THE EFFECTS OF SETTLEMENT ON AN INSURER'S SUBROGATED RIGHTS

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1. Introduction

The term "subrogation" is derived from the Latin root, "*subrogare*", meaning "to substitute". This is an apt description of its current legal usage in the area of insurance law. In this context, subrogation occurs after an insured person suffers a loss and makes a claim under his or her insurance policy. Once the insurer has fully indemnified the insured, it can then sue the third party who caused the loss in the insured's name. Essentially, the insurer "inherits" the rights of the insured to pursue a claim against the wrongdoer in an attempt to recover the monies that it paid out under the policy.[1]

But what happens if the insured, having claimed under his or her policy and having been paid by the insurer, decides to pursue a claim against the third party and accepts a cash settlement in return for executing a release? Under the general law of subrogation, the insurer would be entitled to claim any surplus funds from its insured in order to recover, at least in part, the money it paid out under the policy. However, according to the Ontario case of *Busgos v. Khamis*,[2] if a third party has notice of the insurer's subrogation rights and reaches a settlement with the insured, that third party may

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1. See, generally: C. Brown and J. Menezes, *Insurance Law in Canada*, vol. 1, looseleaf (Toronto: Carswell, 1999), c. 13; *MacGillivray on Insurance Law*, 9th ed. (London: Sweet & Maxwell, 1997), c. 22; M.G. Baer and J.A. Rendall, eds., *Cases on the Canadian Law of Insurance* (Toronto: Carswell, 2000), c. 5; E.R.H. Ivamy, *General Principles of Insurance Law*, 6th ed. (London: Butterworths, 1993), c. 46; M.A. Clarke, *The Law of Insurance Contracts* (London: Lloyd's of London Press, 1989), c. 31; and R. Merkin, *Colinvaux's Law of Insurance*, 7th ed. (London: Sweet & Maxwell, 1997) at §8-09 to 8-31.
2. *Infra*, footnote 16.

be required to pay out a second time in order to satisfy the insurer's subrogated rights. As a result, the insurer is entitled to claim its loss from the third party, who is thus forced to pay twice, while the insured is permitted to recover twice.

This article advocates a departure from the current state of the law in Ontario as established by the *Busgos* decision. Part 2 provides a brief review of the basic principles of the law of subrogation to guide the reader through the discussion ahead. Part 3, the heart of this article, reviews the law specific to settlements in the subrogation context. After identifying certain defects in the *Busgos* decision, the article then explores what is submitted to be the alternate, and preferable, approach taken by the courts in other provinces, notably Alberta. A discussion of the relevant statutory modifications to the common law in this area is also provided. Ontario has enacted an inconsistent framework of statutory provisions governing subrogation rights in some circumstances but not in others. The validity and enforceability of a settlement release against an insurer's subrogation rights varies widely depending on the governing legislation in the particular area of insurance at issue (*e.g.* health, fire, automobile, etc.).

The article concludes with a review of the need for change in the law. Regardless of whether the source of such change is judicial consideration of the *Busgos* case or clarification from the legislature through legislative amendments, a consistent and universally applied approach to settlements in the subrogation context should be adopted in Ontario. Doing so will enhance the transparency, predictability and consistency of subrogation law and, it is hoped, encourage settlements and eliminate unnecessary litigation over who should bear the loss in subrogation claims.

2. The Law of Subrogation Generally

Underlying the law of subrogation is the equitable principle that an insured person who has incurred loss should recover no more than the value of that loss. The insurer pays out under the policy to the insured and, once the insured has been "made whole" again,[3] the insurer seeks to recover its loss by enforcing the litigation rights it

3. At common law, "the insurer's right of subrogation exists only when its customer has been fully indemnified for the loss, even if the insurer has paid to the full extent of its liability": Brown, *supra*, footnote 1, at §13.3(a). Brown finds support for his position in the leading case of *National Fire Insurance Co. v. McLaren*,

inherited from the insured against the wrongdoer. In this way, the insured does not recover twice and liability is ultimately fixed on the wrongdoer who caused the loss. Subrogation is a common law right although, like all common law rights, it can be modified by legislative enactment[4] or private contractual provisions.[5]

