

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**MATTHEW VEZINA, EILEEN MORRISON, KEN WILSON,
LINDA SILMER and ATTILA NAGY**

Plaintiffs

- and -

**LOBLAW COMPANIES LIMITED and JOHN DOE and
LOBLAWS SUPERMARKETS LIMITED**

Defendants

PROCEEDING UNDER THE CLASS PROCEEDINGS ACT, 1992

**AMENDED AMENDED STATEMENT OF CLAIM
(Notice of Action Issued August 26, 2002)**

AMENDED THIS
MODIFIÉ CE
Mars 27/05
PORSUANT TO
CONFORMÉMENT A
RÈGLE/LA RÉGLE 26.02 (b)
THE ORDER OF
L'ORDONNANCE DU
DATED / FAIT LE
S. Sadeghi
REGISTRAR
GREFFIER
SUPERIOR COURT OF JUSTICE
COUR. SUPÉRIEURE DE JUSTICE

CLAIM

1. The Plaintiffs claim:
 - (a) Compensatory damages for negligence and breach of contract of \$100,000,000, or such other amount as may be proven at trial;
 - (b) Punitive, exemplary or aggravated damages of \$5,000,000;
 - (c) Special damages for the cost of past and future health services, including such insured health services as are provided by the Ontario Health Insurance Plan ("OHIP");
 - (d) a declaration that the defendant was negligent in the manufacturing, processing, preparation, storage, handling, display, transportation and sale, or offering for sale, of the fresh or prepared products from the produce section of the defendant supermarket at 3671 Dundas Street

West in the city of Toronto and may have exposed the plaintiffs and class members to the Hepatitis A virus for which the plaintiff and class members were advised by the Toronto Public Health Authority to receive a vaccination;

- (e) a declaration that the defendant is liable to the plaintiffs and class members for the damages suffered by the negligence of the defendant and for breach of contract and warranties in relation to the sale of diseased food that was unfit for human consumption by reason of disease, adulteration, impurity or other causes, during the period of July 19, 2002 and August 16, 2002, requiring the intervention of the Toronto Public Health Authority resulting from the health hazard posed to the plaintiffs and class members as a result of the defendant's actions or omissions;
- (f) Prejudgment and postjudgment interest on the above sums, or such other sums as may be awarded, pursuant to the *Courts of Justice Act*, R.S.O. 1990, c.C-43, as amended;
- (g) Costs of this action on a substantial indemnity basis; and
- (h) Such further and other relief as this Honourable Court may deem just and appropriate.

The Parties

- 2. The defendant, Loblaw Companies Limited, and the defendant, Loblaws Supermarkets Limited (collectively, "Loblaw"), each is incorporated under the laws of Canada and maintains its head office in Toronto, Ontario. Loblaw is a food distributor and retailer and operates numerous grocery stores throughout Canada, including a grocery store located at 3671 Dundas Street West, Toronto, Ontario ("Store").
- 3. The identifier, John Doe, as used herein represents a currently unascertained number of currently unidentified persons who worked at the Store during the material times and who contributed to the outbreak or potential outbreak of Hepatitis A at the Store, including those employees or the employee who had contracted Hepatitis A and worked in the produce section of the Store ("Infected Employee").

4. The plaintiff, Matthew Vezina ("Vezina"), is an individual residing in Toronto, Ontario. Vezina purchased groceries from the Store at the material times. The plaintiff, Eileen Morrison ("Morrison"), is an individual residing in Islington, Ontario. Morrison also purchased groceries from the Store at the material times and contracted Hepatitis A as a result. The plaintiff, Ken Wilson ("Wilson"), is an individual residing in Etobicoke, Ontario. Wilson also purchased groceries from the Store at the material times and contracted Hepatitis A as a result. The plaintiff, Linda Silmer ("Silmer"), is an individual residing in Toronto, Ontario. She also purchased groceries from the Store at the material times. The plaintiff, Attila Nagy ("Nagy"), is an individual residing in Don Mills, Ontario. Nagy consumed produce purchased by another person from the Store during the material times.

