2020 Hfx No. 498480

SUPREME COURT OF NOVA SCOTIA

BETWEEN:

ANDREA PAUL

PLAINTIFF

and

ROBERT MILLER, SHARON CLARKE, NOVA SCOTIA HEALTH AUTHORITY, DALHOUSIE UNIVERSITY and MONTREAL HEART INSTITUTE

DEFENDANTS

NOTICE OF ACTION

(Proceeding under the ***Class Proceedings Act***, S.N.S. 2007, c. 28)

To: The Defendants

Action has been started against you
The Plaintiff takes action against you.

The Plaintiff started the Action by filing this notice with the Court on the date certified by the Prothonotary.

The Plaintiff claims the relief described in the attached Statement of Claim. The claim is based on the grounds stated in the Statement of Claim.

Deadline for defending the action
To defend the action, you or your counsel must file a Notice of Defence with the court no more than the following number of days after the day this notice of action is delivered to you:

- 15 days if delivery is made in Nova Scotia
- 30 days if delivery is made elsewhere in Canada
- 45 days if delivery is made anywhere else.

Judgment against you if you do not defend
The court may grant an order for the relief claimed without further notice, unless you file the Notice of Defence before the deadline.

You may demand notice of steps in the action

If you do not have a Defence to the claim or you do not choose to defend it, you may, if you wish to have further notice, file a Demand for Notice.

If you file a Demand for Notice, the Plaintiff must notify you before obtaining an order for the relief claimed, and, unless the court orders otherwise, you will be entitled to notice of each other step in the action.

Rule 57 - Action for Damages under $150,000
Civil Procedure Rule 57 limits pre-trial and trial procedures in a defended action so it will be more economical. The Rule applies if the Plaintiff states the action is within the Rule. Otherwise, the Rule does not apply except as a possible basis for costs against the Plaintiff.

This action is not within Rule 57.

Filing and delivering documents
Any documents you file with the Court must be filed at the office of the Prothonotary at 1815 Upper Water Street, Halifax, Nova Scotia, (902) 424-4900.

When you file a document, you must immediately deliver a copy of it to each other party entitled to notice, unless the document is part of an *ex parte* motion, the parties agree delivery is not required, or a judge orders it is not required.

Contact information
The Plaintiff designates the following address:

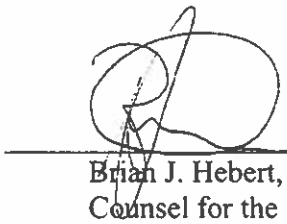
McKiggan Hebert
Purdy's Wharf, Tower 1
502 – 1959 Upper Water Street
Halifax, NS B3J 3N2
Tel: 902-423-2050
Fax: 902-423-6707

Documents delivered to this address are considered received by the Plaintiff on delivery.

Further contact information is available from the Prothonotary.

Proposed place of trial
The Plaintiff proposes that if you defend this Action the Trial will be held in Halifax, Nova Scotia.

Signature
Signed on this 12th day of June, 2020



Brian J. Hebert,
Counsel for the Plaintiff Andrea Paul

Prothonotary's certificate

I certify that this Notice of Action, including the attached Statement of Claim, was filed with the Court on June 12, 2020.

Prothonotary

JENNA BENT
Deputy Prothonotary

2020

Hfx No. 498480

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DEFENDANTS

STATEMENT OF CLAIM

(Proceeding under the ***Class Proceedings Act***, S.N.S. 2007, c. 28)

Representative Plaintiff

1. The Plaintiff, Andrea Paul ("Chief Andrea"), is the Chief of the Pictou Landing First Nation, and lives in Pictou Landing, Nova Scotia. She is Mi'kmaq.

2. In March 2017 Chief Andrea attended the Queen Elizabeth II Health Sciences Centre (the "QEII") in Halifax, Nova Scotia and underwent diagnostic imaging, and in particular magnetic resonance imaging ("MRI"), as part of a medical research project being conducted by the Canadian Alliance for Healthy Hearts and Minds (the "CAHHM Study").

3. The MRI scans involved Chief Andrea lying horizontally on her back on an MRI scanner bed which was then retracted into a narrow cylindrical chamber inside the MRI scanner. With only a few inches of space between her and the inside surface of the cylinder, Chief Andrea was effectively confined and unable to sit up, lift her head, move her arms or legs, roll over or remove herself from the chamber. She felt claustrophobic in this confined position. She held her breath while the MRI scanner emitted a loud, banging sound all around her as MRI scans were taken for the CAHHM Study.

