What Lies Beneath: Workers' Compensation Subrogation In The Wake Of *Holeton v. Crouse Cartage Co.*

"[T]here are far worse things than having the former R.C. 4123.93 revived...."

Less than twenty-four hours after the plaintiffs' bar celebrated the reaffirmation of the time-honored principle that "[t]here are limitations on... [legislative] power which grow out of the essential nature of all free governments,"[1] and while their opponents bemoaned what they perceived as yet another decision yielding "windfalls" to plaintiffs,[2] thoughts of a more practical nature began to surface. If, as the Court in *Holeton v. Crouse Cartage Co.* (2001), 92 Ohio St.3d 115, held, the 1995 version of Ohio's Worker's Compensation Subrogation Statute, R.C. 4123.931, was unconstitutional, did that mean that its short-lived predecessor version – R.C. 4123.93, *eff.* 10-20-93, and repealed as of 9-29-95 – was back in effect? And if it was back in effect, what exactly did that mean? Did injured workers win the battle but lose the war in *Holeton*? Or was *Holeton* every bit the victory it seemed to be?

This article sets out to address these questions. The writer of this article is indebted to the participants in OATL's 2001: *Holeton* seminar for sharing their insights into these topics – though, admittedly, all perspectives contained herein are solely those of the author, and do not necessarily reflect the opinions of seminar participants or other members of the OATL.

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I. HISTORY OF WORKERS' COMPENSATION SUBROGATION IN OHIO

The enactment, in 1913, of Ohio's first compulsory workers' compensation law did not give the BWC or self-insuring employers a right of subrogation or reimbursement.[3] This comes as no surprise. Although, in the early years of the 20th century, several states' workers' compensation statutes did "recognize... [a] right of reimbursement where there has been a full recovery in a direct suit against a third party whose negligence was the cause of the injury,"[4] these were the exception. Indeed, until fairly recently, subrogation was a concept typically limited to property insurance claims, and it was not until the mid-20th century that the doctrine began expanding into the personal injury context.[5]

Still, the issue whether an Ohio employer could recover its workers' compensation outlay from a third party who caused the employee's injury came before the Ohio Supreme Court fairly early. In *Truscon Steel Co. v. Trumbull Cliffs Furnace Co.* (1929), 120 Ohio St. 394, the employee of the steel company was "crippled for life"[6] by the negligence of an employee of the furnace company. The injured party was awarded workers' compensation benefits, and then filed a suit against the furnace company that resulted in a $10,000 judgment. Thereafter, the steel company, a self-insured employer, sought reimbursement from the furnace company for the steel company's $2,800 outlay in workers' compensation benefits. The trial court denied this claim, and the Supreme Court affirmed. The Court, finding in GC 1465-101[7] a legislative intent to prevent reimbursement for any amount paid under the workers' compensation act, and noting that Ohio, unlike some other states, had no reimbursement provisions in its statutory scheme, held that under no circumstances could an employer, "whether self-insure[d] or otherwise, ... recover from any source any sum to reimburse an amount paid under Workmen's Compensation Law to injured employees, whether the injury results from the negligence of some third party, or otherwise."[8]

Truscon Steel remained unchallenged for twenty years. Then, in 1949, the Supreme Court carved out a limited exception to the rule. In *Midvale Coal Co. v. Cardox Corp.* (1949), 152 Ohio St. 437, the Court retreated from its prior

interpretation of GC 1465-101, this time concluding that the statute did not prevent the employer from recovering from the third party who caused the employee's injury, if the injury was a direct result of a breach of contract between the third party and the employer. The exception was limited to situations in which a contractual relationship existed between the employer and the third party; otherwise, the damages suffered by the employer due to the third party's negligence were deemed too remote. The right created by *Midvale* was not a true right of subrogation or reimbursement; it was simply a recognition of the availability of damages flowing from the breach of a contractual duty owed to the employer.

Ohio law did not, however, rest easy with the holding in *Midvale*. In 1963, in *Fischer Construction Co. v. Stroud*,[9] the Supreme Court overruled *Midvale*, and reinstated *Truscon Steel*, holding: "An employer cannot recover from any source any sum to reimburse him for an increased amount paid as a premium under the Workmen's Compensation Act due to the death of an employee, although such death was caused by the act of a third party."[10] Then, in 1984, in *Ledex, Inc. v. Heatbath, Corp.*,[11] the Court overruled *Fischer* and reinstated *Midvale*. *Ledex* was clarified four years later, in *Cincinnati Bell Telephone Co. v. Straley*,[12] which explained that *Ledex*'s revival of *Midvale* was limited to the circumstances of *Midvale*, such that an employer could recoup its costs from a third party tortfeasor only if a contractual relationship existed; but if, as in *Straley*, the tortfeasor was merely a random motorist unknown to the employer, there was no basis for recovery.[13]

The problem with the *Midvale* holding – to which the Court was sensitive – lay in the double pay-out burden it placed on the tortfeasor. Professor Larson, in particular, "'characterized the decision as 'slightly weird,' stating that after *Midvale*... 'if everyone pressed his rights to the utmost... the result... was this: the employer paid compensation and recovered from the [third] party his added premiums, thus coming out approximately even; the employee recovered once from his employer in compensation and again from the third party in tort; and the third party paid twice, once to the employer for breach of contract and once to the employee for tort.'"[14] Yet this incongruity, the Court noted in *Ledex* and *Straley*, was not the fault of decisional law, but was "attributable to the absence of a statute which would subrogate the employer to the employee's claim against the third party to the extent of workers' compensation received by the employee."[15]

The General Assembly took this comment to heart, and, in 1993, enacted Ohio's first workers' compensation subrogation statute. That statute, 1993 H.B. 107, codified as R.C. 4123.93[16], provided, in part, as follows:

> (B) The administrator of workers' compensation, for the amount of compensation and benefits paid to or on behalf of an employee from any fund in the workers' compensation less the amount of reasonable attorney's fees and court costs actually incurred by the employee in the action,... an employer who contracts with an independent third party for the provision of medical... services and supplies to an employee... to the extent of the cost of such services and supplies provided to or on behalf of the employee ... less the amount of reasonable attorney fees and court costs actually incurred by the employee in the action, are subrogated to all of the rights of that employee against a third-party tortfeasor involving that compensable injury or disease.
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> (D) The right of subrogation... under division (B) of this section is automatic and applies only if the employee is a party to an action involving the third party tortfeasor.

