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sent his regrets, being unable to attend. The guests of honor were the justices of the Supreme Court of the State of Washington, and the Hon. Mr. Justice McDonald of British Columbia. Justice McDonald delivered the principal address of the evening. Mr. Stephen F. Chadwick of the Seattle Bar was the toastmaster. Other speakers were Chief Justice Steinert and Justice Simpson. Special entertainment was provided by the Varsity Quartet, and the University of Washington Pep Band. A large number of the members of the State Bar and Superior Court attended, as well as the student body of the Law School, making a capacity crowd of over three hundred. Dean Faulkner announced that Professor Thomas Reed Powell, of the Harvard Law School, will teach constitutional law during the summer session of 1938.

COMMENTS

PHYSICIANS' AND HOSPITALS' LIENS ON TORT CLAIMS FOR SERVICES RENDERED INJURED PARTY

The 1937 session of the Washington Legislature added the medical and allied services to the selective groups whose compensation is protected in part by statutory liens. Chapter 69 of the laws of that session awards a lien to operators of hospitals, licensed nurses, practitioners, physicians and surgeons rendering service "for any person who has received a traumatic injury."¹ The lien is upon "any claim, right of action and/or money to which such person is entitled against any *tort feasor* and/or insurer of such *tort feasor*". The amount of the lien is the "value" of the services, plus costs and such reasonable attorney's fee as the court may allow, incurred in enforcing the lien. The lien does not attach to claims under the Workmen's Compensation Act. The total amount of the liens cannot exceed twenty-five per cent of the "award, verdict, report, decision, decree, judgment or settlement."²

Lawyers, apparently, are not the only ones who sometimes feel the need of protection against unfaithful or indigent clients. But so far, in Washington, in handling personal injury business, they have been content with protection afforded by the contract of employment and their control over the litigation and settlement negotiations. A lawyer in this state has no lien on his client's cause of action. Some corresponding measure of protection is given the lawyer by his lien on money of his client coming into his hands, or on money in the hands of the adverse party to the action.³ But his contract of employment does not protect him against settlements directly with his client unless he has given

¹Session Laws, 1937, Chap. 69, p. 236.

²*Ibid.*, § 1.

³REM. REV. STAT., § 136, P. C., § 185. Lien on money in hands of "adverse party" only when there is an action pending; *Plummer v. Great Northern Ry. Co.*, 60 Wash. 214, 110 Pac. 989, 31 L. R. A. (N.S.) 1215 (1910). Applicable to personal injury actions; *Smith v. C. R. I. & P. R. Co.*, 56 Iowa 720, 10 N. W. 244 (1881).

notice of a claim of lien.⁴ Otherwise, the lawyer's lien goes only to the judgment.⁵

Such comparisons aside, however, the special protection afforded one class of persons by chapter 69 can be seen to have some merit on the assumption that the medical profession and its allied services feel obliged to succor the victims of personal injury under what are usually emergency conditions, they themselves running a risk of ever having their certainly valuable services properly recompensed. But it is a bit extravagant to also assume that the usual victim of such injury is both ungrateful and unwilling to pay. Looking at this statute in a colder light, the lien provided for may work to render the injured person a disservice. So strong a protection in the collection of the compensation for the particular services covered can have the unfortunate effect of emphasizing the commercial aspects necessarily incident to the most humane profession; security for ultimate payment may turn rescue work into a business; at least, it may seriously encumber the speedy settlement of claims, a consummation so often desirable to the one important party—the injured person. The legislature does appear to have given the latter some thought, for the total amount of liens in any one case is limited to twenty-five per cent of the total award, etc.⁶ How this percentage is to be allocated among several claimants in the case of overage, is not stated; on hypothesis, a horizontal deduction is to be applied to each lien. This measure is calculated to stimulate the imagination of the lienor when estimating the value of the services rendered, since there is no way of estimating what settlement or verdict a particular injury may bring.

Claims for personal torts usually are not assignable.⁷ On this and other grounds there is a general reluctance to subject such claims to payment of the injured party's debts.⁸ Undoubtedly, claims of this sort are property. Yet they are a very illusive kind of property because both the liability and the amount of the compensation are highly uncertain. In *Johnson v. Dahlquist*⁹ the Washington Supreme Court found no difficulty in subjecting a contract claim to execution. But in *Swanson v. Olympic Peninsula Motor Coach Company*¹⁰ the court refused to commit itself to extending the execution statute to "unliquidated causes of action sounding in tort". Shortly before it had avoided the same issue under the garnishment statute.¹¹ The language of the exe-

⁴McRea v. Warehime, 49 Wash. 194, 94 Pac. 924 (1908).

⁵REM. REV. STAT. § 136, P. C. § 185. Settlement after trial but before entry of judgment may defeat lien; Cline Piano Co. v. Sherwood, 57 Wash. 239, 106 Pac. 742 (1910). Acc.: Boogren v. St. Paul City R. Co., 97 Minn. 51, 106 N. W. 104, 3 L. R. A. (N.S.) 379 (1906).

