S.B. 227: Workers' Compensation Subrogation Rights

"Whether the S.B. 227 version of the Workers' Compensation Subrogation Statute will withstand constitutional challenges remains to be seen."

I. INTRODUCTION

From an injured worker's perspective, subrogation statutes always raise fairness concerns. If the tortfeasor's resources are insufficient, subrogation depletes the tort recovery below what will make the injured worker whole, even when adding to that recovery his workers' compensation benefits. Moreover, in the settlement context (where most cases get resolved), subrogation raises difficult valuation issues, particularly as to noneconomic damages.[1]

Nevertheless, workers' compensation subrogation appears to be here to stay — at least for the present. As the Court in *Holeton v. Crouse Cartage Co.*[2] pointed out, "virtually every jurisdiction" in the United States has a statutory mechanism that allows "the employer or the fund to recover its workers' compensation outlay from a third-party tortfeasor" and "any decision that would hold the mere concept of a subrogation... statute *per se* invalid in the workers' compensation context would [be] a legal anomaly."[3]

In Ohio, the subrogation right in the workers' compensation context is only a decade old.[4] Prior to 1993, in the absence of a subrogation statute, the Ohio Supreme Court refused to recognize, in all but the most limited circumstances, an employer's right to subrogation or reimbursement for workers' compensation payments made to employees as a result of injuries caused by third parties.[5]

The General Assembly enacted Ohio's first workers' compensation subrogation statute in 1993. That statute, R.C. 4123.93 (*eff.* 10/20/93), was hastily written and full of loopholes[6], causing the legislature to draft a replacement in 1995. The 1995 version, R.C. 4123.93 and 4123.931 (*eff.* 9/29/95), erred in the opposite direction, embodying provisions so draconian that in many "familiar and repeated circumstances"[7] the injured party was unjustly deprived of all or part of her tort recovery.

In *Holeton*, the Ohio Supreme Court held R.C. 4123.931, the operative provision of the 1995 statute, unconstitutional "in its present form."[8] The Court, however, expressly rejected "the proposition that a workers' compensation statute is *per se* unconstitutional" and warned that "nothing in this opinion shall be construed to prevent the General Assembly from ever enacting such a statute."[9]

The General Assembly responded to *Holeton* by enacting Sub. S.B. No. 227 ("S.B. 227"). That Act, effective April 9, 2003, amends both the definitional provision of R.C. 4123.93 and the operational provision of R.C. 4123.931.[10]

Whether the constitutional deficiencies identified in *Holeton* have been corrected by the S.B. 227 version of the statute is an open question. Certain aspects of the S.B. 227 version appear to be an improvement over the predecessor version, while others are a step backwards. The ensuing discussion will recap the salient points of the holding in *Holeton*, describe the new statute, discuss the retroactivity issue, and identify some of the new statute's strengths and weaknesses.

II. CONSTITUTIONAL DEFICIENCIES IN FORMER R.C. 4123.931 AS IDENTIFIED IN *HOLETON*

In *Holeton*, the Court identified three major aspects of former R.C. 4123.931 that violated the Ohio Constitution.

The first arose from how the statute treated an injured worker's settlement with the tortfeasor. Former R.C. 4123.931(D) provided that "[t]he entire amount of any settlement... is subject to the subrogation right of a statutory subrogee, regardless of the manner in which the settlement... is characterized" and that no settlement was final unless the subroga-

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tion right was included. This provision effectively gave the statutory subrogee (*i.e.*, the BWC or the self-insuring employer) a lien on any settlement the claimant entered into with the tortfeasor, which lien had to be satisfied out of the settlement proceeds after attorney fees and costs were first deducted in full.[11]

The problem with this provision was that it created an irrebutable presumption that the injury victim was receiving a double recovery regardless of the settlement amount. Workers' compensation benefits and tort damages, however, are not coextensive. Not only are workers compensation benefits subject to fixed rating schedules that represent only a percentage of the loss sustained, but they do not compensate the same range of losses that tort damages compensate. Workers' compensation benefits are meant to help the worker get by--tort damages are meant to make the injury victim "whole."[12] Thus, recovery of both workers compensation benefits and tort damages does not necessarily mean the injury victim has been twice compensated for the same losses. This is particularly true in the common situation where the tort recovery is constricted by the tortfeasor's limited assets or insurance coverage.

