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Our colleague, Tony Weir, died on 14 December 2011. For forty years, he was a regular contributor to the *Cambridge Law Journal*. He did not want any tributes or memorial. We publish below a long case note which he wrote in 1973 and published privately when it could not be included then in this *Journal*. Si monumentum requiris, lege!

SUBROGATION AND INDEMNITY

TONY WEIR

A FORD EMPLOYEE named Roberts carelessly drove a forklift truck into Morris, a person employed by Ford's cleaning contractor, Cameron. Morris sued Ford. Ford admitted vicarious liability for Roberts' negligence, and claimed against Cameron under a clause in the cleaning contract whereby Cameron had agreed to indemnify Ford against any loss or liability arising out of the cleaning operation. Cameron conceded liability to Ford under this clause and now sought an indemnity from Roberts, the careless employee of Ford: *Morris v Ford Motor Co.* [1973] 2 W.L.R. 843. The trial judge upheld Cameron's claim, but the Court of Appeal (Stamp L.J. dissenting) allowed Roberts' appeal on the ground that an implied term in the indemnity clause (or, *per* Lord Denning M.R., equitable considerations) excluded Cameron's normal right, as indemnitor, to be subrogated to Ford's right of recourse against Roberts, their careless employee, this right of recourse having been held by the House of Lords in *Lister v Romford Ice & Cold Storage Co.* [1957] A.C. 555 to enure even to the insured employer. Cameron has been granted leave to appeal, so the House of Lords has a good opportunity to reconsider *Lister*. While, at the technical level, *Morris* turns on the implications of a contract of

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indemnity and *Lister* deals with the implications in a contract of employment, the situation underlying both cases raises basic questions about the interaction of tort and that most familiar of indemnity contracts, insurance.

It is for a double reason that tort and insurance inevitably interact: to a plaintiff, insurance is an alternative device to tort for procuring compensation for harm, and, to a defendant, insurance is a device for avoiding the harm of having to pay for his torts.

If the plaintiff is insured against harm tortiously caused, we have the problem of cumulation of remedies. If the harm is to his body, he can keep the proceeds of both claims: a leg being inestimable, no one can say that he has been overpaid though he has been paid twice. But if the harm is to property, which can be evaluated, he would be profiting from a double recovery, and his enrichment would be unjust since he is entitled to compensation only, whether from tortfeasor or insurer. To avoid such enrichment (and exclusively for this purpose) the insurer who pays the victim is subrogated to (i.e. is entitled to use) his rights against the tortfeasor. The result is that the plaintiffs insurance does not diminish the incidence or extent of tort liability.

Defendants' insurance, on the other hand, does affect the incidence and extent of tort liability, by increasing it. "We assume that the defendant in an action of tort is insured unless the contrary appears" said Lord Denning M.R. recently (*Post Office v Norwich Union Fire Ins. Society* [1967] 2 Q.B. 363, 375). This affects tort law because it is much easier to award damages to the victim if one assumes that the defendant is not going to have to pay them out of his own pocket Hence decisions that behaviour not in fact reprehensible is in law tortious, or that an exemption clause, perfectly well understood, does not bar the plaintiffs claim. But the reason behind such decisions does not limit their effect: such decisions lay down a rule of law which makes a defendant liable whether he is insured or not If the defendant is not insured, the situation is fairly bad – the law is then transferring a loss from a person who suffered it to a person not better able to bear it; if the person suing is himself insured, the situation becomes unjust – because the plaintiff can be more easily indemnified elsewhere; if the plaintiff is in fact the victim's insurer, the injustice is compounded – for the plaintiff at interest has, after all, been paid to bear the loss in question.

Let us give an instance from that great source of litigation, the highway. The driver of a car incurs tort liability very easily. This is perfectly justifiable if he runs over a pedestrian: the driver is bound to be insured, and the pedestrian is almost certainly not insured, and, even if he is, he can cumulate the proceeds. Thus trivial carelessness in a driver is enough to make him liable. If liable to an injured pedestrian,

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he will be equally liable to the owner of a car with which he collides. This is not so good, for here the driver is not bound to be insured and the owner is quite likely to be insured. It consequently happens quite often that uninsured drivers, not in any real sense to blame, have to pay for damaging property although its owner, being insured, has not suffered any loss at all. In fact, the person they pay is not the owner, but the owner's insurance company exercising its right of subrogation. Indeed insurance companies exercise their right of subrogation *only* against uninsured drivers, since if the driver is insured the 'knock-for-knock' agreement between insurers comes into play.

It was stated earlier that the sole function of the subrogation device is to avoid the unjust enrichment of a victim who has concurrent claims against his insurer and the tortfeasor. Such concurrent claims may exist also in tort law, thanks to the rule that each of several tortfeasors is liable in full, but here double recovery is excluded by the rule (which would be suitable in insurance cases also) that a tortfeasor is released by what another tortfeasor pays. Even so unjust enrichment may still arise, since the tortfeasor so released may be said thereby to have been unjustly enriched at the expense of the tortfeasor who pays. This unjust enrichment cannot be avoided by subrogating the paying tortfeasor to the rights of the victim against the other tortfeasor, since any such rights have gone. Instead there is an analogous device: the person liable *with* others is given an independent right of contribution, and the person liable *for* others is given a right of indemnity against those he releases by his payment to the victim. This right is provided (though there may be a concomitant claim for a common law indemnity or a better action for damages for breach of contract or even for tort) by the 1935 Act, under which the measure of recovery is what is just and equitable, as one would expect of a remedy based on the principle of unjust enrichment.

