

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>TOMMY L. GRAHAM,</b>	:	<b>CIVIL ACTION</b>
	:	
<b>Plaintiff,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>LIBERTY MUTUAL GROUP</b>	:	
	:	
<b>Defendant.</b>	:	<b>NO. 97-4507</b>

**MEMORANDUM**

**Reed, J.**

**December 14, 1998**

Plaintiff Tommy L. Graham (“Graham”) initiated this action in the Philadelphia Court of Common Pleas, seeking a declaration that proceeds of Graham’s legal malpractice action against his former attorneys are not subject to subrogation pursuant to Section 319 of the Pennsylvania Workers’ Compensation Act, 77 Pa. C.S.A. § 671, (“Section 319”). Defendant Liberty Mutual (“Liberty Mutual”) removed this declaratory judgment action to this Court based upon diversity of citizenship and an amount in controversy.<sup>1</sup> The controversy presents an issue of first impression in Pennsylvania law.

Presently before the Court is the motion of Liberty Mutual for summary judgment (Document Nos. 6 and 8), the response of Graham thereto together with his cross motion for summary judgment (Document No. 7) as well as the reply of Liberty Mutual and sur reply of Graham. For the reasons stated below, this Court concludes that the Pennsylvania Supreme Court, if presented with the issue, would rule that a workers’ compensation carrier has the right

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<sup>1</sup>Jurisdiction is proper pursuant to 28 U.S.C. § 1332 and Pennsylvania law applies.

of subrogation. Thus, the motion of Liberty Mutual will be granted and the motion of Graham will be denied.

## **I. BACKGROUND**

The underlying facts are undisputed. Graham suffered an injury while operating a crane for his employer, Kane Transfer Company, at the Delaware Avenue Rail Yard in Philadelphia. Graham was injured when a train operating on a closed track, allegedly in violation of the both the company policy of the operator and standard railroad procedures, struck the crane Graham was operating. The train was owned and operated by the CSX Corporation and the tracks were owned by the Baltimore & Ohio Railroad.

Pursuant to an insurance policy issued to Kane Transfer Company, Liberty Mutual paid workers' compensation benefits to Graham. Those benefits continued until April, 1992, when they ended by a lump sum commutation of benefits.

Shortly after the accident, Graham hired attorneys Zaslow and Rosen to investigate and prosecute a claim for his injuries against the CSX Corporation, its employee, B.K. Firlein, and Baltimore & Ohio Railroad. Graham's attorneys brought an action in Philadelphia County which was subsequently removed to federal court. Thereafter, the action was dismissed for the failure of plaintiff to file a complaint within the time ordered by the Court. Subsequent efforts to revive the case were unsuccessful. Graham has since filed a legal malpractice suit against his former attorneys.

Upon learning of the legal malpractice action, Liberty Mutual gave notice of a claimed subrogation interest, pursuant to Section 319 of the Pennsylvania Workers' Compensation Act,

77 Pa. C.S.A. § 671, in any proceeds derived from the legal malpractice action. On June 16, 1997, Graham began this lawsuit by filing an action in the Philadelphia Court of Common Pleas, seeking a declaration of the parties' rights with respect to the asserted subrogation interest of Liberty Mutual in the proceeds from the legal malpractice action. Liberty Mutual then removed the action to this Court.

## II. LEGAL STANDARD

Defendants have moved for summary judgment pursuant to Federal Rule of Civil Procedure 56. Under Federal Rule of Civil Procedure 56(c), summary judgment may be granted when, "after considering the record evidence in the light most favorable to the nonmoving party, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." Turner v. Schering-Plough Corp., 901 F.2d 335, 340 (3d Cir. 1990). For a dispute to be "genuine," the evidence must be such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). If the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party to "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The non-moving party may not rely merely upon bare assertions, conclusory allegations, or suspicions. Fireman's Ins. Co. of Newark v. DuFresne, 676 F.2d 965, 969 (3d Cir. 1982).

