

**HAMILTON AND NEIGHBOURING
DISTRICTS INFECTION
PREVENTION AND CONTROL
COMMITTEE**

ANNUAL EDUCATION EVENT

**Managing Privacy Challenges While
Protecting Patients and Residents
from Infection:
Can We do Both?**

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1. Management of Privacy in Institutional Settings
2. Liability for Institution-acquired Infection
3. The Balancing Act: Safeguarding Patients' Privacy while Protecting Patients from Infection
4. Concluding Summary
5. Questions?

Management of Privacy in Institutional Settings

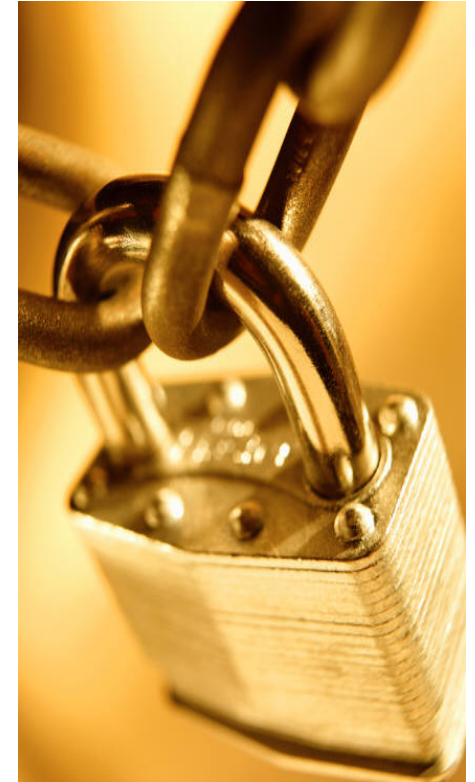
- a. Privacy Protection: an Overview
- b. PHIPA: The Basics
- c. Lessons from Orders Issued Under PHIPA

The Personal Health Information and Protection Act, 2004 (PHIPA)

- Applies to all Health Information Custodians (HICs) and to individuals and organizations that receive information from HICs
- Regulates the way in which HICs collect, use and disclose Personal Health Information (PHI)
- Balances individual's right to privacy with the legitimate needs of persons and organizations providing health care services to access and share this information

Personal Health Information Protection Act, 2004 - PHIPA

- Provides rules for the collection, use and disclosure of PHI that protect the confidentiality and privacy of individuals with respect to that information, while facilitating the effective provision of health care
- Ensures a right of access to an individual's own PHI, subject to certain exceptions
- Extends to individuals the right to require the correction or amendment of their PHI, subject to certain exceptions
- Sets out Information practice requirements
- Provides effective remedies for privacy violations



Personal Health Information

- PHI includes any identifying information about an individual in oral or recorded form (i.e. paper and/or electronic records) that:
- relates to the physical or mental health of an individual including their medical history and family health history
 - relates to providing health care, including identifying a provider of health care
 - identifies a substitute decision-maker
 - information relating to the provision of health care to an individual, including the identification of their health care provider
 - is an individual's health card number

To whom does PHIPA apply? - HICs

Any of the following who has custody or control of PHI in connection with performing the person's or organization's powers or duties:

- Health care practitioners
- Hospitals
- Psychiatric facilities
- Pharmacies
- Laboratories
- Nursing homes and long-term care facilities
- Ambulance services



- Community Care Access Centres
- Boards of health
- The Minister of Health and Long-Term Care
- Retirement homes and homes for special care
- Assessor (*Substitute Decisions Act*)
- Evaluator (*Health care Consent Act*)
- Public Health Laboratory
- Canadian Blood Services

Responsibilities of HICs to Safeguard PHI

- HICs are required to have adequate “**Information Practices**” for actions in relation to PHI, including:
 - when, how and the purposes for which the custodian routinely collects, uses, modifies, discloses, retains or disposes of PHI, and
 - the administrative, technical and physical safeguards and practices that the custodian maintains with respect to the information.