For this and other reasons, the Court held that the statutory subrogee's automatic and irrebutable lien on the injury victim's settlement violated the due process, takings, and right to a remedy provisions of the Ohio Constitution.[13] Reimbursement of the statutory subrogee, the Court explained, "must be preceded by a double recovery for the statute to operate constitutionally."[14]

The second major problem arose with former R.C. 4123.931 (A)'s treatment of future benefits.[15] Former division (A) granted an automatic and absolute subrogation interest in the "estimated future value of compensation and medical benefits." This provision was problematic because the amount of future benefits to which the claimant would be entitled was highly speculative. By requiring the injury victim to pay such a speculative amount to the statutory subrogee, without providing a mechanism that would permit the claimant to recapture any benefits he or she did not actually receive in the future, the statute unfairly shifted the risk of non-payment to the innocent injured worker and his/her beneficiaries.[16]

The third major problem arose from former R.C. 4123.931's inconsistent treatment of the subrogation interest depending on whether the injured worker settled his claim with the tortfeasor, or whether that claim was tried.[17] The statute forced the claimant to satisfy the full amount of the subrogation lien from any settlement recovered, whether or not a double recovery actually occurred. Conversely, the statute permitted those who tried their cases to shield a portion of their recovery from the subrogee by requesting jury interrogatories to designate the types of damages awarded. The court found this disparate treatment to be irrational and arbitrary and, thus, to violate the Ohio Constitution's equal protection provision.

As will be seen in the next section, the S.B. 227 version of the statute addresses each of the problems identified by the Court in *Holeton* — though with varying degrees of success.

III. WORKERS' COMPENSATION SUBROGATION UNDER S.B. 227

A. S.B. 227'S DIVISION OF SETTLEMENT PROCEEDS

Under the S.B. 227 version of the statute, the subrogation right no longer takes absolute precedence over the claimant's interest. Instead, the new R.C. 4123.931 (B) provides that the claimant (*i.e.*, the "person who is eligible to receive [workers'] compensation... benefits"[18]) and the statutory subrogee (*i.e.*, the administrator of workers' compensation or the self-insuring employer[19]) are to share in the "net amount recovered" of the settlement proceeds **on a pro rata basis, unless** they agree to division on a **"more fair and reasonable basis."**

1. Division On A Pro Rata Basis

Instead of simply stating that the "net amount recovered" is to be divided on a pro rata basis, R.C. 4123.931 (B) articulates a formula for determining each party's pro rata share. Under this formula, the claimant's share of the settlement proceeds consists of his "uncompensated damages" ("UD") divided by the sum of the "subrogation interest" ("SI") and his "uncompensated damages" ("UD"), multiplied by the "net amount recovered" ("NAR"). Reduced to an algebraic formula, the claimant's share can be described as follows:

Claimant's Share = [UD/(SI + UD)] x NAR

Conversely, the statutory subrogee's share of the settlement proceeds consists of its "subrogation interest" ("SI") divided by the sum of the "subrogation interest" ("SI") and the claimant's "uncompensated damages" ("UD") multiplied by the "net amount recovered" ("NAR"). Reduced to an algebraic formula, the statutory subrogee's share can be described as follows:

Statutory Subrogee's Share = [SI/(SI + UD)] x NAR

Application of these formulas requires reference back to the amended definitional provisions of R.C. 4123.93. There, **"uncompensated damages"** are defined as "the claimant's demonstrated or proven damages minus the statutory subrogee's subrogation interest."[20] The **"subrogation interest"** is defined as including "past, present, and estimated future payments of compensation, medical benefits, rehabilitation costs, or death benefits, and any other costs or expenses paid to or on behalf of the claimant by the statutory subrogee pursuant to this chapter or Chapter 4121., 4127., or 4131. of the Revised Code."[21] Finally, the **"net amount recovered"** is defined as "the amount of any award, settlement, compromise, or recovery by a claimant against a third party, minus the attorney's fees, costs, or other expenses incurred by the claimant in securing [that] award," but does not include "any punitive damages that may be awarded by a judge or jury."[22]

To illustrate how this formula works, consider the following example.[23] The plaintiff is injured in an automobile accident; the tortfeasor is uninsured; and the plaintiff is an insured under a UM/UIM policy with 100/300 in coverage. The plaintiff sustains a severe ankle fracture requiring plates and screws, and the estimated value of his claim is $350,000.00. The Bureau has paid $30,000.00 on the plaintiff's behalf, with no estimated future costs. The plaintiff's attorney has a 1/3 fee agreement, plus case expenses. The UM carrier tenders the $100,000.00 (there is no med-pay available under the policy). Applying the formula to these facts, the recovery to each party is as found in Table-1.

