





RECOGNIZING SUBROGATION AND THIRD PARTY LIABILITY

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WORKER'S COMPENSATION SUBROGATION INVESTIGATION

1. Early Recognition of Subrogation
2. Prompt Investigation Into Subrogation
3. Creative Subrogation Thinking

Subrogation Is An Investment





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W/C SUBROGATION ANALYSIS

- Answer the following questions for every claim:
 1. What are your SUBROGATION RIGHTS?
 2. Which THIRD PARTIES can be sued?
 3. How is a recovery ALLOCATED?
 4. Are ATTY'S FEES / COSTS owed?
 5. Do we get a future CREDIT?


MUST KNOW ANSWERS TO MAXIMIZE RECOVERY.
ANSWERS DEPEND ON WHICH STATE YOU ARE IN.



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INVESTIGATION: THE WHY


- First and perhaps only chance at some evidence.
- Catch witnesses when memories are fresh.
- Identify and retain evidence.
- Explain the process of subrogation to insured, et al.
- May be only chance to recognize the issues involved.
- The time and energy spent on a thorough investigation is inversely proportionate to the cost of subrogating.
- Identify roadblocks (indemnity, waiver, etc.) early.
- Is essentially a walk-through of your third-party lawsuit.
- On-the-job training for subrogation and claims personnel.
- Lock witnesses into positions and testimony.
- To give notice to parties/government entities.



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INVESTIGATION: THE WHAT


- Look into facts and details surrounding injury or death.
- Valuable commodity that can be used for advantage.
- Information on product or instrumentality causing loss.
- Defense to combat claims for attorney's fees/costs.
- Means to uncover subro killers such as indemnity/waiver.
- Protection against disappearing witnesses/evidence.
- Chance to get info from employee before he is represented.
- Tool to bring extraterritorial issues into play.
- Opportunity to represent Plaintiff's interests.
- Opportunity to uncover third parties and sources of recovery.



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INVESTIGATION: THE HOW



- Consists of:
 - Statements/Recordings
 - Photographs
 - Preserving Evidence
 - Observing Witnesses
 - Taking Measurements
 - Obtaining Documents/Reports
 - Engaging Experts
 - Giving Proper Notice
 - Coming to Conclusions
 - Writing Summary/Recommendations
 - Engaging Subrogation Counsel



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THIRD PARTY LIABILITY

- Recognizing liability of third party tortfeasor.
 - Early recognition is key to maximizing subrogation recoveries.
 - General Negligence
 - Medical Malpractice
 - Premises Liability
 - Products Liability
- Who can be sued?
 - Co-Employee?
 - UM/UIM Carrier?
 - Negligent Doctor?
 - Exclusive Remedy Rule.
 - Can Employer be sued for contribution?

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GENERAL NEGLIGENCE



- Automobile Accident
 - Most Common Third Party Lawsuit In America.
 - Important! Obtain Police Report!
 - Failure to Maintain Proper Control of Vehicle
 - Failure to Maintain Proper Lookout
 - Failure to Yield
 - Improper Turn
 - Deviation from Lane




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GENERAL NEGLIGENCE EXAMPLES

- Employee slows for traffic, adverse rear-ends vehicle.
 - Subro potential? - Failure to maintain proper lookout?
- Adverse stops for traffic, employee rear-ends.
 - Subro Potential? Tail/break lights working?
 - Something (i.e., mud) covering tail lights?
 - Sudden stop?
- Adverse pulls out from stop sign, strikes employee's vehicle who had right of way.
 - Subro Potential? Failure to yield?
- Employee pulls out from stop sign, strikes adverse vehicle who had right of way.
 - Subro Potential? Excessive speed?
 - Lights on?
 - Turn signals on?

