Handle With Care

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A Risk Management Newsletter For the Health Care Protection Program Members

Changes to our Newsletter and Website

A new approach and a new look!

We are experimenting with our newsletter format to make it easier for you the reader. Articles will be accessible by clicking on the links shown in the Article Summary, rather than needing to scroll through our entire newsletter.

Over the coming months you will also notice changes to the newsletters stored on our website. We are in the process of separating out the individual articles, updating the information and reposting them. This change will allow us to keep our website current and make it easier to locate a particular article.

We would love to hear your comments regarding this new format and any suggestions to make our website and publications more useful.

Article Summary

Strategic Settlements When Dealing with Parallel Grievances and BC Human Rights Tribunal Complaints Alon Mizrahi of Dives, Harper and Stanger outlines the importance of communication between legal counsel, human resources and other employer staff when faced with multiple proceedings by an employee with respect to the same or related issues (pages 2-3)

Multiple Claims from Vernacare Machines Tips for preventing water damage claims (page 4)

Subrogation 101 What is it and what can you expect as you go through the process (pages 5-7)

Social Media: Be Careful What You Post Russell Bailey and Bianca Jaegge of Guild Yule LLP discuss how private postings may become part of public court records (pages 8-9)

About Us and Contact Information (page 10)

Please send us your feedback! We love to hear your comments and article ideas. If you would like to be on our distribution list, please contact us at HCPP@gov.bc.ca. And, feel free to distribute the newsletter.

It should be clearly understood that this document and the information contained within is not legal advice and is provided for guidance from a risk management perspective only. It is not intended as a comprehensive or exhaustive review of the law and readers are advised to seek independent legal advice where appropriate.

Strategic Settlements When Dealing with Parallel Grievance and BC Human Rights Tribunal Complaints

Employees have several avenues to challenge issues arising out of workplace injuries and subsequent employer accommodation efforts. On occasion, employees file parallel grievances with the British Columbia Human Rights Tribunal complaints, and WorkSafe BC complaints. Often different legal counsel, human resources, and other employer staff are assigned to respond on behalf of the employer to these proceedings. A recent case from the British Columbia Human Rights Tribunal (the “Tribunal”) highlighted the importance of communication between these individuals and provided insight to employers who are navigating settlements when the same employee commences multiple proceedings in respect of the same or related issues.

The Complainant is employed by a BC Health Care Agency (HCA) and is a member of a Union. The Complainant had filed numerous grievances against the HCA regarding his accommodation in the workplace after suffering a workplace injury. He also filed a complaint regarding the same issues with the Tribunal (the “Complaint”). Although he was eventually represented by legal counsel before the Tribunal, it is not uncommon for unionized employees to pursue their own complaints before the Tribunal while their union pursues the same issues through grievances under the collective agreement.

In this case, a grievance hearing took place prior to a hearing before the Tribunal. After several days of testimony from the Complainant and various witnesses, the parties, with the assistance of the Arbitrator, entered into a Consent Award. A Consent Award is a tool that an arbitrator can use to document a resolution between the parties that has the same effect as a final order. Unfortunately, the HCA and the Complainant were unable to resolve the Complaint as part of this process.

It is important to understand that the Union owned the rights to the Complainant’s grievance and were capable of resolving the grievance by agreeing to a Consent Award without his consent. In fact, in this case, the Complainant claimed to the Tribunal that he vigorously opposed the Consent Award in the grievance. As the Union was not a party to the Complaint, it had no authority to resolve it without his consent. Therefore, even though the major issues involved in both proceedings were settled through the Consent award, the HCA and the Complainant still had to deal with the Complaint.

Although employees can obtain lost wages through both proceedings, employees do not typically receive damages for injury to dignity in grievance proceedings. Before the Tribunal, injury to dignity damages are generally considered a core remedy available to Complainants. This was an important distinction when considering whether there was any basis for the Tribunal to continue with the Complaint in light of the Consent Award.

