IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Massie v. Provincial Health Services Authority*, 2023 BCSC 1275

Date: 20230725
Docket: 2110997
Registry: Vancouver

Between:

Miranda Massie

Plaintiff

And

Provincial Health Services Authority

Defendant

Brought Under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

Before: The Honourable Justice Stephens

Reasons for Judgment on Certification Application

Counsel for Plaintiff:	J. Stanley J. Cameron R. Matheuszik
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Place and Dates of Hearing:	Vancouver, B.C. February 27-28, and March 1-3, 2023
Supplemental Written Submissions:	June 19, 2023, June 21, 2023, June 30, 2023 and July 5, 2023
Place and Date of Judgment	Vancouver, B.C. July 25, 2023

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Introduction

[1] While working at BC Women's Hospital and Health Centre (the "BCWH") during 2020 and 2021, the defendant Provincial Health Services Authority (the "PHSA") estimates that Brigitte Cleroux, who was alleged to be an unlicensed nurse, was involved directly or indirectly in the provision of nursing care to approximately 1,150 patients who attended for gynecological surgical procedures.

[2] One of those patients, the plaintiff Miranda Massie, applies to certify an action as a class proceeding against the PHSA for legal claims arising from Ms. Cleroux's involvement with patient care (characterized as "treatments") while working at the BCWH. She seeks to certify common issues in negligence, battery, breach of privacy, vicarious liability, and for damages, including aggregate and punitive damages.

[3] The issue before me is whether there is a civil litigation remedy through the legal vehicle of a class proceeding for all patients at the BCWH who had Ms. Cleroux involved in their care, directly or indirectly. The question is whether claims of proposed class members can and should be pursued through the procedural mechanism of a class action.

[4] In these Reasons, I answer that question both yes and no. For claims against the PHSA in negligence and for battery, the necessity of proving causation of damage and compensable harm will likely be particular to each proposed class member, requiring individual trials on a major aspect of such claims, which detracts from the commonality of significant issues associated with such claims and renders a class action on those claims not preferable. However, for the claim of breach of privacy and the PHSA's related alleged vicarious liability, and punitive damages, I find that there are common issues and a class action is a preferable procedure for the prosecution of such a claim, and I certify a class action on this basis.

[5] In the result, I certify this action as a class action for a subset of the claims and issues advanced by the plaintiff: breach of privacy and related vicarious liability, and punitive damages.

Factual Background

[6] The plaintiff complains that she received care at the BCWH from Ms. Cleroux, who was not a licensed registered nurse. She alleges Ms. Cleroux "was employed by PHSA in the capacity as a registered nurse at BCWH when in fact she was not lawfully qualified as a nurse and had obtained her employment using falsified documentation and/or credentials which PHSA knew or should have known about". The plaintiff complains that Ms. Cleroux was present and made observations of her in a very private medical procedure and had access to her medical records and medical information. She seeks certification under s. 4 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*], so she can advance a class action against the PHSA.

[7] The PHSA opposes this application. It submits that liability should not be imposed on it for "Cleroux's fraud", which was, among other things, "abhorrent, [and] unauthorized". It submits that the PHSA "has not in any way tried and is not trying now to evade or avoid responsibility". But it says certification would not be legally appropriate in the circumstances of this case.

[8] Where I make factual findings in these Reasons, I do so for the purposes of this application only.

The Plaintiff

[9] In or about January 2021, the plaintiff attended the BCWH for gynecological surgery. She pleads that Ms. Cleroux was assigned as her registered nurse who participated in her surgery.

[10] On or about November 26, 2021, she received a letter from the defendant stating that an unlicensed nurse, who she later learned was Ms. Cleroux, had been involved in her care.

[11] The plaintiff commenced this action and proposes to be the representative plaintiff of the class, if this action is certified as a class proceeding.

The Proposed Class

[12] The proposed class is:

> All residents of Canada who were patients at BC Women's Hospital and Health Centre ("BCWH") and who received treatments directly or indirectly from Brigitte Cleroux ("Cleroux") from June 1, 2020 to June 30, 2021.

[13] The plaintiff tendered evidence from five other proposed class members who describe aspects of their experiences as patients of the BCWH. The names of these affiants as disclosed in their affidavits and related court filings are protected from disclosure in this proceeding under a sealing order made February 27, 2023.

[14] The experiences of these six proposed class members at the BCWH was diverse and individualized. Some, but not all, affidavits of proposed class members record specific conversations to a person who they believe was Ms. Cleroux. Some, but not all, allege they had direct negative experiences with Ms. Cleroux. The specific experiences of proposed class members include evidence of: an individual who interacted with Ms. Cleroux after awakening from surgery, had a monitoring device applied to her arm, and was administered medication in a manner that was considered painful; one who was administered intravenous medication by Ms. Cleroux; one who had blood taken by Ms. Cleroux which caused discomfort, had discussions with Ms. Cleroux about her pain post-surgery, and believes that pre-surgery was administered gas as a painkiller; one who was accompanied to the operating room by Ms. Cleroux who also managed her sedation; and one who was administered fentanyl intravenously by Ms. Cleroux, was cared for by Ms. Cleroux post-surgery and discussed with her the level of her breathing.

[15] The PHSA's evidence suggests Ms. Cleroux performed a variety of activities in a nursing role such as: patient admission, taking vital signs, observing patient symptoms (e.g. cramping) and breathing, administering intravenous medication, and participating in the discharge process. The PHSA denies that the proposed class members suffered any injury, loss, damage, or expense (response to civil claim para. 2).

[16] I conclude that the diversity of patient experiences at the BCWH is a consequence of the range of activities that Ms. Cleroux was involved in as a working nurse at the hospital. I find that the diversity in experiences will likely track across all proposed class members.

[17] One issue which arises on this application is what is the consequence, if any, of the diversity of experiences and interactions with Ms. Cleroux to the suitability of this proceeding as a class action.

The Defendant PHSA, and BC Women's Hospital and Care Centre

[18] The defendant PHSA manages programs and services in British Columbia, including at the BCWH.

[19] The BCWH provides a broad array of services, including providing care and treatment to outpatients through the Gynecological Surgical Services Program.

[20] The Gynecological Surgical Services Program provides elective surgery for a variety of gynecologic health issues. They include laparotomies, hysteroscopies, hysterectomies, insertions and removals of IUDs, endometrial ablations, uterine fibroidectomies, ovarian cystectomies, removal of cysts, and other procedures.

[21] Patients at the BCWH are assessed to determine if that patient is suitable for procedural sedation or general anesthesia.

[22] Patients who receive procedural sedation are not rendered unconscious, and are given a combination of fentanyl and midazolam by a nurse through an IV, and the PHSA's evidence is that this procedure is to be done in the presence of a surgeon and circulating operating room ("OR") nurse.

[23] Part of the services offered by the Gynecological Surgical Services Program took place in the Post-Anesthesia Care Unit ("PACU"), where patients would receive post-operative care in certain phases. The focus of Phase I care in the PACU is to ensure that the patient fully recovers from anesthesia and that the patient's vital signs return to near baseline. It is generally limited to only those patients who

received general anesthetic or anesthesiologist-led sedation. The focus at Phase II care is to prepare patients for hospital discharge to home.

Brigitte Cleroux Working at BC Women's Hospital

[24] From June 1, 2020 and June 30, 2021 Brigitte Cleroux is alleged to have worked as a registered nurse at the BCWH.

[25] The PHSA pleads in its response to civil claim that Ms. Cleroux fraudulently worked for the PHSA from June 22, 2020 until on or about June 23, 2021.

[26] The PHSA's evidence is that Ms. Cleroux claimed to be trained as a procedural sedation nurse, and so was not permitted to work in the OR during procedures involving general anesthetic and anesthesiologist-led sedation, and was permitted in the OR only when administering procedural sedation.

[27] The PHSA pleads in its filed response to civil claim that Ms. Cleroux worked under the name "Melanie Smith", and its evidence is that on a daily basis she worked as a general duty nurse in the pre-operative, PACU Phase I and PACU Phase II of the Gynecological Surgical Services Program. It says that in her role, she worked in pre-screening for procedural sedation, pre-operative assessments, administering procedural sedation, and post operative care (Phase I and Phase II of PACU), and would have been assigned as a float nurse covering for other nurses in Phase I and Phase II of PACU.

[28] The defendant PHSA's evidence is that Ms. Cleroux did not claim to be an OR-trained nurse and was never assigned as a nurse in the OR during procedures where patients underwent general anesthetic or anesthesiologist-led sedation.

[29] Ms. Cleroux is not a defendant in this proposed class action.

Ms. Cleroux's Termination

[30] The PHSA pleads in its response to civil claim that following Ms. Cleroux's hiring, PHSA representatives took steps to address specific concerns raised about Ms. Cleroux's inappropriate conduct to an anaesthesiologist, and issued a warning

letter to her. On December 1, 2020, a letter of discipline was issued and she was given a three-day suspension (later reduced to a one-day suspension) for separate incidents.

[31] The PHSA pleads that in response to a further incident reported by a patient on June 4, 2021, Ms. Cleroux was put on paid leave pending a PHSA investigation.

[32] The PHSA pleads that it was during part of that investigation that it learned that Ms. Cleroux was not Melanie Smith, and was unable to confirm that she was a registered nurse. It pleads that on June 23, 2021, the PHSA terminated Ms. Cleroux's employment effective immediately.

[33] After terminating Ms. Cleroux, the PHSA initiated a quality and clinical review of patient care provided by Ms. Cleroux to BCWH patients.

PHSA Notice Letters

[34] After this review, the PHSA issued two versions of a patient disclosure letter, starting on November 29, 2021, to let the recipients know that Ms. Cleroux was involved in their care. Each version of the letter included the statement that it "recently learned an individual who had been hired to provide perioperative nursing care at [BCWH's] Gynecology Surgical Program, did not have a valid licence with the BC College of Nurses and Midwives":

> We are writing to you today to inform you that we recently learned an individual who had been hired to provide perioperative nursing care at BC Women's Hospital + Health Centre's Gynecology Surgical Program, did not have a valid licence with the BC College of Nurses and Midwives. This individual is no longer employed in the Gynecological Surgical Program and BC Women's/ PHSA is reviewing this matter comprehensively to determine how it occurred, and internal processes that may have contributed, and potential impacts to patients.