⁶Chap. 69, § 1.

⁷See State *ex rel.* Baeder v. Blake, 107 Wash. 294, 181 Pac. 685 (1919) and Slauson v. Schwabacher, 4 Wash. 783, 31 Pac. 329 (1892).

⁸See Sibley v. Nason, 196 Mass. 125, 81 N. E. 887 (1907), Coty v. Cogswell, 100 Mont. 496, 50 P. (2d) 249 (1935) and Toole v. Paumie Parisian Dye House, 101 Mont. 74, 52 P. (2d) 162 (1935).

⁹130 Wash. 29, 225 Pac. 817 (1924).

¹⁰90 Wash. Dec. 42, 66 P. (2d) 842 (1937, April).

¹¹Pacific Mercantile Agency v. Keyes, 175 Wash. 618, 27 P. (2d) 1105.

cution statute¹² does not justify a distinction; and it may be doubted whether, as a matter of construction, a distinction can be justified on principle unless it be upon the grounds that contract claims are assignable while claims for personal injuries are not and the survival statute¹³ indicates a clear legislative policy to restrict the beneficiaries of this class of injuries to the victim and his dependents. Chapter 69 departs from this policy, but it does not aid in solving the problem involved in the *Swanson* case; the remedy given the lienholder is not to foreclose on the cause of action but to sue the *tort feasor* or his insurer.¹⁴

Section 2 requires that the claim of lien be filed with the county auditor within twenty days of the injury; or, if not so filed, at any time before settlement or payment of the cause of action. The filing of the claim is to be indexed as deeds and other conveyances are indexed (sec. 3). The language of section 2 does not require a statement of an amount for which a lien is claimed and twenty days is obviously too short a period of time for that to be determined in a serious case.

Section 4 provides that taking a note or other evidence of indebtedness shall not discharge the lien unless expressly received as payment and so specified therein.

Section 5 provides that the lien shall not be discharged by settlement of the cause of action unless provision be made for payment of the lien claim or a waiver or release of the lien be obtained. The sixth and last section provides for enforcement by action at law against the *tort feasor* or his insurer within one year after filing the lien and constitutes payment or settlement on account of the injury prima facie evidence of the *tort feasor's* negligence and the payer's liability to compensate.

Thus the *tort feasor* and insurer are placed in a position analogous to that of garnishees. Separately but not jointly.¹⁵ Presumably, it is a matter of indifference to either to whom the money measuring the compensation is paid. The injured party has some protection against unfounded and excessive claims in his power to call the lien claimants as witnesses on the elements of damages;¹⁶ although there is no way of telling how much the jury allowed in the verdict short of submitting special interrogatories. Probably the plaintiff would afterwards be estopped from contesting either the claims or their amounts if obtaining a verdict, as having received a benefit accordingly. As to estimates of expenses reasonably likely to be incurred after the trial, the plaintiff's position would not be so good. The judgment would determine the extent of the *tort feasor's* liability and also that of the

¹²REM. REV. STAT. § 518, P. C. § 7326-6.

¹³*Ibid.*, § 194, § 8275.

¹⁴Sec. 6.

¹⁵*Cf.*: Pacific Mercantile Agency v. Keyes, *supra* note 11, where the *tort feasor* only was originally garnisheed and the insurer brought in after it had settled with the principal debtor; the answer of the garnishee denying liability.

¹⁶Hawkins v. Front Street Cable Co., 3 Wash. 592, 28 Pac. 1021 (1892); Cole v. Seattle etc. R. Co., 42 Wash. 462, 85 Pac. 3 (1906); Webster v. Seattle etc. R. Co., 42 Wash. 364, 85 Pac. 2 (1906).

insurer, but the statute transfers the lien to the money and the judgment does not stop its accrual.¹⁷

Like a garnishee who turns over money or property to his creditor, the settling *tort feasor* and his insurer pay at their peril as against properly filed lien claims.¹⁸ Payment is voluntary in the face of such claims and recourse to the payee must needs depend upon mutual mistake or fraud.¹⁹ The injured person's statement as to services rendered could be taken, but such statement would not be binding upon any lienor. Practically, releases or receipts after liens filed must be obtained, as well as consent of the injured person. The twenty-day period allowed lien claimants in any event and the statutory presumption of negligence and liability attaching to payment, will militate against over-hasty settlements and may be made a definite implement of delay.

