



Privacy Update: The Evolution Continues

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Privacy Update – The Evolution Continues

Overview

1. Can you be sued for privacy breach?
Privacy class action update and
Ontario's privacy tort
2. Recent issues and trends
3. Recent decisions

CAN YOU BE SUED FOR BREACH OF PRIVACY?

- In Canada, traditionally no independent action for breach of privacy
- Typically tied to something else (i.e. constructive dismissal, breach of contract, trespass, negligence, breach of fiduciary duty)

CAN YOU BE SUED FOR BREACH OF PRIVACY?

- There may be statutory basis (i.e. PHIPA)
- Increasingly, concern regarding risk of identity theft (i.e. fraud/credit monitoring, need for protective measures)
- Significant increase in privacy class actions in Canada
 - Loss/theft of PHI (i.e. Durham Health Region, Montfort Hospital, Rouge Valley)
 - Unauthorized access by employee(s) (i.e. certification of class action lawsuits against Regional Health Authorities in Newfoundland and Nova Scotia; Peterborough Regional Health Centre)

PRIVACY BREACH – STATUTORY BASIS

- Limited recourse under PHIPA for breach of privacy
- Offences under the *Provincial Offences Act*
 - Significant fines (up to \$50,000 individual / \$250,000 corporation)
- Action for damages for breach of PHIPA
 - Statutory right to seek compensation from Superior Court for breach of privacy for actual harm suffered where order issued by IPC or conviction
 - damages for mental anguish capped at \$10,000 (payable where willful or reckless / no punitive or aggravated damages)

DURHAM HEALTH REGION CLASS ACTION

- December 2009 - Nurse loses unencrypted USB key with PHI of 83,500 individuals immunized for H1N1
- January 2010 - IPC Order HO-007 – strong encryption for mobile storage devices
- December 2011 - Class action certification motion
 - \$40 million damages (negligence, breach of statutory duty, breach of fiduciary duty)
 - Primary concern - identity theft



DURHAM HEALTH REGION CLASS ACTION

- July 2012 – class action settlement approved
 - \$500,000 in costs to counsel, plus % of claims paid
 - Must demonstrate economic loss, otherwise, no damages
 - Opportunity to mitigate loss
 - Mr. Justice Lauwers:
 - Risks from lost data “negligible”
 - No evidence of identify theft / minimal information
- May be negligent, but if no harm, little likelihood of success

PRIVACY CLASS ACTIONS - IMPLICATIONS

- Recent class action law suits in multiple Canadian jurisdictions
- Hospitals notifying patients and managing breach
- Termination / discipline
- Early stages
 - Vicarious liability – is HIC responsible for *intentional* behaviour of employee?
 - Systems responsibilities - adequate training, policies and procedures and systems in place to monitor policies?
 - Grievances and wrongful dismissal suits

PRIVACY TORT – INTRUSION UPON SECLUSION

- 2012 - Ontario Court of Appeal - *Jones v. Tsige*
- Bank employee accessing personal bank account of spouse's ex-wife (another bank employee) 174 times over 4 year period
- Brought motion for summary judgment on the basis that Ontario law does not recognize tort of breach of privacy
- CA determined that there ought to be a right of action for 'intrusion upon seclusion' in certain situations where there has been a deliberate and significant invasion of personal privacy

THREE ELEMENTS – INTRUSION UPON SECLUSION

- Conduct must be intentional (or reckless)
- Individual must have invaded, without lawful justification, another's private affairs or concerns
- A reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish
 - Objectively, only certain types of intrusions highly offensive i.e. involving financial or health information, employment, diary, personal correspondence

DAMAGES FOR INTRUSION UPON SECLUSION

- No need to demonstrate harm to economic interests or actual loss – arises from conduct
- Damages for intrusion upon seclusion will be relatively modest (i.e. capped at \$20,000)
- This tort has NOT been recognized in British Columbia where statutory basis (other jurisdictions?)

