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### DISCLOSURE OF PERSONAL HEALTH INFORMATION IN MEDICAL MALPRACTICE LITIGATION

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Historically in Canada there has been recognition that where a patient commences a medical malpractice action that places his or her health in issue, the patient is deemed to have waived his or her right to confidentiality. In other words, the patient who initiates litigation has given an implied consent for his or her treating physicians to disclose personal health information relevant to the law suit. Subsequent case law has placed limitations on this principle as have the rules of court.

In Ontario, recent cases have confirmed that given the fiduciary nature of the physician-patient relationship which includes the obligation to keep patient information confidential, a treating physician who is not a party to the lawsuit has a duty to refuse to disclose information about the patient without the patient's consent, unless permitted or required to do so by law. The duties of confidentiality and of a fiduciary arise immediately on the creation of the physician-patient relationship for treating physicians and are not qualified by the length of the relationship.

The law makes a clear distinction between physicians who have treated a patient and those who are hired as expert witnesses to provide the Court with expert opinion. There are different professional obligations for health professionals depending upon whether or not the interaction has taken place within the context of the physician-patient relationship. A physician acting as an expert is not considered to be acting in a physician-patient relationship, even if his or her opinion is based upon clinical assessment of the patient. In these circumstances, it is important for the physician to advise the patient of the limits on confidentiality and the fact that the physician is acting at the behest of a third party.

With the recent enactment of health privacy legislation in Ontario, and elsewhere, there has been an increased awareness of individual privacy rights. Health professionals and organizations entrusted with personal health information must rethink how they deal with such information. Further, in jurisdictions that have enacted legislation, an individual has the right to challenge how their personal health information is collected, used and disclosed.

A complaint was recently dealt with by the Alberta Office of the Information and Privacy Commissioner. The patient complained that one of his physicians had

disclosed his health information to the Canadian Medical Protective Association (CMPA) contrary to the Alberta *Health Information Act* (HIA).

In this situation, the patient commenced a medical malpractice action against three of his treating physicians. Dr. M was a treating physician of the patient and was also a health information custodian under the HIA, but was not a defendant or a party to the litigation. The CMPA was representing the defendant physicians in the litigation. Counsel for the CMPA notified counsel for the patient that they intended to interview Dr. M. The patient's counsel responded directly to Dr. M in writing, advising that the patient did not consent to Dr. M's interview with CMPA defence counsel.

Subsequent correspondence from Dr. M to the patient indicated that although Dr. M had considered the patient's objection, she had been in contact with the CMPA who advised Dr. M that she was free to meet with defence counsel even with the patient's objection. The patient did not take any further steps to prevent the interview from going ahead. Dr. M took part in the interview and discussed the patient's medical treatment relevant to the medical malpractice action. Neither the patient nor his legal counsel was present at the interview with Dr. M.

The Commissioner found that although there are Rules of Court and Codes of Conduct that deal with the disclosure of information within the context of litigation, the courts did not have exclusive jurisdiction to deal with these issues. The disclosure of the patient's personal health information in these circumstances fell within the scope of the Alberta health privacy legislation.

The Commissioner went on to consider whether or not Dr. M disclosed the information in accordance with the HIA. The legislation provided that a custodian of health information could disclose information without the consent of the patient for the purpose of a court proceeding, and the Commissioner found that Dr. M had disclosed the patient's health information for this purpose. The Commissioner was satisfied that Dr. M had properly exercised her discretion in this case.

It is doubtful that this situation would be treated the same way in Ontario. Similar to the Alberta legislation, the Ontario *Personal Health Information Protection Act* (PHIPA) preserves the common law, rules of evidence and procedural rules with respect to the disclosure of information relative to various types of legal proceedings.

The disclosure provisions under the PHIPA expressly recognize existing obligations related to legal proceedings. For example, it recognizes disclosure of personal health information pursuant to a summons, order or similar requirement or a procedural rule that relates to the production of information in a proceeding. Further, while it allows discretion to a health information custodian to disclose personal health information for the purpose of a proceeding or contemplated proceeding in which the custodian is or is expected to be a party or a witness, this provision is made expressly subject to "the requirements and restrictions, if any, that are prescribed."

The Ontario *Rules of Civil Procedure* provide for the discovery (disclosure) of documents held by third parties as well as oral discovery (examination) of non-party witnesses and set out a process in this regard. Ontario common law does not permit a non-party treating physician to disclose a patient's personal health information without consent unless required by law. Given these restrictions, the PHIPA does not provide independent authority for a non-party treating physician to disclose confidential personal health information without the consent of the patient.

Although the specific provisions of the PHIPA have not been subject to interpretation by the Ontario Information and Privacy Commission or the courts, treating physicians and other clinicians should be guided by the existing law. From a risk management perspective, a treating clinician who is not a party to a law suit should not disclose personal health information without the consent of the patient unless such disclosure is authorized by the rules of court or a court order.

While disclosure of personal health information in the context of medical malpractice litigation seems like a simple issue on the surface, this case illustrates the type of analysis that must be undertaken before such information is released. There are different rules dictating how and under what circumstances personal health information may be disclosed depending upon the province, the applicable legislation and the common law.

## ABOUT THE AUTHOR:

Kathryn Frelick is a lawyer practising in our Health Industry Practice Group and supervises the Legal Retainer Program. Kathryn provides advice to clients in areas of privacy, administrative law, regulatory law, and health policy issues.

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