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MONTHLY ELECTRONIC SUBROGATION NEWSLETTER JANUARY 2008

TO CLIENTS AND FRIENDS OF MATTHIESEN, WICKERT & LEHRER, S.C.:

This monthly electronic subrogation newsletter is a service provided exclusively to clients and friends of Matthiesen, Wickert & Lehrer, S.C. The vagaries and complexity of nationwide subrogation have, for many lawyers and insurance professionals, made keeping current with changing subrogation law in all fifty states an arduous and laborious task. It is the goal of Matthiesen, Wickert & Lehrer, S.C. and this electronic subrogation newsletter, to assist in the dissemination of new developments in subrogation law and the continuing education of recovery professionals. If anyone has co-workers or associates who wish to be placed on our e-mail mailing list, please provide their e-mail addresses to Rose Thomson at rthomson@mwl-law.com. We appreciate your friendship and your business.

IN THIS ISSUE . . . .

HEALTH INSURANCE SUBROGATION

GARY WICKERT TALKS SUBROGATION ON NATIONAL RADIO

Gary Wickert was interviewed recently on the national radio program, *Radio Health Journal*, hosted by Reed Pence. *Radio Health Journal* is a national program which features award-winning reporting on current issues in health and medicine, and features America's leading health experts and the latest news in medical research. It is broadcast over 425 radio stations nationwide, making it the largest radio program of its kind. The half-hour interview focused on health insurance subrogation, and the public's perception and awareness of subrogation as a whole.

Not surprisingly, there were plenty of questions dealing with the *Deborah Shank* case which was recently featured in the *Wall Street Journal*. As you may recall, Shank was involved in an auto accident that left her brain-damaged and in a wheel chair. Her employer, Wal-Mart, paid for $470,000 in medical expenses. Shank then settled a difficult third-party case for a paltry $700,000, placing $417,000 in a special needs trust for Shank. According to Shank's attorney, he approached Wal-Mart about working out a compromise, but Wal-Mart refused, insisting on a full recovery. The story was a public relations disaster for subrogation generally, and perhaps underscored that while bad facts don't always make bad law - they usually lead to bad results. Gary ended up defending subrogation as a whole in light of stories such as the Shanks', and spent some time going into the origin of subrogation and the purposes it currently serves in society and the insurance industry. Reed Pence was very fair during the interview, but the questions asked clearly indicated some public contempt for the entire notion of subrogation.

There can be no question that the subrogation industry needs exposure in order to educate the public on how and why it works the way it does. Too many people learn about subrogation the hard way - like the Shanks did. Hopefully, Gary's interview is a good first step - as the program plays to more people than read the *Wall Street Journal*. The program is preliminarily set to air on February 10, and will be available to listen to on *Radio Health Journal* archives online and on MWL's firm website at www.mwl-law.com after it airs. Information on the availability of the program on affiliate radio stations in your area can be determined by calling Affiliate Relations at (847) 299-9500.

WORKERS' COMPENSATION SUBROGATION

PENNSYLVANIA SUPREME COURT TAKES STAND AGAINST GERRYMANDERING WORKERS' COMPENSATION THIRD-PARTY RECOVERIES

Gillette v. Wurst, 2007 WL 4555287 (Pa. 2007)

On December 28, 2007, the Pennsylvania Supreme Court dealt a devastating blow to trial lawyers who routinely attempt to structure or gerrymander third-party tort settlements in such a way as to avoid repayment of legitimate workers' compensation subrogation liens.

In Pennsylvania, a carrier is entitled to reimbursment "off the top" of any net recovery by the employee in a third-party tort action. The employee is required to reimburse a workers' compensation carrier the amount of workers' compensation benefits which the carrier has paid to the employee in the past. *Goldberg v. W.C.A.B. (Girard Provision Co.)*, 620 A.2d 550 (Pa. Commw. Ct. 1993). Where a widow of a deceased employee institutes a third-party action and an increased award to her is generated by the presence or existence of children, the workers' compensation carrier is generally not subrogated to the recovery received by the children in a wrongful death action. *Anderson v. Greenville*, 273 A.2d 512, 515 (Pa.1971). The attraction of this nuance of law is that if a trial lawyer can gerrymander a settlement so that the children recover the bulk of a third-party recovery, he can argue that the carrier should not be able to recover its workers' compensation lien from the settlement. Clearly, the potential for gerrymandering in death cases was high in Pennsylvania.