[35] One version of the notice letter went to 899 individuals where Ms. Cleroux had charted in their hospital chart that she provided care to the patient. That letter reads, in part, that PHSA had determined that that this individual "was involved with the care you received at BC Women's on [date]."

[36] The plaintiff Miranda Massie received the first version of the notice letters; her letter stated: “we have determined that this individual was involved with the care you received at BC Women’s on January 12, 2021”.

[37] The second version of the letter went to 258 individuals whose OR packet was reviewed by Ms. Cleroux as part of pre-screening for procedural sedation, but who did not otherwise receive care from Ms. Cleroux. That letter says the individual “was indirectly involved with the care” they received, meaning that “this individual did not interact with you directly or provide any nursing care to you” but “was involved in reviewing patient charts for surgical care.”

The Claims

[38] In her amended notice of civil claim (“ANOCC”), the plaintiff claims that the defendant PHSA is liable to the class members for:

1. Negligently hiring Ms. Cleroux, and breaching the standard of care to take reasonable steps to ensure that nurses who treated the class members were properly licenced and reasonably competent, which caused harm;

2. Committing the tort of battery on every class member that Ms. Cleroux treated, and is vicariously liable for Ms. Cleroux’s actions; and

3. Committing the statutory tort of willful violation of privacy pursuant to s. 1 of the *Privacy Act*, R.S.B.C. 1996, c. 373 on every class member, and that the PHSA is vicariously liable for Ms. Cleroux’s actions.

[39] The plaintiff claims damages for the plaintiff and class members, including punitive damages, and an order pursuant to s. 29 of the *CPA* directing an aggregate assessment of damages, as well as costs, and interest.

[40] The plaintiff in submissions describes the claims of proposed class members, “in many instances”, as ones for “relatively minimal individual harm”.

The Certification Test

Generally

[41] The test for class certification is set out in s. 4 of the *CPA*:

> 4 (1) Subject to subsections (3) and (4), the court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.
>
> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[42] Justice Branch summarized the general principles of certification in *Krishnan v. Jamieson Laboratories Inc.*, 2021 BCSC 1396 [*Krishnan SC*], aff'd 2023 BCCA 72 [*Krishnan CA*]:

> [40] The plaintiff bears the onus of satisfying each of these five certification requirements. The plaintiff must show "some basis in fact" for each of the certification requirements, other than the cause of action requirement in s. 4(1)(a), which is decided based on the pleadings alone: *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 at para. 25.
>
> [41] The court has an important gate-keeping role requiring it to screen proposed claims to ensure they are suitable for class action treatment. In *Thorburn v. British Columbia*, 2012 BCSC 1585, appeal dismissed 2013 BCCA 480, the court stated:
>
> > [117] The goal of the *CPA* is to be fair to both plaintiffs and defendants… "it is imperative to have a scrupulous and effective screening process, so that the court does not sacrifice the ultimate goal of a just determination between the parties on the altar of expediency."
>
> [42] That said, the *CPA* must be construed generously in order to achieve its objectives of access to justice, judicial economy, and behavior modification: *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, leave to appeal ref'd [2010] S.C.C.A. No. 32 [*Infineon*].
>
> [43] The certification stage does not involve an assessment of the merits of the claim, and is not intended to be a pronouncement on the viability or strength of the action. Rather, it focuses on the form of the action so as to determine whether the action can appropriately go forward as a class proceeding: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 [*Microsoft*] at para. 102. The court should not weigh or seek to resolve conflicting facts and evidence at this stage. As the Supreme Court of Canada held in *AIC Ltd. v. Fischer*, 2013 SCC 69, "the court cannot engage in any detailed weighing of the evidence but should confine itself to whether there is some basis in the evidence to support the certification requirements" (para. 43).

Do the Pleadings Disclose a Cause of Action?

Generally

[43] Again, quoting Branch J.'s summary of the law on this part of the test in *Krishnan SC*:

> [44] The pleadings test under the *CPA* is akin to that used on an application to strike a proceeding under Rule 9-5(1) of the *Supreme Court Civil Rules*. A court will only refuse to certify the action on this ground if it is plain and obvious that the plaintiff's claim is bound to fail, assuming the facts

> alleged in the pleadings are true: *Microsoft* at para. 63; *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 19.
>
> [45] The claim "must be read generously to allow for inadequacies due to drafting frailties and the plaintiff's lack of access to key documents and discovery information" and unsettled points of law must be permitted to proceed: *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399 at paras. 136-138. Courts are to consider the claims as they are, or as they may be amended: *Sharp v. Royal Mutual Funds Inc.*, 2020 BCSC 1781 at para.22.

[44] In *Ramdath v. George Brown College*, 2010 ONSC 2019, Justice Strathy stated:

> [40] Certification is decidedly *not* a test of the merits of the action. The question for a judge on a certification motion is not “will it succeed as a class action?”, but rather “can it *work* as a class action?”
>
> [Emphasis in original.]

Negligence

[45] A successful action in negligence requires that a plaintiff demonstrate: (1) that the defendant owed them a duty of care; (2) that the defendant’s behaviour breached the standard of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant’s breach. See *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 3.

[46] Negligent hiring and supervision of an employee or independent contractor is a plausible theory of liability: *Wilson v. Clarica Life Insurance Co*., 2002 BCCA 502 at paras. 1–6, 13–15; *CMA v. Just Energy L.P. and Glen Lancaster et al*, 2012 ONSC 3524 at para. 21.

[47] The plaintiff pleads that the PHSA owed a duty of care to class members to take reasonable steps to ensure that the nurses who treated them were properly licensed and reasonably competent.

[48] The plaintiff pleads that at all material times Ms. Cleroux was employed by the PHSA in the capacity of a registered nurse at the BCWH when, in fact, she was not lawfully qualified as a registered nurse and had obtained her employment using falsified documentation and/or credentials which the PHSA knew or should have

known about. She pleads that the PHSA failed to properly review Ms. Cleroux's credentials as a registered nurse and as a result hired her to work at BCWH where she had inappropriate and illegal contact with multitudes of vulnerable patients including Ms. Massie.

[49] The plaintiff further pleads that for many years prior to becoming employed at the BCWH, Ms. Cleroux had an extensive history of using forged credentials to work illegally as a nurse. She alleges that much of this information is a matter of public record and this information was readily available to the PHSA had it exercised a reasonable level of diligence. She pleads that the PHSA failed to exercise a reasonable level of diligence before hiring Ms. Cleroux, including by failing to confirm Ms. Cleroux's credentials with the British Columbia College of Nurses and Midwives.

[50] She alleges that Ms. Cleroux started working as a registered nurse with the PHSA at the BCWH on or about June 1, 2020 and continued until on or about June 30, 2021 when the PHSA finally discovered she had falsified her credentials as a nurse and terminated her employment.

[51] She pleads that prior to terminating Ms. Cleroux, the PHSA knew or should have known that Ms. Cleroux was not competent to work as a registered nurse regardless of her professional credentials, based on a demonstrated lack of competency and ethics when interacting with patients.

[52] The plaintiff pleads that as a result of Ms. Cleroux's incompetence and lack of ethics, Ms. Cleroux caused damage and harm to many class members.

[53] She pleads that as a result of learning that Ms. Cleroux was not a registered nurse, many class members sustained mental distress and nervous shock all of which was foreseeable to the PHSA.

[54] The plaintiff pleads in her ANOCC at para. 27 the existence and breach of a duty of care:

> 27. PHSA owed every Class Member a duty of care to take reasonable steps to ensure they were receiving treatment by properly licenced and

> reasonable competent nurses. PHSA breached this duty by failing to take reasonable steps to ascertain Cleroux's credentials before hiring her and for failing to respond to her gross incompetence and removing her from providing care to Class Members when PHSA knew or should have known she was incompetent.

[55] I find that the plaintiff has pleaded the requisite elements for a claim of negligence.

Tort of Battery

[56] The tort of battery is described in Allen M. Linden and Bruce Feldthusen, *Canadian Tort Law*, 9th ed. (Markham: LexisNexis Canada, 2011) at 42–43, as follows:

> A person who intentionally causes a harmful or offensive contact with another person is liable for battery. This nominate tort seeks to reduce the incidence of violence in our society. It protects the interest in bodily security from deliberate interference by others. By definition, any contact beyond the trivial contact that is expected in the course of ordinary life is *prima facie* offensive if it is non-consensual. The tort protects the integrity of one's person and does not require proof of further injury.

See also *Qiao v. Owners, Strata Plan LMS 3863*, 2020 BCSC 818, at para. 115 quoting *Kearns v. Marples*, 2009 BCSC 802 ("Battery consists of intentionally causing a harmful or offensive contact with another person."), and at para. 186 (burden on plaintiff to prove causation on a balance of probabilities).

[57] The elements of the tort can be distilled as: (a) the intentional making of harmful or offensive contact with another person (beyond the trivial, or that expected in the course of ordinary life); and (b) no consent.

[58] The plaintiff pleads in her ANOCC at para. 13 that:

> 13. Every Class Member consented to treatment by Cleroux and did so on the representation that Cleroux was a registered nurse and as such every Class Member who received treatments from Cleroux did so without lawful consent and sustained a battery.

[59] The plaintiff pleads that the BCWH represented to her that Ms. Cleroux was a properly licensed registered nurse and, on this basis, Ms. Massie consented to

receiving treatment from Ms. Cleroux. She pleads at para. 20 that "[b]efore, during and after the Surgery, Ms. Cleroux battered Ms. Massie by administering treatments to her in the absence of lawful consent".

[60] The plaintiff pleads in her ANOCC at para. 23 that:

> 23. Cleroux committed the Tort of Battery by administering treatments to Class Members without proper consent. Every Class Member that consented to treatment by Cleroux did so on the representation that Cleroux was a registered nurse and as such no class member issued proper consent. Every treatment that Cleroux administered to a Class Member constituted the Tort of Battery.

[61] I find that the plaintiff has pleaded the requisite elements of the cause of action of tortious battery.

Wilful Violation of Privacy (Privacy Act)

[62] Section 1 of the *Privacy Act* provides for the tort of violation of privacy:

> 1 (1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.
>
> (2) The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interests of others.
>
> (3) In determining whether the act or conduct of a person is a violation of another's privacy, regard must be given to the nature, incidence and occasion of the act or conduct and to any domestic or other relationship between the parties.
>
> (4) Without limiting subsections (1) to (3), privacy may be violated by eavesdropping or surveillance, whether or not accomplished by trespass.

