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| Law 435C.001 | Personal Injury Advocacy | 2021 Term 2 |
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**WEEK 11: Mediation / Post-settlement and Post-judgment procedures / Part 7 Benefits / Subrogated Claims / Appeals**

1. **Teaching Objectives**

To ensure you understand how a resolution may be achieved at mediation before trial, and what happens *after* a settlement or a trial, to ensure finality of the proceedings. This includes consideration of:

* Mediation under the applicable *Notice to Mediate Regulations*;
* How to document a settlement, including drafting of releases;
* BC Ferry Agreements in the case of multi-party litigation;
* Public Guardian and Trustee review of infant settlements;
* Formal offers to settle and cost consequences;
* Taxation of a bill of costs and disbursements;
* The *Health Care Costs Recovery Act*;
* Part 7 benefits and section 83 deductions;
* Subrogated Interests; and
* Appeal deadlines.

READING ASSIGNMENTS:

* Mediation Default: Oral Reasons, Crossin, J. *Crawford v. Nazif, et al.,* (Unreported), Vancouver Registry, Docket: S132325, 20190809 (attached to email).
* Enforcing settlement agreements: *Roumanis v. Hill,* [2013 BCSC 1047](https://www.canlii.org/en/bc/bcsc/doc/2013/2013bcsc1047/2013bcsc1047.html?autocompleteStr=2013%20BCSC%201047&autocompletePos=1);
* BC Ferry Agreements and Apportionment: *Conarroe v. Tallack,* [2020 BCSC 626](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc626/2020bcsc626.pdf)
* Part 7 benefits, section 83 deductions: *Silverston v. Griffin,* [2020 BCSC 0528](https://www.bccourts.ca/jdb-txt/sc/20/05/2020BCSC0528.htm)
* Formal Offers to Settle / Costs: *Park v. Donnelly,* [2018 BCSC 219](http://www.courts.gov.bc.ca/jdb-txt/sc/18/02/2018BCSC0219.htm)
* Appeals: *Uy v. Dhillon,* [2020 BCCA 163](https://www.canlii.org/en/bc/bcca/doc/2020/2020bcca163/2020bcca163.pdf)

1. **Mediation**

A party to personal injury litigation can issue a Notice to Mediate to compel the opposing party to a mediation.

* If the plaintiff’s injury claim arises from a motor vehicle collision, the [*Notice to Mediate (Motor Vehicle) Regulation*](http://www.bclaws.ca/civix/document/id/complete/statreg/127_98) exists under the authority of the *Insurance (Vehicle) Act,* RSBC 1996, c. 231.
* If the plaintiff’s injury claim arises from a non-motor vehicle accident, the [*Notice to Mediate (General) Regulation*](http://www.bclaws.ca/civix/document/id/lc/statreg/4_2001) exists under the *Law and Equity Act,* RSBC 1996, c. 253.
* Both *Regulations* promote pre-trial settlement.
* A Notice to Mediate requires the parties to attend a mediation session, but it does not require them to settle the dispute. A party is free to leave the mediation whenever they choose to do so. But they must show up, with the requisite “authority” to settle the dispute.
* There are deadlines for service. For example, a Notice to Mediate in motor vehicle accident actions can be served 60 days after pleadings close, and 77 days before the trial date.
* Within ten days of service, receiving parties must jointly agree on the appointment of a mediator. If parties are unable to agree on a mediator within ten days, any party may apply to a roster organization designated by the Justice to appoint the mediator. The [Mediate BC Society](http://www.mediatebc.com/) is a roster organization for this purpose. The society maintains a list of trained and experienced mediators who have agreed to a code of conduct.
* Exemptions to the Notice to Mediate process are allowed in certain circumstances. These may include when all parties have already participated in a mediation session in the same dispute or if a judge orders that one or more parties are exempt from attending the mediation.
* Sexual and physical abuse claims are exempted from the *Notice to Mediate Regulation*, s. 2(c).
* If the extent of injuries are not known or injuries have not stabilized or the damage is not yet known, mediation is unlikely to be successful. This is critical when deciding whether and when to use a Notice to Mediate.
* The court has the power to adjourn a mediation on terms and conditions it considers appropriate, on the application of a party.
* If a party fails to comply with the *Notice to mediate,* any other party may file a Declaration of Default with the court.
* If this happens, the court has the ability to make various orders, including (possibly) dismissing the action, or staying the action until the defaulting party attends mediation, or making an order for costs.
* We filed a Declaration of Default against the defendant Dr. Anna Nazif (represented by the CMPA) for failing to attend mediation in the *Crawford* matter.
  + On the hearing of the plaintiff’s application, Mr. Justice Crossin found Dr. Nazif in default, and ordered that she (the CMPA) pay the plaintiff’s mediation costs.

