Subrogation in Insurance Law by S. R. Derham (The Law Book Company Limited, Sydney, 1985) pp. 1-164 (including index). Price $38.00 (hardback) ISBN 0 455 20592 2.

This book is the sixth volume in the series *Monash Studies in Law*, which was established by the Monash Law Faculty and the Law Book Company to encourage the publication of works on specific areas of law not fully dealt with in general text books.

The purpose of the book is to outline the principles of the doctrine of subrogation as they apply to insurance contracts. The author deals with the law of subrogation from three main viewpoints: the history and origins of subrogation, the current state of the law and public policy issues surrounding the doctrine.

1. *Historical Origins of Subrogation*

In chapter one, the author discusses the nature and origins of the doctrine of subrogation. He refutes Lord Diplock's suggestion that subrogation is a common law right arising from an implied term in the contract of insurance. Rather, the author contends that subrogation is equitable in nature and that Lord Diplock's contention confuses the doctrine of subrogation with the doctrine of abandonment (the common law right of an insurer to the remains of the subject matter insured where there has been a total loss).

The author also deals with the relationship between subrogation and the now obsolete offences of maintenance and champerty.

'Maintenance' is said to be the promotion or support of contentious legal proceedings by a stranger with no direct concern in them in the absence of justifying circumstances and 'champerty' the unlawful maintenance of a suit in consideration of a bargain to receive, by way of reward, a part of anything that may be gained as a result of the proceedings.

However, it seems clear from the authority cited in the book that insurance contracts which contemplate the institution of legal proceedings do not infringe the rules against maintenance and champerty, simply because the insurer is considered to have a legitimate interest in the action. Hence, the author's treatment of maintenance and champerty is largely of academic interest only.

2. *Current State of the Law*

The bulk of *Subrogation in Insurance Law* deals with the nature of the doctrine of subrogation, including the application and effect of the Insurance Contracts Act 1984 (Cth). Interesting and useful comparisons are also made with Canadian and American law, including a chapter on the use of the loan receipt in America.

The author emphasizes the requirement of an indemnity policy as the pre-requisite to the operation of the doctrine, and deals at length with the rights to which the insurer is subrogated. He explains that the doctrine of subrogation encompasses not only the right of the insurer to enforce any claims the insured may have against third parties which will diminish the loss, but also the right of an insurer to recover from the insured any moneys received by the latter from a third party.

Several interesting aspects of the doctrine are discussed by the author. Three aspects in particular, are worthy of mention.

First, there is a lengthy discussion as to whether the requirement of an indemnity policy means that the insurer should have indemnified the insured for his *total* loss, or only to the extent required by the policy.

If indemnity for the total loss is necessary, and the actual loss is greater than the insurance coverage (for example, because of an excess clause in the policy or because the policy specifies a maximum amount that may be recovered) the insured would be entitled to refuse to allow the insurer to use his name in an action against a third party, and would retain the right to be *dominus litis* in such action.

Notwithstanding the existence of conflicting authority on the issue, the author argues that indemnity to the extent required by the policy should be sufficient. To hold otherwise would mean that the

insurer would be forced to waive the excess clause or fully indemnify the insured before obtaining the right of subrogation.

Second, the author addresses the issue of whether an insurer can bring a subrogation action against an insured. This could arise where there is more than one insured (for example, a bailor and a bailee or a mortgagor and a mortgagee). If one insured causes damage to the property and the other insured claims from the insurer and receives an indemnity, has the insurer a right of subrogation against the negligent insured?

Three viewpoints on this issue are dealt with by the author ; namely, the MacGillivray view that subrogation is always permitted against a co-insured, the Canadian view that subrogation is permitted except where the co-insureds can be regarded as one person and the American view that subrogation in such circumstances is inequitable and should not be permitted.

The MacGillivray approach is favoured by the author. However, the problem is academic, as circuity of action will ensure that the insurer bears the loss, irrespective of whether a right of subrogation is permitted.

Third, the author deals with the effects of voluntary payments to the insured. He addresses the argument that such a payment would not constitute a payment 'under the policy', with the possible result that equity would not regard the insurer as having a legitimate interest in the enforcement of the insured's claim, and hence may not confer upon the insurer a right of subrogation.

However, the courts have held that where an insurer makes an honest payment and has reasonable grounds for believing that it is liable under the policy, the fact that the insurer did not admit its liability will not deprive it of its rights of subrogation.

3. *Public Policy Issues*

Finally, the author deals with the issue of whether the doctrine of subrogation performs a valid public function.

He casts doubt on the traditional economic argument that subrogation results in lower premiums, arguing that any reduction is outweighed by the costs of subrogation to the community (in the time subrogation litigation takes in the courts).

The author also deals with two philosophical arguments against the abolition of subrogation — first, that 'the issue of whether the third party should be saddled with liability would then depend on the fortuitious circumstances of whether the person suffering the loss was insured' and second, that the prospect of liability may deter people from engaging in conduct likely to cause a loss.

The author casts doubt on the validity of the above arguments, and appears to favour the view that the burden of a loss should remain with the insurer of the loss sufferer, since the insurer is in the best position to spread the loss throughout the community.

The book is carefully compiled and well documented and will be of particular use to students and academic researchers in the field of insurance law. Other helpful references are listed in a bibliography.

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