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Personal Injuries in Canadian Motor Vehicle Insurance Policies and the Conflict of Laws: An Introductory Foray

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I. *Introduction*

At one time the personal injuries aspects of a motor vehicle insurance policy were relatively simple. The insurer agreed to meet the cost of personal injuries caused to a third party by the fault of the insured. These are normally referred to as *Section A* benefits. In time, however, the coverage of the policy could be increased¹ by the payment of additional sums so as to permit:

- i) the insured persons to recover against their own insurer for injuries or loss caused by an uninsured or under-insured driver in circumstances in which liability existed at common law;
- ii) recovery by the owner or driver regardless of proof of fault for injury or loss arising out of the use or operation of a car;
- iii) persons other than the driver or owner of a car (who came within the extended definition of insured person) to recover defined amounts from the insurer in circumstances (i) and (ii).

The so-called *Section B* or “no-fault” benefits usually benefitted the owner or driver of a car (first-party claims) and members of his family or others riding in the insured’s car but could cover other passengers. The inclusion of some “no-fault” benefits has become mandatory² in motor insurance policies. This increase in coverage runs into actual or potential conflict with common law or statutory defences such as those restricting or preventing actions between spouses³ or gratuitous passengers and the driver who volunteered to drive them.⁴

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**This article is dedicated to the memory of the late Professor Arthur Foote, a friend and colleague who first kindled my interest in this area. The mistakes are, of course, my own. I acknowledge the assistance of Tim Chick and William Gilliland, students at law, Dalhousie University, in the preparation of this paper and my colleagues Vaughan Black and Leon Trakman who made helpful comments on an earlier draft of this paper.

1. *See, eg.*, the summary of developments in Canada in Linden, *Canadian Tort Law*, (3rd ed.: Butterworths, 1982) c. 17.

2. *E.g.*, in Ontario for policies after Jan. 1, 1972 (Linden, *id.* at 632). Prior to that date from 1969 awards the coverage was voluntary.

3. *See, eg.*, Married Women’s Property Act, R.S.N.S. 1967, c. 176, s. 17(3), and Insurance Act, R.S.N.S. c. 148, s. 93, though this defence was abolished in May 1986 (S.N.S. 1986, c. 35).

4. *See, eg.*, the Nova Scotia Motor Vehicle Act, R.S.N.S. 1967, c. 191, s. 221(2)(b).

At the same time as the scope of motor vehicle insurance policies increased, a need became apparent to deal with conflicts of laws problems. Generally in Canada jurisdiction could be asserted over a defendant by means of (i) personal service within the jurisdiction; (ii) submission; or (iii) *ex juris* rules.⁵ The latter did not guarantee that a default or other judgment against the foreign defendant would be binding in the defendant's home jurisdiction.⁶ These general rules obviously created hardship for people injured by foreign residents who were insured by foreign insurance companies. One early step was to permit direct enforcement of a judgment against a driver who was insured by a company present within the jurisdiction⁷, coupled with incentives such as the loss of his driving licence in his home jurisdiction⁸, to make the driver comply with judgments of jurisdictions in which the driver had caused personal injuries by his negligence. As if the jurisdictional problems were not enough, they were compounded by the choice of law rules in the conflict of laws, especially the rule⁹ governing foreign torts.

The purpose of this article is to explore in an initial but not exhaustive foray how changes in the coverage of insurance policies coupled with factors such as the development of government insurance monopolies have necessitated changes in the conflict rules, and to evaluate the success of the changes and the courts' performance with regard to the changes.

5. *E.g.*, Nova Scotia Civil Procedure Rule 10.08 (one of the broadest) allows service without leave from the Court in any case in which a non-resident defendant normally lives in another province of Canada or in a state of the United States.

6. The common law rules of recognition are based on personal service on the defendant within the jurisdiction or submission. Reciprocity (outside the area of matrimonial law) has not been a basis of recognition. The Reciprocal Enforcement of Judgements Acts add only the case where the defendant in the original proceedings was carrying on business or was resident in that jurisdiction.

It is profound irony that the Supreme Court of Canada in *Moran v. Pyle* [1975] 1 S.C.R. 393, could permit Saskatchewan jurisdiction over the Ontario company on the basis of "a tort committed in the [Saskatchewan] jurisdiction" but could not guarantee on the existing state of the law that the Saskatchewan judgement would be binding in Ontario.

This result would not follow in Australia because of the Federal Service and Execution of Process Act which guarantees enforcement of judgements of one state in other states provided a sufficient nexus exists between the "hearing" state and the cause of action. In matrimonial law reciprocity has long been the basis of recognition of divorces and nullity decrees (*see: Robinson-Scott v. Robinson-Scott* [1957] 3 W.L.R. 842 (P.D.A.)) and under the *Indyka* principle a more generous jurisdiction is conceded by the forum to a foreign jurisdiction than the forum itself claims (*Indyka v. Indyka*, [1969] 1 A.C. 33 (H.L.)).

7. *E.g.*, *see* Nova Scotia Insurance Act, R.S.N.S. 1967, c. 148, s. 101.

8. *E.g.*, the Nova Scotia Motor Vehicle Act, R.S.N.S. 1967, c. 191, s. 203.

9. In view of the lack of precision in application of the Rule in *Phillips v. Eyre* (1869) 4 Q.B. 225, *aff'd* (1870) 6 Q.B. 1, and its variants, the term "rule" may be an overstatement verging on an oxymoron.

II. *The Extension of Coverage in Motor Vehicle Policies — Two Different Provincial Models and Voluntary Private Extensions*

Although Saskatchewan was perhaps the pioneer amongst the common law provinces in reforming policies by means of its government agency,¹⁰ it will be convenient to examine the Ontario model, both because it is the province with the biggest population and because its interaction with Quebec, the other province chosen, raises interesting conflicts of laws problems.

1. *Ontario and Quebec*

The main elements of the Ontario scheme¹¹ graft onto the basic fault based system a limited amount of compensation, regardless of fault, to defined insured persons who sustain bodily injury or death, directly and independently of all other causes, by an accident arising out of the use or operation of an automobile¹².

The more radical Quebec approach was introduced on March 1, 1978¹³ when the *Parti Québécois* government created a new agency,

10. Wright, Linden, and Klar (eds.), *Canadian Tort Law — Cases, Notes and Materials*, (8th ed. Toronto: Butterworths, 1985), c. 21 at 36.

11. *Insurance Act*, R.S.O. 1980, c. 218, ss. 323, 233. See also Schedule 3 of this Act.

12. The system is described in more detail in Wright, Linden and Klar, *supra*, note 10, c. 21 at 30. An “insured person” includes any occupant of the insured vehicle, any person who is struck in Canada by the insured automobile, and the insured and members of his family injured while occupants of another vehicle or while they are pedestrians.

The benefits are substantial. All reasonable expenses incurred within four years from the date of the accident for necessary medical, surgical, dental, chiropractic, hospital, professional nursing, ambulance service, and rehabilitation care to a limit of \$25,000 per person is paid. The insurer, however, is not liable for any portion of these expenses that are “payable or recoverable under any medical, surgical, dental, or hospitalization plan or law”. In addition, funeral expenses up to the amount of \$1,000 per person will be reimbursed. Death benefits are payable in the amount of \$10,000 for a head of the household, \$10,000 for the spouse of the head of the household and \$2,000 for dependants. If the head of the household dies, leaving two or more survivors, an additional \$1,000 is payable for each survivor other than the first.

Weekly disability benefits are forthcoming during the time when a person “suffers substantial inability to perform the essential duties of his occupation or employment”. To qualify, this inability must occur within 30 days of the accident and the person must have been employed at the date of the accident. These payments will stop after 104 weeks, however, unless it is established that such injury continuously prevents such person from engaging in any occupation or employment for which he is reasonably suited by education, training or experience. In such a case weekly benefits will run for the duration of the inability.

The amount of the weekly benefit is 80 per cent of the gross weekly earnings subject to a maximum of \$140 per week. For a housekeeper who is unable to perform any of his or her duties, by reason of incapacity, the payments are \$70 a week to a maximum of 12 weeks.

Tort rights are preserved for losses over the amount of these benefits. Payments made under the no-fault plan, however, are deducted from any tort recovery (*Insurance Act*, R.S.O. 1980, c. 218, s. 239(2)).