5. Vezina, Morrison, Wilson, Silmer and Nagy bring this action pursuant to the Class Proceedings Act, 1992 on behalf of the following class (the "Class"):
 - (a) All persons who shopped at the Store at any time between July 19, 2002 (or such other time as the Infected Employee became infectious with Hepatitis A) and August 16, 2002 (or such other time when the Store was disinfected) ("Claim Period") and/or who handled ~~or purchased~~ fresh or prepared products from the produce section of the Store ("Produce") and who contracted Hepatitis A ("Infected Persons Shoppers");

 - ~~(b) All persons who shopped at the Store during the Claim Period and who did not contract Hepatitis A ("Uninfected Shoppers");~~

 - ~~(c)(b) All persons who contracted Hepatitis A from one of the Infected Persons Shoppers or from another Cross-Infected Person, either by contact with such Infected Shopper or Cross-Infected Person or by consuming or handling the Produce ("Cross-Infected Persons");~~

 - ~~(d)(c) All persons who were exposed to Infected Shoppers or Uninfected Shoppers or who were exposed to Produce from the Store, and who were vaccinated against Hepatitis A or received immune globulin against Hepatitis A ("Potentially Cross-Infected Persons"); and the risk of infection with Hepatitis A as a result of:
 - (i) handling or consuming Produce;
 - (ii) from coming into contact with a person who handled or consumed Produce; or~~

- (iii) from coming into contact with an Infected Person or a Cross-Infected Person.

and who were:

- (i) vaccinated against Hepatitis A;
- (ii) received immune globulin against Hepatitis A; or
- (iii) attended at a physician's office to seek advice or treatment in relation to the exposure to the risk of infection with Hepatitis A from the Produce;

("Immunized Persons")

(e)(d) All living parents, grandparents, children, grandchildren, siblings and spouses (within the meaning of section 61 of the *Family Law Act*, R.S.O. 1990, c.F-3, as amended) of Infected Persons, Shoppers, Uninfected Shoppers, Cross-Infected Persons or Potentially Cross-Infected Immunized Persons ("Family Law Claimants").

Hepatitis A: The Disease

6. Hepatitis A is a liver disease caused by the Hepatitis A virus. In rare cases, Hepatitis A can be fatal.
7. Hepatitis A virus is spread from person to person by putting something in the mouth that has been contaminated with the fecal matter of a person with Hepatitis A. This type of transmission is called "fecal-oral". For this reason, the virus is more easily transmitted in areas where there are poor sanitary conditions or where good personal hygiene is not practiced.
8. Hepatitis A virus has an incubation period of 15 to 50 days, with an average incubation period of 28 days. The symptoms of Hepatitis A generally include fever, fatigue, loss of appetite, nausea, diarrhea, abdominal discomfort, dark urine, and jaundice (yellowing of the skin and eyes). Symptoms usually last less than two months. Approximately 15% of infected people will have prolonged or relapsing symptoms over a six to nine month period. Additionally, symptoms of

infection become more severe in older individuals: while death due to liver damage from a Hepatitis A virus is rare, it is much more common in individuals who are over fifty (50) years of age.

9. An infected person is most infectious in the two-week period prior to symptom onset and remains infectious for approximately one week after onset of jaundice.
10. Two products are available to prevent Hepatitis A virus infection, namely, immune globulin and Hepatitis A vaccine.
11. Immune globulin is a preparation of antibodies that can be given before exposure for short-term protection against Hepatitis A and for persons who have already been exposed to the virus. Immune globulin must be given within 2 weeks after exposure to Hepatitis A virus for maximum protection.
12. Hepatitis A vaccine is used before a person is exposed to the virus and for persons over the age of 2 years. The vaccine is also recommended for persons who are more likely to become exposed to Hepatitis A virus or who are more likely to become seriously ill, if they eventually become exposed. Two doses are recommended with the second dose scheduled in a six to twelve month period following the first dose. The protection afforded by Hepatitis A vaccine begins only after 4 weeks following the administration of the first dose of the vaccine. The Hepatitis A vaccine is not recommended for persons who have been exposed to the Hepatitis A virus.

