

Court File No. CV-15-54325900CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

YVONNE MARCHAND

REBECCA GREEN

Plaintiff

- and -

**THE HOSPITAL FOR SICK CHILDREN, GIDEON KOREN and
JOEY GARERI**

Defendants

Proceedings under the *Class Proceedings Act, 1992*

**AMENDED STATEMENT OF DEFENCE AND
CROSSCLAIM OF THE HOSPITAL FOR SICK CHILDREN
AND JOEY GARERI**

1. The defendants Hospital for Sick Children ("Hospital") and Joey Gareri (collectively "Hospital Defendants") deny each and every allegation contained in the statement of claim and put the plaintiff to the strict proof thereof.
2. The Hospital is a public hospital operating pursuant to the *Public Hospitals Act*, R.S.O. 1990, c. P.40 as amended. The Motherisk Drug Testing Laboratory ("MDTL") was housed at the Hospital. MDTL conducted tests on, *inter alia*, hair samples to detect drugs of abuse and/or alcohol. Joey Gareri, MDTL's lab manager, was a Hospital employee.
3. The defendant Dr. Gideon Koren was an independent physician with privileges at the Hospital and MDTL's Director. The Hospital is not responsible in law for Dr. Koren's clinical work and research.

AMENDED THIS DEC - 9 2016 PURSUANT TO
 MODIFIÉ CE _____ CONFORMÉMENT À
 RULE/LA RÉGLE 28.02 (A)
 THE ORDER OF _____
 L'ORDONNANCE DU _____
 DATED / FAIT LE _____
 REGISTRAR _____ GRÉFFIER _____
 COUR SUPÉRIEURE DE JUSTICE

4. At the request of third party defendant Catholicthe Children's Aid Society of Toronto ("CCASCAST"), MDTL tested two six samples of the plaintiff's hair, from 2009 to 2012. The specimens were tested for alcohol and drugs of abuse, eannabis. The first was tested in September 2011; the second was tested in April 2012. Each was reported as being positive for alcohol and for cannabis. Thereafter, the plaintiff's hair samples were sent by MDTL to the United States Drug Testing Laboratories ("USDTL") for confirmation of the positive alcohol test results. For each specimen, the USDTL confirmed the positive alcohol result. Test results for these samples were sent to CAST, and in some cases to CAST and the plaintiff.
5. At CCAS's request, Joey Gareri provided his written interpretation report to CCAS explaining the test results. Also under the instructions of CCAS, Mr. Gareri responded to an expert toxicological report, relied upon by the plaintiff, which disputed MDTL's findings. The plaintiff's first sample was received on October 13, 2009, and was tested by GC/LC-MS for alcohol (Fatty Acid Ethyl Esters, or "FAEE"), and tested by enzyme-linked immunosorbent assay ("ELISA") for drugs of abuse. The results were interpreted to be positive for FAEE and cocaine. The results were signed by Dr. Koren reported to the plaintiff and/or the CAST.
6. The plaintiff's second sample was received on May 5, 2010, and was tested by GC/LC-MS for FAEE, and tested by ELISA for drugs of abuse. The results were interpreted to be positive for FAEE and cocaine. The results were signed by Dr. Koren and reported to the plaintiff and/or the CAST.
7. The plaintiff's third sample was received on December 8, 2010, and was tested by GC/LC-MS for FAEE and for drugs of abuse. The results were interpreted to be positive for FAEE and positive (trace) for cocaine. The results were signed by Dr. Koren and reported to the plaintiff and/or the CAST.
8. The plaintiff's fourth sample was received on May 2, 2011, and was tested for FAEE and drugs of abuse. This sample was tested by GC/LC-MS for FAEE and screened by ELISA for drugs of abuse. The results were interpreted to be positive for FAEE. MDTL sent this

