

# Property Subrogation

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# Property Loss... Recovery?

Just because a property loss is suffered, is recovery available?  
If I'm the insured, why should I care?



# Reasons to Care

- Justice



- Accountability of Tortfeasor

# Money!



- Fees normally covered by insurer
- Recovery of deductible
- Loss ratio
- Recovery of uninsured losses
- Time investment can be minimal (documentation, attendance at examinations for discovery)

# First Steps

- Adjuster will be assigned to the loss
- first party claim will be adjusted
  - Emergency repairs
  - Remediation
  - Contents claims
  - Other expenses

# Subrogation Potential

- Cause of the loss must be determined
- Potential parties must be identified
- Notice letters should be served as soon as possible

# Preservation of Evidence

- Document



- Video/Photograph



- Chain of Custody



- Spoliation



# Early retention of expert

- Initial view of cause of loss
- Retain appropriate expert
- If possible, have expert document and retain evidence
- Determine specific cause of loss
- Type of expert must fit cause of loss
  - Electrical, structural, mechanical, metallurgist



# Early retention of Counsel

- To assist adjuster
- Provide instruction to expert
- Litigation privilege
- Provides second set of eyes to ensure subrogation specific matters not overlooked

# Limitation Period

- Generally 2 years in Ontario – in effect since January 1, 2004
- Limitations Act S.O. 2002, CHAPTER 24, Sch. B
- Discoverability
  - A claim is “discovered” on the earlier of the day the person knows they have suffered a loss or injury, or, the day a reasonable person ought to have known they had suffered a loss or injury
  - Has been held in subrogation cases that the person (insured) was not aware of the loss or injury until such time as the insurer had completed its subrogation investigation
- Ultimate Limitation Period – 15 years
  - Transition Rules – if loss “discovered” between time new Act was in place but before old limitation expired ultimate limitation period begins to run as of January 1, 2004 – will expire January 1, 2019

# Right of subrogation

- In common law – insurer has right to subrogate claim
  - Underlying principles
    - To prevent double recovery of insured
    - To hold tortfeasor liable for damages
- Statutory
  - Insurance Act R.S.O. 1990
    - Subrogation
    - 152. (1) The insurer, upon making a payment or assuming liability therefor under a contract to which this Part applies, is subrogated to all rights of recovery of the insured against any person, and may bring action in the name of the insured to enforce such rights.
- Contractual
  - Policy – will contain similar wording to Insurance Act

# When Right of Recovery Arises

- Common law modified under contract (the policy)
  - The Insurer, **upon making any payment or assuming liability therefore under this Policy,** shall be subrogated to all rights of recovery of the Insured against others and may bring action to enforce such rights

# Commencement of Action

- Subrogated actions commenced in name of insured
- Insurer and insured should work together and be kept apprised of subrogated claims
- Ensure proper documentation of uninsured losses to be included in subrogated claim
- Insurer has no better rights than the insured

# Insurer has No Better Rights than the Insured

- Contractual waivers of subrogation generally enforced by courts (Landlord/Tenant)
- Policies often contain express language that these agreements are accepted by insurer
- Coverage under policy may be extended to tortfeasor (i.e. Builder's Risk policy)
- Waiver of Subrogation may be extended to unnamed insureds

# Extensions of Waivers of Subrogation

- Landlord Tenant
- Williams Sonoma v Oxford Properties Group
  - Yorkdale Mall renovations
  - Vandal broke in through door left open by Ellis Don and turned on fire hose
  - Damage to Williams Sonoma of \$7 million
  - Court of Appeal upheld decision that Ellis Don was a “person for whom the landlord (Oxford) was responsible in law and therefore the waiver of subrogation in the lease between WS and Oxford extended to Ellis Don as “contractor”
- Marsh Canada v Centennial Plumbing (Brookfield Properties, third party)
  - Faulty repair of plumbing contractor (Centennial) caused water damage to Marsh premises of \$3 million
  - Oxford (property manager) on summary judgment motion released from action as “person for whom the landlord was responsible in law” as waiver of subrogation extended to Oxford as “agent” of landlord
  - Brookfield also brought summary judgment motion as “after hours property manager” and “person for whom landlord was responsible in law”
  - Despite agreement stating Brookfield not an “agent” of landlord action dismissed against Brookfield

# Extension of Waivers of Subrogation

- Commercial Contract – Sanofi Pasteur v UPS SCS
- allocation of risk under commercial agreement
- UPS contracted to store and deliver vaccines in temperature controlled container
- Temperature control failed causing loss of vaccines, \$8 million
- Lower court held the covenant to insure and limitation of liability in the contract between Sanofi and UPS created a waiver of subrogated claims against UPS and also against parties not privy to the contract
- Ontario Court of Appeal upheld the decision and stated that :
  - Sanofi assumed all risk of damage to the medications, except for up to \$100,000 caused solely by the negligence of UPS
  - It was commercially reasonable to imply Sanofi and UPS intended to extend the benefit of their insurance covenant to the third party manufacturers and installers.
  - To hold otherwise would unfairly subject the third parties, mostly small companies, to significant liabilities for acts over which they had little or no control.



# Control of Litigation

- Under Policy
  - The Insurer, upon making any payment or assuming liability therefore under this Policy, shall be subrogated to all rights of recovery of the Insured against others and may bring action to enforce such rights

# Control of Litigation

Zurich Insurance Company Ltd v. Ison Auto Sales (Ont. C.A.)

- Insurer did not pursue subrogated claim with any diligence, significant uninsured losses, court held insured could maintain control of litigation and insured advised subrogated claim would be included in action

Tree Techol v Via Rail Canada (Ont. C.A.)