Events

13. At some point prior to July 19, 2002, the Infected Employee contracted Hepatitis A, an infectious disease.
14. By no later than July 2002, Loblaw or some or all of the John Does became aware that the Infected Employee had contracted Hepatitis A, who may have

contaminated the Produce with the Hepatitis A virus. Loblaw or some or all of the John Does were, or should have been, aware that the Infected Employee had or was manifesting symptoms of a disease, and possibly Hepatitis A, but Loblaw or such John Does, or some of them, permitted the Infected Employee to continue to work preparing Produce at the Store. In addition, the Infected Employee, a member of the group of John Does, knew or ought to have known that he was ill and may have been exposed to, or contracted, an infectious disease and continued to work handling Produce at the Store.

15. On or about August 16, 2002, the City of Toronto's Public Health Department announced details of the risk of a potential Hepatitis A outbreak at the Store, and advised persons who may have been exposed to the Hepatitis A virus to attend vaccination clinics.
16. The Toronto Public Health Department also informed the general public that any individuals who had purchased products from the Store during the Claim Period should dispose of all leftover fruits, vegetables or other produces containing suspected contaminated produce, such as desserts. Additionally, these individuals were informed that any other produce or perishable goods that had come into direct contact with the contaminated produce from the Store should also be disposed of and that the respective areas of their refrigerators should be sterilized with hot water and a mild bleach solution.
17. In fact, the Toronto Public Health Department Press Release and information "Backgrounder", also released on August 16, 2002, indicated that "any individuals who consumed fresh or prepared fruit or vegetables from the produce section at [the Store] between July 11, 2002 and August 16, 2002" should receive the vaccination for Hepatitis A.
18. The Toronto Public Health Department, between August 18, 2002, and August 23, 2002, opened three vaccination clinics and provided, free of charge, one dose of the vaccine. The Toronto Public Health Department has advised that it

will not provide the second dose but rather individuals will have to arrange to obtain same at their own cost. The estimated cost of the second dose is between \$40.00 and \$55.00 and is not covered by either the Province, through OHIP, or the City of Toronto.

19. Toronto Public Health paid the costs of operating the clinics, including the administration of the vaccine and staffing, which reached 125 staff members at its peak. The Province supplied and paid for the vaccine. Approximately 17,500 people were vaccinated under the program administered by the Toronto Public Health Department.
20. In addition, following the announcement of the outbreak of Hepatitis A at the Store by the Toronto Public Health Department, on August 20, 2002, the defendants, Loblaw, issued letters to approximately 50,000 households in the vicinity of the Store apologizing "for any concerns" resulting from the reported incident of Hepatitis A at the Store.
21. Further, following the reported incidents, the defendants, Loblaw, announced a program to reimburse customers who had purchased Produce at the Store. Initially, for customers who did not have a receipt, reimbursements were at the sole discretion of the Store manager. However, the program was quickly restricted to customers who could produce a receipt for the Produce and was discontinued for all other customers.

Vezina's Exposure

22. At various times during the Claim Period, Vezina purchased groceries, including Produce, from the Store. Prior to being informed of the possible Hepatitis A contamination, Vezina consumed some of the Produce and provided some of the Produce to other friends and co-workers who consumed the Produce as well.

23. In order to try to protect his health, Vezina was required to destroy any remaining produce that he had purchased from the Store during the Claim Period together with other items with which that the produce may have come into contact. Vezina also had to seek medical advice.
24. Vezina repeatedly attempted to contact Loblaw management regarding possible Hepatitis A exposure at the Store but received no satisfactory response.

