

Insurance: Subrogation: Accident and Health Insurance Policy Still Characterized as "Investment" Contract. (Rixmann v. Somerset Public Schools)

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contrast is the double jeopardy clause itself with its protections against multiple prosecutions. *Scott* has the effect of substantially narrowing the scope of such double jeopardy protections, shifting this scope more closely to the position of English law.

LARRY L. SHUPE

INSURANCE—Subrogation—Accident and Health Insurance Policy Still Characterized as “Investment” Contract. *Rixmann v. Somerset Public Schools*, 83 Wis. 2d 571, 266 N.W.2d 326 (1978). In the recent decision of *Rixmann v. Somerset Public Schools*¹ the Wisconsin Supreme Court attempted to eliminate some of the confusion that has surrounded the subrogation and collateral source rules in Wisconsin ever since the Delphic case of *Heifetz v. Johnson*.² The *Rixmann* decision purports to establish simple rules for the treatment of payments under accident and health insurance policies in personal injury cases. It is submitted, however, that the decision's continued characterization of such insurance policies as “investment” contracts, for which there is no automatic subrogation, does not reflect changes that have taken place since the issue was originally decided.

The plaintiffs, Ronald Rixmann and his father, brought an action for damages from injuries Ronald suffered while participating in a high school chemistry class experiment. They had been reimbursed for all but \$656.33 of Ronald's medical expenses by his father's health insurer, Guardian Life Insurance Company. However, Guardian Life had executed a document purporting to assign any interest it had from payments under the policy back to the plaintiffs.

The trial court had ruled that Guardian Life was not subrogated as a result of its payments and, therefore, had no interest to assign to the plaintiffs. Furthermore, the trial court had held that the plaintiffs could not recover expenses for which they had been reimbursed.³ Both rulings were contested on appeal.

With respect to the first ruling, the plaintiffs argued that

1. 83 Wis. 2d 571, 266 N.W.2d 326 (1978).

2. 61 Wis. 2d 111, 211 N.W.2d 834 (1973).

3. 83 Wis. 2d at 574, 266 N.W.2d at 328.

language in *Heifetz* broadly defining the scope of the subrogation doctrine should apply in this case. Consequently, Guardian Life was subrogated by operation of law to the plaintiff's right to recover for the medical bills it paid, and its written assignment operated to reinvest those rights in the plaintiffs.⁴ The defendants contended that the language in *Heifetz* should be limited to the facts of that case. They argued that the instant fact situation should be governed by *Gatzweiler v. Milwaukee Electric Railway & Light*,⁵ which held that payments under accident and health policies do not result in subrogation in the absence of an express subrogation clause.

The plaintiffs further argued that the trial court's second ruling reducing recovery by the amount of the insurance payments was in error because the collateral source rule, which does not allow certain "collateral" payments to reduce a tortfeasor's liability,⁶ applied.⁷ The defendants countered that "if the court has not in fact done so already, the collateral source rule should be expressly abolished on this appeal."⁸

I. THE "INVESTMENT—INDEMNITY" DISTINCTION

Traditionally, whether subrogation applies to particular insurance payments has turned on whether the policy involved was characterized as an "indemnity" or an "investment" contract.⁹ In *Gatzweiler*, the Wisconsin court defined "indemnity" contracts as those under which the insured has a right to be compensated for a definitely ascertainable pecuniary loss.¹⁰ Fire insurance policies, for example, have long been characterized as "indemnity" contracts in Wisconsin.¹¹

Under an "indemnity" contract an injured insured can seek his remedy against either the party causing the loss or his insurer. The insurer stands as a surety for the loss caused by the principal obligor, the tortfeasor. Thus when the insurer pays its insured, it becomes subrogated by operation of law to the claim of the insured, just as a surety who pays the debt of the princi-

4. *Id.* at 576, 266 N.W.2d at 329.

5. 136 Wis. 34, 116 N.W. 633 (1908).

6. *See* 22 AM. JUR. 2d *Damages* § 206 (1965); RESTATEMENT (SECOND) OF TORTS § 920A(2) (Tent. Draft No. 20, 1974).

7. 83 Wis. 2d at 574, 266 N.W.2d at 328.