13. After the *Report of the Committee of Inquiry on Automobile Insurance*, (1974) — Gauvin Committee.

called *Régie de l'Assurance Automobile du Québec* to supply compensation to all Quebec victims of auto accidents regardless of fault in place of the traditional fault based system.¹⁴

2. *Voluntary Extensions of Policies*

In addition to the compulsory extensions required by provincial laws a number of people chose to extend their coverage in case they were injured by an uninsured or under-insured motorist. There were no doubt many reasons for this but foremost amongst them were:

- i) the fact that some Canadian drivers were driving in states of the United States of America which had no unsatisfied judgments fund for motor accident cases, and
- ii) a trilogy of Supreme Court of Canada decisions¹⁵ alerted drivers to the fact that the provincial minimum coverage in their policies might

14. Wright, Linden and Klar, *supra*, note 10, c. 21 at 40 conveniently describe the main elements:

... the right to sue in tort (or delict) was completely abolished. In its place, a compensation system was enacted which pays all reasonable expenses incurred by those injured in car accidents including \$1,466.32 for funeral expenses. In addition, an income replacement indemnity is payable to those victims who are unable to work as a result of an accident. The minimum amount is \$117.31 per week. The maximum indemnity is 90% of net income, which is calculated after certain deductions are made from a maximum gross annual salary of \$26,000. These payments may be made for up to five years and then may continue until retirement with appropriate deductions for other benefits received. No payments are made for the first seven days.

Death benefits are also payable. The dependend survivors are entitled to a pension based on Disability Income Benefits of the deceased. There is a minimum pension of \$117.31 plus \$14.67 per dependent up to \$175.66 and if minor children are killed the parents receive \$5,865.32.

An interesting feature of this plan is the payment of a lump sum indemnity up to a maximum of \$29,326.52 if a victim sustains injury, disfigurement, dismemberment or loss of enjoyment of life.

As for appeal rights, there is a right of reconsideration by the *Régie*. Following that, a dissatisfied claimant may appeal to the *Commission des Affaires Sociales*.

Compensation funds are also established for accidents involving hit-and-run drivers, certain accidents off the highway and for unsatisfied judgement up to a maximum of \$50,000.

Quebec citizens are covered by the plan if they are involved in accidents while outside their home province. Non-residents of Quebec are covered for collisions that occur in Quebec but benefits are provided to them only to the extent that they are not responsible for the accident. The decision of the *Régie* about the percentage of responsibility may be contested in the courts.

The fund is financed from contributions from automobile owners, automobile drivers, interest earned from the investment of accumulated funds and a portion of the taxes collected under the Fuel Tax Act.

15. *Andrews et al. v. Grand & Toy Alta. Ltd.* (1977-78), 3 C.C.L.T. 225; *Arnold et al. v. Teno et al.* (1977-78), 3 C.C.L.T. 272; *Thornton et al. v. Bd. of School Trustees of School District*

not cover either injuries caused by themselves to third parties or injuries caused to themselves by a driver carrying minimum coverage.

The industry's response was to offer a rider known as S.E.F. 42, later replaced by S.E.F. 44. S.E.F. 42 read in essence:

. . . the Insurer shall indemnify an insured person who sustains bodily injury or death by accident arising out of the use or operation of an automobile (by an underinsured or uninsured motorist) for the amount such person is legally entitled to recover from the under-insured or uninsured motorist whose vehicle caused the injury or death.¹⁶

S.E.F. 42 was prefaced by a "brief explanation" which stated:

By this endorsement your Insurer provides additional benefits to you and other insured persons who have a claim against another motorist for injuries or death if the other motorist has insufficient insurance to pay the claim. The limit of this coverage is the difference between the liability insurance limit of your policy and that carried by the motorist at fault. For example, if your policy shows a liability limit of \$500,000 and you obtained a judgment of \$300,000 against the "at fault" motorist — but he was insured for only \$100,000, you would be able to claim the difference of \$200,000 from your Insurer. The coverage also applies if the "at fault" motorist is not insured.

The infelicities¹⁷ of the drafting raise questions about whether recourse to the *contra proferentum* rules are appropriate, and whether, in a conflict of laws situation involving a suit in another jurisdiction, the insurer was guaranteeing to pay whatever was the unsatisfied judgment — even if it was arrived at because of traditionally higher awards in the foreign forum than might have been expected under the law governing the insurance contract.

No. 57 (Prince George) et al. (1977-78), 3 C.C.L.T. 257. These cases are commented on by W. H. Charles, *A New Handbook on the Assessment of Damages and Personal Injury Cases from the Supreme Court of Canada* (1977-78) 3 C.C.L.T. 344.

16. Indemnity limited to the sum specified in the policy, in Canadian dollars.

17. S.E.F. 44 elaborated the earlier scheme by providing in clauses 5 and 6:

5. DETERMINATION OF THE AMOUNT AN ELIGIBLE CLAIMANT IS LEGALLY ENTITLED TO RECOVER

- (a) The amount that an eligible claimant is legally entitled to recover shall be determined in accordance with the procedures set forth for determination of the issues of quantum and liability by the uninsured motorist coverage provisions of the policy.
- (b) In determining the amount an eligible claimant is legally entitled to recover from the inadequately insured motorist, issues of quantum shall be decided in accordance with the law of the province governing the policy and issues of liability shall be decided in accordance with the law of the place where the accident occurred.

III. *Solving the Jurisdiction and Enforcement of Judgements Problem* — *The Power of Attorney and Undertaking*

The old approach¹⁸ of allowing direct enforcement of a local judgment against the defendant's insurer was predicated on national insurers being resident in all provinces. The growth of provincial crown agencies having

- (c) In determining any amounts an eligible claimant is legally entitled to recover, no amount shall be included with respect to pre-judgement interest accumulating prior to notice as required by this endorsement.
- (d) In determining any amounts an eligible claimant is legally entitled to recover, no amount shall be included with respect to punitive, exemplary, aggravated or other damages the award of which is based in whole or in part on the conduct of the inadequately insured motorist or person jointly liable therewith, to the extent that the said damages are not for the purpose of compensating the eligible claimant for actually incurred losses.
- (e) In determining any amounts an eligible claimant is legally entitled to recover from an inadequately insured motorist as defined in paragraph 1(e)(i), no amount shall be included with respect to costs.
- (f) No findings of a Court with respect to issues of quantum or liability are binding on the Insurer unless the Insurer was provided with a reasonable opportunity to participate in those proceedings as a party.

6. PROCEDURES

- (a) The following requirements are conditions precedent to the liability of the Insurer to the eligible claimant under this endorsement:
 - i) The eligible claimant shall promptly give written notice, with all available particulars, of any accident involving injury or death to an insured person and of any claim made on account of the accident;
 - ii) the eligible claimant shall, if so required, provide details of any policies of insurance, other than life insurance, to which the eligible claimant may have recourse;
 - iii) the eligible claimant and the insured person shall submit to examination under oath, and shall produce for examination at such reasonable place and time as is designated by the Insurer or its representative, all documents in their possession or control that relate to the matters in question, and they shall permit extracts and copies thereof to be made.
- (b) Where an eligible claimant commences a legal action for damages for bodily injury or death against any other person owning or operating an automobile involved in the accident, a copy of the Writ of Summons or other initiating process shall be delivered or sent by registered mail immediately to the chief agency or head office of the Insurer in the province together with particulars of the insurance and loss.
- (c) Every action or proceeding against the Insurer for recovery under this endorsement shall be commenced within 12 months from the date upon which the eligible claimant or his legal representatives knew or ought to have known that the quantum of the claims with respect to an insured person exceeded the minimum limits for motor vehicle liability insurance in the jurisdiction in which the accident occurred. No action which is commenced within two years of the date of the accident shall be barred by this provision.

18. See *supra*, note 7.

a monopoly of motor insurance in Saskatchewan, Manitoba and British Columbia and of personal injury coverage in Quebec heightened the problems. It was possible for a judgment to be obtained against a defendant in province A¹⁹ but to be unenforceable in province B where the defendant resided and where his insurance company solely resided and did business.

Superintendants and Registrars of Insurance have considerable powers to regulate what will and will not be regarded as insurance sufficient to comply with the laws of their jurisdiction. Foreign residents' insurance will have to be satisfactory to the local registrar or superintendent. Collectively the superintendents or registrars can bring considerable power to bear on insurance companies by insisting on minimum standards necessary for foreign insureds to drive in their jurisdiction under the "pink-slip" scheme. As a result of an agreement between insurers and the registrars or superintendents certain undertakings were given by the insurers and incorporated in local legislation or regulations.²⁰ One might speculate whether construing such agreements against the insurance industry is appropriate to cases where "gentle persuasion" has been applied by government agencies or officers in order to secure the agreement.

