

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

<b>BETWEEN:</b>	)	
	)	
RICHARD ROSS SHAKER	)	B. Tessier, Counsel for the Plaintiff
	)	
	)	Plaintiff
	)	
<b>– and –</b>	)	
	)	
LOVO CORP. AND JONATHAN	)	No one appearing for the defendants
LAGACE	)	P. Ezzatian, Counsel for Katie Miller
	)	
	)	Defendants
	)	
	)	
	)	<b>HEARD:</b> March 6, 2025

**REASONS FOR JUDGMENT**

**BORDIN, J.**

**Overview**

[1] The plaintiff, Richard Ross Shaker, seeks to add Katie Miller as a defendant to this action and amend the claim accordingly. Ms. Miller opposes the motion on the basis that the plaintiff is barred from adding her as a defendant by the expiry of the limitation period.

[2] The outcome of the motion turns on when the plaintiff discovered that he had a potential claim against Ms. Miller.

[3] The plaintiff denies the limitation expired before he pursued the claim against Ms. Miller. Alternatively, the plaintiff submits that the date upon which he learned he had a claim against Ms. Miller is a live issue and that the amendment should be allowed, and the limitation period determined at trial.

[4] Ms. Miller advances an alternative argument that the claim should not be amended to add her as a defendant because the claim against her is without merit and would have no chance of success at trial.

### **The limitation period and discoverability**

[5] *Rule 5.04(2)* of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 provides that at any stage of a proceeding the court may add a party on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

[6] The Court of Appeal in *Pepper v. Zellers Inc.* (2006), 83 O.R. (3d) 648, [2006] O.J. No. 5042 (C.A.), at para. 14, stated the following:

[A] rule 5.04(2) motion to add parties and, in this case, to add parties after the apparent expiration limitation period, is discretionary. While the threshold in such a motion is low, the motion judge is entitled to consider the evidentiary record to determine whether there is a live issue of fact or credibility about the commencement date of the limitation period.

[7] Section 21(1) of the *Limitations Act*, 2002, S.O. 2002, c. 24, Sch. B provides that if a limitation period in respect of a claim against a person has expired, the claim shall not be pursued by adding the person as a party to any existing proceeding.

[8] Section 4 of the *Limitations Act* provides that a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered. Section 5(1) sets out when a claim is discovered. Section 5(2) provides that a person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

[9] In *AssessNet Inc. v. Taylor Leibow Inc.*, 2023 ONCA 577, 168 O.R. (3d) 276, at para. 35, van Rensburg J.A. explained that:

A defendant may rely on the presumption in s. 5(2) that the claim was discovered on the day the act or omission on which the claim is based took place. In order to rebut the presumption in s. 5(2) the plaintiff need only prove that its actual discovery of the claim within the meaning of s. 5(1)(a) was not on the date of the events giving rise to the claim. Once the presumption is rebutted, the burden remains on the defendant, who is asserting the defence, to prove that the plaintiff knew or ought reasonably to have known the elements of s. 5(1)(a) more than two years preceding the commencement of the proceeding.

[10] In *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31, [2021] 2 S.C.R. 704, the Supreme Court clarified, at para. 42, that a plaintiff discovers they have a claim when they have either actual or constructive knowledge “of the material facts upon which a plausible inference of liability on the defendant’s part can be drawn”. The plaintiff does not have to be certain that the known facts

will give rise to legal liability, but the plaintiff must have knowledge of the material facts that form the basis for the plausible inference of legal liability.

[11] Put another way, the limitation begins to run from when the plaintiff had, or ought to have had, sufficient facts to have *prima facie* grounds to infer the acts or omissions of the party identified caused or contributed to the loss: *Zeppa v. Woodbridge Heating & Air-Conditioning Ltd.*, 2019 ONCA 47, 144 OR (3d) 385, at para. 41, leave to appeal refused, [2019] S.C.C.A. No. 38569; *Kowal v. Shyiak*, 2012 ONCA 512, at para. 18.

[12] The question to be posed is whether the prospective plaintiff knows enough facts on which to base a legal allegation against the defendant: *Zeppa*, at para. 42.

