HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

HELEN MARGARET SWEEDMAN APPELLANT

AND

TRANSPORT ACCIDENT COMMISSION RESPONDENT

Sweedman v Transport Accident Commission [2006] HCA 8
9 March 2006
M28/2005

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Victoria

Representation:

B W Walker SC with J K Kirk for the appellant (instructed by Henry Davis York)

D F Jackson QC with P H Solomon for the respondent (instructed by Transport Accident Commission)

Interveners:

D M J Bennett QC, Solicitor-General of the Commonwealth with G A Hill intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

M G Sexton SC, Solicitor-General for the State of New South Wales with M J Leeming intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor for New South Wales)

C J Kourakis QC, Solicitor-General for the State of South Australia with M J Wait intervening on behalf of the Attorney-General for the State of South Australia (instructed by Crown Solicitor's Office (SA))

C J Kourakis QC, Solicitor-General for the State of South Australia with M J Wait intervening on behalf of the Attorney-General for the State of Western Australia (instructed by Crown Solicitor for the State of Western Australia)

P M Tate SC, Solicitor-General for the State of Victoria with M K Moshinsky intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

CATCHWORDS

Sweedman v Transport Accident Commission

Private international law – Motor accident – Applicable law – Accident occurred in New South Wales between a car registered in Victoria and driven by a Victorian resident and a car registered in New South Wales and driven by a New South Wales resident – Accident assumed to have been caused by negligence of New South Wales driver – Victorian driver and passenger obtained compensation payments from the Transport Accident Commission pursuant to *Transport Accident Act* 1986 (Vic) – The Commission sued the New South Wales driver in the County Court of Victoria, exercising federal jurisdiction, for indemnity pursuant to *Transport Accident Act,* s 104 – Alternative avenue of redress was available to the Victorian residents under the *Motor Accidents Act* 1988 (NSW) – Whether the regime established by the *Motor Accidents Act* supplanted that of the *Transport Accident Act* – Whether identification of the law of Victoria as the applicable law by virtue of common law choice of law rules and the operation of *Judiciary Act* 1903 (Cth), s 80 would be inconsistent with the operation of the Constitution.

Private international law – Choice of law – Applicable choice of law rule – Action brought on a statutory obligation of the appellant to indemnify the respondent – Statute provided no particular method of enforcing the obligation – Where appropriate action for enforcing the right of indemnity is an action in the nature of a quantum meruit – Where action brought in federal jurisdiction – Whether applicable law is the law of the State with which the obligation of the appellant to indemnify the Commission has the closest connection.

Statutes – Construction – Motor accident – Where statutes of different States said to be capable of being invoked in relation to the same circumstances – *Transport Accident Act* invoked in proceedings in County Court of Victoria for an indemnity claim – Whether the provisions of the *Motor Accidents Act* spoke to, or in opposition to, those proceedings.

Constitutional law – Inconsistency between laws of States – Where statutes of different States said to be capable of being invoked in relation to the same circumstances – *Transport Accident Act* invoked in proceedings in County Court of Victoria for an indemnity claim – New South Wales funds depleted in Victorian proceedings – Whether any inconsistency or clash between Victorian and New South Wales statutes – Whether State of New South Wales had the greater governmental interest in providing for the compelled financial consequences of a motor vehicle accident occurring in New South Wales – Whether any such inconsistency denied the operation of the *Judiciary Act*, s 80.

Constitutional law (Cth) – Discrimination between residents – Resident of New South Wales subject to claim to indemnity under Victorian statute – *Transport Accident Act*, s 104(1) provided that that provision did not apply to a person entitled to be indemnified by the Commission under s 94 of that Act – Section 94 obliged the Commission to indemnify persons who have paid the transport accident charge levied upon owners of registered motor vehicles under *Transport Accident Act*, s 109(1) for the relevant period – New South Wales driver would not have been subject to claim to indemnity had she been resident in Victoria – Where New South Wales driver bound to hold third-party insurance pursuant to *Motor Accidents Act*, ss 8 and 11 – Whether *Transport Accident Act*, s 104(1) subjected New South Wales driver to any disability or discrimination which would not be equally applicable to her if she were resident in Victoria.

Words and phrases – "inconsistency".

Constitution, ss 75(iv), 92, 109, 117.
Judiciary Act 1903 (Cth), ss 30, 39, 80.
Motor Accidents Act 1988 (NSW), ss 2, 8, 11, 40-82A.
Transport Accident Act 1986 (Vic), ss 1, 8, 27, 35, 94, 104, 109.

1 GLEESON CJ, GUMMOW, KIRBY AND HAYNE JJ. The event giving rise to this litigation was an accident between two motor vehicles on 20 July 1996. The accident occurred on a public road in the State of New South Wales. One car was registered in the State of Victoria and was driven by a Victorian resident, Mr Sutton, with Mrs Sutton as passenger. The other car was driven by the appellant, Mrs Sweedman, a New South Wales resident. This car was registered in New South Wales and owned by Mrs Sweedman's son. Mr and Mrs Sutton were injured and, for the purposes only of the present litigation, it is assumed that this accident was caused by the negligent driving of Mrs Sweedman.

2 The mobility of the Australian population is assisted by motor vehicles and their passage between the States is protected by the Constitution itself. It is to be expected that when State legislatures deal with the legal and social consequences of motor accidents they do not restrict their attention to the use of cars within particular State territorial limits.

3 At the date of the accident both New South Wales and Victoria had legislative regimes which bore upon the legal responsibility of Mrs Sweedman to Mr and Mrs Sutton. The legislative regimes of New South Wales and Victoria differed in significant respects. They implemented distinct governmental policies concerning the legal consequences of motor vehicle accidents. This litigation is occasioned by the interaction and alleged disharmony between the legislation of Victoria and New South Wales. The Attorneys-General for both States intervened in this Court, together with their Commonwealth, South Australian and Western Australian counterparts. The Attorney-General for New South Wales supported the decision below and opposed the submissions of the appellant.

The legislation of the two States

4 The *Motor Accidents Act* 1988 (NSW) ("the NSW Act") repealed (by s 5) the *Transport Accidents Compensation Act* 1987 (NSW) and thereby abolished the scheme it had established for the compensation of the victims of transport accidents; the common law was reinstated (by s 6) in respect of transport accidents occurring on or after 1 July 1987. However, Pt 5 (ss 40-67) and Pt 6 (ss 68-82A) placed various restrictions and limitations upon the pursuit of the common law rights of Mr and Mrs Sutton against Mrs Sweedman and the measure of damages recoverable. This reflected one of the stated objects of the statute, the reduction of the cost of the former common law based scheme (s 2A(1)(c)(i)).

5 The NSW Act had more than one focus and was not concerned purely with personal injury litigation. In particular, it provided in Pt 3 (ss 8-34) for a

system of compulsory third-party insurance. Section 8 made it an offence to use or cause or permit another person to use on a public street a motor vehicle to which a third-party policy complying with s 9 was not in force. Section 11 forbad the registration of a motor vehicle unless the registration authority was satisfied that there existed a third-party policy in relation to that vehicle. The car driven by Mrs Sweedman was registered in New South Wales and it may be inferred that there was compliance with the third-party insurance requirements of ss 8 and 11 of the NSW Act.

6 Mr and Mrs Sutton did not sue Mrs Sweedman in tort pursuant to the NSW Act. They took the other avenue under the law of Victoria.

7 The *Transport Accident Act* 1986 (Vic) ("the Victorian Act") established a scheme of compensation in respect of those injured or killed as a result of transport accidents (s 1). One of the stated objects of the statute was "[t]o reduce the cost to the Victorian community of compensation for transport accidents" (s 8(a)). Section 35 conferred an entitlement to compensation under the Victorian Act on a person injured as a result of a transport accident which occurred in Victoria or, in certain circumstances, elsewhere in Australia. In particular, the accident in New South Wales in which Mr and Mrs Sutton were involved qualified under s 35(1)(b) because the car was a registered motor vehicle under the *Road Safety Act* 1986 (Vic) and they were residents of Victoria and respectively the driver and passenger.

8 Section 27 of the Victorian Act required the respondent, the Transport Accident Commission ("the Commission"), to establish and maintain the Transport Accident Fund ("the Fund"). Owners of a registered motor vehicle such as that driven by Mr Sutton were obliged by s 109 to pay a transport accident charge to be credited by the Commission to the Fund (s 27(2)). Payments of compensation were to be made out of the Fund (s 27(3)). The Commission made payments of compensation to Mr and Mrs Sutton which it contended totalled $35,310.29 on 9 April 2002, the date of the institution of the action giving rise to this appeal.

The litigation between the Commission and Mrs Sweedman

9 The subject of the litigation is not the rights of Mr and Mrs Sutton to compensation payments by the Commission, nor their rights in tort against Mrs Sweedman.

10 By statement of claim filed in the County Court of Victoria at Melbourne on 9 April 2002, the Commission sued Mrs Sweedman for indemnity for that proportion of the amount of its liability to make payments under the Victorian

Act in respect of the injuries to Mr and Mrs Sutton which was appropriate to the degree to which the injuries were attributable to the negligence of Mrs Sweedman.

11 Counsel for the Commission stressed that the ambit of the insurance provided to Mrs Sweedman by the compulsory third-party insurance under the NSW Act was not confined to her liability in tort to Mr and Mrs Sutton; it extended to "liability in respect of the death of or injury to a person caused by the fault of the owner or driver of the vehicle"[1]. The phrase "liability in respect of" is sufficiently broad to provide Mrs Sweedman with recourse to the third-party insurer for the indemnity sought by the Commission. The essence of the submission for Mrs Sweedman is that the occasion for such recourse cannot arise. This is said to be because the source of the claim by the Commission to indemnity is in the Victorian Act and, in the circumstances, that legislation is inoperative or inapplicable for constitutional reasons.

12 As already remarked, Mrs Sweedman is a resident of New South Wales. The Commission is established by Pt 2 (ss 10-33) of the Victorian Act with characteristics which bring it within the constitutional description of the State of Victoria for the purposes of s 75(iv) of the Constitution[2]. That has not been disputed. It also is accepted that, by operation of ss 75(iv) and 77(iii) of the Constitution and s 39(2) of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act"), the County Court was invested with federal jurisdiction in a matter between the State of Victoria and a resident of the State of New South Wales. (It is unnecessary to enter upon the question whether there was a matter relating to the same subject-matter claimed under the laws of different States, within the meaning of s 76(iv) of the Constitution.)

13 The claim for indemnity made by the Commission was expressed by reference to s 104(1) of the Victorian Act. This confers upon the Commission in certain circumstances an entitlement to indemnity where the Commission has made compensation payments under the Victorian Act. Section 104(2) imposes what in argument was identified as a "cap"; the liability of Mrs Sweedman under s 104(2) is not to exceed the amount of damages which, but for the Victorian Act, she would be liable to pay Mr and Mrs Sutton in respect of their injuries. There are various issues of construction of s 104 which were not pressed by the parties

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1 NSW Act, s 9; Sched 1, Item 1.

2 See *Deputy Commissioner of Taxation v State Bank (NSW)* (1992) 174 CLR 219 at 232-233.

as decisive of this case, and upon which it is unnecessary for this Court to enter. However, as noted above, Mrs Sweedman did contend that s 104(1) does not apply to her situation.

14 On 18 July 2003 the County Court (Judge Duggan) reserved questions for the Court of Appeal in the form of a special case. The Court of Appeal (Winneke P, Callaway and Nettle JJA) amended the applicable form of the text of s 104(1) as stated in the questions reserved. The Court of Appeal went on to give answers which favoured the Commission[3]. It is against that order that the appeal is brought by special leave.

15 Section 104(1) reads:

> "If an injury arising out of a transport accident in respect of which the Commission has made payments under this Act arose under circumstances which, regardless of section 93, would have created a legal liability in a person (other than a person who is entitled to be indemnified under section 94) to pay damages in respect of pecuniary loss suffered by reason of the injury, the Commission is entitled to be indemnified by the first-mentioned person for such proportion of the amount of the liability of the Commission to make payments under this Act in respect of the injury as is appropriate to the degree to which the injury was attributable to the act, default or negligence of the first-mentioned person."

Section 93 denies recovery by an action for damages but makes special provision for some recovery in cases of "serious injury" and in wrongful death actions. Section 94 imposes in some circumstances a liability upon the Commission itself to provide indemnity. It will be necessary later in these reasons to make further reference to s 94.

16 For the reasons that follow the appeal should be dismissed.

The scope of the two laws

17 It is convenient first to give further consideration to the scope of the two statutes, the NSW Act and the Victorian Act. The accident in which Mr and Mrs Sutton were injured took place in New South Wales but they received compensation payments from the Commission set up by the Victorian Act. In turn, the Commission (the respondent) in the County Court action in Victoria

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3 *Transport Accident Commission v Sweedman* (2004) 10 VR 31.

asserts against a New South Wales resident, Mrs Sweedman (the appellant), its entitlement under s 104(1) of the Victorian Act to indemnity.

18 There is nothing necessarily antithetical to the system of federation established and maintained under the Constitution in the legislation of one State having legal consequences for persons or conduct in another State[4]. There are three relevant corollaries to that general proposition. First, it is sufficient for the validity of a law such as s 104(1) that it has any real connection between its subject-matter and the State of Victoria[5]. Plainly, s 104(1) meets that criterion. The appellant does not assert lack of State power to legislate with extra-territorial operation.

19 Secondly, as to adjudication of the legal consequences referred to above, the choice of law rules have the important function, in the absence of an effective statutory overriding requirement, of selecting the law to be applied to determine the consequences of acts or omissions which occurred in a State (or Territory) other than that where action is brought[6]. This means that questions of alleged "inconsistency" between laws of several States must be considered not at large, but first with allowance for the operation of applicable choice of law rules. This may remove the necessity in a given case to answer those questions of inconsistency. However, as will appear, the appellant enlists what are said to be constitutional imperatives which dictate an outcome in the litigation at odds with the operation of choice of law rules, rather than consistent with those rules.