8. *Id.* at 576, 266 N.W.2d at 329.

9. *See, e.g.,* *Campbell v. Sutliff*, 193 Wis. 370, 374, 214 N.W. 374, 376 (1927); *Gatzweiler v. Milwaukee Elec. Ry. & Light*, 136 Wis. 34, 37, 116 N.W. 633, 634 (1908).

10. 136 Wis. at 38, 116 N.W. at 634.

11. *Id.* at 36, 116 N.W. at 633.

pal debtor becomes subrogated by operation of law to the creditor's claim.¹²

In contrast, "investment" contracts merely provide that the insurer will pay a specified sum to the insured upon the happening of a specified event. Life insurance policies are typical "investment" contracts.¹³ The *Gatzweiler* court stressed that under these contracts, the amount payable is a fixed sum and "has no necessary relation to damages actually suffered by the beneficiary."¹⁴ The court also noted that the loss suffered is usually not a "definitely ascertainable pecuniary loss" "determinable by any definite rule for computing the money equivalent for the damages."¹⁵ Consequently, the insurance company in that case was not subrogated to any of the plaintiff's rights to recover.¹⁶

The insurance policy in *Gatzweiler* was an accident and health policy. Unlike many modern accident and health policies, however, it merely guaranteed to pay a fixed sum whenever the plaintiff sustained particular specified injuries,¹⁷ such as the loss of an eye or a limb. Since the amount payable bore no relation to the plaintiff's actual loss, the court held the policy to be an "investment" contract. Thus, no subrogation rights arose in favor of the insurer in the absence of an express subrogation clause.¹⁸

It is clear that the *Gatzweiler* court classified the accident and health policy before it as an "investment" contract chiefly because of the absence of any relation between payments made and loss sustained. Following the letter of the *Gatzweiler* holding, the Wisconsin court has consistently treated accident and health insurance policies generically as "investment" contracts.¹⁹ This Wisconsin approach is by no means unique,²⁰ and

12. *Id.*

13. *Id.* at 37, 116 N.W. at 634.

14. *Id.*

15. *Id.* at 38, 116 N.W. at 634.

16. *Id.* at 39, 116 N.W. at 634.

17. *Id.* at 37, 116 N.W. at 634.

18. *Id.* at 39, 116 N.W. at 634. This case has been cited for the proposition that accident and health insurance policies are to be classified as "investment" contracts because of their resemblance to life insurance policies. Kimball & Davis, *The Extension of Insurance Subrogation*, 60 MICH. L. REV. 841, 846 n.19, 856 n.57 (1962) [hereinafter cited as Kimball & Davis].

19. See, e.g., *Pattitucci v. Gerhardt*, 206 Wis. 358, 240 N.W. 385 (1932); *Campbell v. Sutliff*, 193 Wis. 370, 214 N.W. 374 (1927). In *Campbell* the court classified the policy as an "investment" contract although it noted that the insured had "the right to have indemnity" under the policy. *Id.* at 375, 214 N.W. at 376.

20. See, e.g., *Michigan Hosp. Serv. v. Sharpe*, 339 Mich. 357, 63 N.W.2d 638

continues despite the fact that many modern accident and health insurance policies differ significantly from the policy with which the *Gatzweiler* court was faced. Many of these policies simply reimburse the insured for actual hospital, medical and doctors' bills. Under such policies the payments made are determined by the loss sustained, rather than being set in advance as in the *Gatzweiler* policy. Thus, the policies operate to "indemnify" the insured.²¹ Therefore, they more closely approximate fire insurance policies, which have traditionally been classified as "indemnity" contracts, than life insurance policies, with which the courts have continued to classify them for subrogation purposes.²²

Some accident and health policies issued today still resemble the *Gatzweiler* policy, which provided for the payment of a fixed amount to the insured upon the loss of a leg, an arm or some other bodily member or function. These policies should continue to be classified as "investment" contracts since the payment made is not determined by the loss sustained. However, courts should look to the nature of the particular contract involved in each case. This is preferable to the present method of treating entire lines of insurance policies generically, regardless of significant differences between various types of policies within each line.²³

II. SUBROGATION AND THE COLLATERAL SOURCE RULE

The collateral source rule is a court established rule that benefits received by a plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer.²⁴ In addition to insurance benefits, the collateral source rule has also been applied in Wisconsin to salary continuation by an employer during an employee's disability,²⁵ to the payment of

(1954). The dissent in that case, however, urged that all insurance policies indemnifying the insured in fact should be treated as "indemnity" contracts, regardless of their generic classification. See generally Kimball & Davis, *supra* note 18, at 857 n.58.