[13] A plaintiff is required to act with due diligence in determining if they have a claim. The nature and extent of the required action will depend on all the circumstances of the case: *Longo v. MacLaren Art Centre*, 2014 ONCA 526, at para. 42.

[14] The rights of the plaintiff and Ms. Miller are determined as of the date the motion to add her as a defendant was served, not the date the motion is heard: see *Computer Enhancement Corporation v. J.C. Options*, 2013 ONSC 4548, 116 O.R. (3d) 714, at paras. 15-18, *Philippine v. Portugal*, 2010 ONSC 956 (Div. Ct.), at paras. 33-34, 44, and 48; *Sweda Farms Ltd. et al. v. Ontario Egg Producers et al.*, 2011 ONSC 6146, at para. 22.

[15] The plaintiff and Ms. Miller agree that the plaintiff served Ms. Miller with his motion record after 8 p.m. on August 14, 2024 and that the claim must have been discovered on or before August 15, 2022, to be statute barred.

[16] The plaintiff conceded that he had the knowledge required by s. 5(1)(a)(i), (ii) and (iv) of the *Limitation Act* before August 15, 2022. In other words, he knew before August 15, 2022, that the injury, loss or damage had occurred, was caused by or contributed to by an act or omission, and that having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it.

[17] The parties agree that the issue is when the plaintiff knew or ought to have known that the act or omission was that of Ms. Miller.

### **The statement of claim**

[18] The plaintiff's action, commenced by notice of action issued March 8, 2024, and statement of claim dated April 5, 2024, is for the tort of intrusion upon seclusion. The Court of Appeal for Ontario in *Owsianik v. Equifax Canada Co.*, 2022 ONCA 813, 164 O.R. (3d) 497, leave to appeal refused, [2023] S.C.C.A. No. 40577 summarized the elements of the tort as follows at para. 54:

- a. The defendant must have invaded or intruded upon the plaintiff's private affairs or concerns, without lawful excuse [the conduct requirement];

- b. The conduct which constitutes the intrusion or invasion must have been done intentionally or recklessly [the state of mind requirement]; and
- c. A reasonable person would regard the invasion of privacy as highly offensive, causing distress, humiliation or anguish [the consequence requirement].

[19] The tort is actionable without proof of any pecuniary loss: *Owsianik*, at para. 1.

[20] The first element, the conduct requirement, requires an act by the defendant which amounts to a deliberate intrusion upon, or invasion into, the plaintiffs' privacy. The prohibited state of mind, whether intention or recklessness, must exist when the defendant engages in the prohibited conduct. The state of mind must relate to the doing of the prohibited conduct: *Owsianik*, at para. 59.

[21] In the plaintiff's claim, he pleads that on October 1, 2021, he learned that one of his computers was located at Maple Leaf Avenue in Ridgeway, Ontario on September 28, 2021. He did not know that address or why his computer would be there. Before issuing the claim, he learned it was the address of the defendant Jonathan Lagace ("Lagace"). On October 17, 2021, the plaintiff realized that someone else may have accessed his computers which had been left in the family home and used them without his knowledge or consent.

[22] The plaintiff pleads that he retained the services of a digital forensics examiner in January 2022 to assess the computers and identify who may have accessed them and what they accessed. He received a report that there may have been a large number of files copied to another location. He pleads that the report also indicated someone had the credentials to use the laptop while it was out of the plaintiff's possession. This caused the plaintiff serious concern given the content of the files and other content accessed without his consent.

[23] In the original claim the plaintiff pleads that Ms. Miller hired the defendant Lovo Corp. prior to his arrest on September 27, 2021 to unlawfully access his computers to collect digital material she could use against him in their matrimonial dispute.

[24] Paragraph 18 of the proposed amended statement of claim reads as follows:

The Plaintiff verily believes that Mr. Lagace had access to his Apple Macbook computers without his consent or knowledge, and while it was not in his care or control, and accessed his personal information, as well as the personal information belonging to his children and university students. The Plaintiff verily believes that Mr. Lagace deleted, destroyed, added, copied, and tampered with the Plaintiff's Apple Macbook computers and associated cloud accounts (including Apple iCloud, Google Drives), on-line accounts (including Facebook, Gmail), and local hard-drive contents, at the

request of Ms. Miller. The Plaintiff verily believes that Mr. Lagace targeted exculpatory evidence that could weaken the Crown's case with respect to the criminal charges ~~brought by his ex-common law spouse~~.

