July 2012

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THE COMPENSATION CARRIER'S RIGHT TO RESTITUTION FOR MEDICAL EXPENSES THROUGH A LIEN ON THE EMPLOYEE'S TORT RECOVERY

BERNARD E. GEGAN*

The inquiries which led to this Article began with a curious case decided in 1943.¹ A workmen's compensation insurance carrier paid an injured employee's $43 medical bill and fought unsuccessfully all the way to the New York Court of Appeals to impose a lien for that amount on the employee's $100 judgment obtained against the third-party tortfeasor. Insurance companies are composed of practical people and $43 was not a great deal of money, even in 1943, so the question arose: "What legal point was the carrier trying to establish?" Alternative means for reimbursement were already available; Worker's Compensation Law (WCL) section 13 expressly gave the insurer "a separate cause of action" against the tortfeasor for costs incurred in providing care for the employee.²

The ways in which the interests at stake in this lawsuit have been dealt with by the legislature and the courts, from the beginnings of workmen's compensation in 1914³ until the present day, afford an interesting glimpse of the legal system at work. While most have been settled with as much finality as the law can ever attain, others remain in flux. It may be worthwhile, therefore, to set down in one place the history of legislative amendment and judicial response, in order to ascertain how the present law has evolved and

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⁴ The Worker's Compensation Law (WCL) was enacted by ch. 816, [1913] N.Y. Laws 2277 (eff. Dec. 16, 1913) as chapter 67 of the Consolidated Laws. The legislature was not given constitutional authorization to enact such a law until Jan. 1, 1914, N.Y. CONST. art. 1, § 19, and so the law was reenacted to ensure constitutionality. Ch. 41, [1914] N.Y. Laws 87. A previous attempt to bring about workmen's compensation had been made by the legislature, Ch. 674, [1910] N.Y. Laws 1945, but was declared unconstitutional by the New York Court of Appeals. Ives v. South Buffalo R.R., 201 N.Y. 271, 94 N.E. 431 (1911). The court upheld the second attempt at a workmen's compensation law in Jensen v. Southern Pac. R. R., 215 N.Y. 514, 109 N.E. 600 (1915), rev'd on other grounds, 244 U.S. 205 (1916).
whether certain initial objectives have been overlooked in the process.

EARLY DEVELOPMENTS

From the very outset, one basic purpose of the Worker's Compensation Act was to shift the cost of medical care from the employee to the employer who could better carry and spread the economic risk attending industrial accidents. To that end, WCL § 13 provided, as it does today, that the employer must “promptly pro-

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4 In 1909 the New York Legislature established a commission “to make inquiry, examination and investigation into the working of the law in the state of New York relative to the liability of employers to employees for industrial accidents, and into the comparative efficiency, cost, justice, merits and defects of the laws of other industrial states and countries, relative to the same subject . . . .” Ch. 518, § 1, [1909] N.Y. Laws 1310. The commission assigned to this task bore the name of its chairman, Senator V. Mayhew Wainwright.

At the time the commission was appointed, American courts were applying common-law rules to determine whether an injured employee was entitled to receive compensation from his employer. Under such rules, the employee recovered if he could establish that: (1) the injury complained of was due to the employer's fault; (2) the employee had not assumed the risk of such injury occurring; (3) the employee's negligence had not contributed to causing the injury; and (4) a fellow employee was not responsible for the injury. See 1 A. Larson, THE LAW OF WORKMEN'S COMPENSATION § 4.30 (1978) [hereinafter cited as Larson].

The Wainwright Commission reported to the New York Legislature in 1910, severely criticizing the existing common-law system of recovery. The commission noted, inter alia:

1. That only a small proportion of the workmen injured by accidents of employment get substantial compensation, and, therefore, as a rule, they and their dependents are forced to a lower standard of living and often become burdens upon the state through public or private charity.

2. That the system is slow in operation, involving of necessity great delay in the settlement of cases.

3. That the system is wasteful, being costly to employers and the state, and of small benefit to the victims of accidents.

4. That the operation of the law breeds antagonism between employers and employees.

N.Y. LEG. DOC. NO. 38, at 19 (1910).

The commission recommended that New York adopt a workmen's compensation law which would shift the emphasis from tortious conduct to disabling injury and compensation for such injury, leaving “no questions to litigate” and taking “the cases out of the courts.” Id. at 56. For a discussion of the Act's early developments, see A. Millus & W. Gentile, WORKERS' COMPENSATION LAW AND INSURANCE 21-30 (1976) [hereinafter cited as Millus & Gentile].

vide" necessary hospital and medical services. Under the original section 29, however, the injured employee was required to elect either compensation or his common-law tort remedy against any third party responsible for his injury; he could not pursue both. If he elected to receive compensation, section 29 automatically assigned the employee's tort cause of action to the one who furnished compensation.

Against this statutory pattern, the case of *Zurich General Accident & Liability Co. v. Childs Co.* was decided. In *Zurich*, the plaintiff was the compensation carrier for a company whose em-

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4 WCL § 13 (McKinney 1972). As originally enacted, § 13 provided:
Treatmert and care of injured employees. The employer shall promptly provide for an injured employee such medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches and apparatus as may be required or be requested by the employee, during sixty days after the injury. If the employer fails to provide the same, the injured employee may do so at the expense of the employer. The employee shall not be entitled to recover any amount expended by him for such treatment or services unless he shall have requested the employer to furnish the same and the employer shall have refused or neglected to do so.


7 WCL § 29 as originally enacted provided in pertinent part:
Subrogation to remedies of employee. If a workman entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured workman, or in the case of death, his dependents, shall, before any suit or claim under this chapter, elect whether to take compensation under this chapter or to pursue his remedy against such other. Such election shall be evidenced in such manner as the commission may by rule or regulation prescribe.


8 WCL § 29 originally provided that if the injured workman elected to receive compensation, his common-law action against the third party would be assigned to the "association or corporation liable for the payment of such compensation." Ch. 816, § 29, [1913] N.Y. Laws 2293. The underlying rationale here was that the new remedy created by the Act served as consideration for the surrender of the common-law action to the employer or his insurer. See *Sabatino v. Thomas Crimmins Constr. Co.*, 102 Misc. 172, 168 N.Y.S. 495 (Sup. Ct. N.Y. County 1918), *aff'd mem. sub nom.* Sabatino v. Thomas Crimmins Contracting Co., 186 App. Div. 891, 172 N.Y.S. 917 (1st Dep't 1919). In 1935, § 29 was amended to require the employer or insurer prosecuting the assigned negligence action to turn over two-thirds of any amount recovered in excess of the compensation to the employee. Ch. 328, [1935] N.Y. Laws 830. By so recognizing the employee's interest in at least a portion of the tort recovery, the stage was set for the 1937 amendment, which abolished the requirement of an election of remedy. See note 25 infra.

ployee was injured by a third party. The carrier, having discharged the employer's duty under the WCL by providing compensation and paying the employee's medical expenses, commenced a suit against the tortfeasor as assignee of the employee's cause of action. The New York Court of Appeals, in an opinion by Chief Judge Cardozo, sustained the carrier's cause of action but held that its recovery could not include amounts expended for medical care. The court reasoned that "[t]he insurance carrier suing under section 29 as assignee or subrogee of the injured employee, may recover those damages and those only that could be recovered by the assignor if he were suing for himself." Since medical and hospital expenses could not have been recovered by the employee if he had sued as plaintiff, "for the reason that he had neither incurred nor paid them . . . ," they were not recoverable by the carrier.

