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Can the Pennsylvania Courts Interpret Delay Damages Consistently With Sovereign Immunity, or Are They as Incompatible as Oil and Water?

In interpreting the provisions of legislatively created sovereign immunity in recent years, the Supreme Court of Pennsylvania has handed down several decisions that severely restrict the right of recovery to parties injured as a result of the negligence of the commonwealth and its agencies. However, once such a party does get into court, the supreme court has been extremely liberal in its interpretation of the rule permitting delay damages. This comment asks: what sort of mixed message is the court sending?

Initially, this comment will briefly summarize the history of sovereign immunity in Pennsylvania. It will then look at how the Pennsylvania courts have interpreted one of the exceptions to legislatively-created immunity—the motor vehicle exception—and how the Pennsylvania courts have continued to take a narrow reading of the immunity statutes. The comment will analyze recent case law concerning the imposition of delay damages against commonwealth parties and expose what appears to be a conflict of policies relative to delay damages and immunity. The author will offer a proposal to harmonize the two policies.

SOVEREIGN IMMUNITY IN PENNSYLVANIA

The first case in Pennsylvania adopting sovereign immunity was *O'Connor v. Pittsburgh*.¹ In the decades following *O'Connor*, immunity came under criticism from both the courts and the legal community in general.² In *Ayala v. Philadelphia Board of Public*

1. *O'Connor v. Pittsburgh*, 18 Pa. 187, 189 (1851).

2. In *Mayle v. Department of Highways*, 388 A.2d 709 (Pa. 1978), Justice Roberts stated:

Three times in recent years we have repudiated as unfair similar status-based immunities of parties. A majority of the states has rejected sovereign immunity at least to some degree, and commentators oppose it nearly unanimously . . . [m]oreover, the immunity accorded Pennsylvania as 'sovereign' has been far greater than that claimed by any English king or queen at least since the restoration of the monarchy in 1660.

Mayle, 388 A.2d at 710-11 (citations omitted).

Education,³ the Supreme Court of Pennsylvania, following the leads of many other jurisdictions,⁴ declared that "the doctrine of governmental immunity—long since devoid of any valid justification—is abolished in this Commonwealth."⁵ It is important to note that the *Ayala* decision only abolished governmental immunity, and in fact, specifically pointed out that the sovereign immunity of the Commonwealth of Pennsylvania was not affected by its decision.⁶

However, in 1978, the *Ayala* decision was followed by *Mayle v. Department of Highways*⁷ wherein Justice Roberts opined that "[o]nce the 'errors of history, logic and policy' which underly [sic] . . . sovereign immunity . . . have been laid bare, we see no reason to perpetuate them. . . . We therefore abolish the doctrine of sovereign immunity."⁸ It should be remembered that the court in *Ayala* and *Mayle* was not confronted with statutorily mandated immunities, rather it only abolished the common law doctrines of governmental and sovereign immunity.

The General Assembly of Pennsylvania, reacting to the decision in *Mayle*, reinstated sovereign and governmental immunity.⁹ How-

3. *Ayala v. Philadelphia Bd. of Pub. Educ.*, 305 A.2d 877 (Pa. 1973).

4. The *Ayala* opinion contains an appendix that sets forth the various jurisdictions and their positions on sovereign immunity. That listing is not reprinted here because an elaboration on the historical roots of sovereign immunity is beyond the scope of this comment.

The *Ayala* decision was four-to-three, with Justices Roberts, Pomeroy, Nix and Manderino siding with the abolitionists and Chief Justice Jones, and Justices Eagen and O'Brien dissenting. *Ayala*, 305 A.2d at 889.

5. *Id.* at 878 (citations omitted).

6. *Id.* The distinction between governmental immunity (also called local governmental immunity) and sovereign immunity is that sovereign immunity attaches to the state or commonwealth, while governmental immunity attaches to local government agencies such as cities, towns and school districts. *Mayle*, 388 A.2d at 714-15.

7. 388 A.2d 709 (Pa. 1978).

8. *Id.* at 719-20 (citations omitted). In the time between *Ayala* and *Mayle*, Chief Justice Jones had left the bench and was replaced by Justice Larsen. *Mayle* was decided by a four-to-three majority, with Justices Roberts, Nix, Manderino and Larsen aligning with abolition, and Chief Justice Eagen and Justices Pomeroy and O'Brien dissenting. Note that Justice Pomeroy had approved of abolishing governmental immunity, but disapproved of abrogating sovereign immunity. *Id.*

9. 1 PA. CONS. STAT. ANN. § 2310 (1978).

Pursuant to section 11 of Article I of the Constitution of Pennsylvania, it is hereby declared to be the intent of the General Assembly that the Commonwealth, and its officials and employees acting within the scope of their duties, shall continue to enjoy sovereign and official immunity and remain immune from suit except as the General Assembly shall specifically waive the immunity. When the General Assembly specifically waives sovereign immunity, a claim against the Commonwealth and its officials and employees shall be brought only in such manner and in such courts and in such

ever, the enacting legislation provides statutorily created exceptions to sovereign immunity.¹⁰ Under *Mascaro v. Youth Study Center*,¹¹ the court held that as a precondition to maintaining an action against a commonwealth agency, plaintiffs have to satisfy three statutory requirements.¹² First, plaintiffs must demonstrate that, were it not for the defense of sovereign immunity, they would have a cause of action recognized either at common law or provided by statute.¹³ Secondly, the plaintiffs must demonstrate that the injury was caused by the negligent acts of the commonwealth agency or an employee acting within the scope of his or her office or duties (excluding acts of crimes, fraud, malice or willful misconduct).¹⁴ Finally, the more difficult hurdle for plaintiffs, the plaintiff must establish that the cause of action falls within one of the statutorily created exceptions to sovereign immunity,¹⁵ as enunciated under the Political Subdivisions Tort Claims Act.¹⁶ One of the exceptions to sovereign immunity under the Political Subdivisions Tort Claims Act, and a fertile area for litigation, is the motor vehicle exception.¹⁷

THE MOTOR VEHICLE EXCEPTION TO SOVEREIGN IMMUNITY

Pennsylvania has created several transportation authorities to provide mass transportation facilities for urban areas. These authorities are defined as commonwealth agencies under current case

cases as directed by the provisions of Title 42 (relating to judiciary and judicial procedure) unless otherwise specifically authorized by statute.

