Interstate journeys:

Walsh v Nagy

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Facts

On the 6th October 1993 at about 11:45 p.m. the Plaintiff was seated in the front passenger seat of a Victoria registered motor vehicle that had pulled up in the emergency stopping lane of the South Eastern Freeway about 10 kilometres east of Mt Barker, South Australia. The driver of the Plaintiff's vehicle had stopped to render assistance to the driver of a broken down vehicle. A South Australian registered motor vehicle driven at high speed by the Defendant veered from the left hand lane into the emergency stopping lane and collided with the rear of the Plaintiff's vehicle. The Defendant was found to have been driving with a very high blood alcohol level and was ultimately charged by the Police with a number of serious traffic offences. The Plaintiff sustained serious injury as a result of the collision, including a moderately severe brain injury. She was hospitatilised in Adelaide for several weeks and then transferred back to Victoria. She was unable to work for several months after the collision. She then returned to work on a graduated basis. Since the accident she has only been able to work in a limited part-time capacity. The *Transport Accident Commission* (Victoria) accepted the Plaintiff's claim.

The Relevant Law

Transport Accident Act (Vic) 1986

Section 42 Sub-Section 2 of the *Transport Accident Act* states "the person, or a Dependent or surviving spouse of the person, is not entitled to compensation in accordance with this Act if, under the law of the place outside Victoria -

(a) The person, dependent or surviving spouse has been paid or has recovered an amount of compensation or ▶

damages; or
(b) An award of compensation or judgement for damages has been made, given or entered; or
(c) Any payment into Court has been accepted; or
(d) There has been a compromise of settlement of a claim; or
(e) A claim for compensation or action for damages is pending."

This Section enables the Transport Accident Commission to terminate an accident victim's entitlement to compensation in circumstances set out in the Section. The Section was presumably designed to prevent "double dipping". The Transport Accident Commission has, however, adopted a tactical approach to the application of this Section. In Walsh's case, a decision under Section 42 (2)(e) was made on the 16th February 1994 in response to a letter from the Plaintiff's solicitors putting Transport Accident Commission on notice that it was intended to bring a common law proceeding in Victoria against the South Australian insured Defendant. The Transport Accident Commission's policy has been to make such decisions, but to limit the scope of the decision to entitlements under Sections 47 and 48, that means benefits paid for long term impairment. A decision under Section 47 is a pre-condition to the commencement of a common law proceeding in Victoria. The Section 42(2)(e) decision in question was made prior to the Court of Appeal decisions in *Wilson v Nattross* and *Martin v Kelly*. Those decisions were handed down by the Appeals Division on the 16th May 1995. Prior to those decisions, the law in Victoria enabled someone in Walsh's position to bring a proceeding in Victoria without complying with Section 93 of the Act (Section 93 requires that common law action cannot be commenced unless a "serious injury" is found by the Transport Accident Commission or the Court).

Section 35A of the *Wrongs Act* 1936 (South Australia) set out the principles governing assessment of damages in relation to injuries arising from motor vehicle accidents in South Australia. The Transport Accident Commission held the view that all of Section 35A of the *Wrongs Act* was substantive and would apply to the assessment of damages made by a Victorian Court. The Transport Accident Commission also held the view that all of Section 93 in the Victorian Act was substantive law, but that it would not apply to an interstate claim bought in Victoria, presumably because the substantive law of the place where the tort was committed would apply to govern the awarding of damages. The Appeals Division in *Wilson and Nattross* and *Martin and Kelly* held that only Sub-Sections 1 to 4 of Section 93 were substantive law and that regardless of where an accident occurred, a Plaintiff would have to meet the requirements of Section 93 in order to prosecute a common law claim for damages in Victoria. Certainly, insofar as Victoria and South Australia are concerned, the statutory compulsory third party insurers have a vested interest in maintaining that all of their relevant laws were substantive in operation so as to avoid "forum shopping" and to maintain the financial viability of their respective schemes.