From the perspective of those the statute was intended to benefit, this maiden effort proved ill-conceived. As one commentator noted, "the 1993 statute was poorly drafted, providing for subrogation rights only where the employee was 'a party to an action' involving the third party... [thus] creat[ing] one of many loopholes" in the statutory subrogation right.[17] Under the 1993 statute, subrogation did not apply to settlements occurring before an action was filed[18]; nor did it apply to settlements occurring after the action was voluntarily dismissed.[19] It did not apply to wrongful death actions, as the deceased employee was not a "party to [the] action."[20] It applied to past payments of benefits, but not to future outlays.[21] Moreover, due to division (B)'s curious definition of the subrogation right, it did not apply when the reasonable attorney fees and costs incurred by the employee in pursuing his action against the tortfeasor exceeded the payments made for workers' compensation benefits. Thus, if the subrogation lien was for $37,000, and the case settled with the tortfeasor for $145,000, generating $48,000 in attorney fees and costs, there was no subrogation under the statute's plain language.[22]

It did not take long for the General Assembly to rue its early drafting efforts, and, in 1995, it "[re]attacked the issue... with a passion."[23] In its zeal to correct the deficiencies of the 1993 statute, however, it drafted a statute in which the subrogation right bulldozed all in its path. Now the statutory subrogee had a first priority lien in ***any*** settlement entered into between the claimant and the third party, even if there was only enough money available from the tortfeasor to pay the claimants' attorney fees and costs and satisfy the subrogation lien, and even if there was no duplication in the kinds of losses the workers' compensation benefits recompensed and the damages paid by the tortfeasor.[24] The statute also expanded both the scope of the subrogated interest and the third party sources it reached. Now the subrogation right applied not only to benefits already paid, but to "estimated future values of compensation and medical benefits arising out of [the] injury."[25] The right also applied to the injured party's recovery from uninsured or underinsured motorist policies;[26] indeed, it applied to amounts recoverable from "any third party" that "is or may be liable to make payments" to the injured worker or his beneficiaries.[27] The right applied, as well, to wrongful death settlements,[28] even if those settlements included claims of beneficiaries who received no workers' compensation death benefits.[29] In short, in its effort to close the "loopholes" and ensure reimbursement of the workers' compensation benefits, the statute ran roughshod over the rights of injured workers and their beneficiaries – particularly in situations where there was no true "double recovery" – which, some would argue, is most often the case.[30]

It was this new workers' compensation subrogation law, 1995 H.B. 278, codified as R.C. 4123.93 and 4123.931, effective September 29, 1995, which the Court reviewed in *Holeton*.

II. THE *HOLETON* DECISION.

Rick Holeton, a construction worker, was seriously injured when a negligent motorist hit the truck he was working from, throwing him from the lift bucket. Holeton made a claim for workers' compensation benefits, and he and his wife filed suit against the tortfeasor in federal district court. The Holetons joined the BWC in the suit as the statutory subrogee, then challenged the constitutionality of the subrogation statute under various provisions of the Ohio Constitution. At the Holetons' request, and with the BWC's concurrence, the district court certified to the Ohio Supreme Court seven questions of Ohio law – all but one of which questioned whether R.C. 4123.931 violated the Ohio Constitution.[31]

Six provisions of the Ohio Constitution were at issue. Two enabled the creation of the compulsory workers' compensation system in Ohio: Sections 28 and 35, Article II of the Ohio Constitution. The remaining constitutional challenges involved more familiar provisions: the "takings" and "right to a remedy" clauses of Sections 16 and 19, Article I; the "equal protection" and "special privileges and immunities" clauses of Section 2, Article I; and the "one-subject rule" of Section 15, Article II of the Ohio Constitution.

The Court began by addressing the argument that R.C. 4123.931 violated Section 35, Article II. The Holetons argued that Section 35 represented "a social bargain in which employers and employees exchange their respective common-law rights and duties for a more certain and uniform set of statutory benefits and obligations,"[32] and that R.C. 4123.931 offended this "great compromise"[33] by depriving the employees of the "benefit of their bargain" and destroying the delicate balance struck by that constitutional provision.[34] The Holetons also argued that, while the subrogation statute materially benefitted the employer (who retained its immunity from suit while acquiring a right to recoup all the benefits it paid out), the employee received no *quid pro quo* – thus tilting the balance drastically in favor of the employer – and destroying the very essence of the compromise struck by Section 35, Article II of the Ohio Constitution.[35]

The Court did not agree; nor did it agree with a similar argument the petitioners made under Section 28, Article II of the Ohio Constitution. The Court found that these constitutional provisions "enable... a displacement of the common law only to the extent necessary to provide the injured worker with an automatic recovery."[36] Beyond that, the employer may "without any disparagement to the" employee's "rights... seek to impose the loss upon the ultimate wrongdoer."[37] The Court was also persuaded by the fact that "virtually every jurisdiction" has some form of workers' compensation subrogation, reimbursement, or offset provision, and that Ohio would "constitute a legal anomaly" if it held "the mere concept of subrogation or reimbursement *per se* invalid in the workers' compensation context."[38]

The petitioners fared far better in their "takings," "right to a remedy" and "equal protection" arguments. Each of these provisions involves a constitutional right which can only be interfered with when the state has a legitimate and sufficiently important interest in doing so. Moreover, under established Ohio "takings clause" jurisprudence, even where the state interest is valid, the "'means adopted must be suitable to the ends in view, they must be impartial in operation, and not unduly oppressive upon individuals, must have a real and substantial relation to their purpose, and must not interfere with private rights beyond the necessities of the situation.'"[39]

With respect to the subrogation statute, the ostensible "state interest" was the prevention of a double recovery by the injury victim. Although the Court found this a valid state interest, a series of Ohio Supreme Court opinions had held that statutes designed to prevent double recoveries "are not rationally related to their purpose where they operate to reduce a plaintiff's tort recovery irrespective of whether a double recovery has actually occurred."[40] An injury victim's right to his tort recovery is constitutionally protected "to the extent that it does not duplicate the employer's or the bureau's compensation outlay."[41] Therefore, "if R.C. 4123.931 operates to take more of the claimant's tort recovery than is duplicative of the statutory subrogee's workers' compensation expenditures, then it is at once unreasonable, oppressive upon the claimant, partial, and unrelated to its own purpose."[42]

The statute in question, the Court found, offended this principle in a number of ways. For simplicity's sake, they can be broken down as follows.