Id.

10. 42 PA. CONS. STAT. ANN. § 8521(a) (1982).

(a) General rule.-Except as otherwise provided in this subchapter, no provision of this title shall constitute a waiver of sovereign immunity for the purpose of 1 Pa. Cons. Stat. § 2310 (relating to sovereign immunity reaffirmed; specific waiver) or otherwise.

Id.

11. 523 A.2d 1118 (Pa. 1987).

12. *Mascaro*, 523 A.2d at 1121.

13. *Id.*

14. *Id.* at 1123.

15. *Id.*

16. *Mascaro*, 523 A.2d at 1121-23 (citing 42 PA. CONS. STAT. ANN. § 8542(a)).

17. 42 PA. CONS. STAT. ANN. § 8522(b) provides in pertinent part:

The following acts by a Commonwealth party may result in the imposition of liability on the Commonwealth and the defense of sovereign immunity shall not be raised to claims for damages caused by:

. . . The operation of any motor vehicle in the possession or control of a Commonwealth party. As used in this paragraph, "motor vehicle" means any vehicle which is self-propelled and any attachment thereto, including vehicles operated by rail, through water or in the air.

Id.

law.¹⁸ As can be expected, the vast majority of claims and lawsuits for personal injury related to these transportation entities arises under the motor vehicle exception to sovereign immunity.¹⁹ Just what is the motor vehicle exception, and how have the courts interpreted it?

The motor vehicle exception is limited to *operation* of a motor vehicle.²⁰ While the statute defines *motor vehicle*,²¹ the courts have been left to their own resources with the more difficult question of what constitutes *operation*. In answering that question, the supreme court, in the seminal case of *Love v. City of Philadelphia*,²² noted that "exceptions to governmental immunity were to be 'narrowly interpreted . . . given the expressed legislative intent to insulate political subdivisions from tort liability.'"²³

In *Love*, the plaintiff was a seventy-three year old woman, who was blind in one eye and had impaired vision in the other.²⁴ The defendant, City of Philadelphia ("City"), provided her with van service to a senior citizens' center.²⁵ It was the van driver's custom to place a portable stepping stool beneath the bottom step of the van so that Mrs. Love could more easily traverse the distance to the ground.²⁶ On the date of her accident, the plaintiff alleged that the stepping stool was not properly placed by the defendant's agent, and, as a result she fell, suffering multiple injuries that caused her to be confined to a nursing home.²⁷ In affirming the commonwealth court's decision that overturned the jury's verdict against the City,²⁸ Justice McDermott stated that entering or exiting a motor vehicle do not constitute operation of a motor vehicle,

18. *Miller v. Erie Metro. Transit Auth.*, 618 A.2d 1095 (Pa. Commw. Ct. 1992). In *Miller*, Judge Pellegrini stated "[o]ur Supreme Court in *Marshall v. Port Authority of Allegheny County*, 568 A.2d 931 (Pa. 1990), has determined that transportation authorities are commonwealth agencies rather than local agencies and are entitled to sovereign immunity because they exercise the public powers of the Commonwealth as agencies." *Miller*, 618 A.2d at 1096 n.3.

19. 42 PA. CONS. STAT. ANN. § 8522(b)(1).

20. *Id.*

21. *Id.* The statute defines motor vehicle as "any vehicle which is self-propelled and any attachment thereto, including vehicles operated by rail, through water or in the air." 42 PA. CONS. STAT. ANN. § 8522(b)(1).

22. 543 A.2d 531 (Pa. 1988).

23. *Love*, 543 A.2d at 532 (quoting *Mascaro v. Youth Study Ctr.*, 523 A.2d 1118, 1123 (Pa. 1987)).

24. *Id.* at 531.

25. *Id.*

26. *Id.*

27. *Id.* at 532.

28. The verdict was \$375,000.00. *Love*, 543 A.2d at 532.

but are "ancillary" acts and immunity attaches to such acts.²⁹

At first blush, there is a paradox here—how can the court say in *Mayle* that there is no longer any justification for immunity, and just fifteen years later, read an exception to statutorily created immunity so narrowly? It is easy to excuse this anomaly by parroting the court's words and saying that exceptions to immunity were to be narrowly interpreted.³⁰ The more accurate response is that the supreme court had undergone a change of personnel and philosophy. With the departure of five members of the *Mayle* court,³¹ and no binding precedent regarding interpretation of the newly enacted statutory immunity, the *Love* court was able to develop its own views on the issue. In retrospect, one would think that if the court was ever to be accused of judicial activism and was looking for a case to dilute the effect of the legislative reenactment of sovereign immunity, the facts in *Love* would have been especially appealing. On one side of the scales there was a very sympathetic plaintiff with debilitating injuries that destroyed her lifestyle, while on the other side was the faceless public coffers. The court could have very easily taken an expansive interpretation to include assisting a person out of a motor vehicle in the term *operation*. Nevertheless, the court was unpersuaded and ruled in favor of the economic argument.³²

In the aftermath of *Love*, several decisions have further refined

29. *Id.* Quoting Justice McDermott:

According to the word "operation", the van was not in operation at the time of Mrs. Love's accident. Getting into or alighting from a vehicle are merely acts ancillary to the actual operation of that vehicle.