The classic statement of the nature of subrogation was provided by Chancellor Boyd in *National Fire Insurance Co. v. McLaren*,[6] which was cited with approval by the Supreme Court of Canada in *Ledingham v. Ontario Hospital Services Commission*:[7]

> The doctrine of subrogation is a creature of equity not founded on contract, but arising out of the relations of the parties. In cases of insurance where a third party is liable to make good the loss, the right of subrogation depends upon and is regulated by the broad underlying principle of securing full indemnity to the insured, on the one hand, and on the other of holding him accountable as trustee for any advantage he may obtain over and above compensation for his loss. Being an equitable right, it partakes of all the ordinary incidents of such rights, one of which is that in administering relief the Court will regard not so much the form as the substance of the transaction. *The primary consideration is to see that the insured gets full compensation for the property destroyed and the expenses incurred in making good his loss. The next thing is to see that he holds any surplus for the benefit of the insurance company.*

There are three potential situations in which an insurer's subrogated claim can arise:[8]

> (i) if the insurer has already paid out under an insurance policy, and the insured has been fully compensated, *the insurer may bring an action against the third party in the insured's name*. Any amount recovered goes first to reimburse the insurer, and any recovery in excess of the amount paid by the insurer is owed to the insured;
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> (ii) if the insured has already exercised its rights against the third party and recovered the value of its loss, and the insurer has paid out under the insurance policy, *the insurer may seek reimbursement from the insured*; or
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> (iii) if the third party has indemnified the insured and the insurer has not yet paid out, *the insurer may refuse to pay the insurance proceeds.*

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infra, footnote 6, in which the court held (at p. 688) that "there can be no such thing as subrogation to the right of a party whose claim is not wholly satisfied".

4. See the discussion at Part 3(2) below.
5. A good discussion of this issue, albeit from an English perspective, may be found in J. Bird, "Contractual Subrogation in Insurance" (1979), J. Bus. L. 124.
6. (1886), 12 O.R. 682 at p. 687 (Ont. Ch.) (emphasis added).
7. [1975] 1 S.C.R. 332 at p. 337, 46 D.L.R. (3d) 699, 2 N.R. 32.
8. Brown, *supra*, footnote 1, at §13.1 (emphasis added).

Category (i) above highlights the difference between subrogation and assignment. While in a subrogated claim the insurer may recover no more than the amount paid out to the insured, in cases where an insured has assigned its right to recover to the insurer, the insurer may retain all monies recovered from the third party.

The insurer's right of subrogation is derivative. This means that the insurer inherits the legal rights of the insured and can, therefore, stand in no better position towards the third party than the insured would if it sued independently.[9] Therefore, any limits on the insured's right to recover are passed on to the insurer. This limitation is an essential element of the settlement discussion in Part 3 below.

The insurer's right of subrogation arises only *after* the insured has been fully indemnified for its loss, even if the insurer has paid out to the full extent of its liability.[10] This limitation recalls the essential nature of subrogation, which is to deny the insured double recovery. This principle would apply to the three categories of subrogation outlined above as follows:[11]

> (i) where the insurer is seeking to enforce the insured's rights against a third party, the insurer must have fully indemnified the insured before it can (a) control the litigation or settlement process, and (b) recover from the third party;
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> (ii) where the insurer has paid out under a policy and the insured has already received compensation for its loss from the third party, the insurer may only seek reimbursement from the insured if the total amount recovered by the insured exceeds its total loss. Even then the insurer may only recover the surplus amount, so that the insured remains fully indemnified;
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> (iii) where the insured has received payment from a third party and the insurer has not yet paid out under the policy, the insurer may withhold only the amount paid by the third party, and must make good the remainder of the insured's loss.

