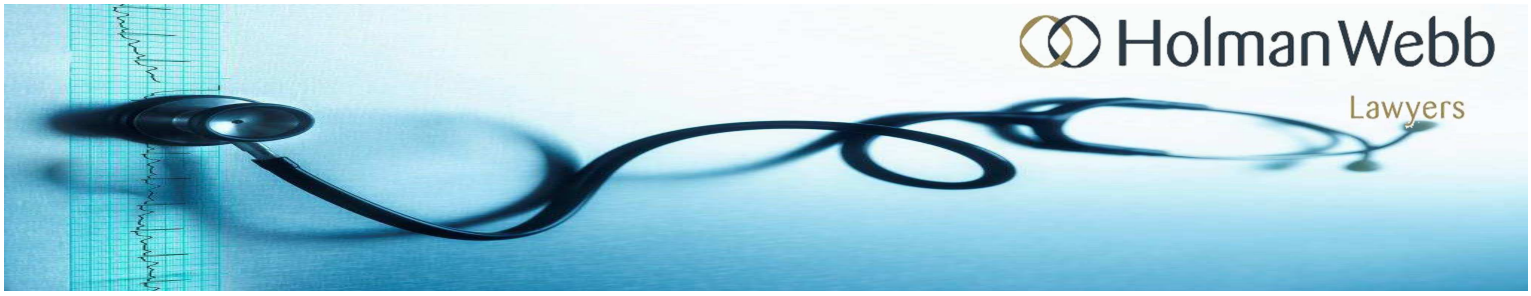

Health Law Alert

THE HIGH COURT DECIDES THAT A HOSPITAL IS NOT LIABLE FOR VIOLENT ACTS OF A DISCHARGED MENTAL HEALTH PATIENT

***Hunter & New England Local Health District v Merryn Elizabeth McKenna*, and *Hunter & New England Local Health District v Sheila Mary Simon & Anor* [2014] HCA 44 12 November 2014**

By Zara Officer, Special Counsel

In a decision that will be welcomed by mental health professionals discharging patients into the community, the High Court has recently ruled that hospital and medical staff do not owe a duty of care to protect other persons from harm caused by a mentally ill person on discharge.

Phillip Pettigrove (**Phillip**) had a long history of chronic paranoid schizophrenia for which he was treated in his home town of Echuca in Victoria. In July 2004 Phillip was in NSW with his friend, Stephen Rose. Phillip was admitted involuntarily and detained in the Manning Base Hospital at Taree (**hospital**). Phillip's medical records were obtained from the Echuca Community Mental Health Service and a decision was made by the treating team, his mother and with his friend, Stephen Rose, to keep Phillip in the hospital overnight. Stephen Rose would then drive Phillip back to his mother's home in Echuca where he would have continuing treatment. Following discharge, Stephen Rose picked Phillip up at the hospital and they set off for Echuca by car. During the course of the journey Phillip killed Stephen Rose on impulse, believing Stephen Rose had killed him in a past life. Later Phillip took his own life.

Relatives of Stephen Rose brought proceedings against the hospital for mental harm arising from their emotional reaction to the murder of Stephen Rose. Stephen's mother and two sisters brought proceedings in the District Court. The trial judge, Elkaim DCJ, found there was no breach of duty, and judgment was entered in favour of the hospital. On appeal to the NSW Court of Appeal, the majority ordered there be judgments for the relatives. The hospital appealed to the High Court.

The High Court unanimously held there was no common law duty of care owed by the hospital or medical staff to protect other persons against harm that a mentally ill person might cause on discharge. The reasoning behind this ruling lies in the provisions of the *Mental Health Act 1990 (NSW)* (**Act**) which requires (amongst other things) that any restriction on the liberty of patients and other persons who are mentally ill or mentally disordered and any interference with their rights, dignity and self-respect are kept to a minimum necessary in the circumstances. Section 20 of the Act prohibits the detention of a mentally ill person "unless the medical superintendent is of the opinion that no other care of a less restrictive kind is appropriate and reasonably available to the person". It is inconsistent with the performance of that obligation to impose a duty of care on the hospital or medical staff to take reasonable care to protect others from the risk of physical harm, or mental harm such as that suffered by Stephen Rose's family. Therefore the High Court found that the hospital and the treating psychiatrist did not owe the relatives of Stephen Rose a relevant duty of care.