[25] In the original claim the plaintiff pleads that the unauthorized use of his personal and protected information caused him to suffer serious damage to his professional reputation as a professor at the Toronto Metropolitan University and the State University of New York ("SUNY"); rendered him unable to continue his livelihood; brought about significant legal expenses in both family and criminal court; caused emotional distress, loss of enjoyment of life and decreased mental and physical health; and caused him and his children to suffer significant damages, including their ability to become Canadian citizens.

[26] What can be readily seen from the draft amended statement of claim proposed by the plaintiff, and as conceded by the plaintiff in submissions, is that the only new facts pleaded are a description of Ms. Miller in paragraph 5 and the addition of the words "at the request of Ms. Miller" in paragraph 18.

**The facts relating to the discovery that Ms. Miller was the person who accessed the computer**

[27] The facts are not much in dispute.

[28] The plaintiff has a PhD in geography. He is currently an assistant professor at SUNY. The plaintiff and Ms. Miller lived together for a short period of time, and they have one child together. At all material times the plaintiff and Ms. Miller were the only two adults living at the property where they had cohabited.

[29] In early 2020, the plaintiff knew that Ms. Miller was in the habit of accessing his devices and his social media accounts without his permission.

[30] The plaintiff was arrested on September 27, 2021. He was released from custody the next day.

[31] On September 28, 2021, Ms. Miller accessed the plaintiff's laptop and deleted images of herself and her children. She took the laptop to Lagace's residence and asked him to make a backup of the hard drive onto an external drive. The plaintiff was not told this at the time. Ms. Miller did not acknowledge this until 2024.

[32] On or about September 28, 2021, using the "Find My" app, the plaintiff learned that the second laptop was last seen at the Maple Leaf Avenue address in Ridgeway, Ontario. The plaintiff did not know who resided at that address.

[33] The plaintiff returned to the property he had shared with Ms. Miller on October 17, 2021. His laptop was there, and he retrieved it. On October 18, 2021, the plaintiff noticed that someone

had accessed the laptop without his knowledge or consent. One thing he noted was that his Freedom Mobile cell phone records had been downloaded.

[34] On October 22, 2021, the plaintiff texted Ms. Miller stating that she had access to all his computers. He also referenced Ms. Miller downloading his Freedom Mobile bills. He suspected Ms. Miller was involved in accessing his laptop.

[35] In November or December 2021, the plaintiff learned that chat histories between him and Ms. Miller had been deleted from his Facebook account. By July 27, 2022, at the latest, he suspected it was Ms. Miller who had done this.

[36] In January 2022, the plaintiff retained Envista Forensics to provide forensic imaging services and conduct a preliminary analysis of the laptop and to determine whether it would be worthwhile to conduct an in-depth analysis of the laptop. The plaintiff received Envista's report on or about March 22, 2022.

[37] Envista concluded that it appeared that there may have been a vast number of files copied from the laptop to another location. The accessed content appeared to be of a financial, business and educational nature. It was Envista's opinion that someone had access to the laptop, as well as the credentials to utilize the laptop. Envista recommended an in-depth analysis to, among other things, see if the user could be identified. This in-depth analysis was not done for two years. There is no explanation for this delay in the evidence.

[38] The March 22, 2022, Envista report also authenticated the "Find My" app search which located the laptop at the Maple Leaf Avenue property in Ridgeway on September 28, 2021.

[39] On July 11, 2022, the plaintiff learned that Ms. Miller had been given permission by the police to access his computers and delete files.

[40] On July 27, 2022, the plaintiff swore an affidavit in the family litigation in which he stated at paras. 53, 57-58, and 61, that:

On September 28, 2021 according to Detective Simon Yu ("Detective Yu") and I believe the fact to be true, the Respondent [Ms. Miller] had my second computer with her at the matrimonial home and accessed it unlawfully. During that call with Detective Yu, the Respondent requested I be arrested for violating release conditions as my Kijiji account was accessed that day. On that date, Detective Yu also gave permission to Katie to access my computer to remove data and information.