The dispute between the parties in this case rests on conflicting interpretations of Section 319 and consequently the asserted subrogation rights of Liberty Mutual with respect to Graham's legal malpractice claim. The underlying facts are undisputed. Summary judgment is therefore

appropriate. Estate of Reddert v. United States, 925 F. Supp. 261, 265 (D.N.J. 1996); see also Gans v. Mundy, 762 F.2d 338, 341 (3d Cir.) (“summary judgment is proper where the facts are undisputed”), cert. denied, 474 U.S. 1010 (1985).

The principles governing statutory construction apply to this case. When construing statutes, Pennsylvania courts are to ascertain and effectuate the intention of the General Assembly. 1 Pa.C.S.A. § 1921(a). When the language of a statute is clear and unambiguous, it must be given effect in accordance with its plain and common meaning. 1 Pa.C.S.A. § 1921(b); Commonwealth v. Burnsworth, 669 A.2d 883, 886 (Pa. 1995). In attempting to ascertain the meaning of a statute, the court must consider the intent of the legislature and examine the practical consequences of a particular interpretation. Commonwealth v. Davis, 618 A.2d 426, 428 (Pa. Super. 1992), appeal denied, 631 A.2d 1004 (1993). The court is to presume that the legislature did not intend a result that is absurd or unreasonable. Id. In construing legislative intent, the court may look to the occasion and necessity of a statute, the circumstances in which it was intended, the mischief to be remedied, the object to be attained by the law, former law on the same subject and the consequences of a particular interpretation. Id.

### **III. DISCUSSION**

The issue presented by this motion is whether an employer who has paid workers’ compensation benefits to a covered employee is entitled to subrogation pursuant to Section 319 in an action against an attorney for failing to prosecute a third party claim. The parties contend that this question has not been decided in any reported decision in Pennsylvania and this Court has found none.

In interpreting state statutes, only decisions of the state's highest court are binding upon federal courts sitting in diversity. Permack v. J.C.J. Ogar, Inc., 148 F.R.D. 140, 144 (E.D. Pa. 1993). If there is no such decision to bind the court, “the federal court must predict how the state court would resolve the issue.” Id. (quoting Robertson v. Allied Signal, Inc., 914 F.2d 360, 378 (3d Cir. 1990)). In making such predictions, the Court recognizes that “the state's highest authority is the best authority on its own law.” Robertson, 914 F.2d at 378 (citing Commissioner v. Estate of Bosch, 387 U.S. 456, 465 (1967)). The federal judiciary's role is “not to form or create state law but to decide the case as we believe it would have been decided by the state's highest court had the case arisen in the state court system.” Id. In predicting the response of the Pennsylvania Supreme Court, the federal court should consider: (1) what the Pennsylvania Supreme Court has said in related cases; (2) the decisional law of the Pennsylvania intermediate courts; (3) federal appeal and district court cases interpreting state law; and (4) decisions from other jurisdictions that have discussed the issue the court faces. Gruber v. Owens-Illinois, Inc., 899 F.2d 1366, 1369-1370 (3d Cir. 1990).

The controversy centers on the statutory language which gives Liberty Mutual the right of subrogation. Section 319 provides in pertinent part:

Where the compensable injury is caused in whole or in part by the act or omission of a third party, the employer shall be subrogated to the right of the employe, his personal representative, his estate or his dependents, against such third party to the extent of the compensation payable under this article (footnote omitted) by the employer; reasonable attorney's fees and other proper disbursements incurred in obtaining a recovery or in effecting a compromise settlement shall be prorated between the employer and the employe, his personal representative, his estate or his dependents.

77 Pa. C.S.A. § 671. If Graham had been successful in his claims against the CSX Corporation, B.K. Firlein or Baltimore & Ohio Railroad, any recovery would have been subject to a subrogation interest of Liberty Mutual pursuant to Section 319. In this case, however, the Court must decide whether Liberty Mutual's right of subrogation applies to a potential recovery from his former attorneys who allegedly committed malpractice by failing to prosecute his claims on the underlying suit against the third party tortfeasor.

