

SUBROGATION AND LIENS:  
Medicare, Medicaid, Hospitals  
JUDY KOSTURA



THE CAR CRASH SEMINAR



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**The basis for the interest  
or lien MATTERS; read the  
statute, any contract, and  
the caselaw**



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**It matters who the Plaintiff is re: the subrogation interest or lien**



child



Employee participant; or injured spouse; or derivative claimant



Wrongful death or estate

**Start early. Be consistent. Be strategic.**



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I. **Chapter 33 requires a credit for the daughter's [CP's] settlement [of her derivative damages], which does not violate the Texas Constitution's Open Courts provision.** The court of appeals held that applying Chapter 33 to reduce Puente's damages in this case would be unconstitutional. Because Puente has not lost a common-law remedy, we conclude that the Open Courts provision has not been violated and that C.P.'s settlement should be credited against the judgment. ... *Virlar v. Puente*, (Tex. Feb 17, 2023, Mo reh den)

BUT see *Fort Bend County v. Norsworthy*, (Tex. App. – Houston [14<sup>th</sup> Dist.] No. 14-17-00520-CV, 2019 WL 1291526 March 21, 2019, pet. den.). And:

**Ahlborn Fn 19 quoting a state w/c case: the department could not “share in damages for which it has provided no compensation” because such a result would be “absurd and fundamentally unjust.”** [SCOTUS on Medicaid subrogation, but the logic applies to child's COA] Guardian ad Litem for child (and attorneys) should follow the law/logic.



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CHILDREN: “Neither the next friend nor the parent of a minor child is authorized to ... throw away” the “substantial rights” of a minor child; *Lowery v Berry* (Tex 1954)

But see *Hermann Hospital v Martinez* (Tex. App. Houston 1999): **hospital lien** attached to minor child’s recovery; see hosp lien section for ideas

PERSONAL INJURY DAMAGES

PJC 15.5

**PJC 15.5** Personal Injury Damages—Injury of Minor Child

QUESTION \_\_\_\_\_

PJC 15.5 includes elements of damages (e.g., loss of earning capacity and medical care expenses incurred before the age of majority) that reflect injuries to the minor, but that are not recoverable by the minor, the Committee felt that a revision was necessary



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Shielding recoveries by diverting some to derivative claimants? Spouse or kids for loss of consortium?



*ACS v Griffin*: Husband’s share was subject to subro interest but wife’s\* **derivative claim** was not. [\*ex-wife as of appeal. Get a conflicts waiver.]



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