Responsibilities of a HIC to Safeguard PHI

- Under PHIPA, HICs must safeguard PHI in their custody or control by taking steps that are reasonable in the circumstances to:
 - ensure that PHI is protected against theft, loss and unauthorized use or disclosure
 - ensure that PHI records are protected against unauthorized copying, modification or disposal
 - ensure that PHI records are retained, transferred and disposed of in a secure manner

Responsibilities of HICs to Safeguard PHI

- Responsible for ensuring that patient/client information is used only for purpose for which it was collected
- Must ensure information lawfully disclosed outside health team is accurate, complete and up-to-date as possible
- In the event that an individual's PHI is stolen, lost or accessed by unauthorized persons, HIC must notify the affected individual of this occurrence at the first reasonable opportunity
- Ensure that PHI remains secure within the health care team

Responsibilities of HICs to Safeguard PHI

Other Responsibilities of Custodians

- Must appoint a contact person
- Must establish information practices
- Must take care to ensure security of patient records
- Must make available to the public a written statement that sets out the following:
 - Description of the custodian's information practices
 - How to contact the contact person
 - How to access and correct a patient record
 - How to make a complaint to the Information and Privacy Commissioner

Best Information Practices

- **Clinics and Institutions should have:**
 - A Privacy Policy (may be internal); and
 - A Privacy Brochure or Poster (Statement of Information Practices)
- **These set out:**
 - What information is collected from and about clients
 - The purposes for which you collect PHI
 - How you protect clients' PHI (through physical, administrative and technological security measures)
 - The requirement for consent
 - The client's right to withhold or withdraw consent

- Under *PHIPA*, HICs must ensure that PHI and PHI Records are securely stored:

Physical Safeguards

- locking filing cabinets storing PHI Records;
- ensuring that PHI Records are supervised when they are not locked;
- restricting office access to authorized personnel (i.e. through locks, pass codes and alarm systems);
- ensuring that faxes and printers are kept in a restricted area and are directly monitored while running; and
- protecting against the effects of fire

Technological Safeguards

- all staff should have their own computers, wherever possible. At the very least, all staff should have their own login names and passwords to access PHI;
- passwords should not be easy to guess and should be changed regularly;
- access should be removed as soon as a staff member leaves;
- an administrator login and password should be established;
- automatic back-up for file recovery should be set up; and

Technological Safeguards, cont'd.

- all electronic PHI Records should have an audit trail that records the date and time of each entry, showing any changes in a record and preserving the original information when PHI is changed, updated or corrected.



Administrative Safeguards

- appointment of a staff member who is responsible for security issues;
- security clearances for staff members and other applicable agents;
- confidentiality agreements for all staff members and other applicable agents;
- restrict access to certain PHI to certain employees; and
- regular audits to ensure compliance with the security protocol and to determine whether changes should be made to the security protocol and the HIC's information practices.

Role of the Contact Person

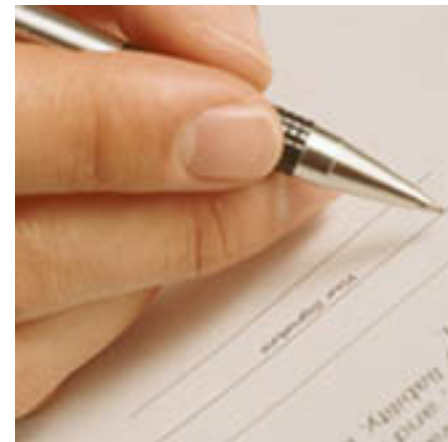
- **A contact person is an agent of the custodian and is responsible for the following functions:**
 - facilitate the custodian's compliance with PHIPA;
 - ensure that all agents of the custodian are appropriately informed of their duties under PHIPA;
 - respond to inquiries about the custodian's information practices;
 - respond to requests for access to PHI and/or corrections to PHI that is in the custody of the custodian; and
 - receive complaints about alleged breaches of PHIPA

