William & Mary Law Review

Volume 3 | Issue 2 Article 22

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Repository Citation

Sheppard W. McKenney, *Municipal Corporations - Subrogation to Employees' Rights Against Third Party Tortfeasors*, 3 Wm. & Mary L. Rev. 528 (1962), https://scholarship.law.wm.edu/wmlr/vol3/iss2/22

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MUNICIPAL CORPORATIONS

Subrogation of a Municipal Corporation to its Employees' Rights Against Third Party Tortfeasors

In the case *City of Richmond* v. *Hanes*,[1] the plaintiff, a police officer of the city, was injured in the course of his employment as a result of the negligence of a third party. The city, having paid the plaintiff's medical bills, sought to recover the amount it had expended, relying on a provision of the city personnel rules which provides that such payments constitute an assignment to it of the right to recover damages. After the officer's claim for damages was settled, the city filed its claim to the money paid into court by the third party and was made a party defendant. The trial court ruled that the city was not entitled to assignment of the plaintiff's claim in the absence of a statute permitting assignment of personal actions arising *ex delicto*, and further, that there were not sufficient grounds to raise subrogation in favor of the city. The Supreme Court of Appeals affirmed this decision on the same grounds.

The question of the right of a municipal corporation to be subrogated to a claim of an employee against a third party tortfeasor has been raised in several other jurisdictions.[2] In the case of *Potoczny to the use of the City of Philadelphia v. Vallejo*,[3] the court did not discuss the validity of subrogating a personal tort claim. Since the city had discharged an obligation primarily owed by another, it was held that subrogation must take place in order to prevent unjust enrichment of the obligee.[4]

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[1] 203 Va. 101, 122 S.E.2d 895 (1961).

[2] In the only major case of this type (i.e., concerning a public employer) involving the Federal Government, United States v. Standard Oil Co., 322 U. S. 301 (1947), the government asked for a direct right of action against a third party who had injured a soldier. The action was brought on a master-servant theory and the question of subrogation was not even in issue, 332 U.S. 301 at 304, Footnote 5. The Supreme Court refused to "create this new tort liability", contending that if Congress had wanted such a liability to exist, they would have created it.

[3] 170 Pa. Super. 377, 85 A.2d 675 (1952).

[4] The doctrine of subrogation is generally stated to be—"When property of one person is used in discharging an obligation owed by another, under such circumstances that the other would be unjustly enriched by the benefits thus conferred, the former is entitled to be subrogated to the position of the obligee . . ." RESTATEMENT, RESTITUTION § 162 (1936).

The opposite view was taken in the case of *Birmingham v. Walker*.[5] The court, in refusing to grant the right of subrogation to the city, held that the obligation of the city to pay sick leave benefits to employees for injuries received in the course of employment did not amount to a "contract of indemnity". The court contended that this situation is closely analogous to an accident insurance policy in which there can ordinarily be no subrogation in favor of the insurer.

While the *Hanes* case reached the same result as the *Walker* case, substantially different reasons were given for arriving at that result. The Virginia Court based its conclusion on three major points: (1) that in the absence of a validating statute there can be no assignment of a personal tort claim,[6] (2) that subrogation is essentially the same remedy as assignment and therefore its use in a personal tort claim is also invalid, and (3) that the city was a mere volunteer in making such payments to its employee and was thus not entitled to subrogation. As to the first point, it can hardly be questioned that personal tort claims are not assignable. The second and third points are, however, open to some discussion.

The authority given by the Virginia Court in arriving at its second conclusion was a quotation from the California case of *Fifield Manor v. Finston*,[7] which stated:

> While subrogation and assignment have certain technical differences, each operates to transfer from one person to another a cause of action against a third, and the reasons of policy which make certain causes of action nonassignable would seem to operate as forcefully against the transfer of such causes of action by subrogation.[8]

Neither the *Hanes* nor the *Fifield* cases cited any direct authority supporting this proposition. On the contrary, it would seem that the authorities hold the opposite view.[9] Assignment is

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[5] 267 Ala. 150, 101 So.2d 250 (1958).

[6] It was held that the city charter did not grant sufficient authority to the city to alter the ancient rule against assignability of personal tort actions.

[7] 54 Cal. 2d 632, 354 P.2d 1073 (1960).

[8] *Id.* at 640, P.2d at 1078.

