MANAGING SUBROGATED CLAIMS IN PERSONAL INJURY ACTIONS

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Overview

Black's Law Dictionary defines subrogation as: "The substitution of one party for another whose debt the party pays, entitling the paying party to rights, remedies, or securities that would otherwise belong to the debtor."[1] In simpler terms, it is the right to reimbursement.

In the context of a personal injury case, subrogation is the process by which the Plaintiff advances claims to recover the cost of benefits or services that were provided or will be provided to her by a third party (the "subrogating entity") as a result of her injuries. The right to subrogate (i.e. to be reimbursed) arises by virtue of contract or statute. Although the subrogating entity is not named as a Plaintiff in the lawsuit, its claims essentially "piggy back" onto those claims advanced personally by the Plaintiff. When the Plaintiff recovers the value of the subrogated claim from the Defendant, the money flows through the Plaintiff to the subrogating entity. In regards to *past* subrogated claims, as with other claims for past losses, pre-judgment interest applies.

The importance of understanding subrogated claims cannot be understated, especially since it is possible for these claims to reach hundreds of thousands dollars. The failure to

advance a subrogated claim can have serious consequences for the Plaintiff, personally, and for Plaintiff's counsel.

The purpose of this paper will be to canvass some of the key considerations for Plaintiff's counsel in the management of subrogated claims.

Common Subrogated Entities

OHIP

a. General Overview

Colloquially, Canadians like to boast about having "free" healthcare. When the system is being accessed as a result of an injury arising from a wrongdoing, OHIP may be entitled to reimbursement by the tortfeasor. OHIP's right to subrogation in these circumstances is prescribed in section 30(1) of the *Health Insurance Act*[2], which reads:

> Where, as the result of the negligence or other wrongful act or omission of another, an insured person suffers personal injuries for which he or she receives insured services under this Act, the Plan is subrogated to any right of the insured person to recover the cost incurred for past insured services and the cost that will probably be incurred for future insured services, and the General Manager may bring action in the name of the Plan or in the name of that person for the recovery of such costs.

In circumstances where OHIP is entitled to advance a subrogated claim (which circumstances will be discussed later), the types of services for which reimbursement may be sought include the costs of a basic in-patient hospital stay, visits with physicians, diagnostic tests, OHIP-funded therapy, and services rendered by the Community Care

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[1] *Black's Law Dictionary*, 9th ed., *s.v.* "subrogation".

Access Centre ("CCAC"). It should be noted that there is a sliding scale for these costs, depending upon the facility at which they are received. For instance, services provided at a larger teaching hospital in Toronto will generally be charged at a higher rate than those provided at a smaller hospital.

Services and costs which would *not* appear on an OHIP subrogated payment summary include the costs of nurses, ambulance fees, any extraordinary room charges (cable, private room, etc.), and any further privately-funded care (e.g. private therapy).

In addition to a claim for past services, OHIP may advance a future subrogated claim if there is evidence that the Plaintiff is likely to access OHIP-funded services in the future.

Only those expenses incurred directly as a result of the incident subject to the litigation may be advanced as a subrogated claim by OHIP. This can become tricky when, for instance, there is some question as to whether a surgery was required only as a result of the incident-related injuries or whether it may have been required in any event, due to some pre-existing condition.

b. Insured vs. Uninsured Rates

A unique aspect of a subrogated claim advanced by OHIP as opposed to a subrogated claim advanced by, for instance, a group health insurer, is that OHIP's claim may be based upon two different rates of pay. Services provided at a hospital or health facility in Ontario are invoiced at either an "insured" and "uninsured" rate. Residents of Ontario

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[2] *Health Insurance Act*, R.S.O. 1990, c. H.6 [*Health Insurance Act*].

are “insured” under OHIP. Non-residents who require care while visiting Ontario are uninsured, such that the services provided to them are charged at a higher rate. In some cases, the uninsured rate of a particular service can be double that of the insured rate. In a case involving multiple surgeries, a long hospital stay, or admission to a long-term health care facility, the difference in cost can be astouding.

As a matter of practice, the rates appearing in the payment summary rendered by OHIP in the context of its subrogated claim are generally insured rates. Plaintiff’s counsel should be aware, however, that OHIP is actually entitled to advance its subrogated claim based on *un*insured rates – even though the services were provided to an insured person. In fact, the language in the *Health Insurance Act* is mandatory with regards to claiming at uninsured rates. Section 30(3) reads:

> For the purposes of this section [*the subrogation section*], the cost of insured services rendered to an insured person in or by a hospital or health facility **shall** be at the rate charged by the hospital or health facility to a person who is **not an insured** person.