Culture of Privacy

- The most significant protective measure is the establishment of a Culture of Privacy.
- This requires all staff and agents of the HIC:
 - to be aware of HIC's obligations
 - to have concern for client's confidence in HIC
 - to realize the consequences of a breach or loss of PHI
 - to focus on prevention of problems
 - to take responsibility for ensuring that clients fully understand their rights and choices

- **With clients:**
 - Establish ground rules at outset and stick to them (including for sharing PHI with family members, providers, etc.)
 - Address problematic areas with them (especially before sharing/releasing PHI)
- **With Staff:**
 - Do not engage in discussions about clients outside of clinical setting
 - Call colleagues on unsafe practices

- Custodian needs to obtain a patient's knowledgeable consent to collect, use and disclose personal health information, unless PHIPA allows said collection without consent
 - Knowledge means the individual knows why the information is being collected, used, disclosed and that they have the right to withhold consent
- Consent can be either:
 - Implied; or
 - Express



Why Consent?

- Consent is at the heart of PHIPA
- Consent is required for the collection, use, disclosure of personal health information (PHI) unless PHIPA authorizes the collection, use, or disclosure of PHI without consent - s.29
- Purposes of PHIPA include establishment of rules for the collection, use and disclosure of PHI that:
 - protect the confidentiality of the information,
 - protect the privacy of individuals with respect to that information, and at the same time,
 - facilitate the effective provision of health care. - s.1(a)

What is Required for Valid Consent?

A HIC needs to obtain an individual's knowledgeable consent to collect, use and disclose personal health information, unless PHIPA allows the collection, use or disclosure without consent

- Consent is knowledgeable if it is reasonable in the circumstances to believe that the individual knows the purposes of the collection, use or disclosure and that the individual may give or withhold consent
- A HIC may rely on a notice of purposes (posted or made readily available) as reasonable belief of the individual's knowledge of the purposes, where reasonable in the circumstance
- Consent must satisfy the requirements of PHIPA, whether it is express or implied.

What is Required for Valid Consent?

Consent must:

- be a consent of the individual (or the individual's Substitute Decision Maker (SDM) if the individual is incapable)
- be knowledgeable
- relate to the information that is collected, used or disclosed
- not be obtained through deception or coercion - s.18(1)

Implied Consent (Assumed implied consent for health care)

PHIPA specifies several conditions when consent may be implied:

- Information exchanged between (disclosed to) custodians within the **“circle of care”** for the purpose of providing direct health care
- Using the name or address of person or SDM when PHI is collected, used or disclosed for fundraising purposes
- Disclosing the name and location of patient, to a religious organization, if the patient has previously provided information concerning affiliation
- A HIC may collect or use PHI for any purpose ancillary to provision of health care

Implied Consent “Circle of Care”

- Not defined under PHIPA
- Describes health information custodians and their authorized agents
 - eg. all agencies providing health care services to a client, and the client’s physicians, psychologist, and, if the client has been in hospital, the hospital staff, etc.
- Medical officer of health or a board of health



Implied Consent “Circle of Care”

- **Does not include:**
 - Any health care provider who is not a part of the direct or follow-up team
 - Evaluator under the *Health Care Consent Act*
 - Assessor under the *Substitute Decisions Act*
 - The Minister
 - Any other person prescribed in the proposed Regulations

- **Needed for:**
 - Disclosure to a non-custodian outside the circle of care (eg. insurance provider)
 - Disclosure of information by one custodian to another custodian for a purpose outside of providing health care
 - Collection of information for marketing research
 - Collection of information (other than name and address) for fundraising purposes

Tips for Requests for access & corrections

- Clients can ask to review their own PHI (your records and notes)
- Such requests can be in writing or made orally
 - However, if client wants to avail themselves of PHIPA protections, requests must be in writing
- Need to have a policy for access requests
- Before providing a client with access to their PHI, must verify identity
- Do not give client your original record. Give a copy
 - If client wants to see original, should do so in your office
- Entitled to charge a “reasonable” fee for the provision of a client’s PHI