1. **Settlement Agreements generally**

* It is important to ensure an effective settlement agreement is reached and that all parties and lawyers understand the consequences of the agreement.
* The terms of a settlement agreement must be given sufficient thought. An inadequate settlement agreement may give rise to numerous issues, for example:
* Was an agreement reached on all terms?
* Is it enforceable?
* What parties are bound?
* Many parties experience “settler’s remorse” after a mediation, because, as is commonly said, a mediation is successful when all parties walk away from the table a little bit unhappy.
* But if this happens, can a client simply walk away?
* A settlement agreement is a contract. Any contract is enforceable.
* In *Roumanis v. Hill,* 2013 BCSC 1047, the plaintiff changed her mind after a settlement offer was accepted by her lawyer, on her instructions. The court enforced the settlement, finding that the court had no discretion to refuse to enforce a binding settlement made on the instructions of the client. The court must give effect to a valid contract.

1. **Terms of a Settlement Agreement**

* In *Fieguth v. Acklands Ltd.* (1989), 37 B.C.L.R. (2d) 62 (C.A.), McEachern C.J. provided an overview of relevant principles regarding the formation and enforcement of settlement agreements. These principles were later summarized in *Re Rickards Estate v. Diebold Election Systems Inc.,* 2004 BCSC 1357 at para. 23:

(1) It is necessary to separate the question of formation of contract from its completion.

(2) Whether a contract is formed depends upon whether the parties have reached an agreement on all essential terms.

(3) It is common with settlements that the deal is struck before documentation can be completed. In such cases, if there is agreement on the essential terms a contract has been formed and the settlement is binding.

(4) Generally speaking, litigation is settled on the basis that a final agreement has been reached which the parties intend to record in formal documentation, rather than on the alternative basis that the parties have only reached a tentative agreement which will not be binding upon them until the documentation is complete.

(5) A settlement implies a promise to furnish a release (and a consent dismissal if an action has been commenced).

(6) Where an agreement has been concluded with documentation to follow, either party can tender whatever documents he or she thinks appropriate without thereby rescinding the settlement agreement.

(7) If the documents are not accepted there must be further discussion, but neither party is released or discharged unless the other party has demonstrated an unwillingness to be bound by the agreement by insisting upon terms or conditions which have not been agreed upon or are not reasonably implied in these circumstances.

(8) Not every disagreement over documentation consequent upon a settlement amounts to repudiation of a settlement.

(9) Parties who reach a settlement should usually be held to their bargains, and disputes should be resolved by application to the court or by common sense within the framework of the settlement to which the parties have agreed and in accordance with the common practices which prevail amongst members of the bar.

1. **BC Ferry Agreements: Settling with One of Multiple Defendants**

* The term “BC Ferry Agreement” arises from the case, *British Columbia Ferry Corp. v. T&N,* 1995 CanLII 1810 (BCCA) [*BC Ferry*]. A “BC Ferry Agreement” is required where there are multiple defendants, who may be jointly and severally liable to the plaintiff, and the plaintiff is considering a settlement agreement with just one or some of the defendants, but not all.
* In *BC Ferry,* the plaintiffs agreed to settle their claim against one of the defendants, on the following terms:

1. Neither B.C. Ferries nor the Province will seek to recover, either in the Action or by any other proceedings, any portion of the losses which it claims in the Action which by a court or other tribunal may attribute to the fault of Yarrows. In particular, without limiting the generality of the foregoing, neither B.C. Ferries nor the Province will seek to recover such portion of its losses form the Defendants in the Action.
2. At the first reasonable opportunity, B.C. Ferries and the Province will advise the Court that they expressly waive any right to recover from the Defendants in the Action any portion of the losses which they claim and which the Court any attribute to the fault of Yarrows.