The limitation imposed in Zurich was based on a traditional New York rule of damages originating in Drinkwater v. Dinsmore, where a line was drawn between losses never sustained and losses sustained but recompensed from collateral sources. Only in the

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10 253 N.Y. at 326-27, 171 N.E. at 392.
11 Id. at 329-30, 171 N.E. at 393.
12 Id. at 329, 171 N.E. at 393.
13 Id.
14 80 N.Y. 390 (1880).
15 Id. at 392-93.
16 Id. Explaining the effect of a collateral source recovery, the Dinsmore court stated: [P]roof of insurance actually paid would not tend to show that the damage claimed was not actually occasioned by the wrong-doer; but it would simply show that compensation had been received by the injured party in whole or in part from some other person — not that the wrong-doer had made satisfaction which alone could give him a defense. Id. at 392.

The term "collateral source" was adopted in Harding v. Town of Townshend, 43 Vt. 536 (1870). The principles of the rule, however, had been applied 10 years earlier in Althorf v. Wolfe, 22 N.Y. 355 (1860), wherein the court refused to instruct the jury in a wrongful death action that insurance proceeds should be considered in assessing damages. The rule has been aptly described in the following manner:

The so-called Collateral Source Rule provides that any benefits received by an injured party from a source which is entirely independent of and collateral to a wrongdoer who is legally responsible for the injuries will not serve to reduce the damages otherwise recoverable from the wrongdoer.

Moceri & Messina, The Collateral Source Rule in Personal Injury Litigation, 7 GONZ. L. REV. 310, 310 (1972). Although the rule was first developed and applied most often in tort cases involving insurance, other areas of application arose, such as employment benefits, gratuities, and social legislation benefits. See Maxwell, The Collateral Source Rule in the American Law of Damages, 46 MINN. L. REV. 669 (1962). It should be noted that New York is among the minority of jurisdictions that refuse to apply the collateral source doctrine to the employment benefits situation. Id. at 680. For a discussion of the New York position, see Recommendation and Study Relating to the Effect of Collateral Payments on Recovery for Personal Injury,
latter case could a plaintiff obtain an undiminished recovery from the tortfeasor.17

This interaction of an old rule of damages with a new statutory assignment of a personal injury cause of action resulted in a windfall for the tortfeasor never contemplated by the legislature.18 Accordingly, even before the decision in Zurich was handed down, WCL § 13 was amended to supplement the carrier's existing section 29 rights with a "cause of action against such third party to recover any amounts paid by him for . . . medical treatment . . . ." Consequently, where the employee pursued his tort cause of action in lieu of taking compensation and the carrier held the section 13 medical expense cause of action, the rights of each remained separate and distinct. The owner of each cause of action could vindicate his own rights without responsibility for the other, with the result that if the carrier was inactive the employee could satisfy his tort recovery in full out of the defendant's liability coverage and vice versa.20 In this


19 Ch. 553, § 13, [1927] N.Y. Laws 1334. As a result of this amendment, compensation carriers held two causes of action; one obtained by assignment under § 29, see note 8 supra, and the supplemental cause of action under amended § 13, see, e.g., New York v. Steers & Menke, 167 Misc. 566, 4 N.Y.S.2d 292 (Sup. Ct. N.Y. County 1937), aff'd mem., 254 App. Div. 669, 4 N.Y.S.2d 992 (1st Dep't 1938). In addition to supplementing the carrier's rights as holder of an assigned tort claim under § 29, the amendment to § 13 also served the carrier well in situations where the employee did not take compensation so as to assign away his tort claim. The receipt of medical treatment, standing alone, was held not to amount to "taking compensation" so as to effect an assignment of the tort claim pursuant to § 29. In such a case, § 13 provided the sole vehicle by which the carrier could seek restitution from the tortfeasor. See notes 33-38 and accompanying text infra.

manner, the respective rights of the employee and the carrier remained stable for many years.  

**Effect of the Amendment of 1937**

Although the existing law allowed the injured employee to forego compensation if he felt it in his best interest to pursue the third party, in practice a disabled and needy person often was unable to wait for the legal process to work and was forced to take compensation, with the result that his tort claim was automatically assigned to the carrier. When the carrier sued the tortfeasor as assignee pursuant to section 29, however, the carrier might obtain a recovery in tort for many times the amount of compensation paid. This


In Haberman v. Hartford Accident & Indem. Co., 230 App. Div. 314, 244 N.Y.S. 161 (2d Dep't 1930), an insurance company was both the employer's compensation carrier and the tortfeasor's liability insurer. The employee, who had received medical care for which the carrier paid $2,185, recovered a $35,000 judgment against the tortfeasor. Under the Dinsmore-Zurich rule, no part of the judgment represented medical expenses. When the tortfeasor proved bankrupt and the judgment was returned unsatisfied, the employee sued the insurer on the $10,000 liability policy it had issued to the tortfeasor. The insurer, which had never sought to enforce the § 13 cause of action it held as the employer's compensation carrier, counterclaimed to offset the $2,185 medical expense. The court unanimously denied the counterclaim. As a judgment creditor, plaintiff was held entitled to priority, and the company could not prefer a claim it held in another capacity, and which it had never reduced to judgment, against its own obligation as the tortfeasor's liability insurer. Id. at 317-18, 244 N.Y.S. at 164-65.

In Butchers' Mut. Cas. Co. v. Emerald Cab Corp., 174 Misc. 1, 19 N.Y.S.2d 685 (Sup. Ct. App. T. 1st Dep't 1940), the court reaffirmed the independence of the two actions, observing that if the employee's negligence action were allowed to affect the insurer's action for medical expenses, WCL § 13(c), granting the insurer this latter "additional cause of action," would be meaningless. 174 Misc. at 2, 19 N.Y.S.2d at 686. In United States Trucking Corp. v. New York & Pa. Motor Express Inc., 177 Misc. 377, 32 N.Y.S.2d 251 (N.Y.C. Mun. Ct. N.Y. County 1941), the court discussed at length the legislature's intent in giving the parties their separate paths of recourse and concluded that "the Legislature never intended to permit the employee by any act of his own to forclose any additional rights of the employer." Id. at 379, 32 N.Y.S.2d at 254. Thus, the carrier's rights survived any settlement, release or adverse verdict in the employee's suit.


Several lower courts held that the carrier retained the excess of the tort recovery after reimbursement in trust for the injured employee. See, e.g., Casualty Co. of America v. Swett
inequity was mitigated but not eliminated when section 29 was amended in 1935 to provide for an apportionment of the tort recovery, whereby the carrier retained one-third of the excess over its compensation costs while the remaining two-thirds was awarded to the employee. Accordingly, in 1937, a major amendment to section 29 was adopted whereby the necessity for an absolute election of remedies was eliminated. Henceforward, the employee could take compensation and also retain the right to proceed against the third-party tortfeasor. The carrier, however, was given a lien on the proceeds of any recovery to prevent unjust enrichment of the employee at the carrier's expense.

The anomaly in the amended sec-

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24 Ch. 328, § 29, [1935] N.Y. Laws 830, provides in pertinent part:
If such fund, person, association, corporation or carrier, as such an assignee, recover from such other, either by judgment, settlement, or otherwise, a sum in excess of the total amount of compensation awarded to such injured employee or his dependents and the expenses for medical treatment paid by it, together with the reasonable and necessary expenditures incurred in effecting such recovery, it shall forthwith pay to such injured employee, or his dependents, as the case may be, two-thirds of such excess and to the extent of two-thirds of any such excess such recovery shall be deemed for the benefit of such employee or his dependents.


