

Surrey

08-Feb-21

REGISTRY REPLY

REGISTRY FILE NUMBER 87119
REGISTRY LOCATION Surrey

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA (SMALL CLAIMS COURT)

- To a Claim
- To a Counterclaim

TO:
Copy the name, address and telephone number of the claimant from the Notice of Claim or Notice of Civil Resolution Tribunal Claim.

NAME	Jessica Simpson	CLAIMANT(S)
ADDRESS	BOX 265 Unit 505 - 8840 210 St	
CITY, TOWN, MUNICIPALITY	Langley	British Columbia
POSTAL CODE	V1M 2Y2	TEL. # 778.771.5353

FROM:
Fill in the name, address and telephone number of the defendant filing this reply.

NAME	Fraser Health Authority and Provincial Health Services Authority	DEFENDANT
ADDRESS	c/o Alexander Holburn Beaudin + Lang LLP (att: Karen Zimmer) 2700 - 700 West Georgia Street	
CITY, TOWN, MUNICIPALITY	Vancouver	British Columbia
POSTAL CODE	V7Y 1B8	TEL. # 604.484.1700

DISPUTE:

Using the "HOW MUCH" section of the Notice of Claim or the Notice of Civil Resolution Tribunal Claim as a guide, tell why you disagree with each part (a - e). If you agree with parts of the claim say so.

a See attached "Schedule A"

b

c

d

e

AGREEMENT WITH THE CLAIM:

If you agree to pay all or part of what is claimed, make a proposal.

I (NAME) agree to pay \$

I could make the following payments:
(GIVE DATES AND AMOUNTS)

COUNTERCLAIM (YOU SHOULD ONLY FILL OUT THIS PART OF THE FORM IF YOU WISH TO MAKE A CLAIM AGAINST THE CLAIMANT)

(THIS PART IS NOT TO BE USED WHEN REPLYING TO A COUNTERCLAIM OR TO A NOTICE OF CIVIL RESOLUTION TRIBUNAL CLAIM)

WHAT HAPPENED?

Briefly tell what has led to your counterclaim.

HOW MUCH?

Tell what you are claiming. If your counterclaim has more than one part, separate each part and fill in each individual amount, then add the individual amounts to make the total.

a	\$	
b	\$	
c	\$	
TOTAL		\$ 0.00
+ FILING FEES		\$
= TOTAL CLAIMED		\$

REPLY

court copy

court copy

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA (SMALL CLAIMS COURT)

BETWEEN:

JESSICA SIMPSON

CLAIMANT

AND

FRASER HEALTH AUTHORITY and PROVINCIAL HEALTH SERVICES AUTHORITY

DEFENDANTS

SCHEDULE "A" TO REPLY

Filed by: Fraser Health Authority and Provincial Health Services Authority
(the "Defendants")

A. Introduction

1. The Defendants have an address for service in this action of 2700 - 700 West Georgia Street, Vancouver, BC.
2. The Defendant, Fraser Health Authority ("**Fraser Health**"), is a health authority pursuant to the *Health Authorities Act*, RSBC 1996, c. 180 and the Regulations thereto. Fraser Health delivers a wide range of health care services to more than 1.8 million people living in communities from Burnaby to White Rock to Hope, British Columbia. Fraser Health is dependent on the Ministry of Health to fund its operations, which range from hospital care, to community-based residential, home health, mental health and public health services
3. The Defendant, Provincial Health Services Authority ("**PHSA**") is a society incorporated under the *Societies Act*, SBC 2015, c. 18. PHSA works in partnership with British Columbia's health authorities and health-care professionals to ensure that residents have access to a coordinated provincial network of high-quality specialized health-care services.
4. For the reasons pled herein, the Defendants say that the claim herein should be dismissed on the following basis:
 - (a) The Small Claims Court does not have jurisdiction over the Claimant's allegations herein: pursuant to section 4 of the *Privacy Act*, RSBC 1996, c.