Historically, OHIP appeared either unaware of or unconcerned by the mandatory language in section 30(3) of the *Health Insurance Act*, and continued to advance its claims based upon insured rates. Occasionally, however, OHIP has used the “threat” of section 30(3) in settlement negotiations; the concession being that if the defence settles before trial, OHIP will only seek the value of its claims based upon insured rates. To date, there is no reported trial decision in which OHIP relied upon section 30(3) to advance its claims based upon uninsured rates. Nevertheless, the subsection is there, the mandatory language is there, and it may still become a “hot topic” down the line.

Insurers

Group health insurance, disability insurance, and travel insurance policies typically include the right of subrogation as a term of the contract. For instance, if you are injured abroad and advance a lawsuit in Ontario, the travel insurer will pay the medical expenses up-front with the expectation that the Plaintiff will advance the subrogated claim in the lawsuit.

An example of a subrogation provision contained in a travel insurance policy is provided below[3]:

> If you incur expenses covered under this insurance due to the fault of a third party, we may take action against the party at fault. You agree to cooperate fully with us and to allow us, at our own expense, to bring a lawsuit in your name against the third party. If you recover against a third party, you agree to hold in trust sufficient funds to reimburse us for the amounts paid under the policy.

WSIB

The scheme under the *Workplace Safety Insurance Act, 1997*[4] is complex and beyond the scope of this paper. Suffice it to say that there are circumstances in which a worker or survivor may have concurrent rights to receive benefits under the workplace safety insurance plan and to pursue an action in tort, subject to an election. The right of subrogation generally arises when the worker or survivor receives benefits, then later elects to commence an action in tort instead. In that case, the Workplace Safety Insurance Board may retain a right to subrogate for any benefits that have been paid.

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[3] RBC Insurance Deluxe Package-Single Trip insurance policy.
[4] *Workplace Safety Insurance Act,1997,* S.O. 1997, c. 16, Sch. A.

Section 30(10) states:

> If the worker or survivor elects to claim benefits under the insurance plan and if the worker is employed by a Schedule 1 employer or the deceased worker was so employed, the Board is subrogated to the rights of the worker or survivor in respect of the action. The Board is solely entitled to determine whether or not to commence, continue or abandon the action and whether to settle it and on what terms.

The same right is extended to Schedule 2 employers in subsection 30(11).[5]

Quasi Subrogation & Assignments

Overview

A subrogated claim must be distinguished from an assignment.

With subrogation, the concept is that the expenses incurred by the subrogated entity may be advanced as separate claims over-and-above the Plaintiff's own personal claims. In that sense, the amount that the Plaintiff ultimately recovers for her damages should not be affected by the existence or non-existence of a subrogated claim (subject to the issue of policy limits). The Defendant will pay the Plaintiff what is owed for her damages and the subrogated entity what is owed for its claims.

Conversely, with an assignment, the Plaintiff is directly responsible for reimbursing a third party for expenses it incurred on the Plaintiff's behalf. An easy example in the context of personal injury litigation is the matter of litigation financing. If the Plaintiff secured a loan from a litigation financing company, the cost of the loan cannot be advanced as a subrogated claim. It must, however, as a term to the loan agreement be

[5] *Ibid*. at s. 30(11).

protected out of the Plaintiff's proceeds of the settlement. To that end, the Plaintiff's ultimate net recovery from the settlement would be reduced by whatever she must then pay to the loan company.

While the two concepts are distinct, confusion can arise in circumstances where an entity retains both a right of subrogation and a right of assignment, but exercises its remedies under only one of those rights. The following examples illustrate this conflict between "written rights" and "practical remedies".

ODSP and Ontario Works

It is common for an injured Plaintiff to receive funding through the Ontario Disability Support Program ("ODSP"), Ontario Works, or other similar social assistance programs. Many of these programs provide for both the right of subrogation and assignment though, for all practical purposes, rely only upon the assignment provisions.

Consider the following two sections in the *Ontario Disability Support Program Act, 1997*[6]:

Section 52: Subrogation

> If a person suffers a loss as a result of a wrongful act or omission of another person and if, as a result of the loss, the person receives income support or employment supports under this Act, the Director or service co-ordinator is subrogated to any right of the person to recover damages or compensation for the loss.