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9. *Royal Insurance Co. of Canada v. Aguiar* (1984), 48 O.R. (2d) 705, 16 D.L.R. (4th) 477, 8 C.C.L.I. 300 (C.A.). See also *Bow Helicopters Ltd. v. Bell Helicopter Textron* (1981), 16 Alta. L.R. (2d) 149, 125 D.L.R. (3d) 386, 31 A.R. 49 (C.A.); *Leibel v. Derkach* (1975), 61 D.L.R. (3d) 176, [1976] I.L.R. 186 (Sask. Q.B.); and M.G. Baer, "Rethinking Basic Concepts of Insurance Law" in *Special Lectures of the Law Society of Upper Canada, 1987* (Toronto: Richard De Boo, 1987) 199 at p. 212.
10. *Supra,* footnote 3. See also *Ledingham v. Ontario Hospital Services Commission,* [1972] 1 O.R. 785 at p. 793, 24 D.L.R. (3d) 257 (H.C.J.), revd [1973] 1 O.R. 291, 31 D.L.R. (3d) 18 (C.A.), revd and trial judgment restored by the S.C.C. *supra,* footnote 7.
11. Brown, *supra,* footnote 1, at §13.3(a); see also E.A. Dolden, "Practical and Substantive Aspects of Subrogation" (1992-94), 4 C.I.L.R. 121 at p. 174.

Once the insurer has paid for the full extent of the insured's loss, it gains control over any proceedings against the third party despite the fact that the proceedings are brought in the name of the insured.[12] Decisions respecting the litigation are made by the insurer. In the event that the insured pursues litigation or a settlement independently, he or she must act reasonably and owes a duty of good faith to the insurer.[13] Where the insured acts unreasonably and prejudices the insurer's subrogation rights, the insured will be liable to compensate the insurer for the prejudice suffered.[14] The insured cannot accept a lesser amount from the third party merely because the balance of the loss will be covered by insurance monies. If the insured has been compensated by both the insurer and the third party, any surplus money belongs to the insurer and is held in trust for it.[15]

3. The Effects of Settlement on an Insurer's Subrogated Rights

This article advocates changes to the common law of Ontario as it pertains to the effects of settlement upon an insurer's subrogation rights. It is important to note that the common law in this area has been modified by legislation in certain circumstances. Section (1) below outlines the state of the common law in Ontario and explores the need for change. Section (2) reviews the relevant (but inconsistent) legislative modifications to the law of settlement in subrogation cases and attempts to explain why these legislative provisions support the argument that the state of the law should be revisited by the courts or the legislature in Ontario.

(1) Case Law

This section reviews the case law on the subject of an insurer's subrogation rights following a settlement by the insured. There is a

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12. Brown, *ibid.*, at §13.3(b); see also R. Dedman, "Current Problems in Subrogation" (1994-95), 5 C.I.L.R. 1 at pp. 4-5.
13. *Globe & Rutgers Fire Insurance Co. v. Truedell* (1927), 60 O.L.R. 227, [1927] 2 D.L.R. 659 (C.A.).
14. Brown, *supra*, footnote 1, at §13.3(b); see also Law Reform Commission of Australia, "Report #20, Insurance Contracts" (Canberra: Australian Government Publishing Service, 1982) at §307.
15. *McLaren*, *supra*, footnote 6, cited with approval by the S.C.C. in *Ledingham*, *supra*, footnote 7.

dearth of judicial authority on this subject, particularly in Ontario, despite the fact that this issue arises daily — *i.e.*, any time parties who have received insurance monies settle a dispute. The state of the law in Ontario since *Busgos v. Khamis*[16] is particularly troubling and, as the discussion below will demonstrate, is in need of change. The courts in other provinces, notably Alberta, have provided an example that should be followed in Ontario.

