

CANADA / JUDGMENT

Universe v. Fraser Health Authority

2020 BCSC 1398

COURT

Supreme Court of British Columbia

DECIDED

18 September 2020

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2020 BCSC 1398 Universe v. Fraser Health Authority

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Universe v. Fraser Health Authority,

2020 BCSC 1398

Date: 20200918

Docket: S201989

Registry: New Westminster

Between:

Dr. Emotions UNIVERSE, formerly known as "Osama Al-Salami"

Plaintiff

And

Fraser Health Authority; Burnaby Hospital; Royal Columbian Hospital; Eric J.A. Stanger; Dives,
Harper & Stanger LLP; Kristina Elizabeth Zerr

Defendants

- and -

Docket: S1710877

Registry: Vancouver

Between:

Emotions Paradise UNIVERSE, formerly known as Osama Yassein Al-Salami

Plaintiff

And

Casey Forslund, Provincial Health Services Authority (PHSA) operating as

BC Emergency Health Services, Kristina Elizabeth Zerr,

Fraser Health Authority operating as Burnaby Hospital

Defendants

Corrected Reasons for Judgment: The text of the Judgment was corrected at paras. 2, 5, 6, 26, 29, 135, 143, 171, 187, 222, 224, 226, 228, 231, 244, 245, and 247 on October 5, 2020.

Before: The Honourable Madam Justice Tucker

Reasons for Judgment

The Plaintiff, appearing in person:

E.P. Universe

Counsel for the Defendants:

E.J. Stanger

A. Mizrahi (October 22, 2019 only)

Place and Date of Hearing:

New Westminster, B.C.

October 22-24, 2019 and

January 15, 2020

Place and Date of Judgment:

New Westminster, B.C.

September 18, 2020

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I. BACKGROUND

- [1] The plaintiff (or Dr. Universe) filed two actions: Vancouver Registry S1710877, filed November 23, 2017, and amended December 28, 2017 ("Vancouver action"), and New Westminster Registry S201989, filed May 7, 2018 ("NW action") (collectively, the "actions").
- [2] The amended notice of civil claim in the Vancouver action is 33 pages long and discloses the following claims:
- a. defamation;
 - b. battery;
 - c. malicious prosecution; and
 - d. intentional infliction of harm.
- [3] The notice of civil claim in the NW action is 65 pages long, and discloses three sets of allegations:
- a. negligence in refusing medical care;
 - b. intentional infliction of harm; and
 - c. various privacy torts, statutory claims and negligence in relation to the disclosure, listing, production and/or filing of the plaintiff's hospital records for purposes of these proceedings (collectively, the "privacy claims").
- [4] Three applications were set for hearing before me on October 22-24, 2019.
- [5] The defendants brought two applications under Rule 9-7(2) and (15) of the Supreme Court Civil Rules, B.C. Reg. 168/2009, one in each action, seeking to have the actions dismissed in whole or in part (the "summary trial applications"). The two applications were joined for hearing by order of Justice B. Brown made February 4, 2019.
- [6] The defendants' third application, filed in the Vancouver action, seeks an order under s. 18 of the Supreme Court Act, R.S.B.C. 1996, c. 443, prohibiting Dr. Universe from instituting proceedings without leave of the court ("vexatious litigant application").
- [7] The vexatious litigant application was set for an earlier hearing, but the plaintiff applied to adjourn it. On June 13, 2019, Justice Skolrood granted a consent adjournment subject to conditions ("Skolrood order"). The terms prohibit Dr. Universe from instituting proceedings without leave pending hearing of the application, and provide for the application to be heard with the summary trial applications.

- [8] A further order was made by Justice Dillon on July 4, 2019 ("Dillon order"). Among other things, that order prohibits the plaintiff from filing further applications in the actions without leave pending hearing of the summary trial applications.

A. October 22-24, 2019

- [9] At the outset, each party made an introductory statement regarding the defendants' applications. The plaintiff then applied to adjourn the applications. I gave oral reasons denying the adjournment: *Universe v. Fraser Health Authority* [unreported 22 October 2019, New Westminster S201989 and Vancouver S1710877] ("adjournment ruling").
- [10] Following my reasons, the plaintiff said that he did not accept the adjournment ruling and intended to leave. He was cautioned that the hearing would continue nonetheless. The plaintiff left, and Mr. Stanger began the defendants' case on the summary trial applications.
- [11] The next morning, the plaintiff returned and asked me to recuse myself on the basis that the adjournment ruling was unfair and demonstrated bias. I declined.
- [12] At midday, I observed that the applications were unlikely to conclude in the days set, and directed the parties to consult with the Registry about setting two additional days. On return from the lunch break, the plaintiff took the position that 11 additional days should be set.
- [13] I ruled that three additional days (ultimately, January 15-17, 2020) would be set for the summary trial applications. I set a submission schedule: the defendants were to complete their case in chief by end of day on October 24; the plaintiff would have January 15, 16, as well as the morning of January 17, to respond; any reply would be heard on the afternoon of January 17. The plaintiff was told there would be some flexibility should he, in the end, require an additional hour or so to complete, but that he should make every effort to fit his response within the schedule.
- [14] Given the terms of the Skolrood order, I seized myself of the vexatious litigant application and directed it to be set for hearing separately.

B. Interim Period

- [15] Between October 24 and December 20, 2019, the plaintiff sought leave to file: a second recusal application; an application to cross-examine the defendants' affiants and strike parts of the defendants' affidavits; an application to dismiss the summary trial applications as unsuitable for summary disposition; and an application to adjourn the January dates (collectively, the "plaintiff applications"). Leave was granted.
- [16] On a review of the file, it came to my attention that the plaintiff had filed applications to cross-examine affiants and to strike affidavits earlier, and that those applications had been dismissed by Justice Dillon.

[17] On December 20, 2019, I sent the parties a court memorandum establishing a submission schedule for the plaintiff applications and providing directions. The schedule provided for the applications to be heard on the morning of January 15, 2020. The parties were directed to be prepared to continue with the summary trial hearing, if required.

C. January 15, 2020

[18] On January 15, 2020, the plaintiff appeared, but declined to make submissions on the plaintiff applications, asserting that he required, at minimum, four court hours to present each of his applications.

[19] I then directed the plaintiff to begin his response on the summary trial applications. The plaintiff again declined to make submissions, asserting the summary trial schedule was inadequate, unfair and demonstrated bias against him. I noted for the record that the plaintiff had declined to make submissions on the summary trial applications, and reserved on my decision.

II. THE PLAINTIFF APPLICATIONS

[20] I will address the plaintiff applications.

[21] The plaintiff filed an application hearing binder for each application. Each binder contained: a lengthy notice of application; the response; the affidavits relied upon by the plaintiff; and a tab with the plaintiff's authorities.

A. Recusal

[22] The principles governing recusal and reasonable apprehension of bias are summarized in *Taylor Ventures Ltd. (Trustee of) v. Taylor*, 2005 BCCA 350:

[7] The leading case on recusal is *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259. Counsel for the respondent correctly identified the principles governing the reasonable apprehension of bias concept as discussed in *Wewaykum* and I quote from his factum:

7. These principles are:

(i) a judge's impartiality is presumed;

(ii) a party arguing for disqualification must establish that the circumstances justify a finding that the judge must be disqualified;

(iii) the criterion of disqualification is the reasonable apprehension of bias;

(iv) the question is what would an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through, conclude;

- (v) the test for disqualification is not satisfied unless it is proved that the informed, reasonable and right-minded person would think that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly;
- (vi) the test requires demonstration of serious grounds on which to base the apprehension;
- (vii) each case must be examined contextually and the inquiry is fact-specific.

[Original emphasis deleted.]

[23] As observed by Justice Williams in *Vasdev v. Décor Home Enterprises Ltd.*, 2012 BCSC 420, a court may find it necessary to give direction in proceedings involving unrepresented litigants:

[53] Trial judges today are frequently faced with the special challenges of dealing with self-represented litigants, persons who often have little understanding of the relevant legal concepts or the rules of evidence. Such situations generally require a strong judicial hand and it is not inappropriate for a judge to move the proceedings along; to direct the parties away from legal irrelevancies; and to focus the parties on the issues determinative of the matter.

[Citations omitted.]

[24] The plaintiff continues to assert that the adjournment ruling is evidence of bias. The answer remains the same: a party's disagreement with the substance of a ruling is not a proper basis for recusal: *R. v. Papasotiriou-Lanteigne*, 2018 ONSC 3530 at para. 20.

[25] I will address the remaining grounds for the plaintiff's allegation of bias.

1. Submission Schedules

[26] On October 23, 2019, having reviewed the application materials and having heard introductory submissions the day prior, I concluded that five days (i.e., October 23-24, 2019 and January 15-17, 2020) was a generous estimate of the time that ought reasonably to be required to complete the summary trial. The summary trial submission schedule was set in order to provide clear notice of the allocation of time and when the parties would be expected to start and conclude their submissions.

[27] With respect to the plaintiff applications, the submission schedule took into account various factors, including: the notices of application were lengthy and comprehensive; the court would review the binders prior to January 15; the recusal application substantially duplicated the October 23 application; the significant overlap, in argument and materials, between the plaintiff applications; and the significant overlap between the plaintiff applications and the plaintiff's response position on the summary trial.

- [28] The plaintiff's conception of a fair hearing presumes an unfettered right of judicial audience. The existence of such a right would bring the administration of justice to a grinding halt, and enable the few to monopolize the courts to the great detriment of the many. The courts are a finite public resource of constitutional import. Judges are not merely permitted, but obliged, to ensure court time is used reasonably and responsibly.
- [29] The schedules set may have required the plaintiff to be more concise than he would otherwise. That is not a unique hardship or prejudice, but a practical reality encountered by every advocate coming before the courts. The fact that the schedules were based upon the court's view of what was reasonably required, rather than by deference to the plaintiff's view, does not demonstrate bias.
- [30] An informed, reasonable and right-minded person would recognize court time as a valuable public commodity, and expect it to be rationed accordingly. Such a person would also consider a judge, by function and experience, well-placed to assess the amount of time reasonably required for a particular matter.

2. Laughter on Court Audio Recording

- [31] The plaintiff asserts the court audio recording discloses laughter at some point in time after he left the hearing on October 22, 2019. He asserts the laughter is mine, is "mocking" in tone and is in relation to him. He appears to infer this from the fact that counsel for the defendants was making submissions about the form of the plaintiff's list of documents at or about the same time.
- [32] I have listened to the material part of the court audio recording. I am unable to discern any laughter.
- [33] In any event, even if laughter could be heard, the plaintiff's assertion is speculative ("by me" and "in relation to him") as well as subjective ("mocking"). The presumption of regularity alone suffices to rebut the assertion.

3. Lack of Empathy

- [34] The plaintiff asserts that my failure to display personal empathy toward him demonstrates bias. The defining role of a judge is to be neutral. An informed, reasonable and right-minded person would not only expect neutrality from a judge, but be concerned and discomfited by any indication to the contrary.

