

COURT FILE NO.: N1c141/08

IN THE COURT OF QUEEN'S BENCH OF
NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF MIRAMICHI

COUR DU BANC DE LA REINE DU
NOUVEAU-BRUNSWICK

DIVISION DE

CIRCONSCRIPTION JUDICIAIRE DE
MONCTON

BETWEEN:

ALBERT JOHN GAY,

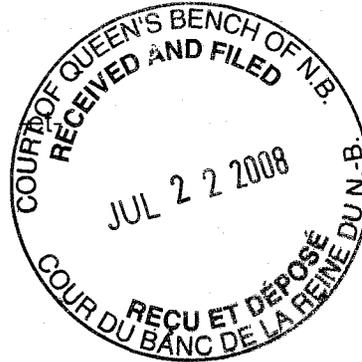
Plaintiff,

- and -

REGIONAL HEALTH AUTHORITY 7, a corporation
Incorporated under the laws of the Province
of New Brunswick

Defendant.

ENTRE:



Demandeurs,

Defendeurs.

**NOTICE OF ACTION WITH
STATEMENT OF CLAIM ATTACHED**
(FORM 16A)

**AVIS DE POURSUITE ACCOMPAGNE
D'UN EXPOSE DE LA DEMANDE**
(FORMULE 16A)

TO: The Defendant

DESTINIAIRE:

**Regional Health Authority 7
500 Water Street
Miramichi, NB E1V 3G5**

LEGAL PROCEEDINGS HAVE BEEN COMMENCED AGAINST YOU BY FILING THIS NOTICE OF ACTION WITH STATEMENT OF CLAIM ATTACHED

If you wish to defend these proceedings, either you or a New Brunswick lawyer acting on your behalf must prepare your Statement of Defence in the form prescribed by the Rules of the Court and serve it on the Plaintiff or his lawyer at the address shown below and, with proof of such service, file it in this Court office together with the filing fee of \$50.00:

- (a) if you are served in New Brunswick, WITHIN 20 DAYS after service on you of this Notice of Action with Statement of Claim Attached or
- (b) if you are served elsewhere in Canada or in the United States of America, WITHIN 40 DAYS after such service, or
- (c) if you are served anywhere else, WITHIN 60 DAYS after such service.

If you fail to do so, you may be deemed to have admitted any claim made

PAR LE DEPOT DU PRESENT AVIS DE POURSUITE ACCOMPAGNE D'UN EXPOSE DE LA DEMAND, UNE POURSUITE JUDICIAIRE A ETE ENGAGEE CONTRE VOUS.

Si vous desirez presenter une defense dans cette instance, vous-meme ou un avocat du Nouveau-Brunswick charge de vous représenter devrez rediger un expose de votre defense en la form prescrite par les Regles de procedure, le signifier au demandeur ou a son avocat a l'adresse indiquee ci-dessous et le déposer au greffe de cette Cour avec un droit de depot de 50\$ et une preuve de sa signification:

- (a) DANS LES 20 JOURS de la signification qui vous sera faite du present avis de poursuite accompagne d'un expose de la demande, si elle vous est faite au Nouveau-Brunswick ou
- (b) DANS LES 40 JOURS de la signification, si elle vous est faite dans une autre region du Canada ou dans les Etats-Unis d' Amerique ou
- (c) DANS LES 60 JOURS de la signification, si elle vous est faite ailleurs.

Si vous omettez de le faire vous pourrez etre repute avoir admis

against you, and without further notice to you, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE.

toute demande formulee contre vous et, sans autre avis, JUGEMENT POURRA ETRE RENDU CONTRE VOUS EN VOTRE ABSENCE.

You are advised that:

Sachez que:

(a) You are entitled to issue documents and present evidence in the proceeding in English or French or both;

(a) vous avez le droit dans la present instance, d'emettre des documents et de presenter votre preuve en francais, en anglais ou dans les deux langues;

(b) the Plaintiff intends to proceed in the English language; and

(b) le demandeur a l'intention d'utiliser la langue; et

(c) your Statement of Defence must indicate the language in which you intend to proceed.