...

From September 27, 2021 to October 17, 2021 the Respondent [ Ms. Miller] had control and acquired full access to my work laptop. In

doing so, the Respondent [Ms. Miller] did not allow the Applicant use of this computer as needed for work purposes.

On October 18, 2021 it became clear my work laptop was tampered with while the Respondent [Ms. Miller] had possession from September 27, 2021 to October 17, 2021. A porn site was bookmarked on my Google tool bar, personal cell records downloaded from Freedom Mobile, a *curriculum vitae* open [sic], several pornographic images and videos were downloaded and viewed, and other modifications made. My cloud-based accounts within Apple iCloud, Facebook, and Google, along with personal and work email, were also unlawfully accessed and data permanently removed or deleted.

According to Digital Forensics Examiner Jason F. Conley and I believe the fact to be true that the Respondent [Ms. Miller] or hired agent(s) Obstructed Justice by [sic] deleted, destroyed, added, copied, and tampered with the Applicant's work computers, associated cloud and local contents, while it was in her possession from September 27, 2021 to October 17, 2021. Although Detective Yu stated the computers were at the matrimonial home, they were at Jonathan Lagace ("Jonathan") personal residence at 237 Maple Leaf Ave N, Ridgeway, ON [...] Jonathan and the Respondent Mother [Ms. Miller] Obstructed Justice, by deleting and planting evidence, spoiling police investigations.

**The information the plaintiff says he required before the limitation period began to run**

[41] The plaintiff says that in sending the text messages on October 22, 2021, and in making the statements he did in his July 27, 2022, affidavit, that he only suspected Ms. Miller was behind the unauthorized access to his computers; he presumed it was Ms. Miller but was only speculating and trying to get her to confirm or deny her involvement and she never did so.

[42] The plaintiff states that he did not know for certain that it was Ms. Miller who accessed his laptop until he received her affidavit dated January 13, 2023 in which she attached an FBI report which he deposes was only available in digital copy from his laptop. This, he says, demonstrated Ms. Miller's unlawful access and misuse of his data and her intention to harm him through a breach of privacy.

[43] I note that the January 13, 2023, affidavit was not tendered in evidence. The plaintiff does not depose that Ms. Miller said in her affidavit that she had obtained this document from the plaintiff's digital files. She did not acknowledge accessing the plaintiff's information. This is no different from Ms. Miller not responding to the plaintiff's allegations sent by text message to her and made in his July 27, 2022.

[44] The plaintiff submits that his “speculative” comments that Ms. Miller had access to his personal and professional data was not confirmed until she gave evidence in the criminal proceeding on May 2, 2024, that she took the laptop to Lagace to make a copy of the hard drive and that she kept the copy of the hard drive. Further, he says it was not until that date that he received an affidavit from the defendant Lagace confirming that he had been asked by Ms. Miller to back up the data from the laptop and that he did not delete or modify any information on the laptop.

[45] Finally, at Ms. Miller’s cross-examination on January 22, 2025, she revealed that she disposed of the back-up hard drive at a landfill in the summer of 2024.

[46] None of this information obtained after July 2022 is alleged in the proposed amended statement of claim. As noted, the only new fact alleged in the proposed pleading is that the alleged deleting, destroying, adding, copying, and tampering with the plaintiff’s laptop and associated cloud accounts (including Apple iCloud and Google Drives), online accounts (including Facebook and Gmail), and local hard-drive contents, was done at the request of Ms. Miller.

**The plaintiff’s claim against Ms. Miller is out of time**

[47] The plaintiff had sufficient information to commence a claim against Ms. Miller by July 27, 2022. The date upon which the plaintiff discovered a claim against Ms. Miller is not a live issue.