4. General Hearing Conduct

- [35] The plaintiff complains that during the defendants' submissions, I asked Mr. Stanger questions about the law and listened attentively to his answers. He also says that I was "very friendly" to Mr. Stanger, and "unfriendly" to him.

- [36] Judges routinely ask counsel to direct them to the evidence in support of an assertion, advise them of the statutory provision or rule being relied upon, and take them to case authority for a proposition of law. Doing so is neither friendly nor deferential. The court is charged with the responsibility of critically assessing the merits of the parties' positions. An informed, reasonable and right-minded person would expect the court to ask questions and listen to answers prior to reaching its own conclusions.
- [37] The plaintiff was, in fact, given direction by the court more often than Mr. Stanger. That is a reflection of the fact that the plaintiff was a lay person representing himself, and Mr. Stanger is trained legal counsel: Vasdev. Direction is not friendly or unfriendly, but rather required or unrequired.
- [38] The recusal application is dismissed.

B. Suitability for Summary Disposition/ Cross-Examination of Affiants and Striking Affidavits/ Adjournment

- [39] The plaintiff has offered no explanation for failing to seek leave to bring these applications prior to the October 2019 hearing dates, let alone for bringing them following the defendants' case in chief. The delay is undue and allowing the applications would be highly prejudicial to the defendants, who duly prepared and have already advanced their case.
- [40] It is unnecessary to determine whether, given the Dillon order, the application to cross-examine affiants and strike affidavits is also an abuse of process.
- [41] The adjournment application was further to the other applications, and it necessarily follows upon the dismissal of the others.
- [42] The applications are dismissed.

III. SUMMARY TRIAL APPLICATIONS

A. A Brief Overview

- [43] The basic facts set out in this overview are not in dispute.
- [44] On July 7, 2017, the plaintiff arrived by ambulance at the emergency department of Burnaby General Hospital ("BGH"), complaining of pain and numbness arising from a long-standing sciatica issue.
- [45] The plaintiff became upset about the wait time to be seen by an emergency physician. This resulted in a series of interactions between the plaintiff, a number of healthcare professionals, and two security officers.
- [46] The individuals involved in the interactions included:

- the personal defendant, Casey Forslund, an ambulance paramedic with British Columbia Emergency Health Services ("BCEHS") (BCEHS operates under the Provincial Services Health Authority ("PSHA"));
- the personal defendant, Kristina Zerr, a licenced practical nurse who works at BGH (BGH operates under the Fraser Health Authority ("FHA"));
- Anastasia Alkenbrack (nee Vlasova), a registered nurse who works at BGH; and
- Eli Bouka-Egah, a security officer employed by Paladin Security ("Paladin") and assigned to BGH at the material time.

[47] Following the interactions, the plaintiff left the BGH property escorted by security officers.

[48] The plaintiff departed BGH without being seen by an emergency physician.

[49] As the plaintiff left the BGH property, officers of the Royal Canadian Mounted Police ("RCMP") detained him.

[50] The plaintiff was criminally charged with uttering threats of death and bodily harm in relation to the interactions at BGH.

[51] The plaintiff was admitted to Royal Columbian Hospital ("RCH") in the early morning of July 8, 2017, and discharged in the early morning of July 9, 2017. He was examined by physicians while at RCH.

[52] The criminal charges against the plaintiff were stayed by Crown counsel in November 2017.

[53] Both actions stem from these core events.

[54] The various claims in the actions, as they relate to the defendants, are as follows:

- a. defamation (against Ms. Forslund and Ms. Zerr in relation to their statements to the RCMP);
- b. battery (against Mr. Forslund);
- c. malicious prosecution (against Mr. Forslund and Ms. Zerr);
- d. intentional infliction of harm (against Ms. Zerr, Mr. Forslund, FHA, BGH and RCH);
- e. negligent refusal of medical care (against Ms. Zerr and BGH);
- f. intentional infliction of harm (against FHA, Ms. Zerr and BGH); and
- g. the privacy claims (against FHA, BGH and RCH).

[55] While it is less than clear, it appears the various allegations made against personal defendants generally include claims of vicarious liability as against one or more of the institutional defendants.

- [56] While the notice of civil claim in the NW action seeks relief for intentional infliction of harm, it contains no corresponding claim. To the extent the NW action seeks to raise a claim of intentional infliction of harm, it is duplicative of the claim in the Vancouver action. The references to intentional infliction of harm in the NW action are struck as unnecessary and/or an abuse of process under R. 9-5(1).

B. Undisputed Evidence Regarding ER Practice

- [57] BGH's emergency department operates using acuity assessments. On arrival, patients are assessed by a triage nurse and assigned an acuity level by reference to the Canadian Triage Acuity Scale ("CTAS"). The CTAS goes from level 1 (very acute) to level 5 (non-urgent).
- [58] BGH's emergency department has multiple waiting areas. It has a Rapid Assessment Zone ("RAZ") for higher acuity patients, and a general emergency waiting area ("waiting area").
- [59] An unchallenged expert report was provided by Lisa Moreljo. Ms. Moreljo is a tenured faculty member at the University of British Columbia - Okanagan, where she teaches clinical and emergency care nursing. She has a Master's Degree in Nursing, an Emergency Nursing Diploma, an Emergency Nursing Certification and more than 25 years of emergency nursing experience.
- [60] I accept Ms. Moreljo as an expert witness, and I accept her evidence in relation to: emergency care practices in general; acuity assessments, including the degree of discretion involved in assigning acuity levels; emergency care waiting room practices; the circumstances in which it is reasonable for emergency care providers to decline to provide services to an abusive or harassing patient; and the definition and assessment of abusive or harassing patient conduct.
- [61] Ms. Moreljo endorses the following description of CTAS level 3: "Urgent (patients who may potentially progress to a more serious condition requiring intervention and may have associated significant discomfort or an issue that impacts their ability to function at work or in activities of daily living)".
- [62] On July 7, 2017, the BGH triage nurse assigned the plaintiff a level 3, with additional notes indicating moderate back pain arising from a chronic lower back problem, with the pain having worsened over the last week. She made a record of his vitals, and notations of "able to void" and "no acute distress". On review of the plaintiff's triage records, Ms. Moreljo opined that a level 3 assignment was reasonable, but that a level 4 (less urgent) or 5 (non-urgent) assignment would also have been reasonable in all the circumstances.
- [63] Ms. Moreljo describes a RAZ as an area used to assess patients of intermediate acuity (such as level 3) who are stable enough to wait in a chair. She indicates that is a common emergency practice to have intermediate acuity level patients wait in a triage area waiting room (i.e., the waiting area) rather than a RAZ, when the RAZ is crowded.

C. The Plaintiff's Evidence[1]

- [64] The plaintiff relies on 10 affidavits in his response to the summary trial applications. He is the sole affiant for all. His affidavits are substantially non-compliant with the Rules. The defendants raised no general objection to these affidavits but made some specific objections in the course of argument.
- [65] As the plaintiff was waiting in the RAZ, a nurse (Ms. Zerr) approached him, aggressively addressed him as "Osama", and moved him into the waiting area. After a time, he went to the triage desk to ask when he would be seen. He was told there was one patient in front of him. He then saw two patients called. He decided to go to a different hospital, and said to Ms. Zerr "you are pushing me to leave the hospital, you will be responsible." As he was going, Ms. Zerr chased him and physically prevented him from leaving. The plaintiff was upset by her conduct and said, in a "raised and firm, but surprising voice tone": "why are you following me?! I am leaving to other hospital".
- [66] A paramedic (Mr. Forslund) then joined them and said: "you are threatening the nurse, I will call police for you, you will be in jail". This upset the plaintiff further, and he turned and asked Ms. Zerr whether he had threatened her, but she did not respond. He says immediately after that, Mr. Forslund struck him on the shoulder, causing him severe pain. The plaintiff says he involuntarily began to speak Arabic in order to release "his justifiable extreme internal anger".
- [67] The plaintiff says he was shocked and "terrified" by Mr. Forslund's conduct. Mr. Forslund was blocking him from leaving the hospital and the plaintiff was concerned Mr. Forslund might assault him again, so he went to the hospital security office to seek protection. He spoke with two security officers. The security officers apologized to him for how he had been treated and tried to get a physician to see him, but reported back that the hospital staff had refused.
- [68] The plaintiff says Mr. Forslund told the security officers they should call the police because the plaintiff had threatened a nurse. The security officers refused to call. The security officers told the plaintiff that Ms. Zerr had said he had not threatened her. The plaintiff says Mr. Forslund became very upset at this point, and "started loudly slandering against the plaintiff with a repetitive false accusation of Terrorism, Jihad, and Criminal activity to kill, to shoot, to get to chop up Mr. Forslund and the defendant Zerr and all Canadians". He says Ms. Zerr and another nurse then spoke up to support Mr. Forslund.
- [69] The plaintiff left BGH, walking and talking with the security officers. As they passed the parking area, Mr. Forslund was out by his ambulance. The plaintiff says Mr. Forslund smiled suggestively at him and made a "very bad" hand gesture, and that in response he shouted an insult: "I told him go to find out who is your real father."

- [70] The RCMP detained the plaintiff as he was leaving the BGH property. They eventually took him to the Burnaby station, where they questioned him about another matter and about the events at BGH. He was charged with uttering threats, and put in a holding cell. He felt unwell and asked the officers to call him an ambulance. The plaintiff says he then made it appear as if he was trying to hang himself in order to get the officers' attention.
- [71] Mr. Forslund's ambulance attended the Burnaby station. The plaintiff, Mr. Forslund and an RCMP officer all sat in the back for the ride to RCH. The plaintiff tried to get Mr. Forslund to admit to making false statements about him, but Mr. Forslund refused to talk about it. During the ride, Mr. Forslund told the RCMP officer that he (Mr. Forslund) has two brothers in the RCMP.
- [72] At RCH, the plaintiff was examined, admitted and treated, including in relation to his sciatica-related complaints, and then discharged under a promise to appear on the criminal charges.
- [73] The plaintiff attests[2] the criminal charges were stayed in November 2017 because the Crown found he was a credible and reliable witness, and that Mr. Forslund and Ms. Zerr were not. He says it was "strongly proved that he was innocent."
- [74] On July 10, 2017, the plaintiff reported to the RCMP that Mr. Forslund had struck him in the waiting area on July 7, 2017. He says his report was not taken seriously because Mr. Forslund has brothers in the RCMP.
- [75] The plaintiff complained to Mr. Forslund and Ms. Zerr's respective employers about their July 7, 2017 conduct, and also to Ms. Zerr's professional college.
- [76] The plaintiff attests that the criminal charges caused him extreme humiliation, in particular, being: put in restraints, taken into RCH in restraints, finger-printed and photographed in the charge process, and appearing in criminal court on five occasions.
- [77] The plaintiff asserts that he enjoyed "an excellent peaceful reputation, character and integrity", until these were injured by Ms. Zerr and Mr. Forslund's false statements to the RCMP.
- [78] The plaintiff says that the defendants' actions were motivated by malice, including malice arising from Islamophobia.
- [79] At the institutional level, the plaintiff asserts BCEHS failed to properly investigate an unrelated complaint he made in March of 2013 about a different paramedic, and that BGH has historically provided him with inadequate or inferior healthcare services.

