HUNTER-LIBERATORE-LAW

Healthcare Update – August 2022

Healthcare Related Cases of Interest

a) *Intrusion Upon Seclusion: This is a limited and specific tort developed for cases where there was a "deliberate and significant invasion" of "highly personal information" that would be "highly offensive to a reasonable person"*

- ***Stewart v Demme*** **(Divisional Court, March 24, 2022)**

The defendant was a nurse employed by the co-defendant William Osler Health System. Over a period of 10 years, the defendant improperly accessed over 11,000 patient information records to steal thousands of Percocet pills. When the hospital discovered the thefts, they contact all the affected patients, who commenced a class action against both defendants seeking damages for "intrusion upon seclusion" and negligence. The defendants brought a summary judgement dismissal motion before the certification judge. The judge accepted that Demme's improper access to patient information was for one purpose – to obtain drugs. She did not retain, pass on or spend much time with the information, and the access was fleeting, lasting a matter of seconds. Nevertheless, the judge found that the three elements of the "intrusion upon seclusion" tort were met: 1) intentional or reckless conduct, 2) the invasion without lawful justification into the plaintiff's affairs or concerns, and 3) the invasion was highly offensive. While the facts, "did not cry out for a remedy", the judge concluded there was a viable cause of action and certified the "intrusion upon seclusion" claim but not the negligence claim.

The defendants appealed the judge's decision. The applicable standard of review was correctness. The Divisional Court found that the judge had misinterpreted the landmark Court of Appeal decision in *Jones v. Tsige*, which first recognised the tort of "intrusion upon seclusion". In *Jones*, the court noted that intrusions into financial and health records can be highly offensive enough to attract liability under the tort. The certification judge, wrongfully interpreting *Jones*, found that any intrusion, "even a very small one into a realm as protected as private health information may be considered highly offensive." The Divisional Court disagreed with the judge's assessment, finding that Demme's intrusions were fleeting, the information accessed not particularly sensitive, she was not after the information itself, and there was no discernable effect on the patients:

> 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. If the case does not "cry out for a remedy", it is a signal that the high standard for certification of this limited tort may not be met (at para 16).

The Divisional Court allowed the appeal.

b) *Professional Development: Unless the course or seminar is required by the employer, employees are not entitled to compensation when they voluntary attend a professional development course on days they are not scheduled to work*

- ***Lakeshore Area Multi-service Project v Ontario Nurses' Association*, (McNamee, July 11, 2022)**

The union and grievors filed a policy and individual grievances alleging employees were entitled to compensation when they voluntarily attended professional development conferences or seminars on days that they were not scheduled to perform work for the employer. The collective agreement stated that "Professional development paid time off as and when authorized by the Employer *shall be made available* each fiscal year…" The union argued there was no restriction on the use of professional development days provided that the employee was within the number of days allotted and was not on another authorized leave. Arbitrator McNamee noted that the collective agreement provision addressing professional development days appeared in an article headed "Leaves of Absence", suggesting that the parties considered this time off as a leave. The word "leave" implied a period of time when an employee was excused from required attendance at work. Since the grievors were not expected to attend work on the Saturdays they voluntarily attended professional development conferences or seminars not required by the employer, they were not on leave and were not entitled to compensation. The grievances were dismissed.

c) *LTD Benefits: The word "administer" in the collective agreement obligates the employer to arrange for an LTD Plan and provide for its administration, it does not obligate the employer to administer individual benefit claims or allow arbitration of denied claims*

- ***Regional Municipality of Peel v Ontario Nurses' Association*, (Hayes, July 13, 2022)**

The union filed a grievance alleging the employer, a long-term care home, violated the collective agreement when it denied long-term disability benefits to the grievor. The employer brought a preliminary motion arguing that under the terms of the collective agreement, a labour arbitrator had no jurisdiction to hear the grievance. The employer's LTD benefits were administered by Sun Life Assurance Company of Canada. Sun Life had awarded the grievor LTD benefits from December 2018 until January 5, 2020, and denied the grievors benefit claim beyond January 5, 2020, arguing that the grievor was able to perform the duties of her occupation as a nurse. The collective agreement provided as follows:

> 17.01 The Employer shall provide at its cost the following insured plans, to be administered in accordance with the rules and regulations of the plans: …
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> 17.01 (d) Employer's self-insured salary continuation plan (Short Term Disability Plan) which provides benefits for up to 15 weeks for non-occupational illness or injury which extends beyond 3 working days. Benefits are based on length of service, and in accordance with the following schedule:
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> 17.04 The Employer shall administer for all regular full-time employees up to age 65 a compulsory Long Term Disability Insurance plan to provide per month, the lesser of $5000 or 60% of earnings; insured earnings refers to the employee's monthly basic earnings to a maximum of $8,333. Long Term Disability premiums are 100% employee paid. Employees have the right to appeal Long Term Disability Claims through the Insurance Provider.