373 (the "**Privacy Act**") any claim made pursuant to the *Privacy Act* must be heard and decided by the Supreme Court; and,

- (b) Further, the Claimant's allegations have no merit in law or in fact. The Defendants, and each of them, have in place and uphold all appropriate and stringent policies and procedures to safeguard personal information and took all prudent and appropriate steps with respect to this matter.

B. The Audit and Investigation concerning the Claimant's health records

5. At all material times, the Claimant's health records were under her legal name, Jessica Johnathan Yaniv.
6. In or about August of 2019, the Claimant contacted Fraser Health and expressed concerns and made inquiries in regards to the protection of her personal health records. At this time:
 - (a) Fraser Health advised the Claimant that if she had any concerns regarding her health records that Fraser Health could conduct a fulsome audit of any and all instances of access to the Claimant's health records (an "**Audit**") to ensure that each and every access to the Claimant's health records was for appropriate purposes and in accordance with the safeguards summarized under subheading (c) herein (the "**Fraser Health Safeguards**") and those summarized under subheading (d) herein (the "**PHSA Safeguards**");
 - (b) Fraser Health advised the Claimant that she could, in addition, request that a VIP status be placed on her health records, which results in a medical record access warning that reiterates that the health records are confidential (the "**VIP Status**").
7. Fraser Health, at the Claimant's request, conducted an extensive Audit reviewing each and every instance of the Claimant's health records being accessed during the six month period prior to August, 2019.
8. In addition, at the Claimant's request, a VIP Status was placed on her health records.
9. The Audit determined that one employee from Fraser Health had viewed the Claimant's health records in a manner that was not in accordance with the Fraser Health Safeguards.
10. The Audit further determined that one employee from PHSA had viewed the health records in a manner that was not in accordance with the PHSA Safeguards.
11. There was no evidence to suggest that the health records viewed were disseminated to a third party.
12. The Defendants imposed discipline on each of the employees involved, including a 5 day suspension for the Fraser Health employee.
13. Following the Audit, and in a letter dated February 25, 2020, the Defendants advised the Plaintiff of the fact that that her health records had been accessed by one employee from Fraser Health and one employee from PHSA (the "**Letter**").

14. The Letter noted that disciplinary action had been taken with respect to the employees in question. Further, the Letter noted that the Defendants had each reviewed best practices within the departments involved in relation to the policies and confidentiality and appropriate accessing of information. Additionally, the Letter noted the Defendants had no reason to believe the information contained within the accessed health records was widely disseminated.
15. The Letter further provided the Claimant with the contact information of the Office of the Privacy Commissioner (the "OIPC") if she had any concerns regarding how the incident was handled, or if she wished to file a formal complaint.
16. Further, PHSA and FHA reported the matter to the OIPC. No further action was taken by the OIPC.

C. Fraser Health's Safeguards

17. At all material times, and continuing to this day, Fraser Health has in place appropriate and prudent safeguards, policies and procedures to safeguard personal information, including but not limited to those set out below.
18. Only individuals assigned a personal user identification (ID) and password can access health records within Fraser Health.
19. Fraser Health requires all employees to confirm by way of signature their agreement and understanding of Fraser Health's Confidentiality Acknowledgement (the "**Confidentiality Acknowledgement**"). Pursuant to the Confidentiality Acknowledgement, employees confirm, *inter alia*, that:
 - (a) they will safeguard the confidentiality of personal information, and that confidential and personal information would only be accessed on a "need to know basis" to carry out her responsibilities to Fraser Health;
 - (b) under no circumstances would they permit unauthorized access to, or use of, personal or corporate information;
 - (c) they would not alter, copy, interfere with, destroy or remove personal information except as authorized;
 - (d) they would report any unauthorized disclosure or demands for disclosure to Fraser Health's Information Privacy Officer, and,
 - (e) that their compliance with the Confidentiality Acknowledgement was a condition of employment, privileges and association with Fraser Health.
20. At all material times, Fraser Health had in place various policies requiring employees to safeguard personal information, including the following:
 - (a) Fraser Health's Confidentiality and Security of Personal Information Policy (the "**Personal Information Policy**") which strictly requires employees to, *inter alia*:
 - (i) refrain from copying, transferring, verbally transmitting, printing, altering, or using personal and other confidential information, unless

appropriate consent or authorization has been given from the individual in accordance with applicable policies and privacy laws;

