

04-CV-281230 cmf

Court file #

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN

AUDRA JEANETTE BELLAIRE, CATHERINE MARIE FRAUENLOB,  
SANDRA LaROCCA, CLAUDIA PAYNE, YVONNE THOMSON,  
STEVEN CHARLES BELLAIRE and ANDREW FRAUENLOB

Plaintiffs

and

SALIM DAYA and HAMILTON HEALTH SCIENCES CORPORATION

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**STATEMENT OF CLAIM**

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiffs. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiffs' lawyers or, where the plaintiffs do not have a lawyer, serve it on the plaintiffs, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of 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 statement of 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 statement of 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 statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, 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.

Dec. 22. 2004

Issued by:



Local Registrar

Address of Court Office:

393 University Avenue

10<sup>th</sup> Floor

Toronto ON M5G 2M2

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TO:  
SALIM DAYA  
2407 Carrington Place  
Oakville ON L6J 7R6

AND TO:  
HAMILTON HEALTH SCIENCES  
CORPORATION  
1200 Main Street West  
Hamilton ON L8N 3Z5

## CLAIM

### DEFINED TERMS

1. In this statement of claim, the following words have the following meanings:

- (a) **“Andrew”** means Andrew Frauenlob;
- (b) **“Audra”** means Audra Jeanette Bellaire;
- (c) **“Catherine”** means Catherine Marie Frauenlob;
- (d) **“Claudia”** means Claudia Payne;
- (e) **“CJA”** means the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
- (f) **“CPA”** means the *Class Proceedings Act, 1992*, S.O. 1992 c. 6, as amended;
- (g) **“Class”** means all women who underwent a Tompkins metroplasty performed by **Daya** at the **Hospital** in the period January 1, 1990 to March 31, 2004;
- (h) **“Daya”** means Salim Daya;
- (i) **“Family Class”** means those persons described in section 61 of the *FLA*;
- (j) **“FLA”** means *Family Law Act*, R.S.O. 1990, c. F.3, as amended;
- (k) **“Hospital”** means Hamilton Health Sciences Corporation;
- (l) **“Public Hospitals Act”** means the *Public Hospitals Act*, R.S.O. 1990, c. P.40, as amended;
- (m) **“Sandra”** means Sandra La Rocca;
- (n) **“Steven”** means Steven Charles Bellaire;
- (o) **“Yvonne”** means Yvonne Thomson.

**RELIEF CLAIMED**

2. AUDRA, CATHERINE, CLAUDIA, SANDRA AND YVONNE

CLAIM on their own behalf and on behalf of the Class:

- (a) an order pursuant to the *CPA* certifying this action as a class proceeding and appointing them as representatives of the Class;
- (b) damages for negligence in the amount of \$50,000,000;
- (c) punitive damages in the amount of \$5,000,000;
- (d) an order directing a reference or giving such other directions as may be necessary to determine the issues not determined at the trial of the common issues;
- (e) prejudgment and postjudgment interest in accordance with sections 128 and 129 of the *CJA*;
- (f) the costs of this proceeding on a substantial indemnity basis, plus taxes; and,
- (g) such further and other relief as to this Honourable Court may seem just and appropriate in the circumstances.

3. ANDREW AND STEVEN CLAIM on their own behalf and on behalf of the Family Class:

- (a) an order pursuant to the *CPA* appointing them as representatives of the Family Class;
- (b) damages pursuant to section 61 of the *FLA* in the amount of \$2,000,000;
- (c) prejudgment and postjudgment interest in accordance with sections 128 and 129 of the *CJA*;
- (d) the costs of this proceeding on a substantial indemnity basis, plus taxes; and,

- (e) such further and other relief as to this Honourable Court may seem just and appropriate in the circumstances.

#### **THE PARTIES**

4. Audra resides in Windsor, Ontario. Daya was her physician. In August, 2002, Audra underwent a Tompkins metroplasty performed by Daya at the Hospital.

5. Catherine resides in Wheatley, Ontario. Daya was her physician. In February, 2000, Catherine underwent a Tompkins metroplasty performed by Daya at the Hospital.

6. Claudia resides in Etobicoke, Ontario. Daya was her physician. In June, 1997, Claudia underwent a Tompkins metroplasty performed by Daya at the Hospital.