Tips for Disclosure of PHI Without Consent

Advise Clients in Advance (through Notice) that you may disclose PHI without consent in these circumstances:

- **Risks:** HICs may disclose PHI where HIC believes on reasonable grounds that disclosure is necessary in order to eliminate or reduce a significant risk of serious bodily harm to a person or group
- **Proceedings:** HICs may disclose for a variety of reasons relating to legal proceedings and in order to comply with summonses or court orders or procedural rules of production

Tips for Disclosure of PHI Without Consent

- **Warrants, Inspections and Investigations:** HICs may disclose PHI in order to comply with a warrant or to facilitate an inspection, investigation etc.
- **Other Law Catch-All:** HICs may or shall disclose PHI if permitted or required by law
- **For example:**
 - Under *Child and Family Services Act* where HIC or agent learns of information relating to a child in need of protection
 - Under *Mental Health Act* for the purposes of examining, assessing, observing or detaining a patient

Two Key Orders Under PHIPA

Order No. 2:

Unlawful Access to PHI Records

Order No. 7:

Lost USB Stick

Health Order No. 2: Unauthorized Access

Facts

- Patient admitted to Ottawa Heart Institute under maiden name to prevent estranged husband (employee at hospital) and his girlfriend (nurse at hospital) from having knowledge of her admission
- Nurse accessed patient's PHI records repeatedly; husband communicated information from hospital record
- Patient complained; privacy officer ordered investigation
- Discipline meeting scheduled weeks later; nurse repeatedly accessed patient's PHI records in the interim.

Health Order No. 2: Commissioner's Findings

- Hospital had not taken steps that were reasonable in the circumstances to ensure that the personal health information was protected against theft, loss and unauthorized use or disclosure;
- Hospital was ordered to review its practices and procedures to ensure that human resource issues did not trump privacy;
- Hospital was ordered to implement a protocol that would require immediate steps to be taken upon being notified of an actual or potential privacy breach.

Lessons Learned

- Hospital criticized for not taking steps to prevent ongoing privacy breaches by an employee, even after the hospital became aware that such breaches had occurred repeatedly;
- Hospital staff did not recognize the obvious threat to privacy posed by the estranged husband and his girlfriend-both employees of the hospital;
- Staff only recognized the threat to the physical security of the patient, not the threat to her privacy;
- After learning about the breach, the hospital was more concerned about the employee's right to due process (Human Resources Policy) than the patient's right to privacy;
- Hospitals can have both –but HR cannot trump privacy.

Health Order No: 7 Lost USB Stick

- Order resulted from a USB memory stick, containing PHI of over 80,000 people, that was lost by a public health nurse
- Memory stick was not encrypted and person who issued stick did not know this was a requirement
- Found to be completely unacceptable in light of Order No: 4
- Act requires HIC to take reasonable steps to ensure PHI protected from theft, loss and unauthorized use and to ensure that OHI is retained and disposed of in a secure manner
- Also concern that they collected too much information (i.e. health card number when everyone was entitled to H1N1 shot, regardless of OHIP status).

Health Order No: 7 Lost USB Stick

- Lessons (that should have been) Learned from Past Orders:
 - Order HO-004 (Sick Kids Hospital) directed that PHI must be encrypted whenever it is stored on mobile devices
 - Commissioner stated:

It is my view that it is no longer reasonable to store PHI on mobile computing devices, unless steps are taken to ensure that any PHI stored on such devices is protected against unauthorized access, in the event that the device is lost or stolen

Health Order No: 7 Commissioner's Order

- The HIC was ordered to:
 - implement procedures to safeguard PHI including by encrypting mobile devices
 - Revise information practices
 - Ensure clinics cease collecting more PHI than was necessary
 - Securely destroy PHI records collected inappropriately
- The Region was advised to
 - inform the public about the Order, through advertisements in local newspapers
 - develop and implement a policy for mobile devices to ensure strong encryption of PHI