- (ii) safeguard their personal user identification (ID) and password, to treat it as a legal signature, and refrain from performing any activity with another employee's ID;
- (iii) ensure that after completing work at a device (i.e. terminal, personal computer or wireless device) connected to the Fraser Health computer network, that the user properly log out or lock the computer screen to prevent unauthorized access;

- (b) Fraser Health's Audit of Electronic Health Information Access ("**Electronic Access Policy**") which strictly requires employees to, *inter alia*, be subjected to an auditing of access within personal information systems.

21. At all material times, Fraser Health took various steps to ensure that employees complied with their respective Confidentiality Acknowledgement, as well as the Personal Information Policy and Electronic Access Policy, including, *inter alia*:

- (a) offering initial and refresher training on these issues;
- (b) issuing various reminder communications regarding the Fraser Health Safegaurds;
- (c) using proactive auditing tools such as algorithms to audit the access to and disclosure of personal information available. Such proactive auditing tools include a same name algorithm to expose incidents where someone is seeking to access their own or a family member's records; and
- (d) performing reactive audits where warranted.

D. Provincial Health Services Authority's Safeguards

22. Similarly, at all material times and continuing to this day, PHSA has appropriate and prudent safeguards, policies and procedures in place to safeguard personal information, including but not limited to those set out below.

23. Only individuals assigned a personal user identification (ID) and password can access health records.

24. PHSA requires all employees to formally acknowledge their understanding of and commitment to upholding confidentiality by signing an acknowledgement of PHSA's Privacy and Confidentiality Policy (the "**Privacy Acknowledgement**").

25. At all material times, PHSA had in place various procedures requiring employees to safeguard personal information, including the following:

- (a) PHSA's Privacy and Confidentiality Policy (the "**Privacy Policy**") which strictly requires employees to confirm they will abide by the following requirements:

- (i) only access, use, or disclose personal information and other confidential information of PHSA as necessary to fulfill the terms and requirements of their duties;
 - (ii) only access personal information on a "need to know" basis to carry out their responsibilities to PHSA;
 - (iii) disclosure of personal information to other employees must be exercised only when required in order to carry out their responsibilities to PHSA;
 - (iv) disclosure of personal information to external parties must be made only where disclosure is permitted by the appropriate laws and authorized by PHSA;
 - (v) all reasonable steps to ensure that the security of personal information is at all times protected against unauthorized access, use, and disclosure; and
 - (vi) report any actual or suspected violations of privacy or confidentiality to the PHSA's Information Access and Privacy Office.
- (b) PHSA's Code of Ethics Policy (the "**Ethics Policy**") which strictly requires employees to, *inter alia*:
- (i) uphold the legal and ethical duty to protect the confidentiality of personal information and other confidential information in the custody and control of PHSA;
 - (ii) comply with applicable legislation and regulations governing PHSA; and
 - (iii) uphold legal and ethical duties to protect patient privacy and confidentiality.
26. At all material times, PHSA took various steps to ensure that employees complied with their Privacy Acknowledgement, the Privacy Policy, and the Ethics Policy, including, *inter alia*:
- (a) requiring employees to take a mandatory Privacy and Security 101 course;
 - (b) requiring employees to complete the E learning privacy training every two years;
 - (c) requiring employees to complete privacy training that is specifically required by their role;
 - (d) requiring employees to complete privacy training that is specifically required by the professional regulatory association they are affiliated with;
 - (e) prior to undertaking a new initiative, program, or activity that involves personal information, departments and agencies are required to complete a Privacy Compliance Review or Privacy Impact Assessment;

- (f) implementing disciplinary action against an employee for failing to comply with the Privacy Policy, including, but not limited to, the termination of their employment, loss of computing privileges, prosecution, and restitution for damages; and
- (g) performing appropriate reviews and audits of PHSA systems and processes to ensure compliance with PHSA policies and standards.

