A New Tort:  
The Unauthorized Disclosure of Medical Information and  
Implications for Electronic Medical Records  

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Whatever, in connection with my professional service, or not in connection  
with it, I see or hear, in the life of men, which ought not to be spoken of abroad, I  
will not divulge, as reckoning that all such should be kept secret.  
-The Hippocratic Oath, circa 400 B.C.

I.  HISTORICAL PROGRESS OF TECHNOLOGY AND CONFIDENTIALITY LAW

Tort actions against those who breach confidentiality are nothing new;  
indeed, remedies for improperly divulging confidential information began to  
emerge as early as the eighteenth century.¹ Historically, many developments in  
breach of confidence law have followed the technological progress that made  
such breaches more common.² For example, by 1890, postal confidentiality and  
literary property laws began protecting the confidentiality of letters in response to  
the difficulty of properly sealing letters and the lack of mailboxes (requiring  
delivery to public places, such as bars and coffee houses).³

The invention of the telegraph in 1844 presented new issues as every  
telegraphic dispatch was viewable not only to the sender and the receiver, but to

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² Id. at 140-141.
³ Id.
the telegraph company as well.\(^4\) As a result, telegraphic communications became increasingly protected by law.\(^5\) By 1879, two-thirds of the states had passed laws imposing a nondisclosure obligation on telegraph company employees in order to protect the “inviolability” of telegrams.\(^6\) As these developments show, “by 1890 both public opinion and significant statutory law gave substantial protection to telegraphic confidentiality.”\(^7\)

The tort of medical breach of confidentiality began to emerge by the early twentieth century.\(^8\) In 1920, the Nebraska Supreme Court held that because doctors were “bound” by “professional honor and the ethics of [their] high profession” to maintain patient confidentiality, a “wrongful breach of such confidence, and a betrayal of such trust, would give rise to a civil action for damages naturally flowing from such wrong.”\(^9\)

II. TECHNOLOGY AND MODERN BREACH OF CONFIDENTIALITY TORTS

In 1985, the Supreme Court of Massachusetts held that a physician owes a patient a duty not to disclose confidential information gained through their physician-patient relationship, and “a violation of that duty gives rise to a cause of action sounding in tort.”\(^10\) The recognition of similar torts throughout the country has since grown common.\(^11\)

As with modern mail and the telegraph, breach of medical privacy and confidentiality law has evolved to meet some of the newer issues presented by e-mail and the internet. Recently, Georgetown University Hospital suspended a trial program with an electronic prescription-writing firm after a computer

\(^4\) Id. at 144.
\(^5\) Id.
\(^6\) Morris Gray, A Treatise on Communication by Telegraph 212-13 (1885).
\(^7\) Richards & Solove, supra note 1, at 145.
\(^8\) Id. at 151-52.
\(^11\) Richards, supra note 1, at 158.
consultant stumbled across confidential data belonging to thousands of patients.\textsuperscript{12} Generally, e-prescribing allows doctors to write and renew drug prescriptions electronically and transmit them to participating pharmacists for fulfillment. In this case, the private medical information of many as 23,000 patients was left viewable to the public.\textsuperscript{13} While such examples remain relatively rare, accidental dissemination of electronically maintained medical files has the potential to create massive breaches of patients’ privacy and confidentiality. In response to this threat, HMOs, clinics, hospitals, and doctors have implemented strict policies about what information can be stored electronically and where the information can be stored.\textsuperscript{14}

Despite numerous attempts to regulate the dissemination of electronically maintained medical information, by both state and federal government, the Government Accountability Office (GAO) reported that approximately 570 data breaches have been reported by the media from January 2005 through December 2006.\textsuperscript{15} These breaches have affected medical facilities and other institutions, though the precise number of patients’ records that have been breached improperly remains unknown.\textsuperscript{16}

Without precise records, it is difficult to quantify the extent to which private and confidential medical records have been breached or how many potential causes of action there may be against doctors and medical institutions. Clearly though, these sorts of breaches are becoming more common with the emergence of electronic prescriptions and maintenance of medical records.\textsuperscript{17} Also, evidence shows that the emerging market for private companies to maintain

\begin{itemize}
  \item[13] \textit{Id}.
  \item[16] \textit{Id}.
  \item[17] \textit{Id} at 5-6.
\end{itemize}
these records increases the danger of a breach. While any entity that bills for health care services, such as doctors, hospitals, or insurers, are bound by the federal Health Insurance Portability and Accountability Act (HIPAA), companies that only maintain health records are not covered by that law, which means people must rely on corporate privacy policies and a company’s good faith.

III. Ohio’s Recent Supreme Court Decisions

The Supreme Court of Ohio recently held that an attorney’s unauthorized disclosure of medical information learned during litigation could be the basis of a tort. This Supreme Court of Ohio decision follows the growing country-wide trend to recognize a separate tort for breach of privacy and confidentiality related to medical records. As HIPAA and federal privacy laws generally contain no private right of action, this decision helps open the door for more suits based upon breaches of confidentiality. The court held:

With these considerations in mind, we hold that when the cloak of confidentiality that applies to medical records is waived for the purposes of litigation, the waiver is limited to that case. An attorney can certainly use medical records obtained lawfully through the discovery process for the purposes of the case at hand. However, an attorney may be liable to an opposing party for the unauthorized disclosure of that party’s medical information that was obtained through litigation.

In 1999, the same court also recognized a tort for breach of privacy and confidentiality related to medical records. The court explicitly recognized that an “independent tort exists for the unauthorized, unprivileged disclosure to a third party of nonpublic medical information that a physician or hospital has learned

19 Id.
22 Hageman, 893 N.E.2d at 157.
23 Biddle, 715 N.E.2d at 519.
through a physician-patient relationship."  

While the court reinforced the existence of a common law tort for breach of confidentiality, it preserved the traditional statutory and common law exceptions to physician-patient confidentiality.  

The court found that a physician or hospital may disclose confidential medical information to comply with a statutory mandate or common-law duty, or to protect a countervailing interest that outweighs the patient's interest in confidentiality.

The court also extended liability under this new tort beyond physicians. Now, in fact, a third party can be held liable under this tort for inducing the unauthorized, unprivileged disclosure of confidential medical information when that information was learned by a physician or hospital through a physician-patient relationship. To prove this cause of action against a third party, the plaintiff must prove:

“(1) the third party knew or reasonably should have known of the existence of physician-patient relationship; (2) the third party intended to induce physician to disclose information about the patient or the third party reasonably should have anticipated his actions would induce the physician to disclose such information; and (3) the third party did not reasonably believe the physician could disclose that information to the third party without violating duty of confidentiality that the physician owed the patient.”

The Supreme Court of Ohio’s creation of a breach of medical privacy and confidentiality tort appears to be a part of a recent effort, focused primarily on physicians and other occupations where a duty of confidentiality exists, to deter such breaches. It is likely that the trend towards electronic maintenance of medical records, and other advances in technology, will spur further adjustments in the law to meet these new challenges.

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24 Id.
25 Id.
26 Id. at 402.
27 Id. at 408.
28 Richards & Solove, supra note 1, at 157.