20 Thirdly, reference is appropriate to the point clearly made in the joint reasons in *John Pfeiffer Pty Ltd v Rogerson*[7] that, subject to what followed in that passage:

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4 *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at 26 [16], 58 [122]; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 79 ALJR 1620 at 1653 [158]; 219 ALR 403 at 445.

5 *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at 22-23 [9], 34 [48], 58-59 [122]-[123].

6 *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at 36 [57].

7 (2000) 203 CLR 503 at 518 [15].

> "because there is a single common law of Australia[8], there will be no difference in the parties' rights or obligations on that account, no matter where in Australia those rights or obligations are litigated".

Their Honours went on to refer to statutory modifications to the common law and to other considerations, including those applying in federal jurisdiction, which may dictate different outcomes according to the seat of the litigation. Further, it is well settled that (putting to one side consideration of specific provisions such as ss 51(ii), 51(iii), 92, 99 and 117) there is no general requirement in the Constitution that a federal law such as s 80 of the Judiciary Act have a uniform operation throughout the Commonwealth[9]. In addition, s 118 of the Constitution does not require certainty and uniformity of legal outcomes in federal jurisdiction or otherwise[10].

21 New South Wales and Victoria submitted that in any event no question of differential outcome could arise here because, if the Commission had sued in a New South Wales court, the Judiciary Act would have mandated the same outcome as in the County Court. That submission may be accepted as correct. It appears that the limitation period under the *Limitation of Actions Act* 1958 (Vic)[11] would be the general period of six years. On the other hand, the NSW Act (s 52) imposes a limitation period of three years and the Commission sued more than five years after the accident. But counsel for the Commission correctly emphasised that in its terms s 52 addresses "legal proceedings for damages under [the NSW Act]" and the claim by the Commission for indemnity did not answer that description. Hence the postulated identity of outcome.

22 What has been said so far as to it being not uncommon for one State to legislate with consequences for persons or conduct in another State must be read

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8 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 15; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 556; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562-563, 566; *Lipohar v The Queen* (1999) 200 CLR 485 at 505, 509, 551-552.

9 *Leeth v The Commonwealth* (1992) 174 CLR 455 at 467; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 63, 153-154; *R v Gee* (2003) 212 CLR 230 at 255 [64].

10 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 532-534 [59]-[65], 555-558 [137]-[143].

11 Section 5(1)(d).

with a caveat. This is that in a federal system one does not expect to find one government legislating for another[12]. But that is not an absolute proposition, as the outcome in *State Authorities Superannuation Board v Commissioner of State Taxation (WA)*[13] indicates. No party or intervener questioned the correctness of this decision. There, a body identified with the State of New South Wales was validly assessed to stamp duty on its agreement to acquire a real estate interest in Perth.

23 Section 4 of the NSW Act states:

> "This Act binds the Crown, not only in right of New South Wales but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities."

If the NSW Act had gone on to stipulate that no claim to indemnity or exoneration might be brought in any court by any party against a tortfeasor in respect of a motor accident occurring in New South Wales, other than as permitted by the NSW Act, and if s 4 be read in terms as applicable to the Commission, there may have been questions both as to constitutional power[14] and inconsistency. But that situation has not arisen.

24 Moreover, an examination of the NSW Act discloses that it is not directed to blocking or restricting claims, whether made in New South Wales or elsewhere, to enforce liabilities of the nature of that created by s 104(1) of the Victorian Act. Indeed, as earlier mentioned, the compulsory third-party policy would cover the appellant for the claim by the Commission to indemnity under s 104(1). Nor is the NSW Act (or the Victorian Act) concerned to displace the operation in respect of such claims of the choice of law rules[15]. These are critical considerations for what follows in these reasons.

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12 cf *In re Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508 at 529.

13 (1996) 189 CLR 253.

14 See *BHP Billiton Ltd v Schultz* (2004) 79 ALJR 348 at 364-365 [89]-[94], 374-375 [142]-[144], 380 [178]-[179], 382-383 [191]-[201]; 211 ALR 523 at 544-545, 557-559, 566, 568-570.

15 cf *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418.

Choice of law

25 Against this background, two essential steps are to be taken for the resolution of the appeal. The first step concerns the character in law of the claim made for indemnity under s 104(1) and the identification of the choice of law rule applicable to that claim. In *Pfeiffer*[16] it was explained, with reference to *Koop v Bebb*[17], that the term "tort" used for the purposes of choice of law rules may encompass civil actions for acts or omissions made wrongful by statute. The same reasoning applies to quasi-contractual or restitutionary claims arising from statute.

26 The second step concerns the operation upon the indemnity claim of the federal jurisdiction which, given the character and identity of the parties, has been engaged with respect to that controversy. When these steps have been taken some of the substratum upon which the appellant's submissions rest will cease to be of dispositive significance for the present case.

27 First, as to the choice of law rule, the following is to be said. It was accepted on both sides and by the interveners that, consistently with *Victorian WorkCover Authority v Esso Australia Ltd*[18], the obligation of the appellant to indemnify was distinct from any underlying claim in tort[19]. The choice of law rule in tort had no direct role to play. But what was the applicable choice of law rule?

28 Section 104(1) of the Victorian Act states that the Commission "is entitled to be indemnified" but leaves it to the general law to spell out the character and incidents of that entitlement. Section 138 of the *Accident Compensation Act* 1985 (Vic) conferred in similar terms an entitlement to indemnity upon the Victorian WorkCover Authority. This provision was considered in *Esso*[20]. The older authorities referred to in that case indicate that, where the amount of the statutory entitlement was liquidated, the action of debt was appropriate

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16 (2000) 203 CLR 503 at 519-520 [21]; see also at 548 [116].

17 (1951) 84 CLR 629.

18 (2001) 207 CLR 520.

19 cf Dicey and Morris, *The Conflict of Laws*, 13th ed (2000), vol 2, §35-042.

20 (2001) 207 CLR 520 at 526-530 [12]-[20], 555-559 [96]-[105].

notwithstanding that the statute gave no particular method of enforcing the obligation[21].

29 The requirement to fix the appropriate degree of attribution to the negligence of the tortfeasor before quantification of the amount recoverable by the Commission on the indemnity, suggests a characterisation more akin to *indebitatus assumpsit* than to the old action of debt[22]. In that vein, in the present case, Nettle JA described the right of indemnity as "enforceable as a quasi-contractual cause of action in the nature of a quantum meruit"[23]. That view of the matter was consistent with the view of Bray CJ on analogous provisions in other legislation[24]. On that classification, and as explained by Bray CJ in the authorities just cited, for the purposes of the choice of law rules, the law applicable to the action, the lex causae, will be the law of the State with which the obligation of the appellant to indemnify the Commission has the closest connection.

30 There was, however, a dispute as to the selection of New South Wales or Victoria as the place of closest connection. The appellant stressed that the accident occurred in New South Wales and that the appellant resided there. However, the better view favours Victoria. The obligation to indemnify is sourced in s 104(1) of the Victorian Act, the moneys recovered will go to augment the Fund (s 27(2)(a), (g)), and the obligation only arose after payments required by the Victorian Act had been made out of the Fund (s 27(3)(a)) to Mr and Mrs Sutton, Victorian residents.

31 There is no authority in this Court settling the selection of the governing choice of law rule in a case such as the present. Victoria proposed an answer which fixed upon the characterisation of the compensation payments to Mr and Mrs Sutton as made by the Commission from the Fund under compulsion of

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21 (2001) 207 CLR 520 at 528 [15]; cf at 558 [105].

22 cf *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 250-251; *Victorian WorkCover Authority v Esso Australia Ltd* (2001) 207 CLR 520 at 532-535 [26]-[32], 555-559 [96]-[105].

23 (2004) 10 VR 31 at 41.

24 *Nominal Defendant v Bagot's Executor and Trustee Company Ltd* [1971] SASR 346 at 365-366; *Hodge v Club Motor Insurance Agency Pty Ltd* (1974) 7 SASR 86 at 91. Bray CJ's dissenting judgment in the first of these cases was upheld by this Court: (1971) 125 CLR 179 at 183.

Victorian law and upon the liability of Mrs Sweedman to the Commission as restitutionary in nature[25]. Victoria submitted that the outcome of a search for the "closest connection", posited by Bray CJ, may be difficult to predict with certainty. Rather, the governing law was that which was the source of the legal compulsion to make the compensation payments[26].

32 However, it is unnecessary to determine here which of the above classifications is correct as the first step in identifying the applicable choice of law rule. This is because, as noted above, the identification of the law of Victoria as the source of the compulsion upon the Commission to make the payments to the injured parties (two Victorian residents), and thus of a restitutionary obligation, is a significant pointer to the selection of the law of Victoria as the law with the closest connection to the indemnity entitlement of the Fund against the tortfeasor. Whichever competing thesis be adopted, the road so chosen leads to the law of Victoria rather than to that of New South Wales.

Federal jurisdiction

33 However, the County Court was exercising federal jurisdiction. This is national in nature. In those circumstances, there was presented no direct choice between laws of competing States. Rather, federal law controlled and required the ascertainment under the Judiciary Act of the applicable law[27]. Section 80 of the Judiciary Act was engaged[28]. Federal jurisdiction was to be exercised by the

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25 Goff and Jones, *The Law of Restitution*, 6th ed (2002) at 20-22 [1-019]-[1-020]; Jackman, *The Varieties of Restitution*, (1998) at 97-100; Grantham and Rickett, *Enrichment and Restitution in New Zealand*, (2000) at 207-210.

26 Adopting the position taken in Panagopoulos, *Restitution in Private International Law*, (2000) at 175; cf Gutteridge and Lipstein, "Conflicts of Law in Matters of Unjustifiable Enrichment", (1939) 7 *Cambridge Law Journal* 80 at 92-93, favouring "the law of the place in which the payment of money or the vesting of property occurs which constitutes the enrichment".

27 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 530 [53], 562 [156]; *Agtrack (NT) Pty Ltd v Hatfield* (2005) 79 ALJR 1389 at 1392 [8]; 218 ALR 677 at 679-680.

28 Section 80 states:

> "So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law in Australia as modified by the

(Footnote continues on next page)

County Court in respect of a matter, being the controversy as to the enforcement of an obligation the governing law of which under the common law choice of law rules was that of Victoria. The County Court was exercising jurisdiction in Victoria. No Victorian statute was identified as modifying that common law choice of law rule[29]. There was no applicable provision in a law of the Commonwealth. The upshot was that s 80 required the County Court to apply that common law choice of law rule in determining the law to govern the action[30].

34 However, s 80 by its terms is denied any operation which is inconsistent with the operation of the Constitution. The appellant then submits that to apply, by the medium of s 80, the statute law of Victoria as the law which governs the action for indemnity, and operates to the exclusion of the NSW Act, would offend the Constitution in several respects. One respect is the operation of s 117 of the Constitution upon the Victorian Act. Consideration of s 117 may be deferred. The other respect concerns principles for resolving inconsistency between State laws, which are said to be derived from the text and structure of the Constitution[31]. This argument will be treated first.

The case for the appellant on inconsistency

35 There are threshold difficulties with the appellant's case which should be identified immediately. Upon its proper construction did the NSW Act speak at all, or in opposition, to the County Court action by the Commission against the

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> Constitution and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters."

29 Section 80 speaks of "the statute law in force" in that State; the text and structure of s 80 indicate that laws of other States are not "in force" there. Submissions by South Australia and Western Australia to the contrary were correctly controverted by the appellant.

30 *Blunden v The Commonwealth* (2003) 218 CLR 330 at 338-339 [16]-[18], 359-361 [91]-[97].

31 *McGinty v Western Australia* (1996) 186 CLR 140 at 168-169; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 79 ALJR 1620 at 1665 [240]; 219 ALR 403 at 462.

appellant? The provisions of Pt 5 (ss 40-67) and Pt 6 (ss 68-82A) of the NSW Act, headed respectively "CLAIMS AND COURT PROCEEDINGS TO ENFORCE CLAIMS" and "AWARDING OF DAMAGES", were not engaged. The statements of the objects of those parts made in ss 40A and 68A indicate that the legislation is concerned with claims for damages, not an indemnity claim of the nature asserted by the Commission. That claim had its source in Victorian statute law, but it is not suggested that New South Wales should refuse to recognise s 104(1) on the grounds of its public policy. Section 118 of the Constitution would appear to foreclose any such reliance upon public policy[32]. Within the Commonwealth, considerations of the kind considered in *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd*[33] would not arise[34].

36 Where then is the operation of the NSW Act, against which it is said that s 80 of the Judiciary Act cannot operate to enlist the common law choice of law rule which selects the Victorian Act? An affirmative answer appears to require the adoption into inter-State relations of the "covering the field" doctrine developed by this Court in giving effect to the paramountcy of Commonwealth law. But as between States there is no paramountcy. Where then lies the necessity or sufficiency of reasoning to displace the selection of the rule of decision in the County Court litigation which is obtained through Ch III of the Constitution and the Judiciary Act?

37 The appellant's submissions took three steps, each depending upon what preceded it. The first postulated an "inconsistency" or, the preferred term, a "clash" which the Constitution addressed. The second was to identify the constitutional mechanism which resolved the clash. The third was to subject the operation of the Judiciary Act in this case to that constitutional mechanism. These steps are now considered in turn.

38 The appellant submitted that there was a "clash" between the operation of the two statutes. This was demonstrated by considering an outcome in favour of the claim to indemnity made by the Commission in this case. What was said to be "New South Wales funds", apparently the resources of the third-party insurer of the appellant, would be depleted by reference to an amount which, under the scheme of the NSW Act, should be paid out only pursuant to an action for

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32 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 533-534 [64].

