

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

THE HONOURABLE

)

*Tues* DAY, THE

)

JUSTICE BELOBABA

)

*8* DAY OF *December*, 2015

B E T W E E N:

ROSEMARY RITLOP and DONILDA LACKNER

Plaintiffs

- and -

STRYKER CANADA LP, STRYKER CANADA CORP., STRYKER  
CANADIAN MANAGEMENT INC., HOWMEDICA OSTEONICS  
CORPORATION c.o.b. as STRYKER ORTHOPEDICS and  
STRYKER CORPORATION

Defendants

Proceeding under the *Class Proceedings Act*, 1992

**ORDER**  
**(CERTIFICATION)**

**THIS MOTION**, made by the Plaintiffs for an order certifying the within action as a class proceeding pursuant the *Class Proceedings Act*, 1992, S.O. 1992, c.6 and appointing Rosemary Ritlop and Donilda Lackner as the Representative Plaintiffs, was heard on December 8, 2015.

**ON READING** the affidavits of the various affiants and other material filed by the parties, and on hearing the submissions of counsel for the Plaintiffs and the Defendants:

1. **THIS COURT ORDERS** that the within action be and is hereby certified as a class proceeding pursuant to the *Class Proceedings Act*, 1992 S.O. 1992, c.6.
2. **THIS COURT ORDERS** that the Class is defined as follows:

- (a) all persons who were implanted in Canada with the Stryker Rejuvenate Modular Hip System and were resident in Canada at the time of implant; and
  - (b) all other persons who, by reason of his or her relationship to one or more of the above, have standing to sue pursuant to section 61(1) of the *Family Law Act*, R.S.O. 1990, c. F3 or the equivalent legislation in other provinces and territories as set out in Schedule “A”.
- 3. **THIS COURT ORDERS** that Rosemary Ritlop and Donilda Lackner be and are hereby appointed as the Representative Plaintiffs.
- 4. **THIS COURT ORDERS** that Koskie Minsky LLP, Stevenson Whelton MacDonald & Swan LLP and Klein Lawyers be and are hereby appointed as Counsel for the Class (“Class Counsel”).
- 5. **THIS COURT ORDERS** that any other class proceeding based on the facts giving rise to this class proceeding be and is hereby stayed, and no other such proceeding may be commenced without leave of this Court.
- 6. **THIS COURT DECLARES** that the nature of the claims and relief sought on behalf of the Class are as set out in Amended Statement of Claim attached hereto as Schedule “B”.
- 7. **THIS COURT DECLARES** that the common issues are:
  - A Did the Defendants breach a duty of care in tort with respect to:
    - (i) the design of the Rejuvenate Modular Hip System?
    - (ii) the warnings for the Rejuvenate Modular Hip System?
  - B If the answer to A(i) or (ii) above is in the affirmative, how did they breach such duty?
  - C(i) Was the defendants' conduct such as to merit an award of punitive damages, subject to other considerations relevant to the question of whether any such award should be made?

C(ii) Should an award of punitive damages be made against the defendants? If so, in what amount?

8. **THIS COURT ORDERS** that common issue C(ii) above shall be determined only if there are rulings on one or both of common issues A(i) and (ii) above, and on common issue C(i) above, in favour of the Class, and after individual issues and the full amount of other damages awards are determined.
9. **THIS COURT ORDERS** that the Notice of Certification of this proceeding as a Class Proceeding attached as Schedule “C” to this order be and is hereby approved.
10. **THIS COURT ORDERS** that Class Members may opt out of this class proceeding by sending a written election to opt out, signed by him or her, to Crawford Class Action Services ("Crawford") at the address set out in the Notice of Certification. Written notice of the election to opt out must be received by Crawford within 90 days of the date of the Hospital Notice Order to be effective. For the purposes of opting out, Class Members who were implanted may use the Opt-Out Form attached as Schedule “D”.
11. **THIS COURT ORDERS** that the Explanatory Letter attached as Schedule “E” to this order be and is hereby approved.
12. **THIS COURT ORDERS** that the costs of effecting the Notice of Certification as set out in paragraph 13 below shall be paid by the Plaintiffs.
13. **THIS COURT ORDERS** that the Notice of Certification be given to the Class in the following manner, subject to further order of this Court, by:
  - (a) Class Counsel shall mail or email a copy of the Notice of Certification to all Class Members whose identities and addresses or email addresses are known to them, with a copy to their counsel if known, within 2 weeks after the date of the Hospital Notice Order.
  - (b) The Defendants will mail or email a copy of the Notice of Certification to any lawyer whom they have been notified represents a person claiming to have been implanted with a Rejuvenate Modular Hip System, within 2 weeks after the date of the Hospital Notice Order.
  - (c) The Defendants will provide Crawford within 2 weeks after the date of this Order with a list of the names and addresses of the health care institutions in