1. *The Purpose*

The purpose of the agreement between the insurers and superintendents/registrars, and the consequent implementing legislation, is to require the insurer to appear (and to give the superintendent/registrar an irrevocable power of attorney to appear on the insurer's behalf)^{20a} and to deprive the

19. *See supra*, note 6.

20. *E.g.*, see the new s. 93A added to the Nova Scotia Insurance Act, S.N.S. 1982, c. 31:

93A (1) In any action in the Province against an insurer transacting the business of automobile insurance in the Province or its insured arising out of an automobile accident in the Province, the insurer shall appear and shall not set up any defence to a claim under a contract made outside the Province, including any defence as to the limit or limits of liability under the contract, that might not be set up if the contract were evidenced by a motor vehicle liability policy issued in the Province, and the contract made outside the Province shall be deemed to include the benefits prescribed pursuant to Section 100D.

(2) In any action in another province against an insurer transacting the business of automobile insurance in Nova Scotia or its insured arising out of an automobile accident in the other province, the insurer shall appear and shall not set up any defence to a claim under a contract evidenced by a motor vehicle liability policy issued in the other province.

(3) Where the Superintendent is satisfied that an insurer has failed to comply with the provisions of this Section, he may issue an order directing the insurer to cease transacting the business of automobile insurance in the Province.

20a. The power of attorney authorises any Registrar or Superintendent of Insurance who is a party to the agreement to: "accept service of notice or process on its behalf" with respect to an action or proceeding against it or its insured arising out of a motor-vehicle accident in any of

insurer of the right to avail itself of a unique or unusual defence available under the law governing the contract of insurance but not under the *lex fori*. The classic type of situation is one in which a policy (often one issued by a monopoly crown agency such as I.C.B.C. or its Manitoba or Saskatchewan equivalents) contains a restriction on the validity of the policy if the insured either falsely declares his place of residence²¹ or changes his or her place of residence after taking out his insurance policy.²² In the absence of the agreement devised by the superintendents and registrars and the insurance industry, the defendant would be uninsured as a result of a clause in the defendant's policy²³ and the plaintiff would have to resort to the remedies provided by the uninsured drivers fund. It is possible that the registrars and insurance industry were trying to direct matters to be governed by the *lex loci delicti*. For instance in *Kolmatycki*,²⁴ s. 31(4) of the Manitoba Act,²⁵ which restricts the insurer to the defences to those in the *lex fori*, is prefaced by the words "in an action in another province or territory of Canada against the insurer . . . arising out of the motor vehicle accident in that province or territory". Thus the scheme may have envisaged that the *lex fori* and *lex loci delicti* would be the same. In fact the legislation implementing the reciprocal scheme elsewhere is not so narrowly drawn and moreover the registrars may not have been aware of the width of some provincial *ex juris* rules which could lead to a case being heard in a jurisdiction where the defendant was not resident and in which the accident had not occurred.²⁶

the designated Provinces or Territories. The full text is set out in the decision in *Van der Est v State Farm* (1983), 45 B.C.L.R. 133 at 135 (B.C.S.C.) This constitutes a basis under both the Reciprocal Enforcement of Judgements Acts and at common law for the enforcement of a foreign judgment. See further: *Moore v Mercator Enterprises Ltd* (1978), 90 D.L.R. (3d) (N.S.T.D.)

21. *Administrator, Motor Vehicle Accident Claims Act v. Saskatchewan Government Insurance Office*, [1981] 4 W.W.R. 492 (Alta. C.A.).

23. Reinforced by s. 53 of The Manitoba Automobile Insurance Act, S.M. 1970, c. 102, as amended, which states: "Where a vehicle designated in an owner's certificate is operated in another province, state or country when the vehicle is required by the law of that province, state or country to be registered or licenced in that province, state or country but is not registered or licenced, that owner's certificate shall be deemed to have been revoked at the time of the commencement of such operation."

24. *Supra*, note 22.

25. The Automobile Insurance Act, S.M. 1970, c.102, as amended.

26. See: *Robinson v. Warren* (1982), 55 N.S.R. (2d) 147 (C.A.) in which a plaintiff resident in Alberta was injured in a motor accident there and sued in Nova Scotia where she was convalescing at her parents' home. Service was effected on the defendant under N.S. C.P.R. 10.08. If Civil Procedure Rule 10.08 were held to be dealing with property and civil rights outside the province it would be unconstitutional under the Rule in *Royal Bank of Canada v. The King*, [1913] A.C. 283 (J.C.P.C.).

2. *To What Does the Undertaking Apply?*

In *Shea v. Manitoba Public Insurance Policy*²⁷ the British Columbia courts held that the undertaking to appear and not to raise defences other than those arising under the *lex fori* only applied to liability policies. Therefore Section B benefits (or no-fault benefits) were outside the ambit of the undertaking, a fact that produced interesting consequences on the actual facts of that case.²⁸

It is important to study the purpose for which an undertaking was given. In *Van der Est v. State Farm Fire and Casualty Company*²⁹ Wetmore, L.J.S.C. was unwilling to apply the “Power of Attorney and Undertaking” given by the defendants to a B.C. plaintiff in an action against a B.C. resident defendant. The accident had occurred in Hawaii and State Farm was the insured of the rented car there. The judge felt that the undertaking was intended to cover motor accidents in B.C. (e.g. where a B.C. resident is injured by a State Farm-insured driving from the continental U.S.A. into B.C.), bringing it outside the facts. This analysis of the purpose of the power of attorney and undertaking seems to have escaped the Ontario courts in *Travelers Canada v. Macdonald*³⁰, which involved severe injuries caused in Michigan to a passenger in a rented van. Travelers was the insurer of the father’s car on which the plaintiff, his

27. (1985), 20 C.C.L.T. 72 (B.C.C.A.). The point was not raised in *Wardon v. McDonald* (1986), 55 O.R. (2d) 182 (Dist. Ct.) as the court followed the decision in *MacDonald v. Proctor* (*infra*, note 34). In an action in Ontario by a Michigan insurer to recover no-fault benefits paid to a Michigan insured it was held that the undertaking by the Michigan insurer to appear in Ontario did not make the policy an Ontario policy whereby the payment of no-fault benefits constituted a release of the defendant’s liability.

28. The infant plaintiff, who was injured whilst a passenger in a car registered and insured in Manitoba and operated by a B.C. licensed driver, obtained a judgment for \$831,327 against the owner and driver of the car. The owner carried a M.P.I.C. policy with a limit of \$300,000 and the driver had an I.C.B.C. policy with a \$200,000 limit. There was then an action in relation to “no fault” benefits between M.P.I.C. and I.C.B.C. to decide how the losses should be apportioned. Although M.P.I.C. had paid out the \$300,000 limit on the policy (\$2,000 by way of medical expenses, \$7,500 by way of *ex gratia* payment, \$6,000 by way of disability benefit and \$284,000 paid into court), the British Columbia Court of Appeal held that the Manitoba regulation setting out the limit of liability only applied to liability for damages and therefore M.P.I.C. was liable to pay “no-fault” benefits in addition to the \$300,000. Although in both provinces “no-fault” benefits are deducted from the judgment (by way of an express statutory exception to the Rule in *Boarelli v. Flannigan*, [1973] 3 O.R. 69 (C.A.)) and reduce the liability of the insured to pay damages, they did not reduce the liability of the insurer to pay the no-fault indemnity. Although the liability of the defendant in the tort action was reduced by the “no-fault” benefits, the damages still exceeded the \$300,000 limit on liability coverage which M.P.I.C. was bound to pay. The no-fault benefits were payable in addition to that sum. To compound M.P.I.C.’s problems, if the case had been heard in Manitoba costs would have been apportioned between M.P.I.C. and I.C.B.C., but in British Columbia the practice was to make the first insurer, M.P.I.C., pay in full.

29. (1983), 45 B.C.L.R. 133, (S.C.).