After entering into the Consent Award, the HCA proceeded to make a with prejudice settlement offer to the Complainant in an attempt to resolve the Complaint and deal with the outstanding claim of entitlement to injury to dignity damages. The Complainant refused this offer. The HCA then applied to dismiss the Complaint for failure to accept a reasonable settlement offer.

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and trying for him. The Complainant refused this offer. The HCA then applied to dismiss the Complaint for failure to accept a reasonable settlement offer.

Under the British Columbia Human Rights Code (the "Code"), the Tribunal has the jurisdiction to dismiss complaints when proceeding with the complaint does not further the purposes of the Code. Through previous cases, the Tribunal has determined that it does not further the purposes of the Code to proceed with complaints when respondents make reasonable settlement offers. The Tribunal's rationale is that it wants to encourage parties to the settle complaints and avoid the use of Tribunal resources when the entitlements that the complainant could be awarded are offered by a respondent.

In this particular case, after applying a test which applies in this type of application, the Tribunal concluded that:

- The subject matter of the grievances and the Complaint were the same.
- While the Union owned the grievances and had a role in securing accommodation, it was acting to obtain accommodation from the HCA on behalf of the Complainant.
- The Consent Award was intended to settle the entire accommodation dispute reserving jurisdiction in the arbitrator should difficulties arise in the accommodation.

The Tribunal held that the Complaint should be dismissed, as it did not further the purposes of the Code to proceed with it in light of the reasonable settlement offer. The Tribunal believed that the Complainant was attempting to determine what else he could obtain through a complaint at the Tribunal.

The Tribunal's dismissal of the Complaint saved the HCA significant cost and avoided disruption to the workplace by not having to defend itself at a lengthy hearing.

This case highlights the importance of communication between the various counsels or employer representatives when employees bring multiple proceedings dealing with the same issues to ensure a coordinated and comprehensive strategy can be implemented. ➤

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Multiple Claims from Vernacare Machines

Over the past couple of years, we have received several water damage claims caused by Vernacare macerator machines. The machine is supposed to emulsify papier-mâché bedpan liners, bottles, etc. In some cases the machines have overflowed; in other cases, the drain has plugged a short distance downstream from the machine. The cause of the overflow is either that the operating cycle of the machine is not run long enough or that the machine is overfilled and the product is not sufficiently emulsified and hence, when it goes down the drain it causes blockage.

The operating manual for the Vernacare "Vortex" macerator lists several facts and tips (if you have another type, please review the manual for operating instructions):

1. It will dispose of a maximum of four "Vernacare" disposable products such as bedpan liners, bottles etc. together with their contents in a single cycle.

2. Due to their physical size only two Vernacare wash bowls may be disposed of per cycle.

3. Products should be placed in the macerator one at a time.

4. Do not stack products inside each other or attempt to dispose of more than four items in a single cycle as this will impair the effective operation of the machine and in severe cases, may cause the motor to stall.

5. It is considered good practice to operate the machine each time a utensil is placed into the machine.

6. Do not place string, wipes, plastic or metal items inside the machine as these may damage the components.

One health care agency has instituted a monthly preventative maintenance program to inspect the drain and clean as required. However, the key to success will be the training of staff in the disposal procedures. ➤

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Subrogation 101

With subrogation, there are typically three parties involved: the covered entity - health care agency (HCA), Health Care Protection Program (HCPP), and the party who is responsible for the damages. Under subrogation HCPP assumes the right to sue the responsible party for the amount of the damages reimbursed to the HCA, and the deductible paid after an insured loss. Typically subrogation is related to property claims, fleet claims, or product defect losses.

First and foremost, when considering if an opportunity for subrogation exists on a claim is to determine the cause and whether a third party may be responsible for the loss. Once potential for recovery is established it then falls to HCPP, the HCA, and any hired professionals to build a solid case for recovery. There is a very good chance that the HCPP claims examiner/adjuster will have several questions, and perhaps will want you to dig out old documentation from dusty boxes in warehouses, so patience is always a virtue. HCPP successfully recovers a significant amount of money every year through subrogation of property claims. The following is a brief outline of actions that can be performed by the HCAs to contribute to a successful subrogation.