1. "Estimated future values of benefits."

One of R.C. 4123.931's more extravagant provisions was that portion of subsection (A) which granted a subrogation interest in the "estimated future values of compensation and medical benefits." The provision's extravagance lay in two things: the highly speculative nature of this future interest, and the shifting of the risk of nonpayment to the innocent injured worker and his/her beneficiaries.

As to the speculative nature of the future interest, the Court found it to be so in many ways: the "claimant may die before his or her life expectancy",[43] a widow whose workers' compensation death benefits are calculated based on her life expectancy may remarry, thereby ending her entitlement to those benefits,[44] benefits may be "terminated earlier than was estimated for purposes of reimbursement",[45] and, "[i]ndeed, any statutory benefit, anticipated for purposes of reimbursement, may be denied or unrealized."[46]

The statute, moreover, made no provision for returning the unrealized benefits to the claimant in the event that the future payments were never made. Thus, "the statute operates not to prevent the claimant from keeping a double recovery but to provide the statutory subrogee with a windfall at the expense of the claimant's tort recovery."[47]

Nor was the Court persuaded by the BWC's argument that the estimated-future-values provision was "tantamount to estimating future damages in a tort claim, and that the disadvantages of imprecise estimates must yield to the advantages of a final one-time resolution of the subrogation claim."[48] The provision, the Court stated, achieved no finality as between the claimant and the subrogee; entitlement to future benefits is subject to ongoing administrative determinations and review, and payments continue to be made (or not) on an accrual basis. Thus, "[t]he only 'final resolution' achieved by R.C. 4123.931 (A) is to provide immediate recovery to the subrogee by imposing the risk of liability for overestimated future expenditures upon the claimant."[49] But this did not make sense: "[U]nlike the tortfeasor, the claimant is innocent; and it is irrational and arbitrary to impose this kind of risk upon an innocent party, especially when a full (and more accurate) reimbursement can be obtained by simply giving the subrogee the same kind of offset or credit against future payments that has always been used to recoup overpayments of compensation."[50]

2. Settlements: the "make whole" and "matching" problems.

Other major infirmities in the statute's operation occurred in the statute's treatment of settlements.[51] Although the entire statute affected the claimant's tort recovery, one particular provision caught it in a death-grip--the provision in division (D) which stated that "[t]he entire amount of any settlement or compromise of an action or claim is subject to the subrogation right of a statutory subrogee, regardless of the manner in which [it]... is characterized."

The problem with this provision, the Court explained, was that it irrebuttably presumed that a double recovery occurred when a settlement was reached – without creating a mechanism for the claimant to rebut that presumption. Yet, in circumstances where the tortfeasor lacked adequate wealth or insurance to satisfy the claimant's actual total damages, a double recovery would not actually occur.[52] This was true, moreover, even though the claimant also collected workers' compensation benefits, because the tort and compensation systems are not coextensive;[53] tort damages compensate a far wider range of losses than in the worker's compensation system, and "[i]t can hardly be said that a double recovery results where a tort victim is allowed to retain two recoveries that, when combined, still do not make him or her whole."[54]

Nor did the Court accept the BWC's argument that was derived from the holding in *In re Estate of Ross*,[55] in which a wrongful death action was brought by a widow and minor children against a tortfeasor whose sole asset was a $100,000 liability policy. On appeal, the only question was the enforceability of the self-insured employer's subrogation right which, after payment of costs and attorney fees, would absorb the balance of the settlement proceeds. The appeals court in *Ross* had found that this did not constitute a taking of any property right because "'[t]he statute merely allows the employer to be reimbursed for the benefits paid... [and] the employee is not deprived of adequate compensation... as the benefits received... under the workers' compensation laws are not diminished.'"[56] Yet this analysis, the Supreme Court noted, missed the point: "[A] person who receives injuries in the course of employment as a proximate result of a third party's negligen[ce]... possesses certain constitutionally protected rights of recovery beyond those provided in the workers' compensation statutes."[57] It was these rights that were violated by the irrebutable presumption of double recovery in the settlement context: "Reimbursement must be preceded by a double recovery for the statute to operate constitutionally."[58] Here, because the statute ignored this principle, merrily snatching the recovery from the mouths of widows and babes as it went, it was not rationally related to the state interest it ostensibly was designed to achieve.

A further problem in the settlement context was the statute's failure to satisfy the "matching" principle set forth in an established line of Ohio cases.[59] As the Supreme Court stated in an earlier opinion, "[d]ue process does not allow one party's recovery to be reduced by another person's collateral benefits."[60] Here the statute's mandate that the entire amount of any settlement be subject to the subrogation right violated that principle. A wrongful death settlement, for instance, might include recovery on behalf of persons with no claim to workers' compensation benefits, yet the statute "would operate to extinguish their recovery as well."[61] Thus, the statute operated "unconstitutionally to allow one person's tort recovery to be reduced or extinguished by another person's worker's compensa-

tion benefits,"[62] in derogation of an established line of cases interpreting the due process and right to remedy provisions of the Ohio Constitution.