21. See Kimball & Davis, *supra* note 18, at 859-60. See also R. HORN, SUBROGATION IN INSURANCE THEORY AND PRACTICE 220-22 (1964).

22. Kimball & Davis, *supra* note 18, at 856-57. See also Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CALIF. L. REV. 1478, 1502 n.88 (1966) [hereinafter cited as Fleming].

23. Kimball & Davis, *supra* note 18, at 853-54.

24. See 22 AM. JUR. 2d Damages § 206 (1965); RESTATEMENT (SECOND) OF TORTS § 920A(2) (Tent. Draft No. 20, 1974).

25. *Cunnien v. Superior Iron Works Co.*, 175 Wis. 172, 184 N.W. 767 (1921).

medical expenses by a beneficial society²⁶ or by the federal government²⁷ and to medical services gratuitously provided by the state.²⁸

A major criticism of the rule is that in many instances it allows for double recovery by plaintiffs.²⁹ Where an insurer is subrogated to the rights of a plaintiff, however, this problem is eliminated. To be sure, the tortfeasor's liability is not reduced by the insurer's payments,³⁰ but it is the insurer, not the plaintiff, who recovers the payments from the tortfeasor.³¹

One of the major justifications advanced for the collateral source rule is that plaintiffs should not be denied the benefit of contracts for which they have paid.³² A prudent investment by the plaintiff should not inure to the tortfeasor's benefit. This argument is obviously inapplicable to benefits which are gratuitously conferred.³³ Even in the context of insurance payments the argument has its greatest force in the case of "investment" contracts where the insured receives no more than what he expected—a fixed sum to be paid upon the occurrence of a specified contingency. However, this argument is less persuasive in the case of "indemnity" contracts, such as modern accident policies where it is more likely that the insured intends "to hedge himself against loss rather than to gamble for a windfall."³⁴ The operation of the doctrine of subrogation obviates this problem of unexpected double recovery

26. Cf. *McLaughlin v. Chicago, M., St. P. & Pac. R.R.*, 31 Wis. 2d 378, 143 N.W.2d 32 (1966) (medical expenses paid by a priest's religious order held recoverable).

27. *Merz v. Old Repub. Ins. Co.*, 53 Wis. 2d 47, 191 N.W.2d 876 (1971).

28. *Thoreson v. Milwaukee & Suburban Trans. Corp.*, 56 Wis. 2d 231, 201 N.W.2d 745 (1972).

29. See, e.g., Bell, *Complete Elimination of the Collateral Source Rule — A Partial Answer to Criticisms of the Present Injury Reparations System*, 14 N.H.B.J. 20 (1972-1973).

30. See, e.g., Fleming, *supra* note 22, at 1498.

31. If the insurer fails to press its subrogation claim, the tortfeasor may be entirely relieved of the effects of the collateral source rule. See, e.g., *Heifetz v. Johnson*, 61 Wis. 2d 111, 211 N.W.2d 834 (1973) (where the insurer's subrogation claim was barred by the statute of limitations).

32. See D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* 584-85 (1973) [hereinafter cited as DOBBS]; Note, *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARV. L. REV. 741, 750-51 (1964) [hereinafter cited as Note].

33. The argument for the application of the collateral source rule to gratuitously conferred benefits is that the donor intended to benefit the plaintiff, not the tortfeasor. The counterargument is that in all probability the donor intended merely to relieve the plaintiff's hardship in time of need. There was no intention to provide a windfall for anyone. See DOBBS, *supra* note 32, at 585; Note, *supra* note 32, at 751-52.

