

AMENDED THIS Sept 19/06 PURSUANT TO
MODIFIÉ CE, CONFORMÉMENT À
RÈGLE/LA RÈGLE 26.02 ()
THE ORDER OF Mr. J. Winkler
L'ORDONNANCE DU
FAIT LE Sept 14/06

99-CV-181819 CP [TORONTO]

CLERK OF THE COURT / CLERK OF THE COURT
REGISTRAR / GREFFIER
SUPERIOR COURT OF JUSTICE / COUR SUPÉRIEURE DE JUSTICE

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

KATHRYN ANNE TAYLOR

Plaintiff

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY
THE MINISTER OF HEALTH, THE ATTORNEY GENERAL OF CANADA

Defendant

and

UNIVERSITY HEALTH NETWORK (FORMERLY TORONTO GENERAL
HOSPITAL) and DR. W. DOBROVLSKY

Third parties

Proceeding under the *Class Proceedings Act*, 1992

FRESH AS AMENDED THIRD PARTY CLAIM

TO THE THIRD PARTIES

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by way of a
third party claim in an action in this court.

The action was commenced by the plaintiff against the defendant for the relief
claimed in the statement of claim served with this third party claim. The
defendant has defended the action on the grounds set out in the statement of
defence served with this third party claim. The defendant's claim against you is
set out in the following pages.

IF YOU WISH TO DEFEND THIS THIRD PARTY CLAIM, you or an Ontario
lawyer acting for you must prepare a third party defence in Form 29B prescribed
by the Rules of Civil Procedure, serve it on the lawyers for the other parties or,
where a party does not have a lawyer, serve it on the party, and file it, with proof

of service, WITHIN TWENTY DAYS after this third party claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your third party defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a third party defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your third party defence.

YOU MAY ALSO DEFEND the action by the plaintiff against the defendant by serving and filing a statement of defence within the time for serving and filing your third party defence.

IF YOU FAIL TO DEFEND THIS THIRD PARTY CLAIM, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date *Oct. 1, 2004* Issued by *S. Jeevan*
/Local registrar
Address of court office 393 University Ave.
10th Floor
Toronto, Ontario
M5G 1E6

TO: Legge & Legge
Barristers and Solicitors
65 St. Clair Avenue East,
Suite 800
Toronto, Ontario
M4T 2Y3

Per: John B. J. Legge

Tel: (416) 923-1776
Fax: (416) 925-5344

Solicitors for the Plaintiff

AND TO: Lerners LLP
Barristers and Solicitors
130 Adelaide Street West,
Suite 2400
Toronto, Ontario
M5H 3P5

Per: James M. Newland

Tel: (416) 867-3076
Fax: (416) 867-9192

Solicitors for the Ontario Health Insurance Plan

AND TO: Borden Ladner Gervais
Barristers & Solicitors
Scotia Plaza
40 King Street West
Toronto, Ontario
M5H 3Y4

Per: Patrick J. Hawkins

Tel: (416) 367-6000
Fax: (416) 367-6749

Solicitors for the Third Party, University Health Network (Formerly
Toronto General Hospital)

AND TO: Paliare Roland Rosenberg Rothstein
Barristers & Solicitors
250 University Avenue
Suite 501
Toronto, Ontario
M5H 3E5

Per: Margaret L. Waddell

Tel: (416) 646-4300
Fax: (416) 646-4301

Solicitors for the Third Party, Dr. Walter Dobrovolsky

CLAIM

1. The defendant claims against each third party:
 - (a) Contribution and indemnity in respect of any amount or amounts for which it may be found liable or called upon to pay to the plaintiff in the main action;
 - (b) Pre-judgement interest pursuant to section 128 of the *Courts of Justice Act*, R.S.O. 1990, Chap. C. 43;
 - (c) Post-judgement interest pursuant to section 129 of the *Courts of Justice Act*, R.S.O. 1990, Chap. C. 43;
 - (d) Costs of the main action on the substantial indemnity scale;
 - (e) Costs of this third party proceeding on the substantial indemnity scale; and
 - (f) Such further and other relief as this Honourable Court may deem just.

2. The defendant, the Attorney General of Canada ("AGC"), is sued in the main action as a representative of Her Majesty the Queen in Right of Canada.

3. The plaintiff in the main action has brought a claim for damages against the AGC, arising out of injuries which the plaintiff allegedly sustained with respect to the safety of a device used in the temporomandibular joint ("TMJ"). The details of the plaintiff's allegations are more fully set out in the Statement of Claim.

4. The AGC has delivered a Statement of Defence in the main action and has denied any responsibility to the plaintiff for the damages claimed.

