



## **COURT REFUSES TO CERTIFY PRIVACY CLASS ACTION**

**Cathy Beagan Flood, Nicole Henderson, Jessica Lam and Christopher DiMatteo**

In *Broutzas v. Rouge Valley Health System*, 2018 ONSC 6315, Justice Perell of the Ontario Superior Court of Justice recently refused to certify a class action involving allegations of breach of privacy and negligence. In doing so, the Court clarified the scope of the tort of intrusion upon seclusion.

### **BACKGROUND**

In *Broutzas*, the plaintiffs alleged that rogue hospital employees inappropriately accessed the hospital records of patients who had recently given birth. The hospital employees in turn allegedly sold the patients' contact information to RESP sales representatives to be used as sales leads, contrary to the policies of the RESP company defendants.

The plaintiffs claimed damages of over \$450 million in two class proceedings that were brought against the hospitals, the hospital employees, the sales representatives, and the RESP dealers with which the sales representatives were associated. The plaintiffs advanced, among other things, claims for intrusion upon seclusion against the nurses and the RESP sales representatives, and claims for negligence against all defendants.

### **THE DECISION**

#### **Intrusion Upon Seclusion**

The Court held that there was no basis in fact for the plaintiffs' claim of intrusion upon seclusion against the hospital employees. The Court reviewed the Ontario Court of Appeal's decision in *Jones v. Tsige* (which first recognized intrusion upon seclusion in 2012) and held that the tort covers only significant invasions of personal privacy. Intrusion upon seclusion is concerned with invasions of sensitive personal matters such as a person's financial records, health records, sexual practices, sexual orientation, employment, or sensitive correspondence. However, in this case the only material allegedly intruded on was the patients' contact information, which is not private: "there is no reasonable expectation in contact information, which is in the public domain, being a private matter." Moreover, pregnancy and childbirth are rarely private matters and all proposed representative plaintiffs testified that they had not been shy about sharing the news of their newborns. As the Court put it, "there is intrusion but not an intrusion on seclusion."

As for the RESP sales representatives, the Court held that the intrusion upon seclusion claim against them was "doomed to failure" because it was not alleged they intruded on anything. The only alleged intruders were the hospital employees. The Court commented that "the parameters on intrusion on seclusion are tight and narrow and this tort is not established by some sort of guilt by association."

#### **Negligence**

The Court found that the negligence claim against the hospital and the rogue employees had no basis in fact because there was no evidence that the representative plaintiffs or class members suffered any compensable damages from the alleged conduct. No one had experienced any financial loss arising out of the alleged privacy breach.

The Court noted that negligence sets a higher bar for damages than intrusion upon seclusion. The plaintiffs' alleged damages consisted of the ordinary annoyances, anxieties and fears people in society experience routinely, and were not compensable.

The Court also held it was plain and obvious that the RESP sales representatives and dealers did not owe a duty of care to class members to protect their private information due to a lack of proximity and foreseeability. Justice Perell commented that, since the privacy tort of intrusion upon seclusion has been recognized, courts should not introduce a “backstop negligence action” against defendants who committed no actual intrusion, as that “would undermine the careful work of the Court of Appeal...not to open the floodgates of liability for intrusion on seclusion.”

### **Remaining Class Proceeding Criteria**

In the absence of any certifiable common issues (breach of contract and warranty claims were also struck), the Court found that the preferable procedure criterion was not met. Even if there had been certifiable common issues, the Court held that a class proceeding was not a preferable procedure because the action was built on an intrusion on seclusion claim that could have occurred in a variety of scenarios (depending on which of the defendant nurses committed the alleged intrusion and at which hospital). Accordingly, the Court held that individual small claims court actions would be “more manageable and preferable to an omnibus and behemoth class action trial.”

### **DISCUSSION**

This decision provides important guidance in the emerging field of privacy class actions. The Court’s holding will be instructive in other privacy cases where, for example, the defendant is the victim of a criminal cyberattack and a data breach results. It suggests that where there has been no deliberate intrusion by the defendant on the plaintiff’s privacy, there should be no claim for intrusion upon seclusion. Moreover, it is only intrusions into matters that are truly private or sensitive that will meet the requirements of the tort. The Court also reaffirmed that a plaintiff has no claim for negligence damages in a privacy case unless they have experienced an injury that amounts to more than everyday annoyances or anxieties.

Blakes lawyers Cathy Beagan-Flood and Nicole Henderson acted for one of the defendant RESP companies in this matter.

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