Morrison's Exposure

25. At various times during the Claim Period, and specifically during the period August 1-6, 2002, Morrison purchased groceries, including Produce, from the Store. Prior to being informed of the possible Hepatitis A contamination, Morrison consumed some of the Produce.
26. After being informed of the risk of Hepatitis A infection, Morrison received the Hepatitis A vaccination from a Public Health Clinic on August 16, 2002. Despite the vaccination, Morrison contracted Hepatitis A as a result of her exposure to the virus from the Produce obtained at the Store. She suffered, and continues to suffer, from the effects of Hepatitis A, which was confirmed following blood tests directed by the Toronto Public Health Department. She continues to receive medical care.
27. In addition to the stress and anxiety associated with her illness, Morrison may have exposed her 72-year-old mother, Frances Morrison, who is suffering from inoperable lung cancer, to the virus. Frances Morrison has been required to attend for blood tests and further medical care at the direction of Toronto Public Health Department. As a result of the potential exposure of Frances Morrison, both Frances Morrison and Morrison have suffered additional anxiety, inconvenience and stress.

Wilson's Exposure

28. At various times during the Claim Period, Wilson purchased groceries, including Produce, from the Store. Prior to being informed of the possible Hepatitis A contamination, Wilson consumed some of the Produce.
29. Wilson contracted Hepatitis A as a result of his exposure to the virus from the Produce obtained at the Store. Wilson suffered, and continues to suffer, from the effects of Hepatitis A, which was confirmed by The Trillium Health Centre. He continues to receive medical care.

Silmer's Exposure

30. At various times during the Claim Period, Silmer purchased groceries, including Produce, from the Store. Prior to being informed of the possible Hepatitis A contamination, Silmer consumed some of the Produce and provided some of the Produce to her family, including her three young children.
31. After being informed of the risk of Hepatitis A infection, Silmer and her family attended at the Public Health Clinic sponsored by Toronto Public Health and received the Hepatitis A vaccination. As a result of attending the Public Health Clinic, Silmer and her family were put to great inconvenience and stress. Silmer and her family also suffered great anxiety as a result of their potential exposure to the virus.

Nagy's Exposure

32. On August 16, 2002, Nagy attended a funeral service and reception for the father of a friend. He was served and consumed Produce that had been purchased from the Store. Later that day, and as a result of the public announcement of possible Hepatitis A contamination, his friend, who had already lost his father,

contacted Nagy and the other funeral attendees to advise them that the Produce served had been obtained from the Store.

33. After being contacted by his friend, Nagy received the Hepatitis A vaccination from a Public Health Clinic on August 19, 2002. As a result of attending the Public Health Clinic, Nagy was put to great inconvenience and stress. Nagy also suffered great anxiety as a result of his potential exposure to the virus.

Liability and Damages

34. The defendants and the John Does, including the Infected Employee, alone or together, negligently exposed the Class ~~Infected Shoppers and Uninfected Shoppers~~ to the Hepatitis A virus. Further, the defendants and the John Does, including the Infected Employee knew, or ought to have known, that exposing members of the Class ~~Infected Shoppers and Uninfected Shoppers~~ to an infectious virus may (i) lead to infections in Cross-Infected Persons or (ii) may cause damage to others who were exposed to such Infected Persons, Shoppers or Uninfected Shoppers, or (iii) may cause damage to others who consumed were exposed to the Produce, provided by such Shoppers, all of which resulted from the defendants' negligence.

35. Loblaw is vicariously liable for the negligence of the John Does, including the Infected Employee.

~~36. The plaintiffs plead the doctrine of *res ipsa loquitur*.~~

36. Alternatively, the particulars of the negligence of the defendants include the following:

As against the defendants, Loblaw:

- (a) it failed to take all proper care in the circumstances;