3. The equal protection problem.

A third reason the Court found the statute to operate unconstitutionally arose out of the statute's arbitrary distinctions between persons who settled their tort actions and those who proceeded to trial instead.[63] Claimants who settled their tort claims were bound by the irrebutable presumption that a double recovery occurred; yet the statute permitted those who tried their cases to shield a portion of their recovery from the subrogee by requesting jury interrogatories to designate the types of damages awarded. The Court found that this distinction was irrational and arbitrary because "there are situations where claimants' tort recovery is necessarily limited to amounts that if retained along with workers' compensation cannot possibly result in a double recovery."[64] Here again, the prime justification for the creation of the subrogation right (the elimination of the so-called double recovery) failed to support a statute that operated irrespective of its existence.

The Court also rejected the additional arguments made by the BWC in support of the disparate treatment between those who settle and those who try their cases. As to the contention that the distinctions were "a rational response to a legitimate state concern to minimize the loss to the... fund caused by...third-party tortfeasor[s],"[65] the Court noted that, while this justification might support the creation of the subrogation right in general, it failed to explain why a party who settled with an inadequately insured tortfeasor must be penalized by the statute's irrebutable presumption that a double recovery had actually occurred. Similarly, the Court rejected the argument that the disparate treatment was necessary to prevent collusion between the claimant and the tortfeasor, who might otherwise allocate the settlement entirely to damages not duplicated by the workers' compensation benefits in order to defeat the subrogation claim. Here again, the argument failed by glibly presuming a double recovery, as "there is no purpose to allocating damages in the absence of a double recovery, and, in these situations, it is difficult to conceive how collusion could occur, unless the tortfeasor's financial and insurance coverage decisions were somehow made in collaboration with the claimant."[66]

The foregoing are the essential points made in *Holeton* as to why the 1995 version of R.C. 4123.931 is unconstitutional. The Court concluded that, although R.C. 4123.931 does not violate Sections 15, 28, or 35, Article II of the Ohio Constitution, it *does* violate Sections 2, 16, and 19, Article I of the Ohio Constitution. The Court noted, moreover, that nothing in its opinion prevented the General Assembly from enacting another, more carefully drafted, statute, because "we do not accept the proposition that a workers' compensation subrogation statute is *per se* unconstitutional."[67] Rather, the Court stated, it was simply holding that "R.C. 4123.931, in its present form, is unconstitutional."[68]

Which brings us to the point raised at the outset: given that the 1995 version of the subrogation statute is unconstitutional, what follows in its wake?

III. HAS THE 1993 SUBROGATION STATUTE BEEN REVIVED?

The general rule governing whether a former statute is revived when its replacement statute has been held unconstitutional was recently set forth in *State v. Sullivan* (2001), 90 Ohio St.3d 501, paragraph two of the syllabus:

> When a court strikes down a statute as unconstitutional, and the

> offending statute replaced an existing law that had been repealed in the same bill enacting the offending statute, the repeal is also invalid unless it clearly appears that the General Assembly meant the repeal to have effect even if the offending statute had never been passed.[69]

A quick reading of the *Sullivan* holding would suggest that revival of former R.C. 4123.93 is inevitable. Poorly-drafted though the former statute may have been, it appears that the sole reason for its revision was to give it more teeth – it does not appear that the General Assembly would have jettisoned the 1993 version without first replacing it with a "new and improved" model. Nevertheless, several arguments have been suggested as to why the former statute might not have been revived. Whether these arguments will prevail remains to be seen – but all, at this point, are worth considering.

The first argument arises out of an incomplete reading of the Bill which enacted the 1995 statute. The argument holds that, in 1995 H.B. No. 278, the legislature did not actually repeal former R.C. 4123.93; it merely accorded it limited applicability for the two year period between its effective date and the effective date of the 1995 statute. This argument is based on Section 12 of H.B. 278, which provides that, while "[R.C.] 4123.931... as enacted by this act, governs the subrogation rights in any action or claim brought pursuant to a cause of action that arises on or after the effective date of this section... Section 4123.93... as [it] existed prior to the effective date of this section governs the subrogation rights in any action or claim ... that arose on or after the effective date [of the 1993 bill]... and before the effective date of this section."

The problem with this argument is that it is based upon the assumption that the legislature did not repeal the former version of the statute, when the express repeal provision in Section 2 of H.B. 278 provides "[t]hat existing sections 4121.62, 4123.32, 4123.35 and 4123.511 and section 4123.93 of the Revised Code are hereby repealed." Nor is this repeal provision defeated by Section 12's savings provision for actions arising between October 20, 1993,[70] and September 29, 1995. Savings clauses are a common method of continuing an otherwise repealed law in force as to causes of action which arose prior to the effective date of the replacing statute.[71] In short, the first argument against revival is probably doomed to fail.

A second, more intriguing, argument arises in conjunction with the doctrine of severability. This argument relies on Section 10 of H.B. 278, which provides:

> The sections of this act, and every part of such sections, are hereby declared to be independent sections and parts of sections, and the holding of any section or part thereof to be void and ineffective shall not affect any other section or parts of sections.

According to this argument, the above-quoted provision supplies the "clear legislative intention" which *Sullivan* requires for a repealing clause to remain intact when other portions of the bill are struck down as unconstitutional. In other words, because the legislature insisted on severability, it must be taken at its word--the repeal provision being severable, the legislature must have intended it to be so, and no further inquiry into legislative intent is necessary,

as the severability provision provides a clear statement of that intent.

To assess the merits of this argument, it is necessary to review the law on severability. To begin with, R.C. 1.50 states the general rule on severability as follows:

> If any provisions of a section of the Revised Code or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section or related sections which can be given effect without the invalid provision or application, and to this end the provisions are severable.