[63] Justice N. Smith described the tort as follows in *Ari v. Insurance Corporation of British Columbia*, 2022 BCSC 1475:

> [31] The determination of liability for breach of privacy under the *PA* depends on the particular facts of each case. The court must decide whether the plaintiff was entitled to privacy in the circumstances and, if so, whether the defendant breached the plaintiff's privacy. The trial judge has "a high degree of discretion" to determine what is a reasonable expectation of privacy in the circumstances: *Milner v. Manufacturers Life Insurance Company,* 2005 BCSC 1661 [*Milner*] at paras. 74 and 79.

[64] The elements of this tort are therefore: (a) the plaintiff was entitled to privacy in the circumstances; and (b) the defendant breached the plaintiff's privacy.

[65] The plaintiff pleads in her ANOCC at para. 14 that:

> 14. Every Class Member consented to Cleroux being present before, during and after their medical procedures, including surgeries, on the representation that Cleroux was a registered nurse and Cleroux improperly accessed the medical records and medical histories of the Class Members and wrongfully observed Class Members during their medical procedures and as such Cleroux committed the tort of violation of privacy as against all Class Members wilfully and without claim of right.
>
> [Emphasis added.]

[66] She also pleads a breach of privacy in these terms:

> 25. Every Class Member that consented to Cleroux being present before during or after their medical procedures and every Class Member that allowed Cleroux access to their personal medical records and medical information did so on the false representation that Cleroux was a registered nurse. These actions were wilful and without a claim of right. This constitutes a violation of the privacy of the Class Members.
>
> 26. The Plaintiff and Class Members reside in British Columbia and are entitled to statutory damages as a result of Cleroux breaches under the *Privacy Act* BC, s. 1 and 3(2).

[67] I find that the claim for breach of privacy meets the s. 4(1)(a) certification requirement. The plaintiff pleads breach of privacy for being present in a private medical setting during a gynecological procedure, by wrongfully invading privacy both in a physical way ("wrongfully observ[ing]") and an informational way ("accessed … medial records and medical histories"). And that this conduct was wilful and without claim of right. I find these allegations satisfy the requisite elements for actionable breach of privacy.

Vicarious Liability

For Which Torts is Vicarious Liability at Issue?

[68] The plaintiff pleads in "Part 2: Relief Sought" in the ANOCC that the defendant PHSA is vicariously liable for the tort of battery and breach of privacy, and

proposes that this issue be included in the related common issues Questions 2 and 3.

[69] In “Part 2: Relief Sought”, the plaintiff did not expressly plead that the PHSA was vicariously liable for the tort of negligence (although she did allege vicarious liability generally at para. 16 of Part 1 of the ANOCC), and while her written argument suggested she may wish to do so, the framing of her proposed common issues (see Question 1 in Schedule A) does not propose that vicarious liability be included in the framing of the common issue as to negligence.

[70] Accordingly, I will only deal with the plea of vicarious liability for the torts of battery and breach of privacy.

Vicarious Liability

[71] Two concerns underlie the imposition of vicarious liability: (1) provision of a just and practical remedy for the harm; and (2) deterrence of future harm: *Bazley v. Curry*, [1999] 2 S.C.R. 534 at para. 29, 1999 CanLII 692.

[72] Vicarious liability is governed by the *Salmond* test, “which posits that employers are vicariously liable for (1) employee acts authorized by the employer; or (2) unauthorized acts so connected with authorized acts that they may be regarded as modes (albeit improper modes) of doing an authorized act”: *Bazley* at para. 10.

[73] As explained in *Bazley* at para. 37, underlying the concept of vicarious liability for the unauthorized acts of employees,

> … is the idea that employers may justly be held liable where the act falls within the ambit of the risk that the employer’s enterprise creates or exacerbates. Similarly, the policy purposes underlying the imposition of vicarious liability on employers are served only where the wrong is so connected with the employment that it can be said that the employer has introduced the risk of the wrong (and is thereby fairly and usefully charged with its management and minimization). The question in each case is whether there is a connection or nexus between the employment enterprise and that wrong that justifies imposition of vicarious liability on the employer for the wrong, in terms of fair allocation of the consequences of the risk and/or deterrence.

[74] Justice McLachlin, as she then was, summarized the factors to be considered as to the authorized acts branch of vicarious liability in *Bazley* at para. 41:

> Reviewing the jurisprudence, and considering the policy issues involved, I conclude that in determining whether an employer is vicariously liable for an employee's unauthorized, intentional wrong in cases where precedent is inconclusive, courts should be guided by the following principles:
>
> (1) They should openly confront the question of whether liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of "scope of employment" and "mode of conduct".
>
> (2) The fundamental question is whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires. Where this is so, vicarious liability will serve the policy considerations of provision of an adequate and just remedy and deterrence. Incidental connections to the employment enterprise, like time and place (without more), will not suffice. Once engaged in a particular business, it is fair that an employer be made to pay the generally foreseeable costs of that business. In contrast, to impose liability for costs unrelated to the risk would effectively make the employer an involuntary insurer.
>
> (3) In determining the sufficiency of the connection between the employer's creation or enhancement of the risk and the wrong complained of, subsidiary factors may be considered. These may vary with the nature of the case. When related to intentional torts, the relevant factors may include, but are not limited to, the following:
>
> (a) the opportunity that the enterprise afforded the employee to abuse his or her power;
>
> (b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);
>
> (c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;
>
> (d) the extent of power conferred on the employee in relation to the victim;
>
> (e) the vulnerability of potential victims to wrongful exercise of the employee's power.
>
> [Emphasis in original.]

[75] I find that, having regard to the principles of vicarious liability set out above, the plaintiff has pleaded sufficient material facts to support a claim of vicarious liability for the alleged torts of battery and breach of privacy.

Punitive Damages

[76] The defendant argued that a claim for punitive damages was not sufficiently pleaded. Typically, when punitive damages are pleaded in a proposed class action, it is not considered under s. 4(1)(a) (as to whether it discloses a cause of action), but its merit is considered under s. 4(1)(c): e.g. *Krishnan SC*, paras. 207–210.

[77] However, if it were necessary to consider under s. 4(1)(a), I find that it is not plain and obvious that the plaintiff's claim for punitive damages as pleaded is bound to fail. The plaintiff pleads in the ANOCC that, "PHSA's conduct in unlawfully allowing Cleroux to treat vulnerable Class Members and failing to respond appropriately to complaints made against Cleroux, and exposing the public to an unlicensed and unqualified health care professional was outrageous, reckless, wanton, without care, callous, and a disregard of the rights of the Class and an afront to community standards". I find there are sufficient material facts pleaded to support the plaintiff's assertion of a marked departure from ordinary standards of decent behaviour such as to ground a claim for punitive damages: *Kirk v. Executive Flight Centre Fuel Services Ltd.*, 2019 BCCA 111 at paras. 139–140, leave to appeal to SCC ref'd, 38678 (17 October 2019); *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at paras. 36, 87.

Conclusion on the Causes of Action

[78] I find that the three causes of action advanced, and the claim of vicarious liability and punitive damages, are adequately pleaded. The first requirement for certification is therefore met.

Is there a Proper Class?

[79] Section 4(1)(b) of the *CPA* requires that there be an identifiable class of two or more persons. In *Western Canadian Shopping Centres v. Dutton*, 2001 SCC 46 [*Dutton*], the Court described this element of the certification test:

> [38] … First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria: see Branch, *supra*, at paras. 4.190-4.207; Friedenthal, Kane and Miller, *Civil Procedure* (2nd ed. 1993), at pp. 726-27; *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Ct. (Gen. Div.)), at paras. 10-11.

[80] In *K.O. v. British Columbia (Ministry of Health)*, 2022 BCSC 573, aff'd 2023 BCCA 289, Justice Baird stated:

> [47] A clear class definition is critical to certification because it identifies the persons entitled to notice, to relief if any is awarded, and those bound by the judgment: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 38. It is also required so that people can decide whether to have their rights determined within the posited class proceeding or to opt out: *Gariepy v. Shell Oil Co.*, [2002] O.J. No. 2766 at para. 47.

[81] The defendant PHSA opposes the framing of the class in "Part 2: Relief Sought" in the ANOCC, on this application, and in her counsel's litigation plan. It asserts the ANOCC does not include a definition of the term "treatments", "direct" or "indirect", nor is there any explanation of what these terms are intended to mean. The PHSA submits this lack of specificity creates significant issues for determining this case as a class action. The PHSA submits "the class definition does not use intelligible terminology that provides the necessary objective clarity for any particular individual to identify whether they fall within the definition". It also submits that defined term "Impugned Treatments" is also vague, and compounds the difficulty.

[82] The defendant also submits the proposed class is overly broad, and does not allow for identification without further individual inquiries, and relies on *Ileman v. Rogers Communications Inc.,* 2014 BCSC 1002 at paras. 124–128 [*Ileman* SC], aff'd 2015 BCCA 260, leave to appeal to SCC ref'd, 36600 (11 February 2016). It submits that it "is not sufficient to be able to define the class, if identifying the persons who meet the definition will require an inherently individualistic exercise that cannot be resolved objectively".

[83] The defendant argues that in "circumstances such as these --where there is a proposed class action claim against public entities for healthcare-related claims-- then the protection of public finances is a relevant factor to consider in the analysis".

[84] The defendant PHSA also contends that it would be fair and just, but also vital from the view point of protecting public finances, to allow the defendant to cross-examine putative class members on the subjective criteria that would determine whether they fall within the class definition (relying on *K.O.* at paras. 48–49). Specifically, the PHSA submits that "[a]t minimum, PHSA should be permitted to cross-examine any putative class members about whether they suffered any injuries because of Ms. Cleroux and thus have claims in negligence or battery".

[85] I disagree with the defendant's submission that there is not a proper class definition at this stage. The evidence indicates that the PHSA has records indicating who Ms. Cleroux provided care to during her tenure at the BCWH. There is a basis in fact that for me to find that identifying the patients who received care from Ms. Cleroux at the BCWH is not complicated, since the PHSA has conducted an internal investigation and written to patients who it found received such care from her at the BCWH. It is not obvious that determination of class membership is an inherently and inescapably an individualistic exercise that cannot be resolved objectively: *Ileman SC* at para. 127.

