

# Michigan Law Review

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Volume 59 | Issue 8

---

1961

## Contacts - Subrogation - Partial Subrogation of a Cause of Action for Personal Injuries

Jerome M. Salle  
*University of Michigan Law School*

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### Recommended Citation

Jerome M. Salle, *Contacts - Subrogation - Partial Subrogation of a Cause of Action for Personal Injuries*, 59 MICH. L. REV. 1256 (1961).

Available at: <https://repository.law.umich.edu/mlr/vol59/iss8/7>

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CONTRACTS — SUBROGATION — PARTIAL SUBROGATION OF A CAUSE OF ACTION FOR PERSONAL INJURIES — Plaintiff, an incorporated home for the aged, provided all essential medical care to one of its residents under the provisions of a life-care contract between it and the resident. On the basis of a contract clause which purported to subrogate plaintiff to the right of the resident to recover medical expenses caused by the negligence of third parties, plaintiff brought an action to recover certain medical expenses incurred from the party who was allegedly responsible for the injuries and death of the resident. The trial court sustained a demurrer to the complaint for failure to state a cause of action and dismissed the case. On appeal to the California Supreme Court, *held*, affirmed. The statutory prohibition

against the assignment of personal injury claims<sup>1</sup> precluded the transfer of claims for medical expenses by subrogation. *Fifield Manor v. Finston*, 54 Cal. 2d 632, 354 P.2d 1073 (1960).

A right of subrogation was denied in the principal case because, like assignment, subrogation would transfer a cause of action for personal injuries to a third party; the policy barring assignment was considered to apply to subrogation also.<sup>2</sup> The common law rule barred the assignment of personal injury claims because these claims did not survive the death of the wrongdoer or injured party, a characteristic which was regarded as essential to transferable property rights.<sup>3</sup> This rule of nontransferability frustrated early attempts of life insurers to obtain subrogation against a negligent third party who caused the death of one of its policyholders.<sup>4</sup> Even in states which have provided for the survival of a personal injury action, many courts would narrowly construe such a statute which abrogates the common law and thus would require an express act of the legislature to make such actions assignable.<sup>5</sup> However, the retention of this common-law rule should not be based solely on the technical rules of statutory construction. It would seem more persuasive to bar the assignment of personal injury claims because of the need to protect an injured party confronted with the difficulty of determining a fair consideration for transferring his unliquidated claim for damages. Allowing the unrestricted transfer of personal injury claims might open the door for assignees to attempt to profit at the expense of necessitous injured parties through champertous practices.<sup>6</sup> However, in the case of partial subrogation of the injured party's cause of

<sup>1</sup> CAL. CIV. CODE § 956.

<sup>2</sup> Principal case at 382. *But cf.* General Acc., Fire & Life Assur. Co. v. Zerbe Constr. Co., 269 N.Y. 227, 199 N.E. 89 (1935) (workmen's compensation insurer equitably entitled to subrogation); *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366 (1949) (insurer entitled to subrogation when insured was injured by a government employee).

<sup>3</sup> 4 CORBIN, CONTRACTS § 857 (1951). For collected cases, see Annot., 40 A.L.R.2d 500 (1955).

<sup>4</sup> *Insurance Co. v. Brame*, 95 U.S. 754 (1877); *Connecticut Mut. Life Ins. Co. v. New York & N.H.R.R.*, 25 Conn. 265 (1856). Early attempts at subrogation under health and accident insurance policies were denied on the ground that these were not indemnity contracts. See *Gatzweiler v. Milwaukee Elec. Ry. & Light Co.*, 136 Wis. 34, 116 N.W. 633 (1908), where the court held that in the absence of a contractual stipulation that the insurer was to be regarded as an indemnitor, the insured had an absolute right to the proceeds of the policy. See also *Aetna Life Ins. Co. v. Parker*, 30 Tex. Civ. App. 521, 72 S.W. 621 (1902), *aff'd*, 96 Tex. 287, 72 S.W. 168 (1903), where the court held that the policy was not one of indemnity since the insurer did not undertake to be responsible for the entire loss suffered by the insured.

<sup>5</sup> There is a split of authority whether a survival statute also operates to make a cause of action assignable. Compare *Grand Rapids & I. R.R. v. Cheboygan Circuit Judge*, 161 Mich. 181, 126 N.W. 56 (1910) (survival statute did make action assignable), with *Bethlehem Fabricators v. H. D. Watts Co.*, 286 Mass. 556, 190 N.E. 828 (1934) (survival statute did not make action assignable). For collected cases, see Annot., 40 A.L.R.2d 500 (1955).

<sup>6</sup> See CORBIN, CONTRACTS §§ 1422, 1427 (1950).

action in the amount of medical expenses paid for him, the right transferred to the subrogee is valued by the specific payments he has made for the benefit of the injured party.<sup>7</sup> Therefore, since the subrogee's recovery is restricted to reimbursement for the medical expense he has actually incurred, champertous practices should not develop.

