he fell at the ski resort in Colorado. He sued the ski resort, various coaches of the ski team, and a coaches association. The lawsuit was dismissed against the ski resort and against the coaches association, such that the only remaining defendants were the team coaches, who were all based out of Ontario. Nonetheless, the Court ruled that the issue of negligence, including the applicable standard of care, duty owed to the plaintiff, causation, conditions for liability, contributory negligence, assumption of risk, imputed negligence, and joint liability, were to be decided according to the laws of Colorado.

EVALUATING DAMAGES

General Principles

Substantive rights of parties to a lawsuit are to be governed by the law of the jurisdiction where the tort was committed, while matters of procedure are to be governed by the law of the forum in which the lawsuit is proceeding. However, it is not always clear what is considered a substantive right and what is considered a procedure in the context of a court granting a remedy to a plaintiff. In *Barrick Gold Corporation v. Goldcorp. Inc.*[8], the court stated that as a general rule, the nature of a plaintiff's remedy, including whether a plaintiff is entitled to an order for specific

[7] *Long v. Dundee Resort et al.*, 2013 ONSC 4238
[8] *Barrick Gold Corporation v. Goldcorp. Inc.*, 2011 ONSC 3725

performance or imposition of a constructive trust, is treated as a procedural rather than a substantive issue and is therefore governed by the law of the forum.

The most common remedy in personal injury lawsuits in Canada is the award of damages. In Canada, damages are awarded in personal injury cases with the purpose of "making the plaintiff whole again," to the extent that money can do so. In other words, damages are awarded to attempt to put the injured party back in the position he or she was in before he or she was harmed, with the rationale that the injured party should be compensated for the loss he or she has suffered. Damages are assessed by the court under various "heads" of damages that are available to the plaintiff.

Somers v. Fournier[9] is a leading decision of the Ontario Court of Appeal on whether certain damages can be characterized as being either substantive or procedural in nature. *Somers* involved Ontario residents bringing a negligence lawsuit in Ontario arising from a motor vehicle accident in New York involving a vehicle driven and owned by residents of New York. As such, it was agreed that the substantive law of New York and the procedural law of Ontario applied. The Court of Appeal followed past case law and confirmed that the assessment of damages contained both substantive and procedural elements, which can be delineated. **The Court confirmed that entitlement to various heads of damages is a matter of substantive law, whereas the quantification or measurement of damages is a matter of procedural law**.

[9] *Somers v. Fournier*, [2002] O.J. No. 2543

If a certain head of damages is available in the country where the accident occurred, then a Canadian court will use Canadian law to quantify the damages. As noted earlier, the basic principle of Canadian law with respect to damages is that the plaintiff should be put back into the position he or she would have been in had the accident not occurred. A leading case on this principle is the Supreme Court of Canada decision in *Athey v. Leonati*[10], which discussed the "thin skull" rule and the "crumbling skull" rule.

The "thin skull" rule in Canadian tort law notes that a defendant must take the plaintiff as he/she is, even where because of a unique susceptibility or vulnerability, the injury was more dramatic or unexpectedly severe than one would expect an average person to sustain. The "crumbling skull" rule notes that a defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition which a plaintiff would have experienced anyway. A defendant is liable for the injuries caused, even if they are extreme, but need not put a plaintiff in a position better than his or her original position. As such, a defendant is liable for the additional damage but not the pre-existing damage.

Non-Pecuniary Damages

General non-pecuniary damages are awarded to a plaintiff for pain and suffering caused by a defendant's wrongdoing. They are known as non-pecuniary damages because they are non-compensatory in nature as no money can provide true restitution for the tortious act. In other words, a defendant cannot pay any amount of money to purchase a new brain, but can only go

[10] *Athey v. Leonati*, [1996] 3 SCR 458

so far as to provide compensation for a plaintiff's pain and suffering associated with the damaged brain. These are difficult to quantify, as they are quite subjective. It is not only the nature of the injury that determines an assessment of general damages, but how the injury specifically affects a particular plaintiff. A broken leg is likely to affect a plaintiff with an active lifestyle more than it would affect a plaintiff with a sedentary lifestyle.

A trio of cases from the Supreme Court of Canada in 1978 placed an upper limit on the amount of general damages that can be awarded in Canada. This upper limit changes with inflation and is currently almost $370,000 CAD. The upper limit is only awarded in extremely rare cases where the injuries and long-term impairments sustained are exceptionally severe, such as when a young, healthy and active person is rendered a quadriplegic or severely brain-damaged. In *Somers*, the Court of Appeal ruled that this upper limit was a matter of procedure to be governed by the law of Ontario. This cap did not bar claims for damages for pain and suffering, but was a judicially imposed restriction in order to avoid excessive and unpredictable non-pecuniary damages awards.