The parties have argued diametrically opposed interpretations of Section 319, each supported by cases from other jurisdictions. Specifically, Graham argues that a malpractice action against a lawyer for failure to prosecute a third party claim is not within the scope of the statute. Graham relies on the plain language of the statute, arguing that an employer only has a right to subrogation against the third party who caused the compensable injury. Therefore, Graham argues, the statute does not extend the right of subrogation to any recover from his former attorney because his former attorney is not "such third party."

Liberty Mutual, however, asserts that this case is no different than any other subrogation claim in a normal third party action. Liberty Mutual contends that it has an undeniable subrogation interest in any claim against the original tortfeasor and argues that there is no reason why that interest should not also apply where the plaintiff is merely obtaining from his attorney the damages he would have obtained from the original tortfeasor directly but for the attorney's malpractice. Moreover, Liberty Mutual argues that denying its right of subrogation would allow Graham a double recovery, contravening the purpose behind the Section 319.

Despite Graham's assertion to the contrary, courts considering the workers'

compensation statutes of other states are split, with some holding that a compensation insurer is entitled to subrogation when an employee recovers damages in a legal malpractice action arising out of a claim caused by a compensable injury, see Williams v. Katz, 23 F.3d 190 (7th Cir. 1994) (interpreting Illinois law); Bongiorno v. Liberty Mutual Ins. Co., 630 N.E.2d 274 (Mass. 1994); Frazier v. New Jersey Mfrs. Ins. Co., 667 A.2d 670 (N.J. 1995); McDowell v. LaVoy, 63 A.D.2d 358 (N.Y.S.2d 1978), aff'd, 390 N.E.2d 1179 (N.Y. 1979); Toole v. EBI Companies, 838 P.2d 60 (Or. 1992); Tallerday v. Delong, 842 P.2d 1023 (Wash. 1993); and some holding that an insurer is not entitled to subrogation, see Fink v. Dimick, 179 F.Supp. 354 (D. Conn.1959); Travelers Ins. Co. v. Breese, 675 P.2d 1327 (Ariz. Ct. App. 1983); Mt. Pleasant Special Sch. Dist. v. Gebhart, 378 A.2d 146 (Del. Ch. 1977); Woodward v. Pratt, Bradford & Tobin, P.C., 684 N.E.2d 1028 (Ill. App.), (analyzing same statute as in Williams v. Katz, 23 F.3d 190 (7th Cir. 1994), but reaching opposite conclusion), appeal denied, 689 N.E.2d 1147 (Ill. 1997); Sladek v. K-Mart Corp., 493 N.W.2d 838 (Iowa 1992); Smith v. Long, 505 N.W.2d 429 (Wis. Ct. App. 1993). To the extent that general principals can be drawn from each court's analysis of the individual statute before it, these cases are helpful in framing the issues. However, the interpretation of the Pennsylvania statute requires an analysis based upon Pennsylvania law.<sup>2</sup>

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<sup>2</sup>For instance, a number of courts denying a right to subrogation rely to some degree on the ability of the employer to bring suit on its own behalf, allowing it to protect its own interests. See Fink, 179 F.Supp. at 358-59; Breese, 675 P.2d at 513 n.3; Woodward, 684 N.E.2d at 1034; see also Gebhart, 378 A.2d at 150 (explaining that if compensation carrier was precluded from protecting itself by bringing suit on its own behalf, it may be inequitable to permit the employee to retain, as against the compensation carrier, all benefits of an alternative recovery against a third party tortfeasor). Although an employer may intervene, the Pennsylvania statute does not provide employers with the ability to bring suit directly against a third party. See Hankee v. Wilkes Barre/Scranton Int'l Airport, 616 A.2d 614 (Pa. 1992) (employer may intervene to protect subrogation rights); Whirley Indus. Inc. v. Segel, 462 A.2d 800, 802 (Pa. Super. 1983) ("The action against the third party tortfeasor must be brought by the injured employee. Our Court has recently held that the Workers' Compensation insurance carrier has no independent cause of action for indemnification by and contribution from the negligent party who caused the insurance carrier to pay out benefits.