Health Order No: 7 Commissioner's Order

- Class action law suit filed against Durham Region in 2009 on behalf of 85,524 plaintiffs claimed \$40 million in damages
- Settlement proposed:
 - Region denies all liability
 - Region to pay \$500,000 in costs, disbursements and taxes to settle action
 - Individuals can seek compensation, but Region has opportunity to mitigate harm first

A New Risk: Liability for Invasion of Privacy

A New Tort

- In the January 2012 decision *Jones v. Tsige*, the Ontario Court of Appeal recognized a right to bring a civil action for damages for the invasion of personal privacy: “Intrusion Upon Seclusion”

A New Risk: Liability for Invasion of Privacy

Facts

- Jones and Tsigie were both employees of Bank but did not know or work with each other
- Tsigie became involved with Jones' former partner, and became involved in a financial dispute with him
- Tsigie accessed Jones' bank records (including personal and transaction information) 174 times to determine if partner was paying support to Jones
- Jones complained and bank investigated.

A New Risk: Liability for Invasion of Privacy

Findings

- Even though Tsige never published the information or caused Jones any actual harm, Jones sued Tsige for invasion of privacy.
- Trial Court dismissed the action on the basis that there was no free-standing right to privacy and that privacy legislation covered any breach
- Court of Appeal overturned dismissal of action and granted judgment to Jones for \$10,000.

A New Risk: Liability for Invasion of Privacy

Elements of the New Tort

- Defendant's conduct must be intentional or reckless
- Defendant must have invaded plaintiff's private affairs or concerns
- Reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish

Concluding Summary

- Be open and transparent about privacy practices to enable clients to exercise their rights
- Think about what is reasonable in the circumstances in terms of safeguarding clients' PHI
- Take responsibility to ensure that clients have the opportunity to make decisions respecting their PHI
- Work to develop a “culture of privacy”
- Document your decision-making and discussions around consent decisions
- You will have to navigate potentially conflicting duties, and decisions are not always clear cut. Help is available! Speak to colleagues, a supervisor, the privacy officer or your lawyer!

Liability for Institution-Acquired Infections (IAIs)

- a. Who Can Sue for IAIs
- b. Elements of Negligence
- c. Recent Cases on Class Actions for IAIs

Who can sue institution for IAI?

1. Patient, resident, or family member who is infected by IAI
2. Member of the public who came into contact with these individuals and was infected
3. Family members of these individuals who have claims under the *Family Law Act* for expenses incurred and anticipated and to compensate for the loss of the person's guidance, care and companionship
4. Uninfected person who suffered harm as a result of being notified of the possible infection (?)



Liability for IAs: Class Actions

A representative plaintiff can obtain certification of a Class of Plaintiffs if he can meet five elements:

1. The pleadings disclose a cause of action;
2. There is an identifiable class of two or more persons that would be represented by the representative plaintiff
3. The claims of the class members raise common issues
4. A class proceeding would be the preferable procedure for the resolution of the common issues
5. There is a representative plaintiff who has no conflict, would fairly and adequately represent the interests of the class, and who has a plan for notifying and proceeding on behalf of class members

Liability for IAls: Class Actions

Class Actions are well-suited for IAls because:

- Access to justice: individual plaintiffs don't bear whole burden of litigation
- Enormous cost of marshaling expert evidence required
- Cost of determining complex medical issues, standard of care, and breach will be shared among class members and only need to be litigated once
- Avoids potential for conflicting findings
- While damages for individuals may be so limited as not to be worth pursuing, class proceeding has the potential to achieve behaviour modification

However, causation is the major hurdle to litigating IAls

Liability for IAs: The Law of Negligence

Plaintiffs must prove each of four elements of a negligence action on a balance of probabilities:

1. That the defendant owed the plaintiff a duty of care
2. The defendant breached the duty of care, by failing to meet the standard of care
3. That the plaintiff suffered damages or losses
4. That the damages were caused by the defendant's negligence and were reasonably foreseeable.