Determinations of severability typically begin with a presumption against severability – the presumption being that the "legislature intended the act to be effective as an entirety or not at all."[72] The presumption, however, is the opposite when there is a legislative provision favoring severability; such a provision "reverses the common law presumption that the legislature intends an act to be effective as an entirety and creates the contrary presumption of divisibility, which must be overcome by considerations that make evident the clear probability that the legislature would not have been satisfied with the statute unless it had included the invalid part."[73]

Thus, although the courts give effect to the legislative intent expressed in a severability clause, such a legislative declaration is not conclusive[74]; it "is only an aid to interpretation and not an inexorable command."[75] This rule holds true whether the legislative intent is expressed in a generally applicable provision such as that set forth at R.C. 1.50, or whether it is expressed in a more specific provision such as that set forth in Section 10 of H.B. 278. Indeed, it has been stated that "[a]n uncodified saving clause favoring severability... adds little to the basic presumption of severability, for such a clause is merely declaratory of an established rule of construction."[76]

In that the existence of a severability clause is not conclusive, it becomes necessary to examine the cases on severability. At the most basic level, the test for severability inquires "whether the remaining parts of the statute, standing alone and without reference to the unconstitutional portions, can be effective and operable."[77] More specifically, the severability test requires the court to ask:

> (1) Are the constitutional and the unconstitutional parts capable of separation so that each may be read and may stand by itself?
>
> (2) Is the unconstitutional part so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the Legislature if the clause or part is stricken out?
>
> (3) Is the insertion of words or terms necessary in order to separate the constitutional part from the unconstitutional part, and to give effect to the former only?[78]

Here, with respect to the severability of the repeal provision, the foregoing questions might be answered as follows. First, the repeal clause is clearly capable of being separated from R.C. 4123.931; unlike the definitional provision of R.C. 4123.93, which lacks meaning once the operative provision of R.C. 4123.931 is struck, the repealing clause is a free-standing provision capable of having meaning in and of itself. Similarly, there is no difficulty in answering the third question: it is not necessary to insert words or terms into the repeal provision in order to separate it from the unconstitutional provision of R.C. 4123.931 and give effect to the repeal alone.

It is only in addressing the second question that the inquiry becomes difficult, for, as with the *Sullivan* inquiry, the second question focuses on the legislature's intent in repealing the predecessor statute. *Sullivan* asks whether "it clearly appears that the General Assembly meant the repeal to have effect even if the offending statute had never been passed." The second inquiry of the severability test asks whether the unconstitutional portion of the bill is so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the legislature if only the offending portion is stricken out. It might be argued, then, that the two tests lead to the same in-

quiry: would the legislature have repealed former R.C. 4123.93 if it had known that the replacement statute would be struck as unconstitutional? From a common sense perspective, the answer to this question would appear to be no: while the legislature clearly sought to improve upon the former version, it had no intention of abandoning that version without first replacing it with a "better mousetrap." In the event that the better mousetrap failed, the legislature probably intended the repeal to fail as well.

On the other hand, it might be argued that the presumption of severability set forth in Section 10 of H.B. 278 determines whether the repeal clause remains valid. Because, unlike the severability of the definitional provision,[79] this argument does not depend on feasibility of severance, but only on divination of legislative intent, the fact that the legislature expressed an intent that separable provisions remain intact may well carry the day. Clearly, the appropriations provisions set forth elsewhere in the bill would seem to remain viable even after the demise of R.C. 4123.931. In other words, in that the first and third questions of the severability inquiry favor severability of the repeal provision, and in that the only concrete evidence we have of the legislative intent is reflected in Section 10 of H.B. 278 which insists on severability, why should we inquire any further into whether the legislature meant the repeal to have effect even if the offending statute had never been passed? The legislature should be bound by its declaration favoring severability, where, as here, it is possible to sever the non-offending portions of the bill without having to insert words and terms to give them meaning and effect.

Finally, two additional arguments on revival of the former statute might briefly be mentioned here. The first is that, because *Holeton* only held R.C. 4123.931 unconstitutional, but did not strike the definitional provision of R.C. 4123.93, it is impossible to revive former R.C. 4123.93 because the 1995 version of that provision still exists and remains occupying its place in the Code. The problem with this argument, of course, is the severability problem hinted at earlier--unlike the repeal provision, the definitional provision is not severable, *i.e.*, is not capable of standing alone without reference to R.C. 4123.931, and thus must fall with the offending statute upon which it depends.

The second argument arises out of Section 15 (D), Article II of the Ohio Constitution, which provides that:

> No law shall be revived or amended unless the new act contains the entire act revived, or the section or sections amended, and the section or sections amended shall be repealed.

As a result of this provision, so the argument goes, it is constitutionally impermissible to permit a prior version of the statute to be "revived" when the succeeding version is declared unconstitutional. This argument is supported by a single case – *State ex rel. Judy v. Wandstrat* (1989), 62 Ohio App.3d 627, 630 – which cited this constitutional provision in support of its conclusion that "a determination by this court that Am. Sub. H.B. No. 390 was unconstitutional would not operate to revive [the former iteration of that statute]."

Yet this argument is problematic. First, it is difficult, if not impossible, to square the *Wandstrat* holding with the Supreme Court's subsequent holding in *Sullivan*. Indeed, *Wandstrat* has seldom been cited for any reason, and has never been cited for the above-mentioned principle. Moreover, a recent Supreme Court decision suggests that *Wandstrat* misinterpreted the import of Section 15 (D), Article II of the Ohio Constitution. In *Stevens v. Ackman* (2001), 91 Ohio St.3d 182, the Court explained that "Section 15 (D), Article II [merely] sets out the form for the General Assembly to follow when amending a statute."[80] In other words, the purpose of Section 15 (D) is to render the Revised Code intelligible; it is a high-level housekeeping measure designed to prevent the existence of fragmentary amendments scattered throughout the Code. When viewed in this light, it cannot be said that the Court in *Sullivan* overlooked the effect of Section 15 (D), Article II in reaching its holding. Section 15 (D) deals with matters of form--it does not deal with the substantive issue of whether a repealed provision can be revived when the statute containing that repeal has been held unconstitutional.

So, has the 1993 version of R.C. 4123.93 been revived? There is at least a plausible argument for stating that it has not been, although the syllabus of *Sullivan*, coupled with a common sense interpretation of the legislature's motives, suggests it probably has been. But, even if it has been, is that such an awful thing? The final section of this article suggests that, from a plaintiff's perspective, there are far worse things than having the former R.C. 4123.93 revived.