## A. The Pennsylvania Workers' Compensation Act

The Pennsylvania Workers' Compensation Act, 77 Pa. C.S.A. § 1 et seq. (the "Act"), provides the sole and exclusive remedy available to an employee against his employer to secure compensation for injuries sustained by the employee as a result of a work related injury. 77 Pa. C.S.A. § 481. As between the employee and the employer, "[t]he comprehensive system of substantive, procedural, and remedial laws comprising the workers' compensation system is the exclusive forum for redress of injuries in any way related to the work place." Snyder v. Pocono Medical Center, 690 A.2d 1152, 1155 (Pa. 1997).

The Pennsylvania Supreme Court has described statutory framework of the Act as follows:

[I]t has been recognized from the outset that the Act is remedial social legislation, which substitutes a relatively quick and inexpensive scheme to provide certain compensation for lost earnings, in place of the common law process under which any damages would be recoverable only after a suit against the appropriate parties, subject to available defenses and, of course, any expenses and delays inherent in the system. [Footnote omitted] Under this scheme, employees are able to obtain compensation without regard to fault--either their own, that of a third party, or even the lack of fault on the part of the employer--while employers are subject to payment of benefits at a set rate, receive immunity from being otherwise subjected to liability for damages, and have a right of subrogation to the extent of compensation paid in the event a third party is held responsible for the injury.

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The subrogation rights of § 671 are the sole and exclusive remedy against third party tortfeasors, i.e., the employee-victim must sue, and the employer's carrier is subrogated to the employee's claim."); Reliance Ins. Co. v. Richmond Machine Co., 455 A.2d 686, 690 (Pa. Super. 1983) (declining to construe Section 319 as providing an employer or its insurer with a cause of action against a third party in its own right); see also Olin Corp. v. Workmen's Compensation Appeal Bd., 324 A.2d 813, 816-17 (Pa. Cmwlt. 1974) (employee's failure to prosecute third party claim did not bar workers' compensation proceeding against employer).

Hankee, 616 A.2d at 616 (Pa. 1992). The Court also noted that the unique nature of the Workers' Compensation Act is evidenced by the fact that it was necessary to amend the Constitution of the Commonwealth to give the General Assembly the power to enact it. Id. at 616.

The Supreme Court of Pennsylvania has also had occasion to consider the language and meaning of Section 319 with respect to recoveries against third party tortfeasors. See Winfree v. Philadelphia Elec. Co. v. Allis-Chalmers Corp., 554 A.2d 485, 487 (Pa. 1989) (right of subrogation is absolute and can only be abrogated by consent); Cox v. Workmen's Compensation Appeal Bd., 615 A.2d 878, 879 (Pa. Cmwlth. 1992) ("Section 319 of the Act broadly refers to an employer's subrogation rights to 'any recovery,' and this court's conclusion is that the phrase encompasses delay damages and interest."), appeal denied, 625 A.2d 1196 (Pa. 1993). In Winfree the Court determined that the language of the statute was "clear and unambiguous" and that "[t]he Legislature could not have manifested more clearly its intent that the subrogation rights of the employer are absolute." 554 A.2d at 487. The Court's conclusion is grounded in "the purpose of the Act . . . to provide the employee an exclusive right to benefits without the necessity of having to prove fault in exchange for the abrogation of the employee's common law negligence remedies." Id. An employer's "statutorily absolute" subrogation rights also serve to prevent a double recovery in the event that the employee recovers from the negligent third party.