The British Case *Anns v. Merton London Borough Council* provides a two- step test to determine if a duty of care arises:

1. Is the relationship between the plaintiff and defendant close enough to give rise to a duty of care
2. Are there contravening policy considerations that negate the duty of care

- Hospitals, long term care homes clearly owe a duty of care to their patients and residents
- Duty of care may also be owed to visitors, family members who contract infection, and even to others who contract infection from them



Duty of Care: Arbaquez v. Ontario

- Nurses and their family members sued the Government of Ontario for negligence and breaches of rights under section 7 of the *Canadian Charter of Rights and Freedoms* (right to life, liberty and security of person)
- Government moved to strike claim in its entirety
- Nurses and families alleged that Ontario failed to have a system in place to deal with SARS during the 2003 outbreak and that controls relating to prevention of spread of SARS were relaxed too early leading to 2nd outbreak

Duty of Care: Arbaquez v. Ontario

- Court of Appeal struck claim against Province on basis that no cause of action was disclosed
- **Reasoning:**
 - Ontario Government did not owe a duty of care towards nurses and other health care providers
 - Ontario was obliged to protect the public at large from the spread of communicable diseases such as West Nile Virus and SARS, but did not owe individual residents a private law duty of care giving rise to claims for damages
 - Similarly, nurses and other health care workers were “in the eye of the SARS storm” but had no higher claim to have their health protected by Ontario than any other resident of the Province

Duty of Care: Healey v. Lakeridge Health Corporation

Facts:

- Hospital became aware that two patients were infected with tuberculosis (TB)
- Hospital had obligation under *Health Protection and Promotion Act* to notify Medical Officer of Health
- Medical Officer of Health notified 4000 people who had come into contact with infected patients and recommended that they be tested for TB
- Healey and others tested positive for TB

Duty of Care: Healey v. Lakeridge Health Corporation

Allegations:

- Plaintiffs alleged they were infected because of exposure to patients and because hospital failed to properly diagnose active TB and failed to take precautions to prevent the spread of infection and risk of harm
- Plaintiffs brought a class action against hospital and physicians involved in treatment of patients
- Three sets of plaintiffs certified as classes:
 1. Infected plaintiffs
 2. Uninfected plaintiffs who suffered due to notification from Public Health
 3. Derivative claimants under *Family Law Act* (relatives of plaintiffs)

Duty of Care: Healey v. Lakeridge Health Corporation

Summary Judgment Motion:

- Hospital moved to strike claim by uninfected persons who did not contract TB but claim damages for psychological injury as a result of being notified of exposure to TB.
- Partial Summary Judgment granted on basis that:
 1. Hospital owed no duty of care to the uninfected persons
 2. The psychological injuries suffered by the uninfected persons were below the threshold for recovery and
 3. Damages claimed were too remote

Duty of Care: Healey v. Lakeridge Health Corporation

- On appeal, Court found that hospital owed a duty of care to patients and visitors, including uninfected persons
- Appeal dismissed because the Uninfected persons did not suffer an injury that was compensable; their injury fell short of demonstrating serious trauma or illness.



Standard of Care

- Plaintiffs must establish that defendant (institution, health care professional) breached the duty of care owed to the plaintiff, by failing to meet the requisite standard of care
- Health care providers must exercise that degree of care and skill which would reasonably be expected of a normal, prudent practitioner – established by expert evidence
- Guidelines or Standards of Practice will help determine the legal standard of care including the appropriateness of a health care practice
- Departure from standards or guideline will be strong evidence of failure to meet the standard required

- In institutional setting, nurses, physicians, other staff must meet the standard of care that would be exercised by a reasonable person in all the circumstances of the case.
- Health care facilities have an obligation to provide a safe environment to protect patients from harm in the course of receiving care, including by:
 - Establishing necessary systems and protocols for patient safety
 - Taking reasonable steps to ensure that staff (including medical staff) comply with these protocols.

