Michigan Law Review

Volume 53 | Issue 3

1955

Insurance - Subrogation - Group Hospital Service Organization

Douglas Peck
University of Michigan Law School

INSURANCE—SUBROGATION—GROUP HOSPITAL SERVICE ORGANIZATION—Plaintiff, a non-profit hospital service organization, furnished services to defendant, a member of the organization injured in an automobile accident. Defendant thereafter entered into a settlement with the third party whose negligence had caused the accident and executed a release which included the hospital bill. Plaintiff then filed a bill in equity against defendant and the third party, claiming that on common law principles of subrogation[1] it was entitled to recover from defendant all sums received by the defendant in settlement for the hospital services and from the third party the cost of the hospital services made necessary by the latter's negligence. On appeal from a decree dismissing the bill of complaint, *held*, affirmed. Where a party has assumed a primary obligation, the discharge of that obligation does not give rise to any right of subrogation. Such a right never follows an actual primary liability. *Michigan Hospital Service v. Sharpe*, 339 Mich. 357, 63 N.W. (2d) 638 (1954).

Considered as an abstract principle of law it would seem that the assertion that the right of subrogation never follows a primary liability is not open to dispute. For it would be true by definition that one whose liability is primary cannot recover against one whose liability, if any, is only secondary.[2] The result in the present case, however, did not rest upon a finding that plaintiff's liability was primary as against the liability of the third party tortfeasor, but instead on the conclusion that, as between plaintiff and the injured party, plaintiff had by contract assumed a primary liability.[3] It is submitted, however, that where "primary liability" is thus used to compare the liability of the subrogee with that of the person to whose rights he seeks to be substituted and not with that of the person *against* whom he seeks subrogation, a finding that the subrogee is primarily liable should not prevent his recovery.[4] Indeed, in the insurance cases it

[1] Had the contract between plaintiff and defendant contained a provision for subrogation, such a provision would have been enforced. Michigan Medical Service v. Sharpe, 339 Mich. 574, 64 N.W. (2d) 713 (1954).

[2] As used in these subrogation cases, secondary liability means that the obligor is to be liable only in the event that the party having the primary liability fails to make payment. Where, therefore, the person primarily liable has made payment, the obligor's liability would be extinguished. U.S. Fidelity and Guaranty Co. v. Thomas, (La. App. 1930) 129 S. 556.

[3] Principal case at 373.

[4] Tibbits v. Terrill, (Colo. App. 1914) 140 P. 936 (allowing subrogation of land grantee to interest of prior mortgagee even though grantee had assumed a primary obligation to pay such mortgage); Echer v. Echer, 216 Mich. 535, 185 N.W. 690 (1921) (surviving partner, though primarily liable for firm debts, subrogated to rights of creditors whose claims he paid).

is commonly held that the insurer is entitled to subrogation only where the contract is one of indemnity,[5] and yet the prevailing view is that his liability to the insured is primary.[6] It is, therefore, no answer to the problem raised in the present case to say that the plaintiff's liability was primary.[7] The proper approach instead should be to determine whether those elements are present which have led the courts to allow subrogation in other cases. Pursuing this line of inquiry, it appears that, although the court expressly rejected the analogy of the group hospital service contract to indemnity insurance contracts, no significant distinction between the two can be made. As in the indemnity contracts, there is a risk of loss to a party upon the happening of a certain contingency, i.e., his hospitalization, and an assumption of that risk by the service organization in return for payment of a fixed premium.[8] It has been held, it is true, that these group health associations are not insurers because their "primary purpose" is not risk distribution but the providing of contingent services at a reduced rate,[9] but the reasoning which would justify this conclusion is not clear.[10] The members do not pay according to the services they receive, only at a reduced rate, but instead pay a fixed premium, in return for which they may, upon the happening of a certain contingency, receive benefits not measured by the premiums they have paid. Certainly risk distribution, if not a "primary purpose," is a sufficiently prominent feature of these contracts to provide analogy to the insurance cases. Moreover, the actual amount to be paid by the plaintiff association upon the happening of the contingency is not determined in advance by contract with its members, but by the cost of the services which become necessary. Plaintiff's obligation, therefore, is not, as in "investment contracts" such as life and accident insurance policies, a duty to pay a fixed sum upon the happening of the specified contingency,[11] but is rather an obligation to "save the assured whole" from loss due to hospitalization. It is, in other words, an obligation to indemnify,

[5] Ocean Accident & Guarantee Corp. v. Hooker Electrochemical Co., 240 N.Y. 37, 147 N.E. 351 (1925); Dornaus, "Subrogation—An Equitable Approach to the Problem of Imposing Payment Burden on the Wrongdoer," 13 OKLA. B.A.J. 85 (March, 1942); but see U.S. Fidelity & Guaranty Co. v. Thomas, note 2 supra.

[6] Moore v. Capital Nat. Bank of Lansing, 274 Mich. 56, 264 N.W. 288 (1936); Westville Land Co. v. Handle, 112 N.J.L. 447, 171 A. 520 (1933).

[7] See, in this connection, 8 N.Y. UNIV. L.Q. REV. 337 (1930).

[8] VANCE, INSURANCE, 3d ed., §10 (1951). See also McCarty v. King County Medical Service Corp., 26 Wash. (2d) 660, 175 P. (2d) 653 (1946).

[9] Jordan v. Group Health Assn., (D.C. Cir. 1939) 107 F. (2d) 239.

[10] It has been suggested that in all of the cases holding group health associations not to be engaged in the insurance business, the courts were trying to take them out from under the regulation of general insurance laws which would make their existence impossible, and argument has been made that the better position would be that although they are "insurers" they were not intended to be regulated by the general insurance laws. 53 YALE L.J. 162 (1943); 52 HARV. L. REV. 809 (1939).

[11] Subrogation has been denied to life and accident insurers on the ground that their liability is determined in advance by the contract of the parties and therefore bears no necessary relation to the damages actually suffered by the insured and inflicted by the wrongdoer. Gatzweiler v. Milwaukee Electric Railroad and Light Co., 136 Wis. 34, 116 N.W. 633 (1908).

and plaintiff, having satisfied that obligation, should be entitled to the same right of subrogation given in other indemnity cases.[12] The very nature of an indemnity agreement is that the assured, in the event of a loss within the terms of that agreement, shall be entitled to full indemnity but never to anything more than full indemnity.[13] Applying this to the principal case, the injured party, having been fully compensated by the plaintiff for his hospitalization, should not be able to recover again from the wrongdoer. Since he contracted only for indemnity, allowing him to so recover has the effect of providing him with a profit from his injury at the expense of premiums paid by the other members.[14] It would appear, then, that the better result on the facts of the principal case would be to allow subrogation, both to place the burden of payment upon him whose negligence caused the loss and to prevent the "unjust enrichment" of the injured party.[15]

Douglas Peck

[12] See Ocean Accident & Guarantee Corp. v. Hooker Electrochemical Co., note 5 supra.

[13] VANCE, INSURANCE, 3d ed., 789-790 (1951).

[14] See the discussion of this point in Moeller v. Associated Hospital Service of Capital District, 304 N.Y. 73, 106 N.E. (2d) 16 (1952), a case involving facts somewhat different from those of the principal case.

[15] The doctrine of subrogation is a device designed to place the burden of satisfying an obligation upon the party who ought "in equity and good conscience" to make payment, and its application is proper "in all cases where injustice would follow its denial." Stroh v. O'Hearn, 176 Mich. 164 at 177, 142 N.W. 865 (1913).