ACCUMULATION OF PAYMENTS AND SUBROGATION IN THE UNITED KINGDOM 1974 - 78

A paper submitted to the Fifth World Congress on Insurance Law by Professor H.A.L. Cockerell, City University Business School, England, to be held in October, 1978.

A person injured in an accident, whether on the road, or at work, or in other circumstances, is often entitled both to benefits in cash or in kind from the national system of social security, and to an indemnity for his losses from a tortfeasor who caused the accident. In addition, he may become entitled to benefits from a private insurance effected by him or on his behalf. Three questions arise.

1. How far is an injured person entitled to recover from more than one source?

2. May he in some circumstances receive more than a full indemnity in toto?

3. If he makes recoveries from more than one source what rights, if any, does one who has made payment have to recover it from another?

The United Kingdom report to the Fourth World Congress on Insurance Law[1] set out the position as it was in 1973. It is proposed in this paper to bring the situation up to date.

It will be convenient to treat separately (a) hospital and medical expenses and (b) loss of earnings.

Hospital and medical expenses

Under the National Health Service Acts persons in the United Kingdom are entitled to receive hospital and medical treatment free of charge, with minor exceptions. Alternatively, any person may elect to receive and pay for private treatment. More than 95% of hospital and medical treatment is in fact given under the National Health Service. Except in the case of road accidents referred to below the Service does not seek to recover the cost of treatment from a third party tortfeasor.

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1 AIDA Congres Mondial, vol 1, H.A.L. Cockerell, 'Great Britain', Lausanne, 1974

If any person elects to receive and pay for private treatment, he may reclaim the cost from a tortfeasor. About one million people effect insurance to pay private hospital and medical expenses. It is common practice for the insurers to stipulate that claims shall not be payable for expenses recoverable from a third party.[2]

By the Law Reform (Personal Injuries) Act 1948 s.2(4) a tortfeasor is debarred from pleading that it was unreasonable for an injured person to incur expenses for treatment on the ground that he could have received free treatment from the National Health Service.

In March 1978 the Royal Commission on Civil Liability and Compensation for Personal Injury (The Pearson Committee)[3] reported. In considering the assessment of damages it referred to s.2 of the 1948 Act and expressed the view that it did not reflect present day realities. 'It gives rise to the possibility of double compensation where a plaintiff recovers damages on the basis that he will incur private medical expenses, and then in the event seeks treatment under the National Health Service.'[3] The Commission recommended that the Section should be repealed and that private medical expenses should be recoverable from a tortfeasor only if it was reasonable on medical grounds that the injured person should incur them.[4]

So far as costs incurred within the National Health Service are concerned the limited extent to which they are recoverable when arising out of a road accident involving a motor vehicle will now be described.

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2. In practice, pending settlement by the third party of a claim, insurers may be expected to pay the cost of treatment by way of an advance recoverable out of damages subsequently recovered.

Cmnd 7054, HMSO 1978

3. Ibid., para 341

4. Ibid., para 342. The Review of the Criminal Injuries Compensation Scheme: Report of an Interdepartmental Working Party (HMSO, 1978) reaches a similar conclusion in relation to the public scheme of compensation for criminal injuries which operates on a basis analogous to the system of common law damages (para. 10.7).

The Road Traffic Act, 1972, s.155, provides that a person using a motor vehicle shall be liable to pay a small fee to a practitioner or a hospital for emergency treatment of bodily injury necessitated by or arising out of the use of the vehicle on the road. If the event giving rise to the need for treatment was caused by the wrongful act of a third party, the user of the vehicle may claim the cost of the emergency treatment from the third party.

The Act, s.154, also provides that if a motor insurer pays a claim made by an injured person, whether or not liability is admitted, the insurer shall also pay the hospital the cost of the treatment it gave that person, subject to certain limits.[5]

Hospitals have expressed dissatisfaction with the working of this system. For one thing, it entails the calculation of the cost of treatment of individuals, and periodical enquiries of insurers to know when a claim has been settled. For another, the limits are low for an injury of any seriousness. In 1976 the Government proposed to replace existing arrangements by a flat rate levy on motor insurance premiums to recoup the cost of all hospital treatment for the victims of road accidents but after lengthy discussions with insurers the proposal was withdrawn. The argument of insurers that the proposal bristled with administrative complexity prevailed.

The Pearson Commission reported:

'We are in no doubt that the present provisions for recovering the cost of treating road accident victims are ineffective, and that any new proposal should not require investigation of the circumstances of individual injuries. But the question of recouping National Health Service costs for particular groups of patients raises issues of equity and broad social policy outside our terms of reference.'[6]

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5. £200 for in-patient treatment, and £20 for out-patient treatment.

6. Cmnd 70541, HMSO 1978, para. 1085.

The Commission expressed the view that under the present law the amount recovered by the National Health Service at an administrative cost not precisely known, but likely to be high, was probably less than 5 per cent of the hospital treatment costs incurred, which amounted to nearly £50 million in 1976. [7]

Loss of Earnings

The victim of an accident who is disabled from earning is likely to be entitled to social security benefits, principally sickness benefit or, in the case of an injury arising out of and in the course of employment, industrial injury benefit at a slightly higher rate. These benefits are paid by the Department of Health and Social Security which does not have any subrogation right against a tortfeasor who caused the disability giving rise to the payment of benefit.

