Good Faith/Bad Faith — Varying Privileges Could Result in Significant Civil Liability

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Two recent decisions highlight the importance of hospitals acting in good faith regarding physician privileges — each of which is explored in further detail below.

The *Horne* case demonstrates that Canadian courts recognize the intrinsic value of hospital privileges to a physician's reputation and professional success. Just as the Court of Appeal for Ontario's decision in *Rosenhek* gathered widespread attention for demonstrating that loss of income damages for the wrongful revocation of privileges could reach the heights of $3 million, the *Horne* case illustrates that damages for loss of reputation or career can also form a significant civil damages award. While the outcome for the hospital was not favourable in the *Horne* decision, the *Beattie* decision confirms that courts may provide hospitals protection for actions taken pursuant to the legislation in good faith.

Both the *Horne* and *Beattie* cases highlight that hospital boards and administrations must be careful in their decisions and actions to cancel, revoke, refuse, or vary physician privileges. Hospitals must recognize the broad impact of their decisions on the shape of a physician's career and that failing to exercise their powers in good faith may expose hospitals to considerable claims for civil damages.

Horne v Queen Elizabeth II Health Sciences Centre

In *Horne v Queen Elizabeth II Health Sciences Centre*, 2018 NSCA 20, the Nova Scotia Court of Appeal held that $800,000 was an appropriate award of damages for a physician's loss of reputation and research career arising from a "bad faith" summary variation of hospital privileges. This is the highest award of damages for loss of reputation in Canada. The decision highlights the need for hospital boards and administrations to follow proper process and consider the broad impact of their decisions to vary privileges, as failing to do so could result in significant civil liability.

Background

In 2001, Dr. Horne was a clinical and research cardiologist at Halifax's Queen Elizabeth II Hospital (the "Hospital"), operated by the Capital District Health Authority (the "Health Authority"). The majority of her work consisted of research. Her research relied heavily

on her privileges at the Hospital's Heart Function Clinic (the "Clinic"), as she recruited research participants from the Clinic.

The issues with Dr. Horne's privileges stemmed from a conflict between her and the Clinic's director. The Clinic's director made multiple escalating complaints to Dr. O'Neill, Dr. Horne's division head, that Dr. Horne was disrespectful and refused to collaborate. Despite a known conflict of interest between the Clinic's director and Dr. O'Neill, Hospital management agreed with the director's recommendation to terminate Dr. Horne's privileges at the Clinic, varying her overall privileges at the Hospital. The decision was officially communicated to Dr. Horne on October 21, 2002, and reported to the College of Physicians and Surgeons of Nova Scotia the following day.

Dr. Horne's privileges were varied pursuant to article 8.1 of the *Medical Staff (Disciplinary) Bylaws for the District Health Authorities* (the "Bylaws"), under section 23(a) of the former *Health Authorities Act*. Article 8.1 permitted the immediate suspension or variation of privileges where a physician's conduct could endanger the safety of patients or negatively impact the delivery of patient care. Dr. Horne challenged the variation of her privileges through the administrative process in the Bylaws. Four years after her privileges were varied, the Health Authority's Board of Directors (the "Board") re-instated Dr. Horne's privileges on the basis that her behaviour was not sufficiently problematic to justify invoking article 8.1.

Despite the re-instatement, Dr. Horne's research career had already suffered irreparable damage. Her participant recruitment rate dropped from one or two patients *per week*, to one or two patients *per year*. Dr. Horne lost her research grants and she ultimately shut down her lab in June 2004.

Litigation

Dr. Horne sued the Health Authority for damages, alleging breach of contract and exercise of statutory power in bad faith. On June 17, 2016, after a 33-day trial, a jury awarded Dr. Horne $1.4 million in damages against the Health Authority for administrative bad faith. Dr. Horne appealed and the Health Authority cross-appealed to the Nova Scotia Court of Appeal.

The Court of Appeal's Decision

Administrative Bad Faith versus Breach of Contract

The Court of Appeal affirmed the trial judge's decision that wrongful summary variation of privileges should be assessed as an exercise of administrative bad faith, not breach of contract. The Court cited the case of *Rosenhek v Windsor Regional Hospital*, 2010 ONCA 13 ("*Rosenhek*") for the principle that a bad faith exercise of a statutory power to vary privileges can provide a legal basis for a tort claim.

Damages for Loss of Reputation and Loss of Research Career

The Court of Appeal held that the trial judge failed to properly instruct the jury on the legal distinction between claimable and unclaimable features of the loss to Dr. Horne's research career. The Court of Appeal considered "loss of research career" and "loss of reputation" as mixed components of Dr. Horne's general damages award. The Court

stressed the personal function of career and reputation, as both are vital elements of an individual's self-worth and sense of identity. However, damages for "restoration of her research career," were properly rejected by the trial judge. The Court of Appeal set aside the award of $1.4 million and analyzed the extent of Dr. Horne's losses to determine the proper quantum of $800,000.

Further, the manner in which Dr. Horne's privileges were varied elicited a negative public impression of Dr. Horne. An application of article 8.1 suggested to her colleagues, staff, patients and the public that her privileges were varied on an "emergent" basis because her conduct constituted a potential risk to patient safety and negatively impacted the delivery of patient care. This impression remained even after the Board re-instated her privileges in 2006. To the Court of Appeal, the Health Authority caused significant and lasting damage to Dr. Horne's reputation as "being termed a risk to patients pierces the heart of what is expected of a physician."

Beattie et al. v Women's College Hospital

By contrast, in the recent decision of *Beattie et al. v Women's College Hospital*, 2017 ONSC 6723, the Ontario Superior Court of Justice confirmed a hospital's protection from a civil proceeding where it had not acted in bad faith in cancelling the privileges of two physicians pursuant to subsection 44(2) of the *Public Hospitals Act* ("PHA").

The Court found that the claim was barred by the operation of section 44 of the PHA. Under subsections 44(1.2) and 44(2), when the board of a hospital determines that the hospital will cease to provide a service, that board may cancel, revoke, substantially alter or refuse the hospital privileges of any physician that relate to the provision of that service. Subsection 44(5) provides a hospital with immunity from a proceeding for damages where a decision is made pursuant to subsection 44(2). However, subsection 44(5) specifically provides that the act under subsection 44(2) must be done in good faith.

The Court found that the hospital had cancelled the privileges of the physicians under subsection 44(2) and it was entitled to protection under subsection 44(5). Therefore, the physicians' claim was statute-barred by the PHA. In making this finding, the Court specifically considered whether there was bad faith on the part of the hospital. The Court found there was no evidence that the hospital board did not act in good faith.

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