[9] RESTATEMENT, RESTITUTION § 162, comment H (1936).

held to be a transfer whereas subrogation contemplates only a substitution.[10] That is to say, assignment involves continued existence of the claim assigned whereas subrogation presupposes actual payment and satisfaction of the claim, although a remedy is kept alive in equity.[11] Ostensibly, then, subrogation may take place under circumstances which would not admit of assignment. Thus, in the recent case of *Remsen v. Midway Liquors, Inc.*,[12] it was held that the rule against assignment of personal tort claims did not apply to subrogation since subrogation is a substitution and not a transfer. The Illinois Court declared that there were "no public policy reasons for forbidding subrogation in personal injury cases."[13]

The personal injury insurance analogy used in *Birmingham v. Walker, supra*, substantiates rather than refutes this position. While the intent of the parties in personal injury insurance is generally held not to be indemnification, that is no indication that indemnification is not possible in personal injury cases. Indeed, it is generally held—and the Alabama Court in the *Birmingham* case admitted—that there may be subrogation in personal accident insurance if there is *a stipulation so permitting in the policy.*[14] The holding in the *Birmingham* case boils down to the contention that the intent of the parties was not to indemnify the employee but to pay certain expenses absolutely in the event of an injury. It should be noted that in the *Hanes* case, unlike the *Birmingham* case, the city's personnel rules provided for assignment of the employee's claim, indicating that the purpose of the city was indemnity, thereby negating the idea of an absolute promise on the part of the city.

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[10] Wojcuick v. United States, 74 F. Sup. 914 (1947); Reconstruction Finance Corporation v. Teter, 117 F.2d 716, *cert. denied* 314 U. S. 620 (1949).

[11] Gatewood v. Gatewood, 75 Va. 411 (1881); Kansas City Title & Trust Co. v. Fourth Nat. Bank, 135 Kan. 414, 10 P.2d 896 (1932); American Surety Co. v. Bank of California, 133 F.2d 160 (1943); Remsen v. Midway Liquors, Inc., 30 Ill. App. 2d, 32, 174 N.E.2d 7 (1961).

[12] *Supra* note 11.

[13] *Id.* at 12. It should also be noted that all but three of the states (Ohio, New Hampshire and West Virginia) have incorporated a subrogation provision into their workmen's compensation laws, indicating that legislative intent favors rather than disapproves of the use of subrogation in personal injury cases.

[14] APPLEMAN, INSURANCE LAW AND PRACTICE 4931 (1962).

The third conclusion of the court to the effect that a volunteer is not entitled to subrogation is indisputable as a general proposition of law.[15] However, it is at least arguable that in the present case the city was not a "volunteer" at all. Although the city was a "volunteer" in the sense that it voluntarily provided for the payment of sick leave and medical expenses in its personnel rules,[16] it would certainly seem that the rule, once made, would be binding upon the city. Thus, when the city made these payments to Hanes, it was acting pursuant to a legal obligation, even though the obligation was voluntarily created.

The question then resolves itself to "exactly who is a 'volunteer'?" It is said that "the term 'volunteer' as an exception or limitation should be narrowly and strictly construed to the end that the doctrine [subrogation] may be expansively and liberally applied".[17] Decisions in the United States are virtually unanimous in declaring the liberal and broad application of the doctrine of subrogation.[18] It would appear, then, that there is substantial reason for contending that the city was more than a "mere volunteer".

The effect of the decision in this case is to award the employee a double recovery for a single injury, thus violating a basic tenet of the common law.[19] Unless a statute is passed changing the present state of affairs, it is difficult to perceive how this difficulty can be avoided.[20] The city is faced with the dilemma of either not paying for its policeman's medical expenses—incurred in the line of duty—or else awarding him a double recovery in many instances. If the city cannot utilize either the assignment or subrogation theories to reimburse itself, it cannot effectively indemnify its employees against pecuniary loss resulting from personal injury.

S.W.M.

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15 POMEROY'S EQUITY JURISPRUDENCE, 2343 (2d ed. 1905).

16 Section 303, Clause 8, Personnel Rules of the City of Richmond.

17 Boney v. Central Mut. Ins. Co., 213 N.C. 563, 197 S.E.2d 122 (1961).

18 See generally 83 C.J.S. *Subrogation* § 5b (1955).

19 For an excellent discussion of the undesirability of a double recovery in cases of this type, see Geneva Construction Co. et al. v. Martin Transfer and Storage Co., 41 Ill.2d 73, 122 N.E.2d 540 (1954).

20 The Virginia Workmen's Compensation Law exempts policemen and firemen in municipalities with populations exceeding 230,000 from coverage. Therefore the city cannot avail itself of the subrogation provision in that statute. VA. CODE ANN. § 65-4 (1950) (Additional Supp. 1956).