Section 8: Agreement to Reimburse and Assignment

[6] *Ontario Disability Support Program Act, 1997*, S.O. 1997, c. 25, Sch. B [*ODSPA*].

> (1) The Director shall in prescribed circumstances, as a condition of eligibility for income support, require an applicant, a recipient or a dependant to agree to reimburse the Director for the income support provided or to be provided.
>
> (2) An agreement under subsection (1) may require an assignment, as prescribed.

Similar dual provisions apply to the receipt of income assistance pursuant to the *Ontario Works Act*, whereby section 70 deals with subrogation and section 13 deals with assignment.[7]

Although the legislation governing ODSP and Ontario Works both contemplate a right of subrogation *and* a right of assignment, as a matter of practice, neither entity typically exercises its right to subrogation. More commonly, the remedy for reimbursement is exercised by way of the assignment.

There are three primary considerations when dealing with an assignment as opposed to a subrogated claim. First, as stated earlier, the amount recovered on behalf of the Plaintiff ought to be sufficient to re-pay the value of the assignment while still ensuring that the Plaintiff receives some financial benefit for the litigation. Second, third parties relying upon an assignment tend to insist upon recovering the full value of their claims whereas, subrogated entities generally recover to the same degree and extent as the Plaintiff (i.e. if the Plaintiff recovers 75% of the reasonable claim, then the subrogated entity recovers 75% of its claim). Third, subrogated entities will pay costs to Plaintiff's counsel for the services rendered in advancing and recovering the subrogated claim, whereas assigning

[7] *Ontario Works Act, 1997*, S.O. 1997, c. 25, Sch. A.

entities do not. These costs are at a rate to be agreed upon and are often based upon a percentage of the amount recovered, as opposed to counsel's hourly rate.

Beware: Non-Subrogated Entities

Assistive Devices Program

Not all social assistance programs in Ontario give rise to a subrogated claim or an assignment. As always, the contract or legislation must be reviewed. The Assistive Devices Program ("ADP") is one such example. ADP is administered by the Ministry of Health and Long-term Care and funds a portion of the costs for certain assistive devices. Injured Plaintiffs often rely upon ADP, for instance, to fund 75% of the cost of a wheelchair. ADP does not, however, have a statutory or contractual right to a subrogated claim or assignment.

Entities Making Gratuitous Payments

As the law stands now, there is no "equitable" right to subrogation. If a third party pays benefits to the Plaintiff gratuitously or in good faith, there is no legal right to subrogation.

By way of illustration, in the decision of *Musselman v. 875667 Ontario Inc. (c.o.b. Cities Bistro*)[8], the Plaintiff was seriously injured as a result of a fall down a flight of stairs. The Plaintiff's daughter, a lawyer, was unable to generate her expected work product as a result of significant time devoted caring for her mother. Nevertheless, her law firm continued to pay her usual salary as a good faith gesture due to her years of service.

[8] [2010] O.J. No. 2325 (Sup.Ct.).

Although the law firm was not advancing a subrogated claim *per se*, the issue of whether the law firm could be considered a subrogated entity arose in the context of determining whether the daughter's past income loss claim should be reduced to incorporate the payments she received by the law firm.

The Court distinguished the gratuitous payments from payments made pursuant to insurance or a contract:

> There is no evidence and no suggestion that the law firm which is Carolyn Musselman's employer has a right of subrogation for the income she continued to receive when she was not supplying her services on a full-time basis. Her draw from the firm was honoured by the firm gratuitously. While I appreciate the attitude and the conduct of Carolyn Musselman's law firm, I purposefully avoid stating that they "generously" continued to pay her an income for her loyal service in the past and for her commitment to provide such loyal service in the future. I am sure that Carolyn Musselman earned and merited the approach taken by her law firm. However, it was not a benefit that was paid for by her as a form of insurance or as part of a contractual agreement she had with her employer. Counsel have referred me to two earlier cases in which gratuitous payments by an employer to an injured employee did not result in the deduction of these payments from a damages award for lost income. The first is Myers and The City of Guelph v. Hoffman (1955), O.J. No. 606, (1955), O.R. 965.[9]

Circumstances Giving Rise to Subrogation

In Ontario, the ability to advance a subrogated claim depends not only upon the right to do so by contract or statute, but the circumstances of the incident, itself.