(c) l'expose de votre defense doit indiquer la langede que vous avez l'intention d'utiliser.

THIS NOTICE is signed and sealed for the Court of Queen's Bench by *Matthew Cripps* Clerk of the Court at Miramichi, New Brunswick, on the *22* day of *July* 2008.

CET AVIS est sign et scelle au nom de la Cour de Banc de la Reine par greffier de la Court a _____, ce _____ 2008.

[Handwritten Signature]

(clerk)

(greffier)

Court Seal

Sceau de la Cour

Miramichi Court House
673 King George Highway
Miramichi, NB
E1V 1N6



(address of court office)

(adresse du greffe)

STATEMENT OF CLAIM

The Parties

1. The proposed representative Plaintiff, Albert John Gay, resides in Tabusintac in the Province of New Brunswick and was born on January 4, 1945. He brings this action on his own behalf, and on behalf of a class of similarly situated persons pursuant to the *Class Proceedings Act*, S.N.B. 2006, c. C-5.15, such class to be defined in the Plaintiff's application for class certification.
2. The Defendant, Regional Health Authority 7, is a body corporate constituted pursuant to the *Regional Health Authorities Act*, S.N.B. 2002, c. R-5.05, to manage and control the operation of, and was at all material times responsible for the operation, supervision and management of, the Miramichi Regional Hospital, Miramichi, Province of New Brunswick, its employees, agents and servants, including its laboratory staff and pathology staff (the "Hospital").
3. The Defendant operates a pathology laboratory at the Hospital (the "Laboratory"). The Plaintiff was a patient who received services from the Laboratory. He brings this action on his own behalf, and on behalf of a proposed class of similarly situated persons.

Material Facts

4. Regional Health Authority 7 employed Dr. Rajgopal S. Menon as a pathologist at the Miramichi Regional Hospital since 1994. Between 1995 and 2007, Dr. Menon was responsible for the diagnostic testing of approximately 24,000 pathology samples for patients who received services in the Miramichi region.
5. The Defendant's Chief Executive Officer, John Tucker, caused the Defendant to hire Dr. Menon against the advice of Vice President of Medical Services, Dr. John Mackay.
6. Dr. Menon was appointed to Chief of the Hospital's Pathology Department in 2002. When this position came up for renewal in 2005, the Board of the Hospital declined to reappoint Dr. Menon, citing certain complaints that had been filed against Dr. Menon.

The Board elected to appoint the Hospital's only other pathologist, Dr. Dariusz Strzelczak.

7. Upon his appointment, Dr. Strzelczak scrutinized Dr. Menon's work. Dr. Strzelczak discovered at least five cases that were handled improperly by Dr. Menon. These five cases were reported to Dr. Carl Hudson, the Vice President of Medical Services at the Hospital.
8. On January 29, 2007, Dr. Hudson filed a complaint with the College of Physicians and Surgeons of New Brunswick (the "College").
9. At the time of receiving Dr. Hudson's letter, the College was already dealing with two separate unresolved complaints with respect to the deficient practice of Dr. Menon. On April 3, 2006, it received a complaint from the family of a deceased Miramichi resident alleging that Dr. Menon unnecessarily delayed the diagnosis and treatment of a cancerous tumor. On August 8, 2006, the Board further received a complaint from the daughter of another deceased Miramichi resident alleging delays and errors in an autopsy conducted by Dr. Menon. These complaints brought into question the accuracy of Dr. Menon's interpretation of pathology specimens.
10. Upon a review of the complaints, the College suspended Dr. Menon's license on February 7, 2007. It was found that his continued practice presented a significant risk to the health and welfare of his patients.
11. It was after this suspension that Regional Health Authority 7 retained pathologist Dr. Rosemary Henderson to conduct a review of Dr. Menon's work. Eleven months after the suspension, this independent audit was conducted between December of 2007 and January of 2008 and examined 227 cases of prostate and breast cancer biopsies from 2004-2005. This independent review found significant discrepancies in eighteen percent of the cases and that six percent were misdiagnosed.
12. In forty-one of the 227 examined cases there was discovered either a miscalculation of the stage of the cancer, an incomplete protocol, or an incomplete examination.