D. The Defendants' Evidence

[80] The defendants' evidence includes affidavits by: Mr. Forslund, Ms. Zerr, Ms. Alkenbrack, Mr. Bouka-Egah, and Manju Aujla. Ms. Aujla was in the waiting area on July 7, 2017, seeking emergency care for her child.

[81] Mr. Forslund, Ms. Zerr, Ms. Alkenbrack and Ms. Aujla all provided statements to the RCMP on July 7, 2017. Their respective affidavits confirm and attach transcripts of their RCMP statements.

[82] The defendants also filed: a certified copy of BGH's records regarding the plaintiff between 2015 and July 7, 2017 ("BGH records"); a certified copy of RCH's records regarding the plaintiff's admissions there in September of 2015 and on July 8, 2017 ("RCH records"); Ms. Moreljo's original and supplementary expert reports; and the affidavit of Patricia Smid, a BGH manager of Clinical Operations.

1. Hospital Records & Policy

[83] The certified BGH and RCH records are admissible under Hospital Act, R.S.B.C. 1996, c. 200, s. 51:

Records

51 (1) A record regarding a patient that is prepared in a hospital by an employee or by a practitioner is the property of the hospital.

(2) A copy of a hospital record certified to be true and correct by the administrator of the hospital or by another officer of it is admissible as evidence in a court without proof of the official position or signature of the administrator or officer.

[84] Records admitted under s. 51 of the Hospital Act have the same status as "business records" admitted under s. 42 of the Evidence Act, R.S.B.C. 1996, c. 124: *Reid v. Balcaen*, 2003 BCSC 1533 at paras. 5-8. Statements of fact in the records are admissible as evidence of the stated facts. Statements of opinion in the record are not admissible as expert evidence.

[85] The BGH records indicate the plaintiff attended emergency six times in 2015, six times in 2016, and three times in 2017 (up to and including July 7, 2017). He was typically discharged following examination by a physician. However, twice in 2015, once in 2016 and again in March of 2017, the plaintiff left of his own accord without seeing a physician.

[86] On July 31, 2016, an emergency physician made the following entry in BGH's file regarding the plaintiff: "pt. walking out of the room yelling that we are 'fake human beings'; 'angrily walks through department yelling that we were not taking care of him and that he is a 'citizen'; and, 'Notified of policy against abusive behavior! Allowed to leave.'" The physician flagged the plaintiff's file so it would indicate concerns about aggressive or violent behaviour on future admissions.

[87] Ms. Smid, BGH's Manager of Clinical Operations attests that BGH and FHA policy states: "nursing staff and employees have the right to not tolerate violent acts and threatening speech or behaviour from patients, in order to ensure their own safety and that of other patients". Her affidavit attaches a copy of a sign that reads: "Violence, foul language and abusive behaviours are not acceptable. Verbal threats or acts of violence will not be tolerated and may result in removal from this facility and/or prosecution." Ms. Smid says the sign was visibly posted in the BGH's emergency department on July 7, 2017.

2. Defendants' Affidavit Evidence re July 7th Events

a. Ms. Alkenbrack

[88] Ms. Alkenbrack was working in the emergency department on July 7, 2017. The plaintiff approached her at the triage desk repeatedly over a short period of time, asking when he would be seen. He appeared frustrated and became increasingly loud, eventually using foul language and acting in an agitated and threatening manner. Ms. Alkenbrack witnessed the subsequent exchange between Ms. Zerr and the plaintiff in the waiting area and was scared for Ms. Zerr. She says the plaintiff was yelling threats at Ms. Zerr, including: "you are going to be responsible if I leave", "fuck you all" and "I am going to chop you all into pieces".

[89] Ms. Alkenbrack made contemporaneous notes in the hospital record, as she was concerned the plaintiff might hurt himself or someone else. Her entries read:

Pt. In WR, coming up repeatedly to triage asking "how long is it going to be". Writer explained pt. will be brought into fast track area when a spot is available. Pt, raising his voice, states "You're going to be responsible if I leave!" "Fuck you all", "I am going to chop you all in pieces". LPN attempted to talk to pt - pt spat in LPN's face. Security called - standby with patient - AV

[90] At some point, Ms. Alkenbrack left the triage area to alert a department coordinator. When she returned, the plaintiff was in the waiting area, using foul language, swinging his arms, and moving in an agitated and unpredictable manner.

[91] In Ms. Alkenbrack's RCMP statement,[3] she said:

AV: He was directed to go back to the waiting room and told that he will brought um into the department when a space is available. Uh he's then, then proceeded to raise his voice, uh he came up to the desk, told me go fuck myself, um and um basically continued to raise his voice repeatedly. Un one of the, my colleagues walked out to talk to him and then I heard him saying that he was going to chop us all into pieces and put us in a bag. At which point I called security to have him escorted off the property.

AV: Um I felt threatened. Um and I also felt that the other patients waiting in the waiting room felt quite threatened.

DS: Okay. Um can you take me back to the point where he made the initial threat of chopping you, chopping you all up and putting you in a bag?

AV: So it wasn't directed to me, it was directed at my colleague, um and I heard that while he was talking to her.

b. Ms. Zerr

[92] Ms. Zerr says she first spoke with the plaintiff when he approached her in the triage area and said he wanted to lay down, and then became upset when she said no beds were available. She then heard him speaking loudly to a hospital volunteer in the waiting area, so she went to the waiting area to see what was happening. She again explained to the plaintiff that he would have to wait for a stretcher to open up in the RAZ. He became increasingly agitated and loud, and started to speak very quickly with a strong accent. He made threats to her, including threats to chop people up and to blow up the hospital.

[93] As the other patients in the waiting area began to move away from where she and the plaintiff were standing, a paramedic came over and stood beside her. Ms. Zerr says the plaintiff then leaned in towards her, causing her to be concerned about his intentions and her own safety, but the then paramedic moved to keep her separated from the plaintiff. She does not recall there being any contact between the plaintiff and the paramedic. She says the plaintiff spat at her after leaning in, but missed and hit the floor in front of her. She returned to the staff side of triage, leaving the paramedic and the plaintiff out in the waiting area.

c. Mr. Forslund: Part 1

[94] Mr. Forslund was in the triage area with an ambulance patient when he heard escalating voices in the waiting area. He left his partner with their patient and went into the waiting area, where he saw the plaintiff and Ms. Zerr. The plaintiff's body language and appearance caused Mr. Forslund to be concerned he might be unstable, so he went to stand beside Ms. Zerr to show support for her.

[95] After Mr. Forslund joined the conversation, the plaintiff became more angry, and then started to lean in toward the nurse. Mr. Forslund felt he should act to prevent a physical confrontation. He placed his hand on the plaintiff's shoulder, briefly and without significant force, to redirect his attention, and then told the plaintiff the nurse was just doing her job. The plaintiff paused for a moment when Mr. Forslund touched his shoulder, but then became even angrier and began to shout that Mr. Forslund had touched him. At this point, the nurse left the waiting area.

[96] Mr. Forslund retrieved his gloves in case there was a physical confrontation. As he came back toward the plaintiff, the plaintiff removed a shoe, raised it and said: "I should spit at you". Mr. Forslund stayed in the waiting area until the security officers arrived, told them what had happened and then returned to his patient.

[97] Mr. Forslund says he cannot recall all of the words and phrases the plaintiff screamed during these events, but says they included: "Islam will kill you", "I hate Canadians"; "We will kill you all" and "We will shoot you all".

d. Ms. Aujla

[98] Ms. Aujla was with her child in the waiting area when she observed a person speaking to a nurse and a paramedic in loud and aggressive tones. She describes the person as agitated, pacing and waving his hands around. She says the nurse and the paramedic attempted to calm the person down, and then the person began to shout that they should not touch him.

[99] At one point, she saw the paramedic put his hand up in what appeared to be an effort to calm the person down, and then saw the person "smack" the paramedic's hand away. She says the nurse left at that point.

[100] Ms. Aujla says the person was shouting and screaming, saying that he was Muslim and that he could hurt or kill the staff and that he could "fuck you up". She was upset and frightened by the person's behaviour, and thought it possible that he might harm someone.

e. Mr. Bouka-Egah

[101] Paladin has a contract to provide security services at BGH. Mr. Bouka-Egah is employed by Paladin. He was called to emergency to evict a misbehaving patient, and attended along with a second security officer. When he arrived, Ms. Zerr advised him the plaintiff had been discharged and should be escorted out as he had been abusive and had threatened to spit on her.

[102] The security officers informed the plaintiff he was being escorted out for abusing and harassing staff. Mr. Bouka-Egah says the plaintiff was agitated, and that he responded to them with a significant rant, using foul language and making extreme and violent comments about Canadians and Muslims. Mr. Bouka-Egah is unable to recall the specific words used but says they amounted to threats of harm to Canadians.

[103] The plaintiff initially refused to leave with the security officers, but then agreed. As the security officers were walking him off the property, the plaintiff began to shout and swear at a paramedic (Mr. Forslund), becoming very aggressive and agitated again. Mr. Bouka-Egah saw the plaintiff gesture to spit at the paramedic but says his colleague stepped in and directed the plaintiff to keep walking.

[104] Mr. Bouka-Egah says the RCMP officers who attended BGH to take statements that evening also reviewed the video from the emergency department security camera, but did not request a copy or ask for the recording to be preserved.

f. Mr. Forslund: Part 2

- [105] Mr. Forslund and his partner were returning to their ambulance as the plaintiff was being escorted out. When the plaintiff saw Mr. Forslund, he began to shout at him and grabbed his (the plaintiff's) shoe. Mr. Forslund says the plaintiff spat at him, but did not hit him. Mr. Forslund asked security if they had called the RCMP, but understood they had not.
- [106] Mr. Forslund was concerned the plaintiff would call another ambulance once he was off BGH property, and the new paramedics would not know what had happened at BGH or that the plaintiff had been aggressive to paramedics. He called his supervisor. He says his supervisor advised him to call the RCMP and to stay at BGH in case the RCMP wanted a statement, which Mr. Forslund then did.
- [107] Mr. Forslund says he thought the plaintiff was unstable and posed a risk to himself and others, and that he was aware the RCMP could act under mental health legislation as well as under the criminal law.
- [108] Later that same night, Mr. Forslund's ambulance was dispatched to the Burnaby RCMP station. On arrival, the RCMP officers reported that the plaintiff had claimed to be unwell, and then made suicide attempts. Mr. Forslund observed the plaintiff and found him physically stable but complaining of lower back pain. The RCMP officers advised Mr. Forslund they wanted the plaintiff taken to hospital for a certification examination under the Mental Health Act [R.S.B.C. 1996, c. 288].
- [109] Mr. Forslund and an RCMP officer sat in the back of the ambulance with the plaintiff. Mr. Forslund has no recollection of telling the RCMP officer about having brothers in the RCMP, but concedes he may have. Mr. Forslund does, in fact, have two brothers working at separate stations outside the Lower Mainland.

g. RCH Records

- [110] The RCH records indicate the RCMP brought the plaintiff in under s. 28 of the Mental Health Act. He was examined by an emergency physician at 01:10 on July 8, 2017, and certified under s. 22 of the Mental Health Act.
- [111] The admission record also notes the plaintiff's complaints of sciatica-related pain and numbness. At 04:20 (July 8, 2017), a physician noted in the RCH record that the plaintiff reported feeling better and was able to move his legs without any saddle anaesthesia (i.e., numbness).
- [112] The RCH records show a CT scan was done of the plaintiff's lumbar spine on July 8, 2017. The CT scan report includes the following:

HISTORY: KNOWN HERNIATED DISC, INCREASED PAIN, ?DECREASED RECTAL TONE -

COMPARISON: June 14, 2013

IMPRESSION:

A 9 mm central/left central L5 S1 disc protrusion measuring up to 9 mm compresses the left S1 nerve root and causes a moderate spinal stenosis. This has worsened comparison to previous from 2013.

