SUBROGATION IN MEDICAL AND HOSPITAL INSURANCE SCHEMES: JUDICIAL PHILOSOPHY VERSUS LEGISLATIVE PRAGMATISM*

*James A. Rendall***

I. INTRODUCTION

The mandate given me, paraphrased, was to discuss the history and philosophy of the subrogation principle, and the way in which it has been carried into the medical and hospital insurance legislation in Canada.

I begin by venturing an over-simplified and slightly over-stated conclusion. The concept of subrogation has been imported into most of the statutes regulating medical insurance and hospital insurance, but the underlying philosophy of the concept has largely disappeared in the process.

Subrogation is an equitable doctrine derived by the English judges from Roman law.[1] In the context of insurance law, it is one of the major devices for ensuring the integrity of the indemnity principle. Leaving aside a great many complexities in its detail, its first premise and its major concern is simply to prevent the insured from receiving a windfall; it does this by directing any excess recovery, above a full indemnity, to the insurer. It follows, axiomatically, that subrogation operates only ofter the insured has been fully indemnified.

By contrast, many of the statutes considered herein state a subrogation right which is quite independent of considerations of full indemnification. In several ways these statutory subrogation rights operate to impede or deny a full indemnification. Their guiding motive quite clearly is to minimize

---

* This paper was prepared for the Meeting on Third-Party Liability in Ottawa, March 15-16, 1973. The meeting was sponsored by the Department of National Health and Welfare and involved participants from the twelve governments of the Provinces and Territories. I acknowledge the valuable assistance of Mr. Lorne Rozovsky, Departmental Solicitor, Nova Scotia Health Services and Insurance Commission, and also the thoughtful and helpful comments made by conference delegates.

It is very gratifying to have to note that some of the revisions in this paper have been necessitated by recent legislative activity directed at some of the deficiencies which the paper criticizes.

This paper was prepared while I was on sabbatical leave from the Faculty of Law, University of Western Ontario.

** B.A., 1955, University of Toronto; LL.B., 1962, Osgoode Hall; LL.M., 1965, University of Michigan. Professor, Faculty of Law, Dalhousie University.

[1] *See* John Edwards & Co. v. Motor Union Ins. Co., 128 L.T.R. (n.s.) 276, *per* McCardie, J. at 277 (N.B. 1922).

the cost of the government insurance schemes by maximizing the recovery for the insured services which have been extended.

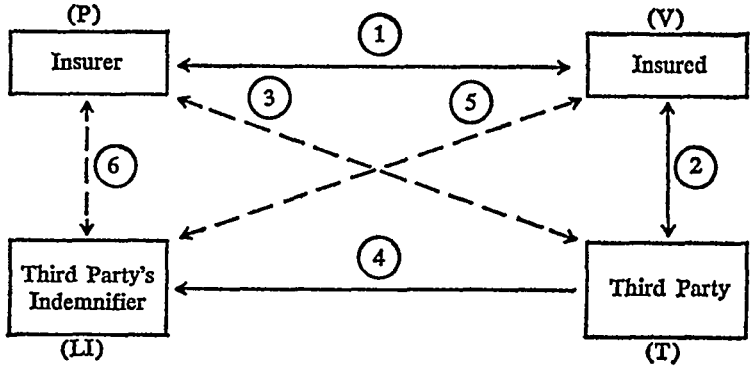
Perhaps it is a little unfair to describe this legislative response as "pragmatic" in a manner which suggests that it is devoid of a philosophic base. It clearly is pragmatic but it could be argued, I suppose, that safeguarding the public treasury is also as much a matter of philosophy as ensuring full indemnification to an individual.

In any event, the legislatures have begun with a different premise, and the result does violence to some of the features of subrogation in its classic form.

II. SUBROGATION SUMMARIZED

It is neither necessary nor appropriate to attempt here a full and extensive exposition of the subrogation concept. The topic is well covered elsewhere. [2] However, to set the stage properly for a discussion of the statutory subrogation provisions it is necessary to summarize the basic concept, and in some degree of detail inasmuch as the legislative variations relate in most cases to matters of detail.

Subrogation is best explained in light of the following diagram which attempts to portray the relationships among the various characters in the subrogation drama:



[2] See IVAMY, GENERAL PRINCIPLES OF INSURANCE LAW c. 46 (2d ed. 1970); *see also* MACGILLIVRAY, INSURANCE LAW 913-945 (5th ed. 1961); COLINVAUX, THE LAW OF INSURANCE 128-134 (3d ed. 1970); Shapiro, *The Law of Subrogation*, SPECIAL LECTURES OF THE LAW SOCIETY OF UPPER CANADA 265-284 (1962); Dilts, *Subrogation*, ISAAC PITBLADO LECTURES c. 8 (1966).

For a brief treatment of subrogation relative to accident and sickness insurance, *see* O'Brien, *Accident and Sickness Insurance*, SPECIAL LECTURES OF THE LAW SOCIETY OF UPPER CANADA 179 (1962).

For the purpose of later reference in connection with the hospital and medical insurance, the characters have been labelled *P*, *V*, *T*, and *LI*.

"*P*" is the Plan, *i.e.*, the particular provincial authority responsible for managing the government insurance scheme. In the statutes the nomenclature is extremely varied—Minister,[3] Commission,[4] Board,[5] Commissioner,[6] Hospital Insurance Commission.[7] Many of the statutes refer to Her Majesty the Queen in right of the Province,[8] and this phrase usually occurs together with one of the other expressions, in the same statute.[9] Ontario, in business-like fashion, refers to the Plan, and its General Manager.[10]

"*V*" stands for the person I have designated, for ease of reference, the Victim—a person who has received government-insured hospital or medical services as a result of an injury[11] inflicted by *T*. Again, there is considerable variation in the terminology chosen by different legislative draftsmen. He is called the "beneficiary", "insured person", "person who has received entitled services", or "person who has received insured services."[12]

"*T*" is the Third Party whose liability to *V* is the subject of the subrogation claim. In our context, we may refer to him as the Tortfeasor, as all the statutes contemplate a relationship between *V* and *T* grounded in tort.

"*LI*" refers to "Liability Insurer"—an insurer of *T*'s liability to *V*.

The solid lines 1, 2, and 4 denote the direct relationships arising out of contract or tort. The broken lines represent derivative relationships which flow from imposing certain legal rules on the structure of primary relationships. For example, line 5 represents the relationship between *V* and *T*'s liability insurer—a relationship which derives from *V*'s statutory direct action against *LI*.

The basic subrogation discussion involves only *P*, *V* and *T*, and the triangular set of relationships represented by lines 1, 2 and 3. The diagram

---

[3] ALTA. REV. STAT. c. 174 (1970), as amended by Alta. Stat. 1971 c. 45 and by Alta. Stat. 1972 c. 89; N.B. Stat. 1960-61 c. 11; *see* N.B. Reg. 1963, Reg. 78; NFLD. REV. STAT. c. 157 (1970); *see* Nfld. Reg. (these regulations are not published in bound volumes, but in different numbers of the Newfoundland Gazette), Reg. 14; QUE REV. STAT. c. 163 (1964); SASK. REV. STAT. c. 253 (1965).

[4] Man. Stat. 1970 c. 81, — Cap. H-35, as amended by Man. Stat. 1971 c. 33; NFLD. REV. STAT. c. 265 (1970); N.S. Stat. 1973 c. 8; P.E.I. Stat. 1959 c. 17, as amended by P.E.I. Stat. 1964 c. 15; P.E.I. Stat. 1970 c. 24.

[5] N.W.T. ORD. 1959 (2d) c. 3; Que. Stat. 1970 c. 37.

[6] N.W.T. ORD. 1970 (3d) c. 8; REV. ORD. c. H-3 (1971); Y.T. REV. ORD. c. H-1 (1971).

[7] N.S. Stat. 1968 c. 9 as amended by N.S. Stat. 1969 c. 88, now repealed.

[8] B.C. REV. STAT. c. 180 (1960); N.B. Stat. 1968 c. 85; N.B. Stat. 1971 c. 6; N.S. Stat. 1973 c. 8; N.S. Stat. 1968 c. 9; P.E.I. Stat. 1959, c. 17, as amended by P.E.I. Stat. 1964 c. 15; P.E.I. Stat. 1970 c. 24; QUE. REV. STAT. c. 163 (1964); Que. Stat. 1970 c. 37.

[9] *Compare* note 8 with notes 3-7.

[10] Ont. Stat. 1972 c. 91.

[11] Most of the statutes speak of "personal injuries" or use a similar expression.

[12] It does not seem fruitful to footnote the minute details of the endlessly varied statutory language. It is sufficient to say that there are one or two further ways in which the "victim" is identified, but the most common expressions are "beneficiary" and "insured person."

is an attempt to portray the manner in which each of the three stands in a relationship, primary or derivative, to each of the others. Each of the three relationships is reciprocal in that rights and obligations flow in both directions. A very brief summary of these respective rights and duties will lay the groundwork for examination of the statutory subrogation provisions.

Insurer—Insured

At common law, full indemnification of the insured was the major premise. The insured could claim against his insurer notwithstanding a potential right of action against a third party, and the insurer's subrogation right did not arise until the insured had been fully indemnified.

If the insurance recovery did not fully indemnify him, the insured remained *dominus litis* in respect of any claims against third parties, with liberty to pursue those claims by action or to settle them. [13] In computing a full indemnity, the insured was entitled to reckon his expenses of recovery from third parties, including his litigation costs, and the insurer was entitled only to the excess. [14]

Co-relatively to these rights, the insured had responsibilities to protect the insurer's subrogation claim. He was obliged to assist the insurer in prosecuting its subrogated claim, and was required to lend his name to the insurer's action. If, being *dominus litis*, the insured sought to make recovery from the third party, he was under a duty not to prejudice his insurers; accordingly, he was bound to pursue his claim diligently and to exercise good faith in its compromise. [15]

Insured—Third Party

The insured was entitled to press his claim in full against the third party notwithstanding that he had recovered, or might recover, part or all of his loss from his insurer. The third party was not entitled to have the benefit of the insurance arranged by insured for his own protection. [16]

The only right of the third party which must be mentioned here is his right to avoid multiplicity of litigation. This is a matter which is not confined to the relationship of insured and third party, and the point will be mentioned again.

Insurer—Third Party

The subrogated insurer could bring action against the third party in the

---

[13] Globe & Rutgers Fire Ins. Co. v. Trudell, 60 Ont. L.R. 227, [1927] 2 D.L.R. 659.

[14] Crown Bank v. London Guarantee & Accident Co., 17 Ont. L.R. 95 (1908).

[15] *Supra* note 13; *see also* Davis v. MacRitchie, [1938] 4 D.L.R. 187 (N.S. Sup. Ct.).

[16] *See* IVAMY, GENERAL PRINCIPLES OF INSURANCE LAW c. 46, at 248 (2d 1970); *see also* the cases there cited.

insured's name, or in its own name if it had taken from the insured an express assignment of his right of action. [17]

The insurer need not prove that litigation would have established liability to pay on its policy. So long as the insurer acted in good faith in settling with its insured the third party could not defend by raising speculations as to the insurer's liability to its insured, [18] nor by showing that the insurer had failed to raise against the insured an extremely technical defence. [19] However, if the insurance policy was clearly invalid the third party could defend on the ground that the insurer was a mere volunteer. [20]

The third party was entitled to raise against the insurer any defence which he could use against the insured; for example, settlement or release, or a particular legal rule disabling the insured from taking action against the third party. [21] A common defence, equally applicable against insured or insurer, would be expiry of a limitation period. [22]

Additionally, the third party was entitled to recognize that the insurer was the real plaintiff, and to raise defences which might not be available as against the insured. [23]

Finally, the third party has an interest, previously mentioned, in avoiding redundant actions at the hands of insurer and insured.

III. Statutory Variation of Subrogation—Generally

Although the structure of rules above summarized was intended to recognize the interests of each of the three participants in the subrogation triangle, and was designed to give protection to each, not everyone was content with this system of achieving balance. In particular, insurers perceived shortcomings in the duty of "good faith and diligence" which was imposed on the insured for the protection of the insurers. In the result, legislative intervention was obtained in respect of fire insurance and automobile insurance.

---

[17] King v. Victoria Ins. Co., [1896] A.C. 250 (P.C.).

[18] *Id.*

[19] Leduc v. British Canadian Ins. Co., 35 Que. B.R. 342 (1923).

[20] John Edwards Co. v. Motor Union Ins. Co., 128 L.T.R. (n.s.) 276 (K.B. 1922). It should be noted that though this case is cited for the above proposition, see for example Shapiro, *The Law of Subrogation*, Special Lectures of the Law Society of Upper Canada 274-75 (1962) the contest was actually between insurer and insured.

