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THE VOLUNTEER DEFENCE

Pamela D. Pengelley, B.Sc., LL.B.
Chris Reain, B.A., LL.B.

Cozen O'Connor
One Queen Street East, Suite 2000, Toronto, ON M5C 2W5
Phone: (416) 361-3200 Fax: (416) 361-1405
E-mail: ppengelley@cozen.com

I. WHAT IS THE VOLUNTEER DEFENCE?

The volunteer defence may be raised by defendants in a subrogated action in order to challenge the right of an insurance company to seek recovery for a loss paid to an insured under a policy. As the name suggests, the volunteer defence alleges that an insurance company has made voluntary payments to its customer without any obligation to do so under the policy or in law. As the argument goes, the payment to the insured is essentially a "gift" rather than a payment of indemnity under the policy. The purported effect of such a payment is that the insurer remains a 'stranger' to the loss and so does not obtain the right to subrogate against the defendant. By questioning the insurer's motives for its payments to its insured, a defendant may also argue that it is entitled to the claims handlers' and adjusters' files which would otherwise be irrelevant in the subrogated action.

Defendants in a subrogated action may try to raise the volunteer defence when it appears that there has been a dispute between the insurer and its customer regarding coverage in an attempt to show that the insurer's payments to its customer were not required by the policy and were made for some other reason, for instance, as a goodwill gesture, or as a settlement offer for the release of potential claims that could be

made by its insured under the policy. The defendant may also try to raise new coverage issues that were not even contemplated when the claim was adjusted. Nonetheless, this phantom defence is most often invoked by defendants who know little about property insurance claims and even less about subrogation. Accordingly, in many cases, subrogation counsel will be able to take the necessary steps to preclude this defence form proceeding.

II. ORIGINS OF THE DEFENCE

The volunteer defence has its origins in the historic English case of *King v. Victoria Insurance Co.*[1] A plaintiff had obtained insurance for crates of wool to be shipped by sea. In preparation for the voyage, the crates were taken to the port and placed in a small boat alongside the defendant's boat, to be rowed up to the ship the next day. That night, a storm arose which caused the defendant's boat to break free from its moorings and collide into the plaintiff's boat, carrying it downstream where it capsized, destroying the wool. The plaintiff's insurer paid the plaintiff for its loss and then brought a subrogated action against the defendant. The defendant challenged the insurer's right to bring the action, claiming that the loss was not covered by the plaintiff's policy - the insurance policy covered the sea journey, but the wool had not yet been loaded onto the ship for the journey. Since the loss "was not within the terms of the insurance", the defendant argued that the insurance company could not subrogate. The insurer was "in the position of a mere stranger making a voluntary payment".

The English Court proclaimed this defence to be 'startling' and flatly rejected it. One consequence of allowing this sort of defence to be raised by a defendant would be that an insurance company who paid out a claim in good faith in order to avoid a coverage dispute with its customer could then find itself in the very same coverage dispute it had tried to avoid, but raised by a person who was not even a party to the insurance contract. Accordingly, the Court held that a defendant had no right to *"insist on ripping up the settlement, putting in a plea for the insurers which they did not think it right to put in for themselves; and all for the purpose of availing himself of a highly technical rule of law which has no bearing on his wrongful act."*[2] So long as the insurer paid its customer's claim honestly and reasonably, defendants had no right to raise the issue of whether a claim had been covered by the policy.

III. THE LAW IN CANADA

Canadian law has its roots in England and the decision of the English judges in *King* is still followed by courts in Canada. For example, in the case of *Manitoba Public Insurance Corp. v. Digerness et al.*, [3] the Manitoba Court of Appeal held that even where a defendant could prove that the insurer was not

legally obligated to pay the insured's claim under a policy, an insurer will still have the right to subrogate against the wrongdoer. Simply put, the defendant could not complain that an insurer had paid its customer for a loss for which it was not liable to pay under the terms of a policy. Similar reasoning has been expressed by the courts of other provinces.[4]

Nonetheless, some defendants still try to raise the volunteer defence in subrogated actions, possibly because of confusion about the case law. This is because the volunteer defence *can* be a valid argument when it is raised by the *insured* against its insurance company. For example, in *Wellington Insurance Co. v. Armac Diving Services Ltd.*,[5] the insured was the owner of a boat that had capsized. The insurance company denied coverage under the policy, but after being sued by its insured for payment, the insurer agreed to settle the action with its insured for half of the amount claimed, on the following terms:

> [I]n order to conclude this matter without any further legal costs accruing and as a public relations gesture, our client has instructed us that they would be prepared to pay the sum of $17,500.00 in full settlement of your client's claim all inclusive of interest and costs.