[86] In addition, the notice letters assist to provide objective clarity as to who received care directly, or indirectly. The notice letters suggest that direct care means Ms. Cleroux interacted with a patient directly or provided nursing care to them.

However, indirect care means that Ms. Cleroux did not provide direct care but "was involved in reviewing patient charts for surgical care".

[87] There is a basis in fact that the class definition can be defined with sufficient and objective clarity to satisfy the identifiable class requirement of s. 4(1)(b).

[88] I do not find that cross examination is likely necessary to establish membership in the class, as was the case in *K.O.* at para. 49.

[89] The plaintiff has provided some basis in fact that there are two or more members of the class. The defendant's evidence is that over one thousand notice letters were sent to patients in respect of care they received, directly or indirectly, by Ms. Cleroux. There are six affidavits from such patients filed on this application. Further, the plaintiff's evidence is that her law firm's counsel has been contacted by approximately 150 people who report that they are proposed class members.

Are there Common Issues?

Generally

[90] To satisfy this requirement the plaintiff must demonstrate some basis in fact that "the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members": *CPA*, s. 4(1)(c).

[91] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 108 [*Microsoft*] (following *Dutton*) states that here, "[t]he underlying question is whether allowing the suit to proceed as a [class action] will avoid duplication of fact-finding or legal analysis". This is a practical question, answered with an eye to serving the ends of fairness and efficiency: *Rumley v. British Columbia*, 2001 SCC 69 at para. 29. *Microsoft* describes *Dutton*'s further instructions on the commonality requirement:

> (1) The commonality question should be approached purposively.
>
> (2) An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim.

> (3) It is not essential that the class members be identically situated *vis-à-vis* the opposing party.
>
> (4) It not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues.
>
> (5) Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

[92] Subsequently, the Supreme Court of Canada clarified that success for one class member on a common issue need not necessarily mean success for all, but success for one member must not mean failure for another: *Krishnan SC* at para. 114, following *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at para. 45 [*Vivendi*].

[93] The "threshold that must be met to find that there are common questions is a low one": *Vivendi* at para. 72.

[94] Section 7(a) of the *CPA* provides that the "court must not refuse to certify a proceeding as a class proceeding merely because" the "relief claimed includes a claim for damages that would require individual assessment after determination of the common issues".

[95] *Krishnan SC* adds:

> [115] The evidence matters in establishing the common issues. The plaintiff must adduce some basis in fact that: (a) the common issue actually exists; and (b) the proposed issue can be answered in common across the class: *Simpson v. Facebook*, 2021 ONSC 968 at para. 43; *Mancinelli v. Royal Bank of Canada,* 2020 ONSC 1646 at para. 120; *Bhangu* at para. 97-99; *Charlton v. Abbott Laboratories Ltd.*, 2015 BCCA 26, at para. 85.

[96] The plaintiff amended its proposed common issues during the course of the hearing of this application. The finalized list of common issues the plaintiff advances, incorporating a revision made to Question 1 in reply submissions, is set out in Schedule A.

Parties' Positions on Commonality

[97] The plaintiff submits the experiences of class members are all common. That they all share substantial common ingredients, and Ms. Cleroux was involved directly or indirectly in their care. The plaintiff says:

> Adopting a purposive approach to commonality and following recent case law in this and the Federal Court, the plaintiff's proposed common issues share substantial common ingredients to justify a class action. Their resolution will advance the litigation for the Class and are ideally suited to common determination. Their determination will advance the claims of all Class Members and avoid duplication of fact-finding or legal analysis. And nuanced answers can be given if they are required for any Class Members or for any subset of the Class.

[98] The defendant PHSA submits the claim fails to raise common issues on several key issues, and the claims will inevitably break down into many individual trials. The PHSA contends:

> … that certification of the plaintiff's proposed negligence, battery or privacy claims will necessarily and infallibly devolve into a myriad of separate trials in which varied issues of fact, credibility, fault, causation, injury and damages will have to be independently evaluated and proved – as in the overwhelming majority of cases where damages are claimed for individual personal injury.
>
> …
>
> Here, certification does nothing to move litigation forward because all of the claims will inevitably break into individualized trials – both on liability and damages. There is little to gain in judicial economy through a class action when the alleged common issues are, in reality, dependent on individual findings of fact. Where there will be no gain to the judicial system or its users through the class procedure, recognizing that fact should not be postponed out of an excess of judicial reticence.

Negligence Issues (Question 1 and Question 2)

[99] The first proposed common issue raises three questions: duty, breach, and the PHSA's liability for harm caused to class members. The plaintiff frames this legal theory as one of an alleged "negligent hire" of an employee under Question 1 (see also Question 2).

[100] I accept there is some basis in fact that the questions of the existence of a duty of care, and breach of the standard of care, in the hiring of Ms. Cleroux, could

likely be properly determined separately on a common basis. The hiring of Ms. Cleroux involves the conduct of the defendant, and a single event, common to all in the class.

[101] However, I find that the third aspect of Question 1 – Is the PHSA liable in negligence for the harm caused by Ms. Cleroux to class members? – is not a common issue (see also Question 2, in its reference to the Tort of Negligence). Liability presumes causation of harm. Each of the class members likely had different experiences with Ms. Cleroux, given the variety of her nursing tasks at the BCWH. It is possible, on the evidence before me, that there would be significant variety in the extent to which any of the class members may have been physically or emotionally harmed by the care received from Ms. Cleroux. There is no basis in fact that this aspect of Question 1 is a common issue. Question 1 in full, as proposed by the plaintiff, is not a common issue.

Battery (Question 2)

[102] So too I find that Question 2, which posits questions with respect to alleged battery and related vicarious liability, is not a common issue. The class members' physical interactions, if any, with Ms. Cleroux were not the same. Battery requires proof of causation and harmful contact, and I find there is no basis in fact that such issues would be common across the proposed class. (I have also found above that the issue of liability in the Tort of Negligence, to the extent it is set out in Question 2, is also not a common issue.)

[103] I further agree with the PHSA's submission that consent for an unlicensed nurse to deliver care is an issue which will likely have individualized aspects. The PHSA argued that it is possible that a person who is not licenced to be nurse could nonetheless still possess some qualifications to be a nurse. The PHSA argued that, faced with the prospect of not having a medical procedure at all, or having the procedure but with an unlicensed nurse involved, some class members may have chosen to consent to the involvement of an unlicensed nurse; thus, whether class members consented would require an individualized inquiry. I agree that whether

consent would have been given or not to Ms. Cleroux's involvement in a patient's care is not a common issue.

[104] Question 2 as framed is not a common issue.

Breach of Privacy (Question 3)

[105] Question 3 asks if the Impugned Treatments constitute a breach of privacy (and vicarious liability), and is of a different character. I accept that Question 3 constitutes a suitable common issue.

[106] The PHSA contends that "as to the privacy claims, the circumstances in which Ms. Cleroux interacted with any given patient varied across the proposed class", and so likely gives rise varied damages assessments. They rely on *Jones v. Tsige*, 2012 ONCA 32 paras. 81–87 (intrusion upon seclusion when defendant repeatedly examined the private bank records of the plaintiff; damages in the amount of $10,000 awarded) and *Severs v. Hyp3R Inc*., 2021 BCSC 2261, among other authorities.

[107] I disagree.

[108] Instead, I find there is some basis in fact that all class members were subject to a breach of privacy, sufficient to support the commonality of the proposed breach of privacy issue. There is a basis in fact that whether Ms. Cleroux's presence during, and involvement with, the care of patients as part of gynecological surgeries constitutes actionable wilful invasion of privacy is common to all class members.

[109] I further find that the resolution of this common issue would avoid duplication of fact finding and legal analysis, and would be efficient and fair.

[110] That the specific privacy claims may be somewhat different across the class – some may be solely based on allegedly wrongfully accessing medical records and medical information, and some will relate to allegedly wrongfully being present and observing the class members in a clinical setting – is not an obstacle to proceeding

as a class action. Though it may mean the Court will have to give a nuanced answer to the common question: *Rumley* at para. 32.

[111] The merit of such a pleaded claim succeeding at a common issues trial, whether as it relates to her physical presence, or her access to private medical information, is at least arguable: *Krishnan CA*, paras. 48, 109–111.

[112] Approaching the matter purposively, with an eye to the ends of fairness and efficiency, and cognizant the threshold is a low one, I find that there is a basis in fact that a common issue actually exists, and it can be answered in common across the class.

[113] Simply because the class members' claims for breach of privacy (and vicarious liability) might require individual assessments after determination of this common issue is not a basis to refuse to certify the proceeding: *CPA*, s. 7(a).

Damages (Question 4)

[114] Question 4 would ask what damages were suffered by class members: "What are the damages, if any, payable to the Class?"

[115] There is no basis in fact on this application for me to infer that the damage suffered by class members would be the same. The evidence is to the contrary: patient experiences with Ms. Cleroux differed. There is no basis in fact presented by the plaintiff for a "plausible methodology capable of establishing loss on a class-wide basis": *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187 at para. 11, leave to appeal to SCC ref'd, 38784 (19 December 2019); see also *Live Nation Entertainment, Inc. v. Gomel*, 2023 BCCA 274 at paras. 145–147.

[116] This is not a common issue.

Aggregate Damages (Question 5)

[117] Question 5 asks whether the Court can make an aggregate damages award in favour of class members and, if so, in what amount. Section 29 of the *CPA* governs the availability of such damages:

> 29 (1) The court may make an order for an aggregate monetary award in respect of all or any part of a defendant's liability to class members and may give judgment accordingly if
>
> (a) monetary relief is claimed on behalf of some or all class members,
>
> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability, and
>
> (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.
>
> (2) Before making an order under subsection (1), the court must provide the defendant with an opportunity to make submissions to the court in respect of any matter touching on the proposed order including, without limitation,
>
> (a) submissions that contest the merits or amount of an award under that subsection, and
>
> (b) submissions that individual proof of monetary relief is required due to the individual nature of the relief.