Canada to which the Defendants sold the Rejuvenate Modular Hip System ("Hospitals"), along with the Defendants' product codes or catalogue numbers for the devices.

- (d) Class Counsel will provide Crawford with copies of their motion record by December 22, 2015, for a motion returnable on March 3, 2016 before this Court, for an Order in the form attached as Schedule "F" (the "Hospital Notice Order") hereto requiring the Hospitals to mail a copy of the Notice of Certification and Explanatory Letter to the last known address the health care institution has in its records for each person implanted with a Rejuvenate Modular Hip System (the "Motion Record").
- (e) Crawford will mail a copy of such Motion Record, by Prepaid First Class Mail, to each Hospital, without disclosing the identity of the Hospitals to one another, by January 5, 2016.
- (f) Crawford will provide Class Counsel with an affidavit confirming that such Motion Record has been mailed to the Hospitals and when, but without disclosing the identities of the Hospitals, within two weeks after January 5, 2016, which affidavit shall be filed with the Court by Class Counsel.
- (g) Absent opposition from the Hospitals, an Order substantially in the form of the Hospital Notice Order shall be made, and then mailed by Crawford to the Hospitals, within 2 weeks after the date of the Hospital Notice Order.
- (h) If necessary, the Plaintiffs will seek enforcement orders in provinces outside Ontario to ensure that the Hospitals comply with the terms set out in the Hospital Notice Order within 6 weeks after the date of the Hospital Notice Order.
- (i) Additionally, Class Counsel will post a copy of the Notice of Certification to their websites, and will provide a copy of the Notice of Certification to any Class Member who requests it, within 2 weeks after the date of the Hospital Notice Order.

- 14. **THIS COURT ORDERS** that if a Class Member who was implanted with a Rejuvenate Modular Hip System opts out of this class proceeding, his or her family members shall also be deemed to have opted out.
- 15. **THIS COURT ORDERS** that no person may opt out a minor or a mentally incapable class member, other than a child of a person who was implanted with a Rejuvenate Modular Hip System in accordance with Paragraph 14 above, without the permission of the Court after notice to the Children's Lawyer and/or the Public Guardian and Trustee, as appointed.

16. **THIS COURT ORDERS** that Crawford will serve on Class Counsel and Defendants' counsel, and file with this Court, an affidavit setting out the number (but not the name or other identifying information) of persons (1) who were reported by Hospitals to have been given notice and (2) who sent a written election to opt out of the class proceeding in accordance with this order, within 30 days of the expiry of the opting-out deadline.
17. **THIS COURT ORDERS** that there shall be no costs of this motion to any party.

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Edu Belson J.

## SCHEDULE "A"

### PROVINCIAL STATUTES RE FAMILY MEMBER CLAIMS

#### ALBERTA

*Tort-feasors Act*, R.S.A. 2000 c. T-5

#### **Loss of consortium through injury**

2.1(1) When a person has, either intentionally or by neglect of some duty existing independently of contract, inflicted physical harm on a married person and thereby deprived the spouse of that married person of the society and comfort of that married person, the person who inflicted the physical harm is liable in an action for damages by the spouse or in respect of the deprivation.

2.1(2) The right of a spouse to bring the action referred to in subsection (1) is in addition to, and independent of, any right of action that the married person has, or any action that the spouse in the name of the married person has, for injury inflicted on the married person.

*The Domestic Relations Act*, R.S.A. 2000, c. D 10.5, was repealed by RSA 2003, c.F-4.5 [Family Law Act].