Whether the *pro rata* division of the recovery called for by S.B. 227 corrects the problem identified in *Holeton* is debatable. On the one hand, the pro rata method takes less from the injury victim than the lien approach of the prior statute did, and thus achieves a degree of fairness the prior statute lacked. Yet, the *pro rata* method still results in a taking even when the claimant is not "made whole" for his losses after

TABLE-1

Recovery:	$100,000
Less attorney fees/expenses:	35,000
Net Amount Recovered:	$ 65,000
Uncompensated Damages: [proven damages minus SI] Here, assume proven damages of $350,000 minus the $30,000 paid by the statutory subrogee:	$320,000
Claimant's Recovery: [UD/(SI + UD) x NAR] [$320,000/($30,000 + $320,000) x $65,000 =	$59,429
Statutory Subrogee's Recovery: [SI/SI + UD) x NAR] [$30,000/($30,000 + $320,000) x $65,000=	$5,571[24]

the workers' compensation benefits and available tort damages are added together. If, for example, the subrogation interest is $30,000 and the uncompensated damages are $150,000, but the tortfeasor only has a $25,000 liability policy from which to satisfy any judgment, the plaintiff will come nowhere near being made whole even if he is permitted to keep the entire $25,000.

Because *Holeton* holds that the injured party has a constitutionally protected property right in his tort recovery to the extent it does not duplicate the statutory subrogee's outlay,[25] to comply with *Holeton* the statutory subrogee should not be entitled to share in *any* portion of the claimant's settlement that does not result in a true "double recovery."

For this reason alone, the "pro rata" distribution is a less than satisfactory solution to the "takings" problem identified in *Holeton*. Moreover, the pro rata formula may prove to be less workable in practice than in theory. Successful application of the pro rata formula requires consensus as to the value of the claimant's "uncompensated damages," including noneconomic losses — a difficult feat under any circumstances. Given that the portion of the available "pie" to which the respective parties are entitled turns on the value of the "uncompensated damages," a fair amount of disagreement over this number can be anticipated.

The statute, however, does attempt to resolve these issues — though in a rather nebulous way — by also providing for an alternative means for division of the recovery: division on a "more fair and reasonable basis."

2. Division On A "More Fair And Reasonable Basis"; Dispute Resolution Mechanisms

As an alternative to division on a pro rata basis, the new R.C. 4123.931 (B) provides that the "net amount [of any settlement] recovered **may instead be divided and paid on a more fair and reasonable basis that is agreed to by the claimant and the statutory subrogee.**" It is believed that the "more fair and reasonable basis" language was the legislature's answer to the "make whole" challenge. Whether it will succeed in accomplishing that goal remains to be seen. It does, however, provide an answer to certain arguments made by the plaintiffs and their *amici curiae* in *Holeton*. Whereas under the prior statute's absolute and irrebutable subrogation right the claimant and her counsel had no "bargaining chip," other than the good will of the subrogated party, now there is at least a statutory basis for the parties to come to the bargaining table to hammer out a "more fair" division of proceeds.

The statute also provides, in R.C. 4123.931 (B), that if the claimant and the statutory subrogee "cannot agree to the allocation of the net amount recovered," either one may request the administrator of workers' compensation to appoint a designee to make that determination, or they may agree to utilize any other binding or non-binding dispute resolution process.

If the claimant and the statutory subrogee request the administrator to appoint a designee, R.C. 4123.931 (B) provides that fees may not be assessed for this service. The administrator's designee must schedule a conference on or before 60 days after the parties file the request[26], and the designee is not subject to Chapter 119. of the Revised Code (the Administrative Procedure Act).[27]

If the claimant and the statutory subrogee agree to use any other binding or non-binding dispute resolution process, R.C. 4123.931 (B) provides that the parties shall share equally in fees and expenses, unless they agree otherwise.