(a) The Law in Ontario: Busgos v. Khamis

In *Busgos*, Wawanesa Mutual Insurance Co. ("Wawanesa") brought a subrogated claim against the defendant, Firoz Khamis ("Khamis"). A fire, the result of Khamis' negligence as tenant, had destroyed certain premises owned by the insured landlord, Alex Busgos ("Busgos"). Wawanesa claimed reimbursement in the amount of $14,000, representing the funds it had paid out under its policy with Busgos. Khamis defended on the basis that Wawanesa had no right to bring the claim, as Busgos had settled the claim against him. In return for a payment of $1,768.23, Busgos had released Khamis from any liability. If the release was valid against the insurer, then Wawanesa would be barred from bringing its claim.

The court rejected Khamis' argument. Scott D.C.J. held that since Khamis had knowledge (through his solicitor) of Wawanesa's subrogated claim *before* he entered into the settlement with Busgos, he could not rely on the settlement to escape liability to Wawanesa. Justice Scott concluded that where a third party wrongdoer has notice of the insurer's subrogated interest, any release granted to that third party is ineffective as against the insurer.

This conclusion appears to conflict with the general principles of subrogation law discussed in Part 2 above — *i.e.*, that the insured has a duty to act in the best interests of both itself *and* the insurer and, if the insured does anything to prejudice the insurer's rights, the insurer's remedy is against the insured and not the third party. Put simply, Wawanesa should have looked to Busgos either to pay back any additional compensation he received from Khamis or to pay damages for acting in bad faith. Furthermore, the outcome in *Busgos*

16. (1990), 48 C.C.L.I. 233, [1990] O.J. No. 179 (QL) (Ont. Dist. Ct.), supp. reasons 48 C.C.L.I. 233 at p. 240.

rested on a number of questionable authorities, each of which is discussed below.

Scott D.C.J. cited portions of the Ontario High Court's decision in *Ware Chemical of Canada Ltd. v. Cosmos Chemical Co.*,[17] which held that:[18]

> if a third party has notice that the insurer has been subrogated to the claim of the insured, a release given by the latter is ineffective. If any authority is needed for the proposition, I refer to MacGillivray *op. cit.*, para. 1903, and cases there cited.

There are two problems with using *Ware Chemical* to reach this conclusion. First, the passage of the judgment reproduced above was irrelevant to the outcome in the *Ware Chemical* case. Justice Scott admitted it to be "obiter on obiter".[19] Second, the *Ware Chemical* quote relies on *MacGillivray on Insurance Law*, then in its fifth edition,[20] as authority for the rule that the release is no defence to a subrogated claim if the defendant has notice of the insurer's subrogation rights. However, the authors of this text subsequently reversed their opinion on this point in the seventh edition[21] of the text (1981). Thus, at the time *Busgos* was decided (1990), the fifth edition of *MacGillivray* relied on in *Ware Chemical* was no longer an accurate statement of the law.

In fact, since 1981 the *MacGillivray* text has taken the opposite position on whether or not a release given by the insured binds the insurer. The current edition of *MacGillivray* summarizes the law as follows:[22]

> *Release or settlement of claims*. So far as third parties are concerned the insurer and the assured are a single entity, and an unconditional settlement or abandonment of a claim by the assured will prima facie bind the insurer. But, as between the insurer and the assured, that is not the end of the matter. The assured is under an obligation not to deal with any claim he possesses, or will possess, against a third party in such a way as to prejudice the insurer's rights of subrogation in relation to it. The insurer's remedy will be to repudiate liabil-

17. [1973] 3 O.R. 255, 36 D.L.R. (3d) 483.
18. *Ibid.*, at p. 266.
19. *Busgos*, *supra*, footnote 16, at p. 238.
20. *MacGillivray on Insurance Law*, 5th ed. (London: Sweet & Maxwell, 1961) at §1903-04.
21. *MacGillivray on Insurance Law*, 7th ed. (London: Sweet & Maxwell, 1981) at §1172 and 1175.
22. *MacGillivray on Insurance Law*, 9th ed. (London: Sweet & Maxwell, 1997) at §22-52.