[21] In the case Midland Ins. Co. v. Smith, 6 Q.B.C. 561 (1881), the insured's wife destroyed the insured property. The insured could not sue his wife, and the insurer was restricted by that disability.

In Simpson & Co. v. Thomson and Burrell, 3 App. Cas. 270 (H.L. 1877), the insurer was frustrated by the proposition that its insured could not claim recovery against himself in his role as vicarious tortfeasor.

[22] Union Ass. Society v. B.C. Elec. Ry., 8 W.W.R. 327, 21 D.L.R. 62 (B.C. Sup. Ct. 1915).

[23] *Eg.*, the defence that the insurer had made a gratuitous payment to the insured. *See supra* note 20. The third party might also rely on provisions in the policy by which the insurer waived its rights against the third party. *See* Ivamy, General Principles of Insurance Law 428 (2d 1970) and the cases there cited.

These statutory accretions to the subrogation structure were directed at two objectives—acceleration of insurer's rights so that it might claim to be subrogated before it had actually paid a full indemnity to the insured, [24] and improvement of the insurer's protection in cases in which the insurer was dependent upon the insured to press his claim against the third party. This second objective was approached by requiring the insured to bear a proportionate part of any short fall in recovery, thus giving him a financial stake in achieving full recovery from the third party and, presumably, stimulating his diligence and good faith. [25]

These modest legislative incursions demonstrated how tinkering with a small part of the system has wider ramifications on other parts. The question soon arose whether the provision accelerating the insurer's subrogation claim operated only as between insurer and insured, or whether it also varied the third party's rights. In a number of cases the insurer brought action against the third party to recover amounts paid to its insured; simultaneously, the third party found himself faced with a separate action by the insured to recover damages beyond those for which his insurance provided indemnity. The judicial response has been to support the third party in his claim to avoid multiplicity of litigation. In the result, the statutory provisions elevating the insurer's claim have been given a narrow definition. [26]

In turn, this has prompted further legislative action, in respect of automobile insurance, establishing an elaborate formula to regulate the competing claims of insurer and insured to have carriage of the action against the third party. [27] Another very significant statutory variation of the subrogation structure provides that no release or settlement given by the insurer or the insured alone will bind the other. [28] This has a very clear impact on the third party.

I do not attempt here any discussion of non-statutory techniques for variation of the subrogation mechanism. The insurer and insured, by their contract, may substantially alter their rights and duties; that is a topic which is not germane to the present enquiry.

---

[24] *See for example* ONT. REV. STAT. c. 224, § 126 (1) (1970); *see also* N.S. REV. STAT. c. 148, § 128(1) (1967), in respect of fire insurance. *See* ONT. REV. STAT. c. 224, § 240(1) (1970); *see also* N.S. REV. STAT. c. 148, § 100M(1) (1967), in respect of auto insurance.

No attempt is made here to canvass all of the counterpart provisions in the other provinces but it may be noted that this is an area of uniformity.

[25] *See* ONT. REV. STAT. c. 224, § 126(2), (1970); *see also* N.S. REV. STAT. c. 148, § 128(2) (1967) (fire insurance). *See* ONT. REV. STAT. c. 224 § 240(2) (1970); *see also* N.S. REV. STAT. c. 148 § 100M(2) (1967) (auto insurance).

[26] Kellar v. Jackson, [1962] Ont. W.N. 106 (High Ct.); Cleveland v. Yukish, [1965] 2 Ont. 497, 51 D.L.R.2d 208 (County Ct.); Sheridan v. Tynes, 4 N.S.R.2d 143, 19 D.L.R.3d 277 (1971).

[27] *See* ONT. REV. STAT. c. 224, §§ 240(3), 240(4), 240(5), (1970); *see also* N.S. REV. STAT. c. 148, §§ 100M(3), 100M(4), 100M(5) (1967).

[28] *See* ONT. REV. STAT. c. 224, § 240(6) (1970); *see also* N.S. REV. STAT. c. 148, § 100M(§) (1967).

IV. The Hospital and Medical Insurance Statutes

To begin, it may be useful to list the many statutes in the various Provinces and Territories which govern the delivery of hospital and medical services.[29] Where appropriate, the sections regulating subrogation are indicated. Not all of the statutes contain subrogation provisions.

Alberta:

The Alberta Health Care Insurance Act, Alta. Rev. Stat. c. 166, § 28 (1970).

The Alberta Hospitals Act, Alta. Rev. Stat. c. 174, § 52 (1970), as amended by Alta. Stat. 1971 c. 45, Schedule and Alta. Stat. 1972 c. 89, § 9.

British Columbia:

Hospital Insurance Act, B.C. Rev. Stat. c. 180, § 29 (1960).[30]

Manitoba:

The Health Services Insurance Act, Man. Stat. 1970 c. 81—Cap. H 35, §§ 121-137, as amended by Man. Stat. 1971 c. 33, §§ 11-14.[31]

New Brunswick:

Regulations under the Hospital Services Act, N.B. Stat. 1960-61 c. 11. See N.B. Reg. 1963, Regulation 78, §§ 35, 36.

Medical Services Payment Act, N.B. Stat. 1968 c. 85, § 10.

Health Services Act, N.B. Stat. 1971 c. 6, § 5.

Newfoundland:

The Hospital Insurance (Agreement) Act, Nfld. Rev. Stat. c. 157, § 6 (1970).

Regulations under the Hospital Insurance (Agreement) Act,—Reg. 14.[32]

The Newfoundland Medical Care Insurance Act, Nfld. Rev Stat. c. 265, § 42 (1970).

Northwest Territories:

Territorial Hospital Insurance Services Ordinance, N.W.T. Ord. 1959 (2d) c. 3, §§ 12-16.

---

[29] It should be noted that this list does not purport to include statutes setting up hospital or medical services Commissions, or imposing taxing schemes in support, where these matters are separately dealt with. The list is confined to those statutes which regulate the actual delivery of the services.

[30] This statute has never been proclaimed in force, but the Deputy Minister and the insurance companies operate under it as though it had.

[31] It should be noted that there is only one statute in Manitoba, as in Ontario; in each case, the one statute provides a unified system of delivery of health services, replacing separate predecessor statutes relating to hospital and to medical services.

[32] Both the statute and the regulations are in force. They contain provisions governing subrogation which are nearly, but not quite, identical. Theoretically, at least, a situation could arise in which they would be in conflict.

Medical Care Ordinance, N.W.T. Ord. 1970 (3d) c. 8, §§ 11-15.

Nova Scotia:

Health Services and Insurance Act, N.S. Stat. 1973 c. 8, § 13. [33]

Ontario:

Health Insurance Act, Ont. Stat. 1972 c. 91, §§ 35-42. [34]

Prince Edward Island:

Hospital and Diagnostic Services Insurance Act, P.E.I. Stat. 1959 c. 17, § 18 (as amended by P.E.I. Stat. 1964 c. 15, § 3).

Health Services Payment Act, P.E.I. Stat. 1970 c. 24, § 28.

Quebec:

Hospital Insurance Act, QUE. REV. STAT. c. 163, § 9 (1964).

Health Insurance Act, Que. Stat. 1970, c. 37, § 14.

Saskatchewan:

Health Services Act, SASK. REV. STAT. c. 252 (1965).

Saskatchewan Hospitalization Act, SASK. REV. STAT. c. 253, § 22 (1965).

Saskatchewan Medical Care Insurance Act, SASK. REV. STAT. c. 255 (1965).

Saskatchewan Health Insurance Act, SASK. REV. STAT. c. 257 (1965).

Yukon:

Hospital Insurance Services Ordinance, Y.T. REV. ORD. c. H-3, §§ 11-15 (1971).

Health Care Insurance Plan Ordinance, Y.T. REV. Ord. c. H-1, §§ 10-14 (1971).

General Comment on the Statutes

Mention has already been made of the variety of language used by these statutes to cover the same ground. Much more significantly, the statutes are very inconsistent in their fundamental approach to subrogation. The statutes can be put in four categories ranging across the entire spectrum.

First: Alberta's Health Care Insurance Act [35] excludes subrogation entirely by providing that there shall be no right of action against the third party ("wrong-doer") whose action or omission has necessitated the delivery of services or payment of benefits. This is a very significant departure which will be discussed toward the end of the paper.

---

[33] This new statute, which repeals the Hospital Insurance Act, N.S. REV. STAT. c. 125 (1967), and the Medical Care Insurance Act, N.S. Stat. 1968 c. 9, is designed to provide a unified system of delivery of health services under the Health Services and Insurance Commission which replaces the Hospital Insurance Commission and the Medical Care Insurance Commission.

[34] See the explanation given note 31 *supra*.

[35] *See* ALTA REV. STAT. c. 166, § 28 (1970).

Second: A few of the statutes are entirely silent on the matter of subrogation.[36] This leaves open the very important question whether a right of subrogation is to be implied from the fact of the insurer-insured relationship.[37]

Third: Most of the statutes import the subrogation concept and add some further statutory refinements. However, this group varies greatly in the extent to which statutory detail is added. Some of the Acts simply declare a right of subrogation in favour of the Plan, and add very little elaboration.[38] Others deal specifically with a great many facets of the subrogation structure. This variety of provisions leaves a maze of problems relating to the question how far the Plan's subrogation right must be taken as conforming to the classic common law model described above.

Fourth: The Health Services Insurance Act (Man.) does not specifically refer to subrogation at all, but does contain seventeen sections which establish an elaborate code to regulate the respective rights and obligations of the Plan, the Victim and the Tortfeasor. The Manitoba approach appears to cover the ground very thoroughly, and if any problem remains it would seem to be the question whether, if the statutory code leaves untouched any feature of the common law model. The position in Quebec is similar, by reason of call in aid the classic subrogation principles. In view of the extensive and detailed system stated by the Manitoba Act, it would seem a reasonable inference that all vestiges of the common law concept have been legislatively excluded.

Before proceeding to a discussion of the many changes in the subrogation system wrought by the various statutes, it remains to consider two preliminary questions.

Conformity to Common Law Subrogation

The cases interpreting the statutory subrogation provision in respect of automobile insurance[39] indicate a judicial disposition to restrict the statutory language so that it disturbs the common law concept as little as the language reasonably allows. An important recent case on this point is *Ledingham v. Di Natale*[40] which holds that the former Hospital Services Commission Act (Ontario) did, by express language, over-ride a basic principle of common law subrogation. However, the case confirms that, in the absence of such specific statutory variation ". . . an examination of the legal implications of the doctrine of subrogation would have been necessary during the course of

---

[36] SASK. REV. STAT. c. 252 (1965); SASK. REV. STAT. c. 255 (1965); SASK. REV. STAT. c. 257 (1965).

[37] Notwithstanding the case of Guardian Ass. Co. v. Town of Chicoutimi, 51 Sup. Ct. 562 (1915), and the propositions developed in reliance on that case, *see infra*, note 48, the Saskatchewan Attorney General's Department takes the position that the three Saskatchewan statutes do not give rise to a subrogation right.

[38] *See for example,* Que. Rev. Stat. c. 163 (1964).

[39] *See supra* note 26.

[40] [1973] 1 Ont. 291 (1972).

which the technical acceptance and application of a definition dealing with the technical term would have been appropriate." [41]

A stronger stand in favour of limiting the statutory subrogation right, to make it conform as closely as possible to the classic model, has been taken in Nova Scotia. [42]

This has a wide significance in view of the size of the third category of statutes discussed above. Most of the hospital and medical insurance statutes introduce a subrogation right and then proceed to qualify it in some respects. In each instance it seems that *P*, *V* and *T* may rely on the common law definition of their rights except as they have been specifically varied. Given the spectacularly varied detail from one statute to another, it is impossible to construct a general statement of the rights and obligations of *P*, *V* and *T*. In each case one must begin with the common law model and then work through the appropriate statute.

Necessity to State a Subrogation Right

It has already been mentioned that some of the statutes are silent as to subrogation. More importantly, perhaps, all of the statutes which confer a subrogation right do so by reference to limiting criteria. Typically, the subrogation right is related to services or benefits which have been necessitated by "injury" [43] or "personal injuries" [44] suffered by *V*. Typically also, these expressions are not defined, and this leaves open the question whether they would include a condition in the nature of illness or disability. Perhaps "injury" or "personal injuries" could readily be construed that widely. Perhaps also most conditions of illness or disability caused by a third party will fall to be dealt with by Workmen's Compensation legislation. However, the question has not universally been thought academic; several statutes relate the subrogation right to benefits necessitated by "injury or illness" [45] or by "injury or disability." [46]

Manitoba's Health Services Insurance Act predicates the subrogation right on delivery of services or benefits occasioned by "bodily injury". This terminology does seem narrower than the more typical expressions. One wonders, for example, whether "bodily injury" would include a purely psychic harm requiring psychiatric treatment.