33 (1988) 165 CLR 30.

34 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 549-551 [119]-[124].

damages by Mr and Mrs Sutton litigated in accordance with the stipulations (including the limitation provision in s 52) of the NSW Act.

39 The Constitution required that "clash" to be resolved by a means other than the common law choice of law rules. The path dictated by the Constitution required the court of the forum to identify which of New South Wales and Victoria had "the greater governmental interest" in providing for the compelled financial consequences (not necessarily all those consequences) of a motor vehicle accident occurring in New South Wales.

40 The greater governmental interest was that of New South Wales. Why this was so, and why the greater governmental interest here was not that of the State with which the indemnity claim had the closest connection (the choice of law rule in quasi-contract and for a restitutionary claim), was not succinctly articulated. Rather, various considerations were prayed in aid. These appear to be as follows.

41 The appellant contended that her preferred outcome was referable to, or consistent with, the "constitutionally conformed" but not mandated choice of law rule in tort as settled by *Pfeiffer*. It also was said that New South Wales had "the closer nexus to the subject matter of the intersection" between the two laws. That "intersection" appeared to be "how [much] money can be paid out for accidents [occurring in New South Wales]". Another consideration was that the entitlement to indemnity only arose under s 104(1) because of the liability of the appellant under the combination of the NSW Act and the common law of tort and it was the law of New South Wales which was availed of in fixing the "cap" under s 104(2).

42 The outcome of this application of the constitutionally mandated criterion of greater governmental interest was that the primacy of the NSW Act could not accommodate the operation of s 104(1) against the appellant. This meant that nothing in the provisions of the Judiciary Act could operate in a way which denied that result.

Conclusions respecting inconsistency

43 The acceptance, now recognised in s 2(1) of the *Australia Act* 1986 (Cth), of the proposition that State Parliaments may make laws with extra-territorial operation, allows for the possibility that individuals and corporations are subjected to conflicting commands. Legislation most often enlists the criminal

law and creates offences to encourage observance of its requirements. Questions of "double jeopardy" may arise[35].

44 The Constitution itself, in s 74, contemplates the exercise of federal jurisdiction in resolving questions "as to the limits inter se of the Constitutional powers of any two or more States"[36]. Other provisions of the Constitution (in particular, ss 52, 90) require a distinction between exclusive and concurrent legislative power. The body of authority concerning s 109 of the Constitution is concerned with inconsistent laws made in exercise of concurrent federal and State powers. There was some consideration of inconsistency between State laws in *Port MacDonnell Professional Fishermen's Association Inc v South Australia*[37] but no "real" inconsistency arose on the facts of that case.

45 Any question of "inconsistency" in the present case requires as a first step asking whether the NSW Act as well as the Victorian Act spoke at all to the indemnity action brought by the Commission. That is not answered by contemplation at the higher realms of abstraction upon which the submissions for the appellant concentrated. What is called for is a consideration of the particular claim made by the Commission, rather than, as the appellant would have it, looking in the broadest sense to a character attributed to the NSW Act as implementing a policy controlling the total financial outcomes of accidents occurring in that State. References by the appellant to an outcome consistent with the choice of law rule in tort were inapposite. When attention is given to the nature of the claim made by the Commission, it is apparent, and in accord with what has been said earlier in these reasons, that the NSW Act does not speak in any way which impairs or detracts from the pursuit of that claim. Indeed, as also pointed out, the coverage of a claim by the appellant under the third-party policy to answer the demand for indemnity by the Commission would supplement the operation of the Victorian Act. Claims of such a kind are only likely to be a small proportion of claims under the two legislative schemes and then only because of the interstate movement of motorists within Australia in accordance with the freedom that the Constitution itself envisages in s 92.

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35 *Pearce v The Queen* (1998) 194 CLR 610 at 630 [71], 644-645 [107].

36 *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at 52-53 [109]-[110].

37 (1989) 168 CLR 340 at 374. See also *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at 34 [48], 52-53 [110], 61 [131].

46 The appellant's case fails at the first step. But something more should be said respecting the criterion of inconsistency the appellant propounded.

47 Constitutional discourse has been informed by principles of varying width and precision which identify and resolve the disharmony between laws of more than one legislature. One principle adopts from Imperial law the term "repugnancy"; another the term "incompatibility" considered recently in *Fardon v Attorney-General (Qld)*[38]. The broadest principle is the "covering the field" test which was developed in cases applying s 109 of the Constitution, as remarked above. Authorities such as *Collins v Charles Marshall Pty Ltd*[39] and *Ansett Transport Industries (Operations) Pty Ltd v Wardley*[40] which upheld State laws against "covering the field" claims by federal law suggest that the NSW Act would not prevail over s 104(1) if this were the determinative constitutional norm.

48 But principles derived from Imperial law and later from s 109 assume a hierarchy of legislative competence, whether its peak be at Westminster or at the seat of government established under s 125 of the Constitution. The "covering the field" test was devised to uphold conceptions of federalism expressed in the paramountcy provision of s 109[41]. Whatever principle may be settled upon to meet cases of inconsistency between laws of several States in exercise of concurrent powers held as polities of equal authority, it will not be one that relies upon a "covering the field" test.

49 Perhaps with an awareness of these difficulties, the appellant in her submissions eschewed reliance upon the s 109 case law. (And, in light of *Pfeiffer*[42], reliance upon s 118 of the Constitution as itself a circuit breaker also was discounted in oral submissions.)

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38 (2004) 78 ALJR 1519; 210 ALR 50.

39 (1955) 92 CLR 529.

40 (1980) 142 CLR 237.

41 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 79 ALJR 1620 at 1658 [192]; 219 ALR 403 at 452.

42 (2000) 203 CLR 503 at 533-534 [62]-[65], 555-558 [137]-[143]; see also *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 at 536-537 [127].

50 Instead, the appellant appealed to the constitutional criteria of a "clash" at an "intersection" which was resolved by ascertainment of the "greater governmental interest". The latter may take its inspiration from United States conflict of laws jurisprudence which, along with the "proper law of the tort", was not accepted for Australia in *Pfeiffer*[43] and is now in disfavour in the United States Supreme Court[44].

51 New South Wales has an undoubted interest in legislating with respect to motor accidents in its territory; Victoria also has an undoubted interest in recoupment from out-of-State tortfeasors of payments Victoria has made to injured residents of Victoria. Which interest is the greater? The interests are not easily measurable or even comparable within the means available in the processes of adjudication. It is undoubtedly the case that the many criteria of constitutional adjudication do not involve bright lines. That is no encouragement to further indeterminacy.

52 In the end, three things are to be said on this branch of the case. First, no adequate constitutional criterion is asserted by the appellant which would resolve inconsistency between the laws of two or more States. That criterion awaits formulation on another occasion where the circumstances of the propounded incompatibility of the State laws suggest a criterion by which that incompatibility is to be recognised and resolved. Secondly, and in any event, the NSW Act has not in this case been shown to speak at odds with the claim to indemnity made against the appellant in the County Court. Thirdly, the operation of the Judiciary Act is not displaced in the County Court action and the law of Victoria is the lex causae in that litigation.

53 There remains for consideration the submissions respecting s 117 of the Constitution.

Section 117 of the Constitution

54 The appellant submits that if she had resided in Victoria rather than New South Wales she would not have been subjected to the claim to indemnity under s 104(1). This sub-section in its terms does not apply to "a person who is entitled to be indemnified [by the Commission] under section 94" and, it is said, the

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43 (2000) 203 CLR 503 at 537-538 [76]-[80], 562-563 [157]-[158].

44 See *Franchise Tax Board of California v Hyatt* 538 US 488 (2003).

practical effect of this is that, had the appellant resided in Victoria, the exception would have operated and s 104(1) would not have been engaged.

55 Section 117 states:

> "A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State."

56 The appellant is a subject of the Queen resident in New South Wales and contends that she is exposed in Victoria to a disability or discrimination, amenability to a s 104(1) claim by the Commission, which would not be equally applicable to her were she a resident of Victoria. The mandatory terms of s 117 of the Constitution require that the appellant not be amenable to the s 104(1) claim, with the result that there is no content to the "matter" propounded under s 75(iv) of the Constitution. This last step was not advanced in these terms but was implicit in the appellant's case.

57 That submission may be compared with the outcome in *Goryl v Greyhound Australia Pty Ltd*[45]. The plaintiff, as a resident of New South Wales, was, by the terms of s 20 of the *Motor Vehicles Insurance Act* 1936 (Q), limited in her action in the Queensland District Court to the damages she could have recovered under New South Wales law for her motor vehicle accident in New South Wales; these were less than the damages she would otherwise have received under Queensland law had she been a Queensland resident. Section 20 was rendered inapplicable by s 117 of the Constitution to limit recovery of damages.

58 However, for several reasons *Goryl* does not support the reliance placed upon s 117 by the present appellant.

59 The appellant urged consideration of the reality of the situation as that to which s 117 is directed. That emphasis upon substance and practical operation of laws impugned for contravention of a constitutional limitation or restriction on power may be accepted[46]. But to approach the present case in that way does not assist the appellant. She was required by the NSW Act to have third-party

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45 (1994) 179 CLR 463.

46 *Ha v New South Wales* (1997) 189 CLR 465 at 498.

insurance and it was not asserted that she had any direct personal financial interest in the outcome of the case. The insurer no doubt has an interest, but the NSW Act (s 101) stipulates that applications to become a licensed insurer may be made only by corporations licensed under the *Insurance Act* 1973 (Cth) or by the Government Insurance Office of New South Wales or its affiliates. It is not suggested that a corporation may be a subject of the Queen within the meaning of s 117.

60 Secondly, unlike the Queensland statute considered in *Goryl*, the operation of s 94 of the Victorian Act is not conditioned by residence. Rather, it is conditioned by payment for the relevant period of the "transport accident charge" for the registered motor vehicle in question. Section 94 would have obliged the Commission to indemnify Mr Sutton as driver of a motor vehicle registered in Victoria in respect of any liability in respect of an injury to or death of a person arising out of its use in Victoria or in another State or Territory, but not in respect of any period where the transport accident charge had not been paid. Payment of that charge to the Commission is required by s 109 and receipts are paid by the Commission into the Fund established under s 27. The obligation of payment of the charge is imposed upon the owner of a "registered motor vehicle" (s 109(1)). That expression has a detailed definition in s 3 which refers to the *Road Safety Act* 1986 (Vic) and the regulations made thereunder. The upshot is that a vehicle may be registered in Victoria even though its owner or user or both ordinarily reside outside that State[47], and a person must not use a vehicle on a highway in Victoria unless registered under that statute or exempted under the regulations[48].

61 On the other hand, the effect of s 111 of the Victorian Act is that the owner of the car driven by the appellant, being insured under the third-party system in New South Wales, would not have been required, while in Victoria, to have paid the transport accident charge.

62 The words in brackets in s 104(1), namely "other than a person who is entitled to be indemnified under section 94", reflect the circumstance that the entitlement against the Commission under s 94 is, in a practical if not also legal sense, the consideration for payment of the transport accident charge. Without the exception to s 104(1), the benefit under s 94 conferred by payment of the transport accident charge required by s 109 would have been rendered nugatory.

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47 Road Safety (Vehicles) Regulations 1988, reg 203.

48 *Road Safety Act* 1986 (Vic), s 7.

63 The appellant is exposed to the claim by the Commission to indemnity under s 104(1). She is not exempted. But that is because she was not required to have paid the charge levied under the Victorian scheme.

64 There is no differential treatment in s 94 attributable to residence so as to attract s 117 of the Constitution. A non-Victorian resident who owned or drove a registered motor vehicle in respect of which the s 109 charge had been paid would have the benefit of the exception to s 104(1); a Victorian resident who had failed to pay the charge would not have the benefit of the exception.

65 By its terms, s 117 of the Constitution is addressed to protecting a "subject of the Queen" from disability or discrimination in the form of laws and governmental actions or policies. It is therefore necessary in each case where s 117 is invoked to examine the operation of the impugned law, action or policy, to decide whether the discrimen it chooses concerns the State residence of the person who invokes its provisions.

66 It is unnecessary to consider, on the footing that there was a disability or discrimination attributable to residence, whether this was appropriate and adapted (sometimes described as "proportional"[49]) to the attainment of a proper objective[50].

Orders

67 The appellant seeks orders displacing the answers given by the Court of Appeal. In particular she seeks answers that s 104(1) of the Victorian Act would be invalid and inapplicable against the appellant in the County Court proceeding. That answer should not be given. The appeal should be dismissed with costs.

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49 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 567, referring to *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 377, 396.

50 *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vict)* (2004) 220 CLR 388 at 423-424 [88]-[89].

68 CALLINAN J. This appeal raises federal constitutional questions, and questions about the integrity of the Constitutions of the States, and their hegemony over events and people within them, and of choice of law.

Facts and previous proceedings

69 On 20 July 1996, a car driven by the appellant ("the New South Wales car") collided with a car driven by Mr John Sutton ("the Victorian car") on a road in New South Wales. Mrs Helen Sutton was a passenger in the Victorian car. Mr and Mrs Sutton were residents of Victoria at the time of the collision. Both suffered injuries as a result of it. The Victorian car was registered in Victoria. The New South Wales car was owned by the appellant's son. It was registered in New South Wales. When it was not in use it was kept at a garage at the appellant's residence at Gravesend in New South Wales[51].

70 The respondent, which is a body corporate established by the *Transport Accident Act* 1986 (Vic) ("the TA Act"), has paid compensation to Mr and Mrs Sutton ("the casualties") in satisfaction of a claim made by them under that Act. How their entitlement in that regard arises will be explained later.

