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Privacy Breach May Prove *More* Costly for Healthcare Employers

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A recent Ontario class action against the Peterborough Regional Health Centre ("PRHC"), for misuse of patient information has called into question whether a proceeding under the *Personal Health Information Protection Act, 2004* ("PHIPA") is the only recourse available for a breach of privacy in the health sector. The case, *Hopkins v Kay*, has potentially opened the door for a patient to launch a court claim directly against a healthcare provider for breach of privacy without first making a complaint to the Privacy Commissioner. It has also created the possibility of higher damage awards without the need to prove actual harm.

PHIPA is an Ontario law that governs the collection, use and disclosure of personal health information within the health sector. Under PHIPA a patient who alleges a breach of privacy has no direct access to the court to obtain damages, but must first launch a complaint with the Information and Privacy Commissioner for Ontario. Only if the Privacy Commissioner makes a favourable order will a wronged patient be entitled to commence a court proceeding for damages for "mental anguish", capped at $10,000 per patient, and requiring proof of "actual harm". From a patient's perspective, the benefit of this model is no cost or risk to initiate a complaint or investigation. For the healthcare provider, the benefit of PHIPA is the certainty of knowing that damages for mental anguish are limited to $10,000 per patient[1].

The tort of "intrusion upon seclusion"

In *Hopkins v Kay*, a group of patients proposed a class action against PRHC for the misuse of their information. The class action initially included allegations of breach of privacy under PHIPA, but through various amendments the only claim which proceeded before the court was made under the tort of *intrusion upon seclusion*.

A relatively new tort for breach of privacy, *intrusion upon seclusion* was first recognized by the Court of Appeal for Ontario in the 2012 case, *Jones v Tsige*, in the context of a relationship among two colleagues and the same man. Winnie Tsige, an employee with the Bank of Montreal, had entered into a common law relationship with the ex-husband of her colleague Sandra Jones and, using her bank access, repeatedly reviewed Jones' private banking information throughout the span of four years. Tsige did not publish, distribute or record the information. Nevertheless, Jones characterised this as a serious intrusion upon her personal privacy and brought a civil action against Tsige.

The Court of Appeal awarded Jones $10,000 in damages on the basis Tsige's conduct was intentional or reckless; invaded, without lawful justification, Jones' private affairs or concerns; and a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish.

[1] A patient able to prove *actual damage* (*e.g.* a financial loss caused by a privacy breach) may fully recover that loss and is not limited to $10,000.

Significantly, the court held that proof of damage was not a necessary element of this intentional tort, and furthermore absent actual, financial loss, damages for *intrusion upon seclusion* would be capped at $20,000.

Fast forward to 2014 and class action against PRHC. The hospital acknowledged medical records were wrongfully accessed and apologized to the affected patients. However, in a preliminary motion intended to strike the claim, PRHC argued the patients' claim fell within the exclusive scope of PHIPA which was intended to be a complete code for precisely the type of matter before the court. As such, PRHC argued, the class action could not be brought under the common law tort of *intrusion upon seclusion*.

In reasons released earlier this year, the Superior Court rejected PRHC's argument, noting that if the position was to succeed, a decision by the Court of Appeal would be required. PRHC has appealed the decision and a Court of Appeal hearing has been scheduled for December 2014.

Significance of *Hopkins v Kay*

The refusal of the court in *Hopkins v Kay* to limit the application of *intrusion upon seclusion* opens the door for its usage against healthcare providers. However, it is important to note the Superior Court did not find the class had met the test for the tort of *intrusion upon seclusion*. Rather the court held it was not "plain and obvious" the claim should be struck at a preliminary stage.

Still, by refusing to limit the class action to the strict parameters of PHIPA, more claimants may opt to pursue claims under the common law tort of *intrusion upon seclusion*, as opposed to statute, since proof of actual harm is not required and a greater quantum of damages may be awarded. Indeed, since the release of the Superior Court's decision, a similar class action has been brought against a second Ontario hospital. Two former employees of Rouge Valley Centenary are alleged to have leaked as many as 8,300 patient records, largely from new mothers, to private companies selling Registered Education Savings Plans. The hospital's liability for these leaks could exceed $160 million if each of the wronged patients is awarded the maximum of $20,000. The action is not expected to proceed until after the Court of Appeal's hearing in *Hopkins v Kay*.

What's next?

If upheld, the Superior Court's decision in *Hopkins v Kay* has the potential to result in a substantial increase in the number, and cost to healthcare providers, of privacy-related law suits. The monetary cap per patient for a claim of mental anguish will double from $10,000 to $20,000 and the evidentiary threshold for compensation will be lowered so as to no longer require proof of actual harm.

Sherrard Kuzz LLP will continue to follow these cases, and report back to our readers.

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