---

[41] *Id.* at 295.

[42] See MacDonald v. Parrish, 24 D.L.R.3d 467 (N.S. Sup. Ct. 1971).

[43] N.W.T. Ord. 1959 (2d) c. 3; N.W.T. Ord. 1970 (3d) c. 8; Y.T. REV. ORD. c. H-3 (1971); Y.T. REV. ORD. c. H-1 (1971).

[44] Eleven statutes use this expression. It does not seem useful to list them all. An approximation can be readily achieved by comparing notes 43, 45, and 46 with the full list of statutes.

[45] Que. Stat. 1970 c. 37.

[46] Regulations under the Hospital Services Act, *see* N.B. REG. 1963, Reg. 78; Regulations under the Hospital Insurance (Agreement) Act, *see* Reg. 14.

A variant, "injured or disabled person," is used by the Hospital Insurance (Agreement) Act itself, and by the Newfoundland Medical Care Insurance Act.

Whether it arises as a problem of definition of the circumstances giving rise to a subrogation right, or by reason of statutory silence as to subrogation, in either case the question is whether *P* may claim to be subrogated by simple implication from the "insurance" relationship.

Guardian Assur. Co. v. Town of Chicoutimi [47] is cited as basic authority for the proposition that "A party (not an insurer in the ordinary sense) may obtain the right of subrogation similar to that of an insurer where it has made payment pursuant to a statutory liability. It is submitted that this right would exist even though the right of subrogation is not spelled out in the statute." [48]

In *Ledingham v. Di Natale,* Mr. Justice Kelly said, for the court, "If the *Hospital Services Commission Act* and Regulations had been silent as to the rights of the Commission, I am prepared to assume that the nature of the relationship created by or under the statutes would have given rise to the right of the Commission to be subrogated to any rights of the insured . . . ." [49]

It must be noted that, to claim a common law right of subrogation, *P* must show not that it is an "insurer" of *V*, but that it is "indemnifying" him, for subrogation arises only to police the integrity of the indemnity concept. This would probably be no problem for *P* as hospital and medical benefits are probably readily characterized as being provided as an indemnity to *V*. [50]

Tautologically, of course, if *P* relies on an implied common law right of subrogation, it is the common law brand of subrogation which it is acquiring, with all of its limitations—chief among them being that *P* could not claim an immediate subrogation right against *T* unless the services or benefits provided to *V* represented a full indemnity to him. It bears noting that most of the statutory embellishments which are now to be discussed are directed at escalating *P*'s rights.

V. Variation of Subrogation: The Hospital and Medical Insurance Statutes

It would enhance the comparison with the common law subrogation model if the statutory variations could be considered in three separate groups according as they relate to one or another of the sides of the subrogation triangle. Such an approach encounters the difficulty that many of the statutory provisions cannot nicely be fitted into one of the categories; many of them bear on the rights and duties of all three of *P*, *V* and *T*, and therefore relate

---

[47] 51 Sup. Ct. 562 (1915).

[48] Shapiro, *The Law of Subrogation*, Special Lectures of the Law Society of Upper Canada 265, at 278 (1962).

[49] [1973] 1 Ont. 291, at 295 (1972).

[50] Note, however, opinion that the standard policy of accident and sickness insurance, not being a contract of indemnity, does not attract the subrogation principle: see O'Brien, *Accident and Sickness Insurance*, Special Lectures of the Law Society of Upper Canada 179 (1962).

to all sides of the triangle. The discussion which follows is organized around a list of specific legislative interventions altering a particular feature of the subrogation structure. So far as possible, the list of specifics is designed to follow the same order as the discussion in Part II, above.

P's Subrogation Right

There are many respects in which the indemnity premise for subrogation has been abandoned. In all of the statutes [51] the Plan's subrogation right is conferred without reference to whether the Plan has provided, or will provide, the Victim with a full indemnity. [52] This has many consequences for both *V* and *T*, as will appear.

One respect in which the statutes greatly vary is the relative independence of *P*'s subrogation right from *V*'s claim—both in terms of whether *P*'s right is immediate and unconditional and in terms of *V*'s obligation to protect *P*'s interest.

At one extreme, Manitoba allows the victim to include in his claim against *T*, or to exclude, the amount of the hospital and medical services and benefits; [53] to protect the plan, *V* is obliged to give notice if he intends to bring action without including a claim for the Plan. [54] Moreover, if *V* does add a claim for the Plan he must serve on *P* a copy of the statement of claim, [55] and *P* has a right of appeal in the action [56] and a right to prevent its abandonment or discontinuance. [57] However, the Act does not contain a general statement of subrogation in favour of *P*, and the implication of such a right seems to be excluded. The Plan is specifically authorized to bring action on its own account if *V* fails to litigate or settle, [58] or dies without litigating, [59] or if *V* brings an action without including a claim for *P*. [60]

Although it is achieved by an elaborate and detailed statutory scheme, and although there are important differences of detail, the result is that in its fundamental design the subrogation right under the Manitoba Act is very like the common law model. The position in Quebec is simlar, by reason of statutory silence rather than specification. There the Hospital Insurance Act provides a subrogation right and then introduces a few alterations which do not touch directly on the points presently being discussed. The Health In-

---

[51] *I.e.*, all of the statutes which do state a subrogation right.

[52] It should be noted that this somewhat cavalier legislative approach does not necessarily mean that the presumption in favour of a full indemnity for the victim is displaced; it will depend upon the judicial interpretation given the statute.

Compare MacDonald v. Parrish, 24 D.L.R.3d 467 (N.S. Sup. Ct. 1971), with Ledingham v. Di Natale, [1973] 1 Ont. 291 (1972).

[53] Man. Stat. 1970 c. 81 Cap. H35, §§ 121, 122. See note 4 *supra*.

[54] *Id.* § 122(1).

[55] *Id.* § 122(2).

[56] *Id.* § 128.

[57] *Id.* § 129.

[58] *Id.* § 130.

[59] *Id.* § 132.

[60] *Id.* § 133.

surance Act declares a subrogation right, adds some detail which is also collateral to our present discussion, and then specifies that the usual rules governing the public domain of Quebec shall apply. [61]

Ontario seems to represent the opposite extreme, though there is some uncertainty on the point. The Act confers a subrogation right [62] and then requires *V*, if he commences an action against *T*, to add a claim for the Plan "unless otherwise advised" by *P*. [63] This may simply mean that *P* has the option of allowing *V* to claim on its behalf or of deciding to forego its claim entirely. However, this interpretation seems too narrow in view of the statement that the Plan may bring action in its own name or in the Victim's name. [64] When this provision, common to most of the statutes, is read together with section 36(1) which authorizes *P* to direct *V* to desist from adding a claim for the insured services, it suggests that *P* has a discretion to conduct its own action entirely independently of *V*. The Alberta Hospitals Act also seems to confer a subrogation right which is quite independent of *V* and his claims. After asserting the subrogation right and stipulating that *P* may sue in its own name or *V*'s name, [65] the Act obliges *V* to give notice if he consults a solicitor. [66] *P* is authorized to "engage a solicitor to prosecute recovery of the cost of the insured services." [67] The Act does not contain the usual provision obliging *V* to add a claim for *P* to his own action and so the inference is again clear that *P* and *V* have independent claims.

These seem to be the polar positions—the Manitoba and Quebec Acts in which the subrogation right is deferred and conditional and the Ontario and Alberta Acts in which the subrogation right is apparently immediate and entirely independent. Most of the statutes fall between these extremes, but not uniformly in the same place on the spectrum. They can be lumped into three groups.

First: British Columbia's Hospital Insurance Act is typical of a group [68] which is difficult to place on the spectrum. These statutes contain no provision to require *V* to add a claim for *P*, or even to give notice of intended litigation. Silence on this important matter might very well be taken as an implication of *V*'s common law duties to protect *P*; on that basis it could be urged that this group of statutes is very like the two Quebec Acts and that *P*'s subrogation right is conditional as in Manitoba and Quebec. However, this group is significantly different in that each statute begins by giving *P* a subrogation right and a specific right to sue in its own name or in *V*'s name.

---

[61] Que. Stat. 1970 c. 37, § 14(5).
[62] Ont. Stat. 1972 c. 91, § 35(1).
[63] *Id.* § 36(1).
[64] *Id.* § 35(1).
[65] ALTA. REV. STAT. c. 174, § 52(1)(b) (1970). See note 3 *supra.*
[66] *Id.* § 52(2).
[67] *Id.* § 52(3).
[68] *See,* Medical Services Payment Act, N.B. Stat. 1968 c. 85; Health Services Act, N.B. Stat. 1971 c. 6; Health Services and Insurance Act, N.S. Stat. 1973 c. 8; Hospital and Diagnostic Services Insurance Act, P.E.I. Stat. 1959 c. 17; Health Services Payment Act, P.E.I. Stat. 1970 c. 24.

Each goes on to preserve *V*'s right to sue on his own behalf and also to claim for the cost of the insured services. These features seem to place this group near the other end of the spectrum, similar to the Ontario and Alberta statutes in conferring on *P* and *V* rights which are quite independent of each other.

Second: The two ordinances of the Northwest Territories, the two Yukon ordinances and the Saskatchewan Act are like the first group, with one major difference. These five statutes announce *P*'s subrogation right and specific right of action; they also preserve *V*'s right to recover the cost of insured services as well as his own loss. However, they also impose on *V*, if he sues, a responsibility to add a claim for *P*. Apart from a provision, common to all of the statutes, preventing *V* from compromising *P*'s claim by settlement, these five contain no further statement of *V*'s duties to *P*. As they contain nothing similar to section 36(1) of the Ontario Act, it seems fair to suppose that the respective rights of *P* and *V* are not so obviously independent as in Ontario and Alberta. Whether the inclusion of a direction to *V* to claim also for *P* makes this group any different from the group discussed immediately above, is problematic.

Third: A last group of statutes, of which New Brunswick's Hospital Services Act [69] is representative, [70] is like the second group except for an inference that *P*'s action is conditional. Here *V* retains his right to sue for all loss and is obliged to add to his own action a claim for *P*. In the first instance *P* is given a subrogation right and an entitlement to sue in its own or in *V*'s name. This distinguishes this group from the Manitoba Act, and raises a presumption, at the outset, that *P* and *V* have independent claims. However, a subsequent section provides for action by *P* if *V* "fails to commence an action . . . within one year." [71] Accordingly, though it is not so plain as in Manitoba, there is a strong inference that *P*'s action is deferred and is conditional upon what is done by *V*.

V's Duty to P

Most of the ground has been covered in the preceding discussion.

In summary, *V*'s common law duty of "due diligence and good faith" has been so intruded upon by statute that it is difficult to generalize about what may remain. A common feature of all the statutes is a section preventing *V* from settling *P*'s claim. Given that *P* also has its own right of action, there is a much reduced area in which it is possible for *V*'s lack of diligence or bad faith to prejudice *P*. In those cases where it seems that *P* cannot bring action except after *V*'s default, it might be said that *P* has an interest in seeing that *V* employs competent solicitors to pursue the action

[69] More properly, N.B. Reg. 1963, Reg. 78.

[70] *See also*: The Hospital Insurance (Agreement) Act, NFLD. REV. STAT. c. 157 (1970) and the regulations thereunder and The Newfoundland Medical Care Insurance Act, NFLD. REV. STAT. c. 265 (1970).

[71] N.B. Reg. 1963, Reg. 78 § 35(6). Note that in the Newfoundland legislation *P* may commence action if *V* fails to do so within two months.

against *T* vigorously and effectively. Although the other statutes prevent settlement, only the Manitoba Act forbids *V* from abandoning or discontinuing his action and gives *P* a right of appeal.

V's Right to Join P's Action

The Newfoundland legislation allows *V*, though he had a chance to launch his own action and failed to do so, to join in *P*'s action at any time prior to trial. [72] In the Northwest Territories, and in the Yukon, *V* may join only if *P*'s action is in *V*'s name. [73]

V's Right to Settle

Apart from the Health Care Insurance Act (Alta.), which removes third party liability, all of the statutes restrict *V*'s right to settle with *T*.

Nova Scotia's Health Services and Insurance Act is typical of many of the statutes; it provides that a release or settlement shall not bind *P* unless *P* has given written approval. [74] Quebec uses different language, but the result is the same. "An undertaking by an insured person to discharge a third party's or an insurer's liability to Her Majesty . . . shall be invalid . . . ." [75] If *T* is in a good bargaining position and is inclined to be difficult, these provisions may raise a problem for *V* in settling his own claim in that *T* may insist on delaying *V* until he can also obtain a release from *P*. However, *V* is free to settle his own claim if *T* is obliging or if *V* is willing to suffer a reduction in his recovery as an inducement.