- (b) it failed to exercise the skill, knowledge and judgment of the ordinary and prudent retailer of produce;
- (c) it failed to meet the minimum standards of practice for preventing transmission of infectious disease, including fecal-borne pathogens, in a retail setting;
- (d) it employed the John Does, including the Infected Employee, when it knew or ought to have known that they were infected with Hepatitis A or other infectious diseases or were or may have been otherwise or may be ill;
- (e) it failed to ensure that those employees who handled produce were free from infection with Hepatitis A or other infectious diseases;
- (f) it failed to comply with the requirements of various governmental authorities regarding the handling of food products, such as the Produce, including the requirements of the *Health Protection and Promotion Act*, R.S.O. 1990, c.H-7, including sections 1, 16, 17, 100, and 101, and the regulations promulgated thereunder, including Ontario Regulation 562, as amended by O. Reg. 502/01, R.R.O. 1990, Reg. 562, including sections 1, 11, 26 and 65, including, but not limited to, the sale of "diseased food", pursuant to the statutory definition, that is unfit for human consumption by reason of disease, adulteration, impurity or other cause which created a "health hazard";
- (g) it failed to employ and properly train competent staff on proper, safe or adequate food handling techniques;
- (h) it failed to alert or educate its employees in identifying or assessing the symptoms of Hepatitis A, a known risk in food contamination;
- (i) it failed to require that its employees immediately inform Loblaw upon learning, identifying or suspecting symptoms of Hepatitis A;
- (j) it failed to eliminate any disincentive for its employees to conceal such information and/or provide any positive incentive to self-reveal if an employee became ill and/or required sick leave;
- (k) it failed to warn its customers of potential exposure to Hepatitis A in a timely fashion;
- (l) once the potential exposure of customers to Hepatitis A had been confirmed, it failed to ensure that an adequate number of vaccination clinics were established and properly staffed;
- (m) it failed to adequately supervise the work of the John Does, including the Infected Employee , including the compliance of the John Does and the Infected Employee with the requirements of the *Health Protection and*

Promotion Act and regulations thereunder, to which reference is made above, or compliance with Loblaw policies concerning maintaining sanitary conditions in the Store and handling food products, such as the Produce, or compliance with industry standards or reasonable practices for the safe and sanitary handling of food products, including the Produce; and

- (n) such further and other particulars which may become known to the plaintiffs and which will be proven at the trial of this action and are within the knowledge of the defendants, Loblaw.

As against the Doe Defendants:

- ~~(a) they failed to take all proper care in the circumstances;~~
- ~~(b) they failed to exercise the skill, knowledge and judgment of ordinary and prudent employees involved in the sale of food products, including the Produce;~~
- ~~(c) they failed to follow the minimum standard of practice for preventing transmission of infectious disease, fecal borne pathogens, in a retail setting;~~
- ~~(d) they continued to work when they knew or ought to have known that one or some of the employees, including the Infected Employee, were infected with Hepatitis A, or were or may have been infected with an infectious illness or were or may otherwise be ill;~~
- ~~(e) they failed to comply with the requirements of various governmental authorities regarding the handling of food products, such as the Produce, including the requirements of the *Health Protection and Promotion Act*, R.S.O. 1990, c.H.7, including sections 1, 16, 17, 100, and 101, and the regulations thereunder, including Ontario Regulation 562, as amended by O. Reg. 602/01, R.R.O. 1990, Reg. 562, including sections 1, 11, 26 and 65;~~
- ~~(f) they failed to warn Loblaws of the risk of Hepatitis A infection in a timely manner or at all; and~~
- ~~(g) such further and other particulars which may become known to the plaintiffs and which will be proven at the trial of this action and are within the knowledge of the Doe Defendants.~~

37. Further, or in the alternative, members of the Class, ~~Infected Shoppers and Uninfected Shoppers~~, including the plaintiffs, had contracts with Loblaw, an implied term of which was that Loblaw and its employees would discharge their duties with reasonable skill and care and provide food products, including the Produce, without infecting customers with or exposing them to any potentially fatal or infectious disease such as Hepatitis A. Moreover, even if the Class, including the plaintiffs, had examined the contaminated goods, there were no defects that such an examination could have revealed in the circumstances.

38. Further, the Class, ~~Infected and Uninfected Shoppers~~, including Vezina, Morrison, Wilson and Silmer had contracts with Loblaw that the produce sold to them would be fit and safe for human consumption. The Class ~~Infected Shoppers~~ unknowingly infected or exposed various family members, friends and associates to the Hepatitis A virus who in turn infected others with Hepatitis A. In addition, the Class ~~Uninfected Shoppers~~ exposed various family members, friends and associates to the risk of having been exposed to the Hepatitis A virus.