25 The Worker's Compensation Act was amended by ch. 684, § 29, [1937] N.Y. Laws 1556 to provide:
1. If an employee entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in the case of death, his dependents, need not elect whether to take compensation under this chapter or to pursue his remedy against such other but may take such compensation and at any time either prior thereto or within six months after the awarding of compensation, pursue his remedy against such other subject to the provisions of this section. If such injured employee, or in case of death, his dependents, take or intend to take compensation under this chapter and desire to bring action against such other, such action must be commenced not later than six months after the awarding of compensation and in any event before the expiration of one year from the date such action accrues. In such case, the state insurance fund, if compensation be payable therefrom, and otherwise the person, association, corporation or insurance carrier liable for the payment of such compensation, as the case may be, shall have a lien on the proceeds of any recovery from such other, whether by judgment, settlement or otherwise, after the deduction of the reasonable and necessary expenditures, including attorney's fees, incurred in effecting such recovery, to the extent of the total amount of compensation awarded under or provided or estimated by this chapter for such case and the expenses for medical treatment paid by it and to such extent such recovery shall be deemed for the benefit of such fund, person, association, corporation or carrier. Notice of the commencement of such action shall be given within thirty days thereafter to the
tion 29 was the inclusion of "expenses for medical treatment" within the carrier's lien on the employee's tort recovery. If the Dinsmore-Zurich rule continued to be applicable, such expenses could not be recovered by the employee in his tort action.26

This inequity did not long escape the attention of the courts, although it came up in a roundabout way. In Wolkenstein v. Luminart Lampshade Products, Inc.,27 an employee who had received both compensation and medical benefits exercised his newly acquired right to pursue the tortfeasor. At the time of the litigation, the employer's obligation to provide medical benefits under section 13 ceased when the employee elected to sue the third party.28 Invoking the literal language of section 13, the carrier ceased paying for medical care.29 The claimant obtained an order from the State Industrial Board requiring the carrier to continue the payments. While the court acknowledged that the retention of the old limitation on the carrier's section 13 duties might have been a legislative oversight, it nevertheless reversed the decision of the board. Pointing out that continued payments by the carrier would in fact be "against the interest of the claimant,"30 Justice Foster observed:

[If the medical expenses are paid by the carrier or employer after the institution of a third-party action the claimant cannot recover such expenses as a part of his damage in a common-law suit because he has neither paid nor incurred them, and they form no part of his special damage; and yet the carrier or employer has a lien for their amount against any recovery the claimant may have. Unless the rules of evidence applicable to common-law actions are changed so as to permit proof of medical expenses paid or incurred by someone other than the plaintiff the result of this construction will be that a claimant will always lose. He cannot prove such expenses but they will, nevertheless, be deducted from his recovery in the event he is successful. In the absence of a direct and clear

commissioner, the employer and the insurance carrier upon a form prescribed by the commissioner.

2. If such injured employee, or in the case of death, his dependents, has taken compensation under this chapter but has failed to commence action against such other within the time limited therefore [sic] by subdivision one, such failure shall operate as an assignment of the cause of action against such other . . . .

Id. The allocation of one-third of the net excess to the carrier and two-thirds to the employee was retained.

See note 16 supra.

26 263 App. Div. 218, 32 N.Y.S.2d 630 (3d Dep't 1942).


29 Id. at 220, 32 N.Y.S.2d at 632.
expression to that effect it is not justifiable to hold that the Legislature contemplated such a situation by the revision of section 29.31

Of course, the hardship Justice Foster identified with respect to medical payments received after the commencement of the third-party action was equally applicable to those paid before. In both cases the employee would end up paying his own medical bills without recovering them from the tortfeasor.

The court of appeals could not have been unaware of this inequity when it was called upon to decide Schreiber v. American Employer’s Insurance Co.,32 mentioned at the beginning of this Article. In Schreiber, an injured employee’s tort action against the negligent third party resulted in a judgment for $100.33 Since the employee had previously received medical care for which his employer’s carrier paid $43, the insurer filed notice of lien with the tortfeasor’s liability insurer, which paid $43 to the carrier and $57 to the employee in satisfaction of the judgment. The employee then sued the carrier for the $43 had and received to his use. Reasoning that since no compensation was paid the carrier’s section 29 lien simply never arose, the appellate division held that money paid to the carrier justly belonged to the employee.34 This decision was affirmed without opinion by the court of appeals.35

Thus, the Schreiber court was able to sidestep the inequity of the scope of the lien by holding that no lien attached. This conclusion was predicated on the express language of section 29, which provided a lien for both compensation awarded and medical expenses paid whenever an employee who had received compensation chose also to sue the tortfeasor.36 In holding that the employee’s receipt of medical benefits did not equate with taking compensation

31 Id.
32 290 N.Y. 673, 49 N.E.2d 627 (1943) (per curiam).
34 Id. at 168, 38 N.Y.S.2d at 251.
35 290 N.Y. 673, 49 N.E.2d 627 (1943).
36 Ch. 684, § 29, [1937] N.Y. Laws 1557. The section reads in part:
If such injured employee . . . take[s] or intend[s] to take compensation under this chapter and desire[s] to bring action against such other, such action must be commenced not later than six months after the awarding of compensation . . . .
In such case, the . . . insurance carrier liable for the payment of such compensation . . . shall have a lien on the proceeds of any recovery from such other, whether by judgment, settlement or otherwise, after the deduction of the reasonable and necessary expenditures, including attorney’s fees, incurred in effecting such recovery, to the extent of the total amount of compensation awarded . . . . and the expenses for medical treatment paid . . . .
(Emphasis added).
so as to activate the carrier’s lien rights under subdivision 1 of WCL § 29, the court maintained harmony between that subdivision and subdivision 2, as to which it had long been held that receipt of medical benefits did not trigger the running of the time period leading to automatic assignment of the employee’s tort claim to the carrier.37

The critical factor in the Schreiber court’s interpretation was that the receipt of medical care did not equate with “taking compensation,” in the absence of which the carrier’s section 29 lien right never attaches.38 The importance of this to the employee was clear: where he did not receive compensation, he did not have to repay the carrier for medical costs not recoverable from the tortfeasor.39


38 See note 34 and accompanying text supra.

39 Id. However, the question arises: What difference did it make to the carrier whether the medical expenses were reimbursed out of the employee’s tort recovery or recovered directly from the tortfeasor pursuant to the separate cause of action provided by § 13? In 1943, the principal difference lay in attorney’s fees. Under the lien approach, the employee bore the cost of litigation to obtain the recovery while the carrier shared in the results. See, e.g., Sarancza v. Roberts & Grancelli Inc., 41 Misc. 2d 415, 245 N.Y.S.2d 403 (Sup. Ct. Nassau County 1963). See also Atleson, Workmen’s Compensation: Third Party Action and the Apportionment of Attorney’s Fees, 14 BUFFALO L. REV. 515 (1970). Additionally, the courts disclaimed authority to recognize a lien for attorney’s fees for an injured employee who had received judgment against a third-party defendant. See Koutrakos v. Long Island College Hosp., 47 App. Div. 2d 500, 386 N.Y.S.2d 528 (2d Dep’t 1975); Kussack v. Ring Constr. Corp., 1 App. Div. 2d 634, 153 N.Y.S.2d 646 (3d Dep’t 1958), aff’d, 4 N.Y.2d 1011, 177 N.Y.S.2d 522 (1958). This free ride for the carrier was eliminated by a 1975 amendment allowing the employee to make application to distribute the litigation costs ratably over both shares of the recovery. Ch. 190, [1975] N.Y. Laws (amending WCL § 227). See Becker v. Huss Co., 43 N.Y.2d 527, 373 N.E.2d 1205, 402 N.Y.S.2d 980 (1978). This amendment was adopted in response to a Law Revision Commission recommendation. See Studies and Recommendations of Law Revision Commission, [1974] 2 N.Y. Law Rev. Comm’N Rep. 1906 [hereinafter cited as Studies and Recommendations]. Section 227, as amended, provides in part:

Should the employee secure a recovery from such third party, whether by judgment, settlement or otherwise, such employee may apply on notice to such lienor to the court in which the third party action was instituted, or to a court of competent jurisdiction if no action was instituted, for an order apportioning the reasonable and necessary expenditures, including attorneys’ fees, incurred in effecting such recovery. Such expenditures shall be equitably apportioned by the court between the employee and the lienor.