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AUTOMOBILE ACCIDENTS



- Police Report. Talk To Officer.
- Names And Statements Of Witnesses
 - Check With Neighbors, Nearby Businesses
- Skids Marks, Debris, Signs, Signals
- Photograph Of Vehicle Damages
- Use Common Sense (Two Green Lights)
- Weather, Trip Logs, Vehicle Inspections
- Possible Use Of Expert





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MEDICAL MALPRACTICE

That degree of care exercised by other doctors in the same or similar location.


- Not responsible for mistake in judgment.
- Not responsible for reasonably foreseen complications.
 - Example: Staph Infection
- Specialist owes higher degree of care.

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MEDICAL MALPRACTICE EXAMPLE

- Employee injured left shoulder, back, hip and head after slip and fall during course and scope of employment.
- Employee undergoes fusion surgery of several vertebrae, and thereafter, has trouble swallowing.
 - Scope
 - Feeding Tube
- Two weeks later, suffers severe shortness of breath, and diagnosed with pneumonia and respiratory failure.
- Upon further examination, discovered surgical screw head protruded through the back wall of employee's esophagus resulting in infection.
 - Was this reasonably foreseeable complication or medical malpractice?



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PREMISES LIABILITY

3 Types of Users



- **Trespassers (w/o Permission) Limited Duty**
 - Undiscovered – Reckless Conduct Only
 - Discovered – Reasonable Care
 - Attractive Nuisance
- **Licensees (Social Guest) Moderate Duty**
 - Owner knows of dangerous, hidden condition of property.
 - Owner fails to make known condition safe.
 - Invitee didn't know of condition and risk.
- **Invitee (Customer) – Heightened Duty to Inspect**
 - Owner knows of dangerous condition and its risk of harm to Plaintiff




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PREMISES LIABILITY

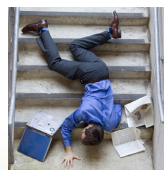

- Slip and Fall, Construction, Hazards
- Document the Condition
 - Photographs, Measurements, Witnesses
- Lighting Conditions
- Sketch of Area
- Warning Aigns
- Timing is Everything. How long was it there?
- Notice? Prior Complaints? Other Conditions?
- Possible Need for Expert

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PREMISES LIABILITY EXAMPLE

- Employee making delivery to private residence in course and scope of employment.
- Slips on ice on stairs outside of home.
 - Issues:
 - Stairs Not Up To Code
 - Uneven
 - Tread
 - No Railing

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PRODUCTS LIABILITY

Most Overlooked Area Of Subrogation


- Difficult To Identify

Requires Cost-benefit Analysis

- Experts
- Investigation Costs

If Cost-effective:

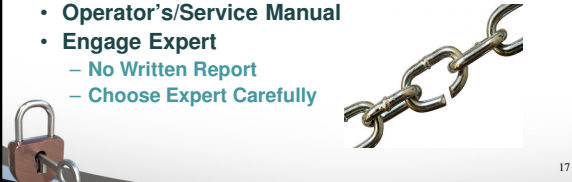
- Prompt Investigation
 - Hire Expert
 - Get The Product!
 - Get Statements!
 - Spoliation: Destruction or withholding of evidence resulting in prejudice to opposing party.



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PRODUCT LIABILITY

- Design Defect, Manufacturing Defect/Warning
- Obtain/Secure Product
- Detailed Statement of Operator
- Who manufactured? Where purchased?
- Modifications? Repairs? Maintenance?
- Operator's/Service Manual
- Engage Expert
 - No Written Report
 - Choose Expert Carefully



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PROOF OF PRODUCT LIABILITY

- Plaintiff Must Prove "Product" Is:
 - Defectively Designed/Manufactured/Marketed
 - Unreasonably Dangerous
 - "Consumer Contemplation" Test
 - No "Risk/Benefit" Analysis
 - Defect Was "Substantial Factor" Causing Injury
- Reasonable Alternative Design (New In WI)
 - Expert With Design Experience



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PRODUCTS LIABILITY (CONT.)