Pecuniary Damages

In Canada, a plaintiff can also be awarded pecuniary damages, which are losses that can be directly quantified in monetary terms. Often the most significant types of pecuniary damages are damages awarded for any economic losses that a plaintiff has suffered or will suffer as a result of the accident. If economic/income loss is available in the country where the accident occurred, then a Court will quantify damages based on past income that has been lost as a result of the injury up to the date of the trial (e.g. due to an inability to work) and future income that will be

lost after the date of the trial. Anticipated future loss of income is oftentimes the most difficult head of damages to evaluate, and is proven on a balance of probabilities.

As mentioned earlier a defendant need not put a plaintiff in a position better than his or her original position. There is a general rule against double recovery for the plaintiff. For example, a plaintiff is not entitled to income loss to the extent that he or she continues to receive income from an employer or a disability insurer after an accident. However, Canadian courts have created two exceptions to the double recovery rule:

a) benefits received by a plaintiff due to a public or private support system (e.g. welfare or charitable gifts) are not to be deducted from an economic loss award [11]; and
b) benefits received by a plaintiff from private insurance plan (e.g. for which he or she paid premiums) are not to be deducted from an economic loss award [12].

Further, plaintiffs may be able to claim for cost of past and future housekeeping and home maintenance services that they are unable to perform as a result of the accident. They may also claim for healthcare and rehThereabilitation expenses they have incurred as a result of the accident, as well as similar expenses they expect to incur going forward. Plaintiffs may claim for any out-of-pocket expenses they have to pay as a result of the accident, which may include clothing damaged in the accident or transportation costs to medical appointments. If these heads of damages are available in the country where the accident occurred, then a Canadian court will

[11] *Boarelli v. Flannigan*, [1973] 3 OR 69
[12] *Ratych v. Bloomer*, [1990] 1 SCR 940

again award damages based on the general principle of putting the plaintiff back into the position he or she would have been in had the accident not occurred. This would mean awarding damages to compensate for the expenses incurred as a result of the accident.

Interest and Costs

In Ontario, there are various rules regarding a plaintiff's entitlement to prejudgment interest arising from both general non-pecuniary and pecuniary damages. The Court of Appeal in *Somers* stated that prejudgment interest relates to compensation for a victim with respect to the delay necessitated by the time interval from the date on which the right to a money award arises the date on which it is awarded. It also noted that interest is merely the value of money, and that prejudgment interest is akin to "damages due to delay". It therefore concluded that prejudgment interest was a matter of substantive law, such that it should be governed by the law of the jurisdiction where the tort was committed. Ontario's rules regarding prejudgment interest changed in 2015, and more recent Ontario court decisions have confirmed that prejudgment interest is a matter of substantive law [13].

In Canadian jurisdictions, plaintiffs are typically entitled to part of their legal costs and disbursements if their lawsuit is successful. Plaintiffs' counsel typically include costs as part of their settlement proposals. However, this entitlement is not absolute, and is subject to the conduct of the parties throughout the litigation and various rules regarding formal settlement

[13] *Carroll v. McEwen*, 2016 ONSC 2075, *Dimopoulos v. Mustafa*, 2016 ONSC 4119, and *Carr v Modi*, 2016 ONSC 1300

offers. In Ontario, the courts are granted authority to award costs at their discretion. Though costs may be regarded as a form of indemnification, they are also used as a mechanism by which abuses of a court's processes may be deterred and penalized. Given this, the Court of Appeal in *Somers* held that costs are a means by which the ends of justice are obtained, and that they are procedural in nature.

Healthcare Expenses Paid for by a Provincial Government in Canada

Canada has a universal, single payer, government healthcare system, and most residents are automatically enrolled in provincial health insurance plans, funded through tax revenue. Most medical procedures and services are covered by provincial health insurance plans. In typical Canadian cases, the provincial government is able to recover from a defendant the healthcare expenses incurred as a result of a plaintiff's accident. In Ontario, the provincial government has an automatic statutory right to subrogation in the plaintiff's claims for expenses covered by the provincial health insurance plan. In other Canadian provinces have similar laws, or laws allowing the provincial government to directly recover its expenses from the defendant. These claims are typically advanced by plaintiffs even though they technically did not have to pay for the treatment and did not incur the healthcare expenses themselves.