Althought the statute is silent on this issue, it would appear that the issue of the amount of uncompensated damages could also be the subject of a civil action.

C. APPLICABLE PROVISIONS WHEN THE CASE PROCEEDS TO TRIAL

If, rather than settling, the action against the tortfeasor proceeds to trial, R.C. 4123.931 (D) (1) provides that the damages awarded are to be divided between the claimant and the statutory subrogee pursuant to the same pro rata formula that applies to settlements.[28] Unlike the settlement context, however, because the amount of damages has been determined by the verdict, such that all that remains is to make the stautory *pro rata* calculation, the statute presents no alternative means of allocating damages between the claimant and statutory subrogee.

If the statutory subrogee institutes the action against the tortfeasor, and the claimant either elects to participate or is joined in the proceedings as a necessary party, R.C. 4123.931 (H) provides that "the claimant may present the claimant's case first if the matter proceeds to trial."

The provisions of S.B. 227 that apply when a lawsuit if filed — particularly the *pro rata* formula — appear to create more problems than they solve. Under former R.C. 4123.931 (D), "[t]he entire amount of any award or judgment [was] presumed to represent [the subrogation interest]... unless the claimant obtain[ed] a special verdict or jury interrogatories indicating that the award or judgment represents different types of damages." The Supreme Court found that the "special verdict" aspect of this provision was unenforceable as inconsistent with Civ. R. 49 (C), but the provision was otherwise seen by the Court to be an appropriate method for "'shielding a portion of [claimant's damages] from the

subrogee."[29] The former statute's method of shielding a portion of the verdict from the subrogee, to ensure that the subrogatio right was only enforced as to the claimait's double recovery, was based on the jury's finding as to what damages had actually been proven, and was thus consistent with the claimant's constitutional right to jury trial. By contrast, the current *pro rata* method assumes that the entire amount of the workers' compensation benefits were duplicated in the tort recovery, thereby assuring that the subrogee makes some recovery from the verdict regardless whether its damages are proven, or whether a double recovery has occurred. Moreover, as noted above, unlike the provision governing division of settlement proceeds, the trial provision offers no alternative method for dealing with circumstances where a double recovery will not actually occur. The statute does provide, however, that the jury must specify the amount awarded for economic and noneconomic damages, so it may be, although the statute does not so provide, that the noneconomic damages are intended to be "shielded" from the subrogation claim.

Why the legislature chose to alter the jury interrogatory option presented by the former statute is unclear. Perhaps the drafters believed the Court's decision in *Holeton* required absolute parity in the treatment of settlement proceeds and jury awards. The equal protection problem in the previous statute, however, was that, whereas in the trial context the claimant *could* rebut the presumption of double recovery, in the settlement context he/she *could not*.[30] The current statute does not remedy this problem, it turns it on its head. The pro rata division in the jury verdict context, moreover, raises constitutional issues concerning the right to jury trial and the due process "matching" requirement, and thus is vulnerable to a constitutional challenge on these grounds.[31]Further, in the extent that a plaintiff would not be permitted, in the context of a settlement, to argue, pursuant to the provision that allows him or her to seek a different "more fair" division, against the application of the *pro rata* formula when he or she believes that none, or only some, of the workers' compensation benefits were duplicated in the tort recovery, the statute would also raise constitutional problems.

D. CLAIMANT'S OPTION TO ESTABLISH INTEREST-BEARING TRUST FOR ESTIMATED FUTURE VALUES OF SUBROGATION INTEREST

The "trust account" provision of new R.C. 4123.931 (E) appears to be a response to the holding in *Holeton* relative to future workers compensation benefits.[32]

The former statute required the entire speculative amount of "estimated future values" of workers' compensation benefits to be paid directly to the subrogee out of any settlement, award, or judgment.[33] Yet, if those payments never materialized — whether due to the injured worker's death, remarriage of his/her spouse, or termination of his/her claim for whatever reason — the subrogee was not required to refund to the claimant any overpayment.

The S.B. 227 version of the statute addresses this problem by permitting the claimant to establish a trust account in which to deposit that portion of the subrogation interest representing "estimated future payments of compensation, medical benefits, rehabilitation costs, or death benefits, reduced to present value." R.C. 4123.931 (E) (1). From this trust, the claimant must make reimbursement payments to the subrogee every January 31st and July 31st based upon the bills submitted by the statutory subrogee on or before the preceding December 31st and June 30th.[34] These bills are to reflect the "total amount that the statutory subrogee has paid for compensation, medical benefits, rehabilitation costs, or death benefits during the half of the year preceding the notice." R.C. 4123.931 (E) (3).