71 The respondent commenced proceedings against the appellant in the County Court of Victoria on 9 April 2002 to recover from the appellant the sum of the payments made to Mr and Mrs Sutton under the TA Act. It contended that s 104 of that Act gave it a statutory right of indemnity against the appellant recoverable in the Victorian courts. On 18 July 2003, at the request of the parties, the County Court ordered that three questions be reserved for the consideration of the Court of Appeal of Victoria, in the form of a special case, pursuant to s 76(1) of the *County Court Act* 1958 (Vic).

The Court of Appeal of Victoria

72 The questions stated for the Court of Appeal (Winneke P, Callaway and Nettle JJA) and the answers given by that Court appear below[52]:

> "A. Whether, given the agreed facts set out in paragraphs 1-9 of the Special Case, s 104(1) of the **Transport Accident Act 1986** (Vic) is capable as a matter of construction of applying to the [appellant]

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51 The *lex loci stabuli*, a term used, as Dicey and Morris point out, in jest with respect to the garaging of cars: *Dicey and Morris on the Conflict of Laws*, 13th ed (2000), vol 1 at 30 [1-075].

52 The decision of the Court of Appeal is reported as *Transport Accident Commission v Sweedman* (2004) 10 VR 31.

so as to give the [respondent] a right of indemnity against the [appellant].

[Yes.]

B. Whether, given the agreed facts set out in paragraphs 1-9 of the Special Case, this proceeding is a matter within federal jurisdiction and, if so, whether s 104(1) of the Act is capable of applying as against the [appellant] in light of ss 79 and 80 of the **Judiciary Act 1903** (Cth).

[Yes.]

C. Whether, given the agreed facts set out in paragraphs 1-9 of the Special Case, in its potential application to the [appellant] in this proceeding s 104(1) of the Act is invalid or inapplicable as being:

(a) contrary to Chapter III and s 118 of the **Commonwealth of Australia Constitution Act** ('the Constitution'); or

[No.]

(b) contrary to s 117 of the Constitution; or

[No.]

(c) inconsistent with the operation of the provisions of the **Motor Accidents Act 1988** (NSW), as it applied at the time of the Accident.

[No.]"

73 In the Court of Appeal, the appellant's principal argument was that s 104 of the TA Act did not apply to her, as a matter of construction. She submitted that this was so because the intended reach of the TA Act was to the borders of Victoria only: otherwise the section would have the potential to expose tortfeasors to double liability, or double jeopardy in respect of torts occurring outside the State. That, and her other arguments were rejected by the Court of Appeal. The appellant did not press the argument principally relied on there in this Court. The Victorian Parliament has, in any event, amended s 104 of the TA Act to apply it explicitly to legal liability for events arising outside Victoria[53].

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53 See s 31(a) of the *Transport Accident (Amendment) Act* 2004 (Vic), which commenced operation on 8 December 2004.

74 Nettle JA, with whom Winneke P agreed, rejected the appellant's further submission, and the one that figured more prominently in this Court, that because the proceeding was within federal jurisdiction, that is, as a matter between a State and a resident of another State within the meaning of s 75(iv), and also a matter arising under the Constitution or involving its interpretation, the law to be picked up and applied by ss 79 and 80 of the *Judiciary Act* 1903 (Cth) should be the common law choice of law rule applicable to all Australian *torts*. The laws to be applied were therefore the laws in force in New South Wales, the *lex loci delicti*. Nettle JA rejected the submission on the basis that the claim under s 104 of the TA Act was in the nature of a statutory "quasi-contractual cause of action in the nature of a quantum meruit"[54], rather than a claim in tort, even though, in order to succeed the respondent would have to prove that the appellant had committed a tort[55].

75 Nettle JA also rejected another of the appellant's submissions, and again one that in a slightly different form, assumed much more prominence in this Court, that s 104(1) trespassed, unconstitutionally, upon a preserve of the New South Wales legislature, and that it was beyond the constitutional competence of the Victorian Parliament to provide for the civil liability of an interstate resident in respect of a collision between motor vehicles occurring in another State. Nettle JA said this of it[56]:

> "It is within the competence of a State to make things in or connected with the State the occasion for the imposition of liability, and evidently the occasion for imposition of liability under s 104(1) is that the tort in question involves a Victorian resident or a Victorian registered motor car. Arguably it is also sufficient to sustain the section that it applies to acts or omissions outside Victoria that have had consequences within the State and it should not be regarded as a problem that the section is productive of consequences for persons or conduct in another State or Territory."

His Honour went on to say[57]:

> "[I]t is tolerably clear that Victoria has power to impose civil liability upon the driver of a Victorian registered vehicle in respect of his or her

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54 (2004) 10 VR 31 at 41 [28], citing *Victorian WorkCover Authority v Esso Australia Ltd* (2001) 207 CLR 520 at 527 and *Hodge v Club Motor Insurance Agency Pty Ltd* (1974) 7 SASR 86 at 102.

55 See s 104 of the TA Act.

56 (2004) 10 VR 31 at 54 [71].

57 (2004) 10 VR 31 at 55 [74].

> driving of the vehicle wherever in Australia, and to impose upon a Victorian resident civil liability in respect of a traffic accident wherever occurring in Australia, and to impose civil liability upon a resident of another State in respect of a traffic accident occurring in Victoria. Therefore it is difficult to see why Victoria would not also have power sufficient to sustain the imposition of liability under s 104 upon a resident of another State in respect of a motor accident occurring in that other State where it results in injury to a victim ordinarily resident in Victoria (or to others to whom the commission may be liable to pay compensation)."

76 Nettle JA also rejected the appellant's next submission, that s 104 of the TA Act and the Victorian statutory scheme generally subjected her to a disability or discrimination to which she would not be subject if she were resident in Victoria. That disability or discrimination was said to arise out of the fact that the respondent had no entitlement to recover from an owner or driver of a "Victorian registered motor vehicle": s 94 precludes that. It was then argued that a vehicle could not be registered in Victoria unless it was ordinarily kept there, and that the section had therefore the practical effect of favouring Victorian residents and discriminating against residents elsewhere. Nettle JA formulated the question whether s 104 created discrimination against non-Victorian residents in contravention of s 117 of the Constitution as, in essence, a question whether s 117 proscribes discrimination by Victoria in the provision of compulsory third party insurance benefits to owners and drivers of vehicles registered in Victoria exclusively, that is without also providing the same or similar benefits to owners and drivers of vehicles registered in other States and Territories. After discussing the reasons of each of the Justices in *Street v Queensland Bar Association*[58], Nettle JA concluded that s 117 does not operate to do so here.

The appeal to this Court

The appellant's arguments

77 The appellant submitted in this Court that in consequence of an inconsistency, as she put it, a "clash", between s 104 particularly, and some other provisions generally, of the TA Act on the one hand, and the provisions of the *Motor Accidents Act* 1988 (NSW) ("the MA Act") on the other, the former was rendered "inoperative": it accordingly could not be relied upon by the respondent to recover money from the appellant. Counsel for the appellant described the "clash", in language customarily used in discourse about s 109 of the Constitution, as one of "operational inconsistency", adding, that "[i]n operation this Victorian law [the TA Act] has an effect which is sufficiently inimical to the intended effect of the New South Wales law [the MA Act]" to produce that

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58 (1989) 168 CLR 461.

result. It was next submitted that because the New South Wales legislature had a "closer nexus" with the subject matter of the clash between the two enactments, the New South Wales enactment prevailed over the Victorian one. The appellant emphasized the fact that the operation of s 104 of the TA Act depended upon the creation, and therefore, the existence of an underlying liability of a tortfeasor under the MA Act. This, it was contended, supported the appellant's argument that the TA Act "force[d] an intersection" with the MA Act in a manner that "altered, detracted [from] or impaired" its intended operation.

78 The appellant again also argued that s 104 of the TA Act had the practical effect of discriminating against her contrary to s 117 of the Constitution. The appellant submitted that had she been a resident of Victoria, then in all likelihood, the car which she had been driving at the time of the collision would have been registered there with the result that she would have been immune from a suit under s 104. To hold, by implication, as the judgment of the Court of Appeal did, that the appellant was free to place herself in the same advantageous position as a Victorian owner or driver, by paying the same fee as the latter to the respondent, even though she was not even on a transitory visit to Victoria, and was subject to statutory obligations already under the law of New South Wales, was discriminatory.

The Transport Accident Act 1986 (Vic)

79 It is necessary to examine the TA Act in some detail to make sense of the statutory language, to ascertain its objects, and the means adopted to achieve them. The same exercise will need to be undertaken in relation to the MA Act.

80 In Victoria, an owner of a motor vehicle must effect insurance against claims for damages for personal injuries caused by the use of the vehicle under the TA Act. The right to indemnity extends to the owner and driver of a registered motor vehicle (s 94). Stated objects of the Act are, to reduce the cost to the Victorian community of compensation for transport accidents, to provide just compensation economically, and to determine claims speedily (s 8). By s 12, the respondent, which is established under the TA Act, is given the function of administering the Transport Accident Fund which is comprised, together with other amounts paid into it, of charges paid by owners of vehicles for the insurance of them in respect of a transport accident, which is defined as an incident directly caused by the driving of a motor car or motor vehicle, a railway train or a tram.

81 Section 35 of the TA Act confers an entitlement to compensation, out of the Fund, for victims of transport accidents occurring in Victoria, or elsewhere in Australia if the victim is a resident of Victoria, or the driver of, or a passenger in a registered motor vehicle, a term defined by the Act to include a vehicle registered under the relevant Victorian enactment, or an unregistered vehicle

usually kept in Victoria, but not a vehicle registered or kept elsewhere in Australia.

82 The scheme which the TA Act establishes is essentially, but as will appear, not exclusively a "no fault" scheme.

83 The respondent may be taken, for present purposes, as one and the same as the State of Victoria[59].

84 By s 35 of the TA Act, a person who is injured, and the dependants of a person who dies, as a result of a transport accident may claim compensation under the TA Act.

85 Section 104 of the TA Act is concerned, among other things, but ultimately principally with fault, or tort, delict, to use the term conventionally used in private international law. At the time of the accident, s 104 provided:

> "***Indemnity by third party***
>
> (1) If an injury arising out of a transport accident in respect of which the Commission has made payments under this Act arose under circumstances which, regardless of section 93, would have created a legal liability in a person (other than a person who is entitled to be indemnified under section 94) to pay damages in respect of pecuniary loss suffered by reason of the injury, the Commission is entitled to be indemnified by the first-mentioned person for such proportion of the amount of the liability of the Commission to make payments under this Act in respect of the injury as is appropriate to the degree to which the injury was attributable to the *act, default or negligence* of the first-mentioned person.
>
> (2) The liability of a person under sub-section (1) shall not exceed the amount of damages referred to in sub-section (1) which, but for this Act, the person would be liable to pay to the injured person in respect of the injury.
>
> (3) Judgment against or settlement by a third party in an action in respect of an injury or death referred to in sub-section (1) does not eliminate or diminish the right of indemnity given by this section, except to the extent provided in this section." (emphasis added)

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59 *Deputy Commissioner of Taxation v State Bank (NSW)* (1992) 174 CLR 219 at 232-233.

86 Some of the differences between the scheme established by the TA Act for the payment of claims for compensation under it, and the scheme established by the MA Act are very substantial ones. As the joint judgment states, they implemented distinct governmental policies to produce different legal consequences of motor vehicle accidents. It may also be added that the financial consequences for those affected by them are also quite different.

87 The TA Act confers these entitlements: sums in respect of loss of earnings for the first 18 months after injury (ss 44 and 45); lesser amounts for "loss of earning capacity" thereafter, and only so long as the loss continues (ss 49, 50 and 51); medical, hospital, rehabilitation, domestic services and burial expenses (s 60); "impairment benefit[s]" (ss 47 and 48); compensation in the nature of damages for pain and suffering (s 93(7)(b), in accordance with ss 53(2)(b) and 93(11)(b)); and a lump sum under s 57 for spouses of victims, and periodical payments under s 58 for not fewer than five years, until the spouse reaches pensionable age, or the children are no longer dependent (if later), and, absent a dependent spouse, similar provision for dependent children (s 59).

88 Some payments are capped, and other limits may apply if the impairment of a casualty is less than 50 per cent. The Commission is not liable after three years from the first manifestation of an injury, and is not liable for an amount in excess of a specified total amount (s 53(3)), although s 61 provides for indexation of monetary limits.

89 Under s 93, a victim may sue for "damages"[60] in respect of injuries suffered in a transport accident if the injury is a "serious injury" as defined, but subject again to limits or caps upon compensation for pecuniary loss, and pain[61]. The TA Act imposes no restriction upon an action by a Victorian resident who is injured in a motor vehicle accident occurring outside Victoria. The degree of fault, if any, on the part of a driver or owner is irrelevant to the right to compensation, and the quantum recoverable, as is any contributory fault on the part of the claimant or plaintiff.

90 Under s 107(1) of the TA Act, the respondent may take over the conduct of proceedings against a person, a tortfeasor, liable to the victim, if other than a person the respondent is itself obliged to indemnify under s 94, and may itself initiate proceedings.

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60 "Damages" is a misnomer in the sense that the defendant is the Transport Accident Commission and not the tortfeasor.

61 In the Court of Appeal, Nettle JA held that s 93 applies only to traffic accidents occurring in Victoria: (2004) 10 VR 31 at 42 [33].

91 Sections 93(10), (11) and (11A) provide that amounts already paid by the respondent to claimants under the TA Act, must be deducted from the damages, except in cases of actions brought outside Victoria. Accordingly, if s 93 applies, s 104 is designed to ensure that the respondent has a right to recover from the tortfeasor the payments that it has made to the claimant.