Preventing a double recovery is one of the three interrelated purposes for Section 319. According to the Supreme Court of Pennsylvania, "the rationale behind Section 319 is threefold: to prevent double recovery for the same injury by the claimant, to ensure that the

employer is not compelled to make compensation payments made necessary by the negligence of a third party, and to prevent a third party from escaping liability for his negligence.” Dale Manufacturing Co. v. Bressi, 421 A.2d 653, 654 (Pa. 1980). In Dale Manufacturing, the Court observed that subrogation is just, because “the party who caused the injury bears the full burden; the employee is ‘made whole,’ but does not recover more than what he requires to be made whole; and the employer, innocent of negligence, in the end pays nothing.” Id. (quoting Arnold v. Brobonus, 390 A.2d 271, 274 (Pa. Super. 1978) (Spaeth, J., concurring and dissenting)).

#### **B. The Employer’s Subrogation Right in the Uninsured/Underinsured Motorist Context is Relevant**

The treatment of an employer’s right to subrogation in the uninsured/underinsured motorist context is instructive because it illustrates Pennsylvania’s strong public policy favoring subrogation in the workers’ compensation context. Prior to being amended in 1993, section 1720 of the Motor Vehicle Financial Responsibility Law (“MVFRL”) explicitly stated that “there shall be no right of subrogation or reimbursement from a claimant’s tort recovery with respect to workers’ compensation benefits . . . .” 75 Pa. C.S.A. § 1720.

Offsetting this prohibition, in an apparent attempt to prevent a double recovery, the MVFRL also mandated that the plaintiff “shall be precluded from recovering [in tort] the amount of benefits paid or payable under this subchapter, or workers’ compensation, . . . .” 75 Pa. C.S.A. § 1722.

Effective August 31, 1993, revisions to the Workers’ Compensation Act repealed

sections 1720 and 1722 to the extent that they relate to workers' compensation payments.

See Section 25(b) of the Act of July 2, 1993, P.L. 190, No. 44. The Superior Court has summarized the effect of the repeal as follows:

Thus, before the amendments, a claimant could not recover amounts paid or payable under workers' compensation and, balanced against that provision, a workers' compensation carrier had no right of subrogation for workers' compensation benefits. By contrast, after the 1993 amendments, a plaintiff's recovery was not reduced by the amount of workers' compensation benefits, and the workers' compensation carrier has the right of subrogation for any benefits paid in connection with the action.

Schroeder v. Schrader, 682 A.2d 1305, 1306-07 (Pa. Super. 1996). A fair reading of the 1993 amendments indicates that they were intended to prevent the possibility of a double recovery of workers' compensation benefits and either damages against a third party tortfeasor or from an uninsurance or underinsurance policy. Gardner v. Erie Ins. Co., 691 A.2d 459, 465-66 (Pa. Super.) (citing Palmosina v. Laidlaw Transit Co., Inc., 664 A.2d 1038 (1995) (MVFRL, as drafted, permitted double recovery)), appeal allowed, 705 A.2d 1309 (Pa. 1997). Thus, in the first instance, section 1720 in its pre-amended form illustrates that the legislature has in the past expressly articulated circumstances in which the right of subrogation is to be precluded. Notably, the General Assembly of Pennsylvania has never similarly expressed an intent to limit subrogation from the proceeds of a legal malpractice case grounded in the negligence of a third party which caused an injury to an employee while at work. In the second instance, the 1993 amendments illustrate the strong public policy against double recoveries and a legislative determination that an employer's right to subrogation is the most effective method of preventing a double recovery by injured