[9] *Ibid*. at para. 241.

Non-Motor Vehicle Cases

Personal injury cases arising from slip and falls, medical malpractice, battery, and other non-motor vehicle incidents generally give rise to the ability to subrogate, subject to the right existing by way of contract or statute.

Motor Vehicle Cases

The same right does not exist in motor vehicle cases. Subject to certain exceptions to be discussed in the following section, the right to subrogate in motor vehicle cases is extinguished by virtue of section 267.8(17) of the *Insurance Act*[10], which reads:

> A person who has made a payment described in subsection (1), (4) or (6) is not subrogated to a right of recovery of the insured against another person in respect of that payment.

The payments referred to in subsections (1), (4), and (6) include any medical, rehabilitative, income loss, or loss of earning capacity-related benefits received prior to trial by way of statutory accident benefits, an income continuation benefit plan, sick benefits, or a health plan.

The issue of OHIP's inability to subrogate, specifically, in the context of a motor vehicle case is also addressed by section 30(5) of the *Health Insurance Act*, which states:

> Despite subsection (1) [*the provision that enables OHIP to subrogate for services incurred as a result of a tort*], the Plan is **not** subrogated to the rights of the insured person, as against a person who is insured under a motor vehicle liability policy issued in Ontario, in respect of personal injuries arising directly or indirectly from the use or operation, after section 29 of the Automobile Insurance Rate Stability Act, 1996 comes

[10] *Insurance Act*, R.S.O. 1990, c. I.8.

> into force, of an automobile in Ontario or in any other jurisdiction designated in the Statutory Accident Benefits Schedule under the Insurance Act.

The reason for the subrogation exception in regards to motor vehicle cases is that the insurers pay an annual levy to OHIP (approximating $150 million).

Quasi Motor Vehicle Cases

The exception to the subrogation exemption rule in motor vehicle cases is set out in section 267.8(18) of the *Insurance Act*, which reads:

> Subsection (17) does not apply if,
>
> (a) the Ministry of Health and Long-Term Care made the payment; and
>
> (b) the right of recovery is against a person *other than* a person insured under a motor vehicle liability policy issued in Ontario.

This section generally applies to what might be called "quasi motor vehicle cases", whereby there are both motor vehicle and non-motor vehicle Defendants - most commonly, a road authority or a tavern.

Subsection (a) confirms that, regardless of whether the incident is a strict motor vehicle case or a quasi motor vehicle case, the only subrogating entity whose rights may be preserved is OHIP. In other words, a group health insurer is never permitted to subrogate in a motor vehicle case.

Subsection (b) is the trickier section. While at first blush, Plaintiff's counsel might assume that a tavern would not be "a person insured under a motor vehicle liability

policy"; however, this assumption is not always correct. A tavern may, for instance, be the registered owner of a "company car" used for deliveries or other purposes, for which the tavern is a named insured. The "trick" is that even if the company car had absolutely no direct involvement in the subject motor vehicle accident, the tavern still receives the benefit of the exemption.

In the decision of *Ontario (Ministry of Health and Long-term Care) v. Georgiou*[11], the Ontario Court of Appeal considered the application of section 267.8(18). The case involved a motor vehicle accident resulting from icy roads. The Plaintiff sued the City of Scarborough (the "City"), who happened to be a named insured under a motor vehicle policy issued in Ontario. OHIP sought to advance a subrogated claim against the City. OHIP argued that the exemption ought not to apply because the claim against the City was premised upon its responsibility for safe roadways – not upon its position as an owner of a vehicle. Indeed, it was not the motor vehicle policy that was responding to the claim, but rather a commercial general liability policy. OHIP argued that the City wore "two hats", whereby it triggered different rights and obligations depending on its "hat" as an owner of a vehicle or its "hat" as a road authority.

The Ontario Court of Appeal rejected the "two hats" argument. The rejection was based on the clear language in the legislation. The Court stated:

> More important, OHIP's argument flies in the face of the plain wording of each of the two statutory provisions. <u>These provisions invite a single question: Is Scarborough "a person who is insured under a motor vehicle liability policy issued in Ontario"? If the answer is yes, OHIP cannot subrogate. If the answer is no, it can</u>. Moreover, not only is the meaning

[11] [2002] O.J. No. 3335 (C.A.).