13. Nine of the 227 cases revealed cases of undetected cancer, a finding contrary to the original diagnosis these patients would have received.
14. The Defendant decided not to advise patients or the public of the retesting and the suspected deficiencies in Dr. Menon's work. The Plaintiff and Class Members learned of the retesting through the news media in February 2008, causing consternation, mental distress, and concern among patients as to whether they had received appropriate therapy.
15. The Plaintiff says that the actions of the Defendant were too little and too late, and they should not have hired Dr. Menon at all, or if hired they should have discharged him or conditioned, suspended or supervised his privileges at an early date.

Representative Plaintiff

16. On March 17, 2004, at the Miramichi Regional Hospital, the Plaintiff had a biopsy performed on a portion of his left forearm due to scarring and discolouration in the area of a skin graft. The Plaintiff had a previous history of skin cancer scares. After the March 17, 2004 biopsy, the Plaintiff was advised that the pathology test results on his left arm tissue sample were negative for cancer.
17. The Plaintiff first learned that many results of pathology tests performed at the Miramichi Regional Hospital were being reviewed when he read an article in the local newspaper, the Miramichi Leader, on February 22, 2008.
18. On February 26, 2008 the Plaintiff was contacted by Dr. Gerard Losier's office and was advised that the pathology tests on his left forearm tissue sample from the March 17, 2004 biopsy were being redone.
19. The Plaintiff experienced panic when he was advised that his tests were being redone and fears that he may have cancer that was misdiagnosed.
20. Approximately ten years ago, the Plaintiff had lumps and moles removed from under his upper arms, from his thighs and from his right hand. The Plaintiff had three surgeries:

one on his right hand, and one on his left shoulder and one on his thighs. Two of those surgeries were performed in Tracadie, New Brunswick, and one was performed in Bathurst, New Brunswick. After these surgeries, the Plaintiff was advised that the pathology tests came back benign. Since that time the Plaintiff has worried about developing melanoma.

21. In August 2007, the Plaintiff had ten biopsies taken from the area of his prostate and the results came back as non-cancerous. The Plaintiff had his prostate “reamed out” or removed in October 2007. The pathology tests performed following the August 2007 prostate biopsies apparently were not performed by Dr. Menon. Nevertheless, the Plaintiff also worries about whether he had cancer of the prostate.
22. To date the Plaintiff has not received the results of the review of his pathology tests and continues to worry about the outcome of the review. The Plaintiff can feel lumps under the skin in the area of the skin graft on his left forearm. The Plaintiff experiences hot sensations and swelling in the area of the skin graft on his left forearm.
23. The Plaintiff no longer has trust and confidence in treatment received at the Miramichi Regional Hospital in particular and in the New Brunswick health care system in general.

Fault or Negligence of Defendant

24. The Defendant is corporately liable to the Plaintiff in tort of negligence. The Defendant’s conduct fell below the reasonable standard of care expected of it under the circumstances and was corporate or systemic in nature. The particulars of the Defendant’s fault or negligence are that they:
 - (a) hired Dr. Menon against the advice of the Defendant’s Vice President of Medical Services, Dr. John Mackay;
 - (b) performed an inadequate background check and minimized or ignored warnings and cautions from previous employers including the Saint John Hospital;
 - (c) improperly credentialed Dr. Menon before hiring and credentialed him inadequately on a regular (at least yearly) basis thereafter;

