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The New Tort of Invasion of Privacy in Ontario

On January 18, 2012, the Court of Appeal for Ontario released its decision in *Jones v. Tsige*1. The decision recognized a tort action for invasion of privacy called "intrusion upon seclusion". While it is somewhat premature to predict the potential consequences of this decision for healthcare providers and healthcare institutions, it is possible that the decision will have implications in the healthcare context in Ontario despite remedies available for breach of confidence and under the *Personal Health Information Protection Act* ("PHIPA").

The facts of the Jones case are quite simple. Jones and Tsige were employees of the same Bank but did not know each other. In 2009, Jones discovered that Tsige had accessed her banking records at least 174 times contrary to the Bank's policy. Tsige admitted that she had accessed Jones' account information without a legitimate reason for doing so. The Bank suspended Tsige and denied her a bonus. Jones claimed that her privacy interest in her banking information was "irreversibly destroyed" and claimed $70,000 for invasion of privacy and breach of fiduciary duty and $20,000 in punitive and exemplary damages.

The central issue before the Court of Appeal was whether Ontario law recognizes a cause of action for invasion of privacy. Sharpe J.A., writing for the Court, concluded that it is appropriate for Ontario to recognize such a cause of action.

Sharpe J.A. found a clear trend in Canadian case law leaving open the possibility of a common law right of action corresponding to intrusion upon seclusion. He also held that existing statutory privacy regimes do not preclude the development of the common law in this area. He reviewed PHIPA, the *Personal Information and Electronic Documents Act* ("PIPEDA"), and several other Ontario and federal privacy statutes. He concluded that PIPEDA did not provide an adequate remedy for Jones. He noted that current privacy legislation in Ontario generally relates to obligations imposed upon organizations and has little to do with private rights of action between individuals.

Justice Sharpe adopted a four tort catalogue suggested by William L. Prosser to encompass the different elements and interests of privacy. He concluded that Jones

had a right of action under the tort of "intrusion upon the plaintiff's seclusion or solitude, or into his private affairs". He set out the key features of this new tort as follows:

- the defendant's conduct must be intentional, which includes recklessness;
- the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and
- a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish.

Sharpe J.A. clarified that proof of harm to economic interest is not an element of the cause of action. Given the intangible nature of the interest protected, he set the upper limit on damages for intrusion upon seclusion at $20,000. Sharpe J.A. awarded damages of $10,000 against Tsige, whose conduct was found to be "deliberate, prolonged, and shocking".

Causes of action may already exist that provide plaintiffs with a means of seeking redress for breach of privacy regarding personal health information. It is therefore arguable whether the decision in *Jones* will have a significant effect on the privacy regime relating to personal health information in Ontario.

Custodians of personal health information have a common law fiduciary duty to hold that information in trust for patients. This duty encompasses a duty to act with the utmost good faith and loyalty and to hold information received in confidence. This duty of confidentiality has been the ground for successful damage awards outside Ontario.

Justice Sharpe did not comment on the place this new cause of action would have where there exists a statutory action addressing particular breaches of privacy. PHIPA generally allows for an action with respect to breaches of its provisions regarding personal health information.5 Indeed, PHIPA imposes obligations upon health information custodians and their employees and other agents with respect to collection, use, disclosure and management of personal health information. Where a

final order or conviction on an offence under PHIPA results, a complainant is permitted to commence an action for damages for "actual harm" suffered due to the contravention.6 Where the contravention was willful or reckless, damages for mental anguish up to $10,000 may be awarded.

The new tort of intrusion upon seclusion may prove to be less relevant in a health care setting. A range of existing causes of actions may be used by plaintiffs to address breaches of medical confidentiality. The new tort may however be used to interpret statutory privacy legislation and may be used to determine a reasonable range of damages.