[48] By the end of July 2022, the plaintiff had constructive if not actual knowledge of the material facts upon which a plausible inference of liability on Ms. Miller’s part could be drawn. The plaintiff did not have to be certain it was Ms. Miller. He did not need Ms. Miller to confirm that she had accessed his laptop. It was only necessary he had knowledge of the material facts that could form the basis for a plausible inference of legal liability on Ms. Miller’s part. The plaintiff knew enough facts on which to base a legal allegation against Ms. Miller. The facts clearly support that the plaintiff had such knowledge. This is set out in the plaintiff’s sworn evidence in his July 27, 2022, affidavit.

[49] The plaintiff had at least the required *prima facie* grounds to infer that it was Ms. Miller who accessed his laptop and information. The plaintiff’s “suspicions” in October through November 2021 were more than speculation. Indeed, it is difficult to conceive who else might have been the culprit. The plaintiff himself has not identified anyone else who might have accessed the laptop and his information or that he suspected it might have been anyone other than Ms. Miller or the forensic examiner at Ms. Miller’s behest.

[50] By the time of his July 27, 2022, affidavit, the plaintiff had sufficient information to believe that it was Ms. Miller who invaded or intruded upon his private affairs or concerns, without lawful excuse. He knew that the access to the information would have been done intentionally. He regarded the alleged invasion of his privacy as concerning and distressing as is evident from his statement of claim.

[51] The information that the plaintiff gained after July 2022 only affected the scope of the alleged invasion of his privacy and the potential scope of damages. This includes the information in the in-depth Envista report dated April 5, 2024, indicating that the access to the plaintiff's information was broader than the laptop and included data on Google Drives, the university's network server, an email and social media account, and Facebook.

[52] The plaintiff did not need to know the exact extent of his loss for the cause of action to accrue. Neither the extent of damage nor the type of damage need be known. Knowing some damage has occurred is sufficient: *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549, at para. 18. In any event, the tort of intrusion upon seclusion is actionable without proof of any pecuniary loss.

[53] Ms. Miller advanced an alternative argument that she should not be added as a defendant because the claim against her has no merit. She cites *Marks v. Ottawa (City)*, 2011 ONCA 248 in support of her position. At para. 19 of *Marks*, the Court of Appeal states:

Although the general rule is that amendments are presumptively approved, there is no absolute right to amend pleadings. The court has a residual right to deny amendments where appropriate. Further, I would agree that the proper factors to be considered are those first set out in *Simrod v. Cooper* and quoted with approval in *Vaiman v. Yates*, which can be summarized as follows:

- An amendment should be allowed unless it would cause an injustice not compensable in costs.
- The proposed amendment must be shown to be an issue worthy of trial and prima facie meritorious.
- No amendment should be allowed which, if originally pleaded, would have been struck.
- The proposed amendment must contain sufficient particulars.  
[Citations omitted.]

[54] It is evident from her factum that the arguments that Ms. Miller advances require an assessment of the case on its merits. In my view, determining whether a claim is “worthy of trial and prima facie meritorious” is a relatively low bar to determine whether the claim has any real chance of success. It is intended to weed out claims which clearly have no chance of success. It is not intended as a form of substitute motion summary judgment. This action is in its early stages. The proposed claim as pleaded meets the low bar. I would not dismiss the motion on this alternative basis.

**Disposition**

[55] For the reasons set out above, the plaintiff's motion to amend the claim to add Ms. Miller is dismissed.

[56] If the parties cannot resolve the issue of costs, they may submit a bill of costs and make written submissions consisting of not more than two double-spaced pages, together with excerpts of any legal authorities and offers to settle. Ms. Miller's submissions are to be served by no later than March 24, 2025; the plaintiff's, by no later than April 7, 2025.

[57] All submissions are to be filed with the court and uploaded to Case Center, with a copy to the Trial Coordinator by end of day April 7, 2025. If no submissions or written consent to a reasonable extension are received by the court by April 7, 2025, the matter of costs will be deemed to have been settled.

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Bordin, J.

**Released:** March 10, 2025

**CITATION:** Shaker v. Lovo Corp et al., 2025 ONSC 1549  
**COURT FILE NO.:** CV-24-14794  
**DATE:** 2025-03-10

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

RICHARD ROSS SHAKER

Plaintiff

– and –

LOVO CORPORATION ET AL

Defendants

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**REASONS FOR JUDGMENT**

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Justice Bordin

**Released:** March 10, 2025