92 Should a casualty pursue an action at law, the liability of the respondent to the casualty will be reduced. The respondent may also be liable to make payments in relation to a period after a settlement, or an award of damages within the meaning of s 93, that is, in respect of damage suffered in or caused by a Victorian accident. To dependants, the respondent's liability will cease upon settlement, or the making of an award of damages (ss 57(5), 58(7) and 59(1)). The respondent may not claw back the amounts it has already so paid because they are deductible from a casualty's damages under s 93.

93 If a claim is made "under the law of a place outside Victoria", the casualty will not be entitled to compensation from the respondent if he or she has recovered an amount in an action, or by settlement, or if a claim is pending (s 42(2)). Under s 42(3) of the TA Act, the respondent may recover the compensation paid under the Act. Provision in that regard is required because the limits prescribed by s 93 do not apply to such claims.

The Motor Accidents Act 1988 (NSW)

94 I turn now to the MA Act, the stated objects of which include the reduction of costs, and the limitation of claims and amounts payable for them to persons injured in motor vehicle accidents. A few of the objects are, in some respects, not dissimilar to those of the TA Act (ss 2A, 40A, 43 and 52 of the MA Act), but discernible in them are very different purposes, for example: the re-enactment of common law rights and remedies, and the introduction of a unique regime for the investigation, and the making, assessment and settlement of claims. Unlike the TA Act, the MA Act does not establish a statutory corporation as effectively the sole insurer of vehicles registered in the State. As had been the position in some of the States for many years, insurance may be effected in New South Wales with insurers licensed under the MA Act. This is an important difference. It means that proprietary rights and interests of persons other than the State, or one of its emanations, insured persons who pay premiums, injured persons and insurers of motor vehicles in New South Wales, are liable to be affected by claims of the kind in issue here. I emphasize this because New South Wales intervened to support the respondent. What may be acceptable, expedient or even advantageous, or seem to be so to an executive government, may not always be of advantage to the residents and others bound by the law, as it is submitted to be on behalf of the executive. Constitutions are not the property of governments of the day.

95 There is no evidence of the identity of the appellant's insurer here but there is no reason to assume that her vehicle was not duly insured in New South Wales. That does not mean however that the appellant, or any person in her situation is unaffected by, or has no interest, financial or otherwise in the litigation. Simply to be named as a defendant in legal proceedings is unfortunately capable of giving rise to adverse inferences. To have a judgment entered against her is capable of producing even more unfavourable inferences. As recent notorious failures of insurance corporations show, sometimes an insured person may have no recourse against her insurer. A litigant such as the appellant, as a resident of New South Wales, also faces the prospect of being obliged to travel to Victoria to give evidence there with all of the inconvenience and distraction thereby entailed. There is also this. The "indemnity" for which the MA Act provides appears to be incomplete. The appellant may have no assurance of a full financial indemnity even if her insurer is solvent. Under s 23 of the MA Act which provides as follows, the appellant could be required to pay $500 of the respondent's claim.

> "**Recovery of an excess in certain cases**
>
> (1) If an insured person incurs a liability against which he or she is insured under a third-party policy and the liability arises out of a motor accident which was to the extent of more than 25 per cent the fault of the insured person, the licensed insurer may recover from the insured person as a debt in a court of competent jurisdiction:
>
> (a) where the money paid and costs incurred by the licensed insurer in respect of the liability do not exceed $500 – the amount of the money paid and costs incurred, and
>
> (b) where the money paid and costs incurred by the insurer exceed $500 – $500.
>
> (2) The licensed insurer is not entitled to recover an amount under this section if the licensed insurer exercises any other right of recovery against the insured person under section 22."

For all of these reasons, I am unable to accept, as the joint judgment holds, that the appellant's compulsory third party policy would *cover* the appellant for the claim by the Commission to indemnity under s 104(1) of the TA Act[62].

96 In her submissions, the appellant emphasizes these further differences as important ones, between the TA Act and the MA Act. A judgment in favour of

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62 Joint reasons at [11] and [24].

an injured person under the MA Act is a final judgment. It may not be reopened on the recurrence, or the worsening of the effects of an injury[63]. This is so even though, under s 81 of the MA Act structured settlements are possible. Section 104 of the TA Act may be productive of quite different consequences. Under that section, a further and separate right to obtain indemnity may accrue each time that a payment is made with the result that liability may exist for an extended period. Indeed, in this case the respondent actually seeks in its statement of claim a "declaration of liability in respect of payments to be made after the date of trial". It is right, as the appellant submits, that if she were liable in this unpredictable and uncertain way, the capacity of her, and other insurers in similar circumstances, to make accurate and sufficient provision for, or to finalize claims may be jeopardized. To put an insurer in New South Wales in such a state of uncertainty is inconsistent with the objects of the MA Act, particularly those stated in s 2A of it, the introduction of a stricter procedure for the making and assessment of claims for damages, and the encouragement of the speedy provision of benefits. A further tension arises between the state of uncertainty to which I have referred, and the statutory direction in s 2A(2) of the MA Act, that in its application, it be acknowledged that insurers are obliged to charge premiums that will fully fund their anticipated liabilities, and that there be a large measure of stability and predictability regarding future claims under policies sold.

97 I have already referred to some of the differences in methods of calculation of entitlements to compensation and damages. There are others which need noting only, including s 73 of the MA Act, by contrast with s 104 of the TA Act, and s 79A of the MA Act with ss 47 and 48 of the TA Act.

98 An even more important, and highly significant practical difference follows from the prescription by the MA Act of a limitation period of three years from the date of an accident unless time be extended. Extensions may only be granted if various conditions, not present here, and which need not therefore be further considered, are satisfied. The limitation period for an action under s 104 of the TA Act is six years. The importance for present purposes of the different periods is that the action with which the Court is concerned in this appeal was brought by the respondent long after Mr and Mrs Sutton could have sued for damages in New South Wales, five years and eight months after the accident, and for an amount in respect of which no extension of time could be granted under the MA Act. The correctness of the respondent's arguments that this is a matter of no present relevance because its claim is for an indemnity, and not in tort, and accordingly is not one subject to a limitation period of three years under the MA Act will need careful consideration but may be deferred until some other matters are dealt with.

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63 cf *BHP Billiton Ltd v Schultz* (2004) 79 ALJR 348; 211 ALR 523.

99 In her written submissions the appellant provided a convenient table of inconsistencies in the processes prescribed by the respective enactments for the making of claims. The table is accurate and should be reproduced:

MA Act	**TA Act**
Claimant to report the accident to police within 28 days (s 42). If duty not complied with, a "full and satisfactory explanation" (as defined in s 40(2)) must be given, and otherwise a court proceeding may not be allowed to continue.	Under s 39(1) and (1A) of the Victorian Act a failure to report to the police can be excused by TAC, and no time limit is set. There is no duty on TAC to report the accident to the police.
A claim must be made to the tortfeasor and insurer within 6 months of the accident or death (s 43), on an approved form (s 44). In cases of late claims for which due objection has been taken (s 43A), a court must dismiss proceedings if satisfied the claimant does not have a full and satisfactory explanation for the delay, and, if the claim was made more than 12 months after the accident / death, must be dismissed if the total damages likely to be awarded are less than 10% of the maximum amount awardable for non-economic loss (ie for this claim, $23,500 un-indexed).	Under the Victorian Act, the *driver* has a duty to notify TAC within 28 days of an accident (s 64), but there is no duty on the claimant to do so, and nor is there any duty on TAC to notify any other relevant CTP insurer. A claim against TAC can be made within 1 year of accident / death, but TAC may accept a claim up to 3 years after such (s 68).

The claimant is obliged to cooperate with the tortfeasor / insurer for the purpose of giving sufficient information to be satisfied as to validity of the claim, to make an early assessment, and to make an informed offer of settlement (s 48).	No equivalent duty on TAC as against potential defendants to s 104 actions, or their CTP insurers.
The claimant is obliged to provide the CTP insurer (if any) with "full details" of injuries, disabilities / impairments, prognoses, and any economic losses and other losses claimed as damages, sufficient to enable the insurer to make a proper assessment of the claimant's full entitlement to damages: s 50A. Failure to comply can lead to the claim being struck out in whole or part.	No equivalent duty on TAC.

100 If the respondent is not bound, in making its claim for indemnity, to comply with any of the obligations imposed by the MA Act upon claimants for damages for personal injury, it is true, as again the appellant submits, and the table unmistakably demonstrates, that the objects of the MA Act of enabling the early investigation, assessment, and settlement of claims may be frustrated.

Co-existence of the States

101 Before considering the parties' principal arguments it is as well to state some basic propositions which bear upon them. Of course it may be accepted that in a federation, and particularly so, where, as in Australia, most of the States are not separated by water, and modern communications facilitate mobility, physical, commercial and electronic, the legislation of one of them may have legal consequences for persons and corporations in others. That cannot deny however that the polity of a State will have the primary responsibility for, and hegemony over the people, institutions, lands and activities within its boundaries. If it were otherwise, then the borders of the States and statehood would be meaningless. The Constitution expressly, and in many places by clearest of necessary implications, recognizes the continuing existence of the States.

Equally it recognizes not only their co-existence with the Commonwealth, but also their co-existence with one another. And while it may further be accepted that a real connexion between the subject matter of legislation, and a State may be enough to support the extra-territorial legislation of that State, that proposition cannot be an absolute one. It must be read subject to the matters I have just stated, and in particular, the primary responsibility of a State for what happens within it. If one State were able to legislate extra-territorially to the point of intrusion upon the primary and predominant responsibilities of another State, then the co-existence of the States and the integrity of their Constitutions, and the federal Constitution itself would be threatened.

Long-arm jurisdiction and legislation

102 I regard this case as another example of a recent disturbing trend on the part of courts and tribunals, and legislatures, towards jurisdictional over-reach, the former by insisting on hearing cases that could more efficiently, proximately and appropriately be heard by courts of other jurisdictions, and the latter, by seeking to confer excessive long-arm jurisdiction on their courts[64]. I adhere to what I said in *Mobil Oil Australia Pty Ltd v Victoria*[65] in a passage which is unaffected by the fact of my dissent there[66]:

> "The Australian Constitution and the federal structure for which it provides, must of necessity contemplate and ensure the unfettered exercise of jurisdiction of the courts of each of the States according to accepted notions of territoriality. All of the State Constitutions contain similar provisions to s 85 of the Victorian Constitution. The plaintiff accepts that the language used in s 85 of the Victorian Constitution and like provisions in other States should not be read in any narrow fashion. However, a consistent, expansive reading and application of all State Constitutions has the capacity to cause, and will inevitably do so, conflicts of jurisdiction, and forum poaching: it is only when the jurisdiction of one State is under consideration, that there may be no immediately apparent problem. The Victorian legislature, by the Victorian Act, has attempted to make the Supreme Court of Victoria a national court for the conduct of class actions: this is so because it has the potential, if the *Supreme Court Act* is

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64 *Agar v Hyde* (2000) 201 CLR 552; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491; *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1; *BHP Billiton Ltd v Schultz* (2004) 79 ALJR 348; 211 ALR 523.

65 (2002) 211 CLR 1.

66 (2002) 211 CLR 1 at 75 [177].

> valid, to draw residents of other places into proceedings in Victoria as plaintiffs in circumstances in which their claims have no necessary connection with Victoria, they have not invoked the jurisdiction of that Court and they might wish, for perfectly valid reasons, to bring proceedings in jurisdictions other than Victoria."

103 I add this. The excessive exercise of long-arm jurisdiction will appear much less attractive when other jurisdictions, particularly off-shore ones, are provoked, as inevitably they will be, to repay the compliment. It has these undesirable side effects as well, of causing unproductive, expensive, and complicated litigation, and unseemly contests between courts and legislatures, of different jurisdictions.

Choice of law

104 The Commonwealth Parliament has no constitutional power to legislate for the resolution of conflicts between the States. Nor does the Constitution contain any provision, such as an adaptation of s 109, which would enable the legislation of one State to prevail over that of another. The High Court, and only the High Court may ultimately resolve conflicts between States (ss 74 and 75(iv) of the Constitution). To the extent that any Commonwealth legislation may appear, or purport to do so, it would be invalid. The fact that the conflict emerges in federal jurisdiction may mean that federal legislation, the *Judiciary Act* has a legitimate role to play, but to the extent that federal legislation, including the *Judiciary Act*, may be thought to have a purpose of resolving constitutional conflicts between the States, it is incapable by reason of an absence of Commonwealth constitutional power, of achieving it.

105 Although ss 74 and 75(iv) of the Constitution contemplate that the High Court may and should resolve disputes between States, neither those sections nor any other provide an indication as to how the disputes should be resolved. It seems to me that consistently with the propositions that I have earlier stated this can only be done by treating the legislation of one State which is in conflict with the extra-territorial operation within it of the legislation of some other State, as prevailing over that extra-territorial operation. It seems to me that the only qualifications in relation to that are those that may flow from ss 117 and 118 of the Constitution to which I will refer later.

106 What I have said does not mean that the choice of law rules will not have a role to play in appropriate cases. The choice of law rules however, whether rules of common law, or adapted or altered by legislation, must be applied, subject to the Constitution. They may operate on occasions in such a way as to answer or resolve questions of apparent inconsistency, but they cannot be used to deny a real or substantial conflict, or, as the appellant not inaccurately put it, a clash of laws between States when it truly exists, as it does in this case.

107 Both New South Wales and Victoria submitted that it would have made no difference to the outcome if the respondent had sued in a New South Wales court: the *Judiciary Act* would have compelled the same outcome as in Victoria. For reasons which will appear I very much doubt the correctness of that submission. It assumes the desired outcome, that a New South Wales court would be bound to choose and accept the law of Victoria, the TA Act, as the law governing the events with which the action is concerned. It is with respect, right, for the reasons stated in the joint judgment, that the action of the respondent is in federal jurisdiction, and that, absent effective legislation to the contrary, the forum, the Victorian court would be bound, pursuant to s 79 of the *Judiciary Act*, to apply its common law choice of law rules, which, as has recently been settled, are common to the whole of Australia[67], or if those rules have been altered by constitutionally competent Victorian legislation, the altered rules. That raises the first issue in the appeal, but one which is not decisive of it: what choice of law rule governs the respondent's action?