As to insurers, the lien is upon "any claim, right of action and/or money to which (the injured person) is entitled against the *tort feasor* and/or the insurer of such *tort feasor*." This language is broad enough to reach any money to which the injured person becomes entitled under a settlement offered and accepted; and, as well, money voluntarily paid in satisfaction of a judgment against an insured. These are usual situations arising under liability policies. In case of litigation covered by a liability policy, the injured person after judgment against the *tort feasor* can reach the money due under the policy by garnishment; or action if the policy so provides;²⁰ and the money so sequestered would seem to be subject to the lien. But when the policy is one of indemnity only, the claim of the injured person against the *tort feasor* must be satisfied before any money becomes due under the policy; so the injured person can acquire no right against the insurer,²¹ and there is nothing to which the lien can attach. A similar situation may arise under a liability policy when the insurer denies liability and the insured *tort feasor* settles without satisfying the lien. Although, under section 5, the lien is not discharged by the settlement, it can continue only against the *tort feasor* as the injured person never acquired any right to the money due under the policy. An injured person may, by statute,²² or by the terms of the policy,²³ be given a right of action directly against an insurer and the lien will attach to such "right of action and/or money" due from the insurer.

When the injured person dies before settlement or final judg-

¹⁷Chap. 69, § 1.

¹⁸*Ibid.*, § 5. *Cf.*: REM. REV. STAT. § 688, P. C. § 8007; Lemagie v. Acme Stamp Works, 98 Wash. 34, 167 Pac. 60 (1917).

¹⁹See Baughn v. J. B. McKee Co., (Tex. C. A.) 124 S. W. 732 (1910).

²⁰Johnson v. McGilchrist, 174 Wash. 178, 24 P. (2d) 607 (1933); Finkelberg v. Continental Casualty Co., 126 Wash. 543, 219 Pac. 12 (1923).

²¹Ford v. Aetna Life Insurance Co., 70 Wash. 29, 126 Pac. 69 (1912); Luger v. Windell, 116 Wash. 375, 199 Pac. 760 (1921).

²²*Cf.*: Devoto v. United Auto Transportation Co., 128 Wash. 604, 130 Wash. 707, 223 Pac. 1050, 226 Pac. 1118 (1924).

²³See Keseleff v. Sunset Highway Motor Freight Co., 187 Wash. 642, 60 P. (2d) 720 (1936) setting out form of indorsement required on carrier policies by Department of Public Works. See also Finkelberg v. Continental Casualty Co., *supra*, note 20.

ment, his right of action survives only as provided by Rem. Stat. sec. 194, P. C. sec. 8275. Under this statute survival is conditioned upon death being caused by the injury, and the recovery is for the sole benefit of the persons enumerated in the statute, which does not include creditors of the decedent.²⁴ The action for wrongful death given by Rem. Rev. Stat. sec. 183 *et seq.*, P. C. sec. 8259 *et seq.*, of course, is an independent right of action and cannot constitute any "claim, right of action and/or money" to which the injured person is entitled. Accordingly, when the injured person dies before settlement or final judgment there would not seem to be any claim, or right of action, and no money, surviving to which this lien could attach.²⁵

If it is the *tortfeasor* who dies, there being no statute in the state to the contrary, the injured person's claim or right of action is at an end;²⁶ and the subject matter of the lien ceases to exist. A more difficult problem will present itself where the injured person is given a direct action against the *tortfeasor's* insurer. In such a case the argument may be advanced that the cause of action sounds in contract and not in tort, so does not abate with the death of the *tortfeasor*. Yet the Washington statutes which require insurance coverage by motor vehicle carriers seem to contemplate a concurrent liability of the insured as the basis of an action against the insurer.²⁷ Since it is the liability to make compensation for personal injury which terminates with the *tortfeasor's* death, it would seem immaterial whether the action is in tort or in contract.²⁸ In either case the claim or right of action of the injured person ceases and so does the lien.

²⁴See *Arsnow v. Red Top Cab Co.*, 159 Wash. 136, 292 Pac. 436 (1930).

²⁵*Cf.*: *Young v. Ostrander*, 270 Ill. App. 368 (1933); *Topping v. Town of St. Lawrence*, 86 Wis. 526, 57 N. W. 365 (1893).

²⁶See *Rinker v. Hurd*, 69 Wash. 257, 124 Pac. 687 (1912); *Bortle v. Osborne*, 155 Wash. 585, 285 Pac. 425 (1930); also, *State ex rel. Baeder v. Blake*, 107 Wash. 294, 181 Pac. 685 (1919).

²⁷See REM. REV. STAT. § 6384, P. C. § 237; REM. REV. STAT. § 6391, P. C. § 234-7; Laws 1933, Chap. 166, § 15; laws 1933 (Extra Session), Chap. 55, § 7; Laws 1935, Chap. 184, §§ 16, 17; Laws 1937, Chap. 166, § 14; *Devoto v. United Auto Transportation Co.*, 128 Wash. 604, 130 Wash. 707, 223 Pac. 1050, 226 Pac. 1118 (1924); *Keseleff v. Sunset Highway Motor Freight Co.*, 187 Wash. 642, 60 P. (2d) 720 (1936).

²⁸*Cf.*: *Bernstein v. Queens County Jockey Club*, 225 N. Y. S. 449 (1927). See *Jonas v. Taylor*, 166 Wash. 302, 6 P. (2d) 615 (1932). Action on police officer's bond, cause of action held to terminate with death of officer. Note: 78 A. L. R. 600 (1932).