

# HEALTH CARE COSTS RECOVERY IN BC: A REFRESHER

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Strong reputation, fresh approach.



# YOU WILL LEARN:

- Legislation
- Statutory requirements
- Settlements
- Joint and several liability
- Small Claims
- Challenge interim account & certificate
- Implied undertaking of confidentiality
- Trial findings binding on Province's subsequent action
- Practical tips



# LEGISLATION

- *Health Care Costs Recovery Act, SBC 2008 c 27 and Health Care Costs Recovery Regulation, BC Reg 397/2008*
- Mechanism for the Ministry to recover health care costs from the wrongdoer(s)
- Imposes various positive obligations on the beneficiary & wrongdoer



# LEGISLATION

- Express exemptions:
  - Only defendant is an ICBC insured
  - Compensation paid/payable by WCB
  - Tobacco related wrong under *Tobacco Damages and health Care Costs Recovery Act*
- Other exemptions: schools, health authorities
- Mixed defendants
- Out of province auto insurers



# LEGISLATION

- Matters under federal jurisdiction?
- *Marine Liability Act* claims E.g. boating accident
  - The Ministry takes the position that the Act applies



# STATUTORY REQUIREMENTS

- Beneficiary's obligations include:
  - Plead the Act (s. 3)
  - Notify the Ministry of the claim (s. 4)
  - Provide records at the request of the Ministry (s. 11)
  - Settlement (s. 12)
- Wrongdoer's obligations include:
  - Notify the Ministry (s. 10)
  - Settlement (s. 13)
- Consequences for failing to give notice of claim and/or settlement



# STATUTORY REQUIREMENTS

- Forms
- Any motion that could result in the plaintiff's claim being dismissed requires notice (s. 5)
  - e.g. summary trial application, summary judgment application, failure to attend EFD



# SETTLEMENTS

- **A claim cannot be settled unless (s. 13):**
  1. written notice is given to the Ministry, and
  2. the Ministry consents in writing
- Applies to all claims settled on/after April 1, 2009
- Exceptions to s. 13 notice:
  - Small claims
  - Settling HCCRA claim only
  - Judgment



# SETTLEMENTS

- Consequences for late or no notice
  - Voids release
  - Ministry can recover full amount of claim (s. 13(5)) – confirmed in *Translink v. British Columbia*, 2013 BCSC 1602
- Waiver of costs
- Nuisance value offers
- All-inclusive offers



# JOINT AND SEVERAL LIABILITY

- Multiple wrongdoers – to be apportioned

*...wrongdoers are jointly and severally liable for the percentage of the past and future costs of health care services attributable to the personal injury that is equal to the percentage of total fault for the injury that is determined by the court to be attributable to those wrongdoers.*

- What about contributory negligence?
- What about mixed defendants where the HCCRA applies/doesn't apply?



# JOINT AND SEVERAL LIABILITY

*Pacheco v. Degife*, 2014 BCSC 1570

- Plaintiff 75% liable; defendant 25% liable

*[192] In the circumstances, it is in my view appropriate to apply, by analogy, the principles of apportionment drawn from the Negligence Act...where a plaintiff is found to be contributorily negligent, he or she may recover from the defendant wrongdoer only that proportion of the loss that corresponds to the defendant's fault...if the plaintiff is blameless and there are two or more wrongdoers, those wrongdoers are jointly and severally liable for the whole of the plaintiff's loss...*



# SMALL CLAIMS

- Does the *Health Care Costs Recovery Act* still apply?
- Partially
- Certain sections do not apply, for example:
  - Plead the Act (s. 3)
  - Notify the Ministry of the claim (s. 4)
  - Settlement (s. 13)
- Does not relieve the insurer from giving notice (s. 10)



# SMALL CLAIMS

- Ministry has the right to commence an independent action
- Settlements – still let the Ministry know



# CHALLENGE INTERIM ACCOUNT & CERTIFICATE

- Obtain an interim account early on (typically provided when notice is given) and again before settlement
- Why?
  - Gives you an idea of the plaintiff's treatment & inform EFD requests
  - You are not surprised by the amount
- Carefully review the account for discrepancies and notify the Ministry early on



# CHALLENGE INTERIM ACCOUNT & CERTIFICATE

- A certificate is issued pursuant to s. 16 that:
  - sets out the past and future health care services that the Minister has determined were a result of the fault of the alleged wrongdoer (s. 16(1)) and is “proof” of those health care services; and
  - sets out the costs of those services (s. 16(2)) and is “conclusive proof” of those services.
- Rebuttable vs. irrebuttable presumption



# CHALLENGE INTERIM ACCOUNT & CERTIFICATE

*MacEachern v. Rennie*, 2009 BCSC 652

[28] *Notwithstanding the filing of a certificate under s. 16(1) of the Act, therefore, it is open to the defendants to contest whether all the health care services claimed in the Minister's certificate are attributable to the accident...*

[31] *...the salient point is that in law, the defendants are at liberty to lead evidence to challenge the facts asserted in a s. 16(1) certificate.*



# IMPLIED UNDERTAKING OF CONFIDENTIALITY

- Ministry may request *“any records or information that the minister considers necessary to evaluate a proposed settlement as it relate to the government’s recovery of past and future costs of health care services”* s. 13(3)
- If so, one must comply with said request s. 13(4)
- What if the Ministry commences an independent action and requests documents produced in the tort action?



# IMPLIED UNDERTAKING OF CONFIDENTIALITY

*British Columbia v. Tekavec*, 2012 BCSC 1348

- Judgment rendered against defendant
- Ministry sought certain documents created in tort action, including EFD transcripts

*[13] ...the applicant will have the onus of satisfying the court on a balance of probabilities that the interest to be advanced through the sought-after disclosure is greater than the values that underpin the rationale for the implied undertaking. Central to the analysis will be a careful consideration of any prejudice that will be caused to the party who initially provided the material at issue. Of course, it goes without saying that the material must be relevant to the issues in the action in which the disclosure is sought...*

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# IMPLIED UNDERTAKING OF CONFIDENTIALITY

*[29]...the circumstances warrant an order overriding the protection of the implied undertaking. The basis for so deciding is that, while the applicant HMTQ was not a party to the original action, the principal issue in the present action is compellingly similar to the issue there: was Mr. Tekavec responsible for the injuries that were sustained by Mr. Jack? ...Mr. Jack has apparently indicated that he has no objection to the materials being disclosed to the applicant. There would be no prejudice to Mr. Jack if the materials were to be disclosed. Finally, the same questions and topics that were canvassed with Mr. Tekavec in the examination for discovery at issue could be quite properly raised in his examination for discovery in the present action. In effect, disclosure of the materials represents a proper means of proceeding more efficiently.*



# TRIAL FINDINGS BINDING ON MINISTRY'S SUBSEQUENT ACTION

*British Columbia v. Tekavec, 2014 BCCA 444*

*[45] The issues of liability and contributory negligence were fully dealt with and the defendant has exhausted any rights of appeal. I am satisfied that the defendant is prevented from raising any defence related to his liability or the plaintiff's contributory negligence in this action.*



# PRACTICAL TIPS

- When in doubt, give notice
- Don't include the HCCRA claim in the plaintiff's settlement
- If PC doesn't represent the Ministry, make any settlement conditional on the Ministry approval
- Carefully review the interim account and notify the Ministry of any issues early on
- Carefully consider requests for documents