108 The answer that Nettle JA gave to that question was in two parts: that the applicable choice of law rule is a rule of common law; and that the common law requires that the law of the jurisdiction in which a statutory cause of action or right is created be chosen[68]:

> "But the cause of action for which s 104(1) provides is not a cause of action in tort and the right of indemnity which the section creates is not a right to damages. As has already been noticed, s 104(1) creates a statutory right and cause of action and, according to the common law choice of law rules applicable to statutory rights and causes of action, those created by s 104(1) are governed by the laws of Victoria[69] as the law of the obligation thereby created. There is no conflict between s 104(1) and the common law choice of law rules which apply within Australia[70]."

109 In other passages in his Honour's judgment and the case cited by Nettle JA[71] as authority for it, weight is placed upon the nature of the cause of action, as a claim analogous to a claim for an indemnity, rather than other factors.

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67 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.

68 *Transport Accident Commission v Sweedman* (2004) 10 VR 31 at 47-48 [51].

69 *Hodge v Club Motor Insurance Agency Pty Ltd* (1974) 7 SASR 86.

70 cf *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581 at 601; *Barcelo v Electrolytic Zinc Co of Australasia Ltd* (1932) 48 CLR 391 at 424.

71 *Hodge v Club Motor Insurance Agency Pty Ltd* (1974) 7 SASR 86.

Subject to a reservation which I will explain later, if the law to be applied to the action is Victorian law, that would not be because a common law rule requires it. It would be so, because, in creating the right or cause of action, the TA Act, necessarily also enacts by necessary implication, a choice of law rule to govern the action. How could it be otherwise? One State cannot legislate for another[72]. In enacting a novel statutory cause of action, a parliament of a State could hardly be intending that the law of some other State apply to the litigation of it. In enacting s 104 of the TA Act, the legislation of Victoria also necessarily sought to enact the choice of law rule to apply to it, of Victoria. There can be no doubt about the statutory intendment of a legislature which creates and enacts a statutory cause of action. On this analysis it is unnecessary to look for and compare similar non-statutory causes of action, and to seek to apply the choice of law rules governing them to the statutory cause of action under s 104 of the TA Act.

110 *Lex causae*[73] means the law of the cause of action but is on occasions used less rigidly. "Cause of action" itself does not have a fixed meaning. As I said in *Air Link Pty Ltd v Paterson*[74]:

> "It is true that lawyers usually tend to think of a cause of action as the label to be given to the category of claims within which the claim in question on the facts alleged in the case falls. But 'cause of action' does not have that meaning exclusively. The phrase is often used in relation to the facts giving rise to a right of action. As Parke B said in *Hernaman v Smith*[75]:
>
> > 'The term "cause of action" means all those things necessary to give a right of action, whether they are to be done by the plaintiff or a third person.'

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72 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

73 *Lex causae* is defined as "the law of the cause of action" in *Butterworths Australian Legal Dictionary*, (1997) and as "the law of the issue" in *CCH Macquarie Dictionary of Law*, rev ed (1996). *Cassell's New Latin Dictionary*, 4th ed (1966) does not include a translation of *lex causae*, but lists "lex" as meaning "law generally, ordinance, rule, precept" and "causa" as meaning "a case at law, a law-suit".

74 (2005) 79 ALJR 1407 at 1429 [145]; 218 ALR 700 at 730.

75 (1855) 10 Exch 659 at 666 [156 ER 603 at 606].

Another statement to a similar effect is as follows[76]:

> '"Cause of action" has been held from the earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed – every fact which the defendant would have a right to traverse.'

Wilson J said this in *Do Carmo v Ford Excavations Pty Ltd*[77]:

> 'The concept of a "cause of action" would seem to be clear. It is simply the fact or combination of facts which gives rise to a right to sue. In an action for negligence, it consists of the wrongful act or omission and the consequent damage[78]. Knowledge of the legal implications of the known facts is not an additional fact which forms part of a cause of action. Indeed, a person may be well appraised of all of the facts which need to be proved to establish a cause of action but for want of taking legal advice may not know that those facts give rise to a right to relief.'"

Dicey and Morris point out, that different Latin expressions are used from time to time to embrace the notion of *lex causae*[79]:

> "The *lex causae* is a convenient shorthand expression denoting the law (usually but not necessarily foreign) which governs the question. It is used in contradistinction to the *lex fori*, which always means the domestic law of the forum, ie (if the forum is English) English law. The *lex causae* may be more specifically denoted by a variety of expressions, usually in Latin, such as the *lex domicilii* (law of the domicile), *lex patriae* (law of the nationality), *lex loci contractus* (law of the country where a contract is made), *lex loci solutionis* (law of the country where a contract is to be performed or where a debt is to be paid), *lex loci delicti* (law of the country where a tort is committed), *lex situs* (law of the country where a thing is situated), *lex loci celebrationis* (law of the country where a marriage is celebrated), *lex loci actus* (law of the country where a legal act

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76 *Cooke v Gill* (1873) LR 8 CP 107 at 116 per Brett J.

77 (1984) 154 CLR 234 at 245.

78 cf *Cooke v Gill* (1873) LR 8 CP 107 at 116; *Read v Brown* (1888) 22 QBD 128 at 131; *Trower and Sons Ltd v Ripstein* [1944] AC 254 at 263; *Board of Trade v Cayzer, Irvine & Co Ltd* [1927] AC 610 at 617; *Shtitz v CNR* [1927] 1 DLR 951 at 953; *Williams v Milotin* (1957) 97 CLR 465 at 474.

79 *Dicey and Morris on the Conflict of Laws*, 13th ed (2000), vol 1 at 29-30 [1-075].

takes place), *lex monetae* (law of the country in whose currency a debt or other legal obligation is expressed). The terms of *lex loci disgraziae* (law of the place where a bill of exchange is dishonoured) and *lex loci stabuli* (law of the place where a motor car is garaged) are used only in jest."

111 Nygh and Davies discuss the steps involved in selecting the *lex causae*[80]:

> "The confusion has arisen because traditionally the process involved in the selection of the *lex causae* has been represented as a series of steps that follow logically the one after the other. The first step in this series is classification in order to determine whether the facts before the court raise an issue which falls within a category for which a choice of law rule exists, such as tort, contract, succession and the like. This process leads to the discovery of the relevant choice of law rule, which, of course, contains the connecting factor. The next logical step is the determination of the connecting factor and this in turn will lead the court to the *lex causae*."

112 And Cheshire and North describe the necessary steps in much the same manner[81]:

> "[T]he 'classification of the cause of action' means the allocation of the question raised by *the factual situation* before the court to its correct legal category. Its object is to reveal the relevant rule for the choice of law." (emphasis added)

To ascertain the cause of action, it is therefore necessary first to ascertain the relevant *facts* causing the harm or loss. The second step, the application of the relevant label to them, of the cause of action, for example, of tort, or a claim for an indemnity, or breach of statutory duty, as the case may be, is a legal and not a factual exercise. The third step, again a legal exercise, is the selection of the law to apply to the cause of action to which the facts give rise.

113 The relevance for present purposes of the matters to which I have referred is that the facts, or the factual situation, determine what the correct cause of action is, and ultimately therefore the law to be chosen.

114 What is strongly arguable is that the facts here, as opposed to matters of law or legal consequence, do not give rise simply to a claim for, or in the nature of an indemnity, statutory or otherwise: that the *facts* constituting or giving rise to the cause of action are those pleaded in paragraphs 3 and 4 of the respondent's

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80 Nygh and Davies, *Conflict of Laws in Australia*, 7th ed (2002) at 273.

81 *Cheshire and North's Private International Law*, 13th ed (1999) at 36.

statement of claim, of a collision, negligence on the part of the appellant causing it, and the suffering of injuries by the casualties as a result of it, in short, of a tort; and that the other matters pleaded are not facts but matters of law, or of legal consequence, of payments to the casualties pursuant to the TA Act, and that the respondent is entitled to sue to recover them under that Act.

115 The argument then proceeds, that the factual situation in substance, and as pleaded, requires the characterization of the respondent's action as one in tort, or at least one which, again as the statement of claim discloses, requires for its success, proof of a tort: the principal or substantial issue is of tort; all other relevant matters are legal ones, and in any event are beyond dispute. *John Pfeiffer Pty Ltd v Rogerson*[82] holds the *lex causae* for torts in Australia is the place of the commission of the tort, here the place where the respondent's right against the appellant arose, Victoria. The argument would also invoke the proposition that modern courts eschew form, and prefer substance wherever possible.

116 There is authority, with which I would respectfully agree, which holds that substance rather than form may be determinative of a question of choice of law, that the true, real, or substantial issues in dispute, of law and fact, govern the choice, and not the nomenclature of the cause of action. In *Macmillan Inc v Bishopsgate Investment Trust Plc (No 3)*[83] the principal issue was whether the defendants were purchasers of shares for value in good faith without notice. The competing laws were the law of England and the law of New York. The primary judge, Millett J, selected New York. The Court of Appeal (Staughton, Auld and Aldous LJJ) affirmed that selection. In doing so, Auld LJ went behind the mere formulation of the cause of action[84]:

> "Subject to what I shall say in a moment, characterisation or classification is governed by the lex fori. But characterisation or classification of what? It follows from what I have said that the proper approach is to look beyond the formulation of the claim and to identify according to the lex fori the *true issue or issues thrown up by the claim and defence*. This requires a parallel exercise in classification of the relevant rule of law. However, classification of an issue and rule of law for this purpose, the underlying principle of which is to strive for comity between competing legal systems, should not be constrained by particular notions or distinctions of the domestic law of the lex fori, or that of the

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82 (2000) 203 CLR 503.

83 [1996] 1 WLR 387; [1996] 1 All ER 585.

84 [1996] 1 WLR 387 at 407; [1996] 1 All ER 585 at 604.

> competing system of law, which may have no counterpart in the other's system. Nor should the issue be defined too narrowly so that it attracts a particular domestic rule under the lex fori which may not be applicable under the other system[85]." (emphasis added)

Aldous LJ adopted a similar approach[86]:

> "I agree with the [primary] judge when he said[87]: 'In order to ascertain the applicable law under English conflict of laws, it is not sufficient to characterise the nature of the *claim*: it is necessary to identify *the question at issue*.' Any claim, whether it be a claim that can be characterised as restitutionary or otherwise, may involve a number of issues which may have to be decided according to different systems of law. Thus it is necessary for the court to look at each issue and to decide the appropriate law to apply to the resolution of that dispute. The judge concluded[88]: 'In my judgment the defendants have correctly characterised the issue as one of priority.' I agree, but believe it right to add what is implicit in that statement, namely that the issue is one of priority of title to shares in Berlitz. Those shares are in the nature of choses in action. They give to the registered holder the rights and liabilities provided by the company's documents of incorporation as governed by New York law. The issue between the parties concerns the right to be registered as the holder of the shares and therefore entitled to the rights and liabilities stemming from registration or the right to registration."

117 The arguments to which I have referred, are consistent with the approach of four judges in the United Kingdom. In substance I would prefer them. It also strikes me as both unfair, and somewhat eccentric that the appellant and her insurer, who may perhaps be presumed to know the law of New South Wales, but hardly the choice of law rules of Victoria and the statutory law creating the claim against them, are now to be confronted with a claim in a Victorian court in respect of events occurring in New South Wales, made long after any action in respect of them in New South Wales could successfully be pursued. That this is so provides further reason for the discouragement and rejection of the excessively long-arm reach of s 104 of the TA Act which Victoria wishes to extend here.

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85 See *Cheshire and North's Private International Law*, 12th ed (1992) at 45-46, and *Dicey and Morris on the Conflict of Laws*, 12th ed (1993), vol 1 at 38-43, 45-48.

86 [1996] 1 WLR 387 at 418; [1996] 1 All ER 585 at 614.

87 [1995] 1 WLR 978 at 988; [1995] 3 All ER 747 at 757 (Millett J's emphasis).

88 [1995] 1 WLR 978 at 990; [1995] 3 All ER 747 at 759.

118 The respondent would no doubt seek to answer those arguments by contending that in pleading as it did, paragraphs 2, 3 and 4 of its statement of claim, it was not simply pleading a factual situation giving rise to a tort, it was pleading, as it was required to do, in order to succeed under s 104 of the TA Act, the criteria which that section prescribes for the success of an action under it. But that argument has these three defects. It makes nomenclature of the cause of action decisive; it ignores the substance of, and the true issues; and it requires for its maintenance too narrow a meaning of "cause of action".

119 It is unnecessary for me to decide the case on the basis just discussed, or reach a firm conclusion on the respondent's ensuing argument, that there was no relevant conflict with respect to limitation periods, because its claim was for an indemnity, and that was a matter as to which s 52 of the MA Act, which imposes a limitation period of three years for actions for damages for personal injuries, did not speak at all because I would uphold the appeal on constitutional grounds.

120 But before leaving this aspect of the case, I would add this. It may be that in any event, even if the respondent's action is properly to be regarded as an action for an indemnity, its nexus with New South Wales is closer than its nexus with Victoria, and would still call for the application of the law of New South Wales as the *lex causae*. This is so because the underlying events, the ones that gave rise to the injuries sustained by the casualties, occurred in New South Wales, they were allegedly caused by a person domiciled and resident in New South Wales, and the indemnity to the extent that it is available, and if the case could be made out, would be provided by satisfaction of the judgment in New South Wales, by an insurer in that State, bound by and acting pursuant to its laws, and basing its premiums, no doubt, upon actuarial calculations of the likely damages assessable under the law of New South Wales. The connexion with Victoria depends almost entirely upon the fact of the TA Act. If the test of closer connexion, the test for an "indemnity claim" is to be applied, New South Wales and its law may better satisfy it. On that basis, the respondent would not be entitled to an indemnity under ordinary principles of subrogation and New South Wales law, because an entitlement to it could not be made out, unless first a liability in tort for the casualties' damages had been established in an action brought, by or in the name of the casualties, as this one was not, within three years of the accident.