- No subrogated action commenced within limitation period
- Insured (Tree Tech) commenced action by way of Notice of Action dated February 21, 2014 seeking damages of \$5 million for “all damages, costs, expenses and or losses sustained...as a result of the derailment”
- Statement of claim issued March 21, 2014 changed to seek damages “otherwise unable to recover from its insurer...”
- Insurer sought to intervene – motion dismissed
- Court held that the insured is under no obligation contractually or statutorily to include an insurer’s subrogated claim in its action (first sentence) and that only if an insurer chooses to pursue such a claim is an insured then required to cooperate and not compromise the insurer’s claim (second sentence)

# Quantum of Recovery



# Valuation of loss under the policy

- 3 types of valuation
  1. Replacement Cost Value (RCV)
  2. Actual Cash Value (ACV)
  3. Valued Amount

# Replacement Cost Value (RCV)

## Replacement cost coverage

- The Insurer, in the event of loss or destruction of or damage to the property insured, shall pay:
  - (a) the actual expenditure incurred in repairing, replacing, construction or reconstruction (whichever is the least) the lost, destroyed or damaged property on the same site, an adjacent site or another site, with new materials of like kind and quality and for like occupancy without deduction for depreciation; or
  - (b) if the property damaged or destroyed is useless to the Insured or is not repaired, rebuilt or replaced on the same or another site within two years from the date of loss, the Insurer shall not be liable for more than the actual cash value (with proper deduction for depreciation) of the property damaged or destroyed, all as of the time when, with due diligence and dispatch, rebuilding, repairing or replacement of the damaged or destroyed property could be affected; or
  - (c) such amount as is otherwise provided for herein.

# Recovery in Tort Action (Subrogated Claim)

- Purpose of Damages in Tort Action

To place the claimant in the position in which they would have been had the tort not occurred.

# What happens if you replace this...





# With this...



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# Common reductions in property losses

- Betterment
- Betterment denotes an addition to or enhancement of real property that increases its capital value and is designed to make the property more useful or have an increased market value. Betterment involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs

# Common Reductions in Property Losses (con't)

- Depreciation
- Similar to betterment
- Cost to replace property or contents is fully indemnified under policy (subject to coverage available), but not fully recoverable in tort action
- Must ascertain the fair market value of the property at the time of loss, allowing for a deduction based on age of property/contents, anticipated useful life span

# Code Upgrades

- Code Upgrades are the cousin of “betterment” improvements to property. In the “betterment” arena, building materials or fixtures which replace existing or lost materials or fixtures, are an “enhancement” upon the “like kind and quality” of the materials and items that they are replacing. Hence, they are termed “betterments.”
- Code Upgrades, on the other hand, are publicly mandated alterations in the building components, structure or materials, which are required by law or “code.” These are improvements for which there can be no deviation and are not necessarily requested by the insured.

# Betterment law in Ontario

- *James Street Hardware v Spizziri* (Ont. C.A.)
- Court's direction:
  - “The answer lies in compensating the plaintiff for the loss imposed upon him or her in being forced to spend money he or she would not otherwise have spent -- at least as early as was required by the damages occasioned to him by the tort. In general terms, this loss would be the cost (if he has to borrow) or value (if he already has the money) of the money equivalent of the betterment over a particular period of time”

?????

# Betterment Analysis

- Court will start with the actual replacement cost
- Onus on defendant to prove betterment
- Court will look at evidence of:
  - Life expectancy of building
  - Evidence of increase in value
  - Is the building re-built to original design, or were improvements made (ie new wing)
  - Are the changes required solely by law (ie building code improvements)

# Who can provide this evidence?

- Architect
- Structural/Mechanical Engineers
- Independent Appraiser
- Experienced Independent Adjuster



# What will the court do with the evidence?

- Evidence will be entered by plaintiff of RCV and issues of necessity in incurring repair costs greater than ACV
- Defendant will enter evidence that repair costs unnecessary and over-inflated



# What will the court do with the evidence?

- The court will then apply a reasoned approach in the circumstances to quantify the betterment of the damages sought
- “each case turns on its own facts and the process of assessing damages should be a practical one designed to do justice to the parties..”

» *James Street Hardware v Spizziri et al*



# Adjuster / investigation expenses

- Adjuster expenses are not, repeat not, recoverable in tort
- Engineering reports required to repair property may be recoverable, but not likely to be paid in settlement
- Engineering reports with a dominant purpose to support litigation (ie cause and origin reports) are recoverable as disbursement in the litigation

# How the recovery is allocated

- At common law, the general rule is that recovery money is divided between the insurer and the insured on a pro-rata basis after deduction of recovery expenses
- Policy wording can be negotiated

# Recovery Split - Policy Wording

- Pro-rata distribution
- any recovery as a result of subrogation proceedings arising out of a loss occurrence, after expenses incurred in such subrogation proceedings are deducted, shall accrue to the Insured in the proportion that the deductible amount and/or any provable uninsured loss amount bears to the entire provable loss amount

# Recovery Split – Policy Wording

- Insured recovers deductible first
- The net amount recovered after deducting the costs of recovery shall first be used to provide the insured with a complete indemnity of the deductible, and any balance remaining shall be paid to the insurers and the insured in their respective interest.

# Note on provable uninsured loss amounts

- Provable uninsured loss amounts are those amounts provable in the tort/recovery action
- They are uninsured/underinsured losses
- You can not claim for loss of wages of salaried employees who are working on remedying the loss as opposed to their “real” job

# Questions and Answers

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