In addition the following Act applies:

*Fatal Accidents Act*, R.S.A. 2000, c. F-8,

2. Action for damages. When the death of a person has been caused by a wrongful act, neglect or default that would, if death had not ensued, have entitled the injured party to maintain an action and recover damages, in each case the person who would have been liable if death had not ensued is liable to an action for damages notwithstanding the death of the party injured.

Persons entitled to benefits

3(1)An action under this Act

(a) shall be for the benefit of the spouse, adult interdependent partner, parent, child, brother or sister of the person whose death has been so caused, and

(b) shall be brought by and in the name of the executor or administrator of the person deceased,

and in the action the court may give to the persons respectively for whose benefit the action has been brought those damages that the court considers appropriate to the injury resulting from the death.

3(2) If there is no executor or administrator, or if the executor or administrator does not bring the action within one year after the death of the party injured, then the action may be brought by and in the name of all or any of the persons for whose benefit the action would have been, if it had been brought by or in the name of the executor or administrator.

3(3) Every action so brought shall be for the benefit of the same persons and is as nearly as possible subject to the same regulations and procedure as if it were brought by and in the name of the executor or administrator.

#### Damages for bereavement

8(1) In this section,

(a) "child" means a son or daughter, whether legitimate or illegitimate;

(b) "parent" means a mother or father.

8(2) If an action is brought under this Act, the court, without reference to any other damages that may be awarded and without evidence of damage, shall award damages for grief and loss of the guidance, care and companionship of the deceased person of

(a) subject to subsections (3) and (4), \$75 000 to the spouse or adult interdependent partner of the deceased person,

(b) \$75 000 to the parent or parents of the deceased person if the deceased person, at the time of death,

(i) was a minor, or

(ii) was not a minor but was unmarried and had no adult interdependent partner, to be divided equally if the action is brought for the benefit of both parents, and

(c) \$45 000 to each child of the deceased person who, at the time of the death of the deceased person,

(i) is a minor, or

(ii) is not a minor but is unmarried and has no adult interdependent partner.

8(3) The court shall not award damages under subsection (2)(a) to the spouse or adult interdependent partner if the spouse or adult interdependent partner was living separate and apart from the deceased person at the time of death.

8(4) [Repealed 2002, c. A-4.5, s. 36(5)(c).]

8(5) A cause of action conferred on a person by subsection (2) does not, on the death of that person, survive for the benefit of the person's estate.

## MANITOBA

*Fatal Accidents Act*, C.C.S.M. c. F50, as amended

Similarly applicable to spouses, children and other defined family members only upon death of benefactor.

## NEW BRUNSWICK

*Fatal Accidents Act*, R.S.N.B. 1973, c.F-7

Similarly applicable to spouses, children and other defined family members only upon death of benefactor.

## NEWFOUNDLAND

*Fatal Accidents Act*, R.S.N.L. 1990, c.F-6

Similarly applicable to spouses, children and other defined family members only upon death of benefactor.

## NOVA SCOTIA

*Fatal Injuries Act*, R.S.N.S. 1989, c.163, amended 2000 c.29, ss 9-12

Similarly applicable to spouses, children and other defined family members only upon death of benefactor.

## ONTARIO

*Family Law Act*, R.S.O. 1990, c. F.3

### **Right of dependants to sue in tort**

**61. (1) If a person is injured or killed by the fault or neglect of another under circumstances where the person is entitled to recover damages, or would have been entitled if not killed, the spouse, as defined in Part III (Support Obligations), children, grandchildren, parents, grandparents, brothers and sisters of the person are entitled to recover their pecuniary loss resulting from the injury or death from the person from whom the person injured or killed is entitled to recover or would have been entitled if not killed, and to maintain an action for the purpose in a court of competent jurisdiction. R.S.O. 1990, c. F.3, s. 61 (1); 1999, c. 6, s. 25 (25); 2005, c. 5, s. 27 (28).**

### **Damages in case of injury**

**(2) The damages recoverable in a claim under subsection (1) may include,**



- (a) actual expenses reasonably incurred for the benefit of the person injured or killed;
- (b) actual funeral expenses reasonably incurred;
- (c) a reasonable allowance for travel expenses actually incurred in visiting the person during his or her treatment or recovery;
- (d) where, as a result of the injury, the claimant provides nursing, housekeeping or other services for the person, a reasonable allowance for loss of income or the value of the services; and
- (e) an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the person if the injury or death had not occurred. R.S.O. 1990, c. F.3, s. 61 (2).