The employee’s improved position in relation to the compensation carrier as a result of the 1975 amendment underscores the inequity of the decision in Durant v. Motor Vehicle Accident Indem. Corp., 15 N.Y.2d 408, 207 N.E.2d 600, 260 N.Y.S.2d 1 (1965) (per curiam). In Durant, the court upheld an endorsement on the insured’s policy which provided that the amount of compensation paid would be deducted from the $10,000 maximum recovery pro-
Thus, it may be seen that Schreiber was a significant, albeit limited, victory for employees over carriers. Although the carrier was shut out from the employee's tort recovery where the employee had not triggered the carrier's lien rights by "taking compensation," the problem averted to by Justice Foster in Wolkenstein remained unresolved.

The Amendment of 1944 and Its Progeny

To harmonize the employer's duty to furnish medical care with the right of the employee both to receive compensation and pursue his common-law tort remedy, section 13 was amended in 1944 to make the employer's duty applicable both before and after the employee commenced his tort action.42 At the same time, section 29 was amended to add the italicized language: The injured employee "need not pursue his remedy against [the tortfeasor] but may take such compensation and medical benefits" and sue within six months. "If such injured employee . . . take[s] or intend[s] to take compensation and medical benefits" he must sue within six months. "In such case," the carrier shall have a lien, etc.43

Although the remedial purpose of the amendment to section 13 is clear,44 the reason for the section 29 amendment remains conjectural. If it was added to make certain that the receipt of medical benefits for the employee's injuries was consistent with the state's policy of providing medical care to injured employees, then the amendment would have eliminated the carrier's lien rights. However, if the amendment was intended to provide the carrier with a lien on the injured employee's recovery, subject to the proration of attorney's fees, then the amendment would have had a similar effect on the carrier's lien rights.

The amendment to section 13 was designed to provide the injured employee with access to medical care while also protecting the carrier's lien rights. The amendment to section 29 was designed to provide the carrier with a lien on the injured employee's recovery, subject to the proration of attorney's fees. These amendments were intended to ensure that the carrier would have a lien on the injured employee's recovery, subject to the proration of attorney's fees, and that the carrier would have a lien on the recovery, subject to the proration of attorney's fees, and that the carrier would have a lien on the recovery, subject to the proration of attorney's fees.
benefits was not an election to forego suit against the tortfeasor, it
indeed reflects an abundance of legislative caution. That issue had
been decided before the 1937 amendment and ratified as recently
as Schreiber.45 Possibly, the legislature intended to reverse the
Schreiber holding and make the employee’s tort recovery subject to
the carrier’s lien under all circumstances, even where the employee
had merely received medical treatment and never applied for or
received compensation payments.46

While the effect of the 1944 amendment to section 29 on the
particular facts of Schreiber must remain in doubt,47 later cases
have used it to address the basic contradiction, noticed in
Wolkenstein, between the carrier’s lien for medical expenses, cre-
ated by the 1937 amendment, and the traditional Dinsmore-Zurich
rule disallowing this item in the employee’s recovery from the tort-
feasor. In the leading case, Calhoun v. West End Brewing Co.,48
an employee’s third-party tort complaint pleaded medical expenses as
special damages. Defendant’s answer alleged that since the medical
costs were paid by the compensation carrier of plaintiff’s employer,
the right to recover those costs belonged to the carrier, not the
plaintiff. The appellate division affirmed an order striking out the
defense as insufficient in law.49 In the course of its opinion, the court
reviewed the historical development of the carrier’s separate section
13 cause of action in light of the 1937 amendment to section 29,

45 See note 32 supra.

46 One lower court seems to proceed on such an assumption. See Aetna Cas. & Sur. Co.
wherein an employee who had received medical care settled his tort claim against the third
party. When the carrier brought a separate action against the third party under § 13, the court
dismissed the complaint because the carrier had not given the defendant notice of the lien in
the employee’s action. If such prior notice had been given, said the court, “a lien would have
attached.” 44 Misc. 2d at 541, 254 N.Y.S.2d at 174. The court gave no reasons for this
assumption and its conclusion throws the predicate for a lien under subdivision 1 out of
harmony with the “taking compensation” predicate for assignment of the tort claim to the
carrier under subdivision 2. As to the latter it had consistently been held that the receipt of
medical benefits does not amount to such taking of compensation as will effect an assignment
of the employee’s tort claim to the carrier. See, e.g., American Mut. Liab. Ins. Co. v. Niagara

47 The difficulty is caused primarily by the Schreiber plaintiff’s receipt of medical treat-
ment only, a situation which apparently has not been presented to the courts since Schreiber
was decided. If the revised language of § 29 in fact provides that these medical payments
alone will now give rise to a lien on the tort recovery, see notes 42-43 and accompanying text
supra, the carrier would be entitled to restitution in that amount regardless of whether
plaintiff could have recovered them as an item of damages.


49 Id. at 401, 56 N.Y.S.2d at 108.
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which gave the carrier a lien on the employee's tort recovery for medical expenses. Against that background, the court stated that "there would be no reason for the legislature to give the carrier the right to a lien for medical expenses unless it intended that the plaintiff could first prove such expenses on the trial and recover therefor."\(^{50}\) The court suspended the Dinsmore-Zurich bar because "[s]ection 29 allows him to bring this action in a sort of representative or trust capacity."\(^{51}\) The rule adopted in Calhoun became settled, so that the court of appeals in 1952, speaking of an employee's third-party claim could say: "[O]n settlement of [the claim] for the sum of $35,000—which sum necessarily included hospital expenses and other special damages—the compensation carrier enforced its lien upon the proceeds of the settlement for the amount it had paid . . . , which embraced the hospital expenses."\(^{52}\)

Thus, the employee who had received medical benefits could recover their cost from the tortfeasor and so was brought within the net of the carrier's lien, from which the employee in Schreiber had narrowly escaped. Although this "reverse-assignment" whereby the employee prosecutes the carrier's cause of action for medical costs relieves the glaring inequity first noticed in Wolkenstein, it nevertheless leaves the employee with the short end of an inadequate recovery since the carrier receives restitution off the top.\(^{53}\)

**RECENT DEVELOPMENTS: THE SPECIAL CASE OF POLICEMEN AND FIREMEN**

General Municipal Law (GML) sections 207-a and 207-c require cities of less than one million population to pay full salary and provide all necessary medical treatment and hospital care to job disabled policemen and firemen.\(^{54}\) Both sections 207-a (firemen) and

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\(^{50}\) Id. at 400, 56 N.Y.S.2d at 107.
\(^{51}\) Id.

\(^{53}\) This is the result of the hierarchy of claims to the tort recovery established in Calhoun. Speaking of the employee's action against the negligent third party, the Calhoun court stated:
Section 29 allows him to bring this action in a sort of representative or trust capacity. The purpose of the action is to create a fund in which the plaintiff has a residuary interest. The insurance carrier or employer, as the case may be, has first claim after attorney's fees, etc., have been paid, for compensation paid, and to be paid, and for medical expenses.

