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

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.
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.

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.

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
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?

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

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?
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

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.

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?
**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

**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

**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
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.

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

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
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.

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.

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
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

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

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)
EVIDENCE PRESERVATION AND SPOILATION

• 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

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

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.
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.

THINK SUBROGATION!

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