The employer argued that the agreement required it to arrange for an LTD plan and provide for its administration, but not to administer individual claims. Article 17.04 required employees to appeal LTD claims through the insurance provider not under the collective agreement The union argued the employer had agreed to "administer" the LTD plan and there was nothing in the plan booklet excluding arbitrability.

Arbitrator Hayes noted that the arbitrability of benefit entitlement claims depends on the contract language. In examining the language in Article

17.04, the arbitrator observed, that "This language obligates the Employer to provide LTD benefits coverage by securing an insurance plan. It does not say that the Employer will provide the benefits or that it will do anything other than contract with an insurer." In Article 17.01(d), the employer agreed to 'self-insure" short-term disability benefits. In contrast, Article 17.04 referred appeals of benefit denials to the insurance provider. Arbitrator Hayes concluded that the word "administer" in Article 17.04 did not obligate the employer to administer benefit claims as contextually, it was clear the parties did not intend to provide a "dual track' for addressing benefit claims. The dispute was between an employee and the insurer and did not arise out of the collective agreement. The arbitrator had no jurisdiction to deal with the grievance and it was dismissed.

d) Abuse of Process: Dismissing a grievance for abuse of process is an extraordinary remedy that should be utilized only in the clearest of cases where the grievor has engaged in deliberate, intentional, unjustifiable noncompliance with an arbitral order

- ***Ontario Public Service Employees Union Local 273 v Hamilton Health Sciences*, (Johnston, July 18, 2022)**

The union filed three grievances pertaining to the grievor's written warning, allegations of harassment, and the termination of the grievor's employment. The arbitrator issued production orders on February 11, 2022, and May 6, 2022. The grievor did not provide the documents sought and later advised that due to the passage of time, he was unable to comply with the production orders. The employer brought a motion to dismiss the grievances for abuse of process as the grievor had failed to provide particulars he had been specifically directed to produce and his reasons for non-production were inaccurate or unbelievable. The union argued that the grievor made best efforts to comply with the production orders and provided accurate explanations for his failure to comply. Arbitrator Johnston noted that the grievor had not completely refused to comply with the arbitral orders; he had made efforts to do so but claimed an inability to comply due to reasons outside his control. The arbitrator did note however that the grievor had refused to provide particulars regarding his whereabouts on the relevant dates in question. The arbitrator directed the grievor to answer specific questions regarding his whereabouts. Failure to comply would result in a reconsideration of the employer's request to dismiss the grievance for abuse of process.

e) *Double Time: "Call-In" premium applies when a regular part-time nurse is asked to work an additional unscheduled tour or partial tour without actually being ordered to attend work*

- ***Royal Victoria Regional Health Centre v Ontario Nurses' Association*, (McNamee, July 18, 2022)**

The grievor was a part-time RN in the Emergency Department and was scheduled to work from 7:00 pm to 11:00 pm on November 23, 2020. On that date, the grievor was asked and agreed to begin her shift early at 3:00 pm. The grievor was paid 7.5 hours at her regularly rate of pay. The grievor's previous last shift worked prior to November 23, 2020, ended at 7:00 am on November 21, 2020. The union argued that the grievor was entitled to be paid double time for the hours worked from 3:00 pm to 7:00 pm on November 23, 2020. The collective agreement provided as follows:

> 14.06 Where a full-time or regular part-time nurse has completed their regularly scheduled tour and left the hospital and is called in to work outside their regularly scheduled working hours, or where a nurse is called back from standby, such nurse shall receive two (2) times their regular straight time hourly rate for all hours worked with a minimum guarantee of four (4) hours' pay at two (2) times their regular straight time hourly rate except to the extent that such four (4) hour period overlaps or extends into their regularly scheduled shift. In such a case, the nurse will receive time two (2) times their regular straight time hourly rate for actual hours worked up to the commencement of their regular shift.

The union argued that Article 14.06 clearly applied to the hours the grievor worked between 3:00 pm (when she started work as a result of the request received on November 23, 2020) and 7:00 pm (the start of her scheduled shift). The employer argued that the grievor was not entitled to the call-in premium because more than 24 hours had elapsed between the grievor's last scheduled shift on November 21 and when she received the request to work and/or commenced work on November 23. The employer further argued that Article G.08 of the local agreement permitted the hospital to schedule short hours and the employee had simply worked a four-hour tour before her regularly scheduled shift. Arbitrator McNamee found that the grievor had finished her last previous shift more than 24 hours before her shift on November 23.

