

COURT OF APPEAL FOR ONTARIO

MORDEN, BORINS AND SIMMONS J.J.A.

B E T W E E N :)
)
MARTIN BRITTON) **David A. Zuber**
) **for the appellants**
) **Brendan and Ian O'Callaghan**
) **Plaintiff**)
) **(Respondent)**)
- and -) **Grant R. Dow**
) **for the appellant**
) **Kyong Hae Nagy**
)
BRENDAN FELIX) **Darcy R. Merkur**
O'CALLAGHAN, IAN) **for the respondent**
O'CALLAGHAN, KYONG HAE)
NAGY)
)
) **Defendants**)
) **(Appellants)**)
) **Heard: September 23 and 24, 2002**

On appeal from the order of Justice Alfred J. Stong of the Superior Court of Justice dated January 4, 2002.

BORINS J.A.:

1. [1] The respondent sustained bodily injuries on June 7, 1996, when the motor vehicle in which he was a passenger, that was owned by the appellant Ian O'Callaghan and driven by the appellant Brendan O'Callaghan, collided with a motor vehicle owned and operated by the appellant Kyong Hae Nagy in Akron, Ohio. The respondent and the O'Callaghans are residents of Ontario, while Nagy is a resident of Ohio. The O'Callaghan motor vehicle was licensed and registered in Ontario and was insured under an insurance policy issued in Ontario. The Nagy motor vehicle was licensed and registered in Ohio and was insured under an insurance policy issued in Ohio. Upon the respondent's return to Ontario, he

applied for and was paid no-fault benefits pursuant to the *Statutory Accident Benefits Schedule* (“SABS”) under the *Insurance Act*, R.S.O., 1990, c. I.8, under a standard motor vehicle liability policy issued to him by his insurer in Ontario. Subsequently, he commenced this action against the appellants to recover damages arising from the accident and caused by the appellants’ alleged negligence.

2. [2] On a motion by the appellants to determine a question of law, the motion judge held that the law of Ohio is the substantive law that applies to this action.

3. [3] It is common ground that if Ontario law applies to the action, as the appellants contend, the respondent is precluded by s. 267.1(1) of the *Insurance Act*, as it provided on the date of the accident, from claiming for pecuniary damages. To recover non-pecuniary damages the respondent must establish that he has sustained serious disfigurement or serious impairment of an important physical, mental or psychological function, as required by s. 267.1(2). If Ohio law applies, the respondent’s damages are not governed by these restrictions.

4. [4] The motion judge, in reasons reported in (2001), 57 O.R. (3d) 644, held that the general rule of choice of law that applies to domestic torts occurring in Canada, as stated in *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, should be applied to the circumstances of this case. Accordingly, he held that the *lex loci delicti*, the law of the place where the wrong took place, which is the law of Ohio, applies.

5. [5] The motion judge recognized that the Supreme Court of Canada held that in certain circumstances involving foreign torts the court retained a discretion to apply the *lex fori*, the law of the forum, where applying the *lex loci delicti* “could give rise to injustice”. He noted that one of the exceptions to the general choice of tort law rule, the *lex loci delicti*, discussed in *Tolofson* is where all parties involved in an accident are from the forum. The motion judge also appears to have recognized that the policy behind a rigid choice of tort law rule emphasizes the importance of certainty in the rules governing choice of law as a means of achieving fairness in the application of private international law.

6. [6] In concluding that the law of Ohio should be applied to this accident, the motion judge declined to apply the law of Ontario because the respondent’s opportunity of achieving a greater recovery in Ohio did not constitute an injustice that required the application of Ontario law. In addition, the facts demonstrated a “real and substantial” connection to the *lex loci delicti*, apart from

Ohio being the place of the accident, as one of the parties was an Ohio resident who was driving a vehicle owned, insured and registered in Ohio. He considered the latter in itself a sufficient ground for the application of the *lex loci delicti*. In summary, the motion judge held that the general choice of tort law rule is to apply the law of the place where the wrong took place, and that this case did not fall within any exception to the rule.