30. (1985), C.C.L.I. 314 (Ont. C.A.).

daughter, was named as an occasional driver. General Accident was the insurer of the van rented from Budget. Since Ontario cars were often driven in the U.S.A., Travellers had made an agreement with the Michigan Superintendent of Insurance to subject itself to the Michigan Insurance Code which (i) provided benefits on a more generous scale than in Ontario, and (ii) made the father's insurer rather than General Accident primarily responsible. Although the Ontario Court of Appeal held that the basic terms of the contract were governed by Ontario law, they held that for accidents in Michigan the scope of the policy was enlarged. The logic of allowing Michigan law to govern the extent of liability of parties all of whom were normally resident in Ontario and the priority between two Ontario insurers needs further scrutiny. In cases where the *lex loci delicti* is fortuitous more sophisticated interest analyses are possible.³¹

A related but not identical problem arose in *Cooper Estate v. Canadian Home Assurance Co.*³² A Nova Scotia resident was insured by the appellants under a Nova Scotian policy of motor insurance that contained the standard S.E.F. 42 endorsement permitting the respondent to claim back against his own insurer in the event of his suffering personal injuries or death at the hands of an uninsured or under-insured motorist up to an indemnity limit of \$500,000. The insured, whilst crossing a road, was hit and killed by a motorist resident in Florida carrying the Florida minimum public insurance coverage of \$10,000. Florida had no unsatisfied judgment or similar fund. Despite allegations that the respondent was intoxicated and had walked into the path of the Florida driver, damages potentially could exceed the policy limits, particularly if they were as assessed by Florida law. Even if they did not exceed the policy limit the damages would probably be much higher if governed by Florida law and procedure (including jury trial) than if governed by Nova Scotia law. The respondent launched concurrent proceedings in both Florida and Nova Scotia against the appellant. The Florida proceedings were originally launched against the Florida motorist and then the appellant was added as an additional party. During the course of the appellant's successful application to restrain the respondents from pursuing their Florida claim against the appellant (which is discussed in more detail later) a question arose about whether Canadian Home had submitted to the Florida court's jurisdiction. In 1971, by a director's resolution, Canadian Home had given the Insurance Commission of Florida a power of attorney to accept process arising out of a "motor vehicle accident in Florida", and would "accept as final and binding any

31. See: *Lewis v. Leigh et al.*, 54 O.R. (2d) 324 (C.A.).

32. (1986), 73 N.S.R. (2d) 230 (C.A.).

final judgment of any court . . . in Florida . . . in any action arising out of a motor vehicle accident in the State of Florida". MacKeigan, J. A. interpreted the resolution as "properly designed to ensure that Florida persons and property can collect against foreign drivers under foreign policies",³³ i.e., that if a Florida resident had been injured in Florida by a Nova Scotia insured and resident motorist the resolution would have applied. It would not, by inference, be applied to a motor accident in which a Nova Scotia resident was injured in Florida by a Florida resident motorist and then sought to claim back on his Nova Scotian insurance from a Canadian company.

3. *Does the Undertaking Alter the Law Governing the Policy from That of the Issuing Province to That of the Lex Fori?*

This issue has arisen in a number of cases.³⁴ In the case of *MacDonald v. Proctor*³⁵ the plaintiff was injured in a car driven by Elizabeth Sneyd and owned by George Sneyd. However the Sneyds were not at fault because they had been hit by another car driven by Proctor. The plaintiff's special damages were \$62,583 and in addition general damages of \$142,714 were payable. The plaintiff, although suing in Ontario, was a Manitoba resident and insured with the Manitoba Public Insurance Corp. Pursuant to her policy she received disability benefits of \$18,000 and the question arose whether she should have these payments deducted from her damages.

If all the elements of the case had involved Ontario law, ss. 231 and 237 of the Ontario *Insurance Act* ^{35a} would have apparently authorised the deduction of the disability benefits. The Manitoba legislation appeared to be similar but was not pleaded as a defence, which perhaps was unfortunate. However s. 200(1) of the Ontario Act apparently restricted the applicability of ss. 231 and 237 to contracts of insurance made or renewed in Ontario. Thus the Manitoba payments fell outside the terms of the insurers' undertaking and couldn't be read as incorporating into extraprovincial policies all the terms that an Ontario

33. *Id.*, at 233, para. 17.

34. See, e.g., *Corbett v. Coop Fire and Casualty Co.* (1984), 9 C.C.L.I. 300 (Atla. Q.B.), and *MacDonald v. Proctor* (1979), 105 D.L.R. (3d) 169 (S.C.C.) dismissing an appeal from (1977), 86 D.L.R. (3d) 455 (Ont. C.A.).

35. *Id.* See also: *Waldon v. McDonald* (1986), 55 O.R. (2d) 1986 (Dist. C.) a case in which Waldon's Michigan insurer had paid no-fault benefits and then instituted a subrogated claim in Ontario against the defendant for the benefits. The Court held that the undertaking by the Michigan insurer to appear in Ontario and not to set up certain defences there did not make the policy an Ontario policy so as to make the payment of no-fault benefits a release of the defendant's liability.

35a. R.S.O. 1980, c. 218.

policy was obliged to contain. As Zuber J. A.³⁶ observed, “an undertaking by the Manitoba Public Insurance Corporation to, in effect, observe Ontario rules to a certain extent, where its insured is involved in Ontario proceedings, does not render the Manitoba policy ‘made in Ontario’.” It should be emphasised that the point made in *Shea*³⁷ about the undertaking only applying to “liability policies” was not addressed in this case.

Whilst it may have been desirable that “no-fault” benefits paid under an insurance policy, wherever it was made, should be deductible from an Ontario liability award, a narrow constructionist approach will prevent that result. Perhaps, then, a better approach would have been to construe the legislation so as to avoid a “false conflict” that might give a plaintiff an advantage she would not have if all the events occurred in Manitoba or Ontario.

Similar points arose in *Corbett v. Coop Fire Casualty Co.*³⁸, where an accident in British Columbia was caused by an Albertan resident driving a vehicle insured in Alberta. The court was called upon to decide:

- i) Were the plaintiffs who had obtained a judgment in B.C. entitled to prejudgment interest?
- ii) Were the plaintiffs entitled to post-judgment interest at more than 5% under Alberta law?
- iii) Were the no-fault benefits governed by the B.C. Insurance Act rather than under the Alberta legislation?
- iv) Were additional no-fault benefits payable under awarding legislation in Alberta that first came into force three months after the accident?

The court held that the British Columbia provisions governing prejudgment interest only covered I.C.B.C. policies; the plaintiffs’ claim actually arose under the terms of the Alberta Insurance Act which governed “no-fault benefit”. The Alberta policy was not to be treated as one “made in British Columbia”, nor was the Alberta amendment intended to have retrospective effect to accidents occurring before its passage. On the question of post-judgment interest, the defendants were ordered to pay this as a “just debt” under the Alberta Act.

Although the terms of the policy generally remain those of the issuing province, including the ceiling on liability, such a defence will not apply where the *lex fori* has fixed a higher minimum level of liability than that of the issuing province. Moreover the coverage may have increased in

36. *MacDonald v. Proctor*, *supra*, note 34 at 458.

37. *Supra*, note 27.

38. *Supra*, note 34.

terms of the persons covered. In *Cunningham et al. v. The Manitoba Public Insurance Corp.*³⁹ Cunningham was injured in an accident in British Columbia. The owner and driver was a Manitoba resident and insured by the defendant. In a B.C. action Cunningham sought her damages from the defendant only to have the defendant raise the issue that the Manitoba policy did not provide coverage for motorcycle passengers. If the claim had been pursued in Manitoba it would have failed. However by suing in British Columbia the plaintiff succeeded. The British Columbia Court of Appeal held that, though in a B.C. policy the possibility of excluding motorcycle passenger coverage existed, “the manner”⁴⁰ of the application of the law of British Columbia prevented such a policy from being issued in British Columbia at that time. Since the plaintiff was a resident of Prince George, B.C. there was no element of her “forum shopping” in a forum with which she had no connection. However the terms of the undertaking indicate a possibility of forum shopping if the plaintiff lives in Manitoba and only sues in B.C. to get around the “Manitoba defence”. It is not clear how much attention was given to avoid an incentive to forum shop when the undertaking was drafted.

IV. *Phillips v. Eyre*⁴¹ and Its Application in Interprovincial Motor Insurance Cases

The rule in *Phillips v. Eyre* is only applicable in cases involving foreign torts. Of the two heads, the first, actionability under the *lex fori*, was traditionally the more important. All sorts of devices were used to minimize the importance of the second- head justifiability under the *lex loci delicti*. In *McLean v. Pettigrew*⁴² the Supreme Court of Canada held that even though no civil liability existed under the *lex loci delicti* (Ontario) and the defendant had been acquitted of any provincial offence under Ontario law, there was nevertheless no justifiability under the second head of *Phillips v. Eyre*. The judgment goes close to upholding the right of the forum to second guess the *lex loci delicti* and to holding that regardless of any decision of the courts in the *loci delicti*, the very fact that an accident occurred means that some fault must have existed. The general tenor of the decision in that case and subsequent ones is that the

39. [1979] 5 W.W.R. 397 (B.C.C.A.).