Any interest that accrues on the trust account may be used by the claimant to pay the expenses of establishing and maintaining the account. The remaining interest is to be credited to the trust account. R.C. 4123.931 (E) (2).

If the claimant ceases, for whatever reason, to be eligible for future benefits, the remainder of the trust account reverts to the claimant or the claimant's beneficiaries, after first making payment of any outstanding amounts owed to the statutory subrogee. R.C. 4123.931 (E) (1).

Although establishment of the trust account is entirely optional with the claimant, if the claimant chooses not to establish a trust account for the estimated future benefits portion of the subrogation claim, the claimant must pay to the statutory subrogee, within thirty days after receipt of the funds from the third party, "the full amount of the subrogation interest that represents estimated future payments of compensation, medical benefits, rehabilitation costs, or death benefits." R.C. 4123.931 (F).

E. MISCELLANEOUS PROVISIONS

The remaining provisions of the new workers' compensation subrogation statute do not appear to be directly responsive to *Holeton*. Nevertheless, some of these new provisions deserve mention here.

The prior version of R.C. 4123.931 (B) required the claimant to "notify [the] statutory subrogee of the identity of all third parties against whom the claimant has or may have a right of recovery," and provided that no settlement or judgment was final without this prior notice. Additionally, under the prior version, if the statutory subrogee was not given notice, the third party and the claimant were jointly and severally liable on the subrogation claim.

The S.B. 227 version of the statute retains these provisions, but expands them. Under the new R.C. 4123.931 (G), the claimant is required to notify both the statutory subrogee and the Attorney General, except that if the statutory subrogee is a self-insuring employer, the claimant need not notify the Attorney General.

The other provision which should be mentioned is a slight expansion of the definition of what is included in the subrogation right. As defined under former R.C. 4123.93 (C), the definition of "subrogated amounts" did not expressly include amounts recoverable in intentional tort actions. Under current R.C. 4123.931 (I) (3), the statutory subrogation right includes "[a]mounts recoverable from an intentional tort action." Does this mean that an employer who is liable for an employer intentional tort may subrogate against its own liability to the plaintiff-employee? This would appear to conflict with the Supreme Court's decision in *Jones v. VIP Development Co.* (1984), 15 Ohio St.3d 90.

F. RETROACTIVITY

Under R.C. 1.48, "[a] statute is presumed to be prospective in its operation unless expressly made retrospective." The intent that a statute be applied retrospectively must be clearly expressed on the statute's face, or it will be deemed prospective. *Nease v. Medical College Hospitals* (1992), 64 Ohio St.3d 396, 398. As S.B. 227 contains no expression of intent that it be applied retrospectively, the statute applies prospectively only. Because the

legislature did not intend for S.B. 227 to apply retrospectively, the constitutional distinction between substantive laws that cannot be applied retroactively and remedial laws that can would not come into play.[35]

Here, however, the constitutional issue might arise nonetheless. If the claimant's injury occurred and workers' compensation benefits were awarded and paid prior to April 9, 2003, any attempt to subrogate under the new law would clearly involve an impermissible retroactive application. But what if the injury occurs prior to April 9, 2003, but the workers' compensation benefits are not payable until after that date? Can the statutory subrogee successfully argue that workers' compensation benefits paid after the statute's effective date are subject to the subrogation right because this is nothing more than a prospective application of S.B. 227? Or suppose the injury occurs prior to April 9, 2003, but the claimant's action against the tortfeasor is not filed until after that date. Is prospectivity determined by the date of the injury, the date of filing, or the date the benefits are paid?