- sample to the United States Drug Testing Laboratories, Inc. ("USDTL") for confirmation of the positive FAEE test result by Ethyl Glucuronide ("EtG") testing. The USDTL confirmed the positive EtG result. The results were signed by Dr. Koren and reported to the plaintiff and/or the CAST.
9. A fifth hair sample from the plaintiff was received on November 17, 2011, and was tested for FAEE and drugs of abuse. This sample was analyzed by GC/LC-MS for FAEE and was screened by ELISA for drugs of abuse. The results were interpreted to be positive for FAEE. MDTL sent this sample to the USDTL for confirmation of the positive FAEE test result by EtG testing. The USDTL confirmed the positive EtG result. The results were signed by Dr. Koren and reported to the plaintiff and/or the CAST.
 10. A sixth hair sample was received on February 27, 2012 and was tested for FAEE and drugs of abuse. This sample was analyzed by GC/LC-MS for FAEE and by ELISA for drugs of abuse. This sample was not interpreted to be positive for any drugs of abuse or FAEE. The results were signed by Dr. Koren reported to the plaintiff and/or the CAST.
 11. Included with some but not all of the MDTL test results were guidelines around interpretation of alcohol hair analysis, as well as an invitation to contact the lab with further enquiries. The guidelines advised clients that the results of the plaintiff's hair tests ought to be interpreted in conjunction with other evidence and ought not to be relied upon as a sole or predominant indicator of best interests of the plaintiff's child(ren).
 12. Upon the CAST's request, in relation to some but not all of the samples, Joey Gareri provided written interpretation reports to CAST explaining the test results.
 13. The plaintiff has plead several liability only. The Hospital Defendants rely upon the negligence of the CAST as an answer to the plaintiff's claim against them.
 14. The CAST investigated reports that the plaintiff's child was in need of protection. The CAST was required to ensure its decisions and recommendations affecting the interests, rights and liberties of the plaintiff's child were based on clear, balanced, fair and

reasonable interpretations of all available evidence with respect to concerns about her child's safety and well-being.

15. The CAST was responsible to ensure policies and procedures were in place such that decisions affecting the interests, rights and liberties of the plaintiff's child were made according to clear and appropriate criteria, subject to procedural and substantive safeguards.
16. Further, and in any event, the plaintiff's case has no chance of success unless CAST made decisions or recommendations regarding custody/access of the plaintiff's child based predominantly or exclusively on the results of MDTL's hair test results.
17. The Hospital Defendants explicitly advised the CAST that the results of the plaintiff's hair tests were to be interpreted in conjunction with all other evidence and were not to be relied upon as the sole or a predominant indicator of best interests of the plaintiff's child(ren).
18. If reliance was placed on one or more of the plaintiff's hair tests, in a manner affecting the custody decision, which is not admitted but expressly denied, then it was the CAST which fell below the requisite standard of care in its investigation of the plaintiff's child custody matter by, *inter alia*:
 - (a) Over-relying on the hair tests results, despite having been warned by MDTL that the hair test results should be interpreted in conjunction with other evidence; and
 - (b) Not providing the Court with the relevant information pertaining to the plaintiff.
19. To the degree inadequate investigations by CAST and over-reliance on plaintiff's MDTL hair test results caused harm as alleged in the Statement of Claim, or at all, this was the fault and responsibility of CAST, not the Hospital Defendants.
20. In the event a class action is certified, the allegations pleaded with respect to CAST in paragraphs 13-20 are alleged with respect to all other Children's Aids Societies or child

welfare organization or body, being any person, legal or natural, carrying out the mandate of child protection in relation to any individual class member.