269 App. Div. at 400, 56 N.Y.S.2d at 107. Thus, if only a part of the judgment is recovered, the carrier's lien will be fully satisfied before the employee can assert his "residuary interest" in whatever balance remains.

\(^{54}\) N.Y. GEN. MUN. LAW (GML) § 207-a (McKinney 1972 & Supp. 1977-1978) reads in
207-c (policemen) give the municipality a cause of action against any third-party tortfeasor for salary and medical expenses paid for the injured employee.

With respect to medical care, the liability of the municipality parallels the WCL § 13 liability of employers generally.55 The major difference in the statutory schemes is that under the GML there is no crossover between the employee’s tort cause of action against the third party and the municipality’s reimbursement cause of action; no assignment, subrogation or resulting lien ever arises; the two claims are kept separate.56 As a consequence, the courts have applied to policemen the Dinsmore-Zurich rule that limited an employee’s tort recovery before the bar was lifted by Calhoun and subsequent cases.57 Accordingly, when the policeman sues the third party in tort he may not claim lost wages or medical expenses as items of special damage.58

As the result of a 1941 amendment to the WCL,59 municipal pertinent part:

1. Any paid fireman, which term as used in this section shall mean any paid officer or member of an organized fire company or fire department of a city of less than one million population, or town, village or fire district, who is injured in the performance of his duties or who is taken sick as a result of the performance of his duties so as to necessitate medical or other lawful remedial treatment, shall be paid by the municipality or fire district by which he is employed the full amount of his regular salary or wages until his disability arising therefrom has ceased, and, in addition, such municipality or fire district shall be liable for all medical treatment and hospital care furnished during such disability . . . .

Id. The provision governing policemen is virtually identical. GML § 207-c (McKinney 1972 & Supp. 1977-1978). It has been noted that the municipality’s duty was imposed “as a matter of public policy to protect both the city and the fireman himself" by extending the most efficacious care possible to those engaged in hazardous activity. Birmingham v. Mirrington, 204 Misc. 821, 123 N.Y.S.2d 72 (Sup. Ct. Niagara County 1953). See also City of Buffalo v. Maggio, 47 Misc. 2d 971, 263 N.Y.S.2d 603 (Sup. Ct. Erie County 1965), rev’d on other grounds, 27 App. Div. 2d 635, 273 N.Y.S.2d 506 (4th Dep’t 1966), aff’d, 21 N.Y.2d 1017, 238 N.E.2d 494, 291 N.Y.S.2d 1 (1968). The compensation systems for firemen and policemen in various states, including New York, are discussed in 1A Larson, supra note 4, §§ 56.31-32.

55 Compare WCL § 13 (McKinney 1972) and note 6 supra, with GML §§ 207-a, -c (McKinney 1972 & Supp. 1977-1978), and note 54 supra.


57 See notes 16-18 supra.


59 Ch. 875, [1941] N.Y. Laws 2013. The added language to WCL § 3(1) read:

Any municipal corporation or other political subdivision of the state may bring its employees or officers, elective or appointed or otherwise, not enumerated in . . . . this chapter within the coverage of this chapter by appropriate action of the legisla-
employees, theretofore excluded from coverage under workmen's compensation, became eligible for inclusion at the option of the municipality—an option widely exercised. In the special case of firemen and policemen, the priorities of coverage under the GML and WCL are reconciled in WCL § 30, which provides that any compensation award is reduced by "any salary or wages paid to, or the cost of any medical treatment and hospital care provided for" the employee under GML §§ 207-a and 207-c. Thus, it may be seen that the municipality's statutory obligation under the GML is primary and the option exercised under the WCL is supplementary.

It was against this background of statutory interrelationships...
that *McKay v. Town of West Seneca* arose. McKay, a policeman employed by the town, was injured in an automobile accident while on duty. The town had elected to provide compensation coverage and the carrier paid McKay's medical expenses in the amount of $2,825. McKay brought an action against the other driver and, in a pre-trial conference, settled his case for $10,000, the limit of the defendant's liability coverage. When McKay later filed a claim for compensation, the Workmen’s Compensation Board held that no compensation was payable because the settlement was without notice to the carrier. The board also held, by implication, that the carrier had a lien on McKay's settlement recovery for the $2,825 medical bill.

On appeal from the board's decision, a divided appellate division left undisturbed the finding that the failure to notify the carrier of the settlement resulted in a forfeiture of compensation rights, but reversed the board's determination that the carrier had a lien on the $10,000 recovery. Citing *Szybura v. City of Elmira*, the majority concluded that since the settlement did not represent any recovery for medical expenses, "it would appear to be clearly inequitable to permit a carrier's lien . . . for medical expenses to be asserted . . . ." The majority reasoned that "[t]o hold otherwise would impose on the police officer the responsibility for seeking and obtaining payment of medical bills for and on behalf of the carrier." In dissent, Justice Mahoney stated that no rule prohibited McKay from claiming medical expenses in his action and that WCL § 29, therefore, gave the carrier a lien on "the proceeds of any recovery." Any other result, he contended, would deprive the in-

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63 Id. at 374, 381 N.Y.S.2d at 893.
64 Id. at 376, 381 N.Y.S.2d at 895.
65 Id. at 376-77, 381 N.Y.S.2d at 895.
66 28 App. Div. 2d 1154, 284 N.Y.S.2d 190 (3d Dep't 1967) (mem.).
68 Id. at 380, 381 N.Y.S.2d at 897 (Mahoney, J., dissenting). Although not the basis for Justice Mahoney's dissent, one reason for disagreement would have been that even if police-
man McKay was precluded by law from obtaining a recovery for medical costs that, nevertheless, under the literal language of § 29 the carrier's lien attached to any recovery McKay did obtain. Disagreement on this fundamental point has agitated the courts in several recent cases involving the interplay between workmen's compensation and no-fault insurance prior to the 1978 amendment of § 29. For example, an employee injured in an automobile accident while on the job could have received medical expenses and portions of lost wages under workmen's compensation, and sue the third party because he had "serious" injuries within the ambit of N.Y. Ins. Law § 671(4) (McKinney Supp. 1977-1978). If successful in that
surer of a means of restitution and discourage carriers from underwriting such a plan. Consequently, the dissent concluded that it

action, he could only have recovered the excess of his own damages over his “basic economic loss,” for which as to the latter he looked to the “first party benefits” of his own insurer. See id. § 671(2). Basic economic loss includes in its measure the same medical expenses and partial wages received in compensation by the employee, while his tort recovery excludes them. The initial issue, therefore, was whether it was proper to follow the literal language of WCL § 13 and give the compensation carrier a reimbursement lien on the insured’s recovery, even though that recovery could never include the items for which the lien is asserted.

