



OHIP subrogated claims

Counsel liability issues raised by OHIP subrogated claims

Counsel representing clients who seek compensation for injuries caused by another's negligence or wrongdoing are encouraged to be mindful that the Ministry of Health and Long-Term Care may also be entitled to recover its costs for health care and medical treatment provided to the injured party from the tortfeasor. Failure to advance OHIP's subrogated claim can lead to adverse consequences for both the injured plaintiff and plaintiff's counsel.

Accordingly, solicitors are wise to develop a working knowledge of the principle of subrogation, and to implement file management procedures to ensure that OHIP's subrogated interest is not forgotten when a personal injury file is resolved through settlement or at trial.

OHIP's statutory right to subrogate and your obligations

OHIP's right to subrogate is conferred by statute. Sections 30 through 36 of *The Health*

Insurance Act (Ontario) ("the Act") and Regulation 552 thereunder prescribe OHIP's entitlement to be reimbursed for hospital and medical costs incurred in treating injured persons involved in accidents caused by another. This issue will come up in most types of personal injury cases, including slip and fall accidents, product liability cases, medical malpractice, municipal liability, and assaults. The one noteworthy exception to this right of subrogation is in relation to a person insured under a motor vehicle liability policy where the person's injuries arise from the use or operation of a vehicle (section 267.8(18) of the *Insurance Act*).

Section 31 of the Act creates a solicitor and client relationship between claimant's counsel and the General Manager of OHIP which effectively obliges plaintiffs' counsel in personal injury matters to properly advance the subrogated interests of OHIP when prosecuting and resolving the claims of their injured clients. Significantly, costs for both past and future insured health care services that an injured person may need can be recovered by OHIP.

Managing OHIP's subrogated claim

After the duty to advance a subrogated claim has been identified, plaintiff's counsel must notify OHIP of the litigation and seek instructions to advance the subrogated claim. OHIP will normally provide these instructions along with a payment summary to date. Thereafter it would be prudent to implement internal procedures to ensure that the subrogated claim is not overlooked when the case is being resolved.

Some practical management techniques include:

1. Having a separate paper or electronic subfolder to file all documentation related to the subrogated claim.
2. Having correct contact information for the Subrogation Unit at OHIP.
3. Ascertaining how often OHIP wants case updates and the documentation OHIP staff require to properly instruct you regarding the resolution of OHIP's interest.
4. Creating a tickler system to ensure the file is flagged to request up-to-date payment summaries at key milestones when it will be relevant (prior to a mediation, pretrial and when going to trial).
5. Confirming with OHIP the details of the payment of legal fees and disbursements for your work involved in recovery of the subrogated interest (so there is no confusion between the plaintiff and OHIP as to who is paying you for your services and how much each party will net).

6. Making sure your client fully understands the terms of a settlement. See sidebar for more information.

Remember, failure to advance OHIP's subrogated interest could lead to legal difficulties for both the plaintiff and plaintiff's counsel as a release or settlement of a claim is not binding on OHIP without OHIP's approval of the release or settlement. Be proactive and take steps to deal with OHIP's subrogated interest when it is appropriate to do so.

For more information about subrogation or how it may affect your client, counsel are encouraged by the Ministry of Health to call 613-548-6663. ■

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Protect yourself when dealing with settlements

All too often, LAWPRO sees claims arise when a client is unhappy with a settlement. Sometimes these complaints come up, literally, the morning after a settlement is reached. They also come up when the client receives the final account – and gets less than they expected. By following these steps you can avoid settlement disputes and better defend an allegation of an improvident settlement:

- Communicate settlement offers in writing: A paper trail clearly establishes what was said, and when.
- Make sure the client understands the terms of the settlement: Review and explain the terms of the settlement, including any calculations, as well as potential outcomes and cost considerations that were considered.
- Document the client's instructions: This can be done in a formal letter, via email, or even handwritten notes. In particular, note any reasons they want to settle quickly (e.g., liability concerns, the prospect of insufficient policy limits or a litigation discount) or if they reject an offer you believe is reasonable.