employees.<sup>3</sup>

### C. The Anatomy of a Legal Malpractice Claim<sup>4</sup>

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<sup>3</sup>In considering the law regarding subrogation in the uninsured/underinsured motorist context, Graham urges this Court to dismiss or at least distinguish the reasoning of the New Jersey Supreme Court which recently extended its “third party or functional equivalent” analysis in the uninsured/underinsured motorist context to encompass legal malpractice actions. Frazier v. New Jersey Manufacturers Ins. Co., 667 A.2d 670, 598-600 (N.J. 1995). In Frazier, the New Jersey Supreme Court held that proceeds from a legal malpractice claim were subject to a workers’ compensation lien. In so doing, the Court relied upon Midland Ins. Co v. Colatrella, 510 A.2d 30 (1986), in which the Court held that an employer’s right to subrogation extended to an uninsured motorist’s award under the employee’s own insurance policy as well as that of the employer. In Midland, the Court reasoned that the statute was not to be construed too rigidly and applied to recoveries that were the functional equivalent of a recovery from the actual third party tortfeasor. In Frazier, the Court reasoned that the legal malpractice claim was a similar functional equivalent because it was completely derivative of the third party claim and, therefore, the recovery was subject to a workers’ compensation lien.

Graham contends that reasoning in Frazier is wholly inapplicable because New Jersey law allows for subrogation when the employee recovers from his or her own uninsured/underinsured policy whereas Pennsylvania law does not. See Standish v. American Mfrs. Mutual Ins. Co., 698 A.2d 599, 600-01 (Pa. Super. 1997) (subrogation not permitted where worker received benefits by virtue of uninsured motorist provision in worker’s personal automobile insurance policy). Although Pennsylvania law differs from New Jersey law with respect to individuals who, at their own expense, insure themselves against the eventuality that a negligent motorist might be uninsured, the law of Pennsylvania does allow for subrogation where a workers’ compensation carrier pays benefits to a worker because of the negligence of a third party who caused an injury to the worker during the course of the worker’s employment. Gardner, 691 A.2d at 464-66 (compensation carrier had right of subrogation for workers’ compensation benefits paid where worker received uninsured motorist benefits from another passenger’s policy); see also Warner v. Continental/CNA Ins. Companies, 688 A.2d 177,185 (Pa. Super.) (“Allowing the injured employee to recover underinsured or uninsured motorist benefits . . . will create a fund against which the employer’s workers’ compensation carrier can exert its subrogation lien”), appeal denied, 698 A.2d 68 (Pa. 1997). Clearly, the uninsured/underinsured insurance carrier in Gardner was not a third party tortfeasor and yet Pennsylvania law allows a recovery from the uninsured/underinsured insurance carrier to be subject to subrogation even though the employee is not recovering from the actual third party tortfeasor. This result is precisely what Graham incorrectly argues is impermissible under Section 319.

I acknowledge, however, that the cases applying Section 319 to the uninsured/underinsured context ultimately have little bearing on how the Pennsylvania Supreme Court would decide the issue now before the Court. These cases are quite distinguishable. Nevertheless, as between the reasoning in Standish and Gardner, I believe Gardner more fully considers the policy rationale behind Section 319 as well as the equitable considerations which are an inherent part of any subrogation analysis and is therefore a more persuasive indication that the Pennsylvania Supreme Court would decide that the proceeds from a legal malpractice claim are subject to subrogation.

<sup>4</sup>Both Liberty Mutual and Graham argue that the Court should draw upon precedent in the medical malpractice context, each focusing on those elements most useful to their position in the legal malpractice context. The Court, however, finds the concerns and corresponding legal doctrines involved in medical malpractice inapplicable to legal malpractice. Kituskie v. Corbman, 714 A.2d 1027, 1030 (Pa. 1998) (in discussing legal malpractice, Court stated: “we recognize that a legal malpractice action is distinctly different from any other type of lawsuit brought in the Commonwealth”). The medical malpractice cases focus on the

In order to establish a cause of action for legal malpractice in Pennsylvania, the plaintiff must demonstrate three basic elements: (1) the employment of the attorney or other basis for duty; (2) the failure of the attorney to exercise ordinary skill and knowledge; and (3) that such negligence was the proximate cause of damage to the plaintiff. McHugh v. Litvin, Blumberg, Matusow & Young, 574 A.2d 1040, 1042 (Pa. 1990). An essential element of a legal malpractice action, regardless of whether the action is denominated in assumpsit or trespass, is proof of actual loss. See, e.g., Boyer v. Walker, 714 A.2d 458, 462 (Pa. Super. 1998) (citing Duke & Co. v. Anderson, 418 A.2d 613, 617 (Pa. Super. 1980)).