Initial Steps

- CONTACT THE HCPP CLAIMS DEPT.
- Identify and obtain statements from key witnesses (include contact information)
- Take photographs (more is better)
- Identify which expert/professionals are needed. Adjusters, remediation contractors, engineers, fire inspectors, etc. (experts to be hired with RMB approval)
- Assess if and when experts will need to attend the scene of the loss (i.e. In some instances, such as fire losses and water damage, it may be advisable to have experts on scene immediately after the loss)
- Identify which physical evidence is key (this may require consultation with your experts)
- Preserve the physical evidence (i.e. take possession of it or have your expert take possession)
- Photograph physical evidence, ensuring that any identifying marks are depicted (i.e. serial number, batch numbers, etc.)
- If others have taken the physical evidence (i.e. police, fire department, other party), put them on notice that they are to preserve the physical evidence and perform no destructive testing

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After the initial scene investigation, the responsible party's ability to pay needs to be considered to determine if the potential recovery is feasible. Additionally, more specific details will need to be gathered to properly support the legal claim. Our rule of thumb has always been "the sooner the better" when gathering information, as there is always the possibility of losing key components over time. (e.g. memories fade; documents are recycled, key witnesses move on, etc.).

Next Steps

- Identify possible responsible parities, and determine their full legal names
- Identify the insurers (if any) of the responsible parties
- The claims examiner may conduct an asset search on the responsible party if appropriate
- Obtain all contract documents between the HCA and any possible responsible party
- Where applicable, obtain the HCA's lease documents
- In construction losses, identify the names of all developers, general contractors, sub-contractors, architects and engineers
- In product defect losses, identify the product vendor, model number, the manufacturer and all distributors and suppliers in the product's supply chain
  - Describe modifications (if any) made to the product or equipment since the purchase plus who performed them and when
  - Determine how long the product or equipment has been in use and whether it was used in accordance with manufacturer's guidelines at the time of the incident
  - Determine if any safety equipment was used at the time of the incident, and whether it was required in order to operate the equipment or product
  - Obtain any available maintenance records of the equipment

There is always a possibility that the responsible party (or its insurer) will opt to accept liability and pay for the damages upon receiving notice of intent from the HCPP claims examiner. A subrogation package is prepared and forwarded to the responsible party and after some deliberation an agreement can usually be reached for reimbursement. Generally other insurers will request some depreciation be applied based on the age of the damaged property which is standard insurance industry practice.

Of course there are always the more difficult cases where the responsible party is not so cooperative. HCPP's claims examiners maintain relationships with legal counsel, who are specifically skilled in

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subrogation, and will be retained and directed based on the information gathered above. The quantum of the claim has usually already been ascertained with considerable precision and is provided to the lawyer along with supporting paid invoices and evidence. With a strongly supported position we are able to affect recovery on out of pocket costs incurred.

So where does this leave us, after all is said and done? The HCAs pay a substantial deductible on property claims which is included in our recovery attempts. Our recovery will generate a pro-rated deductible reimbursement, putting funds back into the HCA coffers for the next emergency. ➤

HCPP Claims hotline: 250-356-1794 (24/7)

HCPP Claims email: RMBClaims@gov.bc.ca

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Social Media: Be Careful What You Post

A Defence Lawyer's Perspective

Most everyone these days seems obsessed with posting their latest activities online on social media platforms like Facebook, Instagram, Twitter and LinkedIn. Since these platforms provide such an accessible and instantaneous way to communicate, it is often tempting to tweet or post current thoughts or feelings or even what you had for breakfast. It may seem like a quick way to vent some stress. However, it is easy to forget that without considering proper security settings, these sorts of posts can be viewed and copied by anyone. In the work environment, such posts can unintentionally lead directly to lawsuits or provide valuable information for the opposing side.