> of these provisions plain, the plain meaning is the most appropriate meaning. Nothing in the purpose or scheme of the legislation suggests that these statutory provisions should be qualified by limiting Scarborough's right to rely on them to claims where it is sued as an owner and operator of an automobile.[12]

Leave to appeal to the Supreme Court of Canada was dismissed without reasons[13].

Rule Against Double Recovery

Overview

One of the purposes behind the concept of subrogation is the idea that a Plaintiff should not receive double-recovery for her losses. The goal of compensation in tort law is to return the Plaintiff to the same position that she would have been in but for the incident; it is not meant to provide a windfall[14]. As such, generally, if the Plaintiff received long-term disability benefits from her group health carrier, she should not then receive a tort award for past loss of income, except for any shortfall.

There are, however, exceptions to the rule against double-recovery.

Private Insurance Exemption

The exception to the general rule against double-recovery is the "private insurance exemption." Where the Plaintiff is able to establish that she privately paid premiums in order to receive the benefit of the disability benefits, the value of these benefits will not

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[12] *Ibid*. at para. 14.
[13] [2003] S.C.C.A. No. 174 (S.C.C.).
[14] *Ratych v. Bloomer*, [1990] 1 S.C.R. 940 (S.C.C.) at para. 45 [*Ratych*].

be deducted from her pecuniary award. This rule only applies in non-motor vehicle cases arising in Ontario.

The Supreme Court of Canada has confirmed that this exemption is based upon "fairness and justice."[15] The exception is based upon the view expressed by Lord Pearce in the House of Lords decision of *Parry v. Cleaver*[16], which view the Supreme Court of Canada has repeatedly endorsed.[17] Lord Pearce stated the following in the context of discussing pensions:

> If one starts on the basis that Bradburn's case (1874) L.R. 10 Ex. 1, decided on fairness and justice and public policy, is correct in principle, one must see whether there is some reason to except from it pensions which are derived from a man's contract with his employer. These, whether contributory or noncontributory, flow from the work which a man has done. They are part of what the employer is prepared to pay for his services. The fact that they flow from past work equates them to rights which flow from an insurance privately effected by him. He has simply paid for them by weekly work instead of weekly premiums.
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> Is there anything else in the nature of these pension rights derived from work which puts them into a different class from pension rights derived from private insurance? Their "character" is the same, that is to say, <u>they are intended by payer and payee to benefit the workman and not to be a subvention for wrongdoers who will cause him damage.</u>

Jurisdiction

While Canadian legislation and jurisprudence is geared against double-recovery, with the exception of the private insurance exemption, the same cannot necessarily be said for other jurisdictions. Our friends to the south less consistently apply this approach. In

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[15] *Ibid*. at para. 11.
[16] *Parry v. Cleaver*, [1970] AC 1 (BaiLII).
[17] *Ibid*.; *Canadian Pacific Ltd. v. Gill*, [1973] S.C.R. 654 at 668; *Guy v. Trizec Equities Ltd.*, [1979] 2 S.C.R. 756 at 763.

1984, the Supreme Court of the United States endorsed the "collateral source rule", whereby the tortfeasor is responsible for the full cost of the Plaintiff's damages, regardless of any collateral funding that the Plaintiff has received.[18] The rule has since been criticized and, in some jurisdictions, overruled by legislation; however, in some States it continues to be applied.

Given the foregoing, it is important to keep in mind the *lex loci delicti* rule, which states that, as a general rule, the law to be applied in tort is the law of the place where the incident occurred.[19] There are times when an action may be maintained in Ontario for an incident that occurred in the United States. In some circumstances, the extra-Ontario jurisdiction in which the tort occurred may permit double recovery.

Principle of Full Indemnity to the Insured

Issues have arisen in past when the combination of the Plaintiff's claims and the subrogated claims exceeds available insurance limits. In the past, subrogated entities have tried to argue that, in these circumstances, there ought to be a system of *pro rata* sharing. This suggestion was rejected by the Supreme Court of Canada in the decision of *Ledingham v. Ontario (Hospital Services Commission)*[20].

Ledingham involved a Judgment awarding the Plaintiffs approximately $65,000.00. Included in that figure was a subrogated claim advanced on behalf of the Ontario

[18] *Ibid*. at para. 58.
[19] *Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon*, [1994] 3 S.C.R. 1022 (S.C.C.) at para. 42.
[20] *Ledingham v. Ontario (Hospital Services Commission)*, [1975] 1 S.C.R. 332 [*Ledingham*].