It is questionable whether such healthcare expense claims (in which the provincial government actually incurred the expenses) would be considered as part of a plaintiff's healthcare and rehabilitation damages or as a separate head of damages altogether, because there are no cases directly on this point. If they are to be considered a separate head of damages altogether, then they would be a matter of substantive law. If they are a matter of substantive

law, then they would not be available to a plaintiff if the accident occurred in a country which does not entitle a plaintiff to similar damages.

In the case of *Robinson v. Fiesta Hotel Group Resorts*[14], the plaintiff was injured when he fell due to a loose tile in a hotel in the Dominican Republic. He commenced a lawsuit in Alberta against the hotel and a number of other defendants. He also added the provincial government as a separate plaintiff. The defendants did not defend the lawsuit, so they were noted in default, and the Alberta court was left to assess damages. The Alberta court granted an award of over $120,000 to the provincial government for the healthcare expenses incurred and paid for by the provincial health insurance plan.

In *Robinson*, the court did not perform any analysis of choice of law, nor did it even consider this issue. Because the defendants did not defend the lawsuit and were noted in default, they were deemed to admit the allegations of the plaintiff. Therefore, this case cannot be held to mean that healthcare expenses incurred by a provincial government, by virtue of Canada's universal healthcare system, are always recoverable against a hotel operator or owner when the accident occurs outside of Canada. Arguably, this issue remains unsettled.

EXCEPTIONS TO THE *LEX LOCI DELICTI* RULE

As discussed earlier, the Supreme Court noted in *Tolofson* that a Canadian court could have discretion to depart from the *lex loci delicti* rule in international litigation when there are

[14] *Robinson v. Fiesta Hotel Group Resorts*, 2008 ABQB 311

circumstances in which such application would work an injustice. *Hanlan v. Sernesky* [15] was an Ontario decision in which an injustice was found in respect of claims brought pursuant to Ontario's *Family Law Act* (i.e. "*FLA*"). For some background, In Ontario, the *FLA* allows for certain family members of an injured plaintiff to also claim against the defendant in the plaintiff's lawsuit, even if the family members were not involved in the accident that gave rise to the plaintiff's lawsuit. The family members can claim for loss of income as a result of taking care of the plaintiff, travel expenses to visit the plaintiff, and any other expenses incurred for the benefit of the plaintiff. The family members can also claim for an amount to compensate them for loss of care, guidance and companionship, an evaluation of which is as similarly subjective as an evaluation of pain and suffering.

In *Hanlan*, one of the plaintiffs was injured in the State of Minnesota when the motorcycle on which he was a passenger was involved in an accident. The motorcycle had a liability insurance policy that was issued in Ontario by an Ontario insurance company. The other plaintiffs in this action were the injured person's parents and siblings who sued pursuant to the *FLA*. Minnesota law prohibited *FLA*-type claims. The Court of Appeal for Ontario upheld the lower court's ruling that the appropriate law to apply was the law that was closely connected to the parties as opposed to *lex loci delicti*. The Court ruled that the lower court did not err in exercising its discretion, because it considered the following factors that suggested that the *lex loci delicti* principle would work an injustice:

(i) that the parties were both resident in Ontario;

[15] *Hanlan v. Sernesky*, [1998] O.J. No. 1236

(ii) that the contract of insurance was issued in Ontario;

(iii) that there was no connection with the State of Minnesota other than that it was the place of the accident;

(iv) that although the accident occurred in Minnesota, the consequences to members of the injured plaintiff's family were directly felt in Ontario; and

(v) that the uncontradicted evidence before the lower court was that the claims of this nature are not permitted under Minnesota law.

The *Somers* decision used *Hanlan* as an example of the type of injustice that a court may seek to remedy, as the application of the *lex loci delicti* principle would result in the unavailability of a complete category of claim or cause of action. *Somers* seems to suggest that there is a difference between a case in which a plaintiff would have different/lower damages available to him, and a case in which a plaintiff would have no remedy available at all, and that it is only in the latter case where an injustice may arise[16].

The Ontario court decision of *Charron v. Bel Air Travel Group Ltd.*[17] ruled on the issue of an appropriate forum to hear a dispute, and did not rule on choice of law. However, in *Charron*, it was held that the *FLA* claims of the primary plaintiff's children would be lost if the case proceeded in Cuba as opposed to Ontario, and this was a factor the court used to assume

[16] *Royal & Sunalliance Insurance Company of Canada v. Wawanesa Mutual Insurance Co.*, 84 O.R. (3d) 449
[17] *Charron v. Bel Air Travel Group Ltd.*, 92 O.R. (3d) 608

jurisdiction. The corollary to this is that the *FLA* claims could be available if an Ontario court assumed jurisdiction, meaning an Ontario court may choose to apply Ontario law [18].