#### PEI

*Fatal Accidents Act*, R.S.P.E.I 1988, c.F-5, as amended

Similarly applicable to spouses, children and other defined family members only upon death of benefactor.

#### QUÉBEC

*Civil Code of Québec* (S.Q. 1991, c. 64), Articles 454, 1457, 1607, 1609, 1614, 1615, 1616, 2926 and 2930.

#### SASKATCHEWAN

*Fatal Accidents Act*, R.S.S. 1978, c.F-11 as amended

Similarly applicable to spouses, children and other defined family members only upon death of benefactor.

SCHEDULE "B"

Court File No. CV-14-504302-OOCP

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

BETWEEN:

**ROSEMARY RITLOP and DONILDA LACKNER**

Plaintiffs

- and -

**STRYKER CANADA LP, STRYKER CANADA CORP.,  
STRYKER CANADIAN MANAGEMENT INC., HOWMEDICA  
OSTEONICS CORPORATION c.o.b. as STRYKER ORTHOPEDICS,  
and STRYKER CORPORATION**

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**AMENDED STATEMENT OF CLAIM**

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. 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 plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, 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.

Date        May        , 2014

Issued by \_\_\_\_\_  
Local registrar

Address of court office 393 University Avenue  
Toronto, ON  
M5G 1E6

TO:            Stryker Canada LP  
                 45 Innovation Drive  
                 Hamilton, ON L9H 7L8

AND TO:      Stryker Canada Corp.  
                 45 Innovation Drive  
                 Hamilton, ON L9H 7L8

AND TO :     Stryker Canadian Management Inc.  
                 1959 Upper Water Street  
                 Suite 900  
                 Halifax, NS B3J 3N2

AND TO :     Howmedica Osteonics Corporation, c.o.b. as Stryker Orthopedics  
                 325 Corporate Drive  
                 Mahwah, NJ, 07430

AND TO :     Stryker Corporation  
                 2825 Airview Boulevard  
                 Kalamazoo, MI 49002

### CLAIM

1. The Plaintiffs, Rosemary Ritlop and Donilda Lackner, claims on ~~her~~ their own behalf and on behalf of all members of the Class (as defined below):

- (a) an order certifying this action as a Class Proceeding and appointing Rosemary Ritlop and Donilda Lackner as representative Plaintiffs for the Class;
- (b) a declaration that the Defendants were negligent in the research, design, manufacture, regulatory licensing, sale and post-market monitoring of the Stryker Implants (as defined below);
- (c) a declaration that the Stryker Implants are dangerous and not fit for their intended use;
- (d) on behalf of the Class, compensatory damages in the amount of \$100,000,000.00, or such other sum as counsel may advise and this Honourable Court deems just;
- (e) special damages in an amount to be determined, including but not limited to past and future loss of income, medical care, screening, diagnosis, examinations, surgical care, and all other medical expenses, including medical expense for treatment, recovery, and medical imaging, on behalf of the Plaintiffs and the subrogated interest of the Ontario Health Insurance Plan pursuant to sections 30 and 31 of the *Health Insurance Act*, R.S.O. 1990, c. H.6, as amended, and the other provincial and territorial health insurers pursuant to the legislation in the Class members' respective provinces or territories of residence;
- (f) punitive damages in the sum of \$10,000,000.00;
- (g) on behalf of the Family Law Claimants, damages pursuant to the *Family Law Act*, R.S.O. 1990 c. F-3 ("FLA");

- (h) pre-judgment and post-judgment interest in accordance with the *Courts of Justice Act*, as amended, compounded annually;
- (i) costs of this action, including the costs of notice and of administering the plan of distribution of the recovery in this action, plus applicable taxes; and
- (j) such further and other relief as counsel may advise and this Honourable Court may deem just.

## OVERVIEW

2. On May 24, 2011, the Plaintiff, Rosemary Ritlop, was implanted with an artificial hip which was designed, manufactured, marketed, and sold by the Defendants. On October 26, 2010, the Plaintiff, Donilda Lackner, was implanted with an artificial hip which was designed, manufactured, marketed, and sold by the Defendants. The products was were defective, and the Plaintiffs has have suffered and continues to suffer severe, chronic, and debilitating injury.