The employee’s “first party” rights against his insurer for “basic economic loss,” moreover, are offset by any amount “recovered or recoverable” under workmen’s compensation. N.Y. Ins. Law § 671(2) (McKinney Supp. 1977-1978). Thus the employee was squeezed between the carrier’s lien and the insurer’s offset. The ultimate issue then was: who finally would bear the cost of medical expenses and partial lost wages? The opinions in several cases ranged from the compensation carrier, see Cederman v. Liberty Mut. Ins. Co., 58 App. Div. 2d 969, 397 N.Y.S.2d 252 (4th Dep’t 1977) (mem.); Grello v. Dasszykowski, 58 App. Div. 2d 412, 397 N.Y.S.2d 396 (2d Dep’t 1977), rev’d, 44 N.Y.2d 894, 407 N.Y.S.2d 633 (1978); Granger v. Urda, 54 App. Div. 2d 377, 388 N.Y.S.2d 396 (3d Dep’t 1977), rev’d, 44 N.Y.2d 91, 375 N.E.2d 380, 404 N.Y.S.2d 319 (1978), to the third party tortfeasor, see id. (Herlihy, J., dissenting), to the employee’s own no-fault insurer, see id. (Greenblott, J., dissenting). In reversing the Granger case, the court of appeals held that the carrier’s lien did attach to the employee’s tort recovery. 44 N.Y.2d 91, 375 N.E.2d 380, 404 N.Y.S.2d 319 (1978). Since WCL § 29 gave the carrier a lien on “any recovery,” the court held it inviolable. In response to the court’s expressed reluctance in reaching this conclusion and the obvious inequities which resulted, the New York legislature amended WCL § 29 to provide, inter alia:

Notwithstanding any other provision of this chapter, the . . . insurance carrier . . . liable for the payment of . . . compensation and/or medical benefits shall not have a lien on the proceeds of any recovery received pursuant to subdivision one of section six hundred seventy-three of the insurance law . . . for compensation and/or medical benefits paid . . .

Ch. 572, [1978] N.Y. Laws (emphasis added) (to be codified in WCL § 29(1)(a)).

* * * 51 App. Div. 2d at 378, 381 N.Y.S.2d at 897-98 (Mahoney, J., dissenting). Justice Mahoney’s fear that absent a lien on the employee’s tort recovery, the carrier would be without remedy, seems groundless. Not only does WCL § 13 afford the employer “an additional cause of action against such third party to recover any amounts paid by him for medical treatment,” but the carrier, if regarded as the insurer of the town’s GML § 207 duty, would be subrogated to the town’s GML § 207 direct cause of action against the third party. See, e.g., Hamilton Fire Ins. Co. v. Greger, 246 N.Y. 162, 158 N.E. 60 (1927); Ocean Accident & Guar. Corp. v. Hooker Electrochemical Co., 240 N.Y. 37, 147 N.E. 351 (1925); Haberman v. Hartford Accident & Indem. Co., 239 App. Div. 314, 244 N.Y.S. 161 (2d Dep’t 1930); Public Serv. Mut. Ins. Co. v. Saks Fifth Ave., 155 N.Y.S.2d 173 (Sup. Ct. N.Y. County 1956); Employers Liab. Assur. Corp. v. Fisher, 13 N.Y.S.2d 902, 905 (Rochester City Ct. 1939); cf. Globe Indem. Co. v. Atlantic Lighterage Corp., 271 N.Y. 254, 2 N.E.2d 640 (1938) (without acceptance of compensation by employee, carrier alone has no right of action against third parties).

The additional observation by Justice Mahoney that the town “had no cause of action for medical expenses, not having advanced any” is incongruous in an opinion subscribing to such enlarged ideas of collateral source benefits. The comparable cause of action given an employer under WCL § 13 is maintainable by the carrier which insured the risk and made the payments, even though the employer did not himself make them, see Zürich Gen. Accident & Liab. Co. v. Childs Co., 253 N.Y. 324, 171 N.E. 391 (1930), as long as it does so within the 3-year statute of limitations. United States Cas. Co. v. North Am. Brewing Co., 253 App. Div. 576, 2 N.Y.S.2d 256 (2d Dep’t 1935), aff’d, 279 N.Y. 762, 18 N.E.2d 856 (1939).
was perfectly equitable for the carrier's lien to attach to the settlement, since, if McKay "mistakenly did not" plead his medical expenses as special damages, "the harm was self-inflicted." When the case reached the court of appeals it was reversed, solely on the basis of Justice Mahoney's opinion.

The question now reduces to: Why was McKay legally entitled to plead and recover for medical costs? The dissent acknowledged the authority of Szybura, where wages and medical costs paid to an injured policeman or fireman by the municipality under GML § 207 were held not to be collateral source benefits under Drinkwater v. Dinsmore, and therefore were not recoverable in an action by the employee against the tortfeasor. The critical point for the dissent was that McKay's medical costs were paid not by the town itself, but by the compensation carrier. Such a payment, it was asserted, is like insurance or pension benefits, and as such has the legal character of "collateral source" benefits.

Such a view, it is respectfully submitted, misapplies the collateral source rule as it prevails in New York. Benefits from collateral sources, which do not diminish the plaintiff's recovery against a tortfeasor, are those benefits he procures for himself, or at the extreme, those paid by others to the plaintiff, in the character of social insurance and not as salary. Medical expenses paid directly

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70 51 App. Div. 2d at 380, 381 N.Y.S.2d at 897 (Mahoney, J., dissenting).
72 51 App. Div. 2d at 377, 381 N.Y.S.2d at 895-96 (Mahoney, J., dissenting) (citing Szybura v. City of Elmira, 28 App. Div. 2d 1154, 284 N.Y.S.2d 190 (3d Dep't 1967)). Szybura involved a collision between a police vehicle and a fire truck in which one policeman and two firemen were injured. The defendant-city paid the three individuals pursuant to GML § 207. In the subsequent negligence action against the city, the court allowed the city to offer the payments it made to the plaintiffs in mitigation of the plaintiffs' tort recovery, reasoning that although the alleged wrongdoer and municipality are the same party, "[i]t would be unjust to permit the third-party wrongdoer to be subjected to double claims for wages paid and medical services provided . . . ." 28 App. Div. 2d at 1155, 284 N.Y.S.2d at 194.
73 28 App. Div. 2d at 1155, 284 N.Y.S.2d at 194.
74 51 App. Div. 2d at 378, 381 N.Y.S.2d at 896.
75 Drinkwater v. Dinsmore, 80 N.Y. 390, 392-93 (1880). Referring to an action in which a plaintiff claimed lost wages as an element of damage, the Dinsmore court stated:

Before the plaintiff could recover for the loss of wages, he was bound to show that he lost the wages in consequence of the injuries, and how much they were. The defendant had the right to show that he lost no wages, or that they were not as much as claimed. He had the right to show, if he could, that for some particular reason the plaintiff would not have earned any wages if he had not been injured, or that he was under such a contract with his employer that his wages went on without service, or that his employer paid his wages from mere benevolence. In either case, upon such showing, the plaintiff could not claim that the defendant's wrong caused him to lose his wages, and the loss of wages could form no part of his damage.

Id.
to the supplier of medical services by an employer under an absolute statutory duty are not collateral benefits; they are elements of expense never borne by the plaintiff in the first instance. Moreover, the fact that the employer arranges insurance to pay its own liability does not alter the legal effect of such payment as far as the employee is concerned.

If, therefore, the McKay dissent felt that the carrier has a lien on the employee's tort recovery because medical benefits are available in the tort action under the collateral source rule, it placed the cart before the horse. Ever since Calhoun, it is because of the carrier's lien that the law suspends the Dinsmore-Zurich barrier and allows the employee to plead such damages as the carrier's representative. In summary, the carrier does not have a lien because the expenses are recoverable by the employee; the employee is allowed to recover such expenses because the carrier has a lien.

The practical reader will ask, what does it matter if the horse and cart are in the proper logical and historical order, as long as they reach the intended destination? First, although it is not the thesis of this Article to defend the New York view on the collateral source rule established by Drinkwater v. Dinsmore, it is nevertheless worthwhile to avoid misunderstanding it. Second, was the intended destination indeed reached?

