

2021 03 G. 10370 CP

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

BETWEEN:

KAYLA WELSHMAN

FIRST PLAINTIFF

AND:

SUSAN ROBERTS

SECOND PLAINTIFF

AND:

CENTRAL REGIONAL
HEALTH AUTHORITY

DEFENDANT

BROUGHT UNDER THE CLASS ACTIONS ACT

STATEMENT OF CLAIM

THE PARTIES

1. The First Plaintiff is Kayla Welshman, whose address for service is c/o Bob Buckingham Law, 81 Bond Street, St. John's, NL A1C 1T2 and whose phone number is 709-739-6688. At all material times she was a resident of Newfoundland and Labrador and was a patient of the Defendant.
2. The Second Plaintiff is Susan Roberts, whose address for service is c/o Bob Buckingham Law, 81 Bond Street, St. John's, NL A1C 1T2 and whose phone number is 709-739-6688. At all material times she was a resident of Newfoundland and Labrador and was a patient of the Defendant.
3. The Defendant is a corporation established under and by authority of the Regional Health Authorities Act, 2006 c. R-7, ss. 6 and 7, and the Regional Health Authorities Regulations 18/08 ss. 3(1)(c). The Defendant's address for service is Central Health Regional Office, 21 Carmelite Road, Grand Falls-Windsor, Newfoundland and Labrador A2A 1Y4 and whose phone number is 709 292-1289.

4. The Plaintiffs have long been patients of the Defendant, the Central Regional Health Authority. At all times material the Defendant was in possession of the Plaintiffs' private, confidential medical records and personal health information. The Plaintiffs' private, confidential medical records and personal health information contain private information, concerning but not limited to, their personal health, their health card numbers, information concerning their family members (especially children), next-of-kin and significant other persons in their lives.

THE CLASS

5. The Plaintiff brings this action under the Class Actions Act, SNL2001 c. C-18.1 on their own behalf and on behalf of a class consisting of:
 - (a) All patients of the Defendant whose private, confidential medical records and personal health information were inappropriately accessed by the Defendant's employee between October 2018 and July 2020 who received a letter from the Defendant dated on or about August 4, 2020, signed by Ms. Joanne Pelley, Vice President Integrated Health and Chief Nursing Executive for Central Health, advising them there had been unauthorized access to their private, confidential medical records and personal health information by a Central Health Employee; and twenty additional patients who were similarly notified by Central Health that their records had been unlawfully accessed by another employee of Central Health as announced by Central Health on VOCM News on January 28, 2021.

THE MATERIAL FACTS

6. The Defendant, Central Regional Health Authority (Central Health), in several policy statements found on its website and in brochures and posters, guarantees to each patient that their private, confidential medical records and personal health information is protected and that Central Health has procedures in place to

make sure that each patient's information will not be shared without the patient's permission. The website promotes a privacy brochure given to patients stating under the heading of "Safeguards" the following:

"Safeguards

We take our duty to keep your information private seriously. It will only be released when you give us consent to do so or when we are required by law. Central Health has policies and procedures in place to make sure that your information is protected from being lost or shared without your permission. Professional employees are guided by their professional codes of ethics and have signed confidentiality agreements. Your information is also protected through the use of ... Limited access to records and work locations by approved employees only, Passwords and other security measures for computers."

7. Throughout the two-year period from October 2018 to June 2020 a Central Health employee unlawfully accessed files containing the Plaintiffs', and proposed Class Members', private, confidential medical records and personal health information and shared some of that information with the public.
8. The unlawful access by the employee of Central Health of private, confidential medical records and personal health information, included in many instances intrusion into obstetric files – pre and post-delivery – of mothers and the files of their new born children.
9. In an August 2020 press release and in subsequent media interviews Central Health Chief Executive Officer Andree Robichaud publicly announced the investigation and findings of a series of privacy breaches by a Central Health employee spanning two (2) years involving two hundred and forty (240) patients.
10. In media interviews Central Health through its CEO publicly verified that the violation by the Central Health employee included access to two types of files, one of which was the electronic "Summary Information" of patients. The Summary Information includes: the patient's personal information, including name, date of birth, age, sex, marital status, their condition, diagnosis and opinion of the healthcare practitioner, medications, allergies, and prognosis of

attending physicians and address and information of next of kin. The CEO did not identify the second type of file accessed by the employee.