7. Sandra resides in Hamilton, Ontario. Daya was her physician. In November, 2002, Sandra underwent a Tompkins metroplasty performed by Daya at the Hospital.

8. Yvonne resides in Grimsby, Ontario. Daya was her physician. In October, 2002, Yvonne underwent a Tompkins metroplasty performed by Daya at the Hospital.

9. Andrew is Catherine's husband.

10. Steven is Audra's husband.
  
11. The Hospital is a non-share capital corporation operating under the *Public Hospitals Act* in Hamilton, Ontario.
  
12. Daya is licensed to practice medicine in Ontario. He is an obstetrician/gynecologist with a specialty in fertility and recurrent pregnancy loss. At all material times, he carried on his practice in Hamilton, Ontario.
  
13. In the years 1986 to 2004, the Hospital granted Daya surgical and medical privileges at the Hospital.

#### **METROPLASTY**

14. Metroplasty is a procedure used to excise a septum dividing a uterus or to correct some other abnormality in uterine shape.
  
15. Metroplasty can be performed either:
  - (a) hysteroscopically, by inserting a scope through the vagina; or
  - (b) by way of an abdominal incision, known as a Tompkins metroplasty.
  
16. Tompkins metroplasty is a very invasive technique that requires incisions in the abdomen of the patient as well as incisions in the uterus.

17. Risks associated with Tompkins metroplasty are use of a general anesthetic, high rates of infection and blood loss at the time of the surgery and potential scarring and adhesions of the uterus.

18. After undergoing a Tompkins metroplasty, a woman cannot deliver a child naturally and must give birth by cesarean section. A cesarean section involves a general anesthetic, incisions of the abdomen and uterus, scarring, pain and/or complications.

19. A woman who undergoes a hysteroscopic metroplasty will have a shorter recovery time than a woman who undergoes a Tompkins metroplasty. Also, she will not require a general anaesthetic and is subjected to fewer risks and complications, less pain and a lower incidence of adhesion formation.

20. Since 1990, hysteroscopic metroplasty has been generally accepted in the medical community as the standard of care for treating septate uterus and other uterine abnormalities.

21. Since 1990, the Tompkins metroplasty has not been accepted in the medical community as a proper procedure.

## **INVESTIGATION BY THE HOSPITAL**

22. On March 3, 2004, the Hospital issued a press release announcing publicly that it had conducted an external review of Daya's practice and that four fertility experts retained by the Hospital had concluded that Daya's use of the Tompkins metroplasty was inappropriate and not in accordance with the accepted standard of medical care.

23. On March 3, 2004, the Hospital admitted that the Tompkins metroplasty was an obsolete and unacceptable medical procedure as of 1998. In fact, the Tompkins metroplasty has been obsolete and not in accordance with the accepted standard of medical care since 1990.

## **NEGLIGENCE**

24. Audra, Catherine, Claudia, Sandra and Yvonne plead that they and every other member of the Class:

- (a) had a doctor-patient relationship with Daya;
- (b) had a history of infertility or recurrent pregnancy loss; and
- (c) were owed a duty by Daya to exercise a reasonable degree of care and skill in treating them and not to act negligently.

25. The relationship between Daya and the plaintiffs and the other members of the Class was also contractual in nature. It was an express or, alternatively, an

implied term of each such contract, that Daya would use reasonable skill and care in treating and caring for his patient and that he would not act negligently, which contract Daya, by his conduct, breached.

26. Audra, Catherine, Claudia, Sandra and Yvonne plead on their own behalf and on behalf of every other member of the Class that Daya was negligent in that:

- (a) he performed a Tompkins metroplasty on them;
- (b) he performed an outdated procedure on them which fell below the medically-accepted standard of care, when a medically-accepted standard of care, less-invasive and safer method was available; and
- (c) he performed unnecessary and antiquated surgery on them.

27. Audra, Catherine, Claudia, Sandra and Yvonne plead on their own behalf and on behalf of every other member of the Class that the Hospital and its servants and agents owed each of them a duty to exercise a reasonable degree of care and supervision over Daya and his practice.