However, citing his decision in *Cambridge Memorial* (see our prior healthcare update) Arbitrator McNamee found that the grievor may be entitled to double time if she was called in at the employer's request to work a part-tour in advance of re regularly scheduled shift. The matter was remitted back to the parties to determine whether the four pre-scheduled hours worked by the grievor on November 23, "were (i) a part of a longer shift which had been previously scheduled to be worked by another nurse who could not attend work on that day; (ii) constituted the whole of a discrete four hour shift which was to have been worked by another nurse; or (iii) a tour which was not pre-scheduled and was not covered by Article 13.01." If the pre-scheduled hours worked by the grievor were a part of a pre-scheduled tour scheduled to last in excess of four hours, the grievor was entitled to a call-in premium for a part shift. If the pre-scheduled hours were a full shift pursuant to a pre-posted master schedule, or if the grievor can be taken to have volunteered to work a tour which was not pre-scheduled and which was not a tour covered by Article 13.01, she would not be entitled to the premium.

f) Consecutive Weekend Premium: Under this collective agreement, the phrase "that is offered" modifies the phrase "full tour shift", so that what constitutes a "full tour shift" depends on the full number of hours the Hospital offers the nurse

- ***Guelph General Hospital v Ontario Nurses' Association*** **(Gedalof, July 25, 2022)**

The union filed a policy and an individual grievance regarding the employer's refusal to pay the grievor the consecutive weekend premium under Article E-4(a) of the local agreement. Under the agreement, part-time nurses were entitled to a premium if the nurse was required to work on a "second or subsequent weekend". During bargaining in 2018, the parties added the following sentence to Article E-4(a): "In order to receive any such premium payment, a nurse must work one (1) full tour/shift that is offered on a weekend as defined in (b) below." The parties disagreed on the meaning of the terms "full tour/shift" and "that is offered". The union argued that if a nurse agreed to work whatever weekend hours the hospital chose to offer the nurse, the premium was engaged. The hospital argued that the premium was payable only when a nurse was offered and agreed to work the full shift as normally scheduled for the unit. After hearing the bargaining evidence presented by the union, Arbitrator Gedalof concluded that the phrase "that is offered" modified what constituted a "full tour/shift".

> Had the parties intended that the premium be restricted to only nurses who work a full tour/shift by some measure other than by "what is offered", they need not have included the words "that is offered" at all. They could simply have said "[i]n order to receive such premium payment, a nurse must work one (1) full tour/shift on a weekend as defined in (b) below." Indeed, that is essentially what the Hospital proposed in bargaining on March 14. But that proposal was rejected, and the parties agreed to include the words "that is offered". A proper interpretation of the provision should seek to give meaning to that additional language. The Hospital's interpretation fails to do so.

The arbitrator further observed that the phrase "full tour/shift" must also be given meaning. Thus, where a nurse was offered a full shift but rejected that offer and subsequently agreed to work less hours, that nurse had not agreed to work the "full tour/shift that is offered" and was not entitled to a premium. The parties had agreed to bifurcate the hearing and first seek a general interpretation of Article E-4(a); the individual grievance was therefore remitted back to the parties.

g) Job Posting: The hospital has the right to set qualifications that are reasonable for the position and has no obligation to determine whether individual applications are accurate

- ***Trillium Health Partners v Canadian Union of Public Employees, Local 5180*** **(Luborsky, July 27, 2022)**

The union alleged that the grievor had been improperly bypassed for five (5) Patient Care Technician (PCT) job postings. PCT's were responsible for administering electrocardiograms ("ECGs") and taking blood (described as "venipuncture and capillary collections") on inpatients and outpatients. Among the key qualifications for the position was, "Completion of a recognized post-secondary education program in Laboratory Medicine" and "Recent and related experience in E.C.G. and Phlebotomy in an acute care setting." The grievor had been employed for 6.5 years as a part-time Hospitality Associate when she applied for the positions. While the grievor had the most seniority, the grievor was never interviewed for any of the posted positions. The hospital's position was that on its face, the grievor's application did not meet the minimum educational requirements as it stated that she was in the *process* of completing a post-secondary program in laboratory medicine for two of the postings. The hospital further argued that the grievor's experience at an urgent care centre during the practicum

component of her education and did not qualify as phlebotomy experience in an "acute care setting" required for the remaining three postings.