The constitutional argument

121 I would hold as I have said, for the appellant on constitutional grounds. What does s 104 of the TA Act really seek to do? The answer is to confer upon a Victorian statutory authority, not only the right to make a unique statutory claim in respect of relevant events wherever occurring in Australia, but also to do so, regardless of any local legal impediments or obstacles to an action for the recovery of the amount sought reflecting New South Wales legislative policy and

the law on the topic of damages for personal injuries caused by the negligent use of a motor vehicle in that State. One obvious impediment here is s 52 of the MA Act, which bars an action for damages for personal injuries after the expiration of three years from their occurrence. But that of course is not the only one. None of the elaborate steps which must be taken before an action could be brought against the appellant in New South Wales, have been taken.

122 In *Port MacDonnell Professional Fishermen's Association Inc v South Australia*[89], the Court foresaw that a conflict between States could arise, and suggested that when it did, it should be resolved by a test of the closer or stronger the connexion of a State with the facts: in that case, the facts of geography. As was said in that case[90]:

> "A problem of greater difficulty would have arisen if the fishery defined by the arrangement had a real connexion with two States, each of which enacted a law for the management of the fishery. The Constitution contains no express paramountcy provision similar to s 109 by reference to which conflicts between competing laws of different States are to be resolved. If the second arrangement had been construed as extending to waters on the Victorian side of the line of equidistance, there would obviously have been grounds for arguing that the Victorian nexus with activities in these waters was as strong as or stronger than the South Australian nexus."

123 If the test propounded in *Port MacDonnell* were a, or the exclusive, test of prevalence, then for the reasons which I have already given, I would hold that New South Wales, and New South Wales law only, should govern the action. The adoption of the State law having the closer or stronger connexion with the facts in issue has several attractions, including that it is suggested in prior authority of this Court. One such benefit is that the application of the closer or stronger connexion test ensures consistency of result, regardless of the forum. Another is that it recognises the primary responsibility or, to use the phrase of the majority in *John Pfeiffer Pty Ltd v Rogerson*, the "predominant concern"[91] that each State has over its own geographical area[92]. Even though, as I pointed out in *Mobil Oil*, more than one State can have a legitimate connexion with the same

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89 (1989) 168 CLR 340.

90 (1989) 168 CLR 340 at 374.

91 (2000) 203 CLR 503 at 536-537 [75] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

92 See at [101] above.

facts[93], it is clear that the Constitution intended each State to have primary legislative responsibility, subject to the Commonwealth's enumerated powers, for occurrences within its borders.

124 Similar issues have arisen in the United States. In general, the approach to their resolution is much the same as the one that I adopt. In *Franchise Tax Board of California v Hyatt*[94], the Supreme Court discussed the various tests arguably applicable to the selection of the appropriate legal regime, in a case in which the Franchise Tax Board of California, which had been sued in another State in tort, sought to rely upon the immunity from suit to which it would have been entitled if similar proceedings had been brought in California. The Supreme Court disallowed the defence. In doing so, it emphasized a number of matters. One was that a State is not compelled to substitute the statutes of other States for its own statutes dealing with a subject matter concerning which it is competent to legislate[95]. Another was that the injury that the plaintiff claimed to have suffered was suffered within the borders of the State in which the action was brought, and that he was one of the citizens of the State[96]. The Court also looked to the degree of significant contact or significant aggregation of contacts creating State interests, pointing out that they were manifest in the case, being in particular, the suffering of injury in the State in which the action was brought, and the fact that at least some of the conduct causing the injury occurred in the State. On the basis of any of those considerations, any conflict between the laws of the State of Victoria and those of New South Wales here should be resolved in favour of the latter.

125 The Supreme Court also discussed a test of "core sovereignty": or to put it another way, which sovereign interest should be deemed more weighty. These were tests which the Court concluded were unworkable in practice.

126 Assistance can be derived from some other United States authority also. In *Brown-Forman Distillers Corp v New York State Liquor Authority*[97], the majority of the Supreme Court (Burger CJ, Marshall, Powell and O'Connor JJ) spoke of the *projection* of the legislation of one State into another, and the *interference* by the law of one State with the ability of another State to exercise

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93 *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 at 80 [186].

94 538 US 488 (2003).

95 538 US 488 at 494, 496 (2003).

96 538 US 488 at 494-495 (2003).

97 476 US 573 (1986).

the latter's constitutional authority[98]. A similar question for consideration arose in *Healy v The Beer Institute*[99]. In that case, the Court referred to "unconstitutional extraterritorial effects"[100]. The reasoning of the Court there made it clear that one State should not be permitted to legislate extra-territorially to regulate events in another State[101].

127 In his Siamese Essays, Professor Regan said of extra-territorial legislation in the United States[102]:

> "[T]he extraterritoriality principle is not to be located in any particular clause. It is one of those foundational principles of our federalism which we infer from the structure of the Constitution as a whole."

128 In *World-Wide Volkswagen Corp v Woodson*, the United States Supreme Court said this[103]:

> "The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.
>
> ...
>
> Nevertheless, we have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution. The economic interdependence of the States was foreseen and desired by the Framers. In the Commerce Clause, they provided that the Nation was to be a common market, a 'free trade unit' in which the

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98 476 US 573 at 583-584, 585 (1986).

99 491 US 324 (1989).

100 491 US 324 at 342 (1989).

101 491 US 324 at 342-343 (1989).

102 Regan, "Siamese Essays: (I) *CTS Corp v Dynamics Corp of America* and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation", (1987) 85 *Michigan Law Review* 1865 at 1885.

103 444 US 286 at 291-293 (1980).

> States are debarred from acting as separable economic entities[104]. But the Framers also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States – a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment."

And in *State Farm Mutual Automobile Insurance Co v Campbell*, the Supreme Court said this[105]:

> "A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction."

129 There can be discerned in those cases an appropriate and well-adapted wariness about the application of the laws of one State, to persons and events in other States, and the activities of those other States. They recognize the need of a State to have the predominant, and if it is so minded, exclusive domain over affairs within it. They also look to, and prefer substance over form, in identifying the people and the events to which the competing laws may apply. The approach focuses first and foremost upon the location of the people and events concerned.

130 I return to the authority of this Court. There must be some territorial limitations upon the legislative powers of the States[106]. In *State Authorities Superannuation Board v Commissioner of State Taxation (WA)*[107], the Court held that the Constitution imposed no impediment upon the imposition by one State, of a tax upon another with respect to property of the latter, situated within the territory of the former, or with respect to dealings by that latter State within the territory of the former. I would not regard that as a case in which one government, the Western Australian government, legislated for another, New South Wales. More accurately, the situation was one in which one State, by an

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104 *H P Hood & Sons Inc v Du Mond* 336 US 525 at 538 (1949).

105 538 US 408 at 422 (2003).

106 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 14; *State Authorities Superannuation Board v Commissioner of State Taxation (WA)* (1996) 189 CLR 253 at 271.

107 (1996) 189 CLR 253.

emanation of it, chose to acquire property and do business in another State. It would be remarkable if New South Wales could be permitted to do that without adherence to the relevant laws of Western Australia. By parity of reasoning, if the respondent here, and those whom it "insured" (the casualties) choose to come into New South Wales or seek to recover money in respect of events occurring there, then they should be bound by the law of New South Wales. It is not as if the casualties could not have sued in that State, and recovered there, had they done so in a timely way, what the respondent now seeks to recover from the appellant.

131 I would accordingly allow the appeal on the basis that s 104 of the TA Act in its application to this case is unconstitutional: it represents an unconstitutional interference with, projection into, or intrusion upon the State of New South Wales, and the natural and predominant hegemony that that State has over claims for personal injuries arising out of negligently caused motor vehicle accidents occurring within it, involving one of its residents, and her insurer licensed to insure her under the law of New South Wales; and upon the further basis that the scheme for which the TA Act provides is in conflict as the table and other provisions discussed show, with the scheme mandated by the MA Act.

132 My conclusion does not depend upon the presence or absence of a provision in the MA Act that no claim to indemnity may be brought in any court, by any party, against a tortfeasor causing a motor accident in New South Wales other than as permitted by the MA Act. The conflict or clash appears clearly from the very marked differences in the statutory schemes, and does not need the express language of such a provision to make it manifest.

133 This conclusion is unaffected by s 118 of the Constitution. It is impossible to give full faith and credit to both sets of laws because they are in conflict with each other. To give full faith and credit to one would be to give no faith or credit to the other. The conflict exists in spite of the common law rules of private international law, because the federal guarantees in the Constitution are paramount[108]. The conflict means that if full faith and credit were to be given to one set of laws, no faith or credit could be given to the other.

134 The United States Supreme Court has countenanced State public policy as a reason for not giving full faith and credit to another State law. The Court said in *Griffin v McCoach*[109]:

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108 See Pryles and Hanks, *Federal Conflict of Laws*, (1974) at 67-68.

109 313 US 498 at 507 (1941).

> "Where this Court has required the state of the forum to apply the foreign law under the full faith and credit clause or under the Fourteenth Amendment, it has recognized that a state is not required to enforce a law obnoxious to its public policy."

In the present case I do not need to go so far as to advocate a public policy exception to giving full faith and credit to laws such as s 104 of the TA Act; the TA Act's unconstitutional intrusion upon the State of New South Wales is sufficient to dispose of the case. To adapt a statement that has been made in relation to the United States full faith and credit clause: to apply the conflicting laws of two States is impossible; to require each State to apply the law of the other is absurd; and to let each State apply its own law ignores the intended operation of s 118[110].

135 It follows that where there is an irreconcilable and direct conflict between two State statutes only one can prevail.

136 The last matter to which reference should be made is the appellant's argument that s 117 of the Constitution required that the appeal be allowed. I have already pointed out that the appellant is not in fact "covered" by insurance in all relevant respects, but in view of the opinion I have formed with respect to the unconstitutionality of s 104 of the TA Act, it is unnecessary for me to decide whether that, or any matter arising under the TA Act subjects the appellant to a disability or discrimination under s 117.

137 I would answer the questions stated for the Court of Appeal differently from the way that Court answered them, and as follows.

A. Whether, given the agreed facts set out in paragraphs 1-9 of the special case, s 104(1) of the *Transport Accident Act* 1986 (Vic) is capable as a matter of construction of applying to the appellant so as to give the respondent a right of indemnity against the appellant.

Unnecessary to answer.

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110 Laycock, "Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law", (1992) 92 *Columbia Law Review* 249 at 297.

B. Whether, given the agreed facts set out in paragraphs 1-9 of the special case, this proceeding is a matter within federal jurisdiction and, if so, whether s 104(1) of the Act is capable of applying as against the appellant in the light of ss 79 and 80 of the *Judiciary Act* 1903 (Cth).

The proceeding is a matter within federal jurisdiction. Section 104(1) of the Act is unconstitutional in its purported application to the appellant whether in light of ss 79 and 80 of the Judiciary Act *1903 (Cth) or otherwise.*

C. Whether, given the agreed facts set out in paragraphs 1-9 of the special case, in its potential application to the appellant in this proceeding s 104(1) of the Act is invalid or inapplicable as being:

(a) contrary to Ch III and s 118 of the Constitution; or

Section 104(1) of the Act is invalid and inapplicable to the appellant by reason of its unconstitutional interference with, projection into, and intrusion upon the constitutional hegemony of New South Wales over the events with which the Act purports to deal. It is otherwise unnecessary to answer this question.

(b) contrary to s 117 of the Constitution; or

Unnecessary to answer.

(c) inconsistent with the operation of the provisions of the *Motor Accidents Act* 1988 (NSW), as it applied at the time of the accident.

Yes.

138 The orders that I would make following upon those answers are that the respondent's action be dismissed, and that the respondent pay the appellant's costs of it, and of the proceedings in the Court of Appeal and in this Court.

139 HEYDON J. The background circumstances and the questions posed in the special case for the Court of Appeal of Victoria are set out in Callinan J's reasons for judgment. However, the range of argument in this Court was less extensive than those questions might suggest. The appellant agreed that the correct answers to question A and the first part of question B were those which that Court gave. The appellant contended that the correct answer to the second part of question B was that s 104(1) of the *Transport Accident Act* 1986 (Vic) did not apply against the appellant for reasons centring on its invalidity. The key controversies in this appeal are thus those raised by question C, which turn on validity. Question C raises as essential issues whether s 104(1) is invalid as being (a) contrary to Ch III and s 118 of the Constitution; or (b) contrary to s 117 of the Constitution; or (c) inconsistent with the *Motor Accidents Act* 1988 (NSW). It is convenient to examine these questions in reverse order.

140 At the heart of the appellant's case was her submission that pursuit of the Commission's s 104(1) action against her would undermine, alter, impair and detract from the *Motor Accidents Act*, and that there was in substance a direct operational inconsistency or "clash" between pursuit of the s 104(1) action and the *Motor Accidents Act*. It was submitted that the *Transport Accident Act* was "inimical to the intended effect of the New South Wales law". The appellant also submitted: "the issue is to identify inconsistency as a matter of substance and operation, reflecting the principle that a subject of Australian law cannot be required simultaneously to comply with two inconsistent legal requirements." The appellant submitted that inconsistency arose essentially in five respects.