- **Manufacturing Defect:** When the product bends, breaks, fails, leaks, ignites, explodes or does something different than as designed.
- **Design Defect:** Product does conform to its plans and specifications, but design itself renders product unreasonably dangerous.
- **Marketing Defect:** Seller fails to warn of product dangers or provide instructions for safe use of the product.



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PRODUCTS LIABILITY EXAMPLE

- Employee killed when bucket attached to backhoe falls into the trench where he is working.
- Bucket was not properly attached to backhoe.
- Attachment not visible from cab of backhoe.
- **Issues:**
 - Operator error? Instruction manual indicates should shake bucket at a safe distance from others to ensure properly latched.
 - Proper for employee to be in trench? OSHA citation issued.
 - Warnings regarding bucket drops issued by company. Company sent out warning and indicated proper procedure to verify attached.
 - Warning included information regarding retrofit locking pin kit.
 - Employer ordered locking pin retrofit kit but didn't put it on backhoe.



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CONSTRUCTION ACCIDENTS



- Names of All Contractors, Subcontractors
- Names/Statements of All on Jobsite
- Copies of Contracts/Agreements
 - Indemnity, Waiver, W/C Coverage
 - Statutory Employer Defense
- Document/Photograph Condition
 - Measurements, Surrounding Conditions
- Borrowed Servant Issues (Control Details)
- Possible Hiring of OSHA/Safety Expert



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STATEMENTS



- Written, Recorded, Video
- Signed or Initialed
- As Soon After Loss As Possible
- Identify Witness (Key Locating Information)
- Fact Finding
- Q & A; No Narrative
- Follow Checklist
- Give Witness Chance To Add Or Change
- True and Correct To Best of Recollection

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NOTICE

- Purposes of Giving Notice
- Notice To Potential Third Parties
- Notice To Governmental Entities
 - Counties, Towns, Cities, Villages
 - States
- Notice To Plaintiffs' Attorneys
- Notice To Third Party Carriers
- Notice To Claimants

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WORK PRODUCT PRIVILEGE

- Protects Investigation/Work Product
 - Lawyers & Non-Lawyers
- "Anticipation of Litigation"
- Not Obtainable From Any Other Source
- Document/Statement Prepared or Obtained Due to Prospect of Litigation
- Document Your File (Self-Serving Memo)




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EVIDENCE PRESERVATION AND SPOILIATION

- Can Be Used As Defense To Lawsuit (Products)
- Put All Parties On Notice Of Inspection
- Requires Egregious Conduct And Prejudice
- May Need To Preserve Surrounding Products
- No Destructive Testing
- Don't Unnecessarily Give Up Advantage



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EXPERTS

- Key: RIGHT Expert At The RIGHT Price
 - E.G., C & O Experts; Design Experts
 - Size Of File Dictates Quality/Price Of Expert
- No Written Reports
- Explain Outcome Desired
- Shade Tree Mechanics
- Reasons To Hire Expert
- Criteria For Hiring Expert



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ADMISSIBILITY OF EXPERT TESTIMONY


- *Daubert v. Merrill Dow* (1993): (1) Whether the methods on which the testimony is based are centered on a testable hypothesis; (2) the known or potential rate of error associated with the method; (3) whether the method has been subject to peer review; and (4) whether the method is generally accepted in the relevant scientific community.
- *Kuhmo Tire v. Carmichael* (1999): Extended *Daubert* to testimony involving "technical and other specialized knowledge".
- Standard Applies In All Federal Courts.
- Codified In Federal Rule of Evidence 702.
- 26 States Adopted; 10 States Rejected; 7 States Have Their Own Standard.



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DEFEATING MADE WHOLE DOCTRINE

- **Good Plan/Policy Language**
“We are entitled to a First Priority right of reimbursement and subrogation regardless of whether you recover all of your damages or whether you are made whole.”
- **Active Participation**
 - Subrogation counsel can monitor the case and effectively evaluate the injured claimant’s damages.
 - Discovery requests can be effectively used to limit made-whole arguments at the time of settlement.



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THINK SUBROGATION!

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