21. ~~6-~~The Hospital Defendants had no contractual relationship with the plaintiff and made no representations to her. Mr. Gareri was retained as an independent expert witness under CCASCAST's instructions.
22. ~~7-~~Pursuant to statute and common law, the Hospital Defendants are immune from and have no liability in respect of the plaintiff's claims.
23. ~~8-~~The Hospital Defendants did not owe a duty of care under legislation, at common law, or in equity to the plaintiff.
24. ~~9-~~The Hospital Defendants did not owe a duty of care under legislation, at common law, or in equity to plaintiff's family members.
25. ~~10. Engaged by the CCAS, the~~The Hospital Defendants provided CCAS~~the CAST with expert assistance regarding appropriate use of and reliance upon hair test results. No proximity or personal relationship existed or arose as between the Hospital Defendants and the plaintiff to give rise to a duty of care. Harm to the plaintiff compensable by law was not reasonably foreseeable. Imputation of a duty of care in the plaintiff's pleaded circumstances would be contrary to public policy. The Hospital Defendants have immunity, under legislation and at common law, against imposition of a duty of care in the pleaded circumstances of the plaintiff's case.~~
26. ~~11-~~As prescribed by the *Child and Family Services Act*, the CCASCAST owes a duty not to the plaintiff but to her child/children, *parens patriae*, using proper considerations, to conduct analyses and carry out detailed investigations prior to making any decision that might affect the interests, rights and liberties of the plaintiff's child. It was not reasonably foreseeable at law, or at all, that actions or inactions of the Hospital Defendants either directly or under CCAS~~the CAST's~~ direction could or would cause legally compensable harm to the plaintiff.

27. ~~12.~~ The Hospital Defendants met a reasonable standard of care in providing to the CCAS the services they did provide in the plaintiff's circumstances. The Hospital Defendants were not in any way negligent or in breach of a standard of care in the services provided the CCAS regarding the plaintiff's hair samples.
28. ~~13.~~ The Hospital Defendants advised the CCAS that the results of the plaintiff's hair tests ought to be interpreted in conjunction with other evidence and ought not to be relied upon as a sole or predominant indicator of best interests of the plaintiff's child(ren). Any assistance provided by the Hospital Defendants in court proceedings is subject to absolute privilege and immunity from suit. The Hospital Defendants' opinions were confined to interpreting the results of testing conducted by MDTL. This assistance was provided in good faith. Where the Hospital Defendants gave these opinions, they did so as a witness during the course of criminal, child protection or custody proceedings. As a result, the Hospital Defendants state that their opinions, having been provided as a witness in judicial hearing, are subject to absolute privilege and immunity from suit.
29. ~~14.~~ The plaintiff has not sustained any legally cognisable loss, damage, injury or harm related to or arising from the hair tests.
30. ~~15.~~ Even if she had, the Hospital Defendants did not cause, or contribute to, any such loss, damage, injury or harm to the plaintiff.
- ~~16.~~ ~~The plaintiff was entirely the author of her own misfortune. In the alternative, she caused or contributed to her own loss, damage, injury or harm.~~
31. ~~17.~~ The Hospital Defendants deny that the plaintiff's alleged losses, damages, injuries or harm were in any way caused or contributed to by breach of any duty owed by them to the plaintiff.
32. ~~18.~~ Any losses, damages, injuries or harm allegedly suffered by the plaintiff were caused entirely by her own actions. In the alternative, she caused or contributed to her own loss, damage, injury or harm. In the further alternative, her alleged losses, damages, injuries or

harm were caused by intervening or subsequent events, not by any breach of a duty or negligence on the part of the Hospital Defendants.

33. ~~19.~~ The plaintiff's alleged losses, damages, injuries or harm are exaggerated, and are too remote to be compensable under Ontario law.
34. ~~20.~~ The plaintiff is, together with the ~~CCASCAST~~, contributorily negligent for her alleged losses, damages, injuries or harm. She failed to take reasonable steps or any steps at all to mitigate her alleged losses, damages, injuries or harm.
35. ~~21.~~ The plaintiff's plea of punitive damages is frivolous and vexatious. The Hospital Defendants deny that the plaintiff's particular circumstances entitle her to any award of punitive or exemplary damages.
36. ~~22.~~ In summary, at all times the Hospital Defendants acted responsibly and in accordance with the appropriate standard of care owed to the ~~CCAS~~ regarding the plaintiff's hair specimens in the circumstances. The Hospital pleads and relies upon the *Negligence Act*, R.S.O. 1990, c. N. 1 as amended and the *Child and Family Services Act*, R.S.O. 1990, c. C. 11 including ss. 15(6) thereof.
37. The Hospital Defendants deny that they are strictly liable in tort to the plaintiff or the proposed class.
38. The Hospital Defendants plead and rely upon the provisions of the *Limitations Act, 2002*, S.O. 2002, c. 24, as amended, and state that the action is statute-barred.
39. ~~23.~~ Accordingly, the Hospital Defendants request that the plaintiff's action be dismissed with full indemnity costs.