[118] Sections 29 and 30 of the *CPA* are "procedural provisions, intended to facilitate the calculation and distribution of damages": *Sharp v. Royal Mutual Funds Inc.*, 2021 BCCA 307 at para. 141, leave to appeal to SCC ref'd, 39882 (17 March 2022).

[119] Justice Branch in *Krishnan SC* stated that "[t]o be certified as a common issue, the plaintiff must show that there is a reasonable likelihood that the preconditions in s. 29(1) of the *CPA* would be satisfied and an aggregate assessment would be made if the plaintiff is otherwise successful at the common issues trial". He stated the test for whether aggregate damages is a common issue:

> [156] An aggregate assessment of monetary relief may only be certified as a common issue where (a) resolving the other certifiable common issues could be determinative of monetary liability and (b) where the quantum of damages could reasonably be calculated without proof by individual class members: *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443 at para. 139, leave to appeal ref'd [2012] S.C.C.A. No. 326; *Cantlie v. Canadian Heating Products Inc.*, 2017 BCSC 286 at paras. 331-332.

[120] However, causation is different than the assessment of monetary relief: *Sharp* at para. 129. Causation is a distinct factual inquiry that necessarily precedes any quantification of loss. As Justice Voith stated, "issues of causation and the 'quantum'

of damages are different", since they "are distinct inquiries that address different issues", and this is relevant to a s. 29 analysis:

> [129] ... An inquiry into causation necessarily precedes any "assessment" or "quantification" of monetary relief. To return to the language of s. 29(1)(b) of the *CPA*, it is an antecedent and outstanding question of "fact … [that] remain[s] to be determined in order to establish the amount of the defendant's monetary liability".

[121] Proof of causation is an essential requirement in a claim for compensatory damages: *Sharp* at para. 124. The Court of Appeal stated in *Sharp* at para. 163:

> A claim for nominal damages does not exist independently from whether, and to what extent, a claim for compensatory damages is established. Nominal damages are normally justified where a party has established a cause of action and *bona fide* sought compensation but failed to prove a loss…

[122] In this case, the plaintiff seeks a claim of compensatory damages, and is not limiting the claim to nominal damages.

[123] In *Sharp*, aggregate damages were not available since the plaintiff sought to avoid the issue of causation in circumstances where it was central to the theory that underlay their claim to compensatory damages. Causation being a distinct factual inquiry necessarily preceded any quantification of loss, and so ss. 29 and 30 were inapplicable.

[124] Likewise, here, the plaintiff seeks awards of compensatory damages for negligence, battery, and breach of privacy. Each such cause of action requires a determination of causation of harm. However, any related common issues could not determine causation, which would have to be left to individual assessments and trials. Since causation would remain to be determined after any trial of common issues as to negligence, battery, and breach of privacy, under to s. 29(1)(b) and *Sharp,* the Court could not make an award of aggregate damages in this case.

[125] Since there is not a "reasonable likelihood that the preconditions in s. 29(1) of the *CPA* would be satisfied and an aggregate assessment would be made if the plaintiff is otherwise successful at the common issues trial" (*Krishnan SC* at para. 156), I decline to certify it as a common issue.

Punitive Damages (Question 6)

[126] The plaintiff also pleads for punitive damages, and alleges:

> The plaintiff pleads that PHSA's conduct in unlawfully allowing Cleroux to treat vulnerable Class Members and failing to respond appropriately to complaints made against Cleroux and exposing the public to an unlicensed and unqualified heath care profession and was outrageous, reckless, wanton, without care, callous, and a disregard of the rights of the Class and an afront to community standards. Such conduct renders PHSA liable to pay punitive damages.

[127] Question 6 asks if the Court should award punitive damages against the defendant and, if so, in what amounts.

[128] The issue of punitive damages focusses on the defendant's conduct. As Justice Branch noted in *Krishnan SC* at para. 207, the analysis to determine if a party is entitled to punitive damages asks whether a defendant's conduct was:

> … sufficiently reprehensible or high-handed to warrant punishment. As such, the entitlement to punitive damages is frequently certified as a common issue in class proceedings: *Rumley v. British Columbia*, 2011 SCC 69 at para. 34; *Cloud v. Canada (Attorney General),* [2004] OJ no. 4924 (C.A.) at para. 72; *Boulanger v. Johnson & Johnson Corp.*, [2007] O.J. No. 179 (S.C.J.) at para. 48, leave to appeal ref'd [2007] O.J. No. 1991 (S.C.J.); *Chalmers v. AMO Canada Company*, 2010 BCCA 560 at paras. 25-35; *Matthews v. La Capitale Civil Service Mutual*, 2020 BCSC 787 at paras. 140-143, 149.

See also: *Chace v. Crane Canada Inc.*, [1997] 44 B.C.L.R. (3d) 264, 1997 CanLII 4058 (C.A.) at paras. 22–26 ("a class proceeding seems particularly well-suited for the hearing of a claim for punitive damages"); *Rorison v. Insurance Corporation of British Columbia*, 2022 BCSC 624 at paras. 71–73; *Kirk* at para. 138.

[129] The evidence before me suggests that Ms. Cleroux, who was unlicensed nurse, nevertheless was permitted by the PHSA to work in a nursing role with patients in a private medical setting, reviewed medical records, and in a nursing role had physical contact with and personally observed putative class members in a clinical setting during their hospital stay for gynecological procedures.

[130] In my view, the issue is how Ms. Cleroux came to be hired by the PHSA as a nurse at the BCWH, and was permitted to do what she did at the hospital, was

sufficiently reprehensible or highhanded to attract a punitive damages award. I do not need to decide the merits of that issue at this stage; nor do I simply apply "symbolic scrutiny" to the merit of such a claim: *Kirk* at para. 141. Steering a course of analysis which lies between, I find there are facts pleaded, and evidence, which describes conduct on behalf of the PHSA that could be characterized as a marked departure of the standards of decent behaviour. There is also basis to conclude at this stage that the amount of punitive damages could be determined as a common issue. There is some basis in fact for a punitive damages common issue.

Conclusion on Common Issues

[131] For these reasons, I find that Question 3 relating to breach of privacy (and related question as to the PHSA's vicarious liability) and Question 6 relating to punitive damages are common issues. The other Questions posed, as set out in Schedule A, are not common issues.

Is a Class Proceeding the Preferable Procedure?

Generally

[132] The plaintiff bears the burden of establishing that certifying this action as a class proceeding is the preferable method of resolving the claims: *Krishnan SC* at para. 212. In *AIC Limited v. Fischer*, 2013 SCC 69 [*AIC*], the Court stated:

> [48] The party seeking certification of a class action bears the burden of showing some basis in fact for every certification criterion: *Hollick*, at para. 25. In the context of the preferability requirement, this requires the representative plaintiff to show (1) that a class proceeding would be a fair, efficient and manageable method of advancing the claim, and (2) that it would be preferable to any other reasonably available means of resolving the class members' claims: *Hollick*, at paras. 28 and 31. A defendant can lead evidence "to rebut the inference of some basis in fact raised by the plaintiff's evidence": M. Cullity, "Certification in Class Proceedings — The Curious Requirement of 'Some Basis in Fact'" (2011), 51 *Can. Bus. L.J.* 407, at p. 417.

[133] I will review the mandatory factors set out in s. 4(2) of the *CPA*. Then I will engage in a broader examination as to whether the proposed proceeding advances

the purposes of class proceedings: *Krishnan SC* at para. 213, citing *Bhangu v. Honda Canada Inc*., 2021 BCSC 794 at paras. 149–150.

[134] I consider the preferability requirement only for the issues I have found to be a common issue: Question 3 (breach of privacy, and the defendant's vicarious liability for it), and Question 6 (punitive damages).

The Parties' Positions

[135] The plaintiff submits that absent a class proceeding, class members will be denied access to justice.

[136] The plaintiff contends that everyone in the class experienced a common event—Ms. Cleroux's presence at the BCWH in a clinical setting—and that some liability issues are common and should be certified: duty and breach in negligence; battery; and breach of privacy. The plaintiff contends that use of s. 27 of the *CPA* can avoid the spectre of any difficulty arising from otherwise having individual trials for each class member.

[137] The defendant contends that a class proceeding is not preferable. The PHSA contends that there are too many individualized issues left over to meet the certification test – causation, damages, and the defences – to get to an end point for class members. The defendant contends that s. 27 cannot be used in the manner the plaintiff contends, and relies on *Ragoonanan v. Imperial Tobacco Canada Ltd.* (2005), 78 O.R. (3d) 98, 2005 CanLII 40373 (O.N. S.C.J.), aff'd 2008 CanLII 19242.

[138] The defendant submits there is no common loss across the class. The defendant argues that Ms. Cleroux's interactions with class members were not uniform or generalized, which would make the *CPA* procedure unmanageable. It submits the proposed class action fails the preferability requirement, since it would be unmanageable, inefficient, and unfair.

[139] The PHSA says that behaviour modification is not an issue here since, for among other reasons, “PHSA has taken steps to prevent a similar thing like this from happening again”.

[140] The defendant contends the privacy claims are also not suitable, stating:

> 230. As for the privacy claims, even if it is accepted that Cleroux’s involvement to any extent, in itself, constituted a breach of privacy, this claim still does not lend itself to a generalized determination across the class. This remains a fact-driven claim for all class members, requiring individualized investigation to determine who experienced what, and what effect that had on each class member. Any initial notion that this claim can be determined classwide is revealed to be an illusion when considering the highly variable circumstances of Cleroux ‘s involvement and the potential effects on each class member.

Application

Section 4(2)(a): Whether Questions of Fact or Law Common to the Members of the Class Predominate Over any Questions Affecting Only Individual Members.

[141] In regard to Question 3, the resolution of the common issue as it relates to whether Ms. Cleroux’s personal presence and access to medical information in respect of the proposed class members’ gynecological procedures would answer a substantial question common to the class that would materially advance the action. As would the related question as to whether the PHSA is vicariously liable for any such breach of privacy.

[142] While the resolution of Question 3 (regarding alleged breach of privacy) would leave for determination causation and the quantum of damages for any breach of privacy, in my view there is a basis to find that such issues are amenable to categorization based on the types of interactions Ms. Cleroux had with each class member as a patient, and the Court could likely use s. 27 of the *CPA* for this purpose.