11. Central Health publicly said that they became aware of the unlawful access and public sharing of the private, confidential medical records and personal health information over the past two years upon "*someone from outside the health authority*" alerting them "*on June 14, 2020, that an employee had shared a patient's personal information.*"
12. The Plaintiffs in this case suffered distress, humiliation, anger, upset, mental anguish, shock, fear of identity theft, uncertainty as to how the private, confidential medical records and personal health information has been used, and confusion as to why their private, confidential medical records and personal health information was accessed. The Plaintiffs plead the illegal access into their private, confidential medical records and personal health information has left them with a feeling of vulnerability by and from the breach of their privacy and the intrusion upon the seclusion of their biological, core personal information, especially given the extended period of time during which this breach of their privacy took place, the possible number of times their private, confidential medical records and personal health information were accessed and in many many instances the intrusion focused on pre-natal and post-natal health circumstances of the Plaintiffs and an interest in their children.
13. The Plaintiffs repeat paragraph 8 and state parents of children whose private, confidential medical records and personal health information were inappropriately accessed, and in particular the parents of newborn children, repeat the proceeding paragraphs 8 and 12, and further state that they are alarmed and terrified at the motivation, purpose, and intent, of the Defendant's employee's systematic, targeted, intrusion into the private, confidential medical records and personal health information of their newborn children.

14. The Plaintiffs seek to certify this action as a Class Proceeding and plead the Class Actions Act, SNL 2001, c. C-18.1, as providing the basis for such certification. The Plaintiffs, as the proposed Representative Plaintiffs, do not have any interest adverse to any of the members of the proposed Class. The Plaintiffs state there is an identifiable class that would be fairly and adequately represented by them; that the Plaintiffs' claim raises common issues; and that a Class Proceeding would be the preferable procedure for the resolution of such common issues.

BREACH OF PRIVACY – based on a statutory tort under the Privacy Act

15. The Plaintiffs plead a statutory tort actionable without proof of damage, in that the employee of the Defendant, did wilfully and without a claim of right, violate their privacy. The Plaintiffs plead subsection 3(1) of the Privacy Act, 1981, c. 6, as amended. The Defendant has acknowledged that the unlawful intrusion into the files of some two hundred and forty (240) patients took place over a two year period and that the Defendant only became aware of the violations upon being informed by a member of the public that patients' private, confidential medical records and personal health information were publicly disclosed by the Defendant's employee.
16. The Plaintiffs plead the employee's wilful actions constituted a breach of the Privacy Act.
17. The Plaintiffs further plead there was an unauthorized intrusion upon their seclusion. The information and records intruded upon were private records containing, but not limited to, core biological information to which the Plaintiffs were entitled a high expectation of privacy and the unlawful intrusion caused the Plaintiffs mental anguish and suffering. The Defendant, contrary to their stated public policy and contrary to law, failed to establish or enact sufficient, or any, readily available safeguards to protect the security of the Plaintiffs' private, confidential medical records and personal health information in the Defendant's custody and control.

18. The Plaintiffs suffered damages as a result of the Defendant's failure to prevent the violations.

BREACH OF PRIVACY based on a Common Law Tort of Intrusion upon Seclusion

19. The Plaintiffs plead a common law tort of cause of action for Intrusion upon Seclusion as allowed in subsection 7(1) of the Privacy Act, which acknowledges the coexistence of a common law cause of action for breach of privacy with the statutory cause of action granted under the Privacy Act.
20. The Plaintiffs plead there was an unauthorized intrusion upon their seclusion. The intrusion was objectionable to a reasonable person. The information and records intruded upon were private and the intrusion caused the Plaintiffs' mental anguish and suffering. The Defendant's employee, without valid reason, intentionally intruded on the seclusion of the Plaintiffs and, at times, wilfully disclosed information publicly. The information and records intruded upon were private records containing core biological information to which the Plaintiffs were entitled a high expectation of privacy and the unlawful intrusion caused the Plaintiffs mental anguish and suffering.
21. The Plaintiffs plead that the Defendant is liable for the actions of the employee and the resultant losses and damages.

NEGLIGENCE

22. The Plaintiffs plead that the Defendant owed them a duty of care to protect their private, confidential medical records and personal health information, that the Defendant's behaviour breached the standard of care, that the Plaintiffs sustained damage and that the damage was caused by the Defendant's negligence.