[Emphasis added.]

[113] The plaintiff was assessed by an RCH psychiatrist again on the morning of July 9, 2017. The psychiatrist found no suicidal ideation present and the certification period was not extended. The plaintiff was discharged from RCH at 01:15 on July 9, 2017.

IV. ANALYSIS

A. Suitability for Summary Disposition

1. Parties' Positions

[114] The courts have identified a number of factors as relevant in determining suitability for summary disposition: *Gichuru v. Pallai*, 2013 BCCA 60, paras. 30 and 31; *Dahl v. Royal Bank of Canada*, 2005 BCSC 1263 at para. 12 (upheld on appeal, 2006 BCCA 369); *Ahlwat v. Green*, 2014 BCSC 1865 at para. 8.

[115] The factors include:

- a. the amount involved;
- b. the complexity of the matter;
- c. its urgency;
- d. any prejudice likely to arise by reasons of delay;
- e. the cost of taking the case forward to a conventional trial in relation to the amount involved;
- f. the course of the proceedings;
- g. the cost of the litigation and the time of the summary trial;
- h. whether credibility is a critical factor in the determination of the dispute;
- i. whether the summary trial may create an unnecessary complexity in the resolution of the dispute; and
- j. whether the application would result in litigating in slices.

[116] The defendants submit that the facts in dispute are quite narrow in scope. They argue that all of the claims in the actions are suitable for summary disposition, and that the vast majority can be disposed of without any need to resolve conflicting affidavit evidence. To the extent that any findings on conflicting evidence may be necessary, the defendants argue there is evidence in the record enabling the court to justly make the required findings.

- [117] The defendants also argue that the plaintiff's own evidence is inconsistent or contradictory on key facts, and say the court can also consider that inconsistency in resolving conflicts.
- [118] The plaintiff submits that the facts in dispute are central and critical facts, and thus summary disposition is inappropriate: *Bell v. Levy*, 2011 BCCA 417, *Jutt v. Doehring* (1993), 82 B.C.L.R. (2d) 223 (C.A.). He argues credibility and malice cannot be determined on affidavit evidence, and that there are no "other" reliable and credible documents for the court to rely upon to make findings in this case.
- [119] The plaintiff also argues the defendants' evidence is inconsistent and contradictory and, that being the case, justice mandates the defendants' witnesses be subjected to cross-examination.
- [120] The plaintiff also generally asserts that the defendants' affidavits contain improper hearsay.
- [121] Finally, he argues it is unjust to decide issues of such personal importance to him, or to make findings that will seriously impact his claims, based on affidavit evidence.

2. Conflicting Evidence in a Summary Trial: General Principles

- [122] The *Brisette v. Cactus Club Cabaret Ltd.*, 2017 BCCA 200, decision summarizes the modern approach to summary trial applications under Rule 9-7:
- [20] The use of the summary trial procedure was encouraged by the majority of the five-justice division of this Court in the seminal decision of *Inspiration Management Ltd. v. McDermid St. Lawrence Limited*. On behalf of the majority, Chief Justice McEachern made the following comments in an effort to settle the practice to be followed (at 213):

In my judgment, it must be accepted that while every effort must be made to ensure a just result, the volumes of litigation presently before our courts, the urgency of some cases, and the cost of litigation do not always permit the luxury of full trial with all traditional safeguards in every case, particularly if a just result can be achieved by a less expensive and more expeditious procedure.

- [21] [Chief Justice McEachern] did caution that a judge should not decide an issue of fact or law solely on the basis of conflicting affidavits even if the judge prefers one over the other, but he pointed out that other admissible evidence may assist the judge in resolving the conflicts.
- [22] The summary trial procedure has served the British Columbia judicial system well over the past 34 years. Its use should continue to be encouraged, and trial judges should not be timid in considering its suitability to decide the action or issues within the action. This is particularly so in light of two developments in the past number of years relating to the concept of proportionality.
- [26] The two prerequisites under the previous Rule 18A continue under the current Rule 9-7. The court must be able to find the facts necessary to decide the issues of fact or law and the court must be of the opinion that it would not be unjust to decide the issues. Proportionality will primarily be of importance in considering the factors relevant to the issue of whether it

would be unjust to decide the matter on a summary trial application, but there may be occasions when proportionality is relevant to the issue of whether the court is able to find the facts necessary to decide the issues of fact or law (for example, the court could in an appropriate case order cross-examination on key affidavits under Rule 9-7(12) rather than dismissing the summary trial application on the basis that a conventional trial is needed).

- [27] As noted in *Inspiration Management*, the court should not decide an issue of fact or law solely on the basis of preferring one conflicting affidavit over another. This was recently reiterated in *Cory v. Cory*: there must be documentary evidence, evidence of independent witnesses or undisputed evidence that undermines the affidavit of one of the parties on critical issues or some other basis for preferring one affidavit over another.

[Emphasis added; citations omitted.]

- [123] Suitability is an inquiry into whether the facts necessary to determine the matter can be found under summary trial. Where a finding of fact is necessary and there is conflicting evidence on the point, the court looks to see whether any of the evidence before it qualifies as "preferred evidence" in the *Cory* sense. If the court finds there is evidence that constitutes preferred evidence, it must then consider whether it would be just to rely on that preferred evidence to make the required factual finding in the circumstances of the case before it. The court should not be timid in determining whether it is just to proceed given the principles and values considered at paragraphs 23-25, in particular, of *Brissette*.

- [124] I agree that the internal reliability of a party's own evidence can also be taken into consideration in assessing whether it would be just to make findings on conflicting evidence on a summary trial.

- [125] In *Inspiration Management*, Chief Justice McEachern approved the comments of Taggart J.A. in *Placer Development Ltd. v. Skyline Exploration* (1985), 67 B.C.L.R. 366 (C.A.) [Placer]. In *Placer*, Justice Taggart specifically endorsed the following statement from *Bank of B.C. v. Anglo-American Cedar Products Ltd.* (1984), 57 B.C.L.R. 350 (S.C.):

Rule 18A anticipates the prompt determination of disputed issues of fact or law. It is a summary trial procedure rather than a summary judgment procedure. The court has a wide discretion under R. 18A. The plaintiff referred to *Yong v. Letchumanan*, [1980] A.C. 331 (P.C.), to suggest an approach which should be adopted by a chambers judge under R. 18A. While that decision is concerned with the removal of a caveat and its facts have no parallel to this case, I agree that the following statement at p. 341 is applicable to these proceedings:

Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit, however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be. In making such order on the application as he "may think just" the judge is vested with a discretion which he

must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient prima facie plausibility to merit further investigation as to their truth.

[Emphasis added.]

[126] The actions here each raise a number of claims. Those claims include some very disparate causes of action. In the circumstances, suitability for summary disposition falls to be assessed on a claim-by-claim basis. Suitability will arise for determination if it is necessary to make findings on conflicting evidence in order determine a particular claim.

B. Internal Inconsistency - Defendants' Evidence

[127] Both parties have asserted the other's evidence is internally inconsistent and unreliable. The defendants have identified discrete points. I will address these if and when they become relevant. The plaintiff has made omnibus objections, so I will deal with his objections at this point.

[128] The plaintiff provided a chart highlighting differences between witness statements, and differences between affiants' affidavits. (The same chart was relied upon by the plaintiff in support of his application to cross-examine the defendants' witnesses.) Differences, however, are not necessarily inconsistencies.

[129] I find the differences identified in the chart do not reflect negatively on the defendants' witnesses or evidence.

[130] I will address the plaintiff's alleged inconsistencies thematically.

[131] Several defendants have stated, in various ways, that "no false allegations" were made to the RCMP. Read in context, it is readily apparent the defendants' statements are denials that the statements made were false, not denials that statements were made. The statements do not give rise to any inconsistencies.

[132] The BGH triage record from July 7, 2017, indicates the plaintiff left "without being seen" [by a physician] "against medical advice." The notation is inaccurate; the plaintiff left without being seen because he was discharged and escorted out by security. That said, the plaintiff has given evidence that his name was called out just as he was leaving BGH,[4] which could account for a notation indicating that he failed to respond when called. In any event, the defendants' other evidence consistently indicates that the plaintiff was discharged and escorted out, and the defendants do not assert otherwise. There is no inconsistency of any consequence arising from the triage record.

[133] The plaintiff asserts that the defendants' evidence is inconsistent with the fact that his criminal charges were stayed. A stay of proceedings is a neutral outcome. There is no evidentiary support for the plaintiff's assertion that the stay was entered because the Crown had concluded he was innocent. There is no conflict or inconsistency.

- [134] The plaintiff asserts that defendants have made inconsistent statements regarding the alleged battery. In fact, contact has been consistently admitted, while the claim that the contact constituted battery at law has been consistently denied. There is no inconsistency.
- [135] The plaintiff says the differences between the witnesses' affidavits and their other statements are inconsistencies. I do not accept this. One would not expect the various statements made to be identical given the different circumstances, purposes and audiences involved. Ms. Kerr, for example, gave an extremely brief oral statement to the RCMP; unsurprisingly it focusses on the plaintiff's conduct. Her affidavit, on the other hand, is a detailed response to multiple tort claims brought against her and others regarding their conduct. The statement she provided to her professional college is a response to the plaintiff's complaint against her and focusses on her discharge of her professional responsibilities. Ms. Kerr's statements are different, but they do not conflict. I find that none of the differences of this sort identified in the plaintiff's chart raise reliability or credibility issues regarding the defendants' witnesses.
- [136] Some of the differences identified in the plaintiff's chart are insignificant for purposes of assessing reliability or credibility. For example, Mr. Forslund has variously said he put his hand on the plaintiff's shoulder: to keep physical separation between the plaintiff and Ms. Zerr, to keep separation between the plaintiff and himself, and to redirect the plaintiff's attention away from Ms. Zerr and toward him. All three can be true. The variation isn't material in context.
- [137] The chart also identifies differences between the various witnesses' affidavits regarding the BGH events. However, the witnesses were not all present for all of the interactions; were observing from different locations and angles; and were at times focussed on specific matters (e.g., Ms. Zerr was focussed on her own personal safety). The fact that the affidavits are not identical, does not mean they are inconsistent. I find no significant conflict between any of them.
- [138] Finally, with regard to hearsay, while some of the defendants' affidavits contain hearsay for narrative context, they do not advance hearsay as evidence to establish any material or disputed facts. For example, Ms. Alkenbrack says she is informed that the plaintiff arrived prior to the start of her shift. She has personal knowledge of when she started work, the plaintiff's arrival time is recorded in the BGH records admitted under s. 51 of the Hospital Act, and it is not a material fact in any event.
- [139] The plaintiff has not persuaded me the defendants' evidence is internally inconsistent or otherwise unreliable.