In summary, we wish to emphasize that the issue here is not whether one may be tortiously injured entering or alighting from a stopped vehicle. Rather, the issue is the confining question of whether a political subdivision is immunized from suit when one is so injured, notwithstanding what may be the actual tort of the employees. The legislature, for reasons of policy, reasons we are not entitled to dilute for sympathy or even outrage at specific instances of blatant tort, has decided that such an immunity does exist, and we must abide, sometimes leaving dreadful injuries, negligently inflicted, uncompensated.

Id. at 533.

Love was decided by a four-to-two majority. The only justice common to *Ayala*, *Mayle* and *Love* was Chief Justice Nix. Interestingly enough, he sided with the abolitionists in both *Ayala* and *Mayle*, but aligned with the majority in *Love* in a restrictive definition of "operation" of a motor vehicle. See notes 4 and 8 and accompanying text. The opinion was authored by Justice McDermott, joined by Chief Justice Nix, and Justices Flaherty and Zapala. Justices Larsen and Papadakos filed dissenting opinions. *Id.* at 531.

30. *Id.* at 532 (quoting *Mascaro*, 523 A.2d at 1123).

31. Justices Roberts, Manderino, Eagen, Pomeroy and O'Brien left the court between *Mayle* and *Love*.

32. *Love*, 543 A.2d at 533.

and defined the interpretation of *operation*. In *Pennsylvania State Police v. Robinson*,³³ the commonwealth court ruled that a state police car, parked in the passing lane of traffic on an interstate highway for the purpose of investigating an accident, was not in operation.³⁴ The plaintiff in *Robinson* was struck by another motorist while standing at the rear of the police cruiser.³⁵ The court noted that even if the plaintiff was correct and the placement of the parked police car was one that could be found to have a causal relationship to the injury, *a parked vehicle did not constitute operation.*³⁶ Note that in *Love* and *Robinson*, both vehicles were parked and unoccupied. What would the result be if the vehicle were parked, but occupied?

In *Vogel v. Langer*,³⁷ a bus driver for Southeastern Pennsylvania Transportation Authority ("SEPTA") was stopped in traffic, when he waved another motorist across his path.³⁸ When the motorist crossed in front of the bus, he was struck by another vehicle that was passing the bus.³⁹ The trial court granted SEPTA's motion for summary judgment, ruling that, because the bus was stopped, the motor vehicle exception was inapposite.⁴⁰ The commonwealth court vacated the trial judge's order, holding that *Love* and *Robinson* were distinguishable because the vehicles involved in those cases were completely parked, while the SEPTA vehicle was *temporarily stopped in traffic.*⁴¹ The court stated that "[t]he operation of a motor vehicle necessarily entails temporary stops. Additionally, operation of a motor vehicle entails communication with other drivers. A wave, horn beep, or the flashing of lights are com-

33. 554 A.2d 172 (Pa. Commw. Ct. 1989).

34. *Robinson*, 554 A.2d at 174. In *Robinson*, the trial court denied the Commonwealth's motion for summary judgment. The Commonwealth argued that the plaintiff's cause of action did not fall under the vehicle exception to sovereign immunity as construed by *Love*. On appeal, the plaintiff argued that even if the motor vehicle exception was inapplicable, the result would be the same under the real estate exception. The commonwealth court agreed that the motor vehicle exception was inappropriate, but declined to rule on the real estate exception as that question was not certified to the court, and not fully briefed and argued. The court vacated the trial court's order denying summary judgment, but remanded the case for a determination as to whether the real estate exception applied. *Id.* at 173.

35. *Id.* at 173.

36. *Id.* at 174.

37. 569 A.2d 1047 (Pa. Commw. Ct. 1990).

38. *Vogel*, 569 A.2d at 1048.

39. *Id.* at 1048.

40. *Id.*

41. *Id.*

mon signals exchanged between motorists.”⁴² Note that it is not clear if the court in *Vogel* relied on the signal to the other motorist to find that the motor vehicle exception applied to the facts therein. If the court’s use of the word “additionally” is used to further elaborate on the point, then the court’s commentary regarding “signalling” may be considered dictum.⁴³ The opinion may be read to hold that a temporary stop in traffic was sufficient for the *Vogel* court to find “operation” of a motor vehicle.⁴⁴

In *Sonnenberg v. Erie Metropolitan Transit Authority*,⁴⁵ the commonwealth court held that if the plaintiff was struck by a moving attachment of the bus, then the vehicle was in “operation” and the motor vehicle exception applies.⁴⁶ In *Sonnenberg*, even though the bus was stationary, the closing of the doors was sufficient to meet the “vehicle operation” exception.⁴⁷ It is interesting to note that the *Sonnenberg* court could have relied on the precedent of *Vogel*, and held that discharging and loading passengers was a temporary stop in traffic; however, this case was decided on the basis that “closing of the bus doors is an act normally related to

42. *Id.*

43. If one accepts the court’s position that a “temporary stop” does not separate SEPTA’s bus from “operation of a motor vehicle,” then that holding is dispositive of the issue before the court and the case is ripe for remand. The issue of whether “signalling acts” constitute operation is then moot—and any further commentary on the subject is dictum.