The union argued that the grievor was the most senior qualified internal candidate for each of the five PCT positions and that her experience at an urgent care clinic met the "acute care" requirement. Despite the misstated information in her resume, as the most senior applicant, the hospital had a duty to inquire whether the grievor had completed the educational requirements before disqualifying the grievor. The hospital argued that it had the right to set the minimum qualifications for the PCT position, the qualifications set were reasonable in the circumstances, and the grievor did not meet the minimum qualifications for the job. Second, the hospital was entitled to rely on the grievor's resume and had no obligation to reach out to the grievor to confirm or correct the information she submitted.

Arbitrator Luborksy noted that the hospital had a presumptive right to set and assess the qualifications; in this case, the requirement for ECG and phlebotomy experience in an acute care (hospital) setting, was relevant and was fairly and reasonably applied to the grievor's applications. The onus was on the union to show that the grievor had an immediate ability to meet the normal requirements of the job as of its posting. Since the grievor did not have the requisite or equivalent experience and the hospital had no obligation to consider her applications for any of the five PCT postings. Furthermore, the hospital reasonably and objectively interpreted the grievor's resume to mean that she had yet to complete the educational requirement:

> To require the Hospital to look behind every application and/or résumé to clarify or potentially correct the information provided by the applicant, would become such an obvious administrative burden to require clear language in the collective agreement to that effect, which is not the case here (at para 130).

The grievance was dismissed.

h) Extended Healthcare Benefits: Changes to benefit carriers that result in legitimate and valid claims being denied for failing to be obtained from an approved provider will violate a collective agreement that requires "comparable" coverage be maintained

- ***Unity Health Toronto v Canadian Union of Public Employees*** **(Parmar, Shaw, Herbert, August 12, 2022)**

The employer was created from a 2017 merger of three institutions: Providence Healthcare, St. Joseph's Health Centre and St. Michael's Hospital. CUPE became the bargaining agent for service and clerical employees, operating under a composite collective agreement for each unit. The CUPE central agreement required the employer to pay the premiums for coverage under the existing 1993 Blue Cross Extended Health Care Benefits Plan, "or comparable coverage with another carrier." The agreement further stated,

> 18.02 – Change of Carrier
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> It is understood that the Hospital may at any time substitute another carrier for any plan (other than OHIP) provided the benefits conferred thereby are not in total decreased. The Hospital shall notify the Union sixty (60) days in advance of making such a substitution to explain the proposed change and to ascertain the views of the employees. Upon a request by the Union, the Hospital shall provide to the Union, full specifications of the benefit programs contracted for and in effect for employees covered herein. The Hospital will provide the Union with the full details of any changes made by an existing carrier to current plan provisions.

Effective January 1, 2019, the employer changed the benefit carrier at Providence and St. Joseph's from Medavie Blue Cross and Desjardin respectively, to Sun Life Financial; St. Michael's already had Sun Life as their benefit carrier. The union filed four policy grievances alleging a breach of the collective agreement flowing from the employer's changes to extended healthcare benefits. The union alleged the employer's changes violated the collective agreement by,

i) substantially lowering the reasonable and customary limits on paramedical benefits;
ii) implementing a $9 cap on dispensing fees;
iii) implementing a requirement that certain medical supplies be obtained only through an Approved Provider Network (APN);
iv) failing to adhere to the agreement with respect to the timing of when it provided the Union a copy of the Sun Life master policy; and

v) failing to adhere to the agreement with respect to the timing and/or content of information related to changes in the benefits provided to the Union and the employees.

During the hearing process, the employer advised that it was reverting to the reasonable and customary limits that existed prior to the change in carriers, rendering this issue moot. The employer also acknowledged that the $9 cap on dispensing fees violated the collective agreement and removed the cap. With respect to the last three issues, the Board of Arbitration held that the employer breached the collective agreement when it implemented a rule requiring employees to purchase medical supplies from specific providers included in the Approved Provider Network (APN). The Board found that a rule which results in employees being denied coverage for supplies, despite having a legitimate and valid claim, is a failure to provide the required comparable coverage as set out in the agreement. Further, absent "extraordinary countervailing justification or clear and express collective agreement language," the employer could not intrude on an individual's private choice of health care provider (at para 38).

The Board further found the employer breached the collective agreement when it failed to advise one bargaining unit of the change in benefit carriers 60 days in advance of the change. Further, the notice failed to meet the collective agreement obligations because it did not adequately explain the newly imposed $9 dispensing fee. The board found there was no employer obligation to notify the union of the APN because that change did not flow from the employer's change of carriers and was implemented months later at the employer's request. The Board did not consider whether the notice breached the agreement because it failed to advise of a change in the reasonable and customary limits since that issue was moot. The Board also did not consider whether the required notice about the cap on dispensing fees was insufficient in light of the second purpose of the notice – to ascertain the views of employee – as the board had already determined the notice breached the agreement for failing to explain the change.