> ity on the policy, or to counterclaim for damages for the loss of, or diminution of, their rights, depending on the circumstances.

With respect to the issue of the defendant having notice of the insurer's claim, the authors offer the following:[23]

> *Release after payment.* If the assured makes a release or settlement with the third party after he has been paid by the insurers, and to their prejudice, he will be liable to compensate them for the amount by which he has diminished their rights of subrogation . . . It has been held that insurers who have paid out under their policy are never bound by a release or compromise made by their assured if the third party has notice of the payment before completing the transaction, but it is submitted that this is too wide. This part of the decision was *obiter* . . .

Based on the foregoing, it appears that *Ware Chemical* was no longer good authority for the proposition that Scott D.C.J. was trying to establish in *Busgos*.

Other cases were cited as support for the conclusion in *Busgos*. Perhaps the most significant of these was *The Connecticut Fire Insurance Co. v. The Erie Railway Co.*[24] In that case, the insured's hotel and premises were damaged in a fire caused by sparks from the defendant railway's passing train. The insured and the railway entered into a settlement, as a result of which the insured provided the railway with an (apparently) complete release. The railway then raised the release as a defence to the insurer's subrogated claim.

The court referred to several cases in its decision and summarized the case of *Clark v. Wilson*[25] as follows: "[i]f the wrongdoer pays the assured after payment by the insurer, with knowledge of the facts, it is regarded as a fraud upon the insurer, and he will not be protected from liability".[26] This is the portion of the *Connecticut Fire* decision cited by Scott D.C.J. in *Busgos*.[27] However, in *Connecticut Fire* the court later noted that "[t]he question is presented in this case in a somewhat novel aspect, *and unlike that of any other case to which our attention has been called* . . . this question and the liability of the defendant *depend on the construction to be put upon the release*".[28] Ultimately, the railway company's defence failed due to

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23. *Ibid.*, at §22-55 (the decision referred to is *Haigh v. Lawford*, discussed at footnotes 32 and 33, *infra*).
24. 73 N.Y. 399 (N.Y.C.A. 1878).
25. 103 Mass. 219.
26. *Supra*, footnote 24, at p. 402.
27. *Supra*, footnote 16, at p. 240.
28. *Supra*, footnote 24, at p. 403 (emphasis added).

poor drafting of the release, and not because of its prior notice of the insurer's interest.

The other decisions referred to by Scott D.C.J. in *Busgos* similarly turned on their individual facts and disclose no broader principle. In *Smidmore v. Australian Gas Light Company*,[29] a decision of the New South Wales Supreme Court, the defendant gas company's negligence led to an explosion which destroyed part of the insured's house. Only a portion of the damage was covered by insurance. The plaintiff settled with the gas company for a cash payment and signed a release. The defendant subsequently resisted the insurer's subrogated claim on the grounds that the insured had signed a total release. The court upheld the insurer's claim. In its view, the release applied only to the uninsured portion of the damage so that "the release only affects what is mentioned in the recitals — that is, is confined to the uninsured part of the loss".[30] The insurer recovered for the damage falling outside the release, but Justice Scott noted that "there are no equivalent recitals in the release at issue"[31] in the *Busgos* case. Justice Scott also referred to the English County Court decision in *Haigh v. Lawford*,[32] but admitted that "this case is distinguishable on its facts, since it appears that the *insurer* provided the form of release".[33]

The foregoing discussion is intended to demonstrate that the conclusion in the *Busgos* case is open to doubt, particularly as it is inconsistent with the general law of subrogation. While it may have been a just outcome on the particular facts of that case, it is submitted that the principle established by *Busgos* should not be followed. This issue should be revisited by the Ontario courts, particularly in light of the approach taken by courts in other provinces. These cases are discussed below.

