

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 subparagraph 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 lies 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.

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