Sub-Sections 1 to 4 of Section 93 of the *Accident Compensation Act* Victoria abolish the common law right except for limited class of accident victims who satisfy the "serious injury" requirements of the Section. These Sub-Sections have been held to be substantive by the Victorian Court of Appeal. The remaining Sub-Sections limit and regulate the awarding of damages and have been held to be procedural. Consequently a Victoria Transport Accident victim, injured in an inter state accident, can bring a common law claim for damages in Victoria provided the provisions of Section 93 Sub-Section 3 or Sub-Section 4 are satisfied. Subject to the Victorian Court satisfying itself that the law of the place where the tort was committed is procedural rather than substantive in operation, then the Plaintiff's damages will be assessed in accordance with the procedural law of Victoria - ie. Section 93 of the *Transport Accident Act*.

Wrongs Act 1936 (South Australia)

Section 35A sets up a statutory scheme for the assessment of damages in motor vehicle accident claims in South Australia. Sub-Section 7 states "this Section is intended to apply to the assessment of damages in respect of an injury arising from a motor accident that occurred in this State:-
(a) Irrespective of whether the assessment is made by a Court of the State or by a Court of some other State, Territory or Country; and
(b) Notwithstanding that the Court by which the assessment is made would not (but for this Sub-Section) assess the damages in accordance with, or by reference to, South Australian law."

Sub-Section 8 states if:-
(a) Damages in respect of an injury arising from a motor accident that occurred in this State are assessed by a Court that is not a Court of this State; and
(b) Notwithstanding Sub-Section 7 the Court does not assess damages in accordance with this Section and the amount of damages awarded exceeds the amount that would have been awarded in an action before a Court of the State; and
(c) The State Government Insurance Commission or Crown is liable to pay the damages awarded either under a policy of insurance or on the basis of a vicarious liability, the State Government Insurance Commission or the Crown is entitled to recover from the person to whom the damages were awarded any amount in excess of the damages that would have been awarded by a Court of the State had the damages been assessed by such a Court in accordance with this Section."

Sub-Section 7 and 8 were presumably designed to give the entire Section the character of substantive law and to thereby protect the financial position of the third party scheme in South Australia. These provisions have been the subject of judicial comment by the Appellate Courts of both South Australia and Western Australia (*Soszynski v Soszynski and Rahim v Crawther*). In both cases the Appeals Courts questioned the constitutionality of Section 35A(8). The High Court has since refused an application for special leave to appeal in *Crawther v Rahim* (unreported decision - 8th December 1997). It is clear from that decision that the High Court is of the opinion that Section 35A is procedural rather than substantive law. Consequently a Victorian resident seriously

injured in a South Australian accident who accesses one of the gateways in Section 93 of the *Transport Accident Act* will have their damages assessed in accordance with the procedural provisions of Section 93 rather than Section 35A. To ascertain what all the fuss is about, one only needs to read Section 35A Sub-Section 1 paragraph B "if damages are to be awarded for non-economic loss, they shall be assessed as follows:-

(i) The injured persons total non-economic loss shall be assigned a numerical value on the scale running from 0 to 60 (the greater the severity of the non-economic loss, the higher the number); and

(ii) The damages to be awarded for non-economic loss shall then be calculated by multiplying the prescribed amount by the number assigned under sub-paragraph i".

Jurisdiction of Courts (Cross-Vesting) Act 1987

The Act provides for the transfer or proceedings from one State to another and sets out the criteria that must be established for a Court to make such a transfer. It is important to note that no Appeal alies from an Order made under this Section.

The Australian Constitution

The Constitution provides that States must give full faith and credit to the laws and judgments of other States.