The danger of gerrymandering in death cases was brought into focus recently. *Gillette v. Wurst*, 869 A.2d 488 (Pa. Super. 2005). In *Gillette*, John Gillette, a middle school teacher, was shot by one of the students while acting as a chaperone at an eighth grade graduation dinner dance. John's wife, Debbie, filed a third-party action against the student and his parents, seeking damages. The case was settled for $300,000, the limits of the student's parent's homeowner's insurance coverage. Under the settlement, Debbie Gillette was to receive $288,000, with the remainder payable to another student who was shot at the same time. The Pennsylvania Wrongful Death Act provides that "damages recovered shall be distributed to the beneficiaries in the proportion they would take the personal estate of the decedent in the case of intestacy." 42 Pa. C.S. § 8301(d). After deduction of attorneys' fees, intestate succession would have provided Debbie Gillette a spousal share of $109,493.77, with the remainder to be divided in equal portions among the three children. However, Debbie Gillette agreed to only retain $12,000 for payment of funeral expenses, and disclaimed her espousal share in favor of her children. The workers' compensation carrier had paid death benefits in the amount of $167,934 and intervened into the third-party action. The trial court ruled that

because the mother had given away her recovery to her children, the workers' compensation carrier could not recover its lien. It amounted to subrogation larceny in broad daylight.

Obviously, the carrier appealed the decision to the Pennsylvania Superior Court (intermediate appellate court in Pennsylvania), and expected a quick reversal. The Superior Court noted that the carrier was only entitled to a subrogation lien against any recovery in tort made by the widow, not the children. *Greater Lancaster Disposal/SCA Services v. W.C.A.B. (Snook)*, 607 A.2d 334 (Pa. Commw. Ct. 1992). Surprisingly, in 2005 the Superior Court ruled that the widow did not have any interest in the third-party recovery because she disclaimed her intestate share of the damages, and therefore, she did not have an interest in a third-party recovery against which the carrier could assert its lien. *Gillette v. Wurst*, 869 A.2d 488 (Pa. Super. 2005). Therefore, the carrier could not subrogate against the monies the widow gave away to her children. The Superior Court said that there was nothing in the law which precluded all of those entitled to recover under the Wrongful Death Statute from agreeing on a different manner of distribution, even though such gerrymandering nullified the carrier's subrogation lien.

The Superior Court ruling was appealed to the Pennsylvania Supreme Court, which granted allowance of the appeal to consider whether a widow claiming entitlement to payment under the Wrongful Death Statute may disclaim her share of those proceeds once offered, when her disclaimer effectively negates the valid entitlement to subrogation of an insurance carrier. *Gillette v. Wurst*, 2007 WL 4555287 (Pa. 2007). For two long years trial lawyers used the Superior Court's ruling as a license to steal subrogated compensation benefit payments. However, on December 28, 2007, the Supreme Court reversed the Superior Court, holding that the workers' compensation carrier, having paid Gillette, was not subrogated to the amount actually received by Gillette; rather, it was subrogated to the share that Gillette had the right to receive. *Id*. Therefore, any attempted waiver of a wrongful death beneficiary does not defeat the carrier's right of subrogation.

It is now clear that a carrier's subrogation rights are not affected by the way in which the claimant and third-party tortfeasor, or the jury, characterize the nature of the third-party recovery. *Cullen v. Pennsylvania Prop. & Cas. Ins. Guar. Ass'n*, 760 A.2d 1198 (Pa. Commw. Ct. 2000). However, this assumes that the worker against whom the subrogation interest is asserted holds a current, legally enforceable interest in the proceeds of the third-party recovery.

Other methods of gerrymandering settlements to avoid subrogation interests have been ruled illegal in recent years in Pennsylvania. A workers' compensation claimant cannot avoid the statutory subrogation lien by apportioning his award to pain and suffering as opposed to lost wages. *Thompson v. W.C.A.B. (U.S.F. & G. Co.)*, 801 A.2d 635 (Pa. Commw. Ct. 2002). This is because the subrogation rights of the employer or insurance carrier encompass amounts which are required to be paid by law. The subrogation lien cannot be affected by an arbitrary agreement between the claimant and third-party, apportioning elements of damages for his injuries. A worker may not apportion his interest in a third-party recovery so as to defeat a workers' compensation carrier's subrogation interest. Any attempt to do so will be deemed voidable to the extent that it operates to defeat a subrogation lien for benefits paid as compensation for the same underlying injury. *Bumbarger v. Bumbarger*, 155 A.2d 216 (Pa. Super. 1959). The final nail in the gerrymandering coffin was pounded in by the Pennsylvania Supreme Court in *Gillette v. Wurst*. *Gillette*, supra. Gerrymandering third-party settlements by claiming damages recovered are for pain and suffering only, rather than for economic damages such as medical expenses and lost wages, or by coaching

a widow to “give away” her third-party recovery, in an effort to avoid repayment of a compensation lien, is no longer allowed in Pennsylvania.