C. Causes of Action

- [140] I will move on to consider the various claims made by the plaintiff, including the claim's suitability for summary determination where required.

1. DEFAMATION

a. The Impugned Words

[141] The defamation claim is stated to be based on Mr. Forslund's RCMP statement ("Forslund statement") and Ms. Zerr's RCMP statement ("Zerr statement"). However, paragraph 3(A)(2) of the amended notice of claim in the Vancouver action sets out the following as the defamatory words in issue (with respect to both Mr. Forslund and Ms. Zerr):

MUSLIMS WOULD SHOOT YOU, WE SHOULD SHOOT YOU ALL. WE MUSLIMS WILL GET YOU CANADIANS. WE HATE YOU CANADIANS. WE ARE GOING TO GET YOU. WE HATE CANADA. I HATE YOU. I HATE ALL CANADIANS. WE SHOULD KILL YOU ALL. MUSLIMS WILL GET YOU ALL. ARABIC WAS GOING TO CHOP EVERYONE UP. ALL CRAZY AND WEIRD THREATS SORT OF RELIGIOUS INNUENDOS, JIHADIST TYPE LANGUAGE AND THREATS.

[142] The relevant portions of the Forslund statement ("Forslund words") read:

CF: as we were walking away he was saying things like I hate Canadians, I hate all of you, we should kill you all, Muslims will get you and all these weird sort of religious innuendoes, kinda Jihadist type language. But even as they [security] were with him he was still shouting big threats against just Canadians in general and you people and we should kill you all. Um, um just lots of general sort of threats like that.

CF: It was, it was pretty general threats. Like he, he did a couple of threats at me like I should kill you. Like he also kept reverting to we Muslims will get you Canadians, we hate you Canadians, we're going to get you, we hate Canada. Uh, all sorts of general threats against the public as well, um and our country and lot of religious kind of uh threats.

[143] The relevant passage in the Zerr statement ("Zerr words") reads:

KZ: Um I tried to explain that to him and he did not want to listen to me at all, he kept on trying to talk over me. And then he proceeded to threat and say that he wants to spit in my face and the paramedic's face. And that he was Arabic and that he was going to chop everyone up. Um I don't know what else. And then I proceeded to walk after he said all that. (inaudible)

[144] A pleading in a defamation action is required to set out, verbatim, the words alleged to be defamatory: *Caron v. A*, 2015 BCCA 47 at para. 58. The plaintiff has not done that. However, he has specified the Forslund and Zerr statements as the source of the impugned words and his pleading does enable the Forslund and Zerr words to be identified within those statements.

[145] The defendants were content to proceed on the defamation pleading as it stands. In the circumstances, I am prepared to do so as well.

b. Elements of the Tort

- [146] To establish the tort of defamation, a plaintiff must establish all of the following elements: (1) the impugned words are defamatory; (2) the words refer to the plaintiff; and (3) the words were published, in that they were communicated to at least one person other than the plaintiff. If these elements are established on a balance of probabilities, then falsity and damage are presumed: *Grant v. Torstar*, 2009 SCC 61 at para. 28; *Qiao v. Owners, Strata Plan LMS 3863*, 2020 BCSC 818 at paras. 148-151.
- [147] It is undisputed that the Forslund and Zerr words refer to the plaintiff, and that the statements were made to the RCMP.
- [148] The Forslund and Zerr words both indicate the plaintiff made statements that would tend to lower his estimation in the eyes of right-thinking people. The impugned words indicate the plaintiff uttered threats of violent criminal conduct and would tend to cause thoughtful and informed persons to regard the plaintiff with feelings of contempt, ridicule, fear, dislike, or disesteem.
- [149] The Forslund words also imply an association with religious violence. The Zerr words, however, do not have that added sting. Ms. Zerr did not refer to religion or religious concepts, and no special meaning was established with regard to her words.
- [150] The three elements of the tort are established, resulting in a presumption that the defamatory words are false. That presumption suffices to establish malice in law, and thus places a burden on the defendants to establish a defence: *Qiao*, para. 151.
- [151] The defendants raise three defences: absolute privilege, qualified privilege and justification.
- c. Defences of Absolute & Qualified Privilege
- [152] The privilege defences hinge on the circumstances in which the statement was made. Both versions were concisely summarized by the Court of Appeal in *Caron*:
- [15] Qualified privilege applies when there is a "duty, legal, social or moral, to publish the matter complained of to persons with a corresponding duty or interest to receive it". The legal effect of the defence of qualified privilege is to "rebut the inference, which normally arises from the publication of defamatory words, that they were spoken with malice. . . . However, the privilege is not absolute and can be defeated if the dominant motive for publishing the statement is actual or express malice". In short, where there is a public or shared interest in support of the statement both being made and received, a defendant cannot be held to have defamed a plaintiff unless the plaintiff can show that the defendant made the alleged publication for a malicious purpose.
- [16] Absolute privilege, on the other hand, provides a complete defence in cases of alleged defamatory publications, even if the defendant published the statement with actual malice. Traditionally, absolute privilege was granted to any "communications which take place during, incidental to, and the processing and furtherance of, judicial or quasi-judicial proceedings".

d. Assertion of Absolute Privilege

[153] Statements made to the police prior to the commencement of a judicial proceeding are covered by qualified privilege: Caron, para. 54. The defendants do not challenge that proposition. Rather, it is their alternative position.

[154] The defendants' assertion of absolute privilege is based on the certification process under ss. 22 and 28 of the Mental Health Act.

[155] The plaintiff's early morning July 8, 2017, admission to RCH was pursuant to the Mental Health Act, and he was held under that statute until his discharge from RCH in the early morning of July 9, 2017. Mr. Forslund and Ms. Zerr have both attested that they were aware, when providing their statements, that the RCMP had the authority to act under the Mental Health Act.

[156] The defendants' argument about the Mental Health Act is made by analogy to cases involving professional tribunals: i.e., Hung v. Gardiner, 2003 BCCA 257. Prior to Hung, it was established law that a complaint to a quasi-judicial professional tribunal was protected by absolute privilege, even where the tribunal had separate complaint and discipline committees. The earlier cases held that a complaint to an investigation committee was a necessary first step in the process leading to the quasi-judicial disciplinary hearing (see Hung, paras. 6-12).

[157] In Hung, the complaints had been investigated by committees, but never referred on to the disciplinary committee and thus never before a quasi-judicial body per se. The Court rejected the argument that absolute privilege only applied where the complaint was referred on for discipline, noting that the policy basis for the extending absolute privilege to complaints would be defeated if the privilege was dependent on the ultimate outcome (para. 32).

[158] The provisions of the Mental Health Act relied upon by the defendants are ss. 22 and 28 in particular:

Involuntary admissions

22 (1) The director of a designated facility may admit a person to the designated facility and detain the person for up to 48 hours for examination and treatment on receiving one medical certificate respecting the person completed by a physician in accordance with subsections (3) and (4).

(2) On receipt by the director of a second medical certificate completed by another physician in accordance with subsections (3) and (5) respecting the patient admitted under subsection (1), the detention and treatment of that patient may be continued beyond the 48 hour period referred to in subsection (1).

- (3) Each medical certificate under this section must be completed by a physician who has examined the person to be admitted, or the patient admitted, under subsection (1) and must set out
- (a) a statement by the physician that the physician
 - (i) has examined the person or patient on the date or dates set out, and
 - (ii) is of the opinion that the person or patient is a person with a mental disorder,
 - (b) the reasons in summary form for the opinion, and
 - (c) a statement, separate from that under paragraph (a), by the physician that the physician is of the opinion that the person to be admitted, or the patient admitted, under subsection (1)
 - (i) requires treatment in or through a designated facility,
 - (ii) requires care, supervision and control in or through a designated facility to prevent the person's or patient's substantial mental or physical deterioration or for the protection of the person or patient or the protection of others, and
 - (iii) cannot suitably be admitted as a voluntary patient.

Emergency procedures

28 (1) A police officer or constable may apprehend and immediately take a person to a physician for examination if satisfied from personal observations, or information received, that the person

- (a) is acting in a manner likely to endanger that person's own safety or the safety of others, and
- (b) is apparently a person with a mental disorder.

...

[159] The emergency involuntary admission process under the Mental Health Act cannot be validly analogized to a professional oversight tribunal for any number of reasons. For this purpose, it is sufficient to note that while a physician under s. 22(3) is making a decision under statutory authorization, the physician is not acting quasi-judicially. To the contrary, the physician is providing medical opinions on diagnosis and treatment based on an examination of the patient.

[160] Absolute privilege is not an available defence.

e. Qualified Privilege

[161] The RCMP asked Mr. Forslund, Ms. Zerr, and others to make statements. A person of ordinary intelligence and moral principle would feel a social responsibility to provide a statement if asked and able in such circumstances. I accept that Mr. Forslund and Ms. Zerr had social duties to provide statements, and that the RCMP had a corresponding interest and duty to receive their statements: Caron, para. 54.

[162] The RCMP was inquiring into what had been said and done by the plaintiff during the BGH events. The Forslund and Zerr statements were on topic and responsive. I find their statements were within the bounds of duties and interests legitimately engaged: *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at paras. 146-47.

[163] Thus, the Forslund and Zerr words are subject to qualified privilege. As noted in Caron at para. 15, qualified privilege rebuts the presumption of malice in law. As the Forslund and Zerr words were stated on an occasion of qualified privilege, a contrary presumption arises - that the Forslund and Zerr words (true or untrue) were stated to the RCMP in good faith. Thus, the defence of qualified privilege will prevail unless the plaintiff is able to establish malice in fact: *Qiao*, para. 160; *Kamloops- Cariboo Regional Immigrants Society v. Herman*, 2015 BCSC 886 at para. 76; *Smith v. Cross*, 2009 BCCA 529 at para. 30.

f. Malice in Fact

[164] In *Smith*, after discussing malice in the defamation context (see paras. 32 and 33), the Court of Appeal stated:

[34] In *Canadian Libel and Slander Actions* (Toronto: Irwin Law, 2004) at 299, R.D. McConchie and D.A. Potts reduce this statement to a helpful framework for the categories under which a finding of malice can be made. A defendant is actuated by malice if he or she publishes the comment:

- i) Knowing it was false; or
- ii) With reckless indifference whether it is true or false; or
- iii) For the dominant purpose of injuring the plaintiff because of spite or animosity; or
- iv) For some other dominant purpose which is improper or indirect, or also, if the occasion is privileged, for a dominant purpose not related to the occasion.