The answer to these questions turns on the constitutional distinction between laws that are substantive in operation and those that are merely remedial. Section 28, Article II of the Ohio Constitution provides that the General Assembly "shall have no power to pass retroactive laws." The Court has interpreted the retroactivity clause to apply to laws affecting substantive but not remedial rights.[36] A statute affects substantive rights when it "impairs or takes away vested rights, affects an accrued substantive right, imposes a new or additional burden, duty, obligation or liability, or creates a new right."[37] A statute is remedial if it "affect[s] merely the methods and procedure[s] by which rights are recognized, protected and enforced, not... the rights themselves."[38]

In *Vogel v. Wells* (1991), 57 Ohio St.3d 91, the Court held that R.C. 2744.05 (B), the statute which abrogated the collateral source rule as to municipalities, could not be applied retroactively "to causes of action arising before November 20, 1985, the effective date of the statute."[39] The Court reasoned:

> The decedent's estate and survivors became entitled to Social Security funds upon the decedent's death. The court of appeals correctly held that impairing these vested benefits would affect the decedent's estate and the survivor's substantive rights and would violate Section 28, Article II of the Ohio Constitution. Thus, we uphold the reversal of the trial court's judgment and restoration of the amount by which the judgment had been reduced by setoff.

Id. at 99.

The same analysis should apply to defeat any attempt to apply S.B. 227's subrogation right to cases where the injury occurred prior to April 9, 2003, but the action was filed and/or the workers compensation benefits were paid after the statute's effective date. Because the 1995 version of R.C. 4123.931 was held unconstitutional in *Holeton*, and because, subsequent to *Holeton*, three appellate courts have ruled the 1993 version unconstitutional as well[40], the BWC and self-insuring employers had no enforceable subrogation right prior to April 9, 2003.[41] Thus, S.B. 227 effectively creates a right of subrogation that did not previously exist. Furthermore, by creating a subrogation right that reduces the claimant's potential recovery from the tortfeasor, S.B. 227 imposes a new burden, duty, or obligation upon the claimant that, prior to April 9, 2003, did not (validly) exist.[42]

Therefore, just as the statute abrogating the collateral source rule could not constitutionally be applied to injuries occurring before the statute's effective date, S.B. 227's creation of a subrogation right that depletes the claimant's tort recovery cannot be applied to actions filed and benefits paid after the statute's effective date if the injury occurred prior to that time.

IV. CONCLUSION

In summary, the primary innovations of the new statute are as follows:

* Rather than granting the statutory subrogee a first lien against any settlement proceeds, the statute creates a formula for dividing those proceeds on a pro rata basis.

* In the context of a settlement, the *pro rata* formula is not absolute. The parties can choose instead to divide the proceeds on a "more fair and reasonable basis" as long as that division is "agreed to by the claimant and the statutory subrogee."

* If the parties cannot agree to the allocation of the settlement proceeds, they may either request the administrator of workers' compensation to appoint a designee to make that determination, or agree to utilize any other binding or non-binding dispute resolution process. It would appear that a civil action could also be instituted to resolve any dispute.

* If, rather than settling, the action against the tortfeasor proceeds to trial, the damages awarded are to be divided between the claimant and the statutory subrogee on the statutory *pro rata* basis.

* If the action proceeds to trial, the trier of fact must make specific findings as to the total amount of compensatory damages and the portion of those compensatory damages that represent economic and noneconomic losses, although these numbers are not relevant to the *pro rata* calculation.

* With respect to the portion of an award or settlement that represents estimated future benefits to be paid, the claimant has the option of creating an interest-bearing trust account out of which future reimbursements to the statutory subrogee will be made. The statutory subrogee will submit a bill to the claimant twice a year representing the payments made to the claimant by the subrogee in the preceding six months. If the claimant ceases to be entitled to workers' compensation benefits, the remainder of the trust reverts to the claimant after his/her final account is settled with the subrogee. Otherwise, the entire amount

must be paid within 30 days of receipt of the tort recovery.

* The notice requirement has been broadened to include both the statutory subrogee, and, if the subrogee is the BWC, the Attorney General.

Whether the S.B. 227 version of the Workers' Compensation Subrogation Statute will withstand constitutional challenges remains to be seen. In certain respects, it is an improvement over the predecessor version. The creation of the trust fund for estimated future benefits at least provides a mechanism to recapture overestimated future damages — a mechanism that will be particularly useful in cases where future damage estimates are substantial. The pro rata sharing of settlement proceeds, while not perfect, is an improvement over the prior statute's lien approach, and the "more fair and reasonable basis" language at least potentially creates a mechanism for negotiating a "more fair" distribution in those situations where the tort recovery comes nowhere near to making the injury victim or his beneficiaries whole.

