

COURT FILE NO.: N/C/93/2013

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  
MIRAMICHI

BETWEEN:

**ALTA CHRISTINE LITTLE**

Plaintiff,

- and -

~~**HORIZON HEALTH NETWORK**~~, a corporation  
incorporated under the laws of the Province  
of New Brunswick

**REGIONAL HEALTH AUTHORITY B,**  
a corporation incorporated under the laws  
of the province of New Brunswick

Defendant

Brought under the *Class Proceedings Act*,  
S.N.B. 2011, c.125

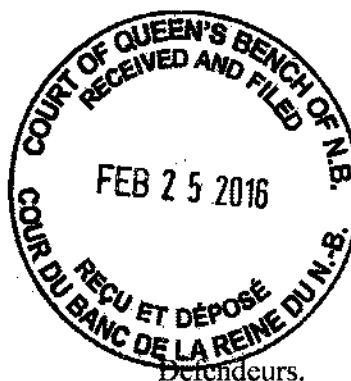
**AMENDED NOTICE OF ACTION WITH**  
**SECOND AMENDED STATEMENT OF**  
**CLAIM ATTACHED**  
**(FORM 16A)**

TO: ~~Horizon Health Network~~  
Regional Health Authority B  
155 Pleasant Street  
Miramichi, NB E1V 1Y3

ENTRE:

Demandeurs,

-et-



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

DESTINIAIRE:

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

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

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 her 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:

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) 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.

- (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.

If you fail to do so, you may be deemed to have admitted any claim made against you, and without further notice to you, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE.

Si vous omettez de le faire vous pourrez être réputé avoir admis toute demande formulée contre vous et, sans autre avis, JUGEMENT POURRA ÊTRE 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 présente instance, d'émettre des documents et de présenter votre preuve en français, 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'exposé de votre défense doit indiquer la langue que vous avez l'intention d'utiliser.

THIS NOTICE is signed and sealed for the Court of Queen's Bench by *M. Cripps*, Clerk of the Court at Miramichi, New Brunswick, on the *26<sup>th</sup>* day of *February*, 200*2* *mi*.

CET AVIS est signé et scellé au nom de la Cour de Banc de la Reine par greffier de la Court a ce 200 .

Court  
Seal

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



Sceau  
de la Cour

(address of court office)

(adresse du greffe)

## **SECOND AMENDED STATEMENT OF CLAIM**

### **The Parties**

1. The proposed Representative Plaintiff, Alta Christine Little (formerly Gillis), resides in Miramichi in the Province of New Brunswick and was born on June 5, 1961. She brings this action on her own behalf, and on behalf of a class of similarly situated persons pursuant to the *Class Proceedings Act*, S.N.B. 2011, c.125.
2. The Defendant, ~~Horizon Health Network~~, Regional Health Authority B, is a body corporate constituted pursuant to the *Regional Health Authorities Act*, RSNB 2011, c 217 to ~~S.N.B. 2002, c. R-5.05~~, manage and control the operation of, and was at all materials times responsible for the operation, supervision and management of the Miramichi Regional Hospital in Miramichi, Province of New Brunswick, its employees, agents and servants, including its staff in the colposcopy clinic.

### **Material Facts**

3. The Defendant operates a colposcopy clinic (the “clinic”) at the Miramichi Regional Hospital (the “Hospital”). Colposcopy is a medical diagnostic procedure which provides an illuminated and magnified view of the cervix and tissues of the vagina and vulva.
4. Between 1999 to May 24, 2013, the method used to clean and disinfect colposcopy biopsy forceps (the “forceps”) at the clinic involved a high-level disinfection. Sterilization after disinfection was not always properly performed as required by the accepted and adopted North American standard which has been in place for more than 50 years. The standard of practice is to sterilize the forceps in every case. Sterilization is a step additional to disinfection which utilizes heat and pressure or chemicals to kill all life forms on the instruments subjected to treatment.
5. On May 24, 2013, the Defendant discovered that the clinic had not followed sterilization practices on forceps used for biopsies at the clinic in accordance with the longtime North American standard. Once allegedly discovered by hospital administration, the Defendant

waited nearly three months before it informed the Plaintiff and Class Members that they may have been treated with unsterilized forceps. At least 2,497 patients at the clinic, including the Plaintiff, were treated with the unsterilized forceps.

### **The Representative Plaintiff**

6. Between 1999 and 2013, the Plaintiff was a patient at the clinic, ~~of the Defendant Hospital.~~
7. During this period, the Plaintiff underwent a biopsy using unsterilized forceps as part of her colposcopy procedure.
8. On or about August 28, 2013, the Plaintiff received correspondence on Horizon Health Network letterhead (the “Notice”) advising her that the clinic may have exposed some of its patients, including herself, to a risk of infection by not consistently following the recommended standard of practice procedure of sterilization of its biopsy forceps. As a result, the Plaintiff and Class Members have been placed at risk of contracting the following diseases (the “diseases”):
  - a. Hepatitis B;
  - b. Hepatitis C; and,
  - c. HIV.
9. Hepatitis B, Hepatitis C, and HIV are potentially life threatening, incurable diseases. All of the diseases carry the added stigma of being known as sexually transmitted diseases.
10. Also in the Notice dated August 28, 2013, the Defendant further advised the Plaintiff and Class Members of the need for medical testing to determine whether they had contracted any of the diseases. The Notice further recognized that this information could be very upsetting. A requisition for bloodwork was included with the Notice.