Some statutes impose much more serious limitations on *V*. Manitoba provides that a settlement by *V* is *void* unless *P* has consented or unless *P* is paid in full. [76] New Brunswick's Hospital Services Act [77] and the Saskatchewan Hospitalization Act [78] state that no action which includes a claim for *P* "shall be settled" without *P*'s consent or provision for full payment of *P*'s claim. Newfoundland provides that a settlement to which *P* has not consented "is not effective" unless *P* is "satisfied." [79]

This kind of restriction can be very onerous on *V*. It is not now a

---

[72] NFLD. REV. STAT. c. 157, § 6(8) (1970); Regulations § 14(6); NFLD. REV. STAT. c. 265, § 42(8) (1970).

[73] N.W.T. Ord. 1959 (2d) c. 3, § 14; N.W.T. Ord. 1970 (3d) c. 8, § 13; Y.T. REV. ORD. c. H-3, § 13 (1971); Y.T. REV. ORD. c. H-1, § 12 (1971).

[74] N.S. Stat. 1973 c. 8, § 13(5).

[75] QUE. REV. STAT. c. 163, § 9(5) (1964) and (with minor modifications in terminology) Que. Stat. 1970 c. 37, § 14(4).

[76] Man. Stat. 1970 c. 81 Cap H35, § 126. See note 4 *supra*.

[77] N.B. Reg. 1963, Reg. H78, § 35(3).

[78] SASK. REV. STAT. c. 253, § 22(4) (1965).

[79] NFLD. REV. STAT. c. 157, § 6(6) (1970), Reg. § 14(4) (with slight modifications of language); NFLD. REV. STAT. c. 265, § 42(6) (1970). But note that the prohibition applies to "A release or settlement of claim which includes the cost of insured services." This language may be intended simply to prevent *V* from giving a settlement which binds *P*, while leaving *V* free to settle his own claim. This inference arises more strongly under the Regulations, § 14(4), where the phrasing is "no settlement which includes the cost of insured services."

question of negotiation only with *T*, but also a problem of persuading *P* to settle, for without *P's* consent *T* cannot safely settle with *V* at all. All of this is not too unreasonable where, as in Manitoba, *P* has no right of action unless *V* fails to pursue the claim. However, it will be observed that the blanket prohibition against settlement by *V* is not co-relative in all cases with limitation on *P*'s right of action.

This kind of inconsistency can produce very strange results. It would seem that in Saskatchewan if *V* anticipates substantial difficulty in obtaining a settlement satisfactory to *P*, and if he is desirous of settling his own claim, he should proceed to negotiate with *T* without first bringing suit. The statute does not prevent *V* from settling his *claim*; it does restrict him in settling an *action* which includes a claim for *P*.[80] It also obliges him to add a claim for *P* to any action which he brings on his own account.[81] For those with a bizarre taste in entertainment, this does provide a highly intriguing game of tactics. If *T* is aware of these dynamics, and is any kind of gamesman, he should be able to turn to advantage *V*'s reluctance to use one of the commonest weapons in negotiation—commencement of action.

This same oddity, and therefore the same tactical struggle, emerges from the Hospital Services Act (N.B.). The only ameliorating difference is that under the New Brunswick Act there is a clear inference that *P* cannot bring action within one year, and then only if *V* has failed to do so. This helps to explain a more severe limitation on *V*'s right to settle, but does not avoid the strange inducement to *V* to attempt settlement without suit.

This leads to a further difficulty of interpretation. If it is correct that *V* can settle without *P*'s consent, so long as he has not commenced action, to what extent does his settlement bind *P*? At common law, *P* would be bound and its only recourse would be against *V* for lack of diligence or for bad faith. The two New Brunswick and Saskatchewan statutes explicitly limit *V*'s right to settle an *action*. Would settlement before action be governed by the common law rules? The answer may be different in the two cases.

The New Brunswick Act begins by asserting *P*'s subrogation right[82] and then stipulates that it "shall not be deemed to restrict any other rights of recovery of [*V*] for loss or damage . . . not the subject of insured hospital and diagnostic services."[83] It seems a fair inference that *P*'s subrogation claim does displace *V*'s right to recover the cost of insured services, and the obligation to add a claim for those services in any action does not conflict with this inference, as the inclusion is specified as being "on behalf of the Minister."[84] Accordingly, *V* may be disqualified from releasing a claim for insured services, and *T* must be alert to this.

By contrast, the Saskatchewan Act begins by confirming *V*'s entitlement

---

[80] SASK. REV. STAT. c. 253, § 22(4) (1965).
[81] *Id.* § 22(3).
[82] N.B. Reg. 1963, Reg. 78 § 35(1).
[83] *Id.* § 35(2).
[84] *Id.*

to recover the cost of insured services [85] and then proceeds to a statement of *P*'s subrogation right which does not obviously reduce *V*'s entitlement. [86] This leaves at least the possibility that *V* could settle the entire claim with *T* leaving *P* only its common law recourse. It should be noted that where *T* has liability insurance, *P* is well protected. [87] This point will be covered below in a discussion of the duties of *LI*.

Indemnity for V

One of the most disturbing features of the statutory elevation of *P*'s rights, and consequent erosion of the rights of *V* and *T*, is the departure from the basic premise that subrogation arises only to limit *V* to a full indemnity and that, therefore, guaranteeing *V* full recovery of his loss is a first priority.

The difficulty of dealing with the many different statutes persuades me to separate what is essentially one issue into two parts—first, priority of claims, and secondly, recovery of costs.

Priority of Claims

The statutes contain few explicit statements of priority for *P*, but there is considerable opportunity for violation of the indemnity concept.

The previous discussion of the difficulties which *V* may face in achieving settlement demonstrates one way in which *V* may be forced to take far less than a full recovery.

A startling priority for *P* may be found in Regulation 78 under the Hospital Services Act (N.B.). Section 35(4) provides that where a court has apportioned liability between *V* and *T*, or where a settlement has been reached with *P*'s consent ". . . [*P*] may accept . . . less than one hundred per cent of [its] claim." If this be legislative magnanimity, let us return to common law.

A number of statutes refer specifically to payment by *LI*. The standard form for such provision is as contained in the Health Services Payment Act (P.E.I.) of which section 28(2) reads as follows:

> (2) a liability insurer, or any person under a liability to pay, shall pay to the Commission any amount referable to a claim for recovery of a sum paid for basic health services that would otherwise be payable to an injured person, and payment of that amount to the Commission shall discharge the liability of the insurer, or any person under a liability to pay, to pay that amount to the injured person or to any person claiming under or on behalf of the injured person.

It is not certain that this is intended to confer a priority on *P*, but it would seem to do so. If *T* is judgment proof, and if his liability insurance is inadequate to satisfy both the claim for insured services and *V*'s claim for his own loss, it seems clear that *P* will be paid in preference to *V*.

---

[85] SASK. REV. STAT. c. 253, § 22(1) (1965).
[86] SASK. REV. STAT. c. 253, § 22(2) (1965).
[87] SASK. REV. STAT. c. 253, § 22(6) (1965).

Ontario, somewhat more restrained, provides that the liability insurer "may pay" to *P* and receive a discharge to that extent. [88]

Saskatchewan, less restrained, stipulates that "An insurer who is liable to the beneficiary . . . shall pay to the minister the amount for which he is so liable or the amount paid under this Act in respect of the injuries, whichever is the lesser . . . ." [89]

It is indicative of the serious erosion of the indemnity assumption that we have been discussing priorities for *P*. Quite apart from a Crown priority, it should be noted that the indemnity principle is not served unless *V* has a priority to the extent of his loss. None of the statutes confers such a priority on *V* and the assumption would seem to be that, except as otherwise stated, *P* and *V* share *pro rata* in any recovery. There remains a question of how far *V* can rely on his common law right of full indemnification ahead of *P*. At the moment there is divergent judicial opinion on this point. In Nova Scotia, Mr. Chief Justice Cowan has upheld the classic definition of subrogation, saying that the Crown could not compete with *V* where the recovery from *T* was inadequate to satisfy all claims. [90] The Ontario Court of Appeal has reversed [91] a judgment of Mr. Justice Keith [92] which was in accord with the Nova Scotia case.

Whether the result is actually any more harsh, it seems somehow even less graceful of *P* to claim in competition with the Victim against a fund such as that set up in each province to relieve against the hardship which results from injury caused by an uninsured motorist. This point is further developed below.

Recovery of Costs

At common law *V* was not considered to be fully indemnified until he had recouped his costs of effecting recovery. Most of the statutes are silent on this point, and there may be room to imply the common law rule. A few Acts contain provisions prescribing that *P* shall bear a part of the costs in the same ratio as *P*'s claim bears to *V*'s claim. [93] This seems rather chary. One might have expected that the costs would at least be pro rated according to the respective amounts of recovery which *P* and *V* achieve. The

---

[88] Ont. Stat. 1972 c. 91, § 40.

[89] SASK REV. STAT. c. 253, § 22(6) (1965).

[90] MacDonald v. Parrish, 24 D.L.R.3d 467 (N.S. Sup. Ct. 1971). *See also*, Grandy v. MacKinnon, 28 D.L.R.3d 710 (N.S. Sup. Ct. 1972). The victim and the Hospital Insurance Commission had agreed that the victim should settle his action against the tortfeasor for an amount that was clearly inadequate to fully compensate the victim. It was also agreed that his solicitors should hold a portion of the recovery in trust pending a decision by the Commission whether to claim to share in the recovery. Cowan, C.F.T.D., delivered judgment confirming the agreement and giving the Commission sixty days in which to decide whether to press its claim.

[91] Ledingham v. Di Natale, [1973] 1 Ont. 291 (1972).

[92] Ledingham v. Di Natale, [1972] 1 Ont. 785, 24 D.L.R.3d 257 (High Ct.).

[93] N.B. Reg. 1963, Reg. 78, § 35(5); NFLD. REV. STAT. c. 157, § 6(7) (1970) and Nfld. Reg., Reg. § 14(5); NFLD. REV. STAT. c. 265, § 42(7) (1970).

existing provisions exert some pressure on *V* to keep down the size of his claim in any case in which it might be anticipated that costs will be substantial and recovery inadequate. This does add one more tactical difficulty for *V*, but it may not be unreasonable for *P* to insist on protection against delay occasioned by exorbitant claims on behalf of the Victim.

At any rate the problem pales in comparison with the situation of the Victim who is governed by the Saskatchewan Hospitalization Act, where a burst of legislative generosity has produced a statement that *P may* bear a part of the costs proportionate to the respective claims, *but* only to a ceiling fixed as 50% of *P*'s claim.[94] To return to the problem considered above in the context of *V*'s right to settle, if *V* brings action he must add a claim for *P*. Having done so, he cannot settle without gaining a full recovery for *P* unless he can obtain *P*'s consent. If *P* insists on litigating *V* may bear a quite disproportionate part of the costs. If this structure was designed to prevent vexatious litigation by victims, one would suppose that it should be effective.

V's Right to Recover Insured Costs

Turning to the relationship between *V* and *T*, most of the statutes reinforce the common law rule that *T* could not defend by pointing to *V*'s insurer. Nearly all the statutes specify that *V* may recover from *T* the cost of insured services though he has not had to pay for them, and state that *P*'s subrogation right does not disqualify *V*.

The Quebec Acts prescribe a subrogation right in *P* and, through silence on most points, leave an inference that the standard subrogation rights apply.

The one clear exception is the Hospital Services Act (N.B.). As previously noted, Regulation 78 creates a strong presumption that *P*'s subrogation right does displace *V*'s claim to recover from *T* the cost of insured services.[95] *V* is obliged to act as the vehicle for effecting *P*'s recovery if *V* sues on his own account.

It is now appropriate to consider the statutes from the point of view of how *T* is affected.

Style of Cause in Subrogation Action

At common law *T* was liable only to action in the insured's name, save where a properly constituted formal assignment of the right of action had been made to the insurer.

All except five of the statutes permit *P* to sue in its own name or in the Victim's name. The Hospital Services Act (N.B.),[96] and the Saskatchewan Hospitalization Act,[97] specify that action by *P* must be brought in *V*'s name.

---

[94] SASK. REV. STAT. c. 253, § 22(5) (1965).
[95] N.B. Reg. 1963, Reg. 78, §§ 35(1), (2).
[96] *Id.* § 35(1).
[97] SASK. REV. STAT. c. 253, § 22(2) (1965).