E. The Claim

27. While not clearly pleaded, it appears the Claimant has filed her claim against the Defendants in regards to the following causes of action:
- (a) vicarious liability for violation of privacy pursuant to the *Privacy Act*, RSBC 1996, c. 373 (the "**Privacy Act Claim**");
 - (b) vicarious liability for breach of private law duty of care pursuant to section 30 of the *Freedom of Information and Protection of Privacy Act*, RSBC, c. 165 (the "**Statutory Negligence Claim**");
 - (c) breach of common law tort of breach of privacy (the "**Common Law Tort Claim**"); and,
 - (d) negligent protection of private medical information (the "**Negligence Claim**").

F. Legal Basis to Dismiss the Claim herein

(i) Privacy Act Claim

28. Pursuant to section 4 of the *Privacy Act*, RSBC 1996, c. 373 (the "**Privacy Act**") an action pursuant to the *Privacy Act* must be heard and determined by the British Columbia Supreme Court:

4 Despite anything contained in another Act, an action under this Act must be heard and determined by the Supreme Court.

29. The *Small Claims Rules* do not provide authority for this Honourable Court to transfer a claim to the British Columbia Supreme Court for lack of jurisdiction. This was noted by Justice Skilnick:

[24] ... Unfortunately, the rule does not contemplate the transfer of a matter to the Supreme Court for reasons of jurisdiction, but only for reasons of the dollar value of the claim.

Homelife Glenayre Realty v. F. V. Real Estate Bd., 2013 BCPC 198 at para 24

30. The Defendants submit that the Privacy Act Claim must be dismissed at the Settlement Conference pursuant to Rule 7(14)(i) of the *Rules* for lack of jurisdiction.

(ii) **Statutory Negligence Claim**

31. The Claimant also claims \$1 in damages for "liability for breach of a statutory duty of care".

32. Section 30 of the *Freedom of Information and Protection of Privacy Act*, RSBC, c. 165 (the "**FIPPA**") states:

30. A public body must protect personal information in its custody or under its control by making reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or disposal.

33. *FIPPA* is a comprehensive statutory framework for dealing with conduct that breaches section 30.

Ari v Insurance Corporation of British Columbia, 2015 BCCA 468 [Ari] at para 62-63

34. The British Columbia Court of Appeal has opined that *FIPPA* does not create a private law duty of care:

[33] The appellant characterizes his claim as one based on ICBC's negligence in the implementation and supervision of its statutorily mandated security arrangements under s. 30 [of the Act]. The appellant asserts that ICBC's alleged failure to comply with s. 30 creates a private law duty of care.

...

[53] Finally, the availability of administrative remedies under *Freedom of Information and Protection of Privacy Act* militates against the recognition of a duty of care. As ICBC submits, the *Freedom of Information and Protection of Privacy Act* provides a comprehensive complaint and remedy scheme for violations of s. 30 (or violations of a public body's duty to make reasonable security arrangements to protect personal information). Where a statute comprehensively regulates the matter at issue by, for example, establishing an institution or office administering and enforcing a regulatory program, it is proper to infer that the legislature did not intend parallel common law remedies to exist: at Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markam: Butterworths, 2002) at 350.

...

[61] It is noteworthy that the *Act* does not create a cause of action in damages for breach of its provisions. The absence of

such a provision may be contrasted with its presence in s. 57 of the *Personal Information and Protection Act*, S.B.C. 2003, c. 63 which regulates the collection and disclosure of personal information by private actors, as opposed to public bodies.

[62] I agree with ICBC's submission that the foregoing constitutes a comprehensive statutory framework for dealing with conduct breaching s. 30 of the *Freedom of Information and Protection of Privacy Act*.

[63] It is therefore my view that a duty of care should not be recognized for public policy reasons.

Ari, Supra at para 33, 53, and 61 - 63

35. The Defendants deny that they owed the Claimant a duty of care as alleged, or at all and in support of this denial rely on the authority in *Ari*.
36. The Defendants submit that the Negligence Claim must be dismissed at the Settlement Conference pursuant to Rule 7(14)(i) of the *Small Claims Rules*, BC Reg 126/2020 (the "**Rules**") as it discusses no triable issue.