4. After the CAHHM Study MRI scans were finished, QEII staff did not withdraw Chief Andrea from the confines of the MRI scanner chamber. Instead, she was detained there longer while additional scans of her body were taken as part of a second, secret and separate study being conducted by the Defendants, Robert Miller and Sharon Clarke, independent of the CAHHM Study, involving MRI elastography of the liver of Indigenous subjects (the "Indigenous Study").

5. Chief Andrea was unaware of the Indigenous Study or that she was participating in it. As she lay inside the claustrophobic MRI chamber holding her breath and cringing from the loud banging sounds around her, the MRI scans generated data that revealed intimate medical information about her body without her knowledge or consent. She had been singled out for one reason - she was Mi'kmaq.

6. The data from the MRI scans for the CAHHM Study were sent to the principle researchers of the CAHHM Study while data from the MRI scans for the Indigenous Study were withheld from the CAHHM researchers and provided to the Defendants Miller and Clarke only.

Defendants

7. The Defendant Robert Miller ("Miller") is a physician who at all material times was employed or contracted by the Defendant Dalhousie University ("Dalhousie") as a professor in the Department of Diagnostic Radiology, Division of Cardiology and by the Defendant Nova Scotia Health Authority ("NSHA") as a radiologist in the Department of Radiology.

8. At all material times Miller was the local site investigator for the CAHHM Study and responsible for arranging MRI scans on participants of the CAHHM Study pursuant to an agreement dated July 4, 2014 between the Defendant Montreal Heart Institute ("MHA") and one or more of Miller, Dalhousie, QEII and NSHA (the "MRI Agreement"). At all material times Miller acted as agent for MHA in respect of the MRI scans. Finally, at all material times Miller was one of the co-investigators of the Indigenous Study.

9. The Defendant Sharon Clarke ("Clarke") is a physician who at all material times was employed or contracted by Dalhousie as an assistant professor in the Department of Diagnostic Radiology, Division of Cardiology and by the NSHA as a radiologist in the Department of Radiology at the QEII.

10. At all material times Clarke was a local site sub-investigator of the CAHHM Study and one of the co-investigators of the Indigenous Study.

11. The QEII is a hospital as defined in the ***Hospitals Act***, R.S.N.S. 1989, c. 208 which at all material times provided MRI diagnostic imaging services. The Defendant NSHA is a body corporate constituted as a health authority under the ***Health Authorities Act***, S.N.S. 2014, c. 32, which at all material times operated the QEII and either directly, or indirectly through the QEII, provided MRI services to the public and employed or contracted Miller and Clarke as radiologists.

12. The Defendant Dalhousie is a university located in Halifax, Nova Scotia which at all material times employed or contracted Miller as a professor and Clarke as an assistant professor and authorized each of them to conduct research on behalf of the university.

13. The Defendant Montreal Heart Institute ("MHA") is a hospital located in Montreal, Quebec which at all material times was a research partner in the CAHHM Study and which contracted with Miller, Dalhousie, the QEII and/or the NSHA for MRI scans on participants of the CAHHM Study in Halifax, Nova Scotia and contracted with Miller to be the local site investigator for the CAHHM Study.

Discovery of the Indigenous Study

14. It was not until June 21, 2018 that Chief Andrea learned about the Indigenous Study and that she had been subjected to MRI scans to which she had not consented.

15. By that time Miller and Clarke had presented the results of the Indigenous Study to a group of radiologists at a conference in Halifax, Nova Scotia and had written an unpublished research paper entitled "MRI Findings of Liver Disease in an Atlantic Canada First Nations Population".

16. A meeting was held between Chief Andrea, Miller and Clarke and others on July 16, 2018. It was at that meeting that Chief Andrea learned the full scope of what had occurred although Miller initially denied that the results of the Indigenous Study had been shared with anyone, he eventually admitted that results of the study had been shared at a radiology conference in Halifax.

17. Upon learning of the Indigenous Study and of the fact that private data was taken from her by means of the MRI scans without her knowledge or consent, Chief Andrea became upset. She felt violated and humiliated. She had voted to support the participation of Pictou Landing First Nation members in the CAHHM Study as a member of the Council of the Pictou Landing First Nation. She felt betrayed. Knowing the long history of subjecting Indigenous people in Canada to cruel medical experiments, including starvation studies amoung children, and knowing that there were research protocols in place to ensure the consent of Indigenous participants in health studies and to confirm the Indigenous right to own and control research data of Indigenous people, Chief Andrea felt powerless, vulnerable and discriminated against because she was Mi'kmaq. She suffered a loss of dignity and self-esteem as a result. The other Class Members suffered the same losses and damages.