* Under a BC Ferry Agreement, the plaintiff is waiving his or her right to pursue any further claim or proceeding relating to the settling defendant, directly or indirectly. The plaintiff agrees that the settling defendant’s ‘share’ of the liability has been paid in full and abandons any further claim against them.
* The plaintiff is required to amend his or her NOCC to clarify that they are only seeking liability as against the remaining defendant(s), in order to prevent that remaining defendant(s) from having a third party claim against the settling defendant for contribution and indemnity.
* However, the remaining defendant(s) will be motivated to want to apportion as much fault over to the settling defendant as possible, in order to minimize the remaining defendant’s exposure. This is accomplished through a third party notice for “declaratory relief” only. Meaning, the settling party can still be compelled as a “party” to participate and give evidence in a legal proceeding, but he or she is not exposed to judgment.
* An example of a BC Ferry settlement was the plaintiff’s resolution with Nicholas Osuteye in *Crawford v. Nazif*. The plaintiff agreed to resolve with Mr. Osuteye on a without costs basis, abandoning any potential recovery of her damages award against him, in the event he was apportioned fault at trial. The defendant Dr. Nazif maintained a third party claim over against Mr. Osuteye for “declaratory relief” and an apportionment of fault. The goal of this was to reduce Dr. Nazif’s own exposure, by pointing the finger at Mr. Osuteye. But, was this a good strategy in front of a jury, for a physician defendant to blame her patient?
* A recent decision confirms that a BC Ferry settlement is deductible from the trial award of damages against the remaining defendant(s): *Conarroe v. Tallack,* [2020 BCSC 626](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc626/2020bcsc626.pdf). Joint and several liability is not severed by the BC Ferry Agreement.

1. **Infant Settlements**

* When an infant (anyone under the age of 19 in BC) is the plaintiff, a settlement must be approved by the  [Public Guardian and Trustee](http://www.trustee.bc.ca/).
* For settlements of $50,000 or under, the PGT can approve or reject the settlement on the minor's behalf.
* If the settlement is over $50,000, the PGT makes a recommendation to court as to whether the settlement is adequate. The court then makes the final decision whether the settlement will be approved. There is a [Practice Direction](https://www.bccourts.ca/supreme_court/practice_and_procedure/practice_directions/civil/PD%20-%2012%20Infant%20Settlements%20and%20Fee%20Agreements%20-%20Applications%20for%20Approval.pdf) in this regard.
* In *Lotocky v. Markle,* 2010 BCCA 75, the plaintiff infant suffered a brain injury during his birth. His parents were his litigation guardians in his medical malpractice action. The plaintiff lost at trial. The defendants were entitled to their costs, which were significant, at over $330,000. The plaintiff appealed the trial order, but agreed his parents agreed to abandon the appeal in exchange for the defendants’ waiver of their claim for costs. But they needed the PGT’s approval. The PGT obtained their own legal opinion that concluded the appeal had merit, and therefore refused approval of the ‘settlement’ on a waiver of costs (a settlement effectively worth less than $50,000, such that the PGT had the jurisdiction to reject the settlement). The parties applied to the BC Court of Appeal to approve the settlement. They did, overriding the PGT’s refusal. They gave the following reasons:

[66]         It is clear that payment of the trial costs would present a significant additional burden for the Lotocky family, and that this would inevitably affect Michael’s home life and future care.

[67]         Turning to the position of the Public Guardian and Trustee on the issue of costs, it takes no issue with the good intentions of the Lotockys, but says that their potential liability for trial costs creates an inevitable conflict of interest between them and Michael. It maintains that their endorsement of the settlement should therefore play no role in this Court’s examination of whether it is in Michael’s best interests to approve the settlement.

[68]         The Public Guardian and Trustee says that it, by contrast, is able to speak to Michael’s interests with the “purity of independence”. In that guise, it argues that the overarching issue must remain the merits of the appeal, and says it is not in Michael’s interests to abandon it. It maintains that it has acknowledged the parents’ burden of costs by offering to act as litigation guardian on the appeal, and carry the responsibility for the appeal costs. It is adamant, however, that it will not assume the parents’ responsibility for the trial costs.