Some of the worst case scenario consequences of venting about a difficult patient, colleague or employer may not only hurt one's job, but could lead to an unfortunate and avoidable lawsuit against oneself directly and one's employer for a defamation claim or a claim of breach of confidentiality or privacy. There have been a number of recent cases for defamation over internet posts and the scope of these potential claims will only increase as more people start to use social media.

Posting work activities online can also provide powerful evidence for litigation many years after the poster has forgotten what and why it was posted in the first place. Searching social media sites is a quick and inexpensive way for lawyers to gather information about their cases and learn about potential witnesses and opposing parties. Even a basic google search can be a goldmine for opposing counsel to look for opportunities to discredit witnesses. For example, a BC Supreme Court judge recently reduced a plaintiff's damages award significantly due in part to social media evidence discrediting her testimony (*Tambosso v. Holmes*, 2015 BCSC 359).

Further, photos, posts, videos, etc. on social media sites are considered 'documents' and are subject to disclosure rules. Once posted online, anyone with the ability to access those documents can copy them even if they are later deleted on the host site. All parties to litigation or potentially even third parties to litigation may be required to produce photos, videos or copies of posts, or even portions of their hard drives.

For those documents that are protected by security measures, an opponent can still seek an opposing party's online or computer-based documents so long as there is a direct connection between the litigation and the documents sought. However, the Courts do set limits and require the party seeking those documents to provide sufficient evidence to support production. The court is required to weigh the value of that potential information with the competing interest of protecting one's privacy (*Wilder v. Munro,* 2015 BCSC 1983 at para 16). These documents may then be entered into evidence at trial, subject to admissibility rules. Failure to produce or preserve these documents carries harsh legal consequences. Also, be aware that once there is a written set of Reasons for Judgment, these sorts of documents and their contents may be quoted from by the Court. These Reasons are usually published online and available to all members of the public.

So does this mean you should never post or tweet again? No. However, be careful what you post and assume what you say is permanent and that anyone can read it, even if you intend it for a very small audience of friends and family. Consider how outsiders may interpret your tweet or post in a negative light. Even if you do not use a person's name or other obvious identifying information, a family member or friend may still recognize who you are posting about. Also, consider tightening your privacy settings or removing photos and posts that could be used against you. If you are involved in a lawsuit, it is likely best to temporarily abstain from social media all together until the matter is resolved.

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Consider an example: A nurse has a particularly hard time with a patient and goes home to vent her frustration on Facebook by posting a public status update about the patient. The nurse also sends a private message to her friend with a short video of the patient. One of the nurse's Facebook friends sees the nurse's public post and recognizes the patient, who in turn tells the patient about the post. After the patient finds out, she sues the nurse for defamation and breach of confidentiality as well as the health care agency for breach of confidentiality and for medical negligence. Two years later, after litigation commenced the patient's lawyer brings an application to compel the nurse to produce all Facebook posts, messages, etc. The court orders her to produce the private message to her friend, including the video. By this time, the nurse had forgotten about her private message and regretted sending it. The message ends up being quoted by the Trial Judge. After the Reasons for Judgment are published, a journalist reads the Reasons prints a story about the nurse's Facebook post, which ends up further embarrassing the Nurse and the health care agency. ➤

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About Our Organization

We are the Client Services Team for the Health Care Protection Program (HCPP). HCPP is a self-insurance program which is funded by the Health Authorities of BC. The program is housed within the offices of the Risk Management Branch of the Ministry of Finance which also has responsibility for similar programs such as the Schools Protection Program, and the University, College & Institute Protection Program. As part of the services of our program, we provide risk management services including risk mitigation, risk financing, and claims and litigation management to HCPP member entities including all the Health Authorities and various other stand-alone health care agencies in the Province of BC. ***Handle with Care*** is published twice a year by HCPP.

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