44. *Vogel*, 569 A.2d at 1048. In another twist on the motor vehicle exception, in *Keesey v. Longwood Volunteer Fire Co.*, a driver of a volunteer fire engine, acting on behalf of two commonwealth agencies, collided with another vehicle in an intersection when the fire engine ran a red light while responding to an emergency. *Keesey v. Longwood Volunteer Fire Co., Inc.*, 601 A.2d 921 (Pa. Commw. Ct. 1992). The other driver suffered brain damage as a result of the accident. *Keesey*, 601 A.2d at 922. There was evidence of negligence on the part of the commonwealth agency for failing to relay a “slow down” order, communicated from the chief on the scene to the commonwealth’s dispatcher. *Id.* The chief radioed the “slow down” order to the dispatcher, but the fire engine was unable to receive that frequency. The dispatcher was aware that the fire engine could not receive the chief’s message, but failed to relay the message over the radio frequency that the volunteer fire company monitored. *Id.* Had the order been communicated, the fire engine presumably would not have run the red light and would not have collided with the other vehicle. *Id.* In affirming the trial court’s grant of summary judgment on behalf of the commonwealth parties, the court ruled that the “failure to communicate” did not rise to “operation” and did not fall within the motor vehicle exception. *Id.* at 924. (The plaintiff had entered into a settlement and release agreement with the fire engine driver and the volunteer fire company that extinguished the vicarious liability of Chester and Delaware Counties. Plaintiff then sought to litigate against said counties regarding their separate and independent acts of negligence in failing to communicate the “slow down” order.) *Id.* at 923.

45. 586 A.2d 1026 (Pa. Commw. Ct. 1991).

46. *Sonnenberg*, 586 A.2d 1028.

47. *Id.*

the 'operation' of a bus."⁴⁸ Note that there may be a conflict here with *Love*, inasmuch as the *Love* court held that "[g]etting into or alighting from a vehicle are merely acts ancillary to the actual operation of that vehicle."⁴⁹ However, *Love* is distinguishable in that the injured party was not struck by a moving part of the vehicle.⁵⁰

Further, in *Lehman v. County of Lebanon, Transportation Authority*,⁵¹ the commonwealth court ruled that the motor vehicle exception did not apply to selecting locations for bus stops.⁵² In *Lehman*, the minor plaintiff was struck by a motorist and plaintiffs alleged that the defendant was negligent in not choosing a safer area to service passengers.⁵³

In 1992, the commonwealth court, in a case very similar to *Vogel* was even more restrictive in construing the motor vehicle exception. In *First National Bank v. Department of Transportation*,⁵⁴ a mother and son were traveling in a vehicle that hit a Department of Transportation ("DOT") truck, resulting in fatal injuries to the son.⁵⁵ At the time, the DOT truck was parked with the engine running.⁵⁶ The driver seat of the DOT truck was occupied and two coworkers were sitting in the truck bed, preparing to set out traffic delineators.⁵⁷ The commonwealth court ruled that the DOT truck

48. *Id.* But see *Speece v. Borough of N. Braddock*, 604 A.2d 760 (Pa. Commw. Ct. 1992), where the court refused to find that the motor vehicle exception applied when a fire hose swung out of control and struck the plaintiff while the fire engine was parked. *Speece*, 604 A.2d at 762. In *Vogel* the operator was still in the driver's seat, while in *Speece* the operator had left the driving controls—otherwise the cases are indistinguishable.

49. *Love*, 543 A.2d at 533.

50. *Id.* See notes 22-30 and accompanying text for discussion of *Love*.

51. 599 A.2d 259 (Pa. Commw. Ct. 1991).

52. *Lehman*, 599 A.2d at 262. The minor plaintiff was struck by a motorist and pinned against a bus being operated by the County of Lebanon Transportation Authority ("COLT"). Her leg was severely injured and required a partial amputation. *Id.* at 260. The plaintiffs alleged that COLT had selected the bus stop and that it was unsafe for minor children. *Id.* at 261. COLT moved for judgment on the pleadings and the Court of Common Pleas of Lebanon County granted the same. *Id.* The Lehmans argued that their averments, if proven, would make the motor vehicle exception applicable. *Id.* The commonwealth court rejected the Lehmans' argument. *Lehman*, 599 A.2d at 262. Accord *Brelish v. Clarks Green Borough*, 604 A.2d 1235 (Pa. Commw. Ct. 1992). In *Brelish*, the minor plaintiff was crossing State Route 4021, with the intention of boarding defendant's school bus when she was struck by a car. The parents alleged that the defendant was negligent in the selection of the school bus stop, but the commonwealth court reasoned that selection of a school bus did not fit within the motor vehicle exception to sovereign immunity. *Brelish v. Clarks Green Borough*, 604 A.2d 1235 (Pa. Commw. Ct. 1992).

53. *Lehman*, 599 A.2d at 261.

54. 609 A.2d 911 (Pa. Commw. Ct. 1992).

55. *First Nat'l*, 609 A.2d at 912.

56. *Id.* at 913.

57. *Id.*

was not in operation and denied recovery to the plaintiff.⁵⁸

As pointed out earlier, a careful reading of *Vogel* reveals that the court did not rely on the fact that the operator waved to the other motorist to find that the commonwealth's vehicle was in "operation."⁵⁹ Rather the court in *Vogel* distinguished earlier cases when it stated that "[the bus driver] applied the brakes and momentarily stopped the bus because of traffic. The operation of a motor vehicle necessarily entails temporary stops."⁶⁰ Can one distinguish *First National*?

DOT's truck was temporarily stopped, with the engine running and the operator in the driver's seat, while his coworkers deployed the delineators⁶¹—clearly the type of work that involves temporarily stopping for short periods of time, then resuming motion for further deployment. The court in *First National* relied on the placement of the vehicle.⁶² "In the present case, the DOT vehicle was temporarily parked on the side of the road. . . . [t]he DOT vehicle was not stopped temporarily *in traffic*."⁶³ Transit agencies were quick to note the distinction in the two cases and began denying liability in similar cases.