Standard of Care: *Glover v. Toronto (City)*

Facts:

- October 2005 outbreak of Legionnaires at Seven Oaks Home for the Aged operated by the City of Toronto
- 70 residents, 21 visitors, 39 staff and 5 community members infected. 23 residents died
- Toronto investigated the outbreak – cause unknown for ten days

Basis of claim:

- Toronto was negligent in failing to use correct test on urine samples to identify the cause of the outbreak in a timely manner
- Toronto breached contract, failed to perform statutory and contractual duties to provide safe and healthy environment for residents

Standard of Care: *Glover v. Toronto (City)*

Plaintiff's Expert Evidence:

- Toronto failed to implement reasonable maintenance and monitoring procedures in accordance with accepted industry standards to minimize and control Legionnaires
- Source of outbreak was cooling tower at Seven Oaks

Contractual Issue:

- Residents' Bill of Rights provided "Every resident has the right to live in a safe and clean environment"
- Plaintiffs will argue that this is a contractual term to provide clean, uncontaminated air

Standard of Care: *Glover v. Toronto (City)*

- **Defendants opposed certification of the class on the basis that:**
 - Class definitions were overly broad
 - Class members did not have common issues
 - Class action not preferable procedure
 - Lack of evidence for certification
- **Defendants argued:**
 - Legionella is ubiquitous and there were other sources in proximity to Seven Oaks, so their negligence (if proved) may not be cause of harm suffered
 - Likely that some class members actually contracted an unrelated illness with similar symptoms

Standard of Care: *Glover v. Toronto (City)*

The Court held:

- Plaintiffs established requirements for certification
- Fact that some class members will be unable to prove that they contracted the disease, or that they contracted it from Seven Oaks, means their claims will not succeed, but class action may proceed



Generally determined on a case by case basis, to compensate for:

- Damages for Pain and Suffering - “general damages” – capped at \$100,000 1978 dollars, or approx. \$330,000 today
- Loss of past wages and future wages
- Costs of future care
- Out of pocket medical costs
- A portion of legal fees

For wrongful death, damages available to dependants/family members for:

- Loss of care, guidance and companionship
- Loss of financial support
- Loss of valuable services

- In class proceeding, amount of damages claimed by each class member will vary in accordance with their individual circumstances. Proof of loss will be individual
- Liability is limited to losses that were foreseeable consequences of the defendant's negligent act



Damages: *Glover v. Toronto (City)*

- Note limited compensation available where person who dies has no dependents and provides little or no services and support to family members
- In Seven Oaks case, Court recognized that average age of confirmed cases of Legionnaires' disease was 84.5 years, and damages are therefore likely to be very modest
- But Court noted that a class proceeding could achieve behaviour modification, encourage those responsible for the well-being of elderly residents (at risk of Legionnaires' disease) to take greater care in preventing an outbreak

- Plaintiff must establish that defendant's breach of the standard of care caused damages suffered by plaintiff
- Requires establishing that "but for" the defendant's breach, the plaintiff would not have suffered the harm he or she suffered
- Where two or more defendants were negligent and it is impossible to establish outcome but for one defendant's negligent act, Courts permit plaintiff to establish that defendant "materially contributed" to the harm suffered

Causation: *Glover v. Toronto (City)*

Causation Issue:

- Did delay in identifying cause of outbreak cause increase in morbidity and mortality? If not, breach of standard of care did not cause damages or harm class members may have suffered.

Civil Liability for IAIs

Conclusion

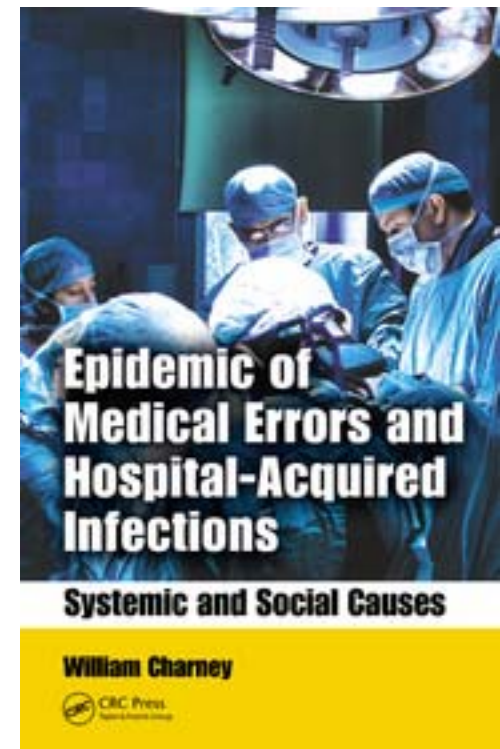
- Where elderly, ill patient or resident with no income or dependents, damages may not justify bringing individual action but class proceeding may be available to group of residents or patients
- Expert evidence will be required to establish that staff or institution breached standard of care or contractual duties
- Causation will be major hurdle: where infections can have multiple causes, to attribute liability to institution requires showing that harm suffered was result of negligence