The two Quebec statutes are silent on the point. The usual subrogation rules would apply—by clear inference in the Hospital Insurance Act, and by the stipulation in the Health Insurance Act. [98]

The Manitoba statute also omits to specify the style of cause which *P* must use, and here the omission is surprising. This Act does not refer to the word "subrogation" at all, and the seventeen sections defining the rights and duties among *P*, *V* and *T* form an elaborate code which apparently aspires to comprehensiveness. This leaves at least a strong doubt that there is any room to import the common law rules. The only straw which may be grasped is section 131 which allows *T* to raise against *P* any defence which he could use against *V*. As *V* would have to sue in his own name, this section may raise the inference that *P* is restricted to suing in *V*'s name.

Multiplicity of Actions

From *T*'s perspective this question has two components. To what extent can *T* settle his liability by negotiation with *V* or *P* alone? And is *T* subject to multiple litigation?

Much of this ground has been covered above. On the question of settlement it will be recalled that most of the statutes prevent *V* from binding *P* by settlement, though in some cases it *may* vary according to whether action has been launched. In general, it can be said that the statutes bear more onerously on *T* than did the common law. *T*'s solicitor must be alert to the possibility that the governing statute requires separate settlement of *P*'s claim and *V*'s claim. He may even find that a settlement with *V* is *void* unless *P* has consented. [99] *Quare,* whether this can possibly mean that *T* cannot even rely on such a settlement as binding *V*?

The question of multiple suits is complex. Under the heading "*P*'s *Subrogation Right*" I have discussed the statutes in five groups, classified according to the degree to which *P*'s right of action is immediate and unconditional, or is in some way deferred or subordinated to *V*'s claim. That kind of classification is aimed mainly at illuminating the competing demands of *P* and *V* to have control of the action, but it also has obvious implications for *T*, and a proper analysis of his position requires that the earlier discussion be reviewed bearing in mind *T*'s particular interest.

From his point of view the statutes can be grouped afresh, according to whether they explicitly or implicitly authorize or forbid separate actions by *P* and *V*.

About half of the statutes contain a provision similar to this one from the Newfoundland Medical Care Insurance Act: [100]

> (5) It is not a defence to an action brought by the Commission . . . that a claim for damages has been adjudicated upon unless that claim included

---

[98] Que. Stat. 1970 c. 37, § 14(5).

[99] The Health Services Insurance Act, Man. Stat. 1970 c. 81, — Cap. H35, § 126 (1). See note 4 *supra.*

[100] NFLD. REV. STAT. c. 265, § 42(5) (1970).

> a claim for the sum paid for insured services, and it is not a defence to an action . . . brought by an insured person that an action taken by the Commission . . . has been adjudicated upon.

Several of the Acts merit special mention. The Medical Care Ordinance (N.W.T.) [101] and the Yukon Health Care Insurance Plan Ordinance [102] both contain the following infelicitous provision:

> It shall not be a defence to an action brought by the Commissioner that *the action* has been adjudicated upon unless it included a claim for the amount paid for insured services. [103]

The marginal note reads, "No defence that Commissioner's claim adjudicated."

The initial inference from this language is that the Commissioner is not barred by previous adjudication of an action of his own. However, the next sub-section prescribes that *V* is not barred by adjudication of the Commissioner's action. Considering that the Ordinance authorizes the Commissioner only to sue for the cost of insured services, and in view of the last twelve words quoted above, it seems clear that the first sub-section was intended only to preserve the Commissioner's right of action from being barred by adjudication on a claim by *V*.

The Hospital and Diagnostic Services Insurance Act (P.E.I.) raises a special problem. It contains a standard form provision preserving *P*'s right of action notwithstanding adjudication of a claim by *V*. [104] However, unlike all of its counterparts, it fails to include a reciprocal protection for *V*.

A number of the statutes are silent on the question of adjudication as a bar. In the Quebec Acts which imply, or import, the usual subrogation rules the answer may thus be provided. As has been mentioned, the Health Insurance Act (Ont.), and the Alberta Hospitals Act, by their whole tenor, assume separate causes of action by *P* and *V*. By inference the common law right of *T* to rely on prior adjudication is removed.

The Saskatchewan Hospitalization Act provides little assistance on the primary question whether *P*'s right of action is independent or is conditional on *V*'s default. As to adjudication as a bar, the question is whether the requirement [105] that *V* add a claim for *P* to any action of his own merely regulates the relationship between *P* and *V* or whether *T* can rely on this provision to resist multiple suits.

The Health Services Insurance Act (Man.) begins by giving *V* an option to claim for himself only or to join a claim for *P*, [106] and continues with a statement of *P*'s right to bring action if *V* fails to sue or declines to add a claim for *P*. [107] When *V* and *P* have begun separate actions *P* can apply

---

[101] N.W.T. Ord. 1970 (3d) c. 8, § 14(1).
[102] Y.T. REV. ORD. c. H-1, § 13(1) (1971).
[103] Emphasis added.
[104] P.E.I. Stat. 1959 c. 17, § 18(d) (as amended by P.E.I. Stat. 1964, c. 15, § 3).
[105] SASK. REV. STAT. c. 253, § 22(3) (1965).
[106] Man. Stat. 1970 c. 81, §§ 121, 122. See note 4 *supra*.
[107] *Id.* §§ 130, 132.

for an order that they be tried together. [108] Nothing is said about *V*'s right or *T*'s right to apply for joint trial.

To resolve the doubt concerning the Saskatchewan and Manitoba statutes we have only the guidance provided by the auto insurance cases which demonstrate a judicial concern to avoid proliferation of causes and preserve *T* from unnecessary litigation. [109]

Application of Res Judicata

The potential for separate actions by *P* and *V* raises a particular problem for *T*. Though he may have to submit to two actions, can he at least rely on the first adjudication as determining some of the issues in the second? For example, if he successfully defends against *V* on the ground that he was not liable for *V*'s loss, or if he obtains a favourable allocation of responsibility on a contributory negligence argument, can he rely on that finding as binding *P* in its separate action? The converse question, of course, is whether *T* is bound by a finding in the first action which is unfavourable to him. Notwithstanding that he has been fixed with full responsibility in an action by *P* or *V*, can he raise the same issue against the other?

This is a complex problem which cannot be satisfactorily explored in this paper. It is possible to begin the analysis by reference to *Continental Casualty Co. of Canada v. Yorke* [110] and to *England v. Dominion of Canada General Insurance Co.* [111] as establishing the basic proposition that a judgment *in personam* does not bind strangers to the action. They may be contrasted with another line of cases, beginning with *McKnight v. General Casualty Insurance Co.* [112] and culminating in *Global General Insurance Co. v. Finlay.* [113] The *Global* case held that the first judgment, fixing liability on the insured for a third party's loss, "constituted conclusive evidence against all the world of its existence, date and legal consequences" [114] and could, therefore, be introduced in a second action brought by the third party against the insurer to forestall arguments directed at disputing the insured's liability to the third party.

It must be noted that the court in *Global* distinguished the *Yorke* case in part by reference to amendments made in the Insurance Act [115] for the express purpose of balancing the respective interests of insurer, insured and third party. It would clearly be an extension of the *Global* case to apply it to the situation we are considering.

For the present, we can say little beyond noting the basic proposition stated by the *Yorke* case.

---

[108] *Id.* § 136.

[109] See note 26 *supra.*

[110] [1930] Sup. Ct. 180, [1930] 1 D.L.R. 609 (1929).

[111] [1931] Ont. 264, [1931] 3 D.L.R. 489 (Sup. Ct.); *aff'd* 40 Ont. W.N. 508 (1931).

[112] 44 B.C. 1, [1931] 2 W.W.R. 315, [1931] 3 D.L.R. 476.

[113] [1961] Sup. Ct. 539, 28 D.L.R.2d 654.

[114] [1961] Sup. Ct. 539, at 552 (Cartwright, J.).

[115] *Id.* at 549.

Four of the statutes touch on one small part of this problem, namely, the defence of contributory negligence.

Effect of V's Contributory Negligence

The Manitoba statute and the two Quebec Acts prescribe that contributory negligence by *V* will operate to diminish the recovery of insured costs proportionately with the reduction in *V*'s recovery for his own loss. [116] As previously noted, these three statutes are among those in which *P*'s right of action is most clearly deferred and conditional upon what *V* does. To find that they contain an abatement provision as described is not surprising; nor does it really assist with the question of the effect of *V*'s contributory negligence when *P* and *V* are bringing separate actions.

Apart from one, all the other statutes are silent on the point. It would seem reasonable to start with the presumption that *T* could raise *V*'s contributory negligence as a defence against *P*, but that prior adjudication on the point as between *V* and *T* would not be binding in the second action.

The one maverick statute is the Hospital Services Act (N.B.) which provides [117] that where a court has apportioned liability or where a settlement has been reached with *P*'s consent ". . . the Minister may accept from the amount of the judgment or settlement in favour of the entitled person less than one hundred per cent of the claim."

This provision does not seem to be directed at settling rights as between *P* and *T*. Its purpose appears to be solely to prescribe the respective claims of *P* and *V* in the amount recovered by action or settlement, however that amount may have been fixed. It serves as another reminder of the stern and unforgiving legislative treatment of *V*. Although, by reason of his own negligence, his recovery from another tortfeasor may be reduced, *V* could apparently be faced by a demand from the Minister to pay over the full cost of the insured services without a proportionate abatement.

Prescription of Action

As mentioned above, in the standard subrogation setting the third party could plead expiry of a limitation period against the insurer, as he could against the insured.

In the hospital and medical insurance statutes competing presumptions arise at the outset. On the one hand, *P* is claiming through *V* and should be in no higher position. On the other hand, *P* may be able to claim Crown privilege.

The statutes can be put in three groups.

First: Two statutes explicitly establish limitation periods for *P*. The Health Insurance Act (Que.) states a two year limit on *P*'s right of action. [118]

---

[116] Man. Stat. 1970 c. 81, — Cap. H35, § 125, see note 4 *supra*; QUE. REV. STAT. c. 163, § 9(2) (1964); Que. Stat. 1970 c. 37, § 14(2).

[117] N.B. Reg., Reg. 78 § 35(4).

[118] Que. Stat. 1970 c. 37, § 14(5).

The Health Services Insurance Act (Man.) prescribes several limitation periods for various situations. If *V* fails to bring an action, or settles his claim with *P*'s consent, *P* may bring action at any time within two years of the tort. [119] There are two situations in which *P*'s right to bring action is uncertain. Section 132 authorizes *P* to bring action, within the two year period, if *V* dies without bringing action and his personal representative does not bring action "within the period to which reference is made in section 130." However, by amendment in 1971, [120] the period formerly referred to in section 130 has been deleted. Whereas formerly *P* could not bring action within the first year after the tort, it must now be supposed that *P* can bring action at any time within two years. The reference to failure by *V*, or his personal representative, to bring action cannot be intended to raise a condition against *P* inasmuch as no time is limited beyond which *P* must wait before proceeding. The second difficulty for *P* is the possibility that *V* may bring an action on his own account only, without adding a claim for *P*. Formerly, section 135 recognized this possibility and prescribed a limitation period within which *P* might begin its action. The 1971 amendment repealed section 135 and did not substitute anything in its place; it would appear that the substituted language in section 133 is intended to deal with this situation and that, accordingly, *P* would have available the usual two year limitation period.

Finally, and confusingly, section 134 gives *P* a period of three months following abandonment of action by *V* later than twenty one months from the tort. At first impression this looks simply like a small extension on the two year period which *P* would have if *V* died or failed to sue. However, it is difficult to be sure of the application of section 134.

The section begins with a reference to an action "as provided in section 121 and subsection (1) of section 122." This is an inauspicious beginning as section 121 authorizes *V* to claim for insured services whereas section 122 (1) contemplates an action by *V* which does not include such a claim. Section 134 then refers to abandonment "in so far as the amount to which reference is made in clauses (a) and (b) of Section 121 is affected." This appears to confirm that section 134 is directed at abandonment of an action which includes a claim for insured services. Section 129 forbids abandonment of such an action without *P*'s consent. In the result, it must be supposed that section 134 is designed to afford *P* an alternative to compelling continuance of *V*'s action; *P* may consent to abandonment by *V* and may, within three months, begin its own action. This may considerably extend *P*'s entitlement beyond the two years which would otherwise be available.

Second: Regulation 78 under New Brunswick's Hospital Services Act authorizes *P* to bring action if *V* has failed to do so within one year from the tort. [121] The Newfoundland legislation authorizes *P* to bring action if *V*

---

[119] Man. Stat. 1970 c. 81, — Cap. H35, §§ 130, 132, 133. See note 4 *supra*.
[120] Man. Stat. 1971 c. 33.
[121] N.B. Reg. 1963, Reg. 78 § 35(6).

has not done so within two months. [122] No specific limit is stated for *P*, but it would seem that the intention is to give *P* ample opportunity to comply with the standard prescription periods, and I would infer that *P* is meant to be subject to those standard prescriptions.