Class Proceedings

18. Chief Andrea was not the only person who, while participating voluntarily in the CAHHM Study, became an unwitting subject of the Indigenous Study. An additional 60 people, all of whom were members, or family or friends of members, of the Pictou Landing First Nation, were subjected to additional MRI scans, as described above, without their knowledge or consent. They too had been selected on the basis of race.

19. The other Class Members only became aware of the facts giving rise to this proceeding sometime after June 21, 2018.

20. Chief Andrea brings this action on her own behalf, and on behalf of the class of persons who were subjected to MRI scans as part of the Indigenous Study without their knowledge or consent and who suffered harm or loss as a result and such other persons or class of persons, as this Honourable Court recognizes or directs (the "Class" and the "Class Members").

21. Chief Andrea seeks to certify this action as a class proceeding and pleads and relies on the ***Class Proceedings Act***, S.N.S. 2007, c. 28 as the basis for such certification.

22. Chief Andrea states that there is an identifiable class that would be fairly and adequately represented by her as the Plaintiff.

23. The within claim raises common issues and a class proceeding would be the preferable procedure for the resolution of such common issues.

Class Period

24. The proposed class period covers the years 2017 and 2018.

Invasion of Privacy – Intrusion upon Seclusion

25. The Plaintiff repeats the forgoing and says the Defendants are severally liable to the Plaintiff for the tort of intrusion upon seclusion or invasion of privacy. The Defendants acted intentionally or recklessly and without lawful justification to intrude upon the right of the Plaintiff and Class Members to be protected from intrusion into their private affairs or concerns. A reasonable person would regard the Defendants' invasion as highly offensive, causing distress, humiliation or anguish.

Unlawful Imprisonment

26. The Plaintiff repeats the forgoing and says that the Defendants are severally liable to the Plaintiff and the Class Members for the tort of false imprisonment for confining the Plaintiff and the Class members in the MRI scanner chamber without lawful justification.

Assault and Battery

27. The Plaintiff repeats the forgoing and says that Defendants are severally liable to the Plaintiff and Class Members for assault and battery, as the MRI scan procedures amount to a medical procedure that was performed on them without their knowledge or informed consent.

Negligence

28. The Defendants owed a duty of care to the Plaintiff and other Class Members to take care not to submit the Plaintiff and the Class Members to medical diagnostic procedures without their informed consent and to follow all applicable research and ethical standards when applying for and receive approval for research. The Defendants knew or ought to have known that failure of the Defendants to fulfil their duty of care would lead to foreseeable injury, loss and damage to the Plaintiff and the Class Members.

29. The Plaintiff repeats the forgoing and says that the conduct described above breached the standard of care expected of a person in similar circumstances to the Defendants and constitutes negligence as creating an unreasonable and foreseeable risk of harm to the Plaintiff and the Class Members. In particular the Defendants:

(a) failed to advise the Plaintiff and Class Members about the Indigenous Study;

(b) failed to advise the Plaintiff and Class Members that they would be participating as subject in the Indigenous Study;

(c) failed to obtain the informed consent of the Plaintiff and the Class Members to the additional MRI scans to be taken for the purpose of the Indigenous Study;

(d) failed to abide by the policies and procedures applicable to research involving Indigenous participants including, without limitation:

(i) the CAHHM Study protocol of November 15, 2013;

(ii) the Tri-Council Policy Statement on Health Research Involving Indigenous People;

(iii) the so-called OCAP principles (ownership, control, access and possession) governing research involving information and data from Indigenous participants; and

(iv) the World Medical Association Declaration of Helsinki – Ethical Principles For Medical Research Involving Human Subjects.

(e) failed to provide all data collected and information obtained from the Plaintiff and the Class Members to them or their appointed agents;

(f) failed to turn control of all data collected and information obtained from the Plaintiff and the Class Members to them or their appointed agents;

(g) used the data collected and information obtained from the Plaintiff and the Class Members for a purpose that was not disclosed to them and without their consent;

(h) failed to provide all findings, reports, results, or summaries derived from the data collected or information obtained from the Plaintiff or the Class Members to them;

(i) disclosed data collected or information obtained from the Plaintiff or the Class Members to third parties without the consent of the Plaintiff and the Class Members;

(j) failed to advise the Plaintiff and the Class Members that the data collected or information obtained from the Plaintiff or the Class Members had been provided to third parties;

(k) failed to immediately advise individual participants of serious health issues discovered on the additional MRI scans or in a timely fashion;

(l) failed to provide all relevant information and providing misleading information about the Indigenous Study and the consent of the Plaintiff and the Class Members thereto to the governing research ethics board when obtaining approval for the Indigenous Study; and

(m) such further and other negligent acts and omissions as may appear from the evidence;

when the Defendants knew or ought to have known, that that such negligence could foreseeably cause injury, loss and damage to the Plaintiff and the Class Members and which did in fact cause injury, loss and damage.