The Supreme Court of Pennsylvania recently explained that a legal malpractice action is “distinctly different from any other type of lawsuit brought in the Commonwealth” because it “requires the plaintiff to prove that he had a viable cause of action against the party he wished to sue in the underlying case and that the attorney he hired was negligent in prosecuting or defending that underlying case (often referred to as proving a ‘case within a case’).” Kituskie, 714 A.2d at 1030 (holding that collectibility of damages in underlying case is a matter which should be considered in legal malpractice action because of its unique nature). It is only after the plaintiff proves that he or she would have secured a judgment against the third party tortfeasor for his or her injuries that the plaintiff can proceed with

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causal relationship between the original work injury and the injury resulting from the medical malpractice. Dale Manufacturing, 421 A.2d at 655; Powell v. Sacred Heart Hospital, 514 A.2d 241, 243 (Pa. Cmwlth. 1986) (recoveries based upon subsequent injuries that aggravate or extend initial compensable injury are subject to employer’s right to subrogation but recoveries based upon new and independent injuries are not subject to employer’s right to subrogation because they were not sustained in the course of employment and are therefore not compensable injuries). This case is factually distinguishable from cases involving medical malpractice because legal malpractice does not cause a bodily injury. Legal malpractice by the worker’s lawyer does not change the disability picture but rather simply serves to interdict the ability of the worker to recover damages. Therefore, a causal analysis between the conduct of Graham’s former attorneys and his compensable injury, as such, is illogical and thus inappropriate.

proof that the attorney he or she hired was negligent in handling the underlying case. Id. Thus, the plaintiff must prove that the compensable injury for which he or she receive workers' compensation benefits was caused by the third party tortfeasor--as required by the language of Section 319. Indeed, "actual losses in a legal malpractice action are measured by the judgment the plaintiff lost in the underlying action." Id. The damages in a legal malpractice case are thus those that would have been recovered from the third party tortfeasor as a result of his negligent act, namely, those that Section 319 provides should be protected by the Act and subject to a successful subrogation claim by a compensation carrier.

#### **D. Equitable Considerations Govern this Analysis**

Finally, it cannot be ignored that the "right to subrogation, although set forth in Section 319 of the Act, is a true equitable right." Boeing Helicopters v. Workers' Compensation Appeal Bd., 713 A.2d 1181, 1185-85 (Pa. Cmwlth. 1998) (citing Smith v. Yellow Cab Co., 135 A. 858, 859-60 (Pa. 1927); see also Hagans v. Constitution State Serv. Co., 687 A.2d 1145, 1149-50 (Pa. Super. 1997). Demonstrating the long history of this principle in Pennsylvania, in 1927, the Supreme Court of Pennsylvania firmly rejected a claim that the incorporation into the first paragraph of Section 319 of the employer's right to be subrogated to a claimant's recovery from a third party tortfeasor rendered that right "statutory" rather than equitable in nature. Smith, 135 A.2d at 859-60. As the Superior Court noted in 1997:

It is well established that an action for subrogation is one based on

considerations of equity and good conscience. The goal is to place the burden of the debt upon the person who should bear it. The right of subrogation may be contractually declared or founded in equity, but even if contractually declared, it is to be regarded as based upon and governed by equitable principles.

Hagans, 687 A.2d at 1150 (quoting Daley Sand v. West American Ins. Co., 564 A.2d 965, 970 (Pa. Super. 1989)). In addition, “due to the equitable principles governing subrogation in the insurance arena, extinguishing a subrogee’s statutory right to be reimbursed is generally disfavored.” Id. (citing Pennsylvania Financial Responsibility Assigned Claims Plan v. English, 664 A.2d 84 (Pa. 1995)). Pennsylvania courts have emphasized the importance of protecting an insurer’s right to subrogation because protecting the insurer’s subrogation rights is necessary to further the Commonwealth’s public policy against a double recovery. See, e.g. Hagans, 687 A.2d at 1150.