IV. THE SCOPE AND APPLICABILITY OF FORMER R.C. 4123.93.

As noted earlier, the 1993 statute, as drafted, contained many exceptions to the subrogation right. This fact, coupled with the principle that workers' compensation legislation is to be construed liberally in favor of the employee,[81] resulted in a body of case law holding that the statute had limited applicability. In this respect, six important points might be noted.

1. The subrogation right did not extend to future benefits.

That the subrogation right extended only to benefits already paid, and not to future benefits, is apparent in the language of the statute itself. In this respect, R.C. 4123.93 (B) described the subrogation right as consisting of "the amount of compensation and benefits ***paid*** to or on behalf of the employee...." It appears to have been undisputed that this usage of the past tense indicates that the right extended only to past payments of benefits, and not to any benefits anticipated to be paid in the future.

2. The subrogation right did not exist unless the compensation and benefits paid exceeded the amount of attorney fees and costs incurred by the claimant in pursuing his tort recovery.

The statute described the subrogation right as consisting of "the amount of compensation and benefits paid... less the amount of reasonable attorney's fees and court costs actually incurred by the employee in the action." Courts construing this language interpreted it to mean precisely what it says. Thus, in *State of Ohio, Bureau of Workers' Compensation v. Swanger* (Aug. 3, 1999), Marion App. No. 9-99-14, 1999 WL 692464, unreported, where the BWC claimed a lien of $37,000, and the plaintiff settled with the tortfeasor for $145,000, incurring attorney fees and costs of $48,333.33, the court of appeals affirmed the dismissal of the BWC's subrogation complaint:

> The Bureau is a "statutory subrogee" by virtue of the R.C. 4123.93 definition. Any rights that inure to the benefit of the Bureau are derived from the statutory language. There is no requirement that the appellee must join the Bureau, get the Bureau's consent to settle a claim, pro rate fees, or take any other action "to protect its interests." As the trial court pointed out, the only issue is the interpretation of the legislative intent and the statute clearly directs that court costs and reasonable fees are to be deducted from the amount paid when determining subrogation.

An identical conclusion was also reached in *Skidmore v. Stacey* (Aug. 25, 2000), Hamilton App. No. C-000131, 2000 WL 1209987, unreported.

3. The subrogation right did not extend to UM/UIM recovery.

Unlike the 1995 statute, which sought to capture "[a]mounts recoverable from a claimant's insurer in connection with underinsured or uninsured motorist coverage,"[82] the 1993 statute's subrogation right extended only against "a third-party tortfeasor." Thus, in *Schultz v. Yellow Freight Systems, Inc.* (Dec. 12, 1996), Franklin App. Nos. 96APE03-382, 96APE04-405, 1996 WL 729867, unreported, the court held that the subrogation right did not extend to the claimant's UIM recovery.

4. The subrogation right did not extend to recovery in wrongful death and survival actions.

Subsection (D) of R.C. 4123.93 provided that the right of subrogation "applies only if the employee is a party to an action involving the third-party tortfeasor." Because a wrongful death action belongs to the wrongful death statutory beneficiaries and not the decedent, and because the decedent cannot be a party to a wrongful death action, courts construing the statute held that the right of subrogation did not apply in wrongful death actions. *See e.g. Sallach v. United Airlines, Inc.* (1997), 121 Ohio App.3d 89; *Lute v. Armstrong World Industries* (Aug. 2, 2000), Lorain App. No. 99CA007499, 2000 WL 1072467, unreported. Additionally, because the employee is no longer a party when his personal injury action survives his death, the court in *Lute* found that the subrogation right did not apply to the survival action either.

5. The subrogation right did not apply if settlement occurred prior to the filing of the action against the tortfeasor or after that action was voluntarily dismissed.

Here, again, the operative statutory language was that the subrogation right "applies **only** if the employee ***is*** a party to an action involving the third-party tortfeasor." Courts construing this provision found that the present pendency of an action by the employee against the tortfeasor was the *sine qua non* to enforceability of the subrogation right. Thus, in *Gregory v. Ohio Bureau of Workers' Compensation* (1996), 115 Ohio App.3d 798, and in *Schultz, supra*, the courts held that no subrogation right existed where the plaintiffs' claims against the tortfeasor were settled prior to filing an action. In *New Artesian v. Stiefel* (Feb. 14, 2000), Stark App. No. 1999CA00163, 2000 WL 222110, unreported, the court held that no subrogation right existed where, although the employee had filed an action against the tortfeasor and joined the subrogee as a party, he subsequently filed a Civ. R. 41 (A) dismissal of the action prior to settling with the tortfeasor.

6. The "make whole" doctrine applied to former R.C. 4123.93.

Finally, in *Moellman v. Niehaus* (Feb. 5, 1999), Hamilton App. No. C-971113, 1999 WL 49370, unreported, the court held that the "make whole" doctrine applies to former R.C. 4123.93, such that the injured worker had priority in the limited recovery available from the tortfeasor. Relying, in part, on *Blue Cross & Blue Shield Mut. of Ohio v. Hrenko* (1995), 72 Ohio St.3d 120, the court stated:

> Tru Green does not dispute that Moellman suffered grave injuries and incurred substantial damages over and above his medical expenses and other losses covered by workers' compensation. All of his damages... far exceed the recovery available from...the tortfeasor[]... and the... Moellmans... own underinsured-motorist [coverage]. They are not, as Tru Green suggests, receiving any kind of windfall.... To allow Tru Green's subrogation claim to take priority would be to deny the Moellmans their recovery.[83]

V. CONCLUSION

At the writing of this article, a motion for reconsideration filed by the BWC in *Holeton* remains pending. The BWC has argued that the "offending" portions of R.C. 4123.931 should be severed from the rest of that section, so that a skeletal version of R.C. 4123.931 can remain intact. The Holetons have argued that severance is not feasible because R.C. 4123.931 is a highly integrated statute; to excise the offending portions would require the courts to rewrite the portions that remain on a case by case basis. As discussed earlier, severability is not feasible when to do so would require the court to insert words and terms in the remaining provisions to make the statute operable. Hence, it is anticipated that the BWC's motion for reconsideration will be denied – in which case the legislature will probably return to the drawing board to create a new statute.