- (d) chose to delay response or not respond to known and reported shortcomings in Dr. Menon's completion of pathology reports and the accuracy of his pathology reports;
- (e) chose to ignore or not to investigate inadequacies and inaccuracies and delays in pathology reports;
- (f) chose to ignore delays in work completion and conflicts of interest caused by absences to pursue private business interests;
- (g) chose not to monitor, not to investigate or not to adequately respond to diagnostic errors in Dr. Menon's pathology reports;
- (h) chose to continue with the contract with Dr. Menon or not to condition, suspend or supervise his privileges;
- (i) established and maintained an inadequate or no quality assurance program for pathology;
- (j) chose to establish an inadequate or no meaningful peer review program for pathology;
- (k) chose to ignore periodic mentoring of medical staff including pathology staff as a means of quality control and assurance;
- (l) established an inadequate or no standard operating procedures for pathology;
- (m) established an inadequate or no meaningful medical review committee of the hospital to supervise, control and discipline medical staff including pathology staff;
- (n) established an inadequate or no policy on minimal continuing education for medical staff including pathology staff;
- (o) chose to ignore concerns and complaints about inadequate or no meaningful communication between technical and pathology staff;
- (p) chose not to engage in external proficiency testing;
- (q) established an atmosphere that discouraged continuous quality improvement;
- (r) chose to have an inadequate or no meaningful policy on conflicts or potential conflicts caused by the pursuit of private business interests by staff including pathology staff;

- (s) established an inadequate or no meaningful policy to identify cases requiring remediation of staff including pathology staff, where other authorities such as the College declined to act;
 - (t) ignored complaints about pathology staff's professional competency; and
 - (u) credentialed a pathologist who was medically impaired.
25. The Defendant is further negligent by its failing to advise the Plaintiff and Class Members of their potential risk of illness at earliest opportunity which at latest was February 2007, and thus, denying them the opportunity to seek early medical attention.

Vicarious Liability

26. The Defendant is also vicariously liable for the acts or omissions of its employees and agents, as set out above. The representative Plaintiff specifically does not allege vicarious liability with respect to the acts or omissions of Dr. Menon. The negligence alleged with respect to medical professional involvement is entirely corporate and systemic.

Breach of Contract

27. The Defendant has a contractual relationship for the provision of medical services to the Plaintiff and other patients. A major or important part of the contractual relationship is to provide the Plaintiff and Class Members with peace of mind and psychological benefit. An implied term of that contractual relationship is that the Defendant would employ competent and properly trained and supervised personnel in its pathological processes, and that it would have a proper quality assurance program, proper controls, and ensure an appropriate level of expertise and specialization among the pathology medical staff charged with responsibility for interpretation of pathology testing, in the exercise of its contractual duties arising out of the testing, diagnosis and treatment of the Plaintiff and Class Members. The Defendant has breached this contractual duty.
28. Another implied term of the contractual relationship was that the Defendant would promptly and appropriately notify the Plaintiff and other patients of the discovery of

testing errors and of the decision to embark on retesting of tissue samples, in a manner calculated to minimize the worry and concern that patients would feel.

29. One of the purposes of accurate and reliable pathology testing is to provide peace of mind to the patient. The nature of the contractual relationship is such that the parties contemplated that the Defendant's breaches of contractual duty set out herein would entail mental distress by the Plaintiff and other patients.

Breach of Fiduciary Duty

30. The Defendant stands in the position of fiduciary to the Plaintiff and Class Members and has a duty of utmost good faith to be open and candid with the Plaintiff and Class Members, and not to withhold information. The representative Plaintiff repeats the foregoing and says that the Defendant has violated duties of disclosure of a fiduciary nature, existing between the Defendant and its patients. The Defendant exercised its sole discretion in its decision not to tell the Plaintiff and Class Members in a timely manner of the potential diagnosis problems. In so doing, the Defendant preferred its own interests to those of the Plaintiff and Class Members. It did so in a manner that affects the interests of the Plaintiff and Class Members by denying such persons knowledge of their medical conditions and the opportunity to seek early medical treatment. The Plaintiff and other Class Members were peculiarly vulnerable and at the mercy of the Defendant in the exercise of its sole discretion. The Plaintiff and other Class Members had no way of knowing of the Defendant's failure to ensure complete, accurate diagnostic testing but for the Defendant informing them.