5. The defendant repeats and relies upon the allegations set out in his Statement of Defence in the main action.

6. The third party, University Health Network (formerly known as Toronto General Hospital) is a public hospital duly licensed, pursuant to the laws of the Province of Ontario, and at all material times was located at 200 Elizabeth Street, Toronto, Ontario, M5G 2C4.

7. According to particulars furnished by the plaintiff, the third party doctor, Dr. W. Dobrovolsky, performed surgery on Kathryn Taylor, at Toronto General Hospital, on April 22, 1988.

8. At all material times, the third party doctor and hospital owed a duty to the plaintiff to exercise all due care, skill and diligence in providing the professional services rendered to her. In carrying out its regulatory functions, Health Canada assumes that health care providers will meet the professional standard of care and placed reasonable reliance on the third parties, in this action, to do so with respect to the treatment provided to the plaintiff.

Role and Obligations of Health Care Providers in TMJ Surgery/ Standard of Care

9. The final decision on implantation of a TMJ device and the selection of a specific device are made by the person implanted, upon the

advice of his or her attending health care providers. The decision is made in consideration of the risk of implantation, given a patient's health history, current medical condition, diagnosis, prognosis and other factors, unique to the individual. The decision includes consideration of the range of medical options available to the patient and the relative risk and benefit to be derived from surgical implantation of the particular type of TMJ device selected for use.

10. It is the responsibility of the impantee's physician to make the appropriate medical assessment, provide information relating to known material risks and to obtain the patient's informed consent to the proposed treatment.

11. The plaintiff's third party doctor is responsible for informed consent issues, including, but not restricted to:

- (a) effectiveness of a TMJ device for that recipient;
- (b) selection of a specific device model;
- (c) surgical complications including infection and device wear;
- (d) the risk of device wear or breakdown; and
- (e) the risk of further arthritic changes within the joint.

12. In the circumstances of this action, it was the responsibility of the third parties to ensure, *inter alia*:

- (a) that the treatment was necessary and appropriate for the plaintiff;

- (b) that the device selected for implantation was appropriate for use in the treatment provided;
- (c) that the TMJ implantation surgery was performed competently; and
- (d) that appropriate after-care was provided, including recall and monitoring of TMJ device recipients, in accordance with the recommendations and professional standards in place at all material times.

13. The defendant states that the TMJ device implanted in the plaintiff was purchased on her behalf and/or supplied to her by the third party physician and/or hospital. The defendant states that the third parties owed an attendant duty to take reasonable steps to ensure that the said device complied with Canadian regulations.

14. The defendant states that the third parties were in the best position to record, for follow up and tracking purposes, the specifics of the TMJ device implanted into the plaintiff and had a professional obligation to maintain adequate records concerning the purchase and use of medical inventory, including medical devices, to permit the effective identification and tracking of devices implanted into patients under their care.

Negligence of the Third Parties

15. The Defendant states that if the Plaintiff sustained the injuries, damages and losses set out in the Statement of Claim, which are not admitted but expressly denied, then such injuries damages and losses

and any liability which this Defendant may incur in the main action, was caused by the negligence of the third parties, the particulars of which follow:

A. As to the Third Party, University Health Network (formerly Toronto General Hospital):

- (a) it supplied, or allowed the use of, an implant for insertion into the jaw of the Plaintiff which it knew, or ought to have known, was not in compliance with the Medical Device Regulations of the *Food and Drug Act*;
- (b) it failed to make reasonable inquiries with Health Canada and/or the seller of the medical device to ascertain the regulatory status for use in Canada prior to purchasing the said medical device and allowing it to be implanted into the jaw of the plaintiff;
- (c) it allowed Dr. Dobrovolsky to perform surgery on its premises that was unnecessary;
- (d) it allowed Dr. Dobrovolsky to perform a surgical operation without obtaining the informed consent of the Plaintiff;
- (e) it failed to require Dr. Dobrovolsky to discuss alternatives to the implant at the time he obtained the consent of the plaintiff;
- (f) it permitted the surgery to be performed on the plaintiff when it knew or ought to have known that Dr. Dobrovolsky was not possessed of the appropriate surgical technique and was inexperienced and incompetent to perform the aforesaid operation, or to provide follow-up medical care, including regular re-examination, post-surgery;
- (g) it failed to properly store, sterilize and otherwise handle the implant thereby damaging the implant and subjecting it to possible deterioration within the body of the plaintiff;
- (h) it failed to keep its knowledge and the knowledge of doctors on its staff, or with hospital privileges, current with respect to concerns about the implant device which was used in the operation relating to the plaintiff;