39. As a result of the negligence of the defendants and/or the breaches of contract by Loblaw, the Infected Persons ~~Shoppers~~ and the Cross-Infected Persons sustained illness, and some may die as result of their illnesses. Some of them have become carriers of Hepatitis A and are or have been a danger to their family members, friends and associates. Their damages include pain and suffering, nervous shock and mental distress, loss of income, impairment of earning ability, future care costs, medical costs, loss of amenities and enjoyment of life, and out of pocket expenses.

40. As a result of the above problems, the Family Law Claimants are entitled to damages pursuant to s. 61 of the *Family Law Act*. The damages for these proposed class members include pecuniary losses resulting from the injury or death of their family member, expenses incurred in visiting their family member during his or her treatment and recovery, a reasonable allowance for loss of income and the value of nursing, housekeeping and other services rendered to

their family member, an amount to compensate for the loss of guidance, care and companionship reasonably expected to be received from their family member if the misconduct at issue had not occurred.

41. In addition, the Class members were sent or reviewed or read or were advised of notices from public health officials or any of the defendants indicating that they may have been exposed to, or contracted, Hepatitis A or other diseases and should consult a physician or be tested or be vaccinated in relation thereto. The members of the Class sustained out-of-pocket expenses, nervous shock and mental distress, fear for their health and loss of enjoyment of life, all of which were or should have been within the reasonable contemplation of the defendants as consequences of their conduct.
42. Still further, Loblaw owes Vezina, Morrison, Wilson, Silmer and Nagy and the other Class members, in particular the Infected Shoppers and Uninfected Shoppers, reimbursement for all produce, including the Produce, purchased at the Store, and food items that come into contact with the Produce, and that was rendered unfit for human consumption by reason of exposure or potential exposure to the Hepatitis A virus.
43. Vezina, Morrison, Wilson, Silmer and Nagy plead and rely on the provisions of the *Ontario Health Insurance Act*, R.S.O. 1990, c.H-6, and include in this claim the cost of past and future insured services provided by OHIP to himself and the other Class members.
44. The defendants conducted their affairs leading to these occurrences in a high-handed and arrogant manner and with a wanton and callous disregard for customer safety. Further, the conduct of the defendants, which involved the preparation and handling of food products, such as the Produce, for human consumption, where such consumption may occur without further cooking of the Produce, created a significant public danger, contrary to the provisions of the *Health Protection and Promotion Act* and, as a result, warrants the imposition of

punitive, aggravated or exemplary damages to ensure future conduct will be in accordance with proper standards.

45. Punitive, exemplary and aggravated damages are further warranted since, during the Claim Period, the safety and well-being of the customers of the Store, including the Class members, were in the care and control of the defendants and, as a result, the Class members were in a vulnerable and special relationship relative to the defendants, as customers of the Store. The defendants failed to discharge their duties owed to the proposed class members to act in their interest and to ensure that the food products provided, including the Produce, were free from exposure to the Hepatitis A virus.
46. The defendants' conduct warrants the sanction of this Honourable Court in the form of punitive damages as the defendants conducted their affairs with wanton and callous disregard for their Class Members' safety. At all material times, the Class Members' physical well-being was in the exclusive control of the defendants. The defendants endangered the safety of the Class and were reckless.
47. Punitive, exemplary and aggravated are further warranted in the event the defendants, or any of them, knowingly endangered the safety and well-being of the proposed Class members and were reckless in relation to therein.
48. The plaintiffs propose that this action be tried in Toronto.

August 30, 2002

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VEZINA, MATTHEW et al.
Plaintiffs

v.

Court File No.: 02-CV-234964 CP
LOBLAWS SUPERMARKETS LIMITED et al.
Defendants

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceedings Commenced in Toronto

**AMENDED, AMENDED
STATEMENT OF CLAIM**

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