

Marvin G. Baer and James A. Rendall,  
"Subrogation and Collateral Benefits;" "Agents;" "The Claims Process,"  
in *Cases on the Canadian Law of Insurance*, Fifth Edition,  
pp. 277–79, 507–19, 742–48, 750–52.

## OUTLINE

### I. SUBROGATION AND COLLATERAL BENEFITS

#### A. Broader View of Subrogation

1. Number of alternatives for compensating a victim
  - a. Universal public hospital and medical insurance
  - b. Private accident insurance
  - c. Liability of the negligent party or his insurer
2. System produces gaps and overlaps
3. Subrogation reflects the belief that a victim should not be overcompensated

#### B. Alternative Approaches to Problem of Duplicate Recoveries

1. **Election** – victim can choose his compensation source
2. **Cumulation** – victim can collect from more than one source
3. **Reimbursement** - tortfeasor must pay all damages and any excess is returned to the collateral source
4. **Relieving the tortfeasor** – tortfeasor's liability is reduced by the amount of the collateral benefit

#### C. Comments on the Approaches

1. All but cumulation prevents double recovery
2. Relieving the tortfeasor and possibly election reduces the tortfeasor's liability
3. Reimbursement and relieving the tortfeasor represent policy choices as to which compensation source should be primary
4. Subrogation
  - a. Current emphasis is on compensation rather than admonishment; because of insurance, subrogation does not put the ultimate burden on the wrongdoer
  - b. Very expensive mechanism as applied on an individual case basis
  - c. For N-F auto benefits, recent shift (by courts or legislation) not to allow subrogation but to reduce the tort claim by the amount of accident benefits

### II. AGENTS: *FLETCHER V. MANITOBA PUBLIC INSURANCE CORP.*

#### A. The Facts

1. Insureds suffer severe injuries from an automobile accident with an at-fault driver whose insurance was inadequate to cover their damages
2. Coverage provided by a government company (MPIC) is of two types:
  - a. Compulsory minimum collision and public liability coverage
  - b. Optional coverages
    - 1) Underinsured motorist coverage (UMC)
    - 2) Public liability and property damage (PL/PD)

3. Insured contends that renewal notice had words "not applic" typed in for UMC which he believed meant it did not apply to him since he had requested the maximum available coverage

B. The Courts Below

1. Trial judge finds that insured was entitled to rely on the advice of the company's agent; otherwise, he should have been referred to a private agent
2. Company breached its duty to the insured when it failed to advise him of the full range of coverage
3. Appeal Court, however, reverses the trial judge in a split decision as one judge finds no duty and another finds duty but no breach
4. Appeal made to the Supreme Court

C. The Issues and Analysis

1. Did the Appeal Court err in departing from the trial judge's finding of fact? – yes, as findings that insured relied on the company's employees and would have purchased UMC if it had been offered were reasonable
2. Did the insurer have a duty provide advice on underinsured motorist coverage?
  - a. Important issue as if duty exists, will affect company training of employees
  - b. Tort
    - 1) Is there a duty of care?
      - a) In certain cases, provider of information does has a duty of care to the person receiving the information
      - b) Example: a banker providing references of solvency
      - c) Requirements for duty of care to exist
        - i) Was there reliance? – yes, as insurance compulsory and government was the only insurer
        - ii) Was the reliance reasonable? – yes
        - iii) Was the reliance expected? – yes, company was aware of customers' reliance
    - 2) What is the scope of duty?
      - a) Scope seen between that of a private agent and that of an ordinary seller
      - b) Duty of private agents and brokers
        - i) To provide information on available coverages
        - ii) Also to provide individualized advice regarding the coverages required to meet customer needs
        - iii) Need to review coverage and point out gaps
        - iv) Seen as more than mere salespeople
      - c) Duty of public insurers
        - i) Duty to provide information on the available range of coverages
        - ii) Employees, however, not seen as risk specialists and thus do not need to provide individualized advice
        - iii) Contention that government insurer should be granted immunity in cases where fail to provide information seen as without merit
    - c. Contract – since duty grounded in tort, this argument of contractual duty was not pursued