The Balancing Act: Safeguarding Patients' Privacy while Protecting Them from Infection

IAIs: Challenges in Health Care

- IAIs estimated to effect 320,000 patients per year, costing nearly 1.5 billion dollars and killing between 8,000 and 12,000 people – 3rd leading cause of death in Canada

– Charney, *Epidemic of Medical Errors and Hospital Acquired Infections: Systemic and Social Causes*



IAIs: Challenges in Health Care

- “Preventable infections are out of control in Canadian Hospitals” –British Medical Journal, April 2005
- “it’s a silent epidemic of a sort, which in sheer numbers puts it as the 4th leading cause of death”
 - **Dr. Dick Zoutman**, Ontario Provincial Infectious Diseases Advisory Committee

Prevention of IAIs

- Failure to follow Standards, Guideline for Prevention puts residents and patients at risk of harm and staff and institutions at risk of liability
- But constraints of delivering health and long-term care challenges institutions' ability to prevent IAIs:
 - Overcrowding: Decrease in number of acute care beds in OECD countries and especially in Canada,
 - 1986: 6.6 hospital beds per 1000 people
 - 1995: 4.1 hospital beds per 1000 people
 - 2012: 2.7 hospital beds per 1000 people
 - High hospital occupancy rates

- **Overcrowding results in:**
 - Higher IAI transmission directly
 - Undermining infection control practices such as hand hygiene, patient cohosting, and environmental cleaning
 - Identified as cause of *C. difficile* at Joseph Brant Memorial Hospital in Burlington, Ontario in May, 2006

Privacy: Not a Barrier to Patient Safety

- **Two Stage Assessment:**

1. In what way does privacy impede patient safety?
2. How can PHIPA permit necessary steps to be taken?

- **Recall primary purpose of PHIPA:**

(a) to establish rules for the collection, use and disclosure of personal health information about individuals that protect the confidentiality of that information and the privacy of individuals with respect to that information, while facilitating the effective provision of health care

Privacy: Not a Barrier to Patient Safety

- **PHIPA permits disclosure:**
 - for reporting pursuant to *Health Protection and Promotion Act*
 - if the custodian believes on reasonable grounds that the disclosure is necessary for the purpose of eliminating or reducing a significant risk of serious bodily harm to a person or group of persons

Privacy: Not a Barrier to Patient Safety

Assess:

- Why is disclosure necessary?
- What person or group is at risk of harm?
- Is the harm anticipated serious bodily harm or death?
- To whom must disclosure be made to reduce risk of harm?
- How will disclosure eliminate or reduce harm?
- What is the basis for this belief (reasonable grounds)
- Can risk of harm be reduced **without** disclosing a person's PHI without consent?

Concluding Summary

- Delivering health or long-term care in institutional setting is made more challenging due to overcrowding, resource constraints and the ever-present risk of IAIs
- Privacy and Confidentiality are the rights of patients and residents and the obligation of staff and institutions
- Where breach of privacy is necessary for patient safety, it can be permitted under PHIPA
- But typically, safety measures and appropriate precautions can be taken that do not require the disclosure of individuals' PHI without consent
- Transparency in Information Practices and a Culture of Privacy need not be sacrificed in the name of Patient Safety.



For More Information

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