Ontario decision: Common law quality assurance privilege to protect quality of care reviews

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In a decision released on April 17, 2023, sitting in an appellate capacity, Justice Robert Centa of the Superior Court confirmed that Ontario's *Quality of Care Information Protection Act* (QCIPA) did not eliminate the common law quality assurance privilege often relied upon by hospitals and healthcare professionals to protect confidential quality of care reviews. The Divisional Court has denied leave to permit a further appeal of the matter.

This decision confirms that there is a myriad of ways in which hospitals and healthcare professionals can come together to have frank discussions about challenging cases with the goal of identifying possible improvements in patient care. Discussions and records generated in the context of such quality of care activities will continue to be protected from disclosure in legal proceedings, so long as they meet the *Wigmore* criteria for establishing the case-by-case privilege at common law.

Background

The appeal concerned two motions – heard together – in two separate medical negligence actions, both of which centred on events surrounding the births of the minor plaintiffs.

During the discovery processes, the plaintiffs sought production of documents generated in the context of quality of care activities: an Incident Analysis Team meeting and Morbidity & Mortality rounds in one case, and a quality of care review in the other. In each instance, the defendant hospital and healthcare professionals opted not to invoke the statutory privilege set out in QCIPA. The defendants nevertheless refused to produce the underlying documents or answer certain questions about the quality of care reviews, claiming the quality of care reviews were protected by the common law quality assurance privilege.

The plaintiffs then brought refusals motions seeking orders to compel the production of the underlying documents and information. The plaintiffs argued that QCIPA eliminated the common law quality assurance privilege and, in any event, the quality of care

reviews at issue would not satisfy the *Wigmore* criteria. The defendants argued the contrary: that QCIPA did not eliminate common law quality assurance privilege and the quality reviews were all privileged on that basis.

The Associate Justice at first instance agreed with the defendants, holding that non-QCIPA quality assurance activities could still attract privilege under the common law if the *Wigmore* criteria were satisfied. The appellants then brought these appeals.

The evolution of QCIPA

When the provincial legislature first enacted QCIPA in 2004, its goal was to encourage the sharing of information and documents within healthcare organizations by assuring health professionals that such quality of care discussions could not be disclosed and used against them.

In 2008, the legislature amended Regulation 965 of the *Public Hospitals Act* to require the disclosure of "critical incidents" to patients, including disclosure of the material facts of what occurred, the consequences for the patient, the actions taken and recommended to be taken to address those consequences, and the systemic steps, if any, that the hospital has taken to avoid or reduce the risk of further similar critical incidents.

Six years later, the legislature convened a committee to review practices relating to the implementation of QCIPA and "its intersection with other related legislation". Following the committee's report, the legislature re-enacted QCIPA in 2016 to clarify the types of information that would not be protected under QCIPA, including the required disclosure about "critical incidents", as outlined in Regulation 965.

However, nowhere in any version of QCIPA did the legislature include any language relating to QCIPA's interactions with the common law quality assurance privilege. In advancing their argument that QCIPA eradicated the common law quality assurance privilege and was a "complete code" for hospital quality of care activities, the plaintiffs relied upon the preamble of the 2016 version of QCIPA and various statements made in legislative debates.

The appeal decision

Justice Centa dismissed both appeals, upholding the Associate Justice's conclusion that QCIPA did not eliminate the common law *Wigmore* privilege in the healthcare context.

Justice Centa emphasized that the "legislature is presumed not to alter the common law unless the language of the statute demonstrates clearly and unambiguously that it intended to do so," and that QCIPA is void of any such unambiguous provision.

Applying the *Wigmore* test, Justice Centa found that all four criteria necessary to establish the common law privilege were satisfied:

1. The communications at issue all originated in a confidence that they would not be disclosed.

2. Confidentiality was essential to the quality assurance activities and to ensuring full and frank participation by the healthcare professionals involved.
3. The relationships among healthcare professionals in non-QCIPA quality assurance or improvement processes help hospitals to achieve the objective of providing quality care to patients and should be sedulously fostered.
4. The injury that would result from disclosure outweighs the benefits of such disclosure, particularly as the facts contained in the quality assurance documents were available elsewhere. Justice Centa agreed with the Associate Justice's conclusion that the benefit that would be gained if the documents were disclosed was very modest given that the plaintiffs already had access to the facts relating to their medical care. Among other things, the Associate Justice noted that the medical records had already been produced and the individual defendants were available to be discovered. Conversely, substantial injury would result if the quality assurance reviews were disclosed because that would serve to restrict the flow of information among healthcare professionals and diminish the effectiveness of the quality assurance processes in improving patient care.

Having found the common law *Wigmore* test for case-by-case privilege was satisfied, Justice Centa held that the documents and underlying communications were protected from disclosure and dismissed the appeals.

Takeaways

The common law quality assurance privilege remains available to hospitals and healthcare professionals wishing to protect certain quality of care information and documents from disclosure in legal proceedings. In affirming this result, the Ontario Superior Court confirmed that QCIPA is not the only means by which hospitals and healthcare professionals can protect quality assurance activities.

The common law quality assurance privilege does not attach automatically. Each case will turn on its own facts and the *Wigmore* criteria must still be satisfied.

Hospitals and healthcare professionals who wish to rely on the common law privilege should ensure that there are clear expectations regarding confidentiality of the underlying communications and processes. Factors that help to indicate confidentiality include labelling documents as "confidential", strictly limiting the people with whom such documents are shared, and emphasizing the importance of confidentiality at the outset of review meetings, as well as in the policies and procedures pursuant to which quality assurance activities are undertaken.

BLG's Keegan Boyd and Henry Ngan represented the hospitals on this motion and appeals. Keegan, Henry or any member of BLG's health law team would happily assist with queries relating to these issues.

By

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