One would hope that, if a new statute is drafted, lessons will have been learned from *Holeton*, such that any new statute will, in an intellectually honest fashion, attempt to fairly balance the interests of injury victims and statutory subrogees. One would expect, moreover, that any new statute would not be able to pass constitutional muster unless it incorporated a "make whole" rule.[84]

Meanwhile, although the personal injury bar will continue to struggle with the questions addressed in this article, in the event that the 1993 version of the statute has been revived and a new, less favorable, statute is not enacted, *Holeton* may be the final victory that it seemed at first to be.

[1] In *Loan Association v. Topeka* (1874), 87 U.S. 655, 663, the Court stated: "There are limitations on such [legislative] power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute... which should enact that the homestead now owned by A. should no longer be his, but should henceforth be the property of B." The 1995 version of R.C. 4123.931 did just that. While it did not take away the injured worker's homestead, it did take away a portion of his or her tort recovery to pay back the statutory subrogee, even if the worker was left with nothing out of his tort recovery after the subrogation lien was paid.

[2] *See, e.g.*, George B. Wilkinson and Brian P. Perry, *Employer's Perspective: Supreme Court Strikes Down Workers' Compensation Subrogation: Employers Make The Case For Judicial Restraint*, Workers' Compensation Journal of Ohio, 45-49 (July/August 2001).

[3] Although often treated interchangeably, the terms subrogation and reimbursement identify two distinct concepts. "With subrogation, the insurer stands in the

shoes of the insured, but with reimbursement, the insurer has a direct right of repayment against the insured." Douglas S. Roberts, Glen R. Pritchard, *Subrogated Claims Regarding Health Insurance, Med-Pay, ERISA, Medicaid, Medicare, Child Support, and Workers Compensation* (1999), at I-3, citing *A. Copeland Ents., Inc. v. Slidell Mem. Hosp.* (La. 1995), 657 So.2d 1292. Interestingly, while, in principle, the version of R.C. 4123.931 held unconstitutional in *Holeton* purported to create a right of subrogation "against a third party," in actuality, the statute operated as if it were a right of reimbursement against the injured claimant. *See, e.g.*, R.C. 4123.931 (D) ("The entire amount of any settlement or compromise of an action or claim is subject to the subrogation right of a statutory subrogee...").

[4] *Truscon Steel Co. v. Trumbull Cliffs Furnace Co.* (1929), 120 Ohio St. 394, 398.

[5] *See, e.g.*, Roger M. Baron, *Subrogation: A Pandora's Box Awaiting Closure*, 41 S. D. L. Rev. 237 (1996); and Roger M. Baron, *Subrogation on Medical Expense Claims: The "Double Recovery" Myth and the Feasibility of Anti-Subrogation Laws*, 96 Dick. L. Rev. 581, 581-583 (1992).

[6] *Truscon Steel*, 120 Ohio St. at 395.

[7] Section 1465-101 of the General Code provided:

'All contracts and agreements shall be absolutely void and of no effect which undertake to indemnify or insure an employer against loss or liability for the payment of compensation to workmen or their dependents, for death, injury or occupational disease occasioned in the course of such workmen's employment, or which provide that the insurer shall pay such compensation, or which indemnify the employer against damages when the injury, disease or death arises from the failure to comply with any lawful requirement for the protection of the lives, health and safety of employees, or when the same is occasioned by the willful act of the employer or any of his officers or agents, or by which it is agreed that the insurer shall pay any such damages. No license or authority to enter into any such agreements or issue any such policies of insurance shall be granted or issued by any public authority.'

[8] *Truscon Steel*, 120 Ohio St. at the syllabus.

[9] *Fischer Construction Co. v. Stroud* (1963), 175 Ohio St. 31.

[10] *Id.* at the syllabus.

[11] *Ledex, Inc. v. Heatbath Corp.* (1984), 10 Ohio St.3d 126.

[12] *Cincinnati Bell Tele. Co. v. Straley* (1988), 40 Ohio St.3d 372.

[13] *Id.* at paragraphs one and two of the syllabus.

[14] *Ledex*, 10 Ohio St.3d at 129, quoting 2A Larson, The Law of Workmen's Compensation (1983) at 14-777, Section 77.13.

[15] *Id.* at 129; *Straley*, 40 Ohio St.3d at 380, n. 1.

[16] A predecessor version of R.C. 4123.93 was not a subrogation statute; it merely provided that the receipt of workers' compensation benefits was not to be introduced as evidence in a civil lawsuit.

[17] George B. Wilkinson and Brian P. Perry, *Employer's Perspective: Subrogation Revisited*, Workers' Compensation Journal of Ohio, 119-120 (November/December 1995).

[18] *Gregory v. Ohio Bureau of Workers' Compensation* (1996), 115 Ohio App.3d 798; *Schultz v. Yellow Freight Systems, Inc.* (Dec. 17, 1996), Franklin App. Nos. 96APE03-382, 96APE04-405, 1996 WL 729867, unreported.

[19] *New Artesian v. Stiefel* (Feb. 14, 2000), Stark App. No. 1999CA00163, 2000 WL 222110, unreported.

[20] *Sallach v. United Airlines, Inc.* (1997), 121 Ohio App.3d 89; *Lute v. Armstrong World Industries* (Aug. 20, 2000), Lorain App. No. 99CA007499, 2000 WL 1072467, unreported.

[21] See text of R.C. 4123.93 (B) (*eff.* 10/20/93).

[22] *State of Ohio, Bureau of Workers' Compensation v. Swanger* (Aug. 3, 1999), Marion App. No. 9-99-14, 1999 WL 692464, unreported.

[23] *Employers Perspective*, *supra*, at 119.

[24] R.C. 4123.931 (D) (*eff.* 9/29/95).

[25] R.C. 4123.931 (A) (*eff.* 9/29/95).

[26] R.C. 4123.93 (C) (2) (*eff.* 9/29/95).

[27] R.C. 4123.93 (C) (1) and (D) (*eff.* 9/29/95).

[28] *See, e.g., In re Estate of Ross* (1997), 116 Ohio App.3d 402.