Tactical Approach

The South Australian Third Party insurer had previously sought to argue that Section 35A was substantive in operation and had to be applied by interstate Courts to damages claims arising out of accidents that occurred in South Australia. The argument had met with a singular lack of success. The principal reason for its lack of success was that the Appellate Courts found that Section 35A was procedural and would therefore only apply to proceedings commenced in South Australia. Hence, the monopoly Third Party insurer decided upon a new tactical approach to overcome this problem. Instead of trying to export the law of South Australia to another State, it decided to try and import the interstate damages claim to South Australia using the *Jurisdiction of Courts (Cross-Vesting) Act* 1987. To enable the insurer to stand some prospect of securing the transfer of an interstate proceeding back to South Australia under this Act it needed to have a related proceeding on foot in South Australia. Consequently, in the present case, the insurer issued a Supreme Court Writ against Walsh seeking declarations under Section 35A Sub-Section 7 and 8. Having laid that foundation, it was then a simple matter for the insurer to issue an application in Walsh's substantive proceeding in Victoria to have it cross-vested to South Australia to be heard with the South Australian proceeding. The cross-vesting application was heard in the Supreme Court of Victoria where an Order for the transfer of Walsh's substantive damages action to the Supreme Court of South Australia for determination was made. In other words, the tactical approach adopted by the insurer was successful in this case.

In opposing the cross-vesting application, notices under Section 78V of the Judiciary Act 1903 were given to the Attorneys General of the States, Territories and the Commonwealth putting them on notice that the cross-vesting application raised a constitutional issue. The constitutional issue involved the constitutionality of Section 35A(7) and (8). It was argued on behalf of Walsh that if the Victorian proceeding were transferred to South Australia, then the Plaintiff would be deprived of the opportunity of challenging the constitutionality of Section 35A as any argument concerning one State giving full faith and credit to the laws another State would be extinguished by a transfer.

What was at stake

Put simply, the Plaintiff's pain and suffering damages under the *Transport Accident Act* would have assessed at between $120,000 and $150,000. Under the Wrongs Act of South Australia, the Plaintiff would be lucky to be ordered $25,000 for pain and suffering. ■

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Focus on medical costs of smoking

Smokers who need tobacco-related medical treatment could be reimbursed from a compensation scheme set up under a new private members' bill to be put before State Parliament early next year.

A draft of the Tobacco Control Bill has been given to Manly Independent MP Dr Peter McDonald this week and will be ready for debate by Parliament in the new year.

It is a joint initiative of ASH Australia (Action on Smoking and Health), the Law Council of Australia and the Australian Plaintiff Lawyers Association.

ASH chief executive Ms Ann Jones said this week that the money to fund the compensation scheme would come from licensing fees for the 17,000 tobacco retailers in NSW.

The draft bill also provides further controls on tobacco sales.

APLA spokesperson, barrister Mr Neil Francey, said this week that "concern over the allocation of scarce medical and hospital resources arising from the denial of lifesaving surgery to the elderly raises serious questions about the need for tobacco companies to pay for the cost of medical treatment of smokers".

ASH Australia says smoking costs $12.7 billion in health care and other costs and accounts for 812,866 hospital-bed-days for smoking-related disease.

The Tobacco Control Act would regulate the use, supply, availability, storage control and promotion of tobacco products.

APLA hopes to secure bipartisan political support for the proposal in the run-up to the March 1999 NSW election and then press for nationally uniform legislation.

Meanwhile, in the US, the tobacco industry is reportedly nearing a $US200 billion ($317.4 billion) settlement in the class action suits brought by dozens of States and Puerto Rico.

Reuters reports that the deal, between eight State attorneys-general and four US-based tobacco giants, would call for the companies to pay $US200 billion over 25 years, with a large upfront payment.

The deal also includes restrictions on advertising and marketing, and could be announced as early as today in the US.

The talks have been held by eight States working to reach a broad settlement of 36 suits in which the attorneys-general are seeking reimbursement from tobacco companies of Medicaid costs for treating sick workers.

So far, four States have reached individual settlements worth $US36 billion.

MARGOT SAVILLE