In *Miller v. Erie Metropolitan Transit Authority*,⁶⁴ the plaintiff was injured as she alighted from an Erie Metropolitan Transit Authority ("EMTA") bus.⁶⁵ According to the plaintiff, the steps were worn, wet and slippery.⁶⁶ The commonwealth court held that entering and exiting the bus did not constitute "operation" and denied the plaintiff's cause of action.⁶⁷

It is clear in reviewing this progression of cases that the courts of

58. *Id.* at 914.

59. See *Vogel*, 569 A.2d at 1048.

60. *Id.*

61. *First Nat'l*, 609 A.2d at 913.

62. *Id.*

63. *Id.* at 914 (emphasis added).

64. 618 A.2d 1095 (Pa. Commw. Ct. 1992).

65. *Miller*, 618 A.2d at 1095.

66. *Id.*

67. *Id.* at 1097. Speaking for the *Miller* court, Judge Pellegrini said:

While we agree that the act of alighting from bus steps into the street is an activity normally related to a passenger's usage of the bus, we do not agree that it is an activity normally related to the 'operation' of the bus . . . Miller was neither injured by the actual movement of the bus or by a moving part of the bus when she slipped on the steps and fell into the street. Because the definition of 'operation' does not include situations other than those where the injury is the result of the vehicle moving or a moving part of the vehicle, EMTA is exempt from liability because Miller has no cause of action against EMTA.

Pennsylvania take a restrictive interpretation of the motor vehicle exception to sovereign immunity. One might assume that the same courts, in analyzing delay damages would take a similar tack, but that is not the case.

DELAY DAMAGES IN PENNSYLVANIA

Under Pennsylvania's Rules of Civil Procedure, whenever a plaintiff recovers a jury verdict that exceeds the defendant's written offer of settlement by 25%, the plaintiff is entitled to recover interest on the jury verdict.⁶⁸ This interest is added from one year after the service of original process on the defendant until the jury renders its verdict.⁶⁹

However, under Pennsylvania case and statutory law, even after the plaintiff has demonstrated a cognizable claim under sovereign immunity, the financial exposure of the commonwealth and its agencies is not unlimited.⁷⁰ In tort cases, a single plaintiff is limited to \$250,000 for property damage and personal injury arising out of any one incident.⁷¹

Of course, it was only a matter of time before a case would present itself where adding delay damages to the jury verdict against a commonwealth agency would exceed the \$250,000 statutory limit. In *Laudenberger v. Port Authority of Allegheny County*,⁷² the Supreme Court of Pennsylvania held that the \$250,000 ceiling can be raised by the imposition of delay damages, and justified its position by reasoning that commonwealth agencies should be required to bargain with injured plaintiffs in good faith.⁷³ The court rea-

68. P.A. R. Civ. P. 238(b)(1).

69. P.A. R. Civ. P. 238(a)(2)(ii). Rule 238 of the Pennsylvania Rules of Civil Procedure provides in pertinent part that "[a]t the request of the plaintiff in a civil action seeking monetary relief for bodily injury, death or property damage, damages for delay shall be added to the amount of compensatory damages . . ." P.A. R. Civ. P. 238(a)(1) (emphasis added).

70. See 42 PA. CONS. STAT. ANN. § 8528 (1982). See also *Laudenberger v. Port Auth. of Allegheny County*, 436 A.2d 147 (Pa. 1981). The limitations on damages recoverable against agencies of the commonwealth are codified at 42 PA. CONS. STAT. ANN. § 8528 that provides in pertinent part:

Actions for which damages are limited by reference to this subchapter shall be limited as set forth in this section.

. . . Damages arising from the same cause of action or transaction or occurrence or series of causes of action or transactions or occurrences shall not exceed \$250,000 in favor of any plaintiff or \$1,000,000 in the aggregate.

42 PA. CONS. STAT. ANN. § 8528 (1982).

71. *Id.*

72. 436 A.2d 147 (Pa. 1981).

73. *Laudenberger*, 436 A.2d at 156.

sioned that such a policy provides agencies with sufficient incentives to discourage "stonewalling" deserving plaintiffs.⁷⁴

The leading Pennsylvania case on imposing delay damages on a commonwealth agency is *Woods v. Department of Transportation*.⁷⁵ Timothy Woods was riding his motorcycle on a state highway.⁷⁶ His motorcycle left the road after failing to make a turn, hit a utility pole, and he was impaled on a fence, suffering serious injuries.⁷⁷ Subsequently, he filed suit against the state Department of Transportation ("DOT") alleging that his injuries were the result of a defectively designed highway.⁷⁸ Prior to trial, DOT offered \$65,000 in settlement that Woods rejected.⁷⁹ The case ultimately resulted in a jury verdict wherein Woods was awarded \$1,500,000.⁸⁰ The trial court reduced that amount to \$250,000⁸¹—the statutory cap on damages attributable to a commonwealth party under the Sovereign Immunity Act.⁸²

Woods then filed post-trial motions, seeking to have rule 238⁸³ delay damages imposed on the full verdict.⁸⁴ The trial court, while agreeing that delay damages were appropriate, declined Woods' request to assess the damages on the \$1,500,000 verdict and, instead, imposed the delay damages on DOT's statutory cap of \$250,000.⁸⁵ If one accepts Woods' argument, that delay damages should be imposed on the total jury verdict, then the delay damages would have amounted to \$622,386.95.⁸⁶ The trial court, unpersuaded by Woods' argument, adopted DOT's analysis and imposed

74. *Id.* This comment does not address that issue. Rather, it attempts to examine those cases wherein the jury verdict exceeds the \$250,000 statutory cap, the trial court then reduces the verdict to the statutory cap, and the plaintiff moves to have delay damages added to the verdict. The question presented to the court in those cases is whether to add the delay damages to the full verdict (in excess of \$250,000) or to the verdict as reduced by the court to \$250,000.