Third: More than half the statutes say nothing about the effect of limitation periods on *P*'s action. This is true of such divergent statutes as the Hospital Insurance Act (Que.) in which there is a strong inference that standard subrogation rules operate, and the Health Insurance Act (Ont.) which clearly implies a separate and unconditional right of action for *P*.

The Position of LI

It has already been mentioned, in canvassing the respective priorities of *P* and *V*, that some of the statutes contain a reference to *T*'s liability insurer. The standard provision stipulates that *LI shall pay P*'s claim and is thereby discharged to the extent of the payment. [123] Ontario says that *LI may pay P* and receive an appropriate discharge; [124] the same section requires *LI* to notify *P* of negotiations for settlement of a claim which includes an amount for insured services.

Three of the statutes use somewhat different language, but seem to achieve much the same result. The Hospital Insurance Act (Que.) provides, [125]

> (4) An insurer of a third party's liability shall not discharge his obligation to indemnify the latter of his liability to Her Majesty under this section otherwise than by payment to Her Majesty. [126]

Five statutes say nothing about *LI*, but contain the standard provision that *P* is not bound by any release or settlement "of any claim or judgment" unless *P* has approved it. [127] Presumably, this would preserve *P*'s claim against *LI* as well as against *T*.

Claims Against Public Funds

In some cases the bottom left corner of the subrogation rectangle will be represented, not by a private carrier of liability insurance, but by a public

---

[122] NFLD. REV. STAT. c. 157, § 6(8) (1970); Nfld. Reg., Reg. § 14(6); NFLD. REV. STAT. c. 265, § 42(8) (1970).

[123] The Health Services and Insurance Act, N.S. Stat. 1973 c. 8, § 13(6) is typical of these provisions.

[124] Ont. Stat. 1972 c. 91, § 40.

[125] QUE. REV. STAT. c. 163, § 9(4) (1964).

[126] The Health Insurance Act, Que. Stat. 1970 c. 37, § 14(3) is identical save for a reference to "Board" instead of to "Her Majesty". The Alberta Hospitals Act, ALTA. REV. STAT. c. 174, § 52(6) (1970), though slightly differently worded, is to the same effect. See note 3 *supra*.

[127] *See* The Hospital Insurance Act, B.C. REV. STAT. c. 180, § 29(5) (1960); Territorial Hospital Insurance Services Ordinance, N.W.T. Ord. 1959 (2d) c. 3, § 16; Medical Care Ordinance, N.W.T. Ord. 1970 (3d) c. 8, § 15; Yukon Hospital Services Ordinance, Y.T. REV. ORD. c. H-3, § 15 (1971); Yukon Health Care Insurance Plan Ordinance, Y.T. REV. ORD. c. H-1, § 14 (1971).

fund in the nature of a workmen's compensation fund or an uninsured motorists' fund. The question then arises whether *P* can participate in the recovery from this fund, and whether it can compete with *V* if the fund is inadequate to satisfy all claims.

This question is not answered solely by reference to the hospital and medical insurance statutes. A full discussion of the problem would necessitate a survey of the bevy of provincial Acts establishing the various compensation schemes and regulating claims against the available funds. Though that survey is far beyond the scope of this paper, I think it useful to venture a few comments on some aspects of the problem. Indeed, it is incumbent upon me in view of the conclusions I shall offer below.

Only two of the hospital and medical insurance statutes refer specifically to this point. The Health Services Insurance Act (Man.) prescribes that *V* or *P* may bring action against the Attorney General to recover the cost of insured services from the Unsatisfied Judgment Fund.[128] The Health Insurance Act (Ont.), section 37, provides:

> 37. The Plan is not an insurer within the meaning of *The Insurance Act*, as referred to in section 21 of *The Motor Vehicle Accident Claims Act*, and may be awarded payment from the Motor Vehicle Accident Claims Fund.

Plainly, the General Manager has been busy on two fronts since the unfavourable judgment pronounced by Mr. Justice Keith in *Ledingham v. Di Natale*. An appeal to the Court of Appeal in the instant case has succeeded; an approach to the Legislature has cured part of the problem for the future.

It is important to distinguish two issues here. The Manitoba and Ontario statutes do not say anything about competition between the Commission and the victim for payment out of a fund which may prove inadequate to answer all claims. These two Acts simply authorize *P* to claim on the public fund, with the question of priorities—indemnity for *V* as a first premise, or pro rata sharing in all instances—left open for resolution. It should be emphasized that the result in *Ledingham* was reached by judicial construction. Mr. Justice Kelly concluded that the statutory subrogation right was somehow different from the common law variety.[129] The subsequent Ontario amendment does not bear on this point, but on the alternative argument by *V* in *Ledingham*. It was argued that *P* was an "insurer" and therefore disqualified by the provision of the Motor Vehicle Accident Claims Act prohibiting payment out of the fund to an insurer. Notwithstanding the amendment to Ontario's Health Insurance Act, and notwithstanding the language of the Manitoba Act, it would still be open to a court to restore the indemnity principle by holding that *P* cannot compete with *V* in an inadequate fund whether it be a public fund or a recovery against a tortfeasor.[130]

There is little to say about the remaining statutes except that some con-

---

[128] Man. Stat. 1970 c. 81, — Cap. H35, §§127, 130. See note 4 *supra*.

[129] [1973] 1 Ont. 291, at 295 (1972).

[130] In this connection, it may be noted that leave has been given in *Ledingham* for an appeal to the Supreme Court of Canada.

fer on *P* a subrogated claim to *the rights* of *V*, [131] while others refer to *all the rights* of *V*, [132] and two prescribe subrogation in respect of *V*'s right of recovery *against any third party*. [133] It is of little value to engage in analysis of these miniscule variations of language; in most cases the matter will be covered in other legislation.

In Alberta, the Motor Vehicle Accident Claims Act [134] requires that payment out of the Fund be reduced by "any amount paid or payable for and on behalf of the applicant under *The Alberta Hospitals Act*." [135] This seems to bear more onerously on *V* than does the Ontario system. *Ledingham v. Di Natale* simply allows *P* to share pro rata with *V* in an inadequate public fund. The Alberta provision appears to give *P* a clear priority by providing for a full abatement of *V*'s recovery from the Unsatisfied Judgment Fund until *P* has been entirely recouped. The Alberta Act also requires a claimant from the Unsatisfied Judgment Fund, if he sues, to add a claim for the Hospital Services Commission; [136] if he fails to do so he may find his judgment diverted to pay for those insured services in any event. [137]

Nova Scotia takes the opposite stand by providing:

> (3) Judgment Recovery (N.S.) Ltd., is not liable for payment of any sum claimed by or on behalf of
>
> (a) an insurer by reason of the existence of a policy of automobile insurance within the meaning of the Insurance Act: or
>
> (b) Her Majesty The Queen in right of the Province or of Canada, or any agent of Her Majesty The Queen, or any Crown Corporation: or
>
> . . . [138]

The Nova Scotia position is obviously much more favourable to *V*, and is, I think, greatly to be preferred.

VI. Conclusions

My reactions to the existing welter of hospital and medical insurance statutes can be summarized in four recommendations arranged in ascending order of importance or preference.

(1) Drafting should be more uniform:

---

[131] *See, for example,* the Medical Care Ordinance, N.W.T. Ord. 1970 (3d) c. 8, § 11.

[132] For example, the Territorial Hospital Insurance Services Ordinance, N.W.T. Ord. 1959 (2d) c. 3, § 12.

[133] Que. Rev. Stat. c. 163, § 9(1) (1964) and Que. Stat. 1970 c. 37, § 14(1) which in fact says "against any third *person*." [Emphasis added].

[134] Alta. Rev. Stat. c. 243 (1970).

[135] *Id.* § 15(7)(c).

[136] *Id.* § 25(7).

[137] *Id.* § 25(10).

[138] The Motor Vehicle Act, N.S. Rev. Stat. c. 191, § 191(3) (1967).

(2) Most of the Acts require review and amendment in the interest of clarification;

(3) Greater attention should be given to the interests of the Victim and the Third Party;

(4) The subrogation right should be legislated out of existence entirely.

Of course, adoption of the fourth proposal would render the preceding three superfluous. However, as I do not anticipate its immediate adoption I shall deal briefly with the first three proposals and then turn to the more fundamental one which will require more extensive treatment.

(1) *Uniformity*

It would obviously be desirable to bring into conformity with one another the substance of the many hospital and medical insurance schemes in the various provinces and territories. Failing uniformity of substance, it should at least be possible to reduce the vexatious terminological proliferation. The treatment of accident and sickness insurance, automobile insurance, fire insurance and life insurance provides a model.

(2) *Clarification*

The discussion in Part V of this paper should have demonstrated how thoroughly unclear is the position under many of the statutes. It is quite unsatisfactory to import into a statute a complex concept such as subrogation, embellish it with a few legislative decorations, and leave a mass of competing inferences as to the application of standard subrogation rules. If the subrogation right is to be retained it would be desirable to codify it comprehensively as Manitoba has done. Failing this, it should at least be possible to add a provision, as the Health Insurance Act (Que.) has done, making plain that standard common law rules of subrogation operate except in so far as they have been expressly excluded.

(3) *Balancing Interests*

Again, if the subrogation right is retained the statutes should be reviewed for the purpose of questioning the need to focus on and elevate *P*'s rights. From the point of view of *V* and *T* what remains of the classic subrogation concept is a tattered remnant indeed.

Subrogation began as a device to deny the insured a windfall from a tragic event. It was designed to limit him to a full indemnity. But the indemnity principle, subrogation's hallmark and only axiom, has disappeared in most of the hospital and medical insurance statutes. These Acts provide a device for adjusting the respective rights and obligations of *P*, *V* and *T*, but it is a misnomer verging on effrontery to style this device "subrogation."

(4) *Abolition*

I suggest that a strong case can be made for removing third party liability

entirely in the hospital and medical insurance acts as has been done in Alberta's Health Care Insurance Act.

The origin and development of subrogation were reasonable enough. The proposition that the victim of a tragic event should be fully indemnified but should not profit thereby does not sound strange to us today. To achieve this result it was necessary either to subrogate the insurer to any excess recovery or to intrude into the normal rules of damages and prescribe an appropriate abatement in the third party's liability to the insured.

The choice in favour of the insurer was natural in the context of the times. Insurance was provided by entrepreneurs. It was optional. It was designed to spread the risk of loss across the group of insureds. In deciding that a third party should not be able to defend the insured's claim by pointing to the insurance policy, it was said that the former had no claim to benefit from the latter's prudence. All of this was consistent with the wider fabric of the law, with the principle of privity of contract and a tort system which focussed on fault. And it is significant that to throw the benefit of the insurance on an imprudent third party would shift the burden of the loss from one part of the private sector to another, from the third party to the insurers in the first instance but ultimately to be borne by the entire group of insureds in the form of a higher insurance cost. Thus, in a very real sense would the imprudent members of society be parasitic on the prudent. Subrogation flourished in a society committed to private enterprise and individual responsibility.

However, the context has changed dramatically. Hospital and medical insurance is provided by the public sector in the interest of seeing that all are protected, imprudent and prudent alike. The opportunity to opt in or out of the scheme is greatly restricted. The costs are spread across the entire populace. At a time when no-fault compensation schemes are winning favour, and are being legislatively imposed in areas heretofore occupied by private insurance carriers, it is anachronistic to retain the fault concept, and third party liability flowing therefrom, in respect of publicly operated hospital and medical insurance plans.

It is at least conceptually schizophrenic to impose legislatively a plan which displaces private enterprise and substitutes public responsibility and public financing, and then to attach a device whose only purpose can be to shift, so far as possible, the burden of loss from the public sector to the private sector.

It is anachronistic and schizophrenic to shift the burden to the private sector as represented by the third party tortfeasor. When part of the burden is shifted to the victim-insured it is more than anachronistic; it is invidious. The ultimate irony is that the victim would frequently fare much better if his insurer were a private, selfish, profit-motivated carrier instead of a public plan administered by a government department whose title in some cases includes the word "welfare".

To be fair, two points must be conceded. First, the Provinces and Ter-

ritories do not have a completely free hand in deciding whether to retain or abolish third party recoveries. Under their agreement with the Federal Government they are obliged to include a subrogation provision in their hospital insurance statutes, though not in their medical insurance legislation. Abolition of third party recoveries, in respect of insured hospital services, would therefore require renegotiation with Ottawa. In the meantime, it is possible to follow Alberta's lead and abandon third party recoveries in respect of medical insurance. And it is certainly open to any Province or either Territory to redesign its subrogation provision to make it more lucid and fairer.