40. Such a policy would have to be approved, including the form of the exclusion, and no such approval existed. Until the approval was obtained no policy containing an exclusion could be used.

41. (1870), L.R. 6 Q.B. 1. See further McLeod, *The Conflict of Laws*, (Calgary: Carswells, 1983), at 546 *et seq.*

42. [1945] 2 D.L.R. 65 (S.C.C.).

first head of *Phillips v. Eyre* is the more important of the two heads. Although the reasoning in *McLean v. Pettigrew*⁴³:

- i) is difficult to reconcile with the apparent interpretation of “justifiability” in Judicial Committee of the Privy Council decisions⁴⁴;
- ii) seems to rest heavily on the much criticised and probably wrongly decided⁴⁵ decision in *Machado v. Fontes*⁴⁶; and
- iii) seems to represent a high water mark in “homeward trendism”⁴⁷; it is nevertheless correctly decided on its facts, though not for the reasons given. In essence there was no reason to apply Ontario law to an accident between Quebec residents driving from Montreal to Ottawa which fortuitously took place in Ontario. The parties could just as easily have driven up the Quebec side of the Ottawa River. This “point of contact” type of reasoning can be found in a line of American cases⁴⁸ and in the House of Lords recognition in *Boys v. Chaplin*⁴⁹ that, though as a general rule there had to be given recognition to the *lex loci delicti*, and that civil liability had to exist for the particular head of damages⁵⁰ claimed, there could be exceptions to that rule. There was simply no reason in *Boys v. Chaplin* to apply Maltese law to an accident in Malta between two English⁵¹ servicemen serving in Malta. Nor was the plaintiff seeking to “forum shop” unfairly by suing a defendant in his jurisdiction of ordinary residence. If the plaintiff had been Maltese and had been trying to gain substantially different heads of damage (and thus greater recovery) than those available in the *lex loci delicti*, it might have been a different matter.

The need for a policy analysis and understanding of tort principles in a conflict of laws context, even if this means modification of the *Phillips v. Eyre* principle, was partially appreciated by the Ontario Court of

43. *Id.*

44. *E.g.*, *C.P.R. v. Parent*, [1917] A.C. 195; *Walpole v. Canadian Northern Railway Company*, [1923] A.C. 113 and *McMillan*, [1923] A.C. 120. The assumption by the forum that some offence must have occurred in the *lex loci delicti* was just what the Judicial Committee declined to assume in those cases.

45. See the attitude of the House of Lords in *Boys v. Chaplin*, [1969] 2 All E.R. 1085.

46. [1897] 2 Q.B. 231 (C.A.).

47. For a “revenge” case in which Ontario unreasonably discounted the impact of the Quebec *lex loci delicti*, see *Going v. Reid* (1982), 35 O.R. (2d) 201 (H.C.).

48. *E.g.*, *Babcock v. Jackson* (1963), 12 N.Y. (2d) 473.

49. [1971] A.C. 356.

50. Thus preventing the manipulation of the procedure/substance distinction by the forum to override the *lex loci delicti* by saying that once some liability existed under the *lex loci*, all matters of damages, whether heads of damage or qualification, become a procedural matter for determination by the forum. For the suggestion that remoteness of damage is a substantive matter in a contract case see *D’Almeida v. Sir Frederick Becker Co.*, [1953] 2 Q.B. 329.

51. For a possible complication, if one or both of the parties had been Scots residents see *McElroy v. McAllister*, [1949] S.C. 110.

Appeal in the recent case of *Lewis v. Leigh et al.*⁵² Two automobile accidents took place in Quebec involving Ontario residents⁵³ and the main question was the extent to which the Quebec Automobile Insurance Act was applicable.

Grange J. A. described⁵⁴ the salient features of the Quebec Act⁵⁵:

... it provided personal injury insurance without fault for all residents of Quebec. It set up an insurer known as the *Régie de l'Assurance Automobile du Québec* (the "Régie") to make payments to injured persons according to a set scale. Action in the courts of Quebec was forbidden to those persons (indeed to any person). The Act also required the *Régie* to compensate non-residents of Quebec who were injured in that province but only to the extent they were not at fault. The *Régie*, under the Act, after compensating a victim of an accident in Quebec, was entitled to recover from a wrongdoer who was not resident of Quebec to the extent that the wrongdoer was responsible for the Quebec accident.

These rights were to be in lieu of a civil legal remedy by the victim. A victim not responsible for the accident in Quebec would be compensated by the Quebec *Régie* unless an agreement existed between the *Régie* and the competent authorities of the place of residence of the victim.

The Quebec scheme produced problems for an Ontario resident driving in Quebec (unless he was driving a vehicle registered in Quebec) as he was not entitled to benefits to the extent that he was at fault in the accident (s. 8). Moreover, the *Régie* reserved the right to pursue him to recover the moneys paid out (s. 9).

To resolve these problems, the *Régie* and the Minister of Consumer and Commercial Relations for Ontario entered into a Memorandum of

52. (1986), 54 O.R. (2d) 324.

53. A third accident took place in Quebec but involved New Brunswick residents.

54. *Id.*, at 326 *et seq.*

55. The relevant sections of the Act (L.Q. 1977, c. 68) are as follows:

4. The indemnities provided for in this title are in the place and stead of all rights, recourses and rights of action of any one by reason of bodily injury caused by an automobile and no action in that respect shall be admitted before any court of justice.

8. The victim of an accident that occurred in Quebec who is not resident therein shall be compensated by the *Régie* under this title to the extent that he is not responsible for the accident unless otherwise agreed between the *Régie* and the competent authorities of the place of residence of such victims.

9. Notwithstanding section 4, the *Régie*, where it compensates a victim by reason of an accident that occurred in Quebec, is subrogated in the victim's rights and is entitled to recover the indemnities and the capital representing the pensions that the *Régie* is thereby required to pay from any person not resident in Quebec who is responsible for such accident to the extent that he is responsible therefor and from any person liable for compensation of bodily injury caused in the said accident of such non-resident.

Agreement⁵⁶ providing that any Ontario resident having automobile insurance issued in Ontario was to be paid by his insurer for an accident occurring in Quebec an amount equal to all benefits payable under the Quebec Automobile Insurance Act regardless of fault. The *Régie* would not compensate any Ontario resident entitled to such payment and the *Régie* waived its right of subrogation against such persons.

The Minister implemented the agreement in Ontario by causing Ontario Regulation 1004/78 to be promulgated. It added a Part III to what was then Schedule E of the *Insurance Act*⁵⁷ entitled "Supplementary Benefits Respecting Accidents Occurring in Quebec" and essentially provided that the insurer would pay to an insured who suffered an accident in Quebec the same amount as would be provided to him under that province's Automobile Insurance Act.⁵⁸

Grange J. A. categorised the two considerations before the Court as:

1. Does the law of Ontario now incorporate the Quebec scheme of compensation for accidents occurring in Quebec?

56. The relevant parts of the Memorandum are as follows:

1.1 WHEREAS by virtue of article 8 of the Automobile Insurance Act (L.Q. 1977, c. 68) the victim of an automobile accident that occurred in Quebec who is not resident therein is compensated by the *Régie* to the extent that he is not responsible for the accident unless otherwise agreed between the *Régie* and the competent authority of the place of residence of such a victim.

1.5 AND WHEREAS it is the desire of both parties that the resident of Ontario, other than the uninsured, who is a victim of an automobile accident occurring in Quebec, be entitled to compensation on the same basis as a resident of Quebec and that his legal liability for such an accident be no greater than that of a Quebec resident.

2.2.1 The Minister shall cause to be made, by regulation, an amendment to Schedule E of the *Insurance Act* (R.S.O. 1970, c. 224), so that:

(i) A Part III is added to subsection 2 of the said Schedule which shall provide for the compensation of the insured resident of Ontario who suffers bodily injury in an accident occurring in Quebec by the insurer who issued the automobile insurance contract and this according to the provision of the Automobile Insurance Act (L.Q. 1977, c. 68) and its Regulations as may be amended from time to time, regardless of who is at fault.

2.2.2. The *Régie* shall not compensate any resident of Ontario who is entitled to receive compensation from insurer by virtue of the Part III of Subsection 2 of Schedule E.