PAST CAS EXAMINATION QUESTIONS

1. According to Baer and Rendall, in *Cases on the Canadian Law of Insurance*, in *Dillon v. Guardian Insurance Company*, Guardian Insurance Company was found responsible for damages in excess of policy limits. Discuss the reason for the judge's decision. (00-7C-62-.5)
2. According to Baer and Rendall, in *Cases on the Canadian Law of Insurance*, in *Broadhurst & Ball v. American Home Assurance Co.*, the judge found that where there is more than one insurer, the costs of defending an action should be shared pro rata in proportion to the coverage afforded by each insurer. (01-7C-13-.5)
3. Baer and Rendall, in *Cases on the Canadian Law of Insurance*, describe the various approaches regarding the relationship between tort recovery and collateral sources of compensation. Identify and describe Professor Fleming's approaches to loss sharing between collateral sources and tort recovery. (01-7C-55-2)
4. According to Baer and Rendall, in *Cases on the Canadian Law of Insurance*, *Fletcher v. Manitoba Public Insurance Corporation (MPIC)*, MPIC had a duty to advise its customers of the existence, nature, and extent of underinsured motorist coverage. It was concluded that MPIC owed a duty of care to its customers if certain criteria were met.
  - a. Identify three of these criteria.
  - b. It was also found that MPIC's duty is less onerous than that of the private agent or broker. Provide two such reasons. (02-7C-48-.75/.5)
5. Baer and Rendall, in *Cases on the Canadian Law of Insurance*, discuss *Broadhurst & Ball v. American Home Assurance Co.*
  - a. What was American Home's position with regards to the allocation of defense costs?
  - b. What did the court decide the basis should be for the allocation of costs? (02-7C-49-.5/.5)
6. In the case of *Fletcher v. Manitoba Public Insurance Corporation*, what was the issue raised with regards to government insurers?
  - A. The lack of competition
  - B. The minimum amount of compulsory insurance
  - C. The responsibility to inform customers about the type of coverage available
  - D. The type of insurance coverage that should be offered
  - E. Whether private insurers should be allowed to offer coverage over the minimum compulsory coverage. (03-7C-5-1)
7. With regards to the case of *Dillon v. Guardian Insurance Co.*, answer the following:
  - a. How was the standard of absolute liability for claim settlement defined?
  - b. Identify and briefly describe three reasons why the standard of absolute liability was the appropriate standard. (03-7C-31-1/1)
8. With regard to the case of *Broadhurst & Ball v. American Home*, answer the following:
  - a. What was the court's decision regarding the allocation of defence costs between insurance companies American Home and Guardian?
  - b. Discuss the court's reasoning for making the decision in a.
  - c. Discuss the implications to the insurance industry from the decision in a. (04-7C-29-.5/1.5/1)

Baer Misc.

1. The judge concluded that there was overwhelming probability that Dillon would be found 100% at fault and that Guardian could have settled the claim for less than the policy limits, pp. 750-51.
2. F, p. 748 – Substitute "equally" for "pro rata in proportion to the coverages afforded by each insurer."
3.
  - 1) Election lets the injured person elect either recourse against the tortfeasor or compensation from the collateral source.
  - 2) Cumulation lets the injured person collect from both the tortfeasor and the collateral source.
  - 3) Reimbursement involves assigning any excess recovery by the injured person to the collateral source.
  - 4) Relieving the tortfeasor involves reducing the tortfeasor's liability by the amount of the recovery from the collateral source, p. 278.
4.
  - a.
    - 1) "[S]uch customers rely on the information."
    - 2) "[T]heir reliance is reasonable."
    - 3) MPIC "knew or ought to have known that they would rely on the information," p. 512.
  - b.
    - 1) "The institutional setting in which public insurance is sold affords considerably less scope for privacy and individual attention."
    - 2) The employees of MPIC "do not hold themselves out as specialists in risk assessment and insurance advice," p. 515.
5.
  - a. That they should be shared between it (the primary insurer) and the excess insurer in proportion to their policy limits, p. 742.
  - b. Equal apportionment between the two insurers involved, p. 748
6. C, p. 510.
7.
  - a. It is "that if an insurer can settle a claim against an insured within its limits and does not do so, it is liable to reimburse its insured for whatever claim goes against him.
  - b.
    - 1) It "avoids the burdens of a determination whether a settlement offer within the policy limits was reasonable."
    - 2) It eliminates "the danger that an insured, faced with a settlement offer at or near the policy limits, will reject it and gamble with the insured's money to further its own interests."
    - 3) It is fair that in a "situation where the insurer's and insured's interests necessarily conflict, the insurer, which may reap the benefits of its determination not to settle, should also suffer the detriments of its decision," p. 750.
8.
  - a. See 5b.
  - b. Since the potential judgment against the insured exceeded the limit of the primary policy, the excess insurer was clearly at risk. The excess insurer has a "clear contractual duty to defend the respondents under the terms of its policy" and absolving it of the duty because the primary insurer is providing defense would confer a windfall on the excess insurer. It is "a simple matter of fairness between insurers under concurrent obligations to defend, and, as well, in fairness to the insured, . . . [the excess insurer] should pay a proper share of defense costs of defense, pp. 747–48.
  - c. The industry should align its pricing to reflect the allocation of defense costs equally between the primary and excess insurers.