75. 612 A.2d 970 (Pa. 1992).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Woods*, 612 A.2d at 970.

81. *Id.*

82. See notes 9 and 10 for more information on statutory authority for sovereign immunity.

83. Pa. R. Civ. P. 238. See notes 68-69 and accompanying text for a discussion of rule 238.

84. *Woods*, 612 A.2d at 970.

85. *Id.*

86. *Id.*

\$103,731.15 in delay damages on the \$250,000 molded verdict.⁸⁷ Woods appealed that portion of the trial court's decision relative to the amount of delay damages.⁸⁸ The commonwealth court, relying on its precedent established in *Kowal v. Department of Transportation*,⁸⁹ (wherein it applied the delay damages to the molded verdict) affirmed the trial court's decision.⁹⁰ Woods then petitioned for allowance of appeal and the Supreme Court of Pennsylvania granted same.⁹¹ The supreme court reversed, holding that rule 238 "is clear and unambiguous and is indicative of the intent to have damages apply to the verdict or award itself, which represents the actual factfinder's assessment of the plaintiff's damage, as opposed to the amount the plaintiff is legally entitled to recover."⁹²

ANALYSIS—RULE 238—SUBSTANTIVE OR PROCEDURAL?

There is no question that the Supreme Court of Pennsylvania has the power, under article 5, section 10(c) of the state constitution, "to prescribe general rules governing practice, procedure and the conduct of all courts."⁹³ The more accurate question is whether the power to proscribe rules governing practice encompasses the power to impose delay damages. If one concludes that it does, is that power unfettered, or are there limits on the power of the court to impose those delay damages? At what point (or better, what dollar amount) does the imposition of delay damages go beyond an effort to move cases more expeditiously through the court system, and become punitive in nature? If the delay damages surpass the compensatory damages (as in *Woods*) are not the substantive rights of the parties affected?

Initially, the court addressed the question of whether delay damages may be imposed, in any amount, on commonwealth agencies.⁹⁴ Turning to its own precedent in *Laudenberger v Port Authority of*

87. *Id.*

88. *Id.*

89. 515 A.2d 116 (Pa. Commw. Ct. 1986), *petition for allowance of appeal denied*, 524 A.2d 496 (Pa. 1987).

90. *Woods*, 612 A.2d at 970.

91. *Id.* at 971.

92. *Id.* at 972. The majority opinion, authored by Justice McDermott, was joined by Chief Justice Nix and Justices Papadakos and Cappy. Justice Larsen, did not participate in the consideration or decision of this case. Justice Zappala did not participate in the decision of this case. Justice Flaherty filed a dissenting opinion. *Id.*

93. PA. CONST. art. V § 10(c).

94. See *Woods*, 612 A.2d at 971.

Allegheny County,⁹⁵ the court summarily disposed of that issue in the affirmative.⁹⁶ In *Laudenberger*, the court noted that “the Pennsylvania Constitution gives the state’s Supreme court exclusive power to establish rules of procedure for state Courts [and] the legislature is *without power to control procedure*.⁹⁷ The court stated further, “it is not the legislators who are held accountable by the public for the efficient and orderly administration of the courts, but the judiciary itself.”⁹⁸ While it makes for nice argument that the court has a valid interest in a more “orderly administration of the courts,” that argument overlooks the simple fact that the court is unable to point to any constitutional power to promulgate rules that are *substantive* in nature.

In his discussion on that point, Chief Justice O’Brien, speaking for the *Laudenberger* court, acknowledged that “[n]umerous federal courts have ruled that, under the *Erie* doctrine, state pre-judgment interest (delay damages) rules concern *substantive* rights of the parties and are therefore applicable to diversity cases.”⁹⁹ Further, the court acknowledged that of nine other states that permit the addition of prejudgment interest, in eight the delay damages were provided by statutory enactments promulgated by their legislatures.¹⁰⁰ If one accepts the court’s own assessment presented in *Laudenberger*, that the legislature is without power to control procedure, and assumes that the constitutions of those states impose similar restrictions on their legislatures, then it must follow that rules on prejudgment interest are as much *substantive* in nature as *procedural*.¹⁰¹ Lastly, the *Laudenberger* court stated that “one can always argue, and not unconvincingly, that Rule 238 creates a new

95. 436 A.2d 147 (Pa. 1981).

96. Woods, 612 A.2d at 971.

97. *Laudenberger*, 436 A.2d at 152 (citation omitted).

98. *Id.* (citing A. Leo Levin & Anthony G. Amsterdam, *Legislative Control over Judicial Rule-making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 10 (1958)).

99. *Laudenberger*, 436 A.2d at 152 (citing Plantation Key Developers, Inc. v. Colonial Mortgage Co., 589 F.2d 164 (5th Cir. 1979); Clissold v. St. Louis-S. F. Ry., 600 F.2d 35 (6th Cir. 1979); *In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979*, 480 F. Supp. 1280 (N.D. Ill. 1979), *aff’d*, 644 F.2d 633 (7th Cir. 1981); Glick v. White Motor Co., 458 F.2d 1287 (3d Cir. 1972)) (emphasis added).