WORKERS' COMPENSATION SUBROGATION

SUBROGATING IN CANADA

By Gary L. Wickert and Robert N. Franklin, Franklin Hall, L.L.P., Toronto, Ontario

An open border and NAFTA have resulted in billions of business dollars being transacted between U.S. and Canadian companies. Canada is by far the largest trading partner of the U.S., as the U.S.-Canadian relationship accounts for 20 percent of all U.S. international trade. On June 8, 2007, the U.S. government, in an effort to avoid damaging business transactions between the two countries, announced it was relaxing stricter requirements which required passports to cross the U.S./Canada border. As a result, the passport requirement for air travel to Canada from the U.S. was put on hold until September 30, 2007. The January 1, 2008 deadline for passports involving crossing the border by water or land has been extended until June 1, 2009. From trucking to construction to sales, U.S. companies routinely send U.S. citizens to Canada to transact business, and American insurers insure billions of dollars of property and risks north of the border. As a result, U.S. insurers routinely face loss claims occurring in Canada, and often scratch their collective heads when it comes to subrogating those losses. Once a claim has been paid for a loss which took place in Canada, subrogation professionals must understand the nuances of pursuing Ontario resident individuals, corporations, and insurers in an attempt to recover those claim payments. This article will serve as a primer on the Canadian system of laws.

Canadian Laws Generally

Each province and territory follows their own set of civil laws – much like each state has its own set of laws. All provinces and territories within Canada, with the exception of Quebec, follow common law legal tradition. Equally, courts have power under the provincial *Judicature Acts* to apply equity. We will take a look at subrogating in Canada using the laws of its most populated province – Ontario – as an example.

Much the same as other common law countries, English-Canadian law follows the system of *stare decisis*. Common law countries, like the U.S. and Canada, refine their laws with the use of courts of review and judges. Courts must adhere to the decisions of the more senior courts, and generally follow precedent. As with the U.S.’s 50 states, the inferior and superior courts of the provinces are not bound by the courts of any other provinces. Their decisions are, however, treated as “persuasive” authority and are generally followed. Only the Canada Supreme Court has authority to bind all courts in the country with a single ruling. For historical reasons, Quebec (like Louisiana) has a hybrid legal system. Private law (contracts and torts) adheres to the civil law tradition, as first set forth in the *Coutume de Paris* as it applied in what was then New France. Today, the *jus commune* of Quebec is codified in the Civil Code of Quebec.

Canadian Subrogation

Subrogation is very much alive in Canada. Unfortunately, subrogation in Canada carries with it the same made whole infection which hampers U.S. subrogation. It is settled law in Ontario that in general, the insurer's right of subrogation arises only when its customer has been fully indemnified for the loss. *National Fire Ins. Co. v. McLaren*, 12 O.R. 682 (Ch. Div. 1886); *Glens Falls Ins. Co. v. Tom Peters, Ltd.*, 10 D.L. R.(2d) 459 (H.C. 1957); *Ontario Health Ins. Plan v. U.S. Fid. & Guar. Co.*, 68 O.R.(2d) 190 (C.A. 1989), *leave to appeal to S.C.C. ref'd* (1989), 68 O.R.(2d)190 (note). An exception to this general principle arises in the areas of automobile and fire insurance. In those cases, where the net amount recovered by action or settlement is insufficient to provide complete indemnity, the recovery is prorated in terms of the respective interests of the insurer and insured. Insurance Act, R.S.O. 1990, c. I.8, §§ 278(2) and 152(2). This common law principle may also be modified by policy wording, although the ability to subrogate must be distinguished from the ability to control the proceedings. Only about one-third of the American states allow for such an alteration of and departure from the made whole doctrine.