Breach of Fiduciary Duty and Breach of Trust

30. As a result of the special relationship between the Defendants and each them and the Plaintiff and other Class Members arising from the vulnerability of the Plaintiff and the Class Members once they were placed in the MRI scanner and from the Defendants having private information about the health of the Plaintiff and the Class Members, the Defendants had a fiduciary duty to the Plaintiff and Class Members to ensure that they were not violated and that no data was obtained without their knowledge and consent and if such data was obtained to hold it in trust for the use and benefit of the Plaintiff and Class Members.

31. The Plaintiff repeats the forgoing and says that the Defendants breached their fiduciary and trust duties by gathering data as outlined above and by dealing with the data for their own benefit.

Breach of Contract

32. The Plaintiff repeats the following and says that the Plaintiff and Class Members had a contract with each of the Defendants that was partly verbal and partly in writing, including but not limited to written consent forms, each of which contracts contained the following express or implied terms:

(a) MRI scans would only be taken for purposes of the CAHHM Study and no additional MRI scans would be taken for any other purpose without the knowledge and informed consent of the Plaintiff and the Class Members;

(b) all applicable research protocols and principles would be followed, including, without limitation,

(i) the CAHHM Study protocol of November 15, 2013;

(ii) the Tri-Council Policy Statement on Health Research Involving Indigenous People;

(iii) the so-called OCAP principles (ownership, control, access and possession) governing research involving information and data from Indigenous participants; and

(iv) the World Medical Association Declaration of Helsinki – Ethical Principles For Medical Research Involving Human Subjects.

(c) all data collected and information obtained from the Plaintiff or Class Members as participants in the CAHHM Study would be given to the Plaintiff and Class Members or their designated agents under OCAP principles;

(d) all data collected and information obtained from the Plaintiff or Class Members as participants in the CAHHM Study would be controlled by the Plaintiff and Class Members or their appointed agents under OCAP principles;

(e) no data collected or information obtained from the Plaintiff or Class members would be used for any purpose of which the Plaintiff and the Class Members had not been informed;

(f) all data collected and information obtained from the Plaintiff or the Class Members would be provided to the CAHHM for safekeeping to be dealt with in accordance with the principles of OCAP;

(g) no data collected or information obtained from the Plaintiff or Class Members, or any part thereof, would be disclosed to any third party, either in the form collected or obtained or in any other form including any analysis, report on results or summary thereof, without the knowledge or consent of the Plaintiff and the Class Members or their appointed agents;

(h) any findings, reports, results, or summaries of the data collected or information obtained from the Plaintiff or the Class Members would be disclosed and provided to the Plaintiff and Class Members or their appointed agents; and

(i) any medical conditions that were apparent from the MRI scans would be reported to individual participants.

33. The Defendants and each of them breached each and every one of the forgoing express or implied terms.

Charter Breaches

34. The Defendant NSHA is a governmental entity or an entity carrying out governmental functions to which the ***Canadian Charter of Rights and Freedoms*** applies. The Plaintiff repeats the forgoing and says that she and the other Class members were discriminated against on the basis of race contrary to s. 15 of the ***Charter*** which grants every individual the right to equal protection and equally benefit of the law; that the Plaintiff's and other Class Members' right to life, liberty and security of the person guaranteed by section 7 of the ***Charter*** were violated; and that their right to be free of arbitrary detention guaranteed by section 9 of the ***Charter*** was violated.

Aggravating Factors

35. Unfortunately there is a long history of oppression of Indigenous people in Canada including many instances where Indigenous people were subjected to medical treatment and research against their will and without their consent. These instances include studies on the effects of starvation on Indigenous children and forced sterilization of Indigenous women! As a result, Indigenous people have been reluctant to participate in health research and to seek treatment from non-Indigenous doctors, health centers and hospitals. There is an historically and evidentiary based mistrust of the health care system.

36. As a result of these historical atrocities and breaches of trust, Indigenous people and communities have been reluctant to participate in community health studies. Relationships between researchers, health organizations and Indigenous communities have been built up slowly and principles and procedures have been put in place to ensure that research is conducted in a way that fosters the health of Indigenous communities rather than harms it. OCAP principles have been established to address these issues and facilitate participation of Indigenous people in health research: Indigenous communities have the right to own, control, access and possess their information.