HOSPITALS SHOULD KEEP HEALTH CARE RECORDS RELEVANT TO A PARTICULAR PATIENT

***AJD v Royal Prince Alfred Hospital* [2014] NSWCATAD 123 2 September 2014**

By Alison Choy Flannigan, Partner

Royal Prince Alfred Hospital (**RPA**) treated AJD, a female patient who suffered from a serious and chronic illness and who also delivered two children at RPA's maternity unit. AJD and the children's father were divorced but both parents had equal custodial rights and responsibilities for the children. The father lodged requests for the children's medical records and in response to that request, RPA supplied copies of its medical records of the children to the father. RPA did not contact AJD, informing her about the release of her information. The records, relating to the time around the children's births, contained information relating to the health of both the children and the mother, indicating that she suffered from a serious chronic illness.

ADJ maintained that the father had been hostile to her for many years, with a history of violent behaviour, and he had used that information to further attack her. She alleged that he used the information in the Federal Magistrate's Court and the Family Court to pursue sole parental responsibility for the children.

The Privacy Commissioner's view is that it is best practice to ensure that only information that relates to the individual concerned is held in a health record. That is, where a third party's information (whether personal or health), is collected, it is included with their health information. If health information relates to another person it should be noted separately for the purposes of identification. Information relating to a third party (whether health or personal) should be redacted before it is released to protect the privacy of the third party.

Senior Member Montgomery held that that there needs to be consideration of the specific context and the relevant facts. In his view, to the extent that an individual's information was "collected to provide, or in providing, a health service" to their child, that health information could also be the health information of the child. For example, a mother's health information that relates to an illness or hereditary condition could be relevant to the provision of a health service to her child. In his view, that health information of the mother could also be the health information of the child.

In addition, to the extent that a mother's conduct during a pregnancy has the potential to effect the child's health, the information could be relevant to the provision of a health service to the child. In Senior Member Montgomery's view, the information that was the subject of the application was AJD's health information and was relevant to the provision of health services to the children and was reasonably collected for that purpose. To the extent that AJD's health information was relevant to the provision of those health services, it was his view that the health information was health information of both AJD and the children. It was not in dispute that the father was entitled to obtain a copy of the children's health records.

Therefore, there was no breach of HPP11 of the *Health Records and Information Privacy Act 2002 (NSW)*. Although section 54 of the *Government Information (Public Access) Act 2009 (NSW)* required RPA to take such steps as were reasonably practical to consult AJD before

providing the father with access to the information, the public interest in the children being able to access their own health information is overriding. He agreed that any interest AJD might have in maintaining her privacy could not outweigh the public interest in disclosure to the children. For this reason, it was not reasonably practical to consult AJD before providing the father with access to information.

He noted the Privacy Commissioner's reference to the Health Policy Directive and the requirement that health care records be relevant to the particular patient and only including personal information about other people when relevant and necessary for the care and treatment of the patient.

Some of AJD's health information was included on the children's records was neither relevant nor necessary for the care and treatment of the children. It is also possible that some of this information was already known to the father and if that was the case there could be no breach of HPP11.

Whilst some of AJD's health information was held on one or both of the children's records, the information does not take on the status of being the children's health records merely from inclusion on those records. In order to fall within the definition of "health information" the information must have relevance to the particular health service provided.

Some of AJD's health information could never be relevant to any health service provided to the children and should not have been released with the children's health records.

RPA was only authorised to release that part of the records that contained the children's health information. It was not permitted to release that part of the children's medical records that contained AJD's health information if it was not also the children's health information. In this respect HPP11 was breached. By retaining AJD's health information on the children's health record, RPA failed to ensure the security of AJD's health information against unauthorised use and disclosure.

Holman Webb Health, Aged Care & Life sciences team wins award!

The Holman Webb Health Law team has recently been successful in being awarded '*Healthcare Law – Law Firm of the Year in Australia* ' 2015 by Corporate Intl Magazine.

Sydney

Level 17 Angel Place
123 Pitt Street
Sydney NSW 2000
T:+61 2 9390 8000
F: +61 2 9390 8390

Melbourne

Level 10
200 Queen Street
Melbourne VIC 3000
T:+61 3 9691 1200
F: +61 3 9462 3183

Brisbane

Level 13
175 Eagle Street
Brisbane QLD 4000
T:+61 7 3235 0100
F: +61 7 3235 0111