Later, the insured sued the party who had caused the loss and was able to recover the full amount of damages. The insurance company argued that since it had paid for a portion of the loss, it was entitled to recover its payments, by way of subrogation, from the monies recovered from the third party. Conversely, the insured claimed that the settlement money that it had received from its insurance company had nothing to do with the loss *per se*. The settlement had been made as payment for the insured agreeing not to sue its insurer. The insurance company had never paid for the actual loss, and so it had no right to any of the money that the insured had recovered as compensation for the loss. The Court agreed with the insured. Since the money had been made as a settlement payment rather than a payment under the policy, the insurance company had never obtained the right of subrogation. The recovered money belonged solely to the plaintiff.

Importantly, it was not the third party defendant who raised the volunteer defence in this case. Rather, it was the *insured* who raised the volunteer defence against its own insurance company *after* it had recovered its money from the defendant. Subrogation professionals will do well to be aware of this distinction in the case law. While the volunteer defence may, in some circumstances, be validly raised by an insured against its own insurance company, it is not often that this defence may properly be raised by a defendant who is a stranger to the policy.

IV. SHOULD INSURERS BE CONCERNED?

In general, so long as payments to an insured are made in good faith, an insurance company need not be overly concerned about the volunteer defence. The defendant is a stranger to the contract of insurance between the insurer and insured, and so he will rarely have the right to concern himself with it.

Moreover, there are good policy reasons not to recognize the volunteer defence when it is raised by a defendant. Even if an insurance company were to take a more hard-nosed approach with its insured because of concerns over the volunteer defence, the defendant would still not escape ultimate liability for the loss. Regardless of whether it is the insured who is suing the defendant, or the insurer who is suing the defendant in the insured's name, or both of them, the defendant will still be liable for the total loss and so from its perspective, it remains unaffected. Therefore, courts may be persuaded in many circumstances that a rigid application of the volunteer defence would serve no purpose and would only create unnecessary litigation.

V. CONCLUSION

Defendants may properly argue that the quantum claimed in a subrogated case exceed the damages that were actually suffered by the insured. This is a legal question relating to the quantum of damages in any tort action. However, since defendants will rarely have the right to second-guess the insurer's decision to settle a claim with its insured, it follows that the volunteer defence will not often create a legitimate issue for trial in a subrogated action. Defendants should not be permitted to bring into question the rationale or justification for an insurance company's decision to pay an insured's claim or obtain production of the subrogating insurer's claims file on that issue. Subrogation counsel should be alert to situations where this defence is raised unmeritoriously and take the appropriate steps to preclude this defence from proceeding.

Cozen O'Connor's expertise and experience in handling these matters, and other issues that arise in subrogated claims, is available to be deployed for the benefit of your company. We welcome your questions or comments with respect to these and other insurance-related matters.

For additional information concerning
Cozen O'Connor's Subrogation and Recovery Program, please contact:

Chris Reain, Esquire
Subrogation and Recovery Department, Toronto
(416) 361-3200
creain@cozen.com
www.cozen.com

1. [1896] A.C. 250 (P.C.).
2. *Ibid,* at 252.
3. (1994), 121 D.L.R. (4th) 331 (Man. C.A.).
4. For example, see *Falls Creek Falling Contractors Ltd. v. Pat Carson Bulldozing Ltd*., [2001] B.C.J. No. 2014 (C.A.), (leave to appeal to S.C.C. denied); *Rio Algom v Liberty Mutual* [2006] OJ No. 329 (S.C.J.).
5. (1987), 37 D.L.R. (4th) 462 (B.C.C.A.).