[69]         While I do not doubt that the Public Guardian and Trustee’s position is well-intentioned, it is, with respect, artificial and misguided to judge the merits of the appeal in isolation from the financial ramifications that would arise from an unsuccessful appeal. This became abundantly clear when the Lotockys raised an argument that the offer of the Public Guardian and Trustee to undertake the appeal amounted to a determination under s. 7(3) of the Public Guardian and Trustee Act, R.S.B.C. 1996, c. 383, and that the Court should compel it to undertake the appeal on the same terms as the parents. Section 7(3) reads:

7(3)      If a litigation guardian is required for a young person under the Court Rules Act and is not otherwise provided for by the Infants Act, the Public Guardian and Trustee must act as litigation guardian for the young person if the Public Guardian and Trustee considers it is in the young person’s best interests to do so.

[70]         The Lotockys argued that they were not prepared to act as Michael’s litigation guardian for the appeal due to their financial circumstances. The Public Guardian and Trustee had nevertheless decided it was in Michael’s best interests that the appeal proceed. Thus a new litigation guardian was required, and under s. 7(3) the Public Guardian and Trustee must step into that role. As a trustee charged with acting in the best interests of the young person, it cannot properly use financial considerations as a reason to abandon its statutory role. It must accordingly take on the appeal by stepping into the same shoes as the former litigation guardian, and assuming her outstanding obligation for trial costs.

[71]         This argument was strenuously resisted by the Public Guardian and Trustee, and it ultimately withdrew its offer to undertake the appeal as litigation guardian and pay appeal costs, on the basis that it had not intended the offer to be an ultimate determination under s. 7(3). While its arguments were couched in terms of statutory construction, administrative policy, and budgetary constraints, I cannot resist the inference that its opposition was fuelled as well by the fact that, if the Court accepted the Lotockys’ argument, it faced significantly heightened financial risks in pursuing the appeal.

[72]         Essentially, it became evident that, if placed in the same position as the Lotockys, the Public Guardian and Trustee would decline to act on the appeal due to the financial risks. It was also apparent that if the Lotockys could have pursued Michael’s appeal on the terms proposed by the Public Guardian and Trustee, they would have had no hesitation in doing so.

[73]         In short, the outstanding obligation for Dr. Markle’s trial costs must play a part in deciding whether the settlement is in Michael’s best interests. While I appreciate the conflict of interest that potential liability creates for the litigation guardian, the financial burden and risks it represents cannot be ignored as the Public Guardian and Trustee advocates. His parents’ financial circumstances have significant repercussions for Michael’s well-being both now and in the future.

[74]         The Lotockys face a potential liability for $205,000 if the appeal is unsuccessful. I earlier indicated that I view the merits of the appeal as arguable at best. I am persuaded that those factors, taken together, make it untenable to proceed with the appeal. I am satisfied that it is in Michael’s best interests to approve the proposed settlement.

1. **Settlement Documentation**

At the time of settlement, and post-settlement, there are additional considerations that must be taken into account.

Prior to settling, it is prudent that the client is appreciative of what expenses and deductions will be made from the settlement amount: legal fees, disbursements, costs, subrogated claims, etc.

Following the settlement, the lawyer must ensure that the proper procedures have been followed – releases, consent orders, etc. and, in making the requirement payments, the settlement funds are not mismanaged.

1. **Release**

* A release is signed by the parties acknowledging that they are waiving all claims in connection with the matters giving rise to the action as a term of the settlement;
* Following the signing of a release, the plaintiff has no further claim against the defendant.

1. **Consent Dismissal Order**

* If pleadings have been filed the parties should sign and file a Consent Dismissal Order pursuant to Rule 8-3;
* The order states that the action settled and the parties have agreed to have the court dismiss the claim.

1. **Consent Dismissal Order versus Notice of Discontinuance**

* A notice of discontinuance *discontinues* the claim but does not waive or extinguish the party’s rights;
* It preserves the plaintiff’s right to re-file its claim, but this can be frustrated by a limitations defence.

1. **Undertakings re: Settlement Funds**

After a settlement is reached, funds must then be delivered.

As a matter of general practice, the defendant issues a cheque to the plaintiff’s lawyer “in trust”, on the undertaking that the payment will be distributed on the terms required, including return delivery of a signed release. The lawyer will then pay out the required disbursements and fees, and pay the remaining to the client.

The most common areas of complaints against lawyers include breaches of undertakings and disputes over fees and accounts.