7. [7] The appellants have advanced the following grounds of appeal:

(1) The common law choice of tort law rule has been modified by s. 267.1(1) of the *Insurance Act* by precluding an action in Ontario for damages arising from an accident that occurred anywhere else in Canada or in the United States of America.

(2) Having elected to claim SABS under Ontario law, the respondent cannot claim tort damages under Ohio law.

8. [8] It is helpful to set out the provisions of the *Insurance Act* that apply to this action:

s. 267.1(1) Despite any other Act and subject to subsections (2) and (6), the owner of an automobile, the occupants of an automobile and any person present at the incident are not liable in a proceeding in Ontario for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of the automobile in Canada, the United States of America or any other country designated in the *Statutory Accident Benefits Schedule*.

(2) Subsection (1) does not relieve a person from liability for damages for non-pecuniary loss, including damages for non-pecuniary loss under clause 61(2)(e) of the *Family Law Act*, if as a result of the use or operation of the automobile the injured person has died or has sustained,

(a) serious disfigurement; or

(b) serious impairment of an important physical, mental or psychological function.

9. [9] In my view, properly interpreted, s. 267.1(1) does not change the common law choice of tort law rule stated in *Tolofson*. The appellants read s. 267.1(1) as prohibiting a person injured in an automobile accident occurring outside of Ontario from bringing a

proceeding in Ontario to recover damages arising from his or her bodily injuries. I do not agree with this interpretation. Section 267.1(1) expressly recognizes that a proceeding may be taken in Ontario arising from an automobile accident in Canada or the United States, but limits the defendant's liability, subject to subsections (2) and (6). However, s. 267.1(1) applies only if the choice of tort law rule calls for the application of Ontario law. Thus, the purpose of s. 267.1(1) is to limit the liability of the tortfeasor in automobile accidents occurring in Canada and the United States. As such, it is not determinative of the choice of tort law rule to be applied.

10. [10] In my view, the fact that the appellant applied for and received SABS in Ontario from his own insurer plays no part in the choice of law analysis. These are benefits for which the appellant paid when he purchased his motor vehicle liability insurance. Indeed, the scheme of compensation for injuries sustained as a result of automobile accidents as provided in the *Insurance Act* through its various changes over the past decade requires that all motor vehicle insurance policies issued in Ontario must provide this coverage. See, e.g., *Gignac v. Neufeld* (1999), 43 O.R. (3d) 741 (C.A.). Trial courts in Ontario, correctly in my view, have held that the receipt of SABS in Ontario has no effect on the application of the choice of tort law rule in cases of domestic torts. See *Schultz v. Panorama Transportation Inc.* (2001), 31 C.C.L.I (3d) 84 (Ont. Sup. Ct.); *Salminen v. Emerald Taxi Ltd.* (1999), 50 C.C.L.T. (2d) 180 (Ont. Gen. Div.); *George v. Gubernowicz* (1999), 44 O.R. (3d) 247 (Gen. Div.). A different result should not follow where a plaintiff has received SABS after sustaining bodily injuries caused by a tort committed in the United States.

11. [11] Although *Tolofson* was a case involving a domestic tort and the rigid choice of tort law rule that it established applies to domestic torts, it is clear that both trial and appellate courts have interpreted and applied *Tolofson* as also establishing the same choice of law rule in the case of foreign torts, the *lex loci delicti*, with the exception that in rare cases the court may exercise a discretion to choose the *lex fori* to prevent an injustice. The motion judge was aware of his limited discretion and declined to exercise it. Although I would not endorse the motion judge's analysis in its entirety, I am of the opinion that he was correct to apply the choice of law rule mandated by *Tolofson* and to decline to exercise his discretion to declare that the substantive law of Ontario applied to the respondent's claim. I find support for this conclusion in the recent decisions of this court in *Wong v. Lee* (2002), 211 D.L.R. (4th) 69

(Ont. C.A.) and *Somers v. Fournier* (2002), 214 D.L.R. (4th) 611 (Ont. C.A.).

12. [12] The appeal is dismissed with costs on a partial indemnity scale fixed at \$2,500.

Released: October 10, 2002

“S. Borins J.A.”

“I agree J. W. Morden J.A.”

“I agree Janet M. Simmons J.A.”