By the Law Reform (Personal Injuries) Act, 1948 s.2(1), a court assessing damages for loss of income due to personal injury, may take account of one-half only of the value of any rights to the main social security benefits during five years from the time when the cause of action is concerned. The reasoning behind this provision appears to be that the injured party is likely to have made social insurance contributions and that social security benefits are therefore in part analogous to private insurance benefits which are not taken into account to reduce the extent of a tortfeasor's liability. The Pearson Commission has considered the present position and recommends that the law should be changed saying: 'It is not realistic to regard social security benefits as the fruits of individual thrift[8]..... We think the time has come for the full co-ordination of the compensation provided by tort and social security.'[9] The Commission recommends that the full value of social security benefits payable to an injured person or his dependants as the result of an injury for which damages are awarded should be deducted in the assessment of damages.[10] Some practical problems arise. For example, if a tortfeasor is liable to the extent of 50 per cent only, on the ground of contributory negligence, should the amount for which he is liable be reduced by the whole value of the social security benefits or only by half of them? The Commission concludes in favour of the latter solution.[11]

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7. Ibid., para 1084
8. Cmnd. 7054-I, HMSO, 1978, para 471
9. Ibid., para 475
10. Ibid., para 483
11. Ibid., para 498

Where the victim of an accident has effected private insurance from which he receives payment the Pearson Commission agrees with the current practice of English law not to take such payment into account so as to reduce the damages. The reasoning is that the victim had himself bought and paid for the voluntary insurance and that it should benefit him rather than the tortfeasor.

In recent years it has become frequent for employers to effect permanent health insurance for their employees, to provide an income for the long term after, say the first six months of disability. The Pearson Commission recommends that benefits under such a contract should be left out of account even though the insurance may not have been paid for directly by the employee.[1] They form part of the employee's remuneration, the Commission considers.

Benefit under a permanent health insurance is comparable in effect to an occupational disability pension. In 1970 The House of Lords in Parry v Cleaver (1970) A.C.1 held by a majority that a disability pension whether or not discretionary, and whether or not contributory, should be left out of account in assessing a victim's lost earnings. The majority argued that a disability pension should be regarded as a first party insurance which was in large measure paid for by the beneficiary himself, by contributions either direct or indirectly in lieu of higher wages. The Pearson Commission does not agree with this view but does think it nearer the truth that disability pensions are provided by the employee rather than by the employer and accordingly recommends that they should be left out of account in assessing damages for lost earnings.[13]

A somewhat different view is taken by an Interdepartmental Committee in its Review of the Criminal Injuries Compensation Scheme.[14] This Government scheme was established in 1964 to permit ex gratia payments to the victims of violent crime and those injured in attempts to prevent crime and to apprehend individuals. The assessment of compensation follows in the main the assessment of damages in actions for tort, but the compensation is somewhat more restricted. In particular the Government, when introducing the scheme, adopted the principle that there should be no double compensation from government funds and that therefore the full value of any entitlement to social security benefits, including industrial injury benefits and analogous payments should be taken into account in assessing compensation. Police officers are comparatively often injured in the course of their duties when in contact with violent criminals or seeking to effect arrests. If their injuries are serious they may become entitled to occupational pensions and to compensation. The question arises how these pensions should be treated in the assessment of the compensation under the scheme. On the strength of Parry v Cleaver (supra) they have hitherto not been taken into account in non-fatal cases. In fatal cases, where a widow or dependant receives a pension as a result of fatal injury four-fifths of the value of the pension is deductible from any compensation.

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12. Ibid., para. 529

13. Ibid., para. 521

14. HMSO, 1978

The Working Party recommends that in future, in non-fatal cases, benefits from occupational pension schemes should be taken into account in assessing the claimant's loss of income.[15] In fatal cases it is recommended that half of any relevant gross pension should be taken into account, together with the full amount of any tax-free lump sum. The proportion of half is suggested to take account of possible income tax on the pension payments and of contributions for pension by the deceased.

Compensation under the Criminal Injuries Compensation Scheme is paid subject to an undertaking by the recipient that he will reimburse any sums received by way of compensation paid by an offender in pursuance of an order to pay made by an English criminal court or any damages recovered in a civil action brought against an offender or tortfeasor. In practice only about £20,000 was recovered in 1975 - 76 from these sources.

Conclusion

United Kingdom law is likely to move in the direction of minimising the extent of double payment for personal injury losses.

The rising cost of health services may force a future government to seek to recoup a greater part of the cost of treatment for those injured in road accidents from motorists but if so, a simpler means than a tax on motor insurance premiums needs to be found. It is not easy to see why road accident medical costs should be singled out for special treatment. If there is a case for that it would apply with equal force to treatment for accidents sustained at work. Simplicity is cost-saving. Hence, no doubt, the absence of subrogation rights on the part of the State for social security benefits.

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15. Ibid., para. 16.2