Now contribution, as a device, is open to the same criticisms as subrogation: its creation has led to an extension of tort liability and to unfair results. Just as the courts hold against defendants because they are probably insured, so they hold against a defendant, not materially at fault, because he will have a claim against the person mainly to blame (see, e.g., *Dutton v Bognor Regis U.D.C.* [1972] 1 Q.B. 373, 398, per Lord Denning M.R.). Furthermore, claims for contribution or indemnity, like subrogation claims, tend to be brought by a person well able to bear the loss against persons able to bear it less well, or, at any rate, not better. This is obvious for subrogation claims, since the subrogee is almost invariably an insurance company. It is true of contribution claims also for the reason that such claims can be brought only by those who have paid the victim on demand, and the people from whom victims demand compensation are those who are best able to pay

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or those who are most obviously liable, these two categories being nearly identical because those most exposed to liability tend to take out insurance against it.

Let us give an instance from that other great source of litigation, the factory. A person injured by a workman at work naturally sues the workman's employer; it is he (more usually, it) who has the money. Because the employer is likely to be sued, he takes out insurance. He takes out insurance against liability to his own workmen because he is bound to, and he takes out insurance against liability to others because, the premium being an allowable expense, he would be a fool if he didn't (unless he (it) is enormously rich). But of course it is the workman who is at fault, and our law gives the employer, because his hands are clean, a right of indemnity against him. Now if there is one class of persons who are unlikely to carry insurance, it is the working class, and it is they who are especially likely to be guilty of torts, since liability attaches to people who do things badly and only people who do things at all can do them badly. *So* the right of indemnity (based, let it be remembered, on the principle of unjust enrichment) operates, as is its wont, to shift the loss from a person well able to bear it to a person not well able to bear it. That an uninsured employer should have a right of indemnity from his workman seems odd enough, but perhaps he is unlikely to use it. That the employer's insurer should, by subrogation, be able to exercise that right against the wish and interest of the employer seems monstrous, which is no doubt why those who insure employers against liability to their workmen have undertaken, under duress, not to do so, Our case fell outside the agreement, since Cameron was not an insurer and Morris was not a Ford employee, so it forces us to ask whether the law should not be formally changed.

One could oppose any change in the law by saying that the root principle of the law of tort is that the person at fault should pay and that the devices of subrogation and contribution tend to this result and are therefore good. But we must remember two things. The first is that fault need not nowadays be serious to entail liability, and that, furthermore, we often, as between master and servant, ignore it. If we do not reduce the servant's claim against the master on the ground that the servant's careless error contributed to his own injury (*Hawkins v Ian Ross (Castings) Ltd.* [1970] 1 All E.R. 180), why should we make the servant fully liable to the master he has exposed to liability for harm caused to others? The latter seems an a *fortiori* case. Secondly, the devices of subrogation and contribution are not part of the law of tort at all, whose role is exhausted once the primary victim is paid. This can, and must, be made very clear.

The insurer who claims subrogation and the tortfeasor who claims indemnity have one thing in common: their claim is in respect of

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financial loss only. Now the law of tort gives no claim to the person who suffers purely financial loss as the result of another's carelessness, unless there be a special relationship. This rule is not the result of an oversight – it was consciously enacted in the German Civil Code in 1896; nor is it a medieval skeleton – it has just, thank goodness, been kept in life by the Court of Appeal. It is the result of a deliberate and wholly justifiable decision to the effect that whereas one must conduct oneself with consideration for the person and property of others, one need not bother about their pocket unless one is very close to them indeed. Accordingly it must be emphasised that the fact that the victim's insurer suffers loss as a result of the tortfeasor's conduct is not sufficient, according to the basic value-judgements of our legal system, to give the insurer a claim in his own right against the tortfeasor: this has been decided in terms by the House of Lords (*Simpson v Thomson* (1877) 3 App.Cas. 279). Similarly the tortfeasor who pays a victim has no claim in tort against another tortfeasor liable in respect of the same damage. The effect of the devices of subrogation and contribution is to procure that the *only* persons who have a claim in respect of the financial loss caused to them by the carelessness of strangers are those who have been paid to take the risk of that loss and those who, by their torts, have matured the risk of that loss – strange bedfellows to put in the best room while those who have suffered financial loss they have neither undertaken nor caused are put in an outhouse. If, therefore, we cut down the right of subrogation and contribution we are not invading a basic precept of the law of tort, we are, on the contrary, upholding it. The *only* reason an insurer is granted the right of subrogation is to prevent the insured's being enriched by a double recovery, and the *only* reason that a tortfeasor is given a claim to contribution or indemnity is to prevent the unjust enrichment of another tortfeasor. If this be true, then when we are presented with a claim by an insurer to be subrogated to his insured's right to indemnity from another tortfeasor we can surely ask the direct question whether the refusal of such a claim to the insurer would unjustly enrich the defendant. Is Roberts unjustly enriched vis-à-vis Cameron when Cameron, pursuant to contract, paid Ford who had paid Morris? The answer is obvious enough. Roberts is not enriched in fact, since Morris would never have sued him, and neither would Ford. And if Roberts is in law enriched, in law that enrichment is not unjust, since for the impoverishment of Cameron there is a cause, namely the clause in the contract with Ford pursuant to which their liability arose.