HOPKINS v. KAY – CLASS ACTION BASED ON PRIVACY TORT

- Spring 2012 – PRHC identified breach involving health records of 280 patients accessed by employees of PRHC and Sir Sanford Fleming without authorization
- PRHC notified patients, issued public apology, terminated 7 employees
- Spring 2013 - \$5.6 M lawsuit commenced
- October 2013 – Hospital brings motion to strike (motion dismissed January 2014)

HOPKINS v. KAY

- Original S/C - breach of PHIPA, breach of confidentiality, breach of contract, negligence, misfeasance and mismanagement, breach of trust and fiduciary duty
- Amended S/C – claim based solely on intrusion upon seclusion or breach of privacy
- Hospital argued that claim precluded because PHIPA provides complete statutory regime which has displaced the common law
- Judgment - without a decision from the Ontario Court of Appeal on this issue, case allowed to proceed
- **Hospital's appeal to be heard December 15, 2014**

IMPLICATIONS FOR HEALTH SECTOR

- Crux of case - can patients sue a health information custodian directly for privacy breach?
 - Significant implications for other privacy class actions in this sector in progress and pending
- Since Hopkins, two other class actions certified in Ontario based on privacy tort
 - Cases in banking and federal public service sectors - looking at issues of vicarious liability and “recklessness”

IMPLICATIONS FOR HEALTH CLIENTS

- Extends beyond PHI to other types of personal information
- Actions may be contrary to organizational policy (employee discipline), but may still be exposed to potential law suits / class action law suits
- Significant public relations and legal risk, therefore, when and how individuals are notified is very important → ensure strong communication strategy

IMPLICATIONS FOR HEALTH CLIENTS

- Risk management
 - Adequate policies and procedures
 - Privacy breach management
 - Training, monitoring and auditing compliance coming under increasing focus
- Consider risk transfer (i.e. privacy notification and look back programs, identity theft monitoring)

RECENT ISSUES AND TRENDS

- Police records checks - significant concerns about disclosure of non-conviction information, including mental health-related encounter information
 - barriers to employment, housing, insurance, immigration, volunteer opportunities, etc.
- IPC releasing report Crossing the Line on indiscriminate disclosure of attempted suicide information to US Border Officials via CPIC
 - Judicial review application to compel Toronto Police Services Board to limit information (“Mental Health Disclosure Test”)

RECENT ISSUES AND TRENDS

- Independent review recommendations (Iacobucci) – July 2014 – Police Encounters with People in Crisis
 - Protocol for sharing PHI
 - Segregation of health care information from other police databases
 - Creation of voluntary registry where individuals could consent to sharing of PHI for purposes of mental health crisis intervention
 - Reducing emergency department wait times
 - standard transfer of care protocol
 - Development of protocols between police services and hospitals
- need for effective sharing of mental health information with police to respond to persons in crisis

FIPPA DECISIONS – RFP SUBMISSIONS

- Number of IPC orders suggesting that winning RFP submissions and evaluation materials not subject to third party exemption
 - “negotiated” and not “supplied” where accepted as part of commercial relationship, even if little or no negotiation
 - difficulty meeting “harms” threshold when relying on other exemptions
- Recent IPC decisions (MA12-144, PA12-491, PA12-436) making important distinction
 - RFP proposal is “supplied” provided that the proposal is NOT incorporated into agreement / contract terms
 - Third party “harms test” has been upheld in relation to pricing, fee and budget information and business approach



RECENT DECISION – ADVICE AND RECOMMENDATIONS

- Supreme Court of Canada decision – *John Doe v. Ontario (Finance)*
 - Scope of section 13 (advice and recommendations) under FIPPA
 - Whether exemption applies to policy options that do not suggest course of action or to information that is not communicated
 - Court finding that opinions setting out advantages and disadvantages of different policy options constitute “advice”, whether or not communicated to anyone

Questions?

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Thank you!