## **The Class**

11. The proposed class is defined to include the following persons:

~~All persons who were patients at the Miramichi Regional Hospital colposcopy clinic between 1999 and May 24, 2013 who received a Notice from the Horizon Health Network offering the option to have a blood test for Hepatitis B, Hepatitis C and HIV.~~

All patients of the colposcopy clinic at the Miramichi Regional Hospital, and their matrimonial and common-law partners, who received correspondence in 2013 from the Horizon Health Network advising of the risk of infection associated with the colposcopy clinic not following recommended cleaning practices on forceps used for biopsies.

## **Causes of Action**

### **Negligence**

12. The Defendant Hospital is responsible to ensure that systems are in place to promote a high level of quality and patient care. The Defendant's conduct fell below the reasonable standard of care expected of it under the circumstances. The Defendant's conduct was negligent. Particulars of this negligence include:
- (a) only disinfecting the forceps when it knew or ought to have known that sterilization was necessary to kill the viruses which cause the diseases;
  - (b) providing improper or no training to and supervision of its employees in sterilization procedures, or else hiring and employing incompetent staff;
  - (c) choosing not to conduct timely periodic reviews or audits of sterilization procedures;
  - (d) not having a written procedure in place for sterilization of the forceps and ensuring, if there was a policy, it was read and understood by staff;

- (e) choosing not to have or implement an inappropriate and inadequate policy of quality assurance and continuous quality improvement with respect to the clinic and the sterilization of instruments used in the clinic;
- (f) choosing to implement inadequate systems, or having no reasonable systems, to ensure patient safety in the clinic and in respect of sterilization;
- (g) choosing not to recognize, or attempt to monitor or discover, that its procedures for cleaning the forceps over a 14 year period between 1999 and May 24, 2013 were inadequate and substandard; and,
- (h) falling below the reasonable standard of care expected of it under the circumstances.

### **Corporate and Vicarious Liability**

13. The Defendant is corporately and systemically liable for having no or inappropriate and inadequate systems of quality assurance and continuous quality improvement as described above. In addition, the Defendant's employees, agents and servants were at fault or negligent in using methods of sterilization which they knew or ought to have known were inadequate and substandard, for which the Defendant is vicariously liable.

### **Breach of Contract**

14. The Defendant has a contractual relationship for the provision of medical services to the Plaintiff and Class Members. The contract was, in exchange for consideration, to conduct pathology testing on the Plaintiff's surgical biopsies obtained by adherence to generally acceptable standards of cleanliness, disinfection and sterilization of the instruments provided by the Defendant to physicians for the purpose, and to provide a reasonably reliable pathology diagnosis. To this end, the Defendant provided clinic facilities, surgical biopsy instruments, and pathology testing facilities, these latter presided over by salaried pathologists paid by the Defendant.

15. An important object of the contract was to provide to the patient the psychological benefit of knowing that disease was absent, or if present, what course of treatment for the diagnosed disease was indicated, and that the conduct of the surgical biopsy procedure necessary to obtain a diagnosis did not expose the patient to additional unnecessary risk of disease.
16. An implied term of that contractual relationship is that the Defendant would exercise due care to employ competent and properly trained staff and that it would use properly sterilized equipment when treating the Plaintiff and Class Members. The Defendant has breached this contractual duty, and the Plaintiff repeats the particulars of negligence pleaded above.
17. It was foreseeable by the Defendant that a breach of generally accepted standards of cleanliness, disinfection and sterilization would destroy the psychological benefit which was an important object of the surgical pathology testing, which benefit included the benefit of believing not only that a reasonably accurate diagnosis had been given, but that the testing did not impose unnecessary additional risk of disease.
18. The Plaintiff further states that the Defendant additionally made an implied promise of performance that the surgical biopsy forceps in use in the clinic would be cleaned, disinfected and sterilized in accordance with generally accepted standards, and the Defendant is strictly liable for breach of this promise.