(b) The Law in Other Provinces: An Alternative to Busgos

The same issue that confronted the court in *Busgos* came before the Alberta courts in *B.H. Shopping Centre Ltd. v. Marrazzo*.[34] The

29. [1881] 2 N.S.W.L.R. 219.
30. *Ibid.*, at p. 222.
31. *Supra*, footnote 16, at p. 237. The authors of the *MacGillivray* text also note that the outcome in *Smidmore* depended on "an incomplete release": *supra*, footnote 22, at §22-54.
32. (1964), 114 L.J. 208.
33. *Supra*, footnote 16, at p. 237 (emphasis in original).
34. (1993), 20 C.C.L.I. (2d) 172, [1993] A.J. No. 781 (QL) (Q.B.).

insured shopping centre owner contracted with the defendant to complete roof repairs. As a result of the defendant's negligence, the roof leaked during a storm, causing significant damage. The shopping centre owner initiated proceedings against the defendant and, eventually, settled its claim in return for $6,500 and the defendant's agreement to drop his counterclaim. The settlement included a release of all claims against the defendant. However, prior to executing the release, the defendant had been notified by the insurer of its intention to seek reimbursement of the approximately $45,000 that it had paid out under the shopping centre owner's insurance policy.

The insurer brought a subrogated claim against the defendant who denied liability based on the release given by the shopping centre owner. At trial, the insurer claimed that the release was ineffective against it as it had given the defendant notice of its claim prior to the execution of the release. ***Busgos v. Khamis*** was cited in support of this position.

Perras J. rejected the insurer's argument, noting that:[35]

> the notice given to the defendants does not preserve a subrogated right to pursue the defendants. *The notice should more properly have been given to the insured to alert him not to settle or dispose of any action until the insurers were satisfied that such was proper.* In any event, there is no suggestion that the settlement and discontinuance in the initial action by B.H. Shopping Centre Limited was anything but bona fide. Such being the case *there is no cause of action existing for the insurers to take over and pursue.*

As noted in the discussion of subrogation law in Part 2, there is a duty on an insured to act in good faith regarding the interests of the insurer. The court noted that where an insured settles its claim against the third party, the insurer's proper remedy is against the insured and not the third party. On this issue, Perras J. stated that:[36]

> The contractual duty to protect the insurer's right to subrogation falls on the insured, not the third party. Notice to the third party alone will not, in my view, preserve the insurer's right to a subrogated claim failing the establishment of a lack of bona fides surrounding the settlement of the action and its discontinuance.

The court also considered at some length the application and effect of the *Busgos* decision on the law of subrogation and settlement. Perras J. declined to follow *Busgos*, referring to it as follows:[37]

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35. *Ibid.*, at p. 176 (emphasis added).
36. *Ibid.*
37. *Ibid.* (emphasis added).

> The *Busgos* decision, as I understand it, relies on an American case [presumably a reference to *Connecticut Fire*] for the proposition that notice by the insurer to the third party will override any release given by the insured to the third party. The American case speaks about fraud on the insurer — if a wrong doer pays the insured knowing that the insured has been paid by the insurer. In my view, that is not the law in this jurisdiction and I do not find that proposition very appealing, that is to say, that fraud would be assumed upon payment being made knowing the insurer had also paid. *It is well settled that the insured is responsible to the insurer for any excess monies collected and, indeed, holds the same in trust for the insurer.*

I respectfully submit that this analysis is preferable to that used by the court in *Busgos*. The reasoning of Perras J. in *Marrazzo* is consistent with the general law of subrogation. It recognizes that the insurer's subrogated rights can never be better than those of the insured. If the insured has waived his rights, then the insurer has no legal rights to "inherit" via a subrogated claim. As the final paragraph of the *Marrazzo* decision notes, "there is no longer any cause of action in existence between B.H. Shopping Centre Limited and the defendants-applicants here and hence no cause of action 'shoes' for the [insurer] to step into".[38]

This same issue came before the courts of Newfoundland in *Tucker v. Tucker*.[39] In that case, Mr. Tucker had damaged parts of the matrimonial home and destroyed certain possessions belonging to his wife. Mrs. Tucker signed a release, relieving her (then estranged) husband from all liability. When her insurer, who had paid for the repairs to home and property, brought a subrogated claim against Mr. Tucker, he sought to escape liability by relying on the release.