100. *Laudenberger*, 436 A.2d at 153. States providing relief via statutes are Colorado, Louisiana, Michigan, New Hampshire, North Dakota, Oklahoma, Rhode Island, and South Dakota. The only state providing prejudgment interest via a judge-made rule is New Jersey. *Id.* at 153 n.8.

101. As in other areas (for example, statutes of limitations, rules of evidence), the procedural and substantive distinction is often lost. The majority and dissenting opinions in *Busik v. Levine*, 307 A.2d 571 (N.J. 1973), are illustrative of the difficulty in drawing a bright line between the two.

substantive right."¹⁰²

In reading Chief Justice O'Brien's opinion, one gets the impression that he is headed in the wrong direction in his search for foundation for his premise that the court has constitutional power to pass a rule that unquestionably affects the *substantive* rights of the parties. However, after the court considered the reasoning of other jurisdictions, referring to "numerous federal courts" [that] have ruled that . . . prejudgment interest rules concern substantive rights of the parties"¹⁰³ and that in eight out of nine states that have pre-judgment interest rules, the rules were passed by the respective legislatures,¹⁰⁴ the *Laudenberger* court rejected the contrary case law in other jurisdictions.¹⁰⁵ Further, the court ignored the lack of a constitutional foundation for its position, and turned to the only precedent comporting with its own view, that of New Jersey, as set forth under the reasoning of *Busik v. Levine*.¹⁰⁶ Noting that *Busik* had withstood a federal challenge as to the constitutionality of a rule embodying delay damages, the Supreme Court of Pennsylvania was quick to align its reasoning with that of *Busik*.¹⁰⁷

However, there was a problem with *Busik* that the *Laudenberger* court should have addressed—the New Jersey Constitution does not place limitations on the Supreme Court of New Jersey's substantive law-making ability.¹⁰⁸ Again, Chief Justice O'Brien down-

102. *Laudenberger*, 436 A.2d at 155 (citations omitted) (emphasis added).

103. *Id.* at 152.

104. *Id.* at 153.

105. *Id.*

106. 307 A.2d 571 (N.J. 1973), *appeal dismissed*, 414 U.S. 1106 (1973). *Busik* was a consolidated appeal that questioned whether the New Jersey Supreme Court had constitutional power to assess prejudgment delay damages in tort cases, and, if so, whether prejudgment interest should be applied, retrospectively. The court, in a five-to-two decision, held that "the grant of interest under the rules is well within the inherent powers of this Court." *Busik*, 307 A.2d at 582. However, in Justice Hall's concurring opinion he noted that "it would be more appropriate in the future for rules proposed by the court in these overlapping areas [procedural and substantive] to be worked out in advance cooperatively between [sic] the three branches of government." *Id.* at 584 (Hall, J., concurring). In his dissent, Judge Conford was quick to point out "[o]n the face of that language [New Jersey's Constitution] the grant of general rule making power to the court extends only to practice and procedure" and "the Court was without power to promulgate [a prejudgment interest rule]." *Id.* at 585 (Conford, J. dissenting) (temporarily assigned to the court).

107. *Laudenberger*, 436 A.2d at 153.

108. *Busik*, 307 A.2d at 577. In *Busik* the court stated,

The constitutional grant of rule-making power as to practice and procedure is simply a grant of power; it would be a mistake to find in that grant restrictions upon judicial techniques for the exercise of that power, and a still larger mistake to suppose that the grant of that power impliedly deprives the judiciary of flexibility in the area called "substantive" law.

played this "minor inconsistency" when he stated:

In Pennsylvania, this Court is limited by the language of the Constitution to promulgating only those rules which do not interfere with the *substantive rights of litigants*. Although New Jersey's Constitution does not specify as much, that is not to say that the power of the judiciary [in New Jersey] is without boundaries Consequently, there is no substantive distinction between New Jersey and Pennsylvania with respect to the judicial procedural rule-making authority.¹⁰⁹

How can the court say in one breath that the Pennsylvania Constitution has limiting language as to rules interfering with substantive rights of the litigants, admit that there is no such limitation in the New Jersey Constitution, and in the next breath say that there is no substantive distinction between the two? For the *Laudenberger* court to admit that it was without constitutional authority to impose rules that so clearly affect the substantive rights of the parties, and to approve of rules that do affect those rights, is a clear case of *ipse dixit*.

While the court's reasoning in *Laudenberger* is very suspect, let us assume that the Supreme Court of Pennsylvania does indeed have the power to impose delay damages and address the issue that *Woods* presents. Under the statutory provisions of sovereign immunity, the legislature has limited the recovery for property damage and personal injury per plaintiff, to \$250,000 and to \$1,000,000 in the aggregate, to all plaintiffs whose cause of action arises out of the same occurrence.¹¹⁰ These limitations have withstood challenges as to their constitutionality.¹¹¹ While one could argue the benefits and costs of such limitations, that argument is best left to the legislature. As the courts are quick to point out, they do not sit as a super-legislature to pass on the wisdom of legislation.¹¹² As long as the legislature has the power to pass the legislation and it is constitutional, the court must defer to it.¹¹³

However, if the court really believes that it must defer to consti-

Id.

109. *Laudenberger*, 436 A.2d at 153-54 (emphasis added).

110. 42 PA. CONS. STAT. ANN. § 8528 (1982).

111. See *Lyles v. City of Philadelphia*, 490 A.2d 936 (Pa. Commw. Ct. 1985).

112. See, e.g., *Ray v. Commonwealth*, 276 A.2d 509 (Pa. 1971), where the court stated that "[t]his court does not sit to judge the wisdom of the Legislature's policies." *Ray*, 276 A.2d 510. See also *Wanamaker v. School Dist.*, 274 A.2d 524, 529 (Pa. 1971) ("It has become a mere platitude to state, what has so often been proclaimed, that courts are concerned, not with the wisdom of legislation, but with the right of the legislative body to enact it,—not with policy but with power.").