Inconsistency of s 104(1) of the *Transport Accident Act* with the *Motor Accidents Act*

141 Before examining the respects in which the appellant submitted that s 104(1) of the *Transport Accident Act* was inconsistent with the *Motor Accidents Act*, it is desirable to point to certain features of each Act.

142 Section 35 of the *Transport Accident Act* creates an entitlement in a person to compensation in accordance with the Act where the transport accident occurred in Victoria, or where it occurred in another State or Territory and involved a "registered motor vehicle" and, at the time of the accident, the person was a resident of Victoria, or the driver of, or a passenger in, the registered motor vehicle. The compensation is paid by the Transport Accident Commission. Section 104(1) gives the Commission a right of indemnity against the person responsible for the accident.

143 The *Motor Accidents Act* has several functions[111]. One relates to insurance. The Act creates a requirement that motor vehicles used on public streets in New South Wales be insured by a "third-party policy" in the terms of Sched 1: ss 3(1), 8, 9 and 11. The third-party policy insures the owner and driver of all but excepted motor vehicles against "liability in respect of the death of or injury to a person caused by the fault of the owner or driver of the vehicle … in the use or operation of the vehicle in any part of the Commonwealth …". Thus the liability of the insurer is not limited to liabilities arising in New South Wales. Nor is the liability limited to damages payable to an injured person. The liability includes a liability like that arising under s 104 – a statutory liability to indemnity which is not a claim for damages.

144 Thus the third-party policy extends to the circumstances of a case like the present, where the victims did not sue the owner or driver in New South Wales, but were compensated by the Commission in Victoria, and the Commission sought indemnity from the driver. Section 104(1) thus does not prevent the insurance scheme contemplated by the *Motor Accidents Act* from operating in an integrated fashion so as to indemnify both the driver and those whom she injured. And it does not take away from the defendant an advantage which that defendant would have had if the victim had not sought compensation from the Commission but had instead sued in New South Wales.

145 Another function of the *Motor Accidents Act* is to regulate the enforcement of common law rights of action for damages in respect of the death of or injury to a person caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle (ss 40(1) and 41). One way in which that function is fulfilled is through Pt 5. The principal role of Pt 5 is to create procedural requirements regulating the manner in which plaintiffs enforce their claims for "damages" in respect of death or injury so caused. A claim under s 104(1) is not a claim of that kind. Part 5 relates to the claims of injured persons, not to claims for indemnity from those who have met claims by injured persons. This illustrates the fact that the *Motor Accidents Act* does not exhaustively define the remedies which may exist in respect of the death of or injury to a person caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle.

146 Yet another function of the *Motor Accidents Act* is seen in Pt 6. It limits the amounts to be arrived at as integers in an award of damages which relates to the death of or injury to a person caused by the fault of the owner or driver of a

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111 The *Motor Accidents Compensation Act* 1999 (NSW) repealed some parts but not other parts of the *Motor Accidents Act*. It is convenient to speak of the *Motor Accidents Act* using the present tense, whether or not the provisions discussed remain in force now.

motor vehicle in the use or operation of the vehicle. Although Pt 6 is exhaustive in the sense that damages are not to be awarded to a person in respect of a motor accident contrary to Pt 6, it does not deal with claims for indemnity by those who have met claims relating to death or injury, but only with the damages payable under those claims.

147 In short, the relevant sections of the *Motor Accidents Act*, in terms of what they provide and what they do not provide, do not seek to deal with and regulate claims of the kind which arise under s 104(1). But they do permit persons against whom indemnity is obtained under s 104(1) to recover from their insurers. There is thus no collision between the *Motor Accidents Act* and s 104(1) in that respect. Similarly, s 104(1) does not purport to reduce the ambit of the *Motor Accidents Act*. Section 104(2) provides that the liability of the defendant under s 104(1) shall not exceed the amount of damages payable to the injured person: that is, under s 104(1) neither the tortfeasor nor the insurer incurs greater liability than that tortfeasor or insurer would have incurred had the victim proceeded against the tortfeasor under the common law as modified by the *Motor Accidents Act*.

148 Against this background it is convenient to examine the five groups of inconsistencies between s 104(1) and the *Motor Accidents Act* which the appellant contended for. They centre on a much smaller range of the provisions than those referred to in argument.

149 The first of the five was that there were differences between the *Motor Accidents Act* and the *Transport Accident Act* as to the permissible recovery of particular heads of loss. Section 104(2) of the *Transport Accident Act* prevents these differences from having significance. Even if in relation to some heads of loss Victoria is more generous than New South Wales and in relation to others New South Wales is more generous than Victoria, whatever a victim recovers under the *Transport Accident Act*, the amount recoverable under s 104(1) by the Commission cannot exceed the amount recoverable by the victim under the *Motor Accidents Act*. For this reason it is necessary to reject the appellant's submission that recoveries by the Commission under s 104(1) "undermine the NSW Parliament's attempts to restrict what is compensable".

150 The second alleged inconsistency was that judgment under the *Motor Accidents Act* in favour of a victim would crystallise the liability of the insurer into a once-and-for-all amount, while potential liabilities under s 104(1) could go on for an extended period. It was said that this impaired the ability of insurers "to provision for, or close off, claims", inconsistently with the objects of the *Motor Accidents Act*. It is convenient to consider this "inconsistency" with the third inconsistency, which was said to lie in the fact that the *Motor Accidents Act*, s 52, subjected a claim under the *Motor Accidents Act* by a victim to a three year limitation period, while a claim by the Commission under s 104(1) was subjected by s 5(1)(d) of the *Limitation of Actions Act* 1958 (Vic) to a six year limitation

period. The appellant pointed out that in this very case the s 104(1) claim was instituted more than three years after the accident. This comparison of the provisions does not indicate "inconsistency". To compare the limitation period applicable to a claim for damages against the owner/driver at fault with the limitation period applicable to a claim by the Commission for indemnity is not to compare like with like. A more appropriate comparison is a comparison between the three year limitation period binding the claimant under the *Motor Accidents Act* and s 68 of the *Transport Accident Act*. Section 68(1) gives to a person making a claim on the Commission as the result of a transport accident one year after the accident or a death caused by the accident in which to make the claim, or one year after the injury first manifested itself. Section 68(2) provides for claims to be made within three years if the Commission considers there are reasonable grounds for the delay. The limitation regime created by the Victorian legislation in relation to claims by injured persons against the Commission, far from being more lenient than that imposed by the New South Wales legislation on claims by injured persons against tortfeasors, is less lenient. The fact that a claimant hampered by the Victorian limitation regime can sue in New South Wales does not reveal an "inconsistency" which is "inimical" to the *Motor Accidents Act*. Even if it be assumed that while only one claim can be made under the *Motor Accidents Act*, several may be made under s 104(1), none of the latter can be made after six years, and all must relate to payments by the Commission in response to claims by victims made within three years at the latest. No doubt there is a risk, as this case reveals, that from time to time an insurer may have to indemnify an owner or driver sued by the Commission under s 104(1) up to six years after the accident. Since the third-party policy insures against "liability in respect of" vehicles used or operated in any part of the Commonwealth, the legislative language contemplates the policy meeting liabilities other than those which sound in damages and which are subject to the specific limitation and other restrictions of Pts 5 and 6 of the *Motor Accidents Act*. The fact that the *Motor Accidents Act* contemplates those other liabilities arising indicates that legislation in other States generating them is not inconsistent with the *Motor Accidents Act*. In particular, provision will have to be made for those other liabilities, or they will have to be closed off, as insurers see fit in the light of claims under the legislation of other States which are subject to limitation periods which may be longer than that provided by the *Motor Accidents Act*. Those are decisions for insurers to make in the light of their experience of those claims being made, and their perception of the likelihood of them being made in future. That circumstance does not create an inconsistency with the objects of the *Motor Accidents Act* in view of the terms of s 9(a)(i) and Sched 1, for the objects must give way to those clear words: the role of the statutory objects is only to assist in resolving a competition between competing constructions (see s 2B(1)).

151 The fourth inconsistency was said to lie in the differences between the procedures which are to be followed by victims making claims under each Act. So far as these differences rest on a relevant comparison, they tend to lack

materiality, partly because some of them are trivial, partly because the absence in the *Transport Accident Act* of requirements equivalent to those in the *Motor Accidents Act* will be overcome by the fact that in practice claimants under the *Transport Accident Act* will tend to behave in a manner functionally similar to the way required under the *Motor Accidents Act*, and partly because s 104(2) prevents recovery under the *Transport Accident Act* greater than that achievable under the *Motor Accidents Act*. But the fundamental reason why the fourth alleged inconsistency is not a true inconsistency is that the *Motor Accidents Act* contemplates that persons driving in New South Wales will be insured against liabilities other than those relating to the payment of damages; that is, statutory indemnities of the type illustrated by s 104(1). A difference between what a claimant for damages must do under the *Motor Accidents Act* and what a claimant for payments under the *Transport Accident Act* must do does not reveal an inconsistency between the *Motor Accidents Act* and s 104(1). Recovery by a claimant for damages under the *Motor Accidents Act* is a form of recovery distinct from recovery under s 104(1). The fact that the latter kind of recovery is one which the language of the *Motor Accidents Act* and the third-party policy contemplates as available precludes a conclusion of inconsistency.

152 The fifth inconsistency relied on turned on "the possibility of double recovery by [the Commission] and the victim", which was said to undermine the goals of the *Motor Accidents Act* – controlling claim payments and insurance premiums (s 2A(2) and s 68A). This appears to postulate a claim in Victoria against the Commission and an earlier, concurrent or subsequent claim in New South Wales against the tortfeasor. In this Court the argument was put very briefly, perhaps because Callaway JA and Nettle JA in the Court of Appeal gave compelling reasons for the conclusion that s 42[112] and s 104 of the *Transport*

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112 Sub-sections (1), (2), (3) and (5) of s 42 provide:

> "(1) This section applies where a person is injured or dies as a result of a transport accident if –
>
> (*a*) the person, a dependant of the person or the surviving spouse of the person is entitled to compensation in respect of the accident in accordance with this Act; and
>
> (*b*) a person has a right to claim compensation or a right of action in respect of the accident under the law of a place outside Victoria.
>
> (2) The person, or a dependant or a surviving spouse of the person, is not entitled to compensation in accordance with this Act if, under the law of a place outside Victoria –

(Footnote continues on next page)

(*a*) the person, dependant or surviving spouse has been paid or has recovered an amount of compensation or damages; or

(*b*) an award of compensation or judgment for damages has been made, given or entered; or

(*c*) any payment into court has been accepted; or

(*d*) there has been a compromise or settlement of a claim; or

(*e*) a claim for compensation or action for damages is pending.

(3) If the person, a dependant or a surviving spouse of the person –

(*a*) receives compensation under this Act in respect of a transport accident; and

(*b*) under the law of a place outside Victoria –

(i) receives compensation or damages; or

(ii) obtains an award of compensation or judgment for damages; or

(iii) payment into court has been accepted; or

(iv) there has been a settlement or compromise of a claim –

in respect of the accident –

the Commission may recover from that person, dependant or surviving spouse as a debt due to the Commission the amount of compensation paid under this Act or the amount to which paragraph (*b*) refers, whichever is the lesser.

...

(5) If a person who claims or is entitled to claim compensation under this Act in respect of a transport accident claims compensation or commences proceedings outside Victoria for the recovery of damages in respect of that accident, the person must give notice in writing to the Commission."

Accident Act in combination prevent any double recovery by victims and also any double recovery by the Commission[113]. For those reasons, which it is unnecessary to repeat, the argument must be rejected.

153 The appellant's arguments that material inconsistencies exist must fail. The *Transport Accident Act* and the *Motor Accidents Act* have differences, but they are not what the appellant accepted had to be found – inconsistencies *in substance*. They satisfy no possible test for inconsistency, and the correctness of various tests for inconsistency debated at the bar table need not be considered.

154 Accordingly, the answer given by the Court of Appeal of Victoria to question C(c) is correct. Thus the question of how inconsistencies between the legislation of different States are to be resolved does not arise.

155 I would prefer to say nothing about the references made in the reasons of the majority and in the reasons of Callinan J to United States authorities. Very little reference was made in argument to United States law. The respondent made no reference to it. Three interveners, and the appellant in reply, referred to it only briefly.

Section 117 of the Constitution

156 Turning to question C(b), I agree with the reasons given by the majority for concluding that s 104(1) is not contrary to s 117 of the Constitution[114]. In consequence, the answer given by the Court of Appeal of Victoria to question C(b) is correct.

Chapter III and s 118 of the Constitution

157 The notice which the appellant served pursuant to s 78B of the *Judiciary Act* 1903 (Cth) maintained that s 104 is unconstitutional on the ground that the effect of its application to the facts of this case would be "to facilitate inconsistent and indeterminate legal results for matters arising within Australia, … contrary to the rule of law, the implied requirements of Ch III of the Constitution in relation to the creation and maintenance of one unified system of law, and the requirements of s 118 of the Constitution". However, the appellant did not advance any specific or distinct submission to this Court in support of that proposition beyond contending that to give effect to s 104(1) was to fail to give full faith and credit to the *Motor Accidents Act* and was to undermine the

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113 *Transport Accident Commission v Sweedman* (2004) 10 VR 31 at 36-38 [9]-[17], 43-44 [38] and 45-46 [42]-[44].

114 At [54]-[66].

"unified and integrated legal structure established under, and envisaged and protected by, Chapter III of the Constitution".

158 These contentions rest on the proposition that the *Motor Accidents Act* is impaired by the claim under s 104(1). That in turn rested on the argument that there were inconsistencies between s 104(1) and the *Motor Accidents Act*. It follows from the rejection of that argument that there is accordingly no reason to doubt the correctness of the answer which the Court of Appeal of Victoria gave to question C(a). It also follows that that Court's answer to the second part of question B is also correct.

Orders

159 I agree with the majority that the appeal should be dismissed with costs.