Secondly, it would be unfair to leave this topic without recognizing that there are strong arguments for retaining the subrogation provision in the hospital and medical insurance statutes. In particular, it is argued strenuously that the cost of injuries inflicted by automobiles should be imposed on the motoring activity rather than being shifted to that part of the public purse from which the medical and hospital insurance schemes are funded. It may well be argued that most of the hardships could be relieved by a proper system of automobile insurance which would guarantee full recovery in all instances for injuries inflicted by motoring.

This is obviously a topic far too large and too complex to debate here. Apart from querying why the motoring activity should be singled out and compelled to internalize all its costs while a myriad of other human activities are not similarly treated, I can only offer a few practical observations.

In Canada we do not have, and I venture to speculate that we are not going to have in the near future, the kind of "proper" automobile insurance scheme which will compensate for all the injuries inflicted by automobiles. In the meantime the hardships above described will continue.

Even admitting the predominant role of the automobile in producing injuries which represent a burden on the hospital and medical insurance plans, it may still be said that a great many injuries are inflicted by other activities which are not likely to be "properly" insured. Accordingly, abolition of the third party recoveries, or at least restoration of *V*'s prior right to a full indemnity, remains a very urgent problem in respect of these cases.

VII. Epilogue

One of the developments since this paper was first prepared relates to *V*'s indemnity, and the question of priority of claims, where a liability insurer is involved.

In its most recent session the Nova Scotia Legislature has enacted a statute to provide a unified system of delivering health services. [139] In the pro-

[139] The Health Services and Insurance Act, N.S. Stat. 1973 c. 8 repeals and replaces the Hospital Insurance Act and the Medical Care Insurance Act. This new statute was proclaimed in force on September 1, 1973.

cess the following new subsection has been added to the section governing subrogation:

> (9) Notwithstanding any other provision in this Section, where a person whose act or omission resulted in personal injuries to another is insured by a liability insurer and the liability insurer pays to the injured person, or to any person claiming under or on behalf of the injured person, the full amount of the policy of insurance and that amount is insufficient to fully satisfy the claim of the injured person, excluding any claim for insured hospital services or insured medical services, Her Majesty is not entitled to share in or claim against the whole or any part of that amount, and the payment thereof discharges the liability of the insurer from making a payment to Her Majesty in respect of the insured hospital services or insured medical services which were received by the injured person. [140]

Plainly, I think, this provision is designed to confirm legislatively the result reached by Mr. Chief Justice Cowan in *MacDonald v. Parrish*, [141] *i.e.*, to assert a first priority for *V* to guarantee him an indemnity as far as possible. It may seem ungracious to cavil over the details of such a well-intentioned attempt, but I do think the new provision is deficient in several respects.

To begin, it is directed only at payments made by a liability insurer. This may suffice for the majority of cases, but it will not be altogether rare that *V* may effect recovery of his judgment directly against the tortfeasor, leaving the latter to look for reimbursement from his insurer if he is insured. In this situation the new subsection would not operate. It may have been thought that there was no need to deal with this eventuality, that priority for *V* is assumed and that all that was needed was a correction of the difficulty raised by the standard provision relating to liability insurers as follows:

> (6) Where a person whose act or omission resulted in personal injuries to another is insured by a liability insurer the liability insurer shall pay to the Commission any amount referable to a claim for recovery of the cost of insured hospital services and insured medical services that would otherwise be paid to the insured person and payment of that amount to the Commission discharges the liability of the insurer to pay that amount to the insured person or to any person claiming under or on behalf of the insured person. [142]

In general, if it is intended to state that an indemnity for *V* is a first principle, I think it would be better to say it more bluntly and more broadly. In any event, I fear that the new provision has not adequately dealt with the difficulty raised by subsection (6).

First, it will be noted that subsection (6) is mandatory (". . . the liability insurer shall pay to the Commission . . .") whereas subsection (9) is not. The relief for *V* is given "where . . . the liability insurer pays to the injured person . . .".

It is arguable that the insurer is obliged to pay to the Commission, but, rather strangely, may nevertheless discharge its liability by paying to *V* and

---

[140] *Id.* § 13(9).
[141] 24 D.L.R.3d 467 (N.S. Sup. Ct. 1971).
[142] N.S. Stat. 1973 c. 8, § 13(6).

may thereby also confer a benefit on *V* by removing from him the necessity of sharing with the Commission. This would be an odd result, and it may very well be urged that no court would so interpret the two provisions. However, if it is intended that subsection (9) over-ride and displace subsection (6) I think it might be more plainly expressed. Beginning with the word "notwithstanding" does not unambiguously do the job.

Even if we assume that a mandatory construction would be given subsection (9), *i.e.*, that in a case within the parameters laid down in the subsection an insurer would be obliged to pay to *V*, there remains the problem that those parameters are not wide enough to protect *V* in all instances in which the insurance fund is inadequate.

Here the language is quite plain. Subsection (9) operates only where ". . . the full amount of the policy of insurance . . . is insufficient to fully satisfy the claim of the injured person, excluding any claim for insured hospital services or insured medical services . . . ." If the insurance is more than enough to satisy *V*'s claim, but not enough to satisfy the combined claims of *V* and *P*, subsection (9) does not assist *V*.

If the subrogation imported by section 13 is the common law variety, with indemnity first for *V*, and if subsection (6), despite what it says, does not disturb that first principle, then subsection (9) is unnecessary. Conversely, if *P*'s subrogation right as stated by section 13(3), or as elaborated by section 13(6), differs from the common law model in that *V* does not have a prior claim for full indemnity, then subsection (9) provides *V* with a partial relief only.

Despite these criticisms, I am encouraged by the initiative taken by Nova Scotia. I think the legislature has moved in the right direction and I would simply suggest that the move should be somewhat bolder and more felicitously expressed.

VIII. Appendix of Statutes

It does not seem fruitful to reproduce all of the hospital and medical insurance statutes. Six have been chosen as representing the wide variety of legislation in the area. They are intended to illustrate, so far as possible, the extremely divergent legislative responses to many of the problems discussed above. Some have been selected for their uniqueness and others because they are typical of a large number of the statutes in several jurisdictions.

1. The Alberta Health Care Insurance Act, Alta. Rev. Stat. c. 166 (1970).

> **28.** Where, as a result of the wrongful act or omission of another (in this section called the "wrong-doer"),
>
> (*a*) a resident suffers personal injuries and receives basic health services as a consequence of those injuries, and
>
> (*b*) the Commission has paid or is liable to pay benefits in respect of those services,

no person has any right or cause of action against the wrong-doer or any other person for the recovery of damages for the cost of those basic health services. [1969, c. 43, s. 28]

2. THE HEALTH SERVICES INSURANCE ACT, Man. Stat. 1970 c. 81 — Cap. H35, as amended.

Action by insured person for cost of insured services.

121 Where an insured person who suffers bodily injuries occasioned by the wrongful act, omission, neglect, or default of another person would, if he were not an insured person, be entitled to recover, as general or special damages, an amount that he has paid or is legally liable to pay to a hospital for care, treatment, drugs, medicines, supplies and medical or nursing services, or both, or for any of those things, received in a hospital, or, an amount that he has paid or is legally liable to pay for medical services or other health services received, or both amounts, he may, subject to section 125, claim and recover from that other person an amount equal to the cost of the hospital services that are benefits, or, an amount equal to the benefits with respect to the medical services, or other health services insured, or both amounts,

(a) that, by reason of those bodily injuries,

(i) he has received before beginning the action, and

(ii) he will subsequently receive, as computed by the court in the case of hospital services on the per diem basis on which charges are made by that hospital to persons who are not insured persons; and

(b) for which, if he were not an insured person, he would be legally liable to pay for the hospital service or for the medical services or other health services or all or any of them.

S.M., 1970, c. 81, s. 121.

Notice of action excluding insured costs.

122 (1) Where an insured person to whom section 121 applies intends to bring an action for damages for the bodily injuries suffered by him, if he does not intend to include in his claim the amount that, under section 121, he is entitled to claim and recover, he shall, not less than seven days before beginning action, notify the commission in writing to that effect.

Notice of action including insured costs.

122 (2) Where an insured person to whom section 121 applies brings an action and includes in his claim an amount equal to the cost of hospital services that are benefits or an amount equal to the benefits with respect to medical services and other health services received by him or both, he, or if he is represented by a solicitor, his solicitor, shall, not less than seven days after filing a statement of claim, serve a copy thereof on the commission, and the service may be effected by mailing by registered mail.

S.M., 1970, c. 81, s. 122.

Judgment creditor a trustee for commission.

123 A person who recovers any amount under section 121 shall receive and hold it in trust for the commission, and shall pay it to the commission forthwith.

S.M., 1970, c. 81, s. 123.

Payment to commission by judgment debtor.

124 A person liable under section 121 to pay any amount may pay it to the commission, the receipt of which given therefor is a discharge of the liability and of any judgment recovered against him by reason thereof, to the extent of the amount so paid.

S.M., 1970, c. 81, s. 124.

Recovery of proportionate parts of damages.

125 Where, by reason of The Tortfeasors and Contributory Negligence Act, a person by whom an action may be maintained under section 121 is entitled to recover only a portion of the damages suffered by him by reason of the bodily injuries, he is entitled to claim and recover under section 121 only an equal proportion of the amount of the cost of the hospital services that are benefits and the amount of the benefits with respect to the costs of medical services and other health services for which he may maintain an action under that section.

S.M., 1970, c. 81, s. 125.

Consent of commission to settlement.

126 (1) Subject to subsection (2), a settlement of the claim that any person has under section 121, whether before or after an action based thereon is brought is void unless the commission consents thereto; and where such a consent is given, the person liable to pay the amount agreed upon shall pay it to the commission forthwith.

Consent not required.

126 (2) Where a person having a claim under section 121 makes a settlement thereof whereby an amount equal to the cost of the hospital services that are benefits or an amount equal to the benefits with respect to the cost of medical services, or other health services, or all or any of them, to which reference is made in section 121 becomes payable by an insurance company, if the insurance company pays that amount to the commission within thirty days from the date of the settlement, the consent of the commission to the settlement is not required.

S.M., 1970, c. 81, s. 126.

Action under section 12 Unsatisfied Judgment Fund Act.

127 A person who may, under section 121, brings an action against another person may also bring an action against the Attorney-General under section 12 of The Unsatisfied Judgment Fund Act, subject to his compliance with that Act, for the amount for which, under section 121, he could bring action against that other person.

S.M., 1970, c. 81, s. 127.

Appeal by commission.

128 (1) Where judgment has been given in an action to which reference is made in section 121, if the plaintiff has not appealed therefrom within the period limited for making such an appeal, the commission, on behalf of and in the name of the plaintiff, may appeal against the judgment as the plaintiff might have done, notwithstanding that the time has elapsed within which the plaintiff could appeal; but no appeal by the commission under this section may be begun after sixty days have elapsed since the end of the period within which the plaintiff could have appealed.

Notice of intention to appeal.

128 (2) Before beginning an appeal under subsection (1) the commission shall give to the defendant in the action notice in writing of its intention to appeal and shall file a copy of the notice in the proper office of the court in which the action was brought.

Stay of proceedings and abandonment of appeal.

128 (3) Subject as herein provided, upon the filing of a notice by the commission under subsection (2), all proceedings under the judgment shall be stayed until the expiration of the period of sixty days mentioned in subsection (1); but if within that period the commission decides not to appeal it may, without payment of costs to any party to the action, file a notice of abandonment of the appeal in the office in which the notice was filed, and thereupon any proceedings under the judgment may be begun or continued.

S.M., 1970, c. 81, s. 128.

Consent of commission to abandonment of action.

129 Where an insured person to whom section 121 applies brings an action in which he includes a claim as provided in that section, he shall not abandon or discontinue the action in so far as that claim is affected, unless he has received the written consent of the commission thereto; and any abandonment or discontinuance without such a consent is void.

S.M., 1970, c. 81, s. 129.

Right of commission to bring action.

130 Where a person who, under section 121 may claim and recover an amount as therein provided does not, within a period of twelve months from the time when the bodily injuries were suffered by him, bring an action therefore, or with the consent of the commission, effect a settlement of the claim, the commission, notwithstanding section 4 of The Limitation of Actions Act and subsection (1) of section 12 of The Unsatisfied Judgment Fund Act, may thereafter, but subject to sections 133 and 134 maintain an action against the person legally liable under section 121 or an action under section 12 of The Unsatisfied Judgment Fund Act (subject to compliance with that section), for the amount that under section 121, the person suffering the bodily injuries could recover or, but for the expiration of the time, could recover.

S.M., 1970, c. 81, s. 130.

Defences to action by commission.