More than one finding can be present in a given case (McConchie and Potts at 299).

[165] Malice in fact is not easily established: *Woods v. Plewes*, 2014 BCSC 318 at para. 74. Malice is a state of mind, and can only be inferred from evidence of what the person said, did or knew: *Mann v. International Association of Machinists and Aerospace Workers*, 2012 BCSC 181 at para. 97. While a court may draw an inference of malice from a lack of honest belief in appropriate circumstances, lack of honest belief does not equate to malice: *Creative Salmon Company Ltd. v. Staniford*, 2009 BCCA 61 at paras. 32-34.

[166] On a generous interpretation, the plaintiff asserts that the Forslund and Zerr words were stated with malice because:

- they knew the words were false;
- they were recklessly indifferent to whether the words were false; or

· the words were stated for the purpose of injuring the plaintiff, either personally or in a representative capacity, by reason of ill-will grounded in negative views of the plaintiff's religion, race and/or country of origin.

- [167] It is also suggested that Mr. Forslund and Ms. Zerr knowingly fabricated the words, or were recklessly indifferent to their being false, in furtherance of a plan to immunize Mr. Forslund from the consequences of having contacted the plaintiff's shoulder.
- [168] The plaintiff asserts that the institutional defendants have treated him adversely in the past. However, no link has been drawn between the institutions and the content of the Zerr and Forslund statements. There is no evidence (nor even assertion) that Ms. Zerr or Mr. Forslund were involved in the earlier institutional incidents mentioned. There is also no evidence that the institutional defendants' past treatment of the plaintiff - assuming for purposes of argument that past adverse treatment actually occurred - was by reason of malice.
- [169] There is no credible evidence of any pre-existing relationship between any - let alone all - of the defendants' witnesses. There is nothing to give even the slightest air of reality to the plaintiff's assertions that were acting together or colluding against him.
- [170] The suggestion that Ms. Alkenbrack and Ms. Zerr fabricated lies to protect Mr. Forslund from the consequences of having touched the plaintiff's shoulder is untenable. Even assuming that was their goal, and further assuming they were prepared to lie to their employer and the police in order to achieve it (and I emphasize there is no evidence whatsoever to support either assumption), it is a bizarre and unlikely plan. It would be more to the point and far simpler to just say that they witnessed the contact and it was trivial in nature. It is incredible to suppose that they instead spontaneously generated an elaborate (and dramatic) fiction to serve the ultimate end goal of undermining the plaintiff's credibility in general (and somehow persuaded Ms. Aujla to participate as well).
- [171] With respect to discriminatory animus, while the impugned words do include references to race, religion and country of origin, it is only by virtue of reporting that the plaintiff spoke of those matters. In any event, the content of the RCMP statements attract qualified privilege, and thus were presumptively stated in good faith (and thus without discriminatory animus).
- [172] The plaintiff attests that Ms. Zerr (and earlier, "others" at BGH) have addressed him as "Osama", and submits that is evidence of discrimination. It is unclear when, and indeed if, the plaintiff legally changed his name. The plaintiff's own evidence indicates that in September 2017, he still identified himself as "Dr. Osama Al-Salami (Emotions Universe)" when corresponding with his criminal legal counsel. Even assuming Ms. Zerr and others at BGH have addressed the plaintiff as "Osama," I am unable to see how the bare use of the plaintiff's first name is evidence of discriminatory animus.

[173] The burden is on the plaintiff to establish malice in fact. The plaintiff has failed to persuade me that Ms. Zerr, Mr. Forslund or any other defendant in this matter bears him ill will of any kind.

[174] The defence of qualified privilege succeeds.

g. Justification

[175] The essence of the justification defence is that if a statement is true, it cannot be defamatory: *Shavluk v. Green Party of Canada*, 2010 BCSC 804 at para. 59 (aff'd 2011 BCCA 286). Justification is a complete defence provided the defamatory statements "are true with respect to the injurious sting of the statements": *Shavluk* at para. 60.

i. Suitability

[176] Here, the impugned words attribute statements to the plaintiff. Thus, justification necessitates factual findings about what the plaintiff actually said. While those factual findings are central to justification, they are also key findings for purposes of the battery claim. Accordingly, I will address suitability with respect to the factual findings here in the context of justification, where it is most squarely raised.

[177] The parties' evidence about what the plaintiff said is starkly contradictory. However, I am satisfied that factual findings can be justly made on the evidence. There is evidence before me that can, in all the circumstances, be justly preferred. In particular, I am satisfied that Ms. Aujla is an independent witness for purposes of Cory, and also that her evidence is reliable.

[178] Other factors also favour resolution at summary trial. There is no complexity to be drawn out or grey areas to be worked through on the points of evidence in dispute: the defendants say the plaintiff said "X"; the plaintiff says he said "Y"; Mr. Forslund says "placed"; the plaintiff says "punched". The plaintiff submits that all of the truth-seeking procedures of a full trial are warranted. I have reviewed the chart the plaintiff created to illustrate the need for cross-examination, and did not find it persuasive. I am, in fact, not persuaded the current evidentiary record would be much changed following a full trial process, let alone significantly improved in terms of the search for truth.

ii. Preferred Evidence

[179] The defendants submit that Mr. Bouka-Egah, Ms. Alkenbrack and Ms. Aujla are all "independent witnesses" for purposes of Cory. They also point to Ms. Alkenbrack's contemporaneous notations in the BGH records as "other" admissible evidence.

[180] Although Ms. Alkenbrack is not, both BGH and FHA are defendants. Affidavits sworn by the employees of parties have received no special consideration in suitability determinations. I find that Ms. Alkenbrack is not an independent witness in the Cory sense - to the contrary, she is an active character in the narrative of the dispute. While Ms. Alkenbrack's file notations are independently admissible under s. 51 of the Hospital Act, they are not "other

admissible evidence" in the sense preferred evidence. Ms. Alkenbrack is not an indifferent actor, and her notations are themselves part of the narrative of the dispute.

[181] Mr. Bouka-Egah is employed by BGH's security services provider. BGH was his workplace and he interacted with the plaintiff in his capacity as a BGH service provider. Mr. Bouka-Egah and Paladin both have an interest in earning BGH's approval qua client. Mr. Bouka-Egah is not an independent witness in the Cory sense.

[182] Ms. Aujla, however, has nothing to lose or gain in this dispute. She is an employee of the City of Burnaby. She was present as a witness by happenstance - her son was unwell. She provided a statement after an RCMP officer asked her if she would. Aside from social responsibility and her oath, she is indifferent to the fray.

[183] I further conclude that Ms. Aujla's evidence is reliable. The factual dispute relates to things said and done in a public place. Ms. Aujla was in that place at the material time, and near enough to the participants to hear statements, identify speakers, and observe the participants' conduct.

iii. Factual Findings

[184] I find it just and appropriate to rely on her evidence to resolve the conflicting evidence before me as to what the plaintiff said during the BGH events.

[185] Ms. Aujla's RCMP statement includes the following:

MA: he starting saying oh you know you guys are being racist because I'm Arabic and Muslim. Um calling them, saying that yes you know I am Muslim, I can fuck you over. Um that's all I can really tell you. He was just swearing the whole time really. Right? And just making threats that yeah he can, like you know I am a Muslim, I can kill you and you're treating me this way because you think all Muslims are terrorists.

MA: Well he, like he just said like I'm a Muslim, I, you know I can fuck you up, like the, blatantly saying pretty much that. And then he implied like you know like you guys all assume Muslims are terrorists um and stuff like that. And I'm just being um, everybody is being a racist against me and I hate Canada.

[Emphasis added.]

[186] In her affidavit, Ms. Aujla further states:

8. I recall that the patient escalated to the point of shouting and screaming, and that he began to say that he was Muslim and that he could hurt or kill the staff and "fuck you up".

[Emphasis added.]

[187] Ms. Aujla's evidence, which I accept, is consistent with the Forslund and Kerr words. It is also consistent with Ms. Alkenbrack's contemporaneous notes, and the defendants' witnesses' affidavit evidence. The evidence given by the other defence witnesses is not identical to Ms. Aujla's, but as discussed earlier, I would not expect it to be. It is sufficient that Ms. Aujla's evidence is substantially confirmatory of the impugned words, and without any significant conflict with regard to the other defendants' statements and affidavits.

[188] Thus, I find that the plaintiff did, in fact, make repeated statements about: Muslims, killing people, Muslims killing people, hating Canadians and "fucking up" people.

iii. Justification Analysis Based on Findings

[189] The truth of a defamatory statement need not be proved in every detail, but the truth established must align with the sting of the words: Kamloops-Cariboo Regional Immigrants Society at para. 72; Shavluk at para. 60. I conclude the plaintiff made statements that warrant the sting arising from the Forslund and Zerr words regarding threats of violence, and the further sting relating to religious violence arising from the Forslund words.

[190] The justification defence also succeeds.

[191] The defamation claim is dismissed.

2. MALICIOUS PROSECUTION

[192] The elements of the tort of malicious prosecution are as set out in *Nelles v. Ontario*, [1989] 2 S.C.R. 170 at pp. 192-3. A party seeking to establish malicious prosecution must prove four elements:

- (i) the proceedings were initiated by the defendant;
- (ii) the proceedings were terminated in favour of the plaintiff;
- (iii) there was an absence of reasonable and probable cause for the defendant's conduct; and
- (iv) the defendant was actuated by malice or a primary purpose other than carrying the law into effect.

[193] As noted in *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 SCR 339, the tort of malicious prosecution lies only against a defendant who initiated a criminal proceeding in the sense of having been "actively instrumental" in setting the law in motion (para. 53). The issue of whether a non-state agent was instrumental in the relevant sense centres on whether the state authorities were able to exercise independent discretion.

[194] In *Chaudhry v. Khan*, 2015 ONSC 1847, Justice O'Connor, stated:

13 [I]n exceptional circumstances, a private citizen may be treated as the prosecutor. This may arise where:

- a. the complainant desired and intended that the plaintiff be prosecuted;

- b. the facts were so peculiarly within the complainant's knowledge that it was virtually impossible for the professional prosecutor to exercise any independent discretion or judgment; or if the complainant puts the police in possession of information which virtually compels an officer to lay an information; and
- c. the complainant procured the initiation of proceedings by the professional prosecutor, either by furnishing information which he knew to be false, or by withholding information which he knew to be true, or both (Kefeli at para 24; see also Harrison at para 8; and Mirra v. Toronto Dominion Bank, [2004] O.J. No. 1804, [2004] O.T.C. 365 (S.C.J.) at para. 35).

[Emphasis added.]