Despite the above cases, there are no decisions that have created a blanket rule that *FLA* claims automatically fall within the limited exception to the *lex loci delicti* principle when all the parties are residents of a jurisdiction that allows such claims and a forum in this jurisdiction is hearing the dispute. Rather, appellate courts have granted deference to the lower courts' decisions to allow such an exception. For example, the Court of Appeal for Ontario in *Wong*, mentioned earlier, noted that it is not necessarily specific facts similar to *Hanlan* that give rise to an injustice.

Wong was followed more recently in the Ontario decision of *Anand v. Rumpal et al.*[19], which involved an Ontario-resident plaintiff who was a passenger in a rented vehicle that was driven by the Ontario-resident defendant. The rented vehicle was involved in a single-vehicle motor vehicle accident while travelling in New York. Under Ontario law, the liability policy of the rental company would respond to the plaintiff's claims. Under New York law, it is possible that the defendant would not have a liability insurance policy to indemnify the plaintiff [20]. The defendant brought a summary judgment motion, in which it was argued that this was a case for the exception to the *lex loci delicti* principle, and that Ontario law should apply. He argued that if

[18] The *Charron* decision was appealed to Court of Appeal for Ontario and the Supreme Court of Canada. The appeal was dismissed at both levels, and the appellate courts did not denounce the reasoning of the original decision.

[19] *Anand v. Rumpal et al.*, 2014 ONSC 7560.

[20] The defendant did not have his own automobile insurance policy, and relied on the policy of the rental company. He argued that New York law could be interpreted in such a way that the rental company's insurance policy did not have to respond.

New York law applied, the plaintiff could be denied effective recovery. However, the court ruled that such a hypothetical injustice cannot ground a court's discretion to deviate from *lex loci delicti*. The court considered both previous decisions of *Hanlan* and *Wong*, and noted that the decision of *Wong* "narrowed the injustice exception". The court did not rule whether Ontario law or New York law applied, and instead left it up to the trial judge.

There is a lack of clarity surrounding the exception to the *lex loci delicti* rule in Canada. Canadian courts have been granted limited discretion to apply the law of the jurisdiction where the lawsuit is proceeding, as opposed to the law of the jurisdiction where the accident occurred, in instances where an injustice would otherwise arise. The determination of whether an injustice would arise is a factual inquiry. If a plaintiff would be deprived entirely of a claim or cause of action under the law of the jurisdiction where the accident occurred, and all the parties are residents of the jurisdiction where the lawsuit is proceeding, this may give rise to a finding of injustice but not necessarily. Such an exception is less likely to be applied in the case of an accident at a hotel, because the hotel owner or operator is usually not located in the Canadian jurisdiction. What is known, however, is that a court's exercise of its discretion is likely to be granted deference on appeal.

CONCLUSION

When a hotel owner or operator is faced with a personal injury lawsuit that has been initiated in a Canadian court by a Canadian plaintiff, it may be worried about the prospect of having to deal with Canadian law and potential North American-style damages awards. The hotel

defendant may be able to successfully raise a jurisdictional defence that the Canadian court should allow the lawsuit to instead proceed in the jurisdiction where the accident occurred.

If a defendant is unsuccessful in raising a jurisdictional defence, it must defend the claim in the Canadian court. However, the *lex loci delicti* rule applies, such that all substantive rights of parties are to be governed by the law of the jurisdiction where the tort was committed, while matters of procedure are to be governed by the law of the forum in which the lawsuit is proceeding. Substantive law creates rights and obligations and is concerned with the ends which the administration of justice seeks to attain, whereas procedural law is the vehicle providing the means and instruments by which those ends are attained. Canadian courts have discretion to depart from the *lex loci delicti* rule in international litigation when there are circumstances in which such application would work an injustice; however, such circumstances would be rare.

With respect to a defendant's liability, issues of negligence, including the applicable standard of care, duty owed to the plaintiff, causation, conditions for liability, contributory negligence, assumption of risk, imputed negligence and joint liability, are considered substantive in nature. With respect to damages, entitlement to various heads of damages is considered a matter of substantive law, whereas the quantification or measurement of damages is considered a matter of procedural law. If a certain head of damages is available in the country where the accident occurred, then a Canadian court will use Canadian law to quantify the damages. The basic principle of Canadian law with respect to damages is that the plaintiff should be put back into the position he or she would have been in had the accident not occurred.