3. The fundamental flaw with the Defendants' product is that it contains metal components that grind upon one another. This causes corrosion and fretting, releasing toxic metal debris into the surrounding tissue, resulting in premature component loosening, misalignment, dislocation, fracture, and ultimately, premature implant failure.

4. The Defendants sell the metal-on-metal hip implants under the brand names Stryker Rejuvenate and ABG II.

5. In June 2012, Stryker recalled the Rejuvenate and ABG II metal-on-metal hip implant devices, citing concern for fretting and corrosion at the modular-neck junction resulting in adverse local tissue reactions, pain and/or swelling at or around the hip.

6. The problems with the Defendants' products, however, are more extensive than the Defendants have so far been willing to admit.

7. The Plaintiffs brings this action on her own behalf, and on behalf of the proposed Class.

### THE PLAINTIFFS AND THE CLASS

8. The Plaintiff, Rosemary Ritlop ("Rosemary"), is a resident of Toronto, Ontario. The Plaintiff, Donilda Lackner ("Donilda"), is a resident of Toronto, Ontario. As described further below, ~~she was~~ they were implanted with a Stryker Implants.

9. The Plaintiffs brings this action on ~~her~~ their own behalf, and on behalf of the Class defined as follows:

All persons (the "Implant Patients") who were implanted in Canada with the Stryker Rejuvenate Modular Hip System ~~or the ABG II hip implant or any other Stryker metal-on-metal hip implant system~~ (collectively, the "Stryker Implants") and were resident in Canada at the time of implant, ~~or any of the Stryker Implant components including heads, necks, stems, tapers, sleeve adaptors and shells~~ (the "Implant Patients"); and

all other persons who by reason of his or her relationship to an Implant Patient have standing pursuant to s. 61(1) of the *Family Law Act*, R.S.O. 1990, c. F.3, or equivalent legislation in other provinces and territories as set out in Schedule "A" (the Family Law Claimants").

10. The Plaintiffs also brings this action on behalf of all provincial and territorial health insurers who are entitled to assert a claim for the recovery of the cost of insured services provided to members of the Class, pursuant to provincial legislation.

### THE DEFENDANTS

11. The Defendant, Stryker Canada LP, is a limited partnership registered in Ontario with its principal place of business at 45 Innovation Drive, Hamilton, Ontario.

12. The Defendant, Stryker Canada Corp., is incorporated in Nova Scotia with a registered head office at 45 Innovation Drive, Hamilton, Ontario.

13. The Defendant, Stryker Canadian Management Inc., is incorporated in Nova Scotia with a registered head office at 1959 Upper Water Street, Halifax, Nova Scotia.

14. The Defendant, Howmedica Osteonics Corp. c.o.b. as Stryker Orthopaedics ("Howmedica"), is incorporated in New Jersey with a registered business address at 325 Corporate Drive, Mahwah, New Jersey. Howmedica, is registered with Health Canada as the manufacturer of the Rejuvenate and ABG II hip implant systems.

15. The Defendant, Stryker Corporation, is incorporated in Michigan with its registered office at 28925 Airview Blvd, Kalamazoo, Michigan.

16. The Defendants are all inter-related corporations with each being the parent, subsidiary, or affiliate of the others. The Defendants, individually and/or collectively, participated in one or more of the following: the development, testing, manufacture, distribution, marketing and promotion the Stryker Implants in Canada. Stryker Canada LP, Stryker Canada Corp., Stryker Canadian Management Inc., Howmedica and Stryker Corporation are collectively referred to in this claim as "Stryker".

17. By virtue of the acts and omissions described herein, the Defendants are liable in damages or other compensation to the Class and each Defendant is responsible for the acts and omissions of the other Defendant for the following reasons:

- (a) each was the agent of the ~~agent~~ other;
- (b) each company's business was operated so that it was inextricably interwoven with the business of the other;
- (c) each company entered into a common advertising and business plan to research, design, test, manufacture, distribute, market and sell the Stryker Implants in Canada;

- (d) the companies issued joint annual reports and consolidated financial statements, which included the statements of the Stryker group of companies and all of its wholly owned subsidiaries;
- (e) the Defendants shared certain executive officers and directors;
- (f) the Defendants had a common business plan and intended that their businesses be run as one global business organization; and
- (g) they carried out the improper acts as pleaded below.