Still, problems can be foreseen with the "pro rata" approach to the distribution of damages in the trial context. And until the bar and bench get used to how the new statute operates, many a cry of angst can be anticipated from those who first attempt to work through the statute's complex verbiage.

1. Granted, valuing noneconomic damages is always difficult in the settlement context, as the tortfeasor will typically view the value of noneconomic damages more conservatively than the person who sustained the loss does. But if the tortfeasor's resources (*i.e.*, insurance coverage) are in an amount equal to or less than a conservative estimation of the plaintiff's total damages (*e.g.*, policy limits of $50,000 where economic losses alone are $35,000), valuing noneconomic damages does not present much of a problem. When the subrogated party is introduced into this equation, however, valuations become more difficult. The subrogated party has an incentive for estimating the noneconomic component of the loss as stingily as possible, for in so doing, its claim for reimbursement goes to a greater portion of the recovery. Put otherwise, the lesser the value of the noneconomic losses, the easier it is to claim the injured party is "made whole" for her loss.

2. 92 Ohio St.3d 115, 2001-Ohio-109.

3. *Id.* at 120.

4. For a general discussion of the history of workers' compensation subrogation in Ohio, I refer the reader to my prior article on this topic, *What Lies Beneath: Workers' Compensation Subrogation In The Wake Of Holeton v. Crouse Cartage*, published in Ohio Trial (Volume 12, Issue 1).

5. The Supreme Court's treatment of this question dates back to 1929. In *Truscon Steel Co. v. Trumbull Cliffs Furnace Co.* (1929), 120 Ohio St. 394, at the syllabus, the Court held that "[a]n employer, whether self-insur[ing] or otherwise, cannot recover from any source any sum to reimburse an amount paid under the Workmens' Compensation Law to injured employees, whether the injury results from the negligence of some third party, or otherwise." In *Midvale Coal Co. v. Cardox Corp.* (1949), 152 Ohio St. 437, the Court carved out a limited exception to *Truscon Steel*, holding that an employer can recover its losses from a tortfeasor on a breach of contract theory, if the employee's injury was a direct result of a breach of contract between the tortfeasor and the employer. In *Fischer Construction Co. v. Stroud* (1963), 175 Ohio St. 31, the Supreme Court overruled *Midvale Coal* and reinstated *Truscon Steel* as an absolute rule that recovery from the tortfeasor by the employer was permitted in no circumstances. In *Ledex, Inc. v. Heatbath Corp.* (1984), 10 Ohio St.3d 126, the Court overruled *Fischer* and reinstated *Midvale*. Then, in *Cincinnati Bell Telephone Co. v. Straley* (1988), 40 Ohio St.3d 372, the Court clarified that *Ledex*'s revival of *Midvale* was limited to circumstances where a contractual relationship existed between the employer and the third-party tortfeasor.

6. George B. Wilkinson and Brian P. Perry, *Employer's Perspective: Subrogation Revisited*, Workers' Compensation Journal of Ohio, 119-120 (November/December 1995); see also *What Lies Beneath: Workers' Compensation Subrogation in the Wake of Holeton v. Crouse Cartage*, n. 4 *supra*.

7. *Holeton*, 92 Ohio St.3d at 130.

8. *Id.* at 135.

9. *Id.*

10. S.B. 227 also amends sections 4123.35 and 4123.66 of the Revised Code.

11. Former R.C. 4123.931 (E) provided, in part, that "[s]ubrogation does not apply to the portion of the judgment, award, settlement, or compromise of a claim to the extent of a claimant's attorney's fees, costs, or other expenses incurred by a claimant in securing the judgment, award, settlement, or compromise, or the extent of medical, surgical, and hospital expenses paid by a claimant from the claimant's own resources for which reimbursement is not sought."

12. With respect to the injured party's tort action, "[i]t is fundamental to the law of remedies that parties damaged by the wrongful conduct of others are entitled to be made whole." *Collini v. Cincinnati* (1993), 87 Ohio App.3d 553, 556; see also *Pryor v. Webber* (1970), 23 Ohio St.2d 104, paragraph one of the syllabus; *Fantozzi v. Sandusky Cement Prod. Co.* (1992), 64 Ohio St. 3d 601, 612. By contrast, the workers' compensation system, "unlike tort recovery, does not pretend to restore the claimant to what he or she has lost; it gives the claimant a sum which, added to his or her remaining earning ability, if any, will presumably enable the claimant to exist without being a burden to others." 1 Larson's Workers' Compensation Law, § 1.03 [5] at 1-10.