23. The Plaintiffs plead that the Defendant was negligent in:

- failing to have in place management and operations procedures that would reasonably have prevented the privacy breaches;
- failing to properly train and supervise its employees;
- failing to conduct reviews to determine if the electronic and/or other data storage were being accessed without valid reasons;
- failing to recognize its procedures were inadequate;
- failing to establish mechanisms to ensure the accountability of persons having custody or control of personal health information and to safeguard the security and integrity of the personal health information in their custody or control;
- failing to establish and implement information policies and procedures to facilitate the implementation of, and ensure compliance with, requirements respecting the manner of collecting, storage, transfer, copying, modifications and use of personal information;
- failing to restrict access to an individual's personal health information by an employee to only that information that the employee requires to carry out the purpose for which the information was collected or will be used;
- failing to provide for secure storage, retention and disposal of records to minimize the risk of unauthorized access to or disclosure of personal health information;
- failing to take appropriate measures to address the risks associated with the storage of personal health information, taking into account the manner and form in which the personal health information is recorded, the location of storage and the degree of sensitivity of the personal health information to be protected; and
- failing to take steps that would have been reasonable in the circumstances given the previous breaches to ensure that personal health information in its custody or control is protected against unauthorized access, use or disclosure.

24. The Plaintiffs plead that the negligence of the Defendant Central Regional Health Authority is systemic, as evidenced in the past by similar breaches by the Defendant in not having procedures which would have prevented the privacy breaches adhered to herein.
25. The Plaintiffs herein plead that the Defendant had reasonable foresight of the seriousness of breaching the privacy of the Plaintiffs and the compensability of the damage done to the Plaintiffs.
26. The Plaintiffs plead that the extreme seriousness of the violations of privacy in the case at hand was known or ought to have been known to the Defendant, in that it is recognized in the community and in law the penalty for the negligence of a Custodian (the Defendant in this case is a custodian) in failing to protect personal health information in a secure manner as required under s.88 of the Personal Health Information Act is a fine of up to \$10,000.00 and/or imprisonment for a term not exceeding six (6) months, or both.
27. The Plaintiffs plead that the custodian Defendant was negligent in that it failed to take reasonable, or any, steps, to prevent the unlawful access into the Plaintiffs' personal and private confidential medical records.
28. The Plaintiffs plead they suffered damages including, but not limited to, mental distress, anguish, anxiety and stress

VICARIOUS LIABILITY

29. The Plaintiffs plead the doctrine of vicarious liability with the statutory cause of action created under the Privacy Act as cited above, the common law tort of intrusion upon seclusion and negligence cited above.
30. The Plaintiffs plead the Defendant's employee, without valid reason, intentionally intruded upon the seclusion of the Plaintiffs of the proposed Class Members'

private, confidential medical records and personal health information in the course of the said employee's employment.

31. The Plaintiffs plead that the Defendant, Central Regional Health Authority, is liable for the unauthorized, intentional wrong committed by its employee. The closeness of the relationship between the Defendant and the employee, as illustrated in its policy statement, imports legal principle to justify the imposition of vicarious liability.

BREACH OF CONTRACT

32. The Plaintiffs plead there was an implied term of the contractual relationship to ensure the Defendant would not employ individuals, including the employee who accessed the Plaintiffs' and proposed class members' private, confidential medical records and personal health information without valid reason, who were not properly trained in the employer's principles, policies, procedures, practices and operations respecting the Plaintiffs' and proposed Class Members' right to privacy.
33. The Plaintiffs plead the Defendant was in a contractual relationship with the Plaintiffs to provide medical services generally and there was an implied term in the contractual relationship that the Defendant would keep the Plaintiffs' and proposed Class Members' private, confidential medical records and personal health information from being accessed by individuals without a valid reason.
34. The Plaintiffs plead that an implied contract can be found by the circumstances and in this case it is reasonable to assume that, since the Defendant's responsibility to protect the privacy of the personal health information is required under the Personal Health Information Act, a term of that implied contract was the obligation to protect privacy of personal health information.

35. The Plaintiffs plead that the Defendant's policy statements found on the Defendant's website and in Central Health's Privacy Brochure given to patients under the heading of "Safeguards" constitute an implied term of the contract to protect the privacy of personal health information.
36. The Plaintiffs plead that the contract to protect private, confidential medical records and personal health information was a good faith contract and the Plaintiffs plead that the unlawful access into their records constitutes a breach of the good faith contract.
37. The Plaintiffs plead that since the Defendant made commitments to privacy safeguards in patient brochures and on its website, and continues to make such commitments after failing to provide such safeguards, an inference can be drawn that supports the conclusion that good faith was not, and is not, present.
38. The Plaintiffs repeat the preceding paragraphs 32-37 and plead the Defendant breached its contractual duty to the Plaintiffs and potential Class Members, and the Plaintiffs suffered damages as a result of the breach of contract.