Another objection, and a very English one, would be that no one should benefit from the insurance taken out and paid for by another, whether victim or fellow-tortfeasor. Do we not have a doctrine that third parties cannot benefit from contracts? We do indeed. It means, or

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ought to mean, that A cannot sue on a promise made by B to C. It does not at all follow from such a doctrine that when C is suing A, C's rights against B need to be ignored, as happens now when an insured victim sues a tortfeasor. Much less does it entail that B should have a suit against A just by reason of B's having a contract with C, as happens now when an insurer is subrogated to his insured's right to claim tort damages. But in any case the insurance contract (the only great contract unknown to the Romans, who also believed in privity) is a very sociable sort of contract: it has lots of parties. The bailee's policy can benefit the bailor; the exporter's policy on cargo can benefit a later purchaser; the policy of the man who sells a house can benefit the man who buys it; the car owner's policy characteristically and effectively protects those who drive it with his permission; the householder's policy protects his household; and, most of all, every liability policy protects the victim who has successfully sued the insured. This being the law, it hardly seems inconsistent with principle or practice to hold that a tortfeasor, such as he now commonly is, may benefit from the fact that his victim or his fellow-tortfeasor is insured. The grounds would be exactly those on which a tortfeasor benefits, if that be the word, from the fact that his victim is old or unemployed, namely that the loss he causes is in fact less than it might otherwise have been, except possibly to others who have no independent claim against him.

It is clear enough what should be done; but how can it be done? The House of Lords can certainly reverse *Lister* and hold that an insured employer cannot claim an indemnity from a careless workman. Indeed there should be no difficulty in procuring by judicial act that the workman be liable to his employer, insured or not, only if he is gravely careless; this has been done in both France and Germany, codes notwithstanding.

That would be enough to allow the House of Lords to uphold the decision of the Court of Appeal in the present case, but it would deal only with indemnity and not also with subrogation. Subrogation cannot be dealt with so easily. In particular one cannot uphold the ground of decision of Lord Denning M.R. that subrogation, as a creature of equity, arises only where its operation is in effect equitable: in *Castellain v Preston* (1883) 11 Q.B.D. 380, the *locus classicus* of subrogation, its effect was as inequitable as one can imagine – the purchaser of a house destroyed by fire between contract and completion was held bound to pay the vendor's insurer, and Lord Denning himself went out of his way in *Harbutt's Plasticine* [1970] 1 Q.B. 447 to invalidate a limitation clause so as to make the defendant pay his contractor's fire insurer. Nor is the method of James L.J. any better: he held that it was an implied term in the indemnity clause between Cameron and Ford that Cameron be not subrogated to Ford's rights

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against its workmen. No such implication is possible on the facts or in justice. Ford was not even represented in the Court of Appeal and, if it had been, it could not with even residual decency have suggested the implied term in question. For if there was one party in the whole affair who was at fault it was Ford. Ford was not bound to require its cleaners to accept a contract which put on the cleaners a liability which the law put on Ford and which Ford was well able to bear, nor was Ford bound to make any claim under that contract in a case where it was their own servant who was at fault. Having made such a contract, maximising their rights under the law, and having claimed under that contract in a like spirit, it very ill became Ford to object to Cameron's claiming its full rights under the law on the mere ground that Ford would thereby be put to some trouble. If Ford is put to any trouble, it is Ford's own fault and Ford's own fault alone. Perhaps if the factory is closed for the duration Ford's ever-so-clever legal department may learn that abuse of power over contractors may lead to the same results as abuse of power over employees, for precisely the same reason.

It is to be hoped, these last considerations notwithstanding, that the House of Lords will dismiss Cameron's appeal by reversing *Lister* and, in so doing, use forceful terms to call the attention of the Law Commission, whose role it is to propose fundamental and needed changes in the law, to the desirability of putting forward quite a simple little Act – less glamorous, no doubt, than a code of contract law, but not beyond their capacities and calculated to do good without attendant harm – to the effect that insurers should no longer be able to sue, whether by subrogation or assignment, persons liable to their insured save, perhaps, to the extent that those persons are themselves insured against liability. The best way to achieve this result would no doubt be to take the bull by the horns and provide that a person who is entitled and able to recover in respect of any loss or liability from an insurer or other indemnitor should to that extent be unable to recover from any other person, unless, perhaps, that other person is himself entitled and able to recover from an indemnity insurer. It need hardly be said that there is not the slightest chance of this being done.

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