The statutory duty of municipalities to pay the wages and medical expenses of firemen and policemen injured on the job dates back to 1938. The employee neither incurred nor paid the medical costs, and was assured of their payment whether it was by the employer or his insurer.

The usual criticism is that the Dinsmore rule unduly benefits the wrongdoer and penalizes the victim. In the peculiar context of the history of medical benefits under workmen's compensation, however, this was not so until after the 1937 innovation of the carrier's lien, when the "reverse assignment" exception of Calhoun sidestepped the Dinsmore rule and allowed the employee to recover the carrier's medical costs on the carrier's behalf. With the possible exception of the situation in Schreiber, therefore, see notes 32-37 and accompanying text supra, the issues raised in this Article will remain with us whether or not New York abandons the Dinsmore rule generally, a choice the court refused to make in Coyne v. Campbell, 11 N.Y.2d 372, 183 N.E.2d 891 (1962) (no recovery for medical expenses allowed a doctor whom colleagues had treated without charge as a professional courtesy).

The statutory duty applicable to firemen was originally "a part of the unconsolidated laws of the State, being chapter 562 of the Laws of 1938, effective April 7, 1938, and the
expenses and the right of the employee to sue him for his damages are kept separate. Unlike the workmen’s compensation system, there is no assignment, subrogation or lien provided for. The benefit to the employee under such a system is that his tort recovery is not a reinsurance fund for the municipality’s medical outlay. If the tortfeasor can pay both claims in full, neither claimant suffers. Where the amount available is insufficient, the employee and the city, as co-claimants, share the inadequacy and abate their claims to the settlement or judgment proportionately.

When, in 1941, municipal employees were made eligible for compensation coverage at the municipality’s option, it is scarcely arguable that the intention was to prejudice rights already held by firemen, and, subsequently, policemen. It is of particular interest that the municipality’s duties under GML §§ 207-a and 207-c are primary and compensation coverage supplementary. WCL § 30 states that the policemen’s compensation claim is reduced by “any salary or wages paid” or “cost of any medical treatment or hospital care provided for” under GML § 207-c. This latter item, it must be remembered, is that for which the carrier was allowed a lien on McKay’s tort recovery.

The McKay dissent’s quotation of section 30 in support of its view is puzzling. According to the court’s statement of the facts, the town paid McKay’s salary but the carrier paid his medical bills. If section 30 means what it says, as between the town and the carrier, the policeman’s medical bills are for the town to bear. Why, then, did the carrier pay them? If it was acting as a volunteer, the carrier should share the same fate as an employee who pays his own medical bills: no reimbursement. Nor should the fact that the carrier, enactment of the section 207-a was added to that portion of the consolidated laws entitled ‘General Municipal Law’ by legislative action, chapter 15 of the Laws of 1941, effective February 17, 1941. The object of this addition to the Consolidated laws was to codify the statute of 1938.” Birmingham v. Mirrington, 204 Misc. 821, 826, 123 N.Y.S.2d 72, 77 (Sup. Ct. Niagara County 1953). The cause of action given the municipality directly against the third party for restitution of such payments was added to GML § 207-a by ch. 919, [1946] N.Y. Laws 1708. Employers’ Liab. Assur. Corp. v. Daley, 271 App. Div. 662, 667, 67 N.Y.S. 233, 237 (4th Dep’t 1947), aff’d, 297 N.Y. 745, 77 N.E.2d 515 (1948). GML § 207-c, creating parallel rights for policemen, was added by ch. 920, [1961] N.Y. Laws 2560.

Municipal employees were included in the § 3(1) grouping by chs. 639, 875, [1941] N.Y. Laws 1431, 2013.

Amendments to WCL § 30(2) for firemen under § 207-a, ch. 812, [1951] N.Y. Laws 2021, ch. 280 [1963] N.Y. Laws 1625, added the same credit against workmen’s compensation for policemen who are covered by GML § 207-c.

Sandberg v. Seymour Dress Co., 242 N.Y 497, 152 N.E. 400 (1926) (per curiam);
rather than the town, paid the bills alter the legal effect of section 30. It could not have been the legislature's intent to allow so easy an avoidance of the relative priorities of coverage. The language of the section so indicates: what is deductible from any compensation award is any salary "paid" and medical benefits "provided for" under GML § 207-c. The policeman's medical bills were "provided for" under the section, whether paid by the town or someone else.

It is submitted that if the carrier paid the medical bills pursuant to the terms of its contract with the town of West Seneca, it was necessarily acting as insurer of the town's primary duty under GML § 207-c and not as carrier of its supplementary WCL § duty. Of course, the carrier and the town are free to allocate their respective costs and risks as they please, subject to the supervision of the state comptroller. The point insisted upon here is that it is impossible to justify a contractual sleight-of-hand whereby the primary legal character of the payment of the policeman's medical bills is changed to his disadvantage. The disadvantage, of course, is that medical costs paid pursuant to the WCL come within the payor's lien rights under section 29, whereas the identical payments made by the town (or its insurer) under GML § 207-c have no effect on the policeman's tort recovery and remain a separate cause of action by the town directly against the tortfeasor.

In McKay the illusion


If the court were willing to soften the disability routinely visited on volunteers, the proper remedy would be against the party whose duty the payment discharged, viz., the town, under GML § 207-c, and not against the party whose legal right it was to have the bills paid, viz., the policeman. See Title Guar. & Trust Co. v. Haven, 214 N.Y. 468, 108 N.E. 819 (1915).

The employee may, however, benefit from a prior precedent in which an employee lost. In Moeller v. Associated Hosp. Serv., 304 N.Y. 73, 106 N.E.2d 16 (1952), the court was required to interpret a policy of hospital insurance held by an injured employee which excluded from coverage any "hospital [s]ervice provided for under any Compensation Law . . . ." Id. at 74, 106 N.E.2d at 18 (emphasis in original). The employee had received hospital care and compensation from his employer's carrier and then recovered a settlement from the tortfeasor. The carrier subsequently enforced its lien against the proceeds of the settlement. The appellate division held, as to the hospital insurance exclusion, that once the carrier has been reimbursed, it has no longer "provided" the hospital service sought to be excluded by the insurer. Accordingly, the court held for the employee. 278 App. Div. 723, 103 N.Y.S. 116 (3d Dep't 1951). The court of appeals reversed, stating that the lower court "overlooked the fact that the insurance contract does not read 'Hospital Service Provided,' but 'Hospital Service provided for under any Compensation Law' . . . . There can be no doubt, therefore, that the plain provisions of the insurance contract excluded that service from coverage." 304 N.Y. at 75, 106 N.E.2d at 17 (emphasis in original).

In Birmingham v. City of Niagara Falls, 282 App. Div. 970, 125 N.Y.S.2d 692 (3d Dep't 1953), a fireman had been paid full wages during the period of his disability pursuant to GML
of different statutory derivations for payment of salary on the one hand, and medical costs on the other, was aided by the presence of two entities: the town and the carrier. Two heads can at least plausibly wear two hats. But what if the town were a self-insurer for both GML duties and WCL coverage? Could the municipality have unilaterally declared which hat it was wearing when it paid the policeman's medical bills and so bootstrap itself into a lien on his $10,000 tort recovery?