113. *Ray*, 276 A.2d at 510.

tutional legislation, how does one explain the *Woods* decision? The trial court reduced Woods' verdict from \$1,500,000 to \$250,000. Why? Because the legislature has told the court that commonwealth agencies simply cannot be made to pay an amount above \$250,000 to an individual plaintiff, no matter the degree of negligence, or the severity of the injuries *and the court must defer to the wishes of the legislature*. The Supreme Court of Pennsylvania cannot deny the merit of that point. In fact, step back and take another look at *Kowal v. Department of Transportation*.¹¹⁴ The facts of *Kowal* are on all fours with *Woods* and in fact, the defendant in both lawsuits was the Pennsylvania Department of Transportation. The plaintiff in *Kowal* received serious injuries from a motor vehicle accident and was rendered a quadriplegic. Delay damages were assessed, not on the jury verdict of over \$1,000,000, but on the statutory cap of \$250,000. *Kowal*'s petition for allocatur to the Supreme Court of Pennsylvania was denied and the plaintiff was not allowed to recover delay damages on the full jury verdict.¹¹⁵ How can one explain the two cases?

In analyzing *Woods* to look for justification for the court's complete about face, Justice McDermott points out that rule 238 compensates the injured party for loss of money during the pendency of the proceedings,¹¹⁶ and, provides compensation to a plaintiff for delay in receiving monetary damages.¹¹⁷ However, if one agrees with the court on that point, that the plaintiff is entitled to interest for late delivery of the monetary damages, what has the plaintiff lost? If DOT had acceded to plaintiff's demands on day one, and given Mr. Woods his \$250,000 (assuming that was the plaintiff's demand)—the most he could recover according to the legislature of this commonwealth—he could have invested the \$250,000 and received interest on that amount. The court cannot, under any scenario (absent a voluntary payment by the defendant in excess of its statutory cap) demonstrate that the plaintiff should have received \$1,500,000 to invest from day one. How then can the court impose a prejudgment interest assessment on \$1,500,000?

The court justified its assessment of delay damages by indicating that defendants, seeking to avoid the imposition of same, will do what men of conscience should do, and not take advantage of the

114. 515 A.2d 116 (Pa. Commw. Ct. 1986), *petition for allowance of appeal denied*, 524 A.2d 496 (Pa. 1987).

115. *Kowal*, 524 A.2d 496.

116. *Woods*, 612 A.2d at 972. *See also Laudenberger*, 436 A.2d at 151.

117. *Id.*

backlog in the courts of this commonwealth to hold on to what rightly belongs to the plaintiff.¹¹⁸ While one could agree with that argument, Mr. Woods was never entitled to an offer of more than \$250,000 under the sovereign immunity laws of this commonwealth. Further, one would assume that the imposition of \$104,000 in delay damages (on \$250,000) would not sit well with those overseeing the litigation unit of DOT and that should be sufficient motivation to see that proper offers are made under appropriate circumstances.

If the legislature decries the imposition of compensatory damages exceeding \$250,000 on a commonwealth agency, how can the court justify delay damages of more than \$600,000? The court has gone beyond its grant of authority and usurped the power of the legislature. Under the guise of reducing the backlog in the courts and promoting settlement discussions, the court has trampled the clear intent of the legislature to cap exposure of commonwealth agencies at \$250,000. Further, an assessment in excess of \$600,000 in delay damages on a molded verdict of \$250,000 is punitive in nature and has nothing to do with the backlog in the courts. On at least one occasion, the supreme court has rejected pleas from a plaintiff who has questioned the inequity (and in fact the constitutionality) of the statutory cap on damages and denied allowance of appeal, suggesting that the court's hands are tied.¹¹⁹ However, under the reasoning of *Woods*, the court may have discovered that the knot that tied its hands and frustrated various plaintiffs in the past may be nothing more than a slip knot.

A PROPOSED SOLUTION

How can this apparent inequity be remedied? Unfortunately, the court has placed itself in a position where it cannot easily remedy the situation and bring delay damage assessments in line with the intent that the legislature showed in drafting the immunity legislation. *Woods* is so clear and unambiguous that the supreme court cannot retreat from its position and at the same time maintain the respect that such a body should command. The only solution to this apparent incongruity lies with the legislature. The sovereign immunity statute should be amended to more clearly express the legislature's intent.

118. *Id.*

119. *Kowal v. Department of Transp.*, 515 A.2d 116 (Pa. Commw. Ct. 1986), *petition for allowance of appeal denied*, 524 A.2d 496 (Pa. 1987).

One can certainly agree that the court has a legitimate concern that commonwealth parties should not use the backlog in the courts to stonewall deserving plaintiffs. Commonwealth parties should continue to be exposed to the threat of delay damages. However, that exposure should be limited to (a) assessing the interest on the verdict, up to a verdict of \$250,000, (and ignoring any verdict amount over \$250,000), or (b) assessing the interest on the full jury verdict, but limiting the interest to the defendant's original exposure, that is, a commonwealth agency's delay damages could not exceed \$250,000, for a total award of \$500,000. Such a move would allow the court to continue to attempt to move cases more swiftly through the court system, while reducing the threat of unlimited delay verdicts. While this approach would not completely restore the sovereign immunity limits that the legislature has bestowed on commonwealth parties, it would permit public entities to preserve already precious fiscal resources and use them to provide services for which the agencies were created.

Colin Meneely