[143] While damages assessment may involve individualized aspects, there is a basis to find that such individual aspects would not likely predominate in respect of alleged breach of privacy.

[144] I adopt the statement of Justice Branch in *Krishnan SC* as applicable in this case:

> [217] When one considers:
>
> 1. the considerable power the court has to constrain and control the procedure required to resolve any residual issues through s. 27 of the CPA; and
>
> 2. the considerable tolerance our courts have shown to cases that would have required much more involved individual issues assessments (see the certified abuse class actions *Rumley*, *Cloud*, *Griffiths v. HMTQ*, 2003 BCCA 367, and *Richard v. HMTQ*, 2005 BCSC 372 *inter alia*);
>
> the Court concludes that the weight of this factor heavily favours certification.

[145] In addition, the resolution of whether the Court should award punitive damages against the defendant, and if so in what amount (Question 6), also would materially advance the action. Again, s. 27 could be likely employed to resolve any residual issues which remain and would require individual assessment.

Section 4(2)(b): Whether a Significant Number of the Members of the Class Have a Valid Interest in Individually Controlling the Prosecution of Separate Actions

[146] There is no evidence of a large number of putative class members who wish to pursue the claims on an individual basis. This would tend to support certification.

[147] Ten individuals have filed their own notices of civil claim in British Columbia against the PHSA (and Ms. Cleroux and the BC College of Nurses and Midwives), alleging negligence, battery, breach of privacy, vicarious liability and seeking aggravated and punitive damages. This is less than one percent of all proposed class members.

[148] The existence of the individual claims does not render a class proceeding not a preferable procedure. If this action is certified, an individual claimant may opt to be part of the class action, or choose not to participate in the class should they wish to proceed with their own individual claim. The fact that some proposed class members have commenced individual actions “does not change the fact that a majority of

proposed class members have not chosen to do so”; and the majority should not be deprived of the benefits of a class proceeding because other members have chosen to pursue their claim through individual actions: *Jer v. Samji*, 2013 BCSC 1671 at paras. 201–202, var’d on other grounds 2014 BCCA 116.

[149] It would be contrary to access to justice to decline to certify a class action simply because less then one percent of all proposed class members have decided to pursue an individual claim.

S.4(2)(c): Whether the Class Proceeding Would Involve Claims That Are or Have Been the Subject of Any Other Proceedings

[150] The Court was advised and the evidence supports that there is no other extant proposed class action proceeding in Canada involving these issues. I have also addressed the filing of individual notices of civil claim above.

S.4(2)(d): Whether Other Means of Resolving the Claims Are Less Practical or Less Efficient

S.4(2)(e): Whether the Administration of the Class Proceeding Would Create Greater Difficulties Than Those Likely to Be Experienced if Relief Were Sought by Other Means

[151] The PHSA says that there are litigation alternatives, namely: the issue of the PHSA’s vicarious liability could “possibly be determined under R. 9-4 as a proceeding on a point of law”; and whether the PHSA owed a duty of care and breached that duty of care could be determined through a test case, with individualized assessments to follow. The PHSA relies on *Winter v. British Columbia*, 2017 BCSC 871 at paras. 30–34.

[152] In my view, there are no other means of resolving the common issues for the proposed class which are likely more practical or efficient. A significant number of class members are unlikely to prosecute privacy claims against the PHSA individually. Nor is there evidence that one member will likely advance a test case or a determination on a point of law.

[153] Prosecuting an action for breach of privacy in Small Claims Court is also not an option for class members. Under s. 4 of the *Privacy Act*, "an action under [the] Act must be heard and determined by the Supreme Court".

[154] The questions regarding whether the PHSA is vicariously liable to class members for permitting an unlicensed nurse to be physically present and to access medical information as part of a gynecological procedure at the BCWH, and is liable for punitive damages, is likely more efficient and practical manner of determining such issues for a significant number of proposed class members than other alternatives. Such a class action would not likely cause greater difficulties in administration than likely to be experienced if relief were sought by other means.

Purposes of Class Proceedings

[155] When evaluating preferability, the Court may also consider the extent to which the proceeding is likely to enhance the three purposes of class actions: (1) access to justice; (2) judicial economy; and (3) behaviour modification: *Krishnan SC* at para. 225, quoting *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 at paras. 50, 104; see also *AIC*. *AIC* instructs, however, at para. 22:

> This should not be construed as creating a requirement to prove that the proposed class action will *actually* achieve those goals in a specific case. Thus, when undertaking the comparative analysis, courts must focus on the statutory requirement of preferability and not impose on the representative plaintiff the burden of proving that all of the beneficial effects of the class action procedure will in fact be realized.
>
> [Emphasis in original.]

[156] I find that access to justice weighs in favour of certifying Questions 3 and 6. A significant number of class members are unlikely to prosecute breach of privacy claims against the PHSA individually, because the cost would be prohibitive. The plaintiff characterized many of class members' claims being for "relatively small value"; and argued that the "plaintiff's claim concerns widespread, but in many instances, relatively minimal individual harm". I adopt the observation in *Krishnan SC* at para. 226 here: "[i]t is only by aggregating their claims that class members will realistically be able to encourage counsel to act on their behalf".

[157] Prosecuting these claims in a single action will improve judicial economy by permitting a single judge to oversee and manage the claims.

[158] As to behaviour modification, I accept that the evidence suggests PHSA has taken measures to mitigate the risk of this type of hiring happening again. However, a class action could serve the laudable purpose to potentially encourage behaviour modification in this regard.

[159] I am mindful of the instructions in *AIC* about the preferability analysis:

(a) "the preferability analysis is not solely focused on procedural considerations but must, within the proper scope of the certification process, consider both substantive and procedural aspects" (paras. 4, 24);

(b) "to determine whether a class proceeding would be the preferable procedure for the 'resolution of the common issues', those common issues must be considered in the context of the action as a whole and 'must take into account the importance of the common issues in relation to the claims as a whole'" (para. 21, citing *Hollick*);

(c) to adopt a "practical cost-benefit approach to this procedural issue, and to consider the impact of a class proceeding on class members, the defendants, and the court" (para. 21); and

(d) that this "is a comparative exercise. The court has to consider the extent to which the proposed class action may achieve the three goals of the *CPA*, but the ultimate question is whether other available means of resolving the claim are preferable, not if a class action would fully achieve those goals" (para. 23).

[160] *AIC* further instructs at para. 34 that "class actions overcome barriers to litigation by providing a procedural means to a substantive end", and that "[e]ven though a class action is a procedural tool, achieving substantive results is one of its

underlying goals. Consideration of its capacity to overcome barriers to access to justice should take account of both the procedural and substantive dimensions of access to justice."

[161] I conclude that certifying this class action will likely overcome barriers to litigation for the majority of class members by providing them a procedure to advance claims for breach of privacy and vicarious liability. I find that certification will advance procedural access to justice, and is compatible with substantive access to justice for class members and the achievement of justice for the defendant.

[162] I have not engaged in a detailed assessment of the merits or likely outcome of the claim as a class action, which is not required at this stage: *AIC* at para. 39. It may be a breach of privacy claim and punitive damages claim will ultimately fail on its merits, but I find at this preliminary stage that it is not bound to fail. Further, it may not be at the end of the day that certification will actually advance access to justice, judicial economy, and behaviour modification, and that is not the plaintiff's burden on this application: but I do find there is a basis in fact, and real prospect, that it will do so.

[163] Taking a practical and generous approach, and considering the impact of a class proceeding on the affected parties and the Court, I find that the scales weigh in favour of certification.

Individualized Trials Caselaw

[164] The parties made submissions as to the body of caselaw which considers the preferability of a proposed class proceeding in cases where impugned acts have systemic effects and there may likely remain considerable individual assessment issues following a determination of the proposed common issues.

[165] The plaintiff relied on these cases in which, despite remaining individualized assessment, certification was nevertheless granted: *Gottfriedson v. Canada*, 2015 FC 706 (certification of class proceeding regarding "day students who attended the Kamloops Residential School between 1949 and 1969 or the Sechelt perhaps

beginning 1941 and ending in 1969"); *Corriveau v. Canada*, 2021 FC 267 (consent certification of a class proceeding against the RCMP for the alleged inappropriate conduct of medical doctors designated by the RCMP to conduct medical examinations); *Gay et al. v. Regional Health Authority 7 and Dr. Menon*, 2014 NBCA 10 [*Gay*] (majority of court certifying a class proceeding of approximately 15,000 patients who incurred expenses and suffered harm as a result of systemic failures attributable to alleged malpractice in the organization, management and operation of a regional hospital's pathology department and laboratory); *Rumley*.

[166] The plaintiff placed particular reliance on *Corriveau*.

[167] The defendant PHSA says this case is distinguishable from *Corriveau* in that here, no common damages are alleged to have occurred. More generally, the PHSA contends that a class action would not be manageable because, in this case, there has been "no common loss". It argues that any common issues trial would not determine liability, especially for compensatory damages for each of the three alleged causes of action; and what would be left to be conducted is many individualized trials across the class to important issues such as causation, damages, and to consider defences. It says a class action would break down into individual trials and class members would be liable for costs of trials of individual claims: *CPA*, s. 37(4); see also *Bennett v. Hydro One Inc.*, 2017 ONSC 7065 at para. 128, aff'd 2018 ONSC 7741. It submits that in such cases, Courts tend not to certify. The PHSA says it is entitled to a fair procedure to defend claims against it relating to Ms. Cleroux's conduct, and it relies on *Caputo v. Imperial Tobacco Ltd.* (2004) 236 D.L.R. (4th) 348, 2004 CanLII 24753 at para. 56 (Ont. S.C.J.).

[168] The defendant PHSA relied on cases where certification was refused on the basis of the need for individualized assessments (due to disparate effects on class members) which would be required post-determination of common issues: *Hollick* at paras. 30–34 (certification refused regarding complaints of noise and physical pollution from a landfill owned and operated by the city, and a proposed class of approximately 30,000 people who live in the vicinity of the landfill); *R.G. v. The*

Hospital for Sick Children, 2017 ONSC 6545 at paras. 153–167, aff'd 2018 ONSC 7058; *Marshall v. United Furniture Warehouse Limited Partnership*, 2013 BCSC 2050, aff'd 2015 BCCA 252, leave to appeal to SCC ref'd, 36584 (17 March 2016); *K.O.*; *Ragoonanan*; *Caputo; Moyes v. Fortune Financial Corp.* (2002), 61 O.R. (3d) 770, 2002 CanLII 23608 (O.N. S.C.); *Dennis v. Ontario Lottery and Gaming Corp.*, 2010 ONSC 1332, aff'd 2011 ONSC 7024, aff'd 2013 ONCA 501, leave to appeal to SCC ref'd, 35553 (13 February 2014); see also *Pearson v. Inco Ltd*. (2006), 78 O.R. (3d) 641, 2006 CanLII 913 (O.N. C.A.) at para. 69-70 and dissenting reasons of Justice Robertson in *Gay* (finding in light of the preferability requirement, would not have granted certification).