[195] Here, the investigation did not involve facts peculiarly within the knowledge of Mr. Forslund, Ms. Zerr, or any of the defendants. The events took place in the waiting area of a hospital in front of a significant number of people, including general members of the public. RCMP officers attended BGH and solicited statements from first-hand witnesses to the events, and reviewed the BGH security tape. The RCMP officers investigated and collected sufficient evidence to make an independent judgment.

[196] There is also no evidence that any of the defendants took a position on whether criminal charges should be laid against the plaintiff.

[197] I am not persuaded that any of the defendants were "actively instrumental" in the laying of criminal charges. That finding is dispositive of the malicious prosecution claim, and it is unnecessary to address the other elements.

[198] The claim for malicious prosecution is dismissed.

3. INTENTIONAL INFLICTION OF HARM

[199] As set out in *Young v. Borzoni*, 2007 BCCA 16, the tort of intentional infliction of harm (also known as intentional infliction of nervous shock) requires each of the following elements to be established:

- (i) flagrant or outrageous conduct;
- (ii) that is calculated to produce harm; and
- (iii) which has resulted in a visible and provable illness.

[200] It is only necessary to deal with the third element in order to dispose of this claim.

[201] The law of tort distinguishes between psychological upset and psychological disturbance: *Mustapha v. Culligan*, 2008 SCC 27 at para. 9; *Saadati v. Moorhead*, 2017 SCC 28 at para. 37. A mental injury is a "serious and prolonged disturbance" that goes beyond the annoyances, anxieties and fears that come with living in a civil society. The court may consider factors such as the seriousness of the impairment, the length of the impairment, and the nature and effect of any treatment in order to distinguish between upset and injury: *Saadati*, para.

38.

- [202] The plaintiff's evidence does not establish a mental injury. The plaintiff points to the humiliation of being photographed and finger-printed, of being put into and seen in restraints, and of having to appear in court on criminal charges. Those obliged to negotiate the criminal system rarely do so without upset and anxiety. Some aspects, such as those identified by the plaintiff, may be particularly humiliating or anxiety-inducing, but those experiences do not establish a mental injury.
- [203] Further, one of the plaintiff's affidavits attaches two letters purporting to be from the plaintiff's physicians.[5] Neither letter meets the expert report requirements. However, the plaintiff has put them before the court and represented them as authentic.
- [204] The first is dated January 22, 2019. The author says he has been a family physician for the plaintiff since 2010, describes the plaintiff as reasonable and rational, and indicates the author has never prescribed the plaintiff any psychiatric medication. The second has an apparent date of January 24, 2019. In it, a different physician indicates that he has been a family physician for the plaintiff since 2013, and then states, with regard to the plaintiff: "I have not detected any evidence of psychosis or ongoing underlying mental health diagnoses."
- [205] The plaintiff has not only failed to establish he suffered a mental injury as a result of the events complained of, he has put documents before the Court documents that positively indicate that he did not.
- [206] The plaintiff's claim for intentional infliction of harm is dismissed.

4. BATTERY

- [207] The plaintiff asserts that Mr. Forslund battered him by striking on his shoulder while they were in the waiting room on July 7, 2017. Mr. Forslund does not dispute that his hand came into contact with the plaintiff's shoulder (the "Contact").
- a. The Law of Battery
- [208] The tort of battery is described in *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 SCR 551 [Scalera]. At paragraph 96 of Scalera, Iacobucci J. (for the court with regard to the test for the traditional (i.e., non-sexual) tort of battery), endorsed LaForest J.'s definition in *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6 at p. 25. That definition is: "causing another person to apprehend the infliction of immediate harmful or offensive force on her person coupled with the actual infliction of that harmful or offensive force." However, not every kind of contact provides a basis for suit (Scalera at paras. 105-06). Some kinds of contact are acceptable to society as part of the ordinary conduct of day-to-day life.
- [209] Self-defence can provide a justification for battery: *Buchy v. Villars*, 2008 BCSC 385 at paras. 111-13 (aff'd 2009 BCCA 519).

[210] Defending a third party can also justify a battery: *Babiuk v. Trann*, 2005 SKCA 5 at paras. 18-24. As noted at paragraph 24 of *Babiuk*, the public policy basis for accepting self-protection as a justification readily extends to acts taken to protect another from harm.

b. Conflicting Evidence regarding Contact

i. The Plaintiff and Mr. Forslund

[211] Mr. Forslund and the plaintiff have given conflicting evidence about the nature of the Contact. Their general evidence on the point has already been set out above.

[212] The plaintiff and Mr. Forslund agree on the basic chronology of events on either side of the Contact: After Mr. Forslund joined Ms. Zerr, he and the plaintiff had an exchange in which Mr. Forslund raised the prospect of the police becoming involved. Following that comment, the plaintiff turned from Mr. Forslund to Ms. Zerr, and focused his attention on her. The Contact followed immediately upon the plaintiff's turn toward Ms. Zerr. The plaintiff shouted angrily after the Contact. Ms. Zerr retreated back to triage at or about the time of Contact.

[213] The plaintiff's evidence in support of the battery claim includes the following details regarding the Contact.[6] He says Mr. Forslund used "a closed hand fist" and the impact "left the plaintiff with a lot of pain". He describes the Contact as a "punch" that struck him on his "very weak" left shoulder.

[214] The plaintiff also says the Contact left him "terrified" and afraid Mr. Forslund would attack again, so he went to the hospital security office to seek protection from Mr. Forslund. The plaintiff says that is how and when he came to speak with the security officers.

ii. Ms. Aujla

[215] I again quote from Ms. Aujla's RCMP statement:

MA: So then the other paramedic gentleman came out just to kinda back her up and um then he got the, the gentlemen got re-, even more mad, why did he come out and started saying oh you know you're a fuckin, he was swearing at him too. He was just calling him a fuckin loser and this and that and saying that um he's a bad guy, this and that. And then walked, then he walked away for a little bit cause he was told that security or the cops will be called and he's like go ahead, I don't care, call who you have to call. He kept on swearing and eventually security came around.

C: Did you ever see him make any threatening gestures towards anybody?

MA: No. The o-, the only time was when the paramedic put up his time to, when they were standing face to face, and then he slapped his hand away, that was the only thing he did do that I saw. He's?

[216] The following paragraphs are from her affidavit:

5. I can recall that the nurse and paramedic were attempting to calm him down, and were holding out their hands to him asking him to calm down.
6. I recall the patient shouting don't touch me, and the paramedic and nurse responding that they were not touching him. I recall that at one point the paramedic put up his hand in what appeared to be an effort to calm the patient down, the patient swung out with his arm and smacked the paramedic's hand away.
7. The nurse left the emergency waiting area and went back into the hospital and the paramedic remained.
8. Eventually the security guards came and took the patient out of the emergency department.

iii. Plaintiff's July 10, 2017 RCMP Statement

- [217] The defendants say the plaintiff appears to have described the Contact very differently than he does now in an RCMP statement he made earlier. A summary of the RCMP statement is found in an attachment to an affidavit sworn by the plaintiff.
- [218] On July 10, 2017, the plaintiff reported the Contact and made a statement. When no charges resulted, he filed a complaint under Part VII of the Royal Canadian Mounted Police Act, R.S.C. 1986, c. R-10 [RCMP Act]. One part of his complaint was that the officer (Constable Bergerman) who took his statement did not put a transcript of it into the file.
- [219] The end result of the plaintiff's complaint was an investigation report pursuant to the RCMP Act, dated by July 23, 2019, and authored by Chief Superintendent Burleigh ("Burleigh Report").[7] With regard to the plaintiff's statement, the Burleigh Report reads:

Constable Bergerman was genuinely surprised that your statement had not been added to the operational file. He immediately checked his audio recorder and located your statement there. Constable Bergerman provided the statement forthwith to Sergeant Landy who then had it transcribed. I reviewed the statement you provided and noted that you felt you had been assaulted by the paramedic and that you requested Constable Bergerman to obtain the video footage from BGH which may help you prove this claim. You did not claim to have suffered any injuries from that assault which you described as an open-handed slap.

[Emphasis added.]

- [220] On the Burleigh Report's summary of the statement, the plaintiff's July 10, 2017 statement does conflict with his sworn evidence. Notably, the plaintiff put the Burleigh Report into evidence to prove that his RCMP report was not properly investigated. That is, the plaintiff put the Burleigh Report into evidence for the truth of its content, and did so without qualification. As such, the summary of the statement found in it, is effectively an admission against interest.
- [221] I agree that the plaintiff has put conflicting evidence before the Court regarding the nature of the Contact in his own case.

c. Findings regarding Nature of the Contact

[222] I held Ms. Aujla evidence's could be justly preferred for the purpose of resolving the conflicts in the evidence about the plaintiff's statements. On the same basis, I find her evidence can justly relied upon as preferred evidence to help resolve conflicting evidence regarding the Contact.

[223] I am satisfied Ms. Aujla was observing during the material period of time. She may have missed the precise moment of Contact and/or the actual point of Contact may have been blocked from view. However, the agreed chronology and Ms. Aujla's evidence taken together demonstrate she was, at the least, observing shortly before and shortly after the actual moment of Contact.

[224] The plaintiff's evidence about the Contact (i.e., a closed fist punch of significant impact) and of his reaction to it (i.e., severe pain and a frightened retreat to the security office) are incompatible with Ms. Aujla's observations. She did not see the plaintiff recoil from impact or react as though he was experiencing severe pain. She saw the plaintiff "smack" Mr. Forslund's hand. She says he became even more angry and yelled at Mr. Forslund about not touching him. She says he stayed at the waiting area with Mr. Forslund, swearing angrily, until the security officers came to collect him.

[225] I am satisfied that the plaintiff's evidence about the force and nature of the Contact, and of his reaction to the Contact, must be rejected. In particular, I reject his evidence that the Contact involved a closed fist, was in the nature of a punch, and involved significant force.

[226] The equivocal nature of the plaintiff's own case points to the same finding. The description of the Contact set out in the Burleigh Report--open-handed and causing no injury--is consistent with the finding obtained by accepting Ms. Aujla's testimony as preferred evidence.

[227] I am unable to make any more detailed factual findings about the nature of the Contact on the evidence before. However, am satisfied that it is just and appropriate in the circumstances to make the following limited finding of fact: the Contact constituted, at most, an open-handed impact of moderate force ["Imputed Strike"]. In the result, the battery claim is suitable for summary disposition only if the claim can be determined assuming the Contact amounted to the Imputed Strike.

[228] Accordingly, I will not address the defendants' argument that the Contact was not sufficient to constitute to a battery at law. Rather, I will assume the Imputed Strike occurred, assume it constituted a battery, and determine whether protective justification provides a basis for disposition of the claim.

d. Self-Defence/ Third Party-Defence of Ms. Kerr

[229] To justify a battery as defensive conduct, a defendant must establish: 1) a response was justified (by an attack or perceived attack); and 2) the force of the response was not disproportionate to the justification: *Mann v. Balaban*, [1970] S.C.R. 74 at p. 87; *Buchy*, at para. 111.

i. Perceived Risk of Harm

[230] A defendant must establish the plaintiff was struck in response to an attack or perceived attack on the defendant or a third person. The defence is available even where the defendant struck the first blow, provided the defendant can establish that imminent harm was reasonably perceived: *Buchy*, at para. 112.