2.3.1. Subject to paragraphs 2.3.2. and 2.3.3. hereafter, the *Régie* waives the exercise of any right of subrogation it may have, against a resident of Ontario involved in an accident, by virtue of article 9 of the Automobile Insurance Act (L.Q. 1977, c. 68).

57. R.S.O. 1970, c.224.

58. The operative clause reads as follows:

B. With respect to bodily injury, as a result of an accident, to a person insured in Quebec the insurer agrees to make payments under this Part in the same amount and form and subject to the same conditions as if such person were a resident of Quebec as defined in the Automobile Insurance Act (Quebec) and the regulations made under that Act and entitled to payments under that Act and those regulations.

2. If the answer to question 1 is no, should the law of Ontario or that of Quebec be applied to the three actions now brought in Ontario?

He considered that:

It is possible that the provinces intended to reduce the insured person's recovery to what he would get under Quebec law — Article 1.5 of the memorandum might be so read — but an agreement between governments or government agencies has no binding effect on the citizens until converted into legislation (*see: Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373; 9 N.R. 541), and that legislation has not been forthcoming.

In my view, this case really resolves itself into a problem in the conflict of laws — specifically, a question of the choice of law in an action in which the courts of Ontario have jurisdiction. And there can be no question that Ontario has jurisdiction to try cases (subject to considerations of the *forum conveniens*) where the defendant resides in and is served in Ontario.

The court justified the result by reference to *Babcock v. Jackson*⁵⁹ and *Boys v. Chaplin*.⁶⁰ The reasoning, however, was justified mainly by reference to *McLean v. Pettigrew* which, though it was felt to be worth re-examination, was said to be binding.⁶¹

The approach in this case contrasts strongly with the earlier decision in *Going v. Reid*⁶² which involved a motor vehicle accident in Quebec involving a Quebec resident defendant. The plaintiffs and corporate defendant resided in Ontario. The result of the decision was to apply the rule in *Phillips v. Eyre* as interpreted in *McLean v. Pettigrew*,⁶³ but with an inadequate discussion of the other case law, in such a way as to expose the Quebec resident to liability where no such liability existed under Quebec law after the advent of the *Régie*. The process involved holding that, as the obverse of *McLean v. Pettigrew*, in the eyes of the Ontario Court, the Quebec defendant in driving on the wrong side of the road must have breached the Quebec *Highway Traffic Act*⁶⁴ and his act was therefore “unjustifiable” under the second head of *Phillips v. Eyre*. There was even a suggestion of an alternative argument that since the defendant was still liable under Quebec law for property damage caused to the plaintiffs, a defence under Quebec law merely pertaining to personal injuries would not make the defendant's actions “justifiable”. Although this argument purported to be consistent with the actual result in *Boys v. Chaplin*⁶⁵, it seems to miss the fact that a majority of the law lords were

59. *Supra*, note 48.

60. *Supra*, note 49.

61. *See supra*, note 44 for doubts about this.

62. (1982), 35 O.R. (2d) 201 (H.C.).

63. *Supra*, note 42.

64. R.S.Q. 1977, c. 24.

65. *Supra*, note 49.

talking about the need for recovery under the *lex loci delicti* for the particular head of damage claimed (as a general rule, though the rule was subject to exceptions).

The decision attracted trenchant and justified criticism from Professor John Swan⁶⁶, cited in *Lewis v. Leigh*⁶⁷. It should henceforth be treated with caution.

V. *Judicial and Legislative Attitudes and Responses to the Quebec Scheme*

Most provinces have reached a governmental agreement with Quebec to protect the *Régie* from claims outside Quebec in respect of Quebec accidents caused by residents in other Canadian provinces covered by the agreement, and who were covered by automobile insurance in their own province of residence. Such persons were to receive from their own insurers an amount equal to the benefits paid by the *Régie* regardless of proof of fault.⁶⁸ The corollary was that Quebec residents suffering bodily injury in an accident in Manitoba were to be compensated in accordance with the Automobile Insurance Act of Quebec regardless of fault.⁶⁹ The precise scope of that agreement has already been discussed in relation to *Lewis v. Leigh*,⁷⁰ but it would be wrong to think that the attitude of the courts or the legislatures has been one of unqualified acceptance of the

66. (1985), 63 Can. Bar Review at 271, esp. 309-10.

The decision in *Going* threatens every Quebec resident by making him or her subject to Ontario law if they are so unlucky as to hit an Ontario resident. It is worth noting that the rule of *Phillips v. Eyre* as applied in *Going* is so forum-centred that the rule would not differentiate between a claim made by an Ontario resident and one made by a Quebec (or for that matter a New York) resident. Any plaintiff could recover full common law damages in Ontario. It is a poor excuse for these results to say that in many cases the Ontario judgment would not be enforceable outside Ontario; the clear potential for unfair and unjustified treatment of Quebec residents exists.

See also the subsequent case of *Ang et al v. Trach et al* (1986), 33 D.L.R. (4th) 90 (Ont. H.C.) where an Ontario resident was successfully able to sue in Ontario for a motor vehicle accident caused in Quebec by a Quebec driver. Henry J. recognised the criticism that had been levelled at *Going v Reid* and similar cases on *Phillips v Eyre*, but felt bound to follow *McLean v Pettigrew* [1945] 2 D.L.R. 65 rather than the "double actionability" test propounded in other cases. The result of the decision is unworthy of a court in a federal nation in that it deprives the Quebec resident of a defence under the law of his residence and in which the accident took place. There is an element of colonialism that applies Ontario law, including the provisions of the *Family Law Reform Act*, which allows dependants to claim damages, to an accident in Quebec caused by a Quebecer. If Ontario law was being applied to "property and civil rights outside the Province" it would be vulnerable to objection under *Royal Bank of Canada v The King* [1913] A.C. 299.

67. *Supra*, note 52.

68. See e.g., cl. 2.2.1 of the Agreement between Manitoba Public Insurance Corp. and the *Régie de l'Assurance Automobile du Québec* dated 25 Jan. 1979.

69. *Id.*, cl. 2.2.6.

70. *Supra*, note 52.

Quebec scheme. In *Perron v. Parise*⁷¹ the plaintiff passenger was injured in a motor accident in Quebec and sued the defendant. Both parties were residents in New Brunswick. The defendant unsuccessfully sought to raise the defence under s. 266(2) of the New Brunswick Motor Vehicle Act⁷² which precluded a plaintiff from having in New Brunswick “a greater right of recovery resulting from the negligent operation of a motor vehicle (in New Brunswick) than that person would have in the jurisdiction in which he ordinarily resides”.

Deschenes J. had little difficulty holding that since the plaintiff resided in New Brunswick the section did not operate to deprive him of the higher damages available in New Brunswick and did not substitute instead the Quebec “no-fault” compensation with its consequent limit on damages. However the interesting question is why the New Brunswick legislature should have legislated a “revenge” section to prevent Quebec residents injured in New Brunswick from being able to recover higher benefits in a New Brunswick negligence action that they would have recovered in Quebec under the no-fault scheme.

The background explanation for this provision is found in an annotation by Professor Walsh.⁷³

Insurers in the common law provinces were concerned that their policy-holders should be denied no-fault protection when visiting Quebec yet limited to the no-fault scale of recovery. They also were upset at the loss of control over the settlement of claims effected by the interposition of the *Régie*. Their unhappiness with the new regime was exacerbated by the fact that it purported to give Quebec residents injured abroad access to both the tort and no-fault compensation worlds.

The way this “grudge”⁷⁴ legislation works can be seen in *Morin and Faucher v. Essiembre*.⁷⁵ Two Quebec resident plaintiffs were injured in a motor accident in New Brunswick caused by the defendant, a New Brunswick resident. After recovering on a no-fault basis for their injuries from the *Régie*, the plaintiffs then sued the defendant in New Brunswick. They failed. They were restricted to the recovery a New Brunswicker could have received in Quebec. Moreover, it was suggested that a Quebec plaintiff would be entitled to recover tort damages, even on the lower no-fault scale, only when he sued in New Brunswick prior to seeking compensation from the *Régie*. Professor Walsh neatly points out the plaintiff’s dilemma:⁷⁶

71. (1983), 44 N.B.R. (2d) 409 (Q.B.).

72. R.S.N.B. 1973, c. M-17.

73. (1984), 55 N.B.R. 443 at 445, para. 7.

74. *Id.*, para. 10 (Professor Walsh’s word).

75. 1984 (51) N.B.R. (2d) 314 (Q.B.)

76. *Supra*, note 73, para. 15.