In the context of a legal malpractice recovery, the equities run overwhelmingly in favor of permitting the employer’s subrogation recovery. Indeed, in an unrelated factual context but relevant equitable setting, in 1998, the Supreme Court of Pennsylvania observed that “it would be inequitable for the plaintiff to be able to obtain a judgment against the attorney which is greater than the judgment that the plaintiff could have collected from the third party. . . .” Kituskie, 714 A.2d at 1030. Denying Liberty Mutual its right to subrogation merely because Graham recovers from his attorney damages he would have recovered from the original tortfeasor directly, but for the attorney’s malpractice, would, by double recovery, allow Graham ultimately to secure a greater recovery than that which Graham could have collected from the third party directly.

In light of the clear policy laden mandatory language of Section 319 (“Where the

compensable injury is caused in whole or in part by the act or omission of a third party, the employer *shall be subrogated* to the right of the employe, . . . , against such third party . . . .”(emphasis supplied),<sup>5</sup> it is inconceivable, considering the equities, that the legislature intended the law of Pennsylvania to require such disparate treatment between a worker who recovers directly from the third party tortfeasor and a worker who recovers from his or her attorney because of the third party tortfeasor’s same tortious conduct. Similarly, it is inconceivable that the legislature intended for the subrogation rights to be determined by the competence or incompetence of a lawyer who is completely beyond the control of the employer. By permitting subrogation, the employee will recover those losses he or she would have recovered if the third party action had been brought in a timely manner and the employer will effectively be reimbursed to the extent it has paid workers’ compensation benefits, at no loss to the worker.

#### **IV. CONCLUSION**

Based upon the foregoing analysis, I predict that the Supreme Court of Pennsylvania would decide that the proceeds of a legal malpractice claim are subject to subrogation pursuant to Section 319 of the Pennsylvania Workers’ Compensation Act, 77 Pa. C.S.A. § 671. Accordingly, I will grant the motion of Liberty Mutual and deny the motion of Graham.

An appropriate Order follows.

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<sup>5</sup>The literal application of the words “against such party” from Section 319 to defeat the otherwise clear right to subrogation when the injury was in fact caused by a third party would be to reach an absurd result, neither expected nor permitted in construing the statute. Commonwealth v. Webster, 681 A.2d 806, 809 (Pa. Super. 1996).

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>TOMMY L. GRAHAM,</b>	:	<b>CIVIL ACTION</b>
	:	
<b>Plaintiff,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>LIBERTY MUTUAL GROUP</b>	:	
	:	
<b>Defendant.</b>	:	<b>NO. 97-4507</b>

**ORDER**

**AND NOW**, this 14th day of December, 1998 upon consideration of the motion of defendant Liberty Mutual Group (“Liberty Mutual”) for summary judgment (Document Nos. 6 and 8), the response of plaintiff Tommy L. Graham (“Graham”) including his cross motion for summary judgment (Document No. 7), as well as the reply of defendant and sur reply of plaintiff thereto, and for the reasons set forth in the foregoing memorandum, it is hereby **ORDERED** that the motion of Liberty Mutual is **GRANTED** and the cross motion of Graham is **DENIED**.

It is hereby **DECLARED** that, pursuant to Section 319 of the Pennsylvania Workers’ Compensation Act, 77 Pa. C.S.A. § 671, Liberty Mutual is entitled to subrogation from the proceeds of the legal malpractice action of Tommy L. Graham against his former attorneys in the Court of Common Pleas of Philadelphia, Pennsylvania, December Term, 1994, No. 1311. This is a final Order.

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**LOWELL A. REED, JR., J.**