131 Where the commission brings an action under subsection (1), the defendant may raise any defence to the action that he could have raised against the person who under section 121 could bring, or could have brought an action, including a defence under The Tortfeasors and Contributory Negligence Act; and, if necessary, the court shall determine the degree of negligence of the defendant, and the commission shall recover only that part of the cost of the hospital services that are benefits and of the benefits with respect to the cost of medical services and other health services or both parts, incurred or to be incurred that is proportionate to that degree of negligence.

S.M., 1970, c. 81, s. 131.

Action of commission on death of insured person.

132 Where a person who, under section 121 may claim and recover an amount as therein provided dies without bringing an action under that section, and his personal representative does not bring action under that section within the period to which reference is made in section 130, the Commission may thereafter but subject to section 133, bring action as provided in section 130.

S.M., 1970, c. 31, s. 132.

Limitation on right to bring action.

133 Subject to sections 134 and 135, the commission may bring action under section 130 within the twelve months next following the expiration of the period to which reference is made in section 130, but not thereafter.

S.M., 1970, c. 81, s. 133.

Extension of time for action by commission.

134 Where an insured person to whom section 121 applies brings an action as provided in section 121 and subsection (1) of section 122, if after twenty-one months have elapsed from the time when the bodily injuries were suffered by him, he abandons or discontinues the action in so far as the amount to which reference is made in clauses (a) and (b) of section 121 is affected, the commission may bring action under section 130 within three months from the date of the abandonment or discontinuance.

S.M., 1970, c. 81, s. 134.

Earlier action by commission.

135 Notwithstanding section 130 where an insured person to whom section 121 applies, brings an action for damages for the bodily injuries suffered by him but does not include in his claim the amount that under section 121, he is entitled to claim, the commission

(a) at any time before the expiration of the period during which the insured person could have brought his action; or

(b) at any time before the expiration of one month from the date on which the insured person brought his action;

whichever is the longer period, may bring action under section 130.

S.M., 1970, c. 81, s. 135.

Application for joint trial.

136 Where the commission brings action, as provided in section 135, within one month after the insured person has brought his action it may, on giving reasonable notice to the insured person, apply to a judge of the court in which the actions are brought, for an order that the actions shall be tried together; and the judge, if he deems it just and reasonable to do so, may make the order.

S.M., 1970, c. 81, s. 136.

Settlement and discharge of liability.

137 Where the commission has, under section 130, a right of action against any person, it may enter into an agreement with that person to settle the claim and discharge the liability to the commission on payment of an amount agreed upon; and upon receipt of that amount, the commission may give to the person liable a release discharging him from all

further liability to the commission under section 130 in respect of that claim.

S.M., 1970, c. 81, s. 137.

Note: Some of these sections have been amended by Alta. Stat. 1971 c. 33, §§ 11-14. The amendments are as follows:

Sec. 130 amended.

11 Section 130 of the Act is amended

(a) by striking out the words "within a period of twelve months from the time when the bodily injuries were suffered by him" in the second and third lines thereof; and

(b) by striking out the words "thereafter but" in the seventh line thereof.

Sec. 131 amended.

12 Section 131 of the Act is amended by striking out the word and figure "subsection (1)" in the first line thereof and substituting therefor the word and figures "section 130".

Sec. 133 repealed and substituted.

13 Section 133 of the Act is repealed and the following section is substituted therefor:

Limitation on right to bring action.

133 Subject to section 134, the commission may bring action under section 130 at any time within twenty-four months from the time when the bodily injuries were suffered by the person who could make a claim under section 121 but not thereafter.

Sec. 135 repealed.

14 Section 135 of the Act is repealed.

3. HEALTH SERVICES AND INSURANCE ACT, N. S. Stat. 1973 c. 8.

13 (1) Where, as a result of the wrongful art or omission of another, a person suffers personal injuries, for which he receives insured hospital services or insured medical services under this Act, he shall have the same right to recover the sum paid for those services against the person guilty of the wrongful act or omission as he would have had if he, himself, had been required to pay for the services.

(2) Where, under subsection (1), a person recovers a sum in respect of insured hospital services or insured medical services received by him under this Act, he shall forthwith pay the sum recovered to the Commission.

(3) Her Majesty the Queen in the right of the Province shall be subrogated to the rights of a person under this Section to recover any sum paid by the Commission for insured hospital services or insured medical services provided to that person, and an action may be maintained by Her Majesty, either in Her own name or in the name of that person, for the recovery of such sum.

(4) It shall not be a defence to an action brought by Her Majesty under subsection (3) that a claim for damages has been adjudicated upon unless the claim included a claim for the sum paid for insured hospital services and insured medical services and it shall not be a defence to an

action for damages for personal injuries brought by a person who has received insured hospital services or insured medical services that an action taken by Her Majesty under subsection (3) has been adjudicated upon.

(5) No release or settlement of a claim or judgment based upon a cause of action for damages for personal injuries in a case where the injured person has received insured hospital services or insured medical services under this Act shall be binding upon Her Majesty unless the Commission or a person designated by it has approved the release or settlement in writing.

(6) Where a person whose act or omission resulted in personal injuries to another is insured by a liability insurer the liability insurer shall pay to the Commission any amount referable to a claim for recovery of the cost of insured hospital services and insured medical services that would otherwise be paid to the insured person and payment of that amount to the Commission discharges the liability of the insurer to pay that amount to the insured person or to any person claiming under or on behalf of the insured person.

(7) For the purposes of this Section the sum paid for insured hospital services that are received by an injured person shall be an amount equal to the charges of the hospital in which the services were provided at rates approved by the Commission that the injured person would have been required to pay if he was not entitled to receive the services as insured hospital services under this Act.

(8) In an action under this Section a certificate of an officer of the Commission as to the sum paid for insured hospital services or insured medical services received by an injured person is admissible in evidence and is prima facie proof of that sum.

(9) Notwithstanding any other provision in this Section, where a person whose act or omission resulted in personal injuries to another is insured by a liability insurer and the liability insurer pays to the injured person, or to any person claiming under or on behalf of the injured person, the full amount of the policy of insurance and that amount is insufficient to fully satisfy the claim of the injured person, excluding any claim for insured hospital services or insured medical services, Her Majesty is not entitled to share in or claim against the whole or any part of that amount, and the payment thereof discharges the liability of the insurer from making a payment to Her Majesty in respect of the insured hospital services or insured medical services which were received by the injured person.

4. THE HEALTH INSURANCE ACT, Ont. Stat. 1972 c. 91.

SUBROGATION

35.—(1) Where, as the result of the negligence or other wrongful act or omission of another, an insured person suffers personal injuries for which he receives insured services under this Act, the Plan is subrogated to any right of the insured person to recover the cost incurred for past insured services and the cost that will probably be incurred for future insured services, and the General Manager may bring action in the name of that person for the recovery of such costs.

(2) For the purposes of subsection 1, the payment by the Plan for insured services shall not be construed to affect the right of the insured

person to recover the amounts so paid in the same manner as if such amounts are paid or to be paid by the insured person.

(3) For the purposes of this section, the cost of insured services rendered to an insured person in or by a hospital or health facility shall be at the rate charged by the hospital or health facility to a person who is not an insured person.

36.—(1) Any person who commences an action to recover for loss or damages arising out of the negligence or other wrongful act of a third party, to which the injury or disability in respect of which insured services have been provided is related shall, unless otherwise advised in writing by the General Manager, include a claim on behalf of the Plan for the cost of the insured services.

(2) Where a person recovers a sum in respect of the cost of insured services, he shall forthwith pay the sum recovered to the Treasurer of Ontario.

37. The Plan is not an insurer within the meaning of *The Insurance Act*, as referred to in section 21 of *The Motor Vehicle Accident Claims Act*, and may be awarded payment from the Motor Vehicle Accident Claims Fund.

38. The judge at trial shall, if the evidence permits, apportion the elements of the injured person's loss and damages so as to clearly designate the amount of the Plan's recovery for the past cost of insured services and separate it from the amount of the Plan's recovery of future cost of insured services, if any.

39. No release or settlement of a claim for damages for personal injuries in a case where the injured person has received insured services under this Act shall be binding on the Plan unless the General Manager has approved the release or settlement.

40. A liability insurer shall notify the General Manager of negotiations for settlement of any claim for damages including insured services and may pay to the Treasurer of Ontario any amount referable to a claim for recovery of the cost of insured services and such payment discharges the obligation of the liability insurer to pay that amount to the insured person.

41. Where a judgment or settlement includes future cost of insured services, the Plan shall provide the future insured services included in the judgment or settlement.

42. Where the Health Services Insurance Division or the Hospital Services Commission had a right of subrogation under *The Health Services Insurance Act* or *The Hospital Services Commission Act*, respectively, or the regulations thereunder immediately before the 1st day of April, 1972, such right of subrogation and all actions, causes of action and judgments relating thereto continue as a right of the Plan and the provisions of this Act and the regulations apply thereto.

5. HEALTH INSURANCE ACT, Que. Stat. 1970 c. 37.

14. 1. La Régie est de plein droit subrogée au recours de toute personne qui bénéficie des services assurés contre un tiers jusqu'à concurrence du coût des services assurés fournis à la suite d'une blessure ou d'une maladie causée par la faute du tiers.	**14.** (1) The board shall be *ipso facto* subrogated in the right of recovery of any person who benefits from insured services, against any third person to the extent of the insured services furnished in respect of injury or illness caused by the fault of such third person.
2. La faute commune entraîne la réduction du montant de cette subrogation dans la même proportion que le recours de la personne assurée.	(2) In case of contributory negligence the amount of such subrogation shall be subject to reduction in the same proportion as the insured person's right of recovery.
3. L'assureur de la responsabilité d'un tiers ne peut se libérer de son obligation de l'indemniser de sa responsabilité envers la Régie découlant du présent article, autrement que par paiement à la Régie.	(3) An insurer of a third person's liability shall not discharge his obligation to indemnify the latter of his liability to the Board under this section, otherwise than by payment to the Board.
4. Un engagement par une personne bénéficiant de services assurés de libérer un tiers ou son assureur de leur responsabilité envers la Régie découlant du présent article ou de les en indemniser est invalide et doit être considéré non écrit dans toute convention, transaction ou quittance.	(4) An undertaking by a person benefiting from insured services to discharge a third person's or an insurer's liability to the Board under this section or to save them harmless from such liability shall be invalid and be deemed unwritten in any agreement, transaction or release.
5. Les droits acquis par l'effet de la subrogation prévue au présent article font partie du domaine public du Québec à compter de leur naissance et sont soumis aux règles applicables aux droits qui en font partie; toutefois le droit d'action qui en résulte se prescrit par deux ans.	(5) The rights acquired by the effect of the subrogation contemplated in this section shall form part of the public domain of the province of Québec from and after the time when such rights arise, and shall be subject to the rules applicable to the rights forming part thereof; however, the right of action resulting therefrom shall be prescribed by two years.

6. THE SASKATCHEWAN HOSPITALIZATION ACT, SASK REV. STAT. c. 253 (1965).

22.—(1) Where, as a result of the negligence or other wrongful act of any other person, a beneficiary suffers personal injuries for which he receives hospital services paid for under this Act, he shall have the same right to recover the sum paid for such services from the person guilty of the negligence or other wrongful act as he would have had if he had himself been required to pay for the services. Upon recovering the sum or any part thereof the beneficiary shall forthwith pay the amount recovered to the minister.

(2) Upon payment being made under this Act for hospital services to a beneficiary mentioned in subsection (1), the minister shall be subrogated to all rights of recovery of the beneficiary from any person in respect of the cost of those services, and may bring action in the name of the beneficiary to enforce such rights.

(3) Nothing in subsection (1) or (2) restricts the right of the beneficiary to recover any sum in respect of the personal injuries in addition to the sum paid for hospital services under this Act, and where the beneficiary brings an action to recover any sum in respect of those injuries he shall, on behalf of the minister, include in his claim a claim for the sum paid under this Act.

(4) Except with the consent in writing of the minister, no action in which a claim for the sum paid under this Act has been included on behalf of the minister shall be settled without provision being made for payment in full of that sum.

(5) The minister may bear such proportion of the taxable costs payable by a beneficiary conducting any such action as bears the same ratio to the total of those costs as the amount claimed on behalf of the minister bears to the total amount claimed, but the portion of the costs borne by the minister shall not exceed fifty per cent of the amount claimed on his behalf.

(6) An insurer who is liable to the beneficiary in respect of such personal injuries shall pay to the minister the amount for which he is so liable or the amount paid under this Act in respect of the injuries, whichever is the lesser, and such payment shall, to the extent of the amount paid, discharge the liability of the insurer to the beneficiary. 1959, c. 80, s. 4.