#### **~~Breach of Fiduciary Duty~~**

- ~~19. The Defendant stands in the position of fiduciary to the Plaintiff and Class Members. The Defendant's relationship with the Plaintiff and Class Members was one of trust and confidence, obliging the Defendant to act with good faith and loyalty and to never prefer its personal interests to the detriment of the professional duty it owed the Plaintiff and Class Members. The Defendant's undertaking to act with loyalty toward the patient was a necessary incident of the faith and confidence required of its patients when exposing their bodily integrity to surgical invasion. The Defendant's patients are particularly vulnerable and must place their trust and confidence in the Defendant to meet the generally accepted~~



~~standards of cleaning, disinfection and sterilization of its surgical instruments. The Defendant has undertaken, as a fiduciary, to ensure that these standards are met.~~

~~20. The Defendant breached its fiduciary obligations by choosing not to clean, disinfect, and sterilize the surgical biopsy forceps to a generally accepted standard, thereby profiting and/or saving resources at the expense of the health of the Plaintiff and Class Members. The Defendant chose to save resources at the expense of the Plaintiff and Class Members' risk to health, by choosing to have insufficient sterilized instruments to service patient demand.~~

### **Violation of Privacy and Intrusion ~~into~~ Upon Seclusion**

~~21.~~ 19. In conducting the release of information to and the testing of affected patients outside the physician-patient relationship in such a manner as to invade the confidentiality of medical information and the privacy of the patients, the Defendant ~~breached not only duties inherent in its fiduciary relationship with the Plaintiff and Class Members but has also~~ committed the tort of violation of privacy against the Plaintiff and Class Members, and the Plaintiff cites the *Personal Health Information Privacy and Access Act*, SNB 2009, c P-7.05 and the *Hospital Act*, SNB 1992, c H-6.1.

~~22.~~ 20. The Defendant intentionally intruded upon the seclusion of the Plaintiff and Class Members' confidentiality of medical information in disclosing to the public unsterilized colposcopy equipment was being used. The intrusion was highly offensive in that other private methods of dissemination existed other than the use of public employees delivering envelopes to the Plaintiff and Class Members.

### **Battery**

21. The Defendant is liable to the Plaintiff and Class Members for having committed the tort of battery. The Defendant has a responsibility to ensure that procedures performed on its patients do not go beyond the limits of consent. The Plaintiff and Class Members did not consent to highly invasive colposcopy procedures being performed with unsterilized instruments. By performing highly invasive colposcopy procedures with unsterilized instruments, the Defendant performed procedures of a fundamentally different nature than

those for which consent was given. The bodily security of the Plaintiff and Class Members was directly invaded, directly causing them mental distress and anguish. Invasion of bodily integrity by the use of unsterilized medical instruments is not a generally expected incident of medical procedures, and the burden of proof of consent rests on the Defendant.

### **Causation and Damages**

~~23.~~ 22. As a result of the Defendant's breach of its obligations, the Plaintiff and Class Members have suffered loss, including invasion of bodily integrity by reason of blood testing. Such loss was foreseeable by the Defendant, and is admitted in the Notice.

~~24.~~ 23. Particulars of the loss or damages suffered by the Plaintiff and Class Members include the following:

- a) damages in tort for nervous shock, serious and prolonged stress and anxiety after being informed by the Defendant of the risk of infection and the need for medical testing;
- b) damages for mental distress in breach of contract;
- c) damages for battery;
- d) damages for invasion into privacy;
- e) damages for intrusion ~~into~~ upon seclusion;
- f) aggravated damages arising out of the Defendant's betrayal of trust and confidence in not timely informing its patients of their potential exposure to disease; and,
- g) punitive or exemplary damages.

~~25.~~ 24. The Plaintiff states that the Defendant's breach of recognized infection control protocol over such an extended period could happen only by reason of gross negligence, bad faith and deliberate misconduct. The Defendant's conduct was high-handed, outrageous, reckless,

deliberate, and callous, and systemic in nature. In particular, the Defendant's 14-year delay in warning the Plaintiff and Class Members of the risks to their health and the risks to the health of their loved ones, and the withholding of this information from the public for such a prolonged period is unconscionable, such that an award of punitive damages is merited.

### **Relief Sought**

~~26.~~ 25. The Plaintiff claims, on her behalf, and on behalf of the Class:

- a) an order certifying this action as a class action;
- b) general damages, to be assessed by way of aggregate relief;
- c) aggravated damages;
- d) punitive or exemplary damages;
- e) costs, including the fees and expenses of expert witnesses in attending at discovery and trial, and the Harmonized Sales Tax thereon;
- f) the costs of providing appropriate notice to Class Members and administering this proposed class action for their benefit;
- g) 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,
- h) such further and other relief as this Honourable Court deems just.

~~**DATED** at Halifax, in the Province of Nova Scotia, this 18<sup>th</sup> day of October, 2013.~~

~~**DATED** at Halifax, in the Province of Nova Scotia, this 12<sup>th</sup> day of November, 2013.~~

**DATED** at Halifax, in the Province of Nova Scotia, this 18<sup>th</sup> day of February, 2016.



Name of Lawyer for the Plaintiff:

Name of Firm:

Business Address:

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Raymond F. Wagner, Q.C.

Wagners

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Telephone: (902) 425-7330

Email: raywagner@wagners.co

Counsel for the Plaintiff and Class Members



Name of Lawyer for the Plaintiff: Ray Wagner For

Name of Firm:

Business Address:

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Co-counsel for the Plaintiff and Class Members