If the insured has not received full indemnity, the insurer is not in position to control the settlement or litigation process, although in cases of fire and marine insurance, it can commence proceedings. Marine Insurance Act, R.S.O. 1990 c. M.2, § 80; Insurance Act, R.S.O. 1990, c. I.8, § 152(1). In auto insurance, the insurer will control the action if the insured's only interest is the deductible amount. Insurance Act, R.S.O. 1990, c. I.8, § 278(3). If the insured is fully indemnified, proceedings must be brought in the insured's name. *Molson Cos. v. Royal Ins. Co.*, 20 C.C.L.I.(2d) 93 (Gen. Div. 1993); Insurance Act, R.S.O. 1990, c. I.8, § 278(1).

The insured has a duty to pursue a third-party claim in good faith so as not to compromise the insurer's subrogation rights, and must include the insurer's claim in its demands. *Globe & Rutgers Fire Ins.Co. v. Truedell*, 60 O.L.R. 227 (C.A. 1927); *Cleveland v. Yukish*, 2 O.R. 497 (H.C. 1965). In the area of automobile insurance, a settlement is not binding on the insurer unless it concurred therein. Insurance Act, R.S.O. 1990, c. I.8, § 278(6).

Limitation Period

The standard limitation period for subrogation causes of action arising since January 1, 2004 is two years from the date that the cause of action arose. Limitations Act, 2002, S.O. 2002 c. 24, Sched. B, § 4. The basic limitation period can be extended as a result of the "discoverability principle", where the facts underlying the cause of action were not known until a later date. *Peixeiro v. Haberman*, 3 S.C.R. 549 (1997).

Automobile Insurance

Certain American insurers, including those doing business in Ontario, will have filed with the Superintendent of Financial Services for Ontario, an Undertaking to be bound by § 263 of the Insurance Act, R.S.O. 1990, c. I.8, as amended. In such a situation, the insured may recover from its insurer damages to the vehicle and the cost of a rental vehicle, as if that insurer were a third-party. Therefore, if your insured is involved in an accident in Ontario for which a third-party is at fault, you are liable to your insured for the damage to the vehicle, even if your policy as written does not provide such coverage. Recovery is determined according to a "fault chart" setting out determination rules (R.R.O. 1990, Reg. 668), although the insured may bring an action against the

insurer if it is not satisfied that the fault determination rules accurately reflect the appropriate degree of fault. Where these provisions apply, the insurer generally does not have a right of subrogation against the at-fault party.

Under automobile policies, except as permitted by the regulations, insurers do not generally have a right of subrogation in respect of payments made to an insured on account of medical, rehabilitation, disability and other benefits, if the accident occurred after October 23, 1989, nor with regard to property damage if a vehicle or its contents, or both, suffers damages arising directly or indirectly from the use or operation in Ontario of one or more other automobiles, after June 21, 1990, if the vehicle that suffers damage and at least one other automobile involved in the accident are insured under motor vehicle liability policies issued by insurers licensed to undertake auto insurance in Ontario.

Accident Benefits

As with the Undertaking for property damage referred to above, certain American insurers, including those doing business in Ontario, will have filed with the Superintendent of Financial Services for Ontario, an Undertaking to be bound by § 268 of the Insurance Act, R.S.O. 1990, c. I.8, as amended. In such a situation, the insured is entitled to claim Statutory Accident Benefits from the insurer for accidents occurring in Ontario, even if your policy as written does not provide such coverage. While these coverages do not apply to subrogated claims, they are set out in this paper to bring to the attention out of province insurer's potential exposure that they may have to their insureds where the accident occurs in Ontario, even though the policy does not specifically provide for these benefits. An insurer is entitled to seek reimbursement from another insurer only in situations involving motorcycles and heavy trucks.

The scope of available accident benefits is complex and beyond the scope of this article, but the most important coverages set out in the Statutory Accident Benefits Schedule, Ont. Reg. 403/96, in the usual course are as follows:

> *(i) Weekly Benefits. Income Replacement Benefits are calculated based on the previous 4 or 52 weeks of employment (or, in the case of self-employed persons, based on the last 52 weeks or the previous fiscal year). The benefits are payable after the first week of disability, for a period of 104 weeks of disability, where the insured is disabled from his/her regular employment. After that time, the benefit is payable only where the "any occupation" test is met. The maximum benefit is $400 per week. Benefits are payable to age 65, after which there is a "ramp down" calculation if the insured remains entitled to benefits.*
>
> *Alternatively, the insured may elect to receive "caregiver benefits" where he/she has a child under the age of 16, or who themselves suffers from a disability. The limit is $250 per week, plus $50 for each additional person in need of care. The benefit is payable for 104 weeks, unless the insured suffers from an injury which prevents him or her from engaging in substantially all of the activities in which the person ordinarily engaged before the accident.*
>
> *The third weekly benefit is a "non-earner benefit" of $185 per week ($320 per week where the insured is in school or has recently completed their education) and is*

payable for 104 weeks unless the insured suffers from an injury which prevents him or her from engaging in substantially all of the activities in which the person ordinarily engaged before the accident.

