

Breach of privacy claim dismissed where unauthorized access was fleeting and incidental

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30 March 2022

From 2007 through 2016, a nurse in Ontario stole opioids from her hospital employer on an almost daily basis, during which time she accessed the individual records of over 11,300 patients. To effect the theft of the opioid pills, the nurse would access a patient's name and identification number, the hospital unit they had visited, and if applicable, any allergy information. Sometimes the screen would also show any medication they had taken during the last 32 hours. The nurse could then move on to have the hospital's automated dispensing machine release medication to her without letting anyone know that it was for her own use.

The hospital terminated the nurse's employment upon discovering the protracted series of thefts. The nurse was prosecuted and convicted of theft under the [Criminal Code](#) and is no longer registered to practice with the College of Nurses of Ontario. The hospital itself underwent considerable regulatory scrutiny by the Ministry of Health, and improved its storage, prescription, dispensing, and safekeeping protocols for prescription drugs as a result of its discovery and reporting of the nurse's conduct.

In April 2017, the hospital sent a letter to every patient whose file or digital records had been accessed by the nurse to supply herself with the opioids.

A class action was subsequently commenced against the hospital and the nurse by a proposed class consisting of the recipients of the letter. The proposed class action sought damages for the tort known as "intrusion upon seclusion," based on the nurse's unauthorized access to their private medical records, and negligence.

On 6 January 2020, the Ontario Superior Court of Justice certified the action as a class proceeding and dismissed a summary judgment motion brought by the defendants. In doing so, the certification judge certified the intrusion upon seclusion claim but not the negligence claim: [Stewart v. Demme, 2020 ONSC 83 \(CanLII\)](#).

The defendants successfully appealed the certification decision to the Divisional Court: [Stewart v. Demme, 2022 ONSC 1790 \(CanLII\)](#).

The tort for intrusion upon seclusion was affirmed by the Ontario Court of Appeal in [Jones v. Tsige, 2012 ONCA 32 \(CanLII\)](#) for cases where there was a "deliberate and significant invasion" of "highly personal information" that would be "highly offensive to a reasonable person."

In the certification decision, the court had noted that the nurse's access to the medical records was a "close call" that could be dealt with by a small award of damages. However, the decision to certify the class action was influenced by the nature of "the privacy interest infringed" and the reasoning that any intrusion—even a very small one—into private health information could be considered "highly offensive".

In the Divisional Court's view, this was an erroneous interpretation of [Jones v. Tsige](#). Not every intrusion into private health information amounts to a basis to sue for the tort of intrusion upon seclusion. The particular intrusion must be "highly offensive" when viewed objectively having regard to all the relevant circumstances.

In [Jones v. Tsige](#), the Court of Appeal confirmed the existence of a right of action for inclusion upon seclusion based on the following criteria: (1) the defendant's conduct must be intentional; (2) "the defendant must have invaded, without lawful justification, the plaintiff's private affairs"; and (3) "a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish". The cases where a claim would be appropriate are those which "cry out for a remedy" and the required elements are intended to avoid opening the floodgates for claims that are not deliberate and significant invasions of privacy.

In the Divisional Court's view, the nurse's conduct did not meet these criteria. The private information that she accessed was only for the purpose of obtaining a metaphorical "key" to unlock a drawer that contained the opioids. The fact that there were over 11,000 such intrusions does not mean that each intrusion was significant and highly offensive.

Further, *Jones v. Tsige* does not lead to the conclusion that any intrusion into private health records, no matter how small, rises to the standard of being "highly offensive". To hold otherwise would be to open the very floodgates that the Court of Appeal wanted to remain closed, and allow claims to proceed where the intrusions were fleeting, the information accessed was not particularly sensitive, the intruder was not "after" the information itself, and where there was no discernible effect on the persons whose private information was accessed.

In the result, the Divisional Court allowed the appeal and set aside the order of the certification judge: *Stewart v. Demme*, 2022 ONSC 1790 (CanLII). The motion to certify the action for intrusion upon seclusion was therefore dismissed.

The case shows that the courts will put some limits on claims for breach of privacy where the consequences of the unauthorized access have not resulted in some form of demonstrable harm. The conduct of the party accessing the information, and their reasons for doing so, are relevant criteria to be considered and "fleeting and incidental" access will likely not be sufficient grounds to pursue a tort claim for intrusion upon seclusion.

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