28. Audra, Catherine, Claudia, Sandra and Yvonne plead on their own behalf and on behalf of every other member of the Class that the Hospital was negligent in that:

- (a) it failed to monitor, supervise and/or prevent Daya as a member of its medical staff from performing a surgical procedure that it knew or ought to have known was unnecessarily invasive, obsolete, not in accordance with the accepted standard of medical care and posed an unnecessary risk to the Class members;
- (b) it failed to establish any or any appropriate system to determine and evaluate the procedures being performed by Daya and other physicians;

- (c) it failed to monitor Daya until at least March, 2003 when it knew or ought to have known that his practice was below the medically-acceptable standard of care; and
- (d) it granted and renewed surgical privileges to Daya;
- (e) it failed to monitor Daya's practices and competence, pursuant to its obligations under the *Public Hospitals Act* and the regulations thereunder; and
- (f) it failed to supply the proper surgical tools, equipment and supplies necessary to perform a hysteroscopic metroplasty safely.

29. Audra, Catherine, Claudia, Sandra and Yvonne plead that by virtue of the acts described above the defendants were negligent and as such as liable to them and to each member of the Class.

#### **DAMAGES**

30. Audra, Catherine, Claudia, Sandra and Yvonne and the other members of the Class have suffered damages as a result of the negligence described above. They have suffered pain, distress and discomfort associated with undergoing an unnecessary invasive surgical procedure. In addition, Audra, Catherine, Claudia, Sandra and Yvonne and the other members of the Class have incurred related medical, pharmaceutical and other service costs, associated with undergoing surgery.

31. Audra, Catherine, Claudia, Sandra and Yvonne and the other members of the Class have also suffered permanent injury to the uterus, increased risk of infertility and miscarriage, permanent numbness or soreness in the region of the incision,

permanent scarring and protracted recuperation periods as a result of the negligence of the defendants.

32. Audra, Catherine, Claudia, Sandra and Yvonne and the other members of the Class must undergo a cesarean section should they become pregnant in the future, an extremely invasive procedure, that would not have been required had the Tompkins metroplasty procedure not been performed on them.

33. Audra, Catherine, Claudia, Sandra and Yvonne and the other members of the Class have lost income and diminished their otherwise available sick time as a result of the hospitalization required for the Tompkins metroplasty and for pre-operative and post-operative appointments with Daya. Their competitive positions in the labour market have been compromised as a result. They have incurred unnecessary hospital and medical expenses.

34. Audra, Catherine, Claudia, Sandra and Yvonne and the other members of the Class now face increased risk due to the certainty of delivery by cesarean section and complications as a result of the defendants' negligence.

35. Andrew and Steven plead that they and the other members of the Family Class are entitled to damages under the *FLA* as a result of the injury the defendants have cause to their family member, including out-of-pocket expenses, travelling expenses,

loss of consortium, payment of all services provided by them to the members of the Class on a *quantum meruit* basis and loss of care, guidance and companionship.

36. Daya performed the outdated Tompkins metroplasty procedure motivated by financial gain and/or for other ulterior personal or professional motives, without regard for the health, safety and well-being of the members of the Class.

37. Daya's conduct is such that it ought to be censured through an award of punitive damages in favour of all members of the Class.

38. The conduct of the Hospital in failing to supervise and monitor Daya and in allowing him to function independently when it knew or ought to have known that his practice was below the medically-accepted standard of care constitutes a gross dereliction of duty that offends the standards of the community. Such conduct warrants the condemnation of the Court by means of an award of punitive damages in favour of all members of the Class.

## **LEGISLATION**

39. On their own behalf and on behalf of the members of the Class and Family Class, the plaintiffs plead and rely upon the provisions of the *CPA*, the *CJA*, the *FLA*, the *Public Hospitals Act* and the *Negligence Act*, R.S.O. 1990, c.N.1, as amended.

40. The plaintiffs propose that the action be tried in the City of Toronto.

December 21, 2004

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BELLAIRE ET AL.

Plaintiffs

vs. DAYA ET AL.

Defendants

04-CV-281230 cm1

Court File No.

**ONTARIO  
SUPERIOR COURT OF JUSTICE.**

PROCEEDINGS COMMENCED AT TORONTO

**STATEMENT OF CLAIM**

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FILE: 24-090-000

REF: JK/ms