[169] The defendant PHSA relied on *R.G.* for example, and contends that there will be defences to each individualized claim of the class members and the defendant is entitled to argue those defences at individualized trials. It contends that this reality renders this not a preferable procedure and prevents certification.

[170] A leading authority on this point is *Hollick v. Toronto (City)* (1999), 46 OR (3d) 257, 1999 CanLII 2894 (O.N. C.A.), aff'd 2001 SCC 68, where the Court of Appeal for Ontario dealt with the circumstance where individuals "lives [were] affected, or not affected, in a different manner and degree". It declined certification, reasoning:

> [22] This group of 30,000 people is not comparable to patients with implants, the occupants of a wrecked train or those who have been drinking polluted water. They are individuals whose lives have each been affected, or not affected, in a different manner and degree and each may or may not be able to hold the respondent liable for a nuisance. A trial judge dealing with liability as a common issue would immediately discover that there was no economy in the proceedings and that the trial would be unmanageable. Every incident complained of would have to be separately examined together with its impact upon every household and a conclusion reached as to whether each owner or occupier had been impacted sufficiently that a finding of nuisance is justified. To add to the already impossible task, complaints of odours are by their nature subjective and thus would have to be individually assessed in order to ascertain whether emissions from the respondent's site had materially affected each class member's enjoyment of property or caused personal discomfort justifying compensation.
>
> [23] No common issue other than liability was suggested and I cannot devise one that would advance the litigation. ….
>
> [Emphasis added.]

See also *Pearson* at paras. 69–70.

[171] In *Sharp*, the Court of Appeal commented on *Hollick*:

> [189] The distinction between breach-based and loss-based issues has been considered in several cases. I have said that the Court in *Pro-Sys* distinguished *Hollick* on the basis that in *Hollick*, the individual loss-based issues predominated the common breach-based issues. In *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187 at para. 117, leave to appeal ref'd [2019] S.C.C.A. No. 311, the Court noted, "Whether common issues predominate over individual issues will often depend on whether loss on a class-wide basis can be considered a common issue, which would support certification, or whether loss will have to be established individually for the class members, which will likely make a class proceeding unmanageable."

[172] The debate between the parties regarding the above cases focussed chiefly, though not exclusively, on the proposed claims in negligence and battery. The PHSA contended that these were in essence individualized medical malpractice trials, which would all require individual trials at which the PHSA would be permitted to defend on the basis that no injury was caused from Ms. Cleroux's involvement in a patient's care. The plaintiff, relying on the results and reasoning in *Corriveau*, *Gottfriedson*, and *Gay*, argues that these were not malpractice cases and the class proceeding including claims of negligence and battery could nevertheless be certified. The PHSA contended that these cases were distinguishable to the one before me.

[173] On the view I take of the certification application, the force of the PHSA's submission relying on *Hollick*, *R.G.*, and *Dennis* and related cases is mitigated considerably.

[174] The only common issues I am considering for certification relates to breach of privacy and punitive damages. I disagree with the PHSA's argument that class members' privacy claims would be significantly individualized, and the common issues would be negligible. On these claims, post-common issues individualized assessments are not as significant as would be for negligence and battery. While there will be individualization for damage assessment for alleged breach of privacy,

in my view there is a basis to find that the procedures afforded by s. 27 of the *CPA* can likely assist to streamline and create efficiencies. I do not foresee the same defences as would be mounted by the PHSA for causation and damage in negligence or battery in a breach of privacy damage assessment.

[175] The defendant contended that s. 27 is not an antidote to any flaws in the preferability of this action as a class proceeding. It relies on this passage from *Ragoonanan* which concerns Ontario's comparable statutory provision:

> [72] Section 25 of the *CPA* recognizes that summary procedures for resolving individual issues may be appropriate after a trial of common issues. This will ordinarily be the case where the issues raise questions of fact that can be resolved on the basis of documentary evidence, or can otherwise be readily determined. The nature of the individual issues in this case, and the evidentiary difficulties to which they may give rise -- and particularly those relating to the causal nexus between the defendant's breach of duty and each fire that occurred -- are such that the defendant should not be deprived of its right to have those issues tried: cp., Fehringer v. Sun Media Corp., [2002] O.J. No. 4110, 27 C.P.C. (5th) 155 (S.C.J.), at para. 36. I recognize, again, that the selection of an appropriate procedure for resolving the individual issues is within the jurisdiction of the judge who tries the common issues. At the certification stage, however, the motions judge must be satisfied that procedures could be devised that would be consistent with the objectives of class proceedings.

[176] However, in *Jiang v. Vancouver City Savings Credit Union*, 2019 BCCA 149, leave to appeal to SCC ref'd, 38738 (14 November 2019), the Court of Appeal discussed "how the potential need for individual inquiries would affect the preferable procedure criterion under s. 4(1)(d) of the *CPA"*, and commented that *Jiang v. Peoples Trust Company*, 2017 BCCA 119 [*Jiang #1 BCCA*] "provides considerable assistance on this question" (para 35). The Court of Appeal at para. 36 quoted *Jiang #1 BCCA*, which referred to several provisions of the *CPA* including ss. 27 and 28, as providing "a wealth of judicial tools to address individual issues in a timely and practical manner", and:

> … … importantly, in ways that promote the objectives of access to justice, judicial economy and behaviour modification that, at bottom, are what the *CPA* is all about encouraging …

It further commented that: the "objectives of access to justice, judicial economy and behaviour modification referred to by Chief Justice Bauman [in *Jiang #1 BCCA*] as being aided by these post-certification powers reproduce the *Hollick* factors to be considered in a preferability analysis": at para. 37; see also para. 61.

[177] In my view, summary procedures can likely be employed to resolve individualized issues with respect to damages for breach of privacy, if necessary. They are potentially amenable to categorization and may be determined based in part on documentary evidence—medical records showing Ms. Cleroux's involvement—or otherwise sufficiently determined. At this point, the nature of the issues which would arise are not such that I can find that the defendant will likely suffer substantial prejudice. I am satisfied, using the "wealth of judicial tools to address individual issues in a timely and practical manner" including s. 27, that procedures could likely be devised consistent with the objectives of class proceedings: *Jiang #1 BCCA* at para. 16.

[178] In my view the breach of privacy/vicarious liability/punitive damages issues in this case is more like *Rumley* where, in a claim for systemic negligence for alleged sexual abuse, the Court certified the class action and stated that "the individual issues will be a relatively minor aspect of this case": at para. 36. The Court added that "the *Class Proceedings Act* provides the court with ample flexibility to deal with limited differentiation amongst the class members as and if such differentiation becomes evident": at para. 32.

[179] In *Rumley*, the Court at para. 34 also stated "the appropriateness and amount of punitive damages is, in this case, a question amenable to resolution as a common issue". I find that is so here as well.

Negligence and Battery – Preferability Assessment

[180] Had I considered certification of this action including common issues related to negligence and battery, I would have likely given the defendant's concerns about excessive individualized assessments, and reliance on *R.G.*, *Hollick* and related cases, more weight. There is merit to the defendant's submissions that despite the

existence of s. 27 of the *CPA* as a procedural mechanism, fairness to the defendant would militate in favour of the PHSA being able to defend claims in negligence and battery for each and every class member: see e.g. *Ragoonanan* at paras. 72–73.

[181] I have also considered all of the s. 4(2) factors (*Lewis v. WestJet Airlines Ltd.*, 2022 BCCA 145 at paras. 49–50) and find that, in weighing them, certification of common issues that related to negligence and battery would not have been a preferable procedure.

[182] Therefore, if and to the extent the issues of duty of care or breach of any such duty might be capable of being re-written to be characterized as stand-alone common issues, I would decline to certify such negligence issues on the grounds that, in light of the considerable individualization issues required such as causation and damages, and defences, it would not be a preferable procedure: e.g. *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187 at paras 133-140. These individual issues would overwhelm any common issues.

[183] However, considered as a class proceeding on the narrower basis of the common issues of breach of privacy, vicarious liability, and punitive damages, I find that the individualized assessments can likely be managed fairly and efficiency.

Conclusion on Preferability

[184] Reading the *CPA* generously (*Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503 at para. 64, leave to appeal to SCC ref'd, 33522 (3 June 2010)), I find that the factors relevant to preferability favour certification on the claims of breach of privacy, vicarious liability, and punitive damages. I find that a class proceeding on the common issues I have identified are likely to be a fair, efficient and manageable structure. And it would afford the class members who received care from Ms. Cleroux at the BCWH access to justice.

[185] The criterion in s.4(1)(d) of the *CPA* for Questions 3 and 6 is satisfied.

Is there an Adequate Representative Plaintiff with a Proper Litigation Plan?

Adequacy of Plaintiff

[186] A representative plaintiff need not be "typical" of the class, nor the "best" possible representative. The test for the adequacy of a proposed representative plaintiff is whether he or she will vigorously prosecute the action: *Krishnan SC* at para. 230, citing *Dutton* at para. 41 and *Campbell v. Flexwatt Corp.*, [1997] 44 BCLR (3d) 343 at paras. 75–76, 1997 CanLII 4111.

[187] The defendant does not take issue with the proposed representative plaintiff.

[188] I find that the plaintiff is a suitable representative plaintiff.

Litigation Plan

[189] The defendant argues that the plaintiff's litigation plan is deficient.