[231] I continue to accept Ms. Aujla's testimony as preferred evidence that can be justly relied upon to make factual findings about the plaintiff's conduct and appearance in the period of time leading up to the Contact.

[232] The plaintiff was swearing angrily at Ms. Zerr before and as Mr. Forslund entered the waiting area. After Mr. Forslund joined, the plaintiff became more angry. He spoke to Ms. Zerr and Mr. Forslund loudly and aggressively, and he was noticeably physically agitated. The plaintiff admits that he turned away from Mr. Forslund and toward Ms. Zerr and focussed his attention on her. The plaintiff agrees that the Imputed Strike occurred immediately upon his doing so.

[233] In her RCMP statement, Ms. Aujla described the plaintiff as about 6'1" - 6'2" and at least 240 lbs. On personal observation, Ms. Aujla's estimates appear fair.

[234] I am satisfied Mr. Forslund reasonably apprehended an imminent risk of physical harm to Ms. Zerr. The plaintiff was already in very close proximity to Ms. Zerr when he turned to focus on her. He was obviously agitated and had been waving his arms and hands about. He had been swearing at Ms. Zerr for a considerable period time and at ever increasing volume. His statements appeared to suggest that he believed she, in particular, had somehow wronged him.

[235] Mr. Forslund generically describes the apprehended harm as "a physical confrontation" with Ms. Zerr. That generic description implicitly reflects the perception that the plaintiff was behaving unpredictably. That perception was also reasonable in the circumstances.

ii. Was the Imputed Strike Disproportionate?

[236] In my view, the Imputed Strike was not a disproportionate response.

[237] Mr. Forslund had no ability to measure the required force with any precision. He was called upon to respond reactively to an unpredictable risk. His general intent was to maintain a physical separation, which was a modest goal in the circumstances, and he appears to have achieved little, if anything, more than that.

[238] As stated in Linda D. Rinaldi, ed., *Remedies in Tort*, loose-leaf (Toronto: Carswell, 1987) vol. 1 at 2-30 to 2-31 (quoted with approval in *Buchy* at para. 112):

it has long been held that an attacked person defending himself and confronted with a provoking situation is not held down to measure with exactitude or nicety the weight or power of his blows.

[239] The claim for battery is dismissed.

5. NEGLIGENCE - MEDICAL CARE

a. Elements of the Claim

[240] A claim in negligence requires a plaintiff to establish:

- (1) the defendant owed a duty of care;
- (2) the defendant's conduct was a breach of the standard of care;
- (3) the plaintiff sustained damage; and
- (4) the damage was caused, in fact and in law, by the defendant's breach.

See, for example, *Mustapha*, para. 3.

[241] The plaintiff must establish all four elements to succeed, thus failure to establish any one element warrants dismissal.

b. Breach of Standard of Care

[242] The plaintiff alleges: (1) as a level 3 patient, he ought to have been assigned to the RAZ; (2) as a level 3 patient, the length of his wait time was excessive; and (3) he should not have been discharged without being seen by an emergency physician.

c. Waiting Area and Time

[243] I accept Ms. Moreljo's evidence that it is a common practice to place level 3 patients in a general emergency waiting area rather than a RAZ. I also accept her evidence that the triage nurse at BGH could also have reasonably assessed the plaintiff as a level 4 or level 5 patient based on his triage record.

[244] The plaintiff has attached a CTAS publication wait times to one of his own affidavits. The publication deals with wait times and CTAS acuity levels. The defendants object, correctly, that the publication is inadmissible expert evidence. In any event, it does nothing more than present guidelines. Even the guidelines are expressed as generalities (e.g., 90% of the time). The CTAS publication does not establish a standard of care.

[245] The plaintiff has failed to establish a standard of care regarding waiting area assignment or waiting time for level 3 patients, even presuming that level 3 is the acuity level that should be referenced for such purposes on the facts of the case.

d. Discharge without Examination

[246] In Ms. Moreljo's opinion, it is reasonable to discharge a patient with the plaintiff's triage information without an examination by an emergency physician.

[247] The factual findings I have made regarding the plaintiff's conduct confirm the central assumptions for Ms. Moreljo's expert opinion regarding discharge. In her opinion, it is reasonable to discharge a patient for behaving as the plaintiff did, on the basis such conduct amounts to abuse and harassment in the healthcare context.

[248] The plaintiff has failed to establish his discharge from BGH on July 7, 2017, was in breach of a standard of care.

e. No Evidence of Damage Sustained

[249] There is also no evidence of damage suffered as a result of the plaintiff's discharge from BGH. The RCH records indicate the sciatica-related pain and numbness that caused him to attend BGH resolved, without treatment, during the period prior to his discharge on July 9, 2017.

[250] The CT Scan results indicate nothing beyond the fact that the plaintiff's sciatica was worse in 2017 than it was in 2013.

[251] The claim in negligence is dismissed.

6. THE PRIVACY CLAIMS

[252] The plaintiff says the defendants "unlawfully, illegitimately, and unethically obtained and accessed" his health records without his consent or a court order. He also complains that the defendants filed certified copies of the BGH and RCH records in this proceeding, making them part of the public court file.

[253] The plaintiff claims against FHA, BGH and RCH asserting the following common law torts and statutory breaches:

- a. breach of privacy under the Privacy Act, R.S.B.C. 1996, c. 373;
- b. breach of privacy under ss. 7 and 8 of the Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), c 11;
- c. breach of confidence;
- d. breach of s. 30.4 of the Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165;
- e. breach of s. 10 of the Ministry of Health Act, R.S.B.C. 1996, c. 301;
- f. breach of s. 91(1) the Public Health Act, S.B.C. 2008, c. 28; and
- g. negligence in relation to the disclosure of the BGH and RCH records.

[254] The privacy claims all arise from the following basic facts:

- FHA, BGH and RCH provided the BGH and RCH records to Mr. Stanger, in his capacity as their legal counsel in these proceedings;
- Mr. Stanger listed the BGH and RCH records in the defendants' list of documents in these proceedings;
- the BGH and RCH records were put into evidence by the defendants on the summary trial applications by attachment of certified copies to an office affidavit.

- [255] As originally filed, the plaintiff also named Mr. Stanger and his law firm as defendants to the privacy claims. The claims against Mr. Stanger and his firm were struck as having no basis in law. That finding was upheld on appeal in *Universe v. Fraser Health Authority*, 2019 BCCA 234. In that decision, Justice Butler (for the Court) stated:
- [10] As the respondent argues, the plaintiff's claim is based on an assertion that has no merit. The appellant says that when a patient brings an action against health care providers alleging negligent treatment and unlawful conduct, those health care providers are not able to disclose the medical records in their possession or control to their counsel, and those lawyers are not able to list and produce the documents in the action in accordance with the Rules without the patient's consent or a court order. This is an untenable proposition. The appellant's arguments improperly conflate the legal principles about privilege and confidentiality on which he relies. He fails to recognize that the health care providers he sued have a right to obtain legal advice and that their lawyer must have the ability to access all of the information and documentation that may be relevant to that action.
- [11] Lawyers have a duty to ensure that their clients list and produce documents in accordance with the requirements of the Rules. This duty could not be fulfilled if defendants could not disclose documents in their possession or control to counsel.
- [12] Further, when a plaintiff claims against his or her medical providers concerning medical care received, the plaintiff "implicitly waives his or her right to privacy and confidentiality of medical records. This also applies to records that were not already within the control of the defendant health care provider. The waiver of privilege is necessary to allow the defendant to make a full and complete defence.
- [26] Although not put forward as a specific claim, the additional argument advanced by the appellant is that the list of documents prepared by the respondent lawyers was overly broad. The suggestion that it is overly broad has little merit in light of the nature of the allegations in the appellant's notice of civil claim. Rule 7-1(1)(a) requires parties of record to prepare a list of "all documents that are or have been in the party's possession or control and that could, if available, be used by any party of record at trial to prove or disprove a material fact". Given the nature of the allegations, the respondent lawyers' obligation to comply with the Rules, and the appellant's implied waiver of privilege, any claim based on the extent of the disclosure has no reasonable prospect of success.

[Citations omitted.]

- [256] The plaintiff's claims included allegations of malice against BGH based on alleged adverse treatment in the historical provision of healthcare. The actions also advance claims founded on mental and physical injuries alleged to have been suffered as a result of the defendants' tortious conduct. By his pleadings, the plaintiff made the BGH and RCH records relevant documents in the dispute, and thus waived privilege over them.
- [257] Medical records are the property of the institution that compiles them: *McInerney v. MacDonald*, [1992] 2 SCR 138, [1992] S.C.J. No. 57 at para. 14; Hospital Act, s. 51(1). The institutional defendants properly disclosed the BGH and RCH records to Mr. Stanger as counsel in this litigation. Mr. Stanger properly concluded the BGH and RCH records should be listed on the defendants' list of documents.
- [258] The plaintiff waived any privilege, the documents are admissible, and there were no court orders restricting or regulating the use or filing of the records in the proceeding. The fact that the BGH and RCH records were filed as attachments to affidavits in this proceeding provides no basis for a claim for breach of privacy or confidentiality.
- [259] Finally, there is no basis for a claim in negligence. The BGH and RCH records were documents relevant to the action and in the defendants' possession. As such, the Rules obliged the defendants to turn them over to Mr. Stanger for use in the litigation.
- [260] The privacy claims are dismissed.

V. SUMMARY

- [261] The actions are dismissed in their entirety.
- [262] The dismissal is without prejudice to the defendants' right to set the vexatious litigant application for hearing and determination.
- [263] Costs are awarded to the defendants.

"Tucker J."

- [1] The factual assertions set out below are taken primarily (but not exclusively) from the plaintiff's affidavit #1 in the NW Action, sworn December 27, 2018.
- [2]. See plaintiff's 7th affidavit in the Vancouver action, sworn February 21, 2018,
- [3] The RCMP statements were recorded audio statements. The affidavits of those witnesses who provided RCMP statements attach both their audio recording and the transcript generated for the RCMP file. The transcripts are expressly noted as "UNCORRECTED". The witnesses have attested to the accuracy of the recordings and the transcripts. Quotes from RCMP statements set out in this decision are reproduced just as they appear in the uncorrected transcript, with the exception of the substitution of apostrophes for question marks. (The uncorrected transcripts show question marks wherever apostrophes would be

appropriate.)

- [4] . See 15th affidavit of the plaintiff in the Vancouver action, sworn January 10, 2019.
- [5] . See 18th affidavit of the plaintiff in the Vancouver action, sworn October 10, 2019, pp. 92-94 (Document "R").
- [6] . See 8th affidavit of the plaintiff in the NW action, sworn December 27, 2018,
- [7]. See 18th affidavit of the plaintiff in the NW action, sworn October 10, 2019.
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