34. Fleming, *supra* note 22, at 1500; Note, *supra* note 32, at 751-52.

under most "indemnity" contracts. However, as explained earlier, this is not true of all insurance policies which "indemnify" the insured.³⁵

In *Heifetz v. Johnson*³⁶ the Wisconsin court appeared to be expanding the doctrine of subrogation to cover all insurance payments, thereby obliterating the "investment/indemnity" distinction and eliminating the double recovery problem entirely. It stated that, "Acceptance of payment from an insurer operates as an assignment of the claim to that extent whether or not the policy contains a subrogation agreement. The plaintiff loses his right to sue for any amount received from his insurer."³⁷

The *Rixmann* court, however, reaffirmed the *Gatzweiler* line of decisions and the traditional "indemnity/investment" contract distinction.³⁸ Furthermore, it followed the specific holding in *Gatzweiler* and classified the accident and health policy under which the plaintiff was paid as an "investment" contract, even though it was a modern policy compensating the plaintiff only for definitely ascertainable medical expenses. Consequently, the insurer had no right to subrogation.³⁹

The court also rejected the defendant's argument that the collateral source rule should be abolished. The court countered the traditional argument that the collateral source rule results in double recovery by saying the injured party's insurance should not inure to the benefit of the tortfeasor.⁴⁰ As pointed out earlier, however, this traditional counterargument is only applicable to true "investment" contracts.⁴¹

The court also noted that, "[T]he recovery has a penal effect on a tort-feasor."⁴² This raises another argument which has often been raised in favor of the collateral source rule, namely that the rule serves to punish wrongdoers.⁴³ It is in conflict, however, with the rule that the negligent tortfeasor is not subject to liability for punitive damages, but only for actual

35. See text accompanying notes 20-22 *supra*.

36. 61 Wis. 2d 111, 211 N.W.2d 834 (1973).

37. *Id.* at 124, 211 N.W.2d at 841 (footnote omitted).

38. 83 Wis. 2d at 579, 266 N.W.2d at 330.

39. *Id.* at 582, 266 N.W.2d at 331-32.

40. *Id.* at 581-82, 266 N.W.2d at 331-32.

41. See text accompanying notes 34-35 *supra*.

42. 83 Wis. 2d at 580, 266 N.W.2d at 331 (quoting *Thoreson v. Milwaukee & Suburban Trans. Corp.*, 56 Wis. 2d 231, 243, 201 N.W.2d 745, 752 (1972)).

43. See *DOBBS*, *supra* note 32, at 586-87; Note, *supra* note 32, at 748-49.

damages suffered by the plaintiff because of his actions.⁴⁴ To the extent that the tortfeasor is liable for damages for which the plaintiff has already been compensated, an element of punishment is injected into the law of damages for mere negligence.⁴⁵

III. CONCLUSION

In several respects the *Rixmann* decision merely reaffirms prior law. The Wisconsin Supreme Court made it clear that it will continue to distinguish between "indemnity" and "investment" contracts of insurance. Only under "indemnity" contracts will an insurer be automatically subrogated to the plaintiff's right to recover the amount of insurance payments. In the absence of a policy provision to the contrary, payments under "investment" policies will not give an insurer such rights. Where subrogation does not occur, the collateral source rule will still apply, giving rise to the possibility of double recovery.

Unfortunately, the decision also made it clear that the Wisconsin Supreme Court will continue to classify all accident and health insurance policies as "investment" contracts. Instead of examining the terms of the various types of policies to determine whether they are investments or truly indemnify the insured, the court will simply continue to call all such policies "investment" contracts because it did so in *Gatzweiler* over seventy years ago. The court's failure to classify modern accident and health policies as "indemnity" contracts, even though they indemnify insureds for definitely ascertainable losses, will mean that the doctrine of subrogation will not be applied to situations entirely analogous to others where it has been applied for years. Consequently, the collateral source rule will have the effect of allowing double recovery in such situations where the insured neither expects nor requires such additional protection.

KENT A. TESS-MATTNER

44. See *Bielski v. Schulze*, 16 Wis. 2d 1, 18, 114 N.W.2d 105, 113 (1962).

45. See Note, *supra* note 32, at 749, cited in *Thoreson v. Milwaukee & Suburban Trans. Corp.*, 56 Wis. 2d 231, 243 n.6, 201 N.W.2d 745, 752 n.6 (1972) (contending that such punishment has no place in the law of damages for mere negligence).