In adjudicating this dispute, the court cited the *Marrazzo* case as authority for the proposition that "[t]he insurer's right of subrogation arises only on payment to the insured and is no greater right than the insured's".[40] It then considered the defendant's submission that "by the time [the] insurers became subrogated to Dorothy Tucker's interests, Dorothy Tucker had released [Mr. Tucker] from all liability and her insurers can have no greater right than that held by her". Justice Barry responded by noting that "[i]f Dorothy Tucker had given Barry Tucker an unqualified release, I would be inclined to accept this argument". However, the court found that

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38. *Ibid.*
39. [1997] N.J. No. 292 (QL), 33 R.F.L. (4th) 149 (Nfld. T.D.).
40. *Ibid.*, at para. 6.

Mrs. Tucker's release had reserved the right of her insurer to bring a subrogated claim and, therefore, Mr. Tucker's defence failed.

Although strictly speaking they were made in *obiter*, Justice Barry's comments support the *Marrazzo* statement of the law on this issue. The court's analysis is logical and consistent with the general law of subrogation — an insurer "inherits" the rights of the insured and, therefore, if the insured has released her right to sue, the insurer can do no better. Had the defendant obtained a complete release from his wife, the outcome in *Tucker* would have mirrored the result in *Marrazzo*. It is submitted that this approach should be followed in Ontario.

(2) Legislative Provisions Affecting an Insurer's Subrogated Rights

The nature and extent of an insurer's common law subrogation rights have, in certain circumstances, been modified by statutory provisions. A review of the settlement provisions in the various Ontario insurance statutes supports the position taken by the Alberta courts that a third party should be able to rely on a settlement release against an insurer's subrogated claim, regardless of whether the third party had prior notice of the claim.

Part VI (automobile insurance) of the Ontario *Insurance Act*[41] (the "Act") deals expressly with the right of subrogation in automobile accident cases. Section 278(6) reads:

> *Concurrence in settlement or release — s. 278(6)*
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> (6) A settlement or release given before or after an action is brought does not bar the rights of the insured or the insurer, as the case may be, unless they have concurred therein.

Under the terms of this section, a person cannot waive their insurer's rights against a third party unless the insurer has consented.[42] In other words, the statute mandates that in auto insurance cases a *Busgos*-type conclusion will prevail instead of a *Marrazzo*-type result.

The Act deals expressly with various other classes of insurance (*e.g.*, life, fire, accident and sickness, weather, fraternal societies),

41. R.S.O. 1990, c. I-8.
42. See, *e.g.*, *Biafore v. Bates-Paris Leasing Inc.* (1976), 11 O.R. (2d) 409, 66 D.L.R. (3d) 225 (Div. Ct.).

and also deals at length with the general rules governing insurance contracts in Ontario. However, none of the other sections of the Act contain a provision similar to s. 278(6). As noted, s. 278(6) duplicates the *Busgos* result. Since the provincial legislature provided this settlement rule for automobile insurance cases only, under the doctrine of *expressio unius est exclusio alterius*[43] one can presume that the legislature chose *not* to apply these rules to other classes of insurance in the Act.

The *expressio unius* argument is strengthened when one considers the number of other statutes in which settlement provisions similar to s. 278(6) of the *Insurance Act* appear. For instance, the Ontario government has provided the Ontario Health Insurance Plan ("OHIP") with similar protection for its subrogation rights by mandating that OHIP will not be bound by any release executed without its approval.[44] If OHIP has incurred health care costs in treating an individual, it retains the right to bring a subrogated claim in that person's name even if the patient has released the third party from liability. Similar provisions may be found in numerous other Ontario statutes,[45] and are common in the other provinces.[46] Clearly, this sort of settlement provision is not unique — if the Ontario legislature wanted to include it as a general provision applicable to all insurance contracts under the *Insurance Act*, it could have done so. Instead, the settlement rules appear only in the automobile insurance part of the Act. The legal implication is that these settlement rules are not intended to apply in non-auto insurance cases and that insurers will be bound by settlements undertaken by their insureds in