37. The Defendants Miller and Clarke decided to carry out the Indigenous Study only when they realized that the Plaintiff and other Class Members from Pictou Landing First Nation would be participating the CAHHM Study and that they had consented to MRI scans for the purpose of that study.

38. Miller and Clarke saw this as an opportunity to conduct research which had never been done before on an Indigenous population. The participants were targeted because they were Indigenous. Miller and Clarke were interested in advancing their careers and esteem as researchers and not the wellbeing of the Plaintiff, the Class Members or Indigenous people generally as evidenced, in part, by (a) the fact that the sample size was noted as a limiting factor on the reliability and usefulness of the results and conclusions of the Indigenous Study; and (b)

the fact that participants whose MRI scans revealed serious health conditions were not advised of the results.

39. Miller and Clarke decided not to advise the Plaintiff or the Class Members of the Indigenous Study or seek their consent to participate in same. They completely ignored the established principles regarding the collection of data and information from Indigenous participants as per OCAP.

40. This is the type of behavior that is, and is perceived to be, motivated by racism and discrimination based on race. The Defendants knew or ought to have known that upon learning of the Indigenous Study the Plaintiff and the Class Members would feel they had been discriminated against leading to mental anguish, feelings of betrayal, humiliation, powerlessness and vulnerability and would suffer loss of dignity and self-esteem and the result would be a further deepening of the mistrust of health research and the medical system.

41. The decision to take additional MRI scans was based solely on the race of the Plaintiff and the other Class members, which is a protected category under the ***Charter*** as well as the Nova Scotia ***Human Rights Act***, R.S.N.S. 1989, c. 214 and thus constitutes an aggravating factor.

42. The Defendants as physicians, health authorities, hospitals and health research institutions were in a position of trust.

43. Miller and Clarke initially denied that the research results had been shared with any third parties when they knew that results had been presented at a radiology conference.

44. The Plaintiff repeats the forgoing and says that the Defendants acted with wanton and reckless disregard for the rights of the Plaintiff and Class Members and in a malicious, oppressive, and high-handed manner that offends all sense of decency.

Damages

45. As a result of the tortious and negligent acts and omissions of the Defendants and the Defendants breaches of fiduciary duty, breaches of trust and breaches of contract, all as set out above, the Plaintiff and the other Class Members have suffered injury loss and damages including, but not limited to:

(a) mental suffering;
(b) anguish;
(c) nervousness;
(d) paranoia;
(e) regret;
(f) trust issues;
(g) anxiety;
(h) worry;
(i) shock;
(j) humiliation;
(k) embarrassment;
(l) shame;
(m) hurt feelings;
(n) disappointment;
(o) feelings of powerlessness; and
(p) psychological injuries;

and such further and other injuries as the Plaintiffs and the Class Members may advise prior to trial of this matter.

Relief Sought

46. Therefore, the Plaintiff and the other Class Members claim against the Defendants, and each of them, severally:

(a) an order certifying this proceeding as a class proceeding and appointing the Plaintiff as representative plaintiff for the Class;

(b) a declaration that the Defendants committed the torts of invasion of privacy (intrusion upon seclusion), unlawful imprisonment, assault and battery, and negligence;

(c) a declaration that the Defendants breached their fiduciary duties and their trust duties;

(d) a declaration that the Defendants committed breach of contract;

(e) a declaration that the NSHA violated the ***Charter*** rights of the Plaintiff and the Class members;

(f) a declaration that the Defendants are severally liable to the Plaintiff and the Class Members for the damages caused as a result of their tortious acts and omissions, breach of fiduciary duty, breach of trust, and breach of contract;

(g) a declaration that the NSHA is liable to the Plaintiff and the Class Members for damages caused as a result of the violation of their ***Charter*** rights;

(h) general damages;

(i) special damages;

(j) aggravated damages;

(k) punitive damages;

(l) costs of this action on a substantial indemnity basis or in an amount that provides full indemnity plus applicable taxes;

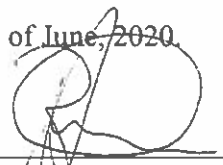
(m) pre-judgment interest;

(n) pursuant to section 36 of the ***Class Proceedings Act***, *supra*, the costs of notice and of administering the plan of distribution of the recovery in this action, and

(o) such further and other relief as this Honourable Court may see fit.

47. The plaintiff requests that the trial of this action take place at Halifax, in the Province of Nova Scotia.

DATED at Halifax, Province of Nova Scotia this 12th day of June, 2020.



Brian J. Hebert,
Counsel for the Plaintiff Andrea Paul