In 2015 LSBC 15 the Law Society sanctioned a lawyer for breach of undertakings and mismanagement of settlement funds.

* The lawyer had his own law corporation but had a partnership/worked with a separate law firm;
* They had a 50-50 fee split agreement;
* Funds would be paid into the Law Firm, and then the Law Firm would pay him 50%;
* Statement of account, legal fees, and payment to the client was all processed through the Law Firm’s account;
* Following the conclusion of a client’s file, the Lawyer instructed DC to issue a cheque to his law corporation rather than the Law Firm;
* Cheque was forwarded on the Lawyer’s undertaking not to release the funds to the client until the release and consent dismissal order had been executed;
* The Lawyer breached this, depositing the cheque into his own account and paying out the client;
* The legal fees were calculated at $88,000; however, he instructed his paralegal and the accounting department that only $44,000 were claimed;
* He kept the remaining $44,000 and then paid out the remainder to the law firm;
* The Law Firm then paid him back $22,000 – 50% of the legal fees charged;
* He eventually paid back the Law Firm – when questioned about it – at this point he had already left the firm and started his own;
* The Law Firm brought a complaint
* He was sanctioned for:
  + Failure to deposit settlement funds into the trust account (of the Law Firm);
  + Breach of implied undertaking;
  + Failure to account to client for trust funds;
  + Questionable conduct.

1. **Contingency Fee Agreements**

* The Contingency Fee Agreement that is signed initially with the client will indicate the % that is to be paid for legal fees;
* In addition to the legal fee, the agreement may also specify that disbursements are to be subtracted from the settlement, along with interest on the disbursement, and applicable taxes;
* Disbursements may include medical expenses, investigation expenses, copying, printing, scanning, faxing, research, insurance, etc. will be paid;

It is important that, from the beginning, the client understands what fees will be taken from the base settlement amount. Further, throughout negotiations and before settling, the client must have an appreciation of what amount will actually end up in their pocket.

1. **Offers to settle and cost consequences**

* Formal offers to settle, whether accepted or rejected, can lead to cost consequences for the parties.
* Rule 9-1 governs:

**Rule 9-1 — Offers to Settle**

#### Definition

(1)In this rule, "offer to settle" means

(a)an offer to settle made and delivered before July 2, 2008 under Rule 37 of the former Supreme Court Rules, as that rule read on the date of the offer to settle, and in relation to which no order was made under that rule,

(b)an offer of settlement made and delivered before July 2, 2008 under Rule 37A of the former Supreme Court Rules, as that rule read on the date of the offer of settlement, and in relation to which no order was made under that rule, or

(c)an offer to settle made after July 1, 2008 under Rule 37B of the former Supreme Court Rules, as that rule read on the date of the offer to settle, or made under this rule, that

(i)is made in writing by a party to a proceeding,

(ii)has been served on all parties of record, and

(iii)contains the following sentence: "The ............[party(ies)]............, ............[name(s) of party(ies)]............, reserve(s) the right to bring this offer to the attention of the court for consideration in relation to costs after the court has pronounced judgment on all other issues in this proceeding."

#### Offer not to be disclosed

(2)The fact that an offer to settle has been made must not be disclosed to the court or jury, or set out in any document used in the proceeding, until all issues in the proceeding, other than costs, have been determined.

#### Offer not an admission

(3)An offer to settle is not an admission.

#### Offer may be considered in relation to costs

(4)The court may consider an offer to settle when exercising the court's discretion in relation to costs.

#### Cost options

(5)In a proceeding in which an offer to settle has been made, the court may do one or more of the following:

(a)deprive a party of any or all of the costs, including any or all of the disbursements, to which the party would otherwise be entitled in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;

(b)award double costs of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;

(c)award to a party, in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle, costs to which the party would have been entitled had the offer not been made;

(d)if the offer was made by a defendant and the judgment awarded to the plaintiff was no greater than the amount of the offer to settle, award to the defendant the defendant's costs in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle.

[am. B.C. Reg. 119/2010, Sch. A, s. 21.]

#### Considerations of court

(6)In making an order under subrule (5), the court may consider the following:

(a)whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;

(b)the relationship between the terms of settlement offered and the final judgment of the court;

(c)the relative financial circumstances of the parties;

(d)any other factor the court considers appropriate.