13. *Holeton*, 92 Ohio St.3d at 122, 125-128.

14. *Id.* at 127.

15. *Id.* at 123-125.

16. *Id.* at 125.

17. *Id.* at 132-133.

18. R.C. 4123.93 (A).

19. R.C. 4123.93 (B). The new definition of "statutory subrogee" also includes "an employer that contracts for the direct payment of medical services pursuant to division (L) of section 4121.44 of the Revised Code." *Id.*

20. R.C. 4123.93 (F).

21. R.C. 4123.93 (D). *See also* R.C. 4123.931 (I).

22. R.C. 4123.93 (E).

23. This example, along with the accompanying calculations, is taken, with minor modifications, (and with her permission) from the article written by my partner, Ellen M. McCarthy, entitled *Workers' Compensation Subrogation*, published in the Cleveland Academy of Trial Attorney's newsletter, CATA News (Spring 2003).

24. This ends the portion of the article taken from Ms. McCarthy's article in the CATA publication.

25. *Holeton*, 92 Ohio St.3d at 122.

26. R.C. 4123.931 (C) (1).

27. R.C. 4123.931 (C) (2).

28. Specifically, R.C. 4123.931 (D) (1) provides: "When the claimant's action against a third party proceeds to trial and damages are awarded... (1) The claimant shall receive an amount equal to the uncompensated damages divided by the sum of the subrogation interest plus the uncompensated damages, multiplied by the net amount recovered, and the statutory subrogee shall receive an amount equal to the subrogation interest divided by the sum of the subrogation interest plus the uncompensated damages, multiplied by the net amount recovered."

29. *Holeton*, 92 Ohio St.3d at 134.

30. *Holeton*, 92 Ohio St.3d at 132.

31. See, e.g., *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415 (holding that former R.C. 2317.45 violated the right to trial by jury in Section 5, Article I of the Ohio Constitution because it permitted courts to enter judgments in disregard of the jury's verdict); see also *Holeton*, 92 Ohio St.3d at 122 ("we have consistently and repeatedly held that due process permits deductions for collateral benefits only to the extent that the loss for which the collateral benefit compensates is actually included in the award.")

32. *Cf. Holeton*, 92 Ohio St.3d at 125.

33. See former R.C. 4123.931 (A) and (D).

34. R.C. 4123.931 (E) (3).

35. *State v. LaSalle*, 96 Ohio St.3d 178, 2002-Ohio-4009 at ¶ 14 ("Inquiry into whether a statute may be constitutionally applied retrospectively only after an initial finding that the General Assembly expressly intended that the statute be applied retrospectively." (citing *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, paragraph two of the syllabus)).

36. *Kiser v. Coleman* (1986), 28 Ohio St.3d 259, 262.

37. *Van Fossen*, 36 Ohio St.3d at 107. But see *Bielat v. Bielat*, 87 Ohio St.3d 350, 2000-Ohio-451, paragraph two of syllabus ("A claim for substantive retroactivity cannot be based solely upon evidence that a statute retrospectively created a new right, but must also include a showing of some impairment, burden, deprivation, or new obligation accompanying that new right. *Van Fossen*... modified.")

38. *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059 at ¶ 15.

39. *Id.* at syllabus.

40. See *Modzelewski v. Yellow Freight Systems*, 151 Ohio App.3d 666, 2003-Ohio-827; *Yoh v. Schlachter*, 6th Dist. No. WM-01-017, 2002-Ohio-3431; *Giles v. Schindler Elevator Corp.* (2001), 146 Ohio App.3d 388. The Ohio Supreme Court has, however, accepted *Modzelewski* for review. See *Modzelewski*, 99 Ohio St.3d 1461, 2003-Ohio-3717 (allowing discretionary appeal).

41. For a general discussion of the revival of the 1993 version of the statute after *Holeton* struck down the prior version, see *What Lies Beneath: Workers' Compensation Subrogation In The Wake Of Holeton v. Crouse Cartage Co.*, Ohio Trial (Volume 12, Issue 1).

42. See *Bielat*, 87 Ohio St.3d at 356. OT