CROSSCLAIM

24. ~~In the event this Honourable Court should find the Hospital Defendants or either of them to be liable to the plaintiff for any losses, damages, injuries, harm, interest, costs etc., then the Hospital Defendants claim over against the co-defendant Dr. Gideon Koren for:~~

~~(a) indemnity and contribution, at common law, in equity, or under the *Negligence Act*;~~

~~(b) interest and costs of the main action and of this crossclaim, inclusive of HST; and~~

~~(c) such further and other relief which this Honourable Court may deem just.~~

25. ~~The Hospital Defendants repeat and rely on each of the pleadings in the within statement of defence.~~

DATE: ~~June 20,~~ December 9, 2016

BORDEN LADNER GERVAIS LLP

Barristers & Solicitors
Scotia Plaza
40 King St. West
Bay Adelaide Centre, East Tower
22 Adelaide St. West
Toronto, ON M5H 4E3 3Y4

Kate A. Crawford- LSUC #50927U
Tel: 416-367-6729/ Fax: 416-367-6749

John Morris- LSUC #23166A
Tel: 416-367-6241/ Fax: 416-367-6749

Logan Crowell- LSUC #64363I
Tel: 416-367-6179/ Fax: 416-367-6749

Naveen Hassan- LSUC #67783M
Tel: 416-367-6729/ Fax: 416-367-6749 682-2819

~~Barry Glaspell- LSUC #32262C~~
Tel: 416-367-6104
Fax: 416-361-7051

Lawyers for The Hospital for Sick Children and Joey Gareri

TO: KOSKIE MINSKY LLP
20 Queen Street West,
Suite 900, Box 92
Toronto, ON M5H 3R3

Kirk Baert LSUC #30940O
Tel: 416-595-2117
Fax: 416-204-2889

Celeste Poltak LSUC #46207A
Tel: 416-595-2701
Fax: 416-204-2909

AND TO: SUTTS STROSBERG LLP
600-251 Goyeau Street
Windsor, ON N9A 6V4

Harvey T. Strosberg Q.C.
Tel: 519-561-6228
Fax: 519-561-6203

- 10 -

David Robins

Tel: 519-561-6211

Fax: 519-561-6209

Lawyers for ~~Yvonne Marchand~~ Rebecca Green

AND TO: McCARTHY TÉTRAULT LLP

P.O. Box 48, Suite 5300

Toronto-Dominion Bank Tower

Toronto, ON M5K 1E6

Darryl A. Cruz

Tel: 416-601-7812

Fax: 416-868-0673

Erica J. Baron

Tel: 416-601-8106

Fax: 416-868-0673

Lawyers for Dr. Gideon Koren

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BORDEN LADNER GERVAIS LLP
Seefta Plaza Bay Adelaide Centre, East Tower
40 King Street 22 Adelaide St. West
Toronto, ON M5H 4E3 3Y4

Kate A. Crawford-LSUC #50927U
Tel: 416-367-6729/Fax: 416-367-6749-682-2819

Barry Glasspell-John Morris-LSUC #23166A 32262C
Tel: 416-367-6104/416-367-6241/Fax: 416-367-6749-361-7051

Logan Crowell-LSUC #64363I
Tel: 416-367-6179/Fax: 416-367-6749

Naveen Hassan-LSUC #67783M
Tel: 416-367-6052/Fax: 416-367-6749

Lawyers for The Hospital for Sick Children and Joey Gareri