The Board found that the employer did not violate the collective agreement when it failed to provide the master policy in advance of the effective date of the change, because the agreement did not place an obligation on the employer regarding the timing of the provision of policy. However, in giving the collective agreement provision some meaning, the Board determined that the obligation to provide the master policy must be met within a reasonable period of time. It took 16 months to finalize the master policy and

provide it to the union. The Board concluded that there was no adequate explanation for the delay, no evidence of the part of the employer to ensure the policy was obtained as soon as possible, nor any evidence that it could not have been obtained earlier; this was a breach of the collective agreement. Finally, the Board found the employer provided "full specifications of the benefit programs contracted for and in effect for employees" when it gave the union documents relating to the benefit changes in November 2018 and a brochure in October 2019 and that the "full specifications" requirement in the collective agreement did not refer to the master policy.

i) Reduction in Part-Time Hours and Layoff. A reduction in part-time RN hours from 6 shifts every 2 weeks to 4 shifts every two weeks was a lay-off.

- ***Quinte Healthcare Corporation v Ontario Nurses' Association*** **(Albertyn, August 16, 2022)**

In 2015, the hospital's infection control department was staffed by 3 full-time and 2 part-time RNs. The Grievor held one of the part-time positions. The part-time commitment under the local agreement up to 45 hours per pay period. In March 2015, the hospital announced that it was reducing the overall hours of the infection control department by 22.5 hours bi-weekly (3 shifts). Following the reductions, the two part-time RNs were scheduled the remaining shifts which averaged 4 shifts ever pay period. Prior to the change, the Grievor regularly worked an average of 6 shifts per pay period.

Arbitrator Albertyn referred to the 2018 Ontario Court of Appeal decision upholding the original arbitrator's decision in *Toronto East General Hospital* (TEGH). In the TEGH decision, arbitrator Felicity Briggs found that RPT nurses who had their hours reduced on an ongoing basis had been laid off and were entitled to the benefits of the layoff provisions of the central agreement. The parties accepted the following parameters of article 10.08(a) of the central agreement:

- Casual employees are not laid-off if they do not get hours and shifts, and if their hours and shifts are reduced from one shift schedule to the next.
- There must be some guarantee or benchmark that creates the foundation for a claim that a reduction in hours and shifts constitutes a layoff.

- There will be fluctuations in the hours assigned to RPT nurses, depending on patient demand in the unit in which they work, particularly at the Hospital, where there is no promise or expectation of a specific number of hours and shifts in the job posting for RPT nurse positions. Such usual fluctuations (ebbs and flows) in the number of hours and shifts of the RPT nurses do not mean that a layoff has occurred. These fluctuations are expected, so are permissible, and do not constitute a layoff.

In the case before him, arbitrator Albertyn found that there was a "benchmark" for the Grievor of 6 shifts every 2 pay periods (she has worked that schedule for at least 6 months prior to the change) and therefore the reduction to 4 shifts every 2 weeks was a lay-off.

j) Addictions Attendants working at a hospital site and RPNs providing remote care entitled to Pandemic Pay despite government direction that they were not entitled.

- ***St. Joseph's Healthcare Hamilton v Canadian Union of Public Employees, Local 786*** **(Nyman, August 15, 2022)**

In this case, arbitrator Nyman considered the entitlement to temporary pandemic pay for addictions attendants who worked on site at a hospital facility and the RPNs working in the Mult-Care Kidney Clinic and Nephrology Clinic during the period pandemic pay was in effect. The RPNs were required to work in-person, in the clinics. They provided some in-person care but mostly they counselled patients by telephone or videoconference.

The hospital sought direction from the Ministry of Health and was advised that additions workers employed at a hospital were not included in the list of employees eligible for the payment. For the RPNs, based on Ministry of Health Guidance, the hospital only paid pandemic pay for that portion of time the RPNs were providing in-person patient care.

Regarding the addictions attendants, arbitrator Nyman reviewed the regulation and the website that described eligibility for temporary pandemic pay. There were two types of workplaces listed - all hospitals and "home and community care settings, including community-based mental health and addictions". The hospital was advised that only community-based addictions

programs were eligible for pandemic pay. Arbitrator Nyman disagreed and concluded that the inclusion of "mental health and addictions workers" in the list of eligible employees meant that all addictions workers, regardless of whether they worked in a hospital, or a community setting, were eligible.

Arbitrator Nyman concluded that the eligibility criteria of providing "in-person, publicly funded services" should focus on the employee, not the patient. The RPNs in question were required to report to the hospital and be "in person" when providing remote care. For that reason, he concluded pandemic pay was owing.