[29] R.C. 4123.931 (D) (*eff.* 9/29/95).

[30] *See, e.g., Subrogation: A Pandora's Box Awaiting Closure*, *supra*, at 242 ("For the most part, th[e] rationale [in support of the subrogation concept] is flawed... Rather, the great irony is that in the vast majority of cases, the insurer who asserts that the insured will receive an unwarranted 'double recovery' is itself picking up a windfall recovery if subrogation is permitted.")

[31] The seven certified questions were as follows:

> 1. Does R.C. § 4123.931 violate Article II, Section 35 of the Ohio Constitution?
>
> 2. Does R.C. § 4123.931 violate Article I, Section 19 of the Ohio Constitution?
>
> 3. Does R.C. § 4123.931 violate Article I, Section 16 of the Ohio Constitution?
>
> 4. Does R.C. § 4123.931 violate Article II, Section 28 of the Ohio Constitution?
>
> 5. Does R.C. § 4123.931 violate Article I, Section 2 of the Ohio Constitution?
>
> 6. Does R.C. § 4123.931 violate Article II, Section 15 of the Ohio Constitution?
>
> 7. Is R.C. § 4123.931 contrary to Ohio Civil Rule 49(C) and, therefore, invalid and unenforceable?

Holeton, 92 Ohio St.3d at 116.

[32] *Id.* at 119.

[33] The "great compromise" terminology was the Court's. *Id.* at 118.

[34] *Id.* at 119.

[35] *Id.* at 119-120.

[36] *Id.* at 120.

[37] *Id.*

[38] *Id.*

[39] *Id.* at 121, quoting *Direct Plumbing Supply Co. v. Dayton* (1941), 138 Ohio St. 540, 546.

[40] *Id.* at 122, citing *McMullen v. Ohio State Univ. Hosp.* (2000), 88 Ohio St.3d 332, 341-344; *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 479-482; *Buchman v. Wayne Trace Local School Dist. Bd. of Edn.* (1995), 73 Ohio St.3d 260; *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415.

[41] *Id.*

[42] *Id.*

[43] *Id.* at 124.

[44] *Id.* at 123.

[45] *Id.* at 124.

[46] *Id.*

[47] *Id.* at 123.

[48] *Id.* at 124.

[49] *Id.* at 125.

[50] *Id.*

[51] *Id.* at 125-128.

[52] *Id.* at 126.

[53] *See, e.g.*, 1 *Larson's Workers' Compensation Law*, § 1.03[5] at 1-10 (The workers' compensation system, "unlike tort recovery, does not pretend to restore the claimant to what he or she has lost; it gives the claimant a sum which, added to his or her remaining earning ability, if any, will presumably enable the claimant to exist without being a burden to others.").

[54] *Id.*

[55] *In re Estate of Ross* (1997), 116 Ohio App.3d 402.

[56] *Holeton*, 92 Ohio St.3d at 126-127, *quoting Ross*, 116 Ohio App.3d at 406-407.

[57] *Holeton*, 92 Ohio St.3d at 127.

[58] *Id.*

[59] *See, e.g., McMullen v. Ohio State Univ. Hosp.* (2000) 88 Ohio St.3d 332, 342-343, and authorities cited therein.

[60] *Buchman v. Wayne Trace Local School Dist. Bd. of Edn.* (1995), 73 Ohio St.3d 260, 269.

[61] *Id.*

[62] *Id.*

[63] *Id.* at 132.

[64] *Id.*

[65] *Id.*

[66] *Id.* at 133.

[67] *Id.* at 135.

[68] *Id.*

[69] Approving and following paragraph three of the syllabus in *State ex rel. Pogue v. Groom* (1914), 91 Ohio St. 1.

[70] That the effective date of the 1993 version of R.C. 4123.93 was October 20, 1993 was conclusively determined in *Laidlaw Waste Sys., Inc. v. Consol. Rail Corp.* (1999), 85 Ohio St.3d 413.

[71] *See, e.g.*, 73 Am.Jur.2d *Statutes* § 387 (1974); 73 Am.Jur.2d *Statutes* § 422 (1974).

[72] 16A Am.Jur.2d *Constitutional Law* § 214 (1998).

[73] 16 O.Jur.3d *Constitutional Law* § 188; see also, 16A Am.Jur.2d *Constitutional Law* § 213 (1998) ("Where a separability clause is included, the burden is upon the assailant to show the inseparability of the statutory provision").

[74] *State ex rel. English v. Industrial Commission* (1953), 160 Ohio St. 215, 219-20.

[75] 16 O.Jur.3d Constitutional Law § 188; *State v. Graham* (1933),30 ONP NS 387; *Sugarloaf Citizens Association, Inc. v. Gudis* (Md. 1990), 573 A.2d 1325.

[76] 16A Am.Jur.2d *Constitutional Law* § 213 (1998), citing *Sugarloaf Citizens Ass'n, Inc. v. Gudis* (Md. 1990), 573 A.2d 1325.

[77] *State, ex rel. King v. Rhodes* (1967), 11 Ohio St.2d 95, 101; *O'Brien v. Columbus S. Paving Co.* (1992), 73 Ohio App.3d 355.

[78] *State ex rel. Maurer v. Sheward* (1994), 71 Ohio St.3d 513, 523-524, quoting *Geiger v. Geiger* (1927), 117 Ohio St. 451, 466.

[79] R.C. 4123.93 (*eff.* 9/29/95).

[80] *Id.* at 195.

[81] *State ex rel. Gassmann v. Indus. Comm.* (1975), 41 Ohio St.2d 64, 67.

[82] R.C. 4123.93 (C) (2) (*eff.* 9/29/95).

[83] *Id.* at **3.

[84] The Georgia subrogation statute, for instance, O.C.G.A. § 34-9-11.1, provides:

> [T]he employer's or insurer's recovery under this Code section shall only be recoverable if the injured employee has been fully and completely compensated, taking into consideration both the benefits received under this chapter and the amount of recovery in the third party claim, for all economic and noneconomic losses incurred as a result of the injury. OT