Only one weekly benefit is payable at a time, and the insured is permitted to change his/her election. Antony v. RBC Gen. Ins. Co., F.S.C.O. Appeal P03-00023 (2004).

(ii) Medical and Rehabiltation Benefits. All necessary and reasonable expenses are payable, to a maximum of $100,000 during the first 10 years after the accident, unless the injury is "catastrophic", in which case the limits are $1,000,000 with no time limit. There is a myriad system of forms and procedures for dealing with these claims.

(iii) Attendant Care Benefits. The limits are $3,000 per month, to a maximum of $72,000, payable for 104 weeks, unless the insured has sustained a catastrophic injury, in which case the limit is $6,000 per month, to a maximum of $1,000,000 with no time limit.

(iv) Housekeeping. The limit is $100 per week for 104 weeks, unless the insured has sustained a catastrophic injury, in which case there is no time limit.

(v) Death Benefits. Payments are $25,000 to a spouse and $10,000 to each dependant. If there is no spouse, the dependants are paid an additional $25,000 combined. $10,000 is paid to each former spouse where there is an obligation to provide support under a domestic contract or court order. $10,000 is paid to anyone whom the insured was dependant on at the time of death, or that person's spouse or dependants. Funeral benefits are payable to a maximum of $6,000.

Personal Injury

For accidents that have occurred in Ontario since October 1, 2003, there is no recovery for pain and suffering unless the injured party passes both a verbal and monetary "threshold". The verbal threshold is met where the injured person has died or has sustained: (a) permanent serious disfigurement; or (b) permanent serious impairment of an important physical, mental or psychological function. Insurance Act, R.S.O. 1990, c. I.8, § 267.5(5).

Where the verbal threshold is met, the claim for pain and suffering is subject to a $30,000 deductible. Income loss is not recoverable during the first seven days after the incident, and is limited to 80 percent of net losses after deducting available collateral benefits, such as short and long term disability benefits available privately or through a group employment contract. Insurance Act, R.S.O. 1990, c. I.8, § 267.5(1). Health care expenses are recoverable if the verbal threshold is met, and are subject to available statutory accident benefits. Insurance Act, R.S.O. 1990, c. I.8, §267.5(3). Out-of-province insurers who have made payments to their insureds and wish to subrogate in Ontario are subject to these provisions.

Workers' Compensation

Canada has a workers' compensation system similar to the one employed by the states in America. However, unlike America, if the injury is caused by his or her own serious or wilful misconduct, then

no benefits will be paid unless the worker dies or suffers serious impairment. Where a third-party is responsible for the injury, the worker must elect whether to proceed against the third-party or accept workers' compensation benefits. He cannot recover both. The election must be made within three months after the accident date or date of death. If the worker elects to recover benefits, the Workplace Safety and Insurance Board is subrogated to the worker's rights against the third-party, and is entitled to determine whether or not to commence, continue or abandon a third-party action. A subrogated American carrier would be able to pursue a third-party action in Canada, subject to the motor vehicle restrictions above. Generally, Canadian subrogation law would govern the third-party action in most circumstances.

Miscellaneous

Like many of the states in America, if a Canadian insured releases a third-party from liability in connection with a matter for which insurance paid benefits, the insured may be liable directly to the subrogated insurer. In fire subrogation, no release of the third-party is effective unless both the insurer and insured concur in the release. *Biafore v. Bates-Pasis Leasing, Inc.*, 11 O.R.2d 409 (1976). Additional Canadian laws applicable to subrogation in Canada may be found at http://www.ambest.com/legal/statelawdigest.html.

Summary

Not surprisingly, Canadian laws are similar to those of the U.S. However, it is the nuances in law that make or break subrogation results. Familiarizing oneself with the laws of Canada can only improve the odds of effecting a recovery, or maximizing one's right to subrogation. For nearly twenty years, MWL has contracted with quality local counsel throughout North America – including Mexico and Canada – to better facilitate your subrogation needs both north and south of the border. For information on subrogating in Mexico, please see the published article entitled "*Subrogating South of The Border*" on the MWL website at www.mwl-law.com.

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