#### Costs for settlement in cases within small claims jurisdiction

(7)A plaintiff who accepts an offer to settle for a sum within the jurisdiction of the Provincial Court under the [Small Claims Act](http://www.bclaws.ca/civix/document/id/complete/statreg/96430_01) is not entitled to costs, other than disbursements, unless the court finds that there was sufficient reason for bringing the proceeding in the Supreme Court and so orders.

#### Counter offer

(8)An offer to settle does not expire by reason that a counter offer is made.

* In [Park v. Donnelly, 2018 BCSC 219](http://www.courts.gov.bc.ca/jdb-txt/sc/18/02/2018BCSC0219.htm), the plaintiff was injured in a motor vehicle collision. ICBC was added as a statutory third party because the defendant was breached (to be explained briefly in lecture). The plaintiff was awarded $402,017 at trial. Eleven days before trial, ICBC made a formal offer to settle in the amount of $430,000 “old money” plus costs and disbursements, but after taking into account Part 7 benefits paid or payable, and after taking into account “any advances paid to date”. ICBC sought recovery of it costs since the plaintiff did not beat the offer at trial. The plaintiff argued the offer was ambiguous because it was “old money”, meaning previous amounts paid under Part 7 or advances would be deducted. The court dismissed ICBC’s application for costs, finding that the offer to settle was unclear and ambiguous – it was confusing because it was “old money”, and it ought to have made clear the amounts to be deducted.

1. **Bills of Costs and Taxation**

Disbursements are out of pocket expenses incurred by the lawyer.

Cost and disbursements are assessed at the conclusion of the matter – after settlement or judgment. If you are entitled to costs, you must prepare a Bill of Costs.

* A Bill of Costs lists a number of categories of expenses and items you can claim on the tariff;
* For each category, the party indicates the amount of “units” expended in relation to it;
* There may be a state minimum and maximum for particular items, some are set at an assigned number;
* The total number of units is then added up and multiplied by the unit value according to the prescribed scale of costs.

In addition to the Bill of Costs, you must prepare a list of disbursements for things like: court filing fees, photocopying, faxes, amounts paid to experts, witness fees, etc.

It is important for plaintiff’s counsel to have an understanding of what costs have been incurred. Settlement offers are presented as *plus reasonable costs and disbursements* or *all inclusive*. When the latter is presented, the client must be advised of what costs and disbursements will be deducted from that total.

Once the Bill of Costs and disbursements are completed, they are sent to the other party for agreement.

If agreement is not reached, an appointment is made to have the costs assessed by the Registrar of the Supreme Court – this process is referred to as a Taxation Hearing.

Parties will prepare submissions addressing any disputed costs and disbursements, justifying their claims. At the Taxation:

* Go through the Bill of Costs with the Registrar;
* Provide justification via invoices, receipts, affidavit evidence;
* Registrar will sign a certificate of costs;
* The filed certificate becomes enforceable as a judgment.

1. **Subrogated Claims**

Subrogation is a term that describes an insurer’s legal right by contract to pursue a third party wrongdoer for an indemnity paid to the insured, by stepping into the insured’s shoes. Subrogation clauses exist in most insurance policies, including in short and long-term disability benefit policies, and extended health care policies.

Thus, in addition to legal fees, costs, and disbursements, there may be subrogated interests that have to be paid out of the plaintiff’s settlement funds.

These claims are generally negotiable, depending on the terms of the advanced benefits.

Some employers or trusts providing disability benefits require 100% repayment.

It is critical to know who has a subrogated interest in the settlement or judgment and to resolve those interests on behalf of the client before disbursing settlement funds to the client.

ICBC has made recent changes that prevent third party insurers from subrogation. Section 83 of the *Insurance (Vehicle) Act* sets out categories of insurance benefits that are deductible from a tort claim and effectively eliminates subrogation rights of various benefit providers.

1. ***Health Care Costs Recovery Act***

The Province of British Columbia is entitled, by statute, to recovery of any health care costs expended to an MSP beneficiary if that beneficiary is injured as a result of a negligent third party, under the *Health Care Costs Recovery Act*, SBC 2008, c. 27. The *Act* does not apply to ICBC-insured tortfeasors, for obvious reasons (no point in moving funds from one government pocket to another). It does apply to all non-ICBC insurers of all accidents, including slips and falls, aviation accidents, medical malpractice, etc.