When, as the plaintiffs in *Morin* had done, he chose to first exercise his right to collect compensation from the *Régie* in Quebec, tort recovery was precluded altogether. In such a case, the real party in interest in the litigation was the *Régie* by virtue of its right of subrogation to the victim's rights of action under the *les loci delicti* against a non-resident tortfeasor. In Deschene, J.'s opinion, section 266(2) operated to deny the *Régie* any such right of reimbursement because, as the defendant's expert witness testified, "subrogated claims of (New Brunswick) insurers were not payable by *la Régie* .

Walsh criticises s. 266(2) as first, an ineffective attempt to improve the compensation of New Brunswickers in Quebec, and second, as interpreted in *Morin*, as a denial of any right in the *Regie* to seek reimbursement because, as the defendant's expert witnesses testified, "subrogated claims of (New Brunswick) insurers were not payable by *la Régie* ". This latter point she asserts misses the essence of subrogation. She points out⁷⁷ that from a reading of the section as a whole it was not intended to bar the insurer's action. Finally she indicates that such a provision may infringe the equality provisions in the *Charter* by denying the equal benefit of the local law to non-resident accident victims.⁷⁸

After the fairly unsympathetic treatment of Quebec law in *Going v. Reid*,⁷⁹ a further decision of the Ontario courts in *Duncan v. Mayhew*⁸⁰ was arguably more in accord with the exhortation in the Interpretation Acts to give statutes a remedial interpretation. The plaintiff, an Ontario resident, was seriously injured in an automobile accident in Quebec which he had been the occupant of a stolen car. The driver who caused the accident had stolen the car in Ontario and at the time of the accident was attempting to evade the Quebec police. Both the owner of the stolen car and the driver resided in Ontario. The plaintiff attempted to recover the no-fault benefits from:

- (i) the insurer of the owner of the car;
- (ii) his own father's insurer who had issued a standard Ontario policy in respect of the father's car; and
- (iii) the *Régie* .

The two Ontario insurers agreed that as between the insurer of the stolen car and the plaintiff's father's insurer, the insurer of the stolen car was the first loss insurer.

The Ontario insurers, however, raised the defence under the Ontario policy that an occupant was not entitled to section B benefits if the car was being used without the consent of the owner. But the effect of this exclusion in the standard Ontario policy was allegedly affected by the

77. *Id.*, para. 17.

78. *Id.*, para. 19.

79. *Supra*, note 62.

80. (1983), 3 C.C.L.I. 138 (Ont. H.C.).

introduction of the no-fault recovery scheme by the Automobile Insurance Act of Quebec and the conclusion of an agreement between the Ontario Minister of Consumer and Commercial Relations and the *Régie* dated Dec. 27, 1978.

Eberle J. held, as have later judges,⁸¹ that a memorandum concluded by the Crown did not of itself bind its subjects. But since the salient terms had been placed *verbatim* in valid Ontario regulations, these had a force of law entirely absent from the agreement. The case was treated as one outside the operation of conflicts rules such as the rule in *Phillips v. Eyre*, and simply involving the proper interpretation of the policy in light of the prevailing Ontario *Insurance Act* and regulations. Although there was a general exception for recovery for loss arising from the use of a stolen car, a new Part III, added at the end of Subsection 2 of Section B, obligated the insurer to pay to the insured resident in Ontario the same benefits he would receive under the Quebec Automobile Insurance Act if he were a resident of Quebec. The general exclusion for losses arising from the use of a stolen car was qualified by the words “except as provided in Part III of Subsection 2” (which specifically governed accidents in Quebec). The general exceptions and conditions were in any event qualified by the words “in so far as applicable”. Since the Quebec Act had no provision denying compensation where a person was injured by a stolen car there was no basis for giving effect to the general conditions in the policy that were not intended to apply to the specific case.

In addition, by way of an alternate *ratio decidendi*, Eberle J. held that though the whole Ontario/Quebec Agreement had not been given force of law, it was nevertheless an agreement within s. 8 of the Quebec Act, which provided that a victim of an accident in Quebec who was not resident there, was entitled to compensation from the *Régie* “unless otherwise agreed between the *Régie* and the Competent Authorities of the place of residence of such victim”. Since the agreement was valid between the parties, and the *Régie*, by entering into the Agreement, had done all it could to protect itself, it was entitled to a defence under s. 8 of the Quebec Act. Although the judge did not elaborate on how Quebec law becomes relevant, it seems implicit that Quebec law gives a complete defence to an action in tort in such circumstances and that the action would be justifiable under the second head of the rule of *Phillips v. Eyre*. This is consistent with the new interpretation of that head in *Boys v. Chaplin*⁸² and even with the old Judicial Committee decisions in *Walpole* and *MacMillan*⁸³, though less easily so with *McLean v. Pettigrew*.⁸⁴

81. See: *Lewis v. Leigh*, *supra*, note 52.

82. *Supra*, note 49.

83. *Supra*, note 44.

84. *Supra*, note 42, and by inference *Lewis v. Leigh*, *supra*, note 52. Also *Lewis v. Leigh* does not pursue *Duncan v. Mayhev*'s treatment of the agreement as a defence.

VI. *Conflicts Problems of Insurance Rider S.E.F. 42 — Cooper v. Canadian Home*⁸⁵

The proper approach to the interpretation of the voluntary additions to motor vehicle insurance policies, and whether the conflict of laws repercussions were adequately considered when drafting clauses primarily intended for use in the jurisdiction of the insured's habitual residence, emerges in the *Cooper* case. The mechanical transference of rules intended for local application to conflict of laws situations is not without risk, and it is to the court's credit that these risks did not go unnoticed.

In February, 1984, Richard James Cooper, a member of the Canadian Armed Forces who normally resided in Nova Scotia, was temporarily in Florida. As he crossed a state highway on the evening of February 14, he was struck and killed by an automobile operated by Julie K. Silecchia, a resident of Florida. Silecchia had public liability insurance coverage of \$10,000.00 (U.S.). Apparently, Florida had no unsatisfied judgment or similar fund. Silecchia's assets were unknown but seemed unlikely to be significant.

Liability for the death was in dispute. A local police report tended to absolve Silecchia; the deceased was allegedly intoxicated and had walked into the path of the vehicle. Another police eye-witness, however, suggested Silecchia was not keeping proper lookout.

The respondents were Mr. Cooper's estate and his widow and infant children. They resided in Nova Scotia where Mr. Cooper had been employed and where his estate would be administered. Mr. Cooper held a motor vehicle liability insurance policy with Canadian Home. The policy had a standard "S.E.F. 42 endorsement". The insuring clause in the endorsement stated:

... the Insurer shall indemnify an insured person who sustains bodily injury or death by accident arising out of the use or operation of an automobile (by an uninsured or under-insured motorist) for the amount such person is legally entitled to recover from.⁸⁶

The policy contained an arbitration clause:

If any difference arises between the insured person and the Insurer as to whether the insured person is legally entitled to recover damages and, if so entitled, as to the amount thereof these questions shall be submitted to arbitration of some person to be chosen by both parties, or if they cannot agree on one person, then by two persons, one to be chosen by the insured person and the other by the Insurer, and a third person to be appointed by

82. *Supra*, note 32.

86. Indemnity limited to \$500,000.00 (Can.)

the persons so chosen. The submission shall be subject to the provisions of the Arbitration Act and the award shall be binding upon the parties.⁸⁷

An action by the plaintiffs was launched against the defendant Silecchia in Florida and shortly thereafter the defendant's insurance company was added to the Florida proceedings. Shortly before Canadian Home was added to the Florida proceedings the plaintiff sued the defendants in Nova Scotia.

Various issues emerged. It appeared that the Florida claims would have permitted damages more generous as to beneficiaries and greater as to quantum than the Nova Scotia ones. Was it a correct interpretation of the Nova Scotian contract insurance that the Nova Scotia insurer agreed to pay whatever damages a Florida injury might award and which Silecchia, the negligent driver, was unable to pay? Or did the reference to liability in the arbitration clause refer to liability under the contract, thus permitting a Nova Scotian court to impose different heads of damage and different quanta than a Florida court? If twin brothers (both Nova Scotia residents) in identical family and financial circumstances had been killed (one in Nova Scotia and the other in Florida), would policy be well served by encouraging the estate of the one killed in Florida to forum shop⁸⁸ (*i.e.*, sue in Florida and recover more than the one suing in Nova Scotia)?

Faced with these possibilities the defendants were ultimately able to secure an order from the Nova Scotia Court of Appeal restraining the plaintiff from further prosecuting her Florida claim against Canadian Home. She was, of course, free to sue Silecchia there.