AGGRAVATED, PUNITIVE AND EXEMPLARY DAMAGES

39. The Plaintiffs plead that the conduct of the Defendant's employee, for which the Defendant is vicariously liable, and the Defendant's own conduct was wilful, reckless, outrageous and callous, and constituted a gross violation of the privacy rights and an intrusion upon seclusion of the Plaintiffs and a breach of the Defendant's statutory duty. The Plaintiffs submit that this is an appropriate case for punitive, aggravated and/or exemplary damages.
40. The Plaintiffs plead that an award of aggravated, punitive and/or exemplary damages in this case at hand would serve to deter the Defendant Central Regional Health Authority and the other Regional Health Authorities in the province from similar misconduct in the future.

DAMAGES/RELIEF SOUGHT

41. The Plaintiffs repeat the foregoing paragraphs and state that as a result of the Defendant's: (i) Breach of Privacy based on the statutory tort under the Privacy Act; (ii) Breach of Privacy based on a common law tort of intrusion upon seclusion; (iii) Negligence; (iv) Vicarious Liability; and (v) Breach of Contract; the Plaintiffs plead they, and the proposed Class Members, have suffered losses.
42. THE PLAINTIFFS THEREFORE SEEK THE FOLLOWING RELIEF on their own behalf and on behalf of the Class:
- (a) an order pursuant to the Class Actions Act certifying this action as a class action and naming the Plaintiffs as Representative Plaintiffs for the Class;
 - (b) costs of providing appropriate notice to Class members and administering this proposed class action for their benefit;
 - (c) an order for an aggregate monetary award pursuant to s. 29 of the Class Actions Act;
 - (d) damages for breach of privacy based on the statutory tort under the Privacy Act;
 - (e) a declaration that the Defendant is vicariously liable for the actions of the Defendant's employee;
 - (f) damages for breach of privacy based on a Common Law Tort of Intrusion upon Seclusion;
 - (g) damages for negligence;
 - (h) damages for breach of contract;
 - (i) aggravated, punitive and/or exemplary damages;
 - (j) costs, including the fees of expert witnesses in attending at discovery and/or trial and the HST on same; and
 - (k) sufficient costs of providing appropriate and sufficient notice to the Class Members of this action and for administering the proposed Class Action for the benefit of the Class Members;
 - (l) special damages to be ascertained;
 - (m) interest pursuant to the Judgment Interest Act, R.S.N. 1990, c. J-2; and
 - (n) such further and other relief as this Honourable Court deems just, equitable and appropriate in all of the circumstances.

43. The Plaintiffs propose that this proceeding be tried at the Judicial Centre of Grand Falls-Windsor, Newfoundland and Labrador.

DATED at the City of St. John's, in the Province of Newfoundland and Labrador, this ^{9th} ~~5th~~ day of February, 2021.




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TO: The Defendant
 Central Regional Health Authorities
 Central Health Regional Office
 21 Carmelite Road
 Grand Falls-Windsor, NL A2A 1Y4

ISSUED AT Grand Falls-Windsor, in the Province of Newfoundland and Labrador this 4th day of February, 2021.



Ashley George
 Clerk of the Court

2021 03 G.0020 CP**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION**

<u>BETWEEN:</u>	KAYLA WELSHMAN	FIRST PLAINTIFF
<u>AND:</u>	SUSAN ROBERTS	SECOND PLAINTIFF
<u>AND:</u>	CENTRAL REGIONAL HEALTH AUTHORITY	DEFENDANT

BROUGHT UNDER THE CLASS ACTIONS ACT

NOTICE TO DEFENDANT

You are hereby notified that the Plaintiff(s) may enter judgment in accordance with the Statement of Claim or such order as, according to the practice of the Court, the Plaintiff(s) are entitled to, without further notice to you unless within 10 days after service hereof upon you, you cause to be filed in the Registry of the Supreme Court of Newfoundland at Grand Falls-Windsor a defence and unless within the same time a copy of your defence is served upon the Plaintiff(s) of the Plaintiff(s) solicitor(s) at the Plaintiff's solicitor(s) stated address(es) for service.

TO: The Defendant
Central Regional Health Authorities
Central Health Regional Office
21 Carmelite Road
Grand Falls-Windsor, NL A2A 1Y4