Under the *Act,* it is mandatory for parties to put the Province on notice of claims and settlements. If the Province does not sign off on a settlement, the settlement may not be enforceable.

In *Woo v. Crème de la Crumb,* [2020 BCSC 0042](https://www.bccourts.ca/jdb-txt/sc/20/00/2020BCSC0042.htm), the plaintiff beneficiary was catastrophically injured as a result of falling from a ladder at the defendant bakery’s premises. The Ministry’s claim, set out in its Certificate, totaled $801,170.12. The defendants challenged the admissibility of the Certificate. Mr. Justice Skolrood found it admissible, reasoning as follows:

[23]         Returning to the Minister’s Certificate here, I agree with the defendant that the language used does not track directly with the wording of ss. 16(1) and (2). It is not clear why that is as it would be relatively straight forward to simply provide the information in the manner contemplated by ss. 16(1) and (2) and in the language used therein.

[24]         That said, I am satisfied that the somewhat unartfully drafted Minister’s Certificate nonetheless conveys the information required by ss. 16(1) and (2). As noted, the first paragraph of the Minister’ s Certificate, after the preamble, certifies that Appendix “A” to the certificate sets out the “health care services claim” for the plaintiff for “personal injuries suffered as a result of the negligence or wrongful act or omission of a wrongdoer on or about 2015/02/17” (emphasis removed).

[25]         Again, “health care services claim” is defined to mean “a claim for the recovery of the past and future costs of health care services attributable to [the specified] personal injury”. The definitions of “past cost of health care services” and “future cost of health care services” make it clear that the specified costs are the costs of the health care services attributable to the personal injury. Further, Appendix “A” to the Minister’s Certificate, which sets out the various health care services and the associated costs, clearly identifies the plaintiff as the beneficiary as well as the date of the subject personal injury. In my view, it is clear to anyone reading the Minister’s Certificate that it identifies the health care services received by the plaintiff in respect of the personal injuries that were the subject of this litigation and the costs of those services, i.e. the information required by ss. 16(1) and (2).

[26]         The defendant seeks to distinguish between a “claim” for recovery of health care costs, which is what it says is set out in the Minister’s Certificate, and a certification that the health care services were received by the plaintiff, which is what is required under s. 16(1). The defendant submits that the former is in the nature of a pleading whereas the latter is a material statement of fact.

[27]         In the context of the *HCCRA* and the Minister’s Certificate, this is a distinction without a difference. Under the *HCCRA*, the only claim that may be advanced, either by the beneficiary (ss. 2 and 3) or by the government (ss. 7 and 8), is for recovery of the costs of health care services received by the beneficiary that are attributable to a wrongful act. The intent of a certificate issued under s. 16 is to identify both the relevant services and the associated costs. By listing the health care services and the costs in the appendix to the certificate, the Minister or his/her designate is stating the necessary material facts. Again, as I noted in para. 25 above, this should be clear to anyone reading the Minister’s Certificate.

Plaintiff’s counsel can accept a retainer to act on behalf of the Ministry in pursuit of the *HCCRA* claim, or not. Either way, it is critical to be cognizant of counsel’s obligations under the *Act* to ensure the Ministry is paid its due by the wrongdoer.

1. **Appeals**

* Appeals of interlocutory orders of import, and appeals of judgments, do happen in the world of personal injury.
* It is important to diarize the appeal period following a trial judgment. Parties have 30 days to file a Notice of Appeal.
  + The liability judgment in *Uy v. Dhillon,* 2019 BCSC 1136 was appealed; the appeal was dismissed, see [2020 BCCA 163](https://www.canlii.org/en/bc/bcca/doc/2020/2020bcca163/2020bcca163.pdf)
  + The lost housekeeping capacity award in *Kim v. Lin,* 2016 BCSC 2405 was appealed; the appeal was dismissed, see [2018 BCCA 77](https://www.canlii.org/en/bc/bcca/doc/2018/2018bcca77/2018bcca77.pdf)
  + Appellate practice is complex and it is best practice to retain outside counsel who are experienced and reasonably known for their advocacy work in the Court of Appeal. Trial lawyers may not always be great appellate lawyers!