Hospital Services Commission (the "Commission") in the amount of approximately $15,000.00. In other words, the Plaintiffs' personal claims were assessed at approximately $50,000.00 ($65,000 - $15,000). The total available insurance limits were a mere $35,000.00 (payable by the Motor Vehicle Accident Claims Fund). Consequently, leaving aside the $15,000.00 subrogated claim, the Plaintiffs' damages of $50,000.00 would not fully be recovered due to the insufficient limits.

The issue to be determined before the Court was whether the Plaintiffs should receive the full benefit of the $35,000.00 policy limits or whether they should have to share with the Commission on a *pro rata* basis. The trial judge sided with the Plaintiffs, which decision was overturned on appeal.

Restoring the decision at trial, Judson J. speaking for the Supreme Court of Canada stated[21]:

> There is provision [*in the legislation granting the right of subrogation to the Commission*] for an apportionment of costs, but does this enable the Commission to share proportionately and on an equal footing in a claim against the fund when there is a deficiency? I think this right would have to be spelled out in those terms. It would have to be said that the Commission's claim would rank proportionately and on an equal footing in any claim out of the fund. Reg. 55(2) does not say any such thing.
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> Therefore, I think Keith J. was right when he adopted the ordinary meaning of "subrogation" as outlined by Chancellor Boyd in National Fire Insurance Co. v. McLaren [(1986), 12 O.R. 682] at p. 687:
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> > …The primary consideration is to see that the insured gets full compensation for the property destroyed and the expenses incurred in making good his loss. The next thing is to see that he holds any surplus for the benefit of the insurance company.

[21] *Ibid*. at 4.

Managing the Subrogated Claim

Initial Notification to the Subrogating Entity

Once it has been determined that a subrogated claim ought to be advanced, Plaintiff's counsel has a duty to notify the subrogating entity of the litigation and seek its instructions to advance the subrogated claim. The subrogating entity will provide a payment summary setting out its claim to date. The file should be appropriately flagged internally so that the subrogated claim does not "fall through the cracks" when the case resolves.

It is a good practice to explain the concept and existence of a subrogated claim to the Plaintiff early on in the litigation, so as to best manage her expectations. Waiting to the last minute, when the Plaintiff is asked to sign a Direction to Settle that sees hundreds of thousands of dollars going to a third party can lead to unnecessary conflict and confusion.

Interim Updates

It is important to remember that a subrogated claim (or assignment) may not exist at the outset of the file, but may come to existence down the line. For instance, if counsel is retained shortly following an accident, the Plaintiff may not yet be in receipt of any ODSP but may ultimately receive benefits at some point in the course of the file. Any new or potential subrogated claims or assignments ought to be kept in mind in the course of any interim file review.

A subrogated claim is usually fluid in that it continues to grow over time. Updated payment summaries should be obtained every 4-6 months and produced to the defence. The purpose is to ensure that the defence properly reserves the file having regard to what may be a significant subrogated claim over-and-above the Plaintiff's own damages.

Some subrogated entities will wish to receive regular file updates. OHIP, in particular, typically wishes to receive copies of any pleadings, liability or medical-legal reports, any demand letters exchanged, and any mediation or pre-trial memoranda. Certainly any medical reports that point to future surgery or long-term care ought to be sent to OHIP to determine whether a *future* subrogated claim ought to be advanced. Sending OHIP defence liability reports and Plaintiff future care reports throughout the file can be particularly helpful if Plaintiff's counsel ultimately intends to ask OHIP to reduce its subrogated claim when resolving the file. Negotiating with a subrogated entity will be discussed in the section below.

Negotiating a Reduced Subrogated Claim

Prior to any settlement meeting, mediation, or pre-trial, Plaintiff's counsel should be ensure to have an updated payment summary.

Subrogated entities are generally open to negotiating a reduced account. A non-exhaustive list of factors that these entities are typically willing to consider includes:

1. Liability Discounts – Subrogated entities will generally be open to reducing the value of its subrogated claim to the same extent that the Plaintiff is reducing her claims on account of contributory negligence. In other words, if the Plaintiff agrees, for purposes of settlement, that she is 30% at-fault, the subrogated entity will generally agree to a 30% reduction to its subrogated claim. Plaintiff's counsel should be forewarned that in recent years, some subrogated entities (in particular, OHIP) have made requests to see copies of demand letters, mediation memos, or pre-trial memos to confirm that the liability split is, indeed, as counsel suggests. This is not to say, however, that written "proof" is required. Subrogated entities are generally mindful that many negotiations are conducted by telephone and will often accept counsel's description of the negotiations, so long as it makes sense.