Canadian Home would ultimately have to face the possibility that its undertaking to appear and defend in Florida (given to the Insurance Commission of Florida) was a submission for the purposes of enforcement.⁸⁹ However, what constitutes submission is for the enforcing rather than rendering court to determine, and in the view of the Nova Scotia Court of Appeal the undertaking was properly designed to protect Florida accident victims, not Nova Scotians having recourse against their own insurers under a Nova Scotia contract.⁹⁰ The Court of Appeal decided, quoting McLeod,⁹¹ but not the latest House of Lords

87. By implication, the Nova Scotia Arbitration Act in a Nova Scotia context.

88. "As moths are drawn to the light so are litigants to the United States" *per* Lord Denning in *Smith, Kline & French v. Bloch*, [1983] 2 All E.R. 72 at 82 (C.A.). *See further* E. Edinger, *The MacShannon Test for Discretion: Defence and Delimitation* (1986), 64 Can. Bar Rev. 283; J.J. Fawcett, *Lis Alibi Pendens and the Discretion to Stay* (1984), 47 Mod. L.R. 481.

89. *See, supra*, the text to note 27 *et seq* and especially the text to note 32.

90. *I.e.*, one giving rights if a negligent driver was under-insured or uninsured.

91. *Conflict of Laws*, (Toronto: Carswell, 1983) at 119-120.

authorities,⁹² that “the plaintiff’s action was vexatious, oppressive and an abuse of process”.

The question of whether the arbitration remedy should have been followed first was regarded as premature since in the Court’s view the duty to arbitrate was hardly relevant until the Cooper estate established a claim against Silecchia. The Court did, however, suggest that the question of law in this case, the major issue, was likely to be better answered by a judge than an adjuster or arbitrator.⁹³

VII. Conclusion

There is no doubt that the various agreements and undertakings, their reduction to statutory forum and some of the voluntary riders in insurance policies are very complex. The courts have expressed various cries of anguish. Perhaps the most dramatic are from the *Shea* line of cases.⁹⁴ The expense of this case alone speaks volumes for the (unnecessary) complexity of this area of law. In the second trial decision⁹⁵ dated December 21, 1984. Bouck J. noted that:

92. *E.g.*, *Rockware v. MacShannon* [1978] 2 W.L.R. 362.

93. *Supra*, note 32.

94. *Shea v. Shea et al.*, [1983] 6 W.W.R. 340 (B.C.S.C.); *Shea et al. v. M.P.I.C.*, [1985] 2 W.W.R. 652 (B.C.S.C.); *Shea v. Shea et al.*, [1985] 6 W.W.R. 641 (B.C.C.A.).

95. See the comments of Bouck J. at [1983] 6 W.W.R. 340 at 341 and 343.

Reasons for judgment were handed down in these actions on 21st April and 26th May 1983 ([1983] 1 L.R. 1-676). Difficulties occurred with respect to settling the exact terms of the orders. On 27th July 1983 counsel for the plaintiff and M.P.I.C (Manitoba Public Insurance Corporation) appeared to argue their differences. For reasons that were not made entirely clear to me, counsel for Michael James Shea and I.C.B.C. (Insurance Corporation of British Columbia) chose not to appear.

On 18th August 1983 I revised my reasons for judgment dated 26th May 1983. After further reflection I discovered several discrepancies in the reasons dated 18th August 1983 ([1983] B.C.W.L.D. 1879, S.C., Nanaimo Nos. SC2654, SC3102 & SC3147 (not yet reported)) and accordingly must issue this judgment in place of reasons dated 26th May 1983 and 18th August 1983. . . .

Having considered the submissions made by the parties on 21st, 22nd April and 27th July 1983, and after reviewing my reasons dated 26th May 1983, I am satisfied I did not completely understand the complexity of the matters hinted at by counsel. During the course of argument on 21st and 22nd April and 27th July 1983, counsel put forward a bewildering number of submissions which were sometimes abandoned and later partly resurrected. What were the precise defences to the claims or no-fault benefits never became entirely clear. As a result I did not get any firm grasp of the various oral arguments made by counsel. Nonetheless I must assume the blame for not holding counsel to a consistent and unequivocal position. As a result of this confusion I propose to analyze the issues once more in this judgment. For the sake of clarity, I withdraw what I said in the reasons dated 26th May 1983 and 18th August 1983 and substitute this judgment in its place.

James Michael Shea is now six-years-old. He was not quite two months of age on 19 December 1978 when he was severely injured while riding as a passenger with his mother and father.⁹⁶

Bouck J. had already stated on August 26, 1983:

All I can tell from the record before me is that these two gigantic insurers, M.P.I.C. and I.C.B.C., are locked into a bitter fight over who will pay and no-fault benefits to the infant plaintiff. In the meantime, the plight of this badly injured child and his parent is forgotten. They have been left begging for assistance. It is a situation legislature specifically set out to avoid.⁹⁷

The main issue in that latter trial was an action between the two provincial insurers, M.P.I.C. and I.C.B.C., to determine which of them was to bear the loss including interest and taxed costs.

In *Shea* there were two trials totalling four days of hearing plus a Court of Appeal decision. In the case of *Cooper v. Canadian Home*⁹⁸ there was a Chamber Application and Court of Appeal hearing in Nova Scotia supplemented by various interlocutory hearings in Florida, with the possibility of a trial against the negligent driver there, even if the defendant insurer in Nova Scotia took no part in those proceedings. This is clearly not calculated to minimize costs.

It is difficult to glean any golden thread running consistently through these cases but it appears that *Perron v. Parise*,⁹⁹ *Van der Est v. State Farm*¹⁰⁰ and *Cooper v. Canadian Home*¹⁰¹ all involve cases where potentially applicable conflicts rules, on a closer examination of the facts and governmental interests involved, have been found to be inapplicable. This sort of approach marks a move away from mechanically applying rules such as the one in *Phillips v. Eyre*. The reasoning in *McLean v. Pettigrew*¹⁰² may be suspect but the result, as *Lewis v. Leigh*¹⁰³ shows, may be the same.

Nor did the Court of Appeal find the matter much easier. See [1985] 6 W.W.R. 641 at 645:

The issues argued before us cannot be dealt with separately or neatly. Every attempt at order fails. The legislative entanglement cannot be circumvented. The regulations and the Acts are appalling. We have had the benefit of carefully prepared factums and competent, experienced counsel. They have struggled to find a path through the tangle. During argument they were obliged to withdraw from paths that were blocked. One attempted to create a new path by asking us to add a "not" when interpreting British Columbia legislation.

96. [1985] 2 W.W.R. 652 at 125 (B.C.S.C.).

97. [1983] 6 W.W.R. 340 at 359 (B.C.S.C.).

98. *Supra*, note 32.

99. *Supra*, note 71.

100. *Supra*, note 29.

101. *Supra*, note 32.

102. *Supra*, note 42.

103. *Supra*, note 52.

The following questions as a minimum need to be resolved, preferably by the legislature and insurance industry:

1. Are they content for litigation to be heard in a jurisdiction other than either the *lex loci delicti* or the province in which the plaintiff was resident at the time of the accident?
2. Are the very wide *ex juris* rules, which allow a certain amount of forum shopping by the plaintiff, constitutional or do they deal with property and civil rights outside the province under the *Royal Bank of Canada v. The King* case¹⁰⁴?
3. Are the agreements between the *Régie* and the common law provinces intended to deal with all accidents in Quebec even though all the litigants reside elsewhere? It may be that giving all persons injured in Quebec some recovery is better than leaving non-Quebec residents with limited Section B benefits to supplement a traditional fault-based tort action.¹⁰⁵

In addition it seems that all too often the various undertakings, riders, *etc.*, have been put together with inadequate consideration of the conflicts implications. In the case of some of the voluntary riders such S.E.F. 42, one is left with the thought that merchandising policies designed to fill a gap in the market have received more thought and effort than the conflicts ramifications and their actuarial consequences.

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104. [1913] A.C. 283 (P.C.). In solving this, one should consider whether the recent House of Lords cases on *forum non conveniens* are relevant within a confederation. See J. Swan *The Canadian Constitution, Federalism and the Conflict of Laws* (1985), 63 Can. Bar Rev. 271.

105. See R. Hasson and H. Glasbeek "Fault — The Great Hoax" in Klar (ed.), *Studies in Canadian Tort Law*, (Toronto: Butterworths, 1977).