18. The Defendants are joint tortfeasors. They each knew, or ought to have known, that the Stryker Implants were defective, and they each were in such a close and proximate relationship to the Plaintiffs and Class members as to owe them a duty of care. They each could have, but failed to take, reasonable steps to have prevented injury to the Plaintiffs and Class members, including ensuring that the Stryker Implants were properly designed, tested and manufactured before marketing it, promptly recalling the Stryker Implants, and properly warning consumers of the risk of harm.

## **THE IMPLANTED DEVICES**

### **i. The Hip Joint**

19. The hip joint connects the thigh (femur) bone of a patient's leg to the patient's pelvis. The hip joint is like a ball that fits into a socket. The socket portion of the hip is called the acetabulum. The femoral head at the top of the femur bone rotates within the curved surface of the acetabulum.

20. In a healthy hip, both the femur and the acetabulum are strong and the rotation of the bones against each other is cushioned and lubricated by cartilage and fluids.

21. Over time, the cartilage of the hip joint is broken down by age and wear. In a diseased or otherwise damaged hip joint, the femur and acetabulum lack this necessary



protection and begin to rub against each other, eventually grinding down the bones and causing significant pain, loss of function and immobility.

## **ii. Hip Implants**

22. Hip implants have been used for more than 40 years. When designed properly, they are an effective treatment for arthritis and other degenerative diseases and injuries to the hip joint.

23. Hip implants mimic the hip joint, and generally consist of the following components: a femoral neck inserted inside the femur bone; a stem connecting the femoral neck with the femoral head; a femoral head (or ball) connected to the top of the stem; a liner which makes contact with the ball; and an acetabular cup which is implanted in the pelvis, connected to the liner, which provides the socket in which the ball rotates.

24. The femoral neck and stem may be constructed from one component, or they may be constructed from several femoral neck and stem components. The one-component design is referred to as a monoblock design, and the multi-component design is referred to as a modular design.

25. A properly designed hip implant, which avoids metal-on-metal components, may be reasonably expected to last for many years, and potentially for the remainder of the patient's lifetime.

## **iii. Metal-on-Metal Hip Implants**

26. A metal-on-metal implant uses metal components that come into contact with one another. This metal contact may take place between a metal femoral head and metal liner, or it may take place between the modular components in the metal femoral neck and the metal stem of a modular device.

27. Metal-on-metal hip implants have an unreasonable propensity to fret and corrode, releasing heavy debris into the surrounding tissue, causing premature component loosening, misalignment, dislocation, fracture, and implant failure.

28. Problems with metal-on-metal designs have been known since the 1970s.

**iv. The Stryker Implants**

29. The Stryker Implants were advertised as non-metal-on-metal. This is because the Stryker Implants are not crafted entirely of metal. Unlike some metal-on-metal hip implants, the Stryker Implants do not have a metal femoral head that rubs against a metal liner.

30. However, advertising the Stryker Implants as non-metal-on-metal was false and deceptive.

31. The Stryker Implants include modular neck and stem components that are both made of metal. These separate metal components in the femoral neck and stem come into contact and rub against each other causing friction. In this manner, the Stryker Implants are metal-on-metal hip implants.

32. The Stryker Implants all shared common defective design characteristics that made them susceptible to early failure and to cause serious adverse effects in patients.

33. The Stryker Implants are defective because their metal components have an unreasonable propensity to fret and corrode, releasing heavy debris into the surrounding tissue, causing premature component loosening, misalignment, dislocation, fracture, and implant failure.

34. The failure of a hip implant is a serious medical event. The adverse effects experienced, as a result of the Stryker Implants, are painful and debilitating. Treatment

may require removal of the implant, and its replacement with another device. This procedure is referred to as revision surgery.

35. In addition to causing premature hip implant failure, corrosion and fretting of a metal hip implant may also cause serious adverse effects in patients. Metal debris is released into the surrounding tissue. Such heavy metals can be toxic, and may cause, *inter alia*, tissue necrosis, metallosis, pseudotumours, bone dislocation and failure of the hip joint.

36. Revision surgery