One compelling reason for allowing recovery on the subrogated portion of the cause of action is suggested by the fact that the majority of states allow the injured party to recover his medical expenses from the negligent party even though they have been paid by a collateral source such as a medical insurer.<sup>8</sup> This is done to prevent the negligent party from benefiting from a contract made by or for the benefit of the injured party.<sup>9</sup> However, this rule enables the injured party to profit through the double payment of medical expenses although the law has sought only to compensate him. This unnecessary enrichment of the injured party would be prevented and the burden of the loss properly placed upon the negligent party if the collateral source was allowed to prosecute his contractual right of subrogation. Where, as in the principal case, the court denies a right of subrogation, the total cost of compensating for negligent acts is unnecessarily increased by the profits received by injured parties; this undesirable result is reached by the dogmatic adherence to a common law rule of non-transferability where the reason for the rule has been abrogated by a survival statute.<sup>10</sup>

On the other hand, when a medical insurer has not obtained a contractual right of subrogation, it becomes a primary obligor and is liable for the medical expenses of the insured injured party without regard to the manner in which the expenses were incurred. Most courts deny such an insurer a subrogated cause of action in order to prevent the unjust enrichment of the insurer through the nonpayment of its primary obligation.<sup>11</sup> Consequently, the total cost of compensating for negligent acts is increased by emphasizing the possible unjust enrichment of the insurer rather than the unnecessary profit of the injured party.

The proper solution of these problems which arise in compensating for personal injuries does not lie in discouraging payments from collateral sources by denying them a right of reimbursement. Such payments are highly useful in shifting the cost of carrying the wrongdoer's obligation from the

<sup>7</sup> Cf. *Black v. Chicago & G.W. R.R.*, 187 Iowa 904, 174 N.W. 774 (1919).

<sup>8</sup> The overwhelming majority of states would not reduce the damages recoverable by the amount of the medical expenses paid by an outside source. See *McCORMICK, DAMAGES* § 90 (1935). For collected cases, see *Annot.*, 95 A.L.R. 575 (1935); *Annot.*, 13 A.L.R.2d 355 (1950).

<sup>9</sup> See *McCORMICK, DAMAGES* § 90 (1935).

<sup>10</sup> The California survival statute provides an interesting paradox. Although it removes the reason for barring assignment, it prohibits the assignment of personal injury claims. CAL. CIV. CODE § 956.

<sup>11</sup> *Michigan Hosp. Serv. v. Sharpe*, 339 Mich. 357, 373, 63 N.W.2d 638, 641 (1954). However, where the policy contains a subrogation clause there would be no unjust enrichment. *Michigan Medical Serv. v. Sharpe*, 339 Mich. 574, 577, 64 N.W.2d 713, 714 (1954).

injured party to the collateral source during the time lag between accident and recovery. Indeed, if the collateral source is allowed to turn to the wrongdoer to recover the medical expenses which it has incurred on behalf of the injured party, it would be encouraged to make funds available for the timely payment of medical bills at a lower cost to the insured. These considerations seem more meaningful than any technical reason for denying the plaintiff a right to be subrogated to that part of the injured party's cause of action which represents the cost of medical treatment.<sup>12</sup>

Only partial subrogation of a cause of action will, however, bring into play many of the procedural difficulties associated with splitting a cause of action. If the action brought in the subrogee's name proceeded to judgment, the injured party would be prevented by the principles of *res judicata* from prosecuting a subsequent action to recover for his remaining injuries.<sup>13</sup> If the injured party were allowed a second action, the defendant would be required to defend the same cause of action twice. These considerations should preclude the subrogee from bringing an action in his own name, but they do not require that he be denied a substantive right to recover for medical expense payments. In common law states, the procedural difficulties associated with splitting a cause of action may be avoided when the action is brought in the name of, or by, the injured party for the benefit of the subrogee who would share in the proceeds to the extent of the medical expenses it has paid.<sup>14</sup> In this case it would seem proper for the court to apportion the judgment between the injured party and the subrogee. In jurisdictions which require the action to be brought in the name of the real party in interest, the injured party and the subrogee should be required to join as co-plaintiffs, each recovering a judgment reflecting his interest in the cause of action. Both the injured party and the subrogee should be treated as indispensable parties to prevent the possibility of a second suit on the same cause of action.<sup>15</sup>

In the principal case, the court could have properly dismissed the action, because the plaintiff did not, under a real party in interest statute,<sup>16</sup> join the resident's estate.<sup>17</sup> Nevertheless, the court proceeded to construe an anti-assignment statute so broadly as to deny a substantive right to partial subrogation by contract; the court did not appear to consider the reasons which seem to compel the opposite result. The foregoing considerations should demonstrate the need for corrective action to facilitate payment and reduce the cost of compensating personal injuries.

*Jerome M. Salle*

<sup>12</sup> These considerations have been given effect in the area of workmen's compensation. See CAL. LAB. CODE § 3852.

<sup>13</sup> *State Farm Mut. Auto Ins. Co. v. Salazar*, 155 Cal. App. 2d 861 (1957); *City of New York v. Barbato*, 5 N.Y.S.2d 125 (Manhattan Munic. Ct. 1938) (dictum).

<sup>14</sup> BLUME, AMERICAN CIVIL PROCEDURE § 7-03 (1955).

<sup>15</sup> *United States v. Aetna Cas. & Sur. Co.*, *supra* note 2; BLUME, *op. cit. supra* note 14, § 7-03. Cf. 51 MICH. L. REV. 587 (1952).

<sup>16</sup> CAL. CIV. PROC. CODE § 367.

<sup>17</sup> CAL. CIV. PROC. CODE § 389.