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43. See R. Sullivan, ed., *Driedger on the Construction of Statutes*, 3rd ed. (Markham: Butterworths, 1994), pp. 168-70; see also *R. v. Shubley*, [1990] 1 S.C.R. 1 at pp. 26-27, 65 D.L.R. (4th) 193.
44. *Health Insurance Act*, R.S.O. 1990, c. H-6, s. 34.
45. *Compensation for Victims of Crime Act*, R.S.O. 1990, c. C-24, s. 26(4); *Environmental Protection Act*, R.S.O. 1990, c. E-19, s. 101(12); *Long-Term Care Act*, S.O. 1994, c. 26, s. 59(9); R.R.O. 1990, Reg. 892, s. 13(4) (regulations under the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O-31); *Workplace Safety and Insurance Act*, S.O. 1997, c. 16, Sch. A, ss. 30(10), 30(11).
46. See, *e.g.*, *Insurance Act*, R.S.B.C. 1996, c. 226, s. 178(6); *Insurance* Act, R.S.A. 2000, c. I-3, s. 651(6); *Saskatchewan Insurance Act*, R.S.S. 1978, c. S-26, s. 225(6); *Insurance Act*, R.S.M. 1987, c. I40, s. 273(6); *Insurance Act*, R.S.N.B. 1973, c. I-12, s. 255(6); *Insurance Act*, R.S.N.S. 1989, c. 231, s. 139(6); *Automobile Insurance Act*, R.S.N. 1990, c. A-22, s. 33(6); *Insurance Act*, R.S.P.E.I. 1988, c. I-4, s. 245(6).

such cases. This is yet further reason that the *Marrazzo* analysis should replace *Busgos* as the law in Ontario.

4. Conclusions and Need for Reform

As stated earlier, this article advocates the clarification and reform of a particular aspect of insurance law in Ontario. There appear to be at least two ways in which this can be achieved.

First, the Ontario courts could (and should) review the law of settlement in subrogation cases to eliminate the inconsistency created by the *Busgos* decision. The outcome of that case was simply not consistent with the general principles of subrogation law. It ignored the contractual and equitable relationships that exist between an insured and its insurer, creating instead a new equitable relationship between the third party wrongdoer and the insurer. In doing so, the *Busgos* court muddied the analytical waters for future subrogation cases. As the equitable rules of subrogation law have recognized for more than a century,[47] it is the insured who is best placed to look after the interests of the insurer. It is the insured who decides whether or not to settle its claim against the third party without consulting its insurer and, therefore, the consequences of that decision should rest on the insured.

The Alberta courts have offered a more coherent and consistent set of principles for resolving these cases. The Ontario courts should follow this approach and adopt the *Marrazzo* analysis in this province.

However, if the *Busgos* principle is to remain the law in Ontario, then it should at least be applied consistently. As demonstrated in Part 3(2) above, Ontario employs a patchwork system of statutory provisions that apply different standards for measuring the validity and enforceability of a settlement release depending on the particular type of insurance in each case. A very simple set of legislative amendments could help provide a level of clarity and consistency that the law currently lacks. By moving the current s. 278(6) from Part VI of the Act to Part III (which governs all insurance contracts in Ontario), the Legislature could provide a certain standard of predictability in subrogation cases and help prevent future disputes over the validity of settlement releases in subrogation cases.

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47. *Supra*, footnote 6.

Whichever approach is taken, this remains an issue with wide-ranging societal impact that has the potential to affect every settlement in Ontario involving a victim who has made an insurance claim in respect of their loss. It is, therefore, deserving of the attention of our courts and our legislature.