- (i) it failed to provide approved procedures to doctors on its staff, or with hospital privileges, with respect to performance of the surgery upon the plaintiff and all matters relating thereto, including any follow-up medical care and re-examination at regular intervals post surgery;
- (j) it failed to keep adequate records with respect to the purchase and use of medical inventory, including the medical device implanted in the plaintiff, to permit adequate post-surgical medical care in response to warnings and recall bulletins concerning the implant device;
- (k) it failed to heed and distribute warnings and recall bulletins concerning the implant device which was used in the operation relating to the plaintiff or, in the alternative, failed to tell its doctors and patients about the warnings and recalls in a timely manner or at all;
- (l) it failed to properly warn the plaintiff of the risks inherent in not having the implant tested, monitored and/or removed in a timely manner, including the possibility of disintegration of the implant; and
- (m) it failed to properly warn the plaintiff of the increased risks inherent in the customized use of a device for a purpose for which it had not been authorized and which was not recommended by the manufacturer.

B. As against the Defendant, Dr. Dobrovolsky:

- (a) he inserted an implant device into the jaw of the Plaintiff which he knew, or ought to have known, was not in compliance with the Medical Device Regulations of the *Food and Drug Act*;
- (b) he customized an implant device for surgical use in a manner for which it had not been authorized by regulation nor recommended by the manufacturer, when he knew, or ought to have known, such use created increased risk of surgical complication;
- (c) he failed to make reasonable inquiries with Health Canada and/or the seller of the medical device to ascertain the regulatory status for use in Canada prior to implanting the said medical device into the jaw of the plaintiff;
- (d) he performed surgery that was unnecessary;

- (e) he performed a surgical operation without obtaining the informed consent of the Plaintiff;
- (f) he failed to discuss alternatives to the implant at the time he obtained the consent of the plaintiff;
- (g) he was lacking in experience and expertise to perform the operation upon the plaintiff and to provide her with the appropriate medical care, including any follow-up medical and re-examination, post-surgery;
- (h) he was an incompetent medical doctor, lacking in reasonable skill and ought not to have attempted the operation in question;
- (i) he failed to properly store, sterilize and otherwise handle the implant thereby damaging the implant and subjecting it to possible deterioration within the body of the plaintiff;
- (j) he failed to keep his knowledge current with respect to concerns about the implant device which was used in the operation relating to the plaintiff;
- (k) he failed to learn and follow approved procedures for performing surgery upon the plaintiff including necessary follow-up medical care and re-examination at regular intervals, post surgery;
- (l) he failed to keep adequate records concerning the medical device implanted in the plaintiff, to permit adequate post-surgical medical care in response to warnings and recall bulletins concerning the implant device;
- (m) he failed to heed and distribute warnings and recall bulletins concerning the implant device which was used in the operation relating to the plaintiff or, in the alternative, failed to tell his patient about the warnings and recalls in a timely manner or at all;
- (n) he failed to properly warn the plaintiff of the risks inherent in not having the implant tested, monitored and/or removed in a timely manner, including the possibility of disintegration of the implant; and
- (o) he failed to properly warn the plaintiff of the increased risks inherent in the customized use of a device for a purpose for which it had not been authorized and was not recommended by the manufacturer.

16. The AGC pleads and relies upon the provisions of the *Food and Drugs Act*, R.S.C. 1985, Chap. F-27 as amended, the regulations framed there under and the *Negligence Act*, R.S.O. 1990, c. N-1, as amended.

17. The AGC proposes that this Third Party Claim be tried together with the main action in the City of Toronto, in the Province of Ontario.

Date of Issue: The 14th day of
September, 2006

Department of Justice
Ontario Regional Office
The Exchange Tower
130 King Street West
Suite 3400, Box 36
Toronto, ON M5X 1K6
Per: Christopher A. Amerasinghe, Q.C.

Tel: (416) 973-2271
Fax: (416) 952-0097
Law Society No. 15521T

Solicitors for the Defendant, The Attorney
General of Canada

KATHRYN ANNE TAYLOR	AND	HER MAJESTY THE QUEEN IN RIGHT OF CANADA	AND	UNIVERSITY HEALTH NEWTWORK ET AL
Plaintiff		Defendant		Third Parties

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding Commenced at Toronto

**FRESH AS AMENDED
THIRD PARTY CLAIM**

Department of Justice
Ontario Regional Office
The Exchange Tower
130 King Street West
Suite 3400, Box 36
Toronto, Ontario
M5X 1K6

Per: Christopher A. Amerasinghe, Q.C.
Tel: (416) 973-2271
Fax: (416) 952-0097

Law Society No.: 15521T

Solicitors for the Defendant, The Attorney
General of Canada