[190] In *Caputo*, Justice Winker stated:

> [75] The *Act* mandates that the representative plaintiffs produce a "plan" that sets out a "workable method of advancing the proceeding on behalf of the class…". McLachlin C.J. held in *Hollick* that the preferability analysis must be conducted through a consideration of the common issues in the context of the claims as a whole. (para. 30) In this context, the litigation plan is often an integral part of the preferability analysis. Frequently, in more complex cases, it is only when the court has a proper litigation plan before it that it is in a position to fully appreciate the implications of "preferability" as it pertains to manageability, efficiency and fairness.

[191] I find that the litigation plan is adequate at this stage of the proceeding. I find there is a realistic possibility that acceptable procedures will be found, given the scope of the class action which I have certified: *Krishnan SC* at para. 238; *Felker v Teva Branded Pharmaceutical Products R*, 2022 BCSC 1813 at para. 294; *Ragoonanan* at paras. 59, 61; *Andersen v. St. Jude Medical Inc.* (2004), 48 C.P.C. (5th) 312 at para 14, 2004 CanLII 17808 (O.N. S.C.).

[192] However, some revisions will be required to the litigation plan to make it consistent with these Reasons. Also, the matter of notice has to be resolved. I direct

that the plaintiff prepare an amended litigation plan for approval of the Court, and that approval be sought within two months of the date of this decision.

[193] For example, para. 23 of the litigation plan proposes that:

> 23. The common issues trial will also determine on a class-wide basis whether Class Members were injured, leading to a finding of liability and a determination of aggregate damages. If the common issues trial does not determine injury on a class-wide basis, liability and damages will be determined on an individual basis in a manageable process.

Since para. 23 is not consistent with what I have ordered to be certified in these Reasons, it must be amended.

Other Matters

Sealing Order

[194] On the first day of this hearing, on the application of the plaintiff, I granted a sealing order protecting the identities of five witnesses who filed affidavits in support of the certification application in this matter.

[195] By separate order, I ordered that redacted versions of the sealed materials be filed.

[196] In consequence of the sealing order the names of the other five affiants who were patients at the BCWH are not referred to in these reasons.

Supplemental Submissions re Individual Claims Filed

[197] In June 2023, the parties were granted leave to make further written submissions to the Court on the recent filing (after the hearing of this application) of ten individual claims against the PHSA, BC College of Nurses and Midwives, and Ms. Cleroux. The PHSA also filed an affidavit attaching those ten notices of civil claim. I have considered that evidence in my reasons above.

Defendant's Notice of Application filed February 2, 2023 to Strike Notice of Application for Certification and Certain Affidavits filed by Plaintiff

[198] The plaintiff filed a notice of application for certification on November 25, 2022. At around the same time, the plaintiff filed affidavits in support.

[199] On February 2, 2023 the defendant filed a cross-notice of application to strike the initial notice of application for certification and certain of the affidavits in support. The defendant argued the notice of application for certification was deficient, and objected that the plaintiff's filed affidavits contained argument, inadmissible opinion, or legal conclusion, and were otherwise objectionable.

[200] On February 14, 2023, the plaintiff filed an amended notice of application for certification, and revised affidavits in support.

[201] During the hearing of the certification application, the plaintiff advised it withdrew its first set of proposed class member witness affidavits, and would rely on the second version of the affidavits.

[202] The defendant advised it was not pursuing its relief to strike the notice of application for certification. And at the end of the hearing, the defendant advised the Court it did not intend to pursue its notice of application as it related to the plaintiff's affidavits.

[203] I therefore order that the defendant's notice of application dated February 2, 2023 be adjourned, generally.

Plaintiff's Request that the Court Revise the Proposed Common Issues/Litigation Plan

[204] In their submissions, counsel for the plaintiff invited the Court to augment the common issues and litigation plan as it considered appropriate. They submitted that the Court might disagree with the framing of the common issues and could reframe and craft them as it sees fit.

[205] PHSA opposes the Court re-writing the litigation plan, submitting "it is not for PHSA and it is not for the court to craft a workable plan".

[206] *Winter v. British Columbia*, 2016 BCSC 2288 cautions against redrafting proposed common issues:

> [39] The mere fact that there may be issues individual to each class member or separate contracts involving different class members does not prevent certification. Indeed s. 7 of the *CPA* expressly mandates otherwise. But it is incumbent upon the plaintiff to expressly identify and articulate the common, but not necessarily identical, issues of fact or law the resolution of which will advance the claims of all class members.
>
> [40] I have already identified above some matters or points of law which might conceivably be common to all claimants and the resolution of which might advance the claims of all class members. I have also posed some questions which might identify or help frame other common issues. No doubt others may exist. While a chambers judge is in a position to make some modifications to any proposed class action framework, as was already done here in terms of the re-drafted definition of the class, he/she cannot and ought not draft the precise questions of fact or law that might be appropriate in any given case. That is the role of counsel, not the court.
>
> [Emphasis added.]

See also *Douez v. Facebook, Inc*., 2018 BCCA 186 at paras. 44–55, leave to appeal to SCC ref'd, 38233 (28 March 2019); and *WN Pharmaceuticals Ltd. v. Krishnan*, 2023 BCCA 72 at paras. 74–85.

[207] I decline to revise the proposed common issues or the litigation plan. I have made a determination on certification on the basis of the class definition, common issues and litigation presented to me on this application.

Plaintiff's Request to Certify a Multijurisdictional Class Action

[208] Though not expressly sought as relief in the notice of application, in their submission at this hearing, the plaintiff sought an order that this proceeding also be certified as a multijurisdictional class action pursuant to s. 4.1 of the *CPA*. The defendant PHSA objected to this relief on the ground it was not set out in the notice of application for certification.

[209] The plaintiff did, in their initial notice of application, seek to certify a class proceeding that would include "[a]ll residents of Canada"-- which would meet the definition of a "multijurisdictional class proceeding": *CPA*, s.1. I find that the defendant had sufficient notice that a multi-jurisdictional class proceeding was being sought on this application, and I should decide the s. 4.1 issue.

[210] I further find it appropriate to certify this proceeding as a multi-jurisdictional class proceeding pursuant to s. 4.1 of the *CPA*. I have found the requirements of ss. 4(1) and 4(2) have been met. There is no evidence of a multi-jurisdictional class proceeding or a proposed multi-jurisdictional class proceeding having been commenced elsewhere in Canada which involves the same or similar subject matter such as to engage s. 4(3). I further find that British Columbia is the appropriate venue for this multi-jurisdictional class proceeding: s. 4.1(1)(a).

Defendant PHSA's Complaints that More Particulars are Required

[211] The PHSA argued that more particulars were required for the claims of punitive damages and negligence. I have found that the claim for punitive damages is sufficiently pleaded at this stage, and I have not certified any claim for negligence in these reasons.

Notice to Class Members

[212] The plaintiff's proposed litigation plan would contemplate that the defendant give notice to all class members.

[213] The defendant requested that, in the event this action is certified, further submissions be permitted to be made on the matter of notice. If agreement is not reached on notice, I will grant leave for the parties to appear back before me for a ruling on this point.

Conclusion and Order

[214] For the foregoing reasons, I find that the plaintiff's application is granted in part. I certify this class action in the terms set out in these Reasons.

[215] Specifically, I order that:

a) This proceeding is certified as class action pursuant to s. 4 of the *CPA*;

b) The proceeding is certified as a multi-jurisdictional class proceeding pursuant to s. 4.1 of the *CPA*;

c) The class is defined as:

> All residents of Canada who were patients at BC Women's Hospital and Health Centre ("BCWH") and who received treatments directly or indirectly from Brigitte Cleroux ("Cleroux") from June 1, 2020 to June 30, 2021.

d) The following issues are certified:

> 3. Do the Impugned Treatments constitute the Tort of Wilful Violation of Privacy pursuant to s. 1 of the Privacy Act by Brigitte Cleroux and if so, is the defendant vicariously liable for the actions of Brigitte Cleroux?
>
> 6. Should the court award punitive damages against the defendant and if so, in what amounts?

[216] The defendant's notice of application filed February 2, 2023 to strike the plaintiff's notice of application and affidavits is adjourned, generally.

[217] There must be a certification order setting out the basis upon which certification has been granted: s. 8 *CPA*. The certification order must, among other things, "state the manner in which and the time within which a class member may opt out of the proceeding": s. 8(1)(f). That part of the certification order that deals with the manner of opt out could, in theory, also address the matter of notice to class members. Given the plaintiff's submission that a limitation period will expire for class members in November 2023 (a point on which I express no opinion), and my view that it would be beneficial that class members have notice of this certification decision, I consider that the matter of notice should be resolved reasonably expeditiously. Accordingly, the parties should discuss the terms of a certification order and a notice program, and I direct that they either come back before me with a proposed form of certification order and notice program for review and approval within 45 days; or if agreement cannot be reached on any such matters to schedule

a hearing before me, expeditiously and preferably within 45 days of the date this decision, to seek a ruling from the court. The parties are also at liberty to schedule a judicial management conference before me if it is considered desirable to assist with scheduling a hearing on the foregoing matters or related procedural matters.

[218] The plaintiff is further ordered to prepare a revised litigation plan for approval within two months of this decision, or such further time period as this court may order.

"Stephens J."

I. SCHEDULE A – PROPOSED COMMON ISSUES

1. Did the defendant owe a duty of care to Class Members pursuant to the Tort of Negligence to take reasonable steps to prevent Cleroux from being able to perform the Impugned Treatments and, if so, did the defendant breach a reasonable standard of care by allowing Cleroux to perform the Impugned Treatments on Class Members? Is the Defendant liable to Class Members for the Tort of Negligence as the result of the Impugned Treatments? [Revised by the plaintiff: "Is the PHSA liable in negligence for the harm caused by Cleroux to Class Members?"]

2. Do the Impugned Treatments constitute the Tort of Battery by Cleroux and if so, is the defendant vicariously liable for the actions of Cleroux and/or directly liable in the Tort of Negligence for failing to take reasonable steps which allowed Cleroux to inflict batteries on Class Members?

3. Do the Impugned Treatments constitute the Tort of Wilful Violation of Privacy pursuant to s. 1 of the PA by Cleroux and if so, is the defendant vicariously liable for the actions of Cleroux?

4. What are the damages, if any, payable to the Class?

5. Should the court make an aggregate damages award in favour of Class Members and, if so, in what amount?

6. Should the court award punitive damages against the defendant and if so, in what amounts?

"Impugned Treatments" means the treatments, directly or indirectly, provided by Cleroux to Class members