INSURANCE - SWITZERLAND

Right of recourse in insurance law: end of *Gini/Durlemann* practice

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The Supreme Court recently abandoned its long-standing practice of restricting recourse under the *Gini/Durlemann* doctrine, which was first adopted in 1954.

Facts

An elderly passenger on a public bus fell over in May 2014 as the bus drove off abruptly. The passenger suffered a compression fracture of the third lumbar vertebra and therefore required treatment and rehabilitation as an inpatient. Her private health insurer paid a total of four invoices in the amount of SFr33,088 for semi-private additional insurance services.

On 29 March 2016 the health insurer filed a lawsuit before the Commercial Court of the Canton of Bern, challenging the bus company and its mandatory motor liability insurer. The plaintiff requested that the defendant pay SFr33,088 plus 5% interest. The plaintiff believed that it should be possible to take recourse against the party responsible for causal liability or its liability insurer. However, the defendant requested that the action be dismissed and denied its liability.

The Commercial Court dismissed the action based on the *Gini/Durlemann* doctrine, which prohibits the recourse of a party that is liable based on a contract (ie, the health insurer) against either another party that is liable based on a contract (ie, the bus company's liability insurer) or another party that faces strict liability (ie, the bus company), unless that other party acted with gross negligence (Article 51(2) of the Code of Obligations).

The plaintiff filed an appeal in civil matters which sought to annul the Commercial Court's judgment and ordered the defendant to pay SFr33,088 plus interest. Unlike the Commercial Court, the Supreme Court affirmed the right of recourse and therefore confirmed the basic liability of the defendant's motor liability insurer.

Decision

In its groundbreaking decision (4A_602/2017) on 7 May 2018, the Supreme Court held that the plaintiff had a right of recourse as the private supplementary insurer against the bus company's liability insurer based on Article 72(1) of the Insurance Contract Act.

According to the Supreme Court, any non-contractual liability falls within the meaning of Article 41 *et seq* of the Code of Obligations under the term 'prohibited act' and Article 72(1) of the Insurance Contract Act, including all facts standardised as hazardous or simple causal liability. Therefore, private insurers must be treated the same as social insurance carriers with respect to the causally liable party that causes an accident.

Previous doctrine

In 80 II 247 – and last confirmed in BGE 137 III 352 – the *Gini/Durlemann* doctrine stated, with respect to Article 51(2) of the Code of Obligations and Article 72 of the Insurance Contract Act, that the insurer responsible for compensating damages based on a contract may not take recourse against other contractually liable persons or against a party that faces strict liability, unless the latter caused the damages through gross negligence. According to this doctrine, there is also no solidarity in internal recourse, even if the insurer took action against other liable parties which caused the damages in tort.

For 64 years, jurisprudence has followed the clear will of the historical legislature: the insurer that charged the premiums for possible claims must pay regardless of whether the other party which caused the accident or its liability insurer were at fault.

Nevertheless, this judgment has been criticised over the years, particularly for holding that:

- the damages insurer had nothing to do with causing the loss;
- the principles for recourse in Article 51(2) of the Code of Obligations did not apply absolutely, but only as a rule; and
- the purpose of damage insurance was not to relieve the party facing liability regardless of fault, based on a legal provision (so-called 'strict liability').

It was noted that the insurer did not fall under Article 51(2) of the Code of Obligations because it owed no compensation for the breach of contract, but rather risk coverage under the insurance contract. Already in a 2005 Commercial Court decision, the *Gini/Durlemann* doctrine did not apply absolutely.

Since then, many convincing arguments have been raised. In any case, the fact that the damage insurer was wrongly considered to be liable within the meaning of Article 50 *et seq* of the Code of Obligations was rightly criticised, although it covered the damages in fulfilment of its primary obligation under the insurance contract and paid no (secondary) compensation for non-performance or defective performance of the contract. Preventing the insurer from recourse against those responsible for strict liability also led to an incorrect distribution of costs, because compensation for damages was the contractual consideration for collecting premiums. The policyholder paid no premiums to relieve other liable parties or cover third-party liability.

A deviation from existing practice or an amendment to existing laws was also necessary because the conditions had changed considerably with the introduction of numerous hazard liability facts; the existing practice or legal situation was no longer up to date and led to irrepressible differences in the Social Insurance Law, where insurers are granted an integral right of recourse under Article 72(1) of the Insurance Contract Act.

According to Article 72(1), to the extent that the insurer has paid compensation, the claim for compensation which the claimant is entitled to from third parties in tort shall pass to the insurer. Private insurance must be treated in the same way as social insurance, which subrogates to the position of the injured person to the extent that they have been compensated. If a party that faces strict liability causes an accident, they commit a tort within the meaning of this provision, even if they are not at fault for causing the accident. Article 72(1) sets out that fault is not required; an unlawful act is sufficient. Thus, any wrongdoing that is standardised as hazardous or simple causal liability (ie, any non-contractual liability within the meaning of Article 41 *et seq* of the Code of Obligations) must be considered an unlawful act in the sense of Article 72(1) of the Insurance Contract Act.

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