Equitable Fraud

31. Having regard to the fiduciary relationship between the Defendant and the Plaintiff and Class Members described above, the conduct of the Defendant in failing to disclose to the Plaintiff and Class Members the potential diagnosis problems at the earliest opportunity was unconscionable and constituted equitable fraud committed against the Plaintiff and Class Members.

Damages

32. As a result of the Defendant's breaches of its obligations, the Plaintiff and Class Members have suffered loss. Such loss was foreseeable by the Defendant.

33. Particulars of the loss or damage suffered by the Plaintiff and Class Members include the following:
 - (a) pain, suffering, and loss of quality and enjoyment of life and loss of life expectancy;
 - (b) mental distress, frustration, anxiety, displeasure, vexation, attention, aggravation, upset and inconvenience;
 - (c) loss of faith and confidence in pathology and in the reliability of diagnostic testing in health care generally;
 - (d) past and future loss of income and earning capacity;
 - (e) past and future cost of care;
 - (f) loss of consortium and loss of guidance, care and companionship; and
 - (g) out-of-pocket expenses.

34. Particulars of the loss or damage suffered by Class Members, whether their initial pathological diagnosis was correct or not, include the following:
 - (a) pain, suffering, and loss of quality and enjoyment of life and loss of life expectancy;
 - (b) mental distress, frustration, anxiety, displeasure, vexation, attention, aggravation, upset and inconvenience;
 - (c) loss of faith and confidence in pathology and in the reliability of diagnostic testing in health care generally;
 - (d) past and future loss of income and earning capacity;
 - (e) past and future cost of care;
 - (f) loss of consortium and loss of guidance, care and companionship; and

- (g) out-of-pocket expenses.
35. As well, as a result of the improper pathology processes performed at the Miramichi Regional Hospital and the failure of the Defendant to take proper and appropriate steps to prevent or minimize the effects of these improper pathology processes, Class Members who are the wives, husbands, parents, children, brothers or sisters of deceased persons, have also suffered damages recognized pursuant to the *Fatal Accidents Act*, R.S.N.B., 1973, c. F-7. These damages include:
- (a) Pecuniary losses resulting from the injury to such deceased persons, expenses incurred for the benefit of such deceased persons, travel expenses incurred in visiting such deceased persons during their treatment and recovery;
 - (b) A reasonable allowance for loss of income and the value of nursing, housekeeping and other services rendered to such deceased persons;
 - (c) An amount to compensate for the loss of companionship incurred and grief suffered; and
 - (d) Reasonable expenses of the funeral and disposal of the body of the deceased.

Aggravated Damages

36. The activities of the Defendant were carried out with reckless, callous and wanton disregard for the health, safety and pecuniary interests of the Plaintiff and Class Members. The Defendant knowingly compromised the interests of the Plaintiff and Class Members, solely for its own purposes. Furthermore, once the Defendant knew of Dr. Menon's history, the shortcomings in the turnaround time and in the procedures followed at the pathology lab at the Miramichi Regional Hospital and the resulting dangers to the physical and psychological health of the Plaintiff and Class Members, the Defendant failed to take remedial action and failed to advise the Plaintiff and Class Members in a timely fashion, or fully, or at all.
37. Consequently, the Plaintiff and Class Members are entitled to aggravated damages, commensurate with the Defendant's outrageous behaviour.

Relief Requested

38. The Plaintiff claims the following relief:

- (a) an order certifying the proceeding as a class action on behalf of all patients whose pathology specimens were analyzed at the laboratory of the Defendant between 1995 and 2007;
- (b) general damages;
- (c) special damages;
- (d) aggravated damages;
- (e) the costs of providing appropriate notice to Class Members and administering this proposed class action for their benefit;
- (f) interest pursuant to the provisions of the *Judicature Act*, R.S.N.B. 1973, c. J-2 and *Rules of Court*, N.B. Reg. 82-73; and
- (g) such further and other relief as this Honourable Court deems just.

DATED at Halifax, in the Province of Nova Scotia, this 21st day of July, 2008.

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