CONCLUSION AND RECOMMENDATION

That the legal legerdemain in *McKay* would result in the pea ending up under the WCL shell rather than the GML shell was hardly foreseeable by anyone. In light of the *Szybura* holding which excluded salary and medical costs from a policeman's tort recovery, it seems rather unfeeling to add the comment that "the injured policeman could have pleaded his medical expenses under the collateral source rule and if he mistakenly did not, the harm was self-inflicted." Not that it would have mattered much in a pre-trial

§ 207-a. He was also awarded $32 per week compensation. The city sued the fireman for reimbursement under WCL § 25, which gives an employer reimbursement rights against unpaid installments of compensation on account of "advance payments of compensation, or . . . payments to an employee in like manner as wages during any period of disability . . . ." Although the case does not explicitly so state, it is assumed that the city's reimbursement was for the $32 per week received as surplus over full salary, and not for the full salary itself. Since this has been held the proper rule as to employees not covered by GML § 207, see *Lynch v. Board of Educ.*, 1 App. Div. 2d 362, 150 N.Y.S.2d 145 (3d Dep't 1956), aff'd, 3 N.Y.2d 871, 145 N.E.2d 27, 166 N.Y.S.2d 313 (1957), it is, a fortiori, the proper rule for those who are so covered.

The interesting point about *Birmingham*, however, is not the court's refusal to allow the employee to receive both wages and compensation. By allowing the city to recoup the compensation award, the court in effect made the carrier bear the cost of the first $32 of the fireman's weekly wages. In so doing, the court cited the recently amended WCL § 30, which, by ch. 812, [1951] N.Y. Laws 2021, gave the carrier a credit for wages paid under GML § 207. 282 App. Div. at 970, 125 N.Y.S.2d at 693. The court stated that this was merely declaratory of existing law, without noting that its decision was exactly contrary to the allocation of cost mandated by the statute. It made no difference to the fireman; but it makes a difference in a case such as *McKay*, in which the precise statutory source of his benefits becomes important to the employee. See *Rosinsky v. City of Binghamton*, 72 Misc. 2d 187, 338 N.Y.S.2d 683 (Sup. Ct. Broome County 1972) (full salary under GML § 207-c held payable notwithstanding prior compensation payments; such salary to be credited against compensation). It seems clear that as to employees covered by GML § 207 the relevant provisions are that section and WCL § 30. The general rule of recapture of salary, given employers in general by WCL § 25, must yield to the specific provisions of the former two sections, in situations where they apply. See generally *Bahr v. Levitt*, 18 App. Div. 2d 942, 943, 237 N.Y.S.2d 379, 381 (3d Dep't 1963) (reimbursement under WCL § 25 will not affect calculations made under section 64 of Retirement and Social Security Law) (dictum).

* 51 App. Div. 2d at 38, 381 N.Y.S.2d at 897 (Mahoney, J., dissenting).
CARRIER'S RIGHT TO RESTITUTION

conference settlement for the defendant's $10,000 liability policy limit.

The chief objection does not lie in mousetrapping litigant McKay, though in all conscience that was harsh enough, nor even in the transformation of a non-recourse payment under GML § 207-c into an advance secured by a lien under WCL § 29. Rather, the objection lies mostly in the loss of the original understanding between laws designed to lift the financial burdens of medical care from the injured worker and place them squarely and finally on the employer, be it private or municipal. That the employer should be reimbursed by the third-party tortfeasor in one way or another does not mean that such restitution should be to the pro tanto exclusion of the employee's equally meritorious claim. This is what necessarily happens when the carrier's lien is applied to the employee's recovery in respect to compensation payments made to him, and the legitimacy of the lien in general is not called into question. Yet a case can be made that the lien for medical payments made to the employee stands on a different footing.

From the beginning of workmen's compensation in 1914, medical payments were a separate item. Once paid by the employer, they were the employer's responsibility to recoup and the employee bore no responsibility for them, directly or indirectly. He could pursue his common-law remedy against a third party and realize on his claim well or ill as the merits of his case and the resources of his defendant dictated.

The amendment to the Worker's Compensation Act in 1937, eliminating the need for an absolute election of remedies, was de-

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Several other states treat the problem of the inadequate recovery by qualifying the carrier's total lien with a requirement that the plaintiff-employee receive various fixed minimum shares of the recovery. See statutes collected in 2A Larson, supra note 4, § 74.31 (Supp. 1978).

A federal case in Georgia resulted in a $35,000 judgment for the injured employee. The defendant was insolvent and the only fund available was $10,000 in insurance coverage. Plaintiff's attorney imposed a lien for his fee, the carrier imposed a lien for $7,045 benefits paid and the plaintiff, consequently, received almost nothing. Johnson v. Lee, 460 F.2d 1053 (5th Cir. 1972). In answer to the inequities exposed by this case, Georgia repealed its carrier's subrogation statute. See 2A Larson, supra note 4, § 74.14, at 14-214. ]

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signed to enlarge the financial return to the employee, not diminish it.91 Yet the innovation of a carrier's lien on the employee's tort recovery, even as ameliorated by the Calhoun case, may often have the latter effect. Although, under Calhoun, the employee represents the carrier in recovering medical expenses, the substantive right to recover is the carrier's. This was the grand design of section 13, which placed sole responsibility for the payment of these costs on the employer and expressly provided for their recovery by way of a separate cause of action against the tortfeasor. This right belongs to the one who pays the expenses. The central point of this Article is that with the privileges of ownership go the burdens. If the pocket of the tortfeasor is not deep enough to pay all claims in full, why should the carrier's claim be fully satisfied through a lien while the victim absorbs the loss? Medical costs which were supposed to be taken off his back completely now come back to haunt him. This seems a poor realization of the legislative intent "to insure an equitable division of the proceeds of any recovery, whether by judgment, settlement or otherwise, between the injured employee . . . and the one liable for the compensation."92 These objections are doubly applicable to policemen and firemen, as to whose recovery the statutes, when properly understood, do not even provide for a lien. If these claims are indeed separate, fairness dictates that where there is not enough to pay both they should abate in proportion.

It is probably too late to hope that such a result could be brought about by judicial interpretation. As a solution, then, an amendment to the statute could be made to provide for an equitable apportionment of inadequacy in the recovery. If such a suggestion or one similar to it were thought worth adopting, the procedure established in 197593 for the apportionment of attorney's fees would seem the appropriate procedural occasion for its enforcement.

91 In Employers Mut. Liab. Ins. Co. v. Refined Syrups Sales Corp., 184 Misc. 941, 53 N.Y.S.2d 835 (Sup. Ct. N.Y. County 1945), the court noted that one of the keys to the amended provision was the fact that it allows the employee or his dependents to recover a sum over and above the compensation award. Id. at 944, 53 N.Y.S.2d at 839. See also Note, Certain Aspects of the Development of Section 29 of the New York Workmen's Compensation Act, 15 St. John's L. Rev. 283, 290 (1941). This is reflected in the cases decided subsequent to the passage of the amendment holding that the insurer was subrogated to the employee's claim not only to the extent of the compensation award but to the full extent of recoverable damages. See Calagna v. Shepard-Pollak, Inc., 264 App. Div. 589, 35 N.Y.S.2d 934 (1st Dep't), appeal dismissed, 289 N.Y. 753, 46 N.E.2d 355 (1942); Lumber Mut. Cas. Ins. Co. v. William Spencer & Son Corp., 181 Misc. 416, 41 N.Y.S.2d 319 (Sup. Ct. Oswego County 1943).


93 WCL § 227, as amended by ch. 190, [1975] N.Y. Laws. The added provision reads:
Should the employee secure a recovery from such third party, whether by judgment, settlement or otherwise, such employee or his dependents may apply on notice to such lienor to the court in which the third party action was instituted . . . for an order apportioning the reasonable and necessary expenditures, including attorney's fees, incurred in effecting such recovery. Such expenditures shall be equitably apportioned by the court between the employee . . . and the lienor.

Id.