2. Insufficient Limits – Subrogated entities are also generally open to reducing its account in circumstances where the insurance limits are insufficient to meet a catastrophic or seriously injured Plaintiff's needs. In cases as these, sending the subrogated entity the future care report and any present value calculations of same can be of assistance.

3. Settlement Discount – Lastly, subrogated entities are generally amenable to some reduction of its subrogated claim in recognition of the fact that the Plaintiff is also, in most cases, agreeing to a compromised settlement figure in lieu of having to endure the significant financial and emotional costs, and risks, of trial. The

same applies when the Plaintiff is elderly or terminally ill, such that there is a serious risk that the Plaintiff may not live to see the trial date.

On a case-by-case basis, there may be other factors that will influence the subrogated entity's willingness to reduce its subrogated claim in favour of a greater "share of the pie" being directed to the Plaintiff. Nevertheless, these factors should be kept in mind. Ultimately, the goal is to fairly accommodate the subrogated entity while ensuring that the injured Plaintiff receives as much from the settlement as possible.

Obtaining Written Instructions for Settlement

Subrogated entities must be treated like any other client, notwithstanding that their claims flow through the Plaintiff. Prior to settling a file, Plaintiff's counsel must obtain written instructions from a subrogated entity to confirm the amount, if any, that it will be paid from the proceeds of the settlement. As with any other claim, this amount would be subject to both partial indemnity and solicitor-and-client costs. In rare cases when the amount of the subrogated claim is extremely high, the subrogated entity may wish to have a representative present at any private mediation to provide instructions.

Any Direction to Settle that the Plaintiff signs should breakdown exactly how much she will net from the settlement *after* the subrogated entity is paid. As a practical tip, although OHIP is run through the Ministry of Health and Long-term Care, the cheque for settlement funds is payable to the Minister of Finance[22]. With regards to assignments, it

[22] Pursuant to section 31(2) of the *HIA*.

may be wise to remind the Plaintiff within the Direction that she is to sign that she is responsible for paying X in regards to the assignment.

Consequences to Failing to Advance a Subrogated Claim

Consequences to the Plaintiff

The consequences to a Plaintiff for failing to advance a subrogated claim are generally found within the contract or legislation which gives rise to the right to subrogate in the first instance.

For example, recall that section 8 of the *Ontario Disability Support Program Act, 1997*[23] provides that a recipient may be required to agree to an assignment as a condition to eligibility. Section 9(1) sets out the consequences for failing to comply:

> If an applicant, recipient or dependant fails to comply with or meet a condition of eligibility for income support, the Director shall, as prescribed, do one of the following:
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> 1. Refuse to grant income support.
> 2. Declare the person ineligible for income support for the prescribed period.
> 3. Reduce or cancel the income support or that part of it provided for the benefit of the person who has failed to comply.
> 4. Suspend the income support or suspend that part of it provided for the benefit of the person who has failed to comply.

Consequences to Plaintiff's Counsel

Apart from the serious ramifications of exposure to a solicitor's negligence claim, the immediate consequences to Plaintiff's counsel for failing to advance a subrogated claim relates to costs. As stated earlier, subrogated claims are typically subject to both partial

indemnity costs and the rendering of a solicitor-client account over-and-above partial indemnity costs. In a case where a Plaintiff endured a lengthy hospital stay and/or multiple surgeries, OHIP's subrogated claim can be worth hundreds of thousands of dollars. Accordingly, the legal fees to be generated from these claims can be significant for Plaintiff's counsel.

Conclusion

Attached to this paper is a "Subrogation Checklist" that ought to provide a quick-glance summary of the key considerations of which Plaintiff's counsel ought to be mindful in order to successfully protect the client and properly advance a subrogated claim.

For any questions, please do not hesitate to contact Sloan H. Mandel[24] (416-868-3123) or Deanna S. Gilbert (416-868-3205) of Thomson, Rogers.*

[23] *ODSPA*, *supra* note 6.
[24] Certified as a specialist in civil litigation by the Law Society of Upper Canada.