(iii) Common Law Tort Claim

37. The Claimant's also seeks \$1 for "common law breach of privacy".
38. The British Columbia Court of Appeal has opined that there is no common law cause of action for breach of privacy in British Columbia:

[13] As to the judge's consideration of the breach of privacy claim, in my view he made no reviewable error. There is no common-law claim for breach of privacy. The claim must rest on the provisions of the *Act*.

Mohl v University of British Columbia, 2009 BCCA 249 [*Mohl*] at para 13

39. Justice Garson of the British Columbia Court of Appeal confirmed *Mohl* in *Ari*:

[9] It is common ground that in British Columbia there is no common law cause of action for breach of privacy: *Mohl v. University of British Columbia*, 2009 BCCA 249 at para. 13; *Hung v. Gardiner*, 2002 BCSC 1234, aff'd 2003 BCCA 257.

Ari, Supra at para 9

40. The Defendants submit that the Common Law Tort Claim must be dismissed at the Settlement Conference pursuant to Rule 7(14)(i) of the *Rules* as it discusses no triable issue.

(iv) Negligence Claim

41. The Claimant further seeks \$1 in damages for the alleged negligent protection of private medical information.
42. The Defendants deny that they owed the Claimant a duty of care as alleged, or at all.
43. In the alternative that the Defendants did owe the Claimant a duty of care, which is not admitted but expressly denied, they deny that they breached any such duty.
44. The Defendants say that at all material times they acted fully in accordance with the standard accepted practice, and in particular, that all care and procedures (including the Fraser Health Safeguards and the PHSA Safeguards) in place to protect personal privacy were appropriate, in accordance with a reasonable standard of practice and procedure, and rendered competently with reasonable care, skill, and diligence.
45. In the alternative that the Defendants breached any such duty, which is not admitted by expressly denied, they submit that any such breach by the Defendants did not cause or contribute in any way to any injury, loss, damage or expense claimed by the Claimant herein or at all.
46. As noted in *Stewart v. Demme*, liability in negligence requires that actual harm be manifest and caused by the wrong:

[86] As indicated in the section above, the invasion of privacy is itself a form of harm. But it is not the type of harm that suffices for a negligence claim. ... negligence liability requires that actual harm be manifest and caused by the wrong.

[87] Plaintiff's counsel has couched the damages portion of the negligence claim in terms of inconvenience, discomfort and distress caused to the class members by the loss of their privacy. The Supreme Court of Canada has established, however, that damages for "upset, disgust, anxiety, agitation or other mental states that fall short of injury" do not constitute compensable damages in a negligence claim: *Mustapha v Culligan of Canada Ltd.*, 2008 SCC 27 (CanLII), [2008] 2 SCR 114, para 9.

[88] There is little doubt that the Defendants breached duties and standards applicable to a health care facility and its professional staff. At the same time, there is no evidence that those breaches caused actual harm – i.e. physical or psychological damage, as opposed to mere psychological upset: *Ibid.*, paras 8-9.

[89] In a phrase that rings true for Anglo-Canadian tort law as much as for its American counterpart, Justice Cardozo famously observed that, "Proof of negligence in the air, so to speak, will not do": *Palsgraf v Long Island Railroad Co.*, 248 NY 339, 162 NE 99 (1928). Negligence liability does not punish wrongs without being linked to the vindication of rights. For that reason, there must be actual harm caused to the claimant.

2020 ONSC 83 at para 86 - 89

47. The Defendants submit that the Negligence Claim must therefore be dismissed at the Settlement Conference pursuant to Rule 7(14)(i) of the *Small Claims Rules*, BC Reg 126/2020 (the "**Rules**").

Defendants' address for service:

Alexander Holburn Beaudin + Lang LLP
Barristers and Solicitors
P.O. Box 10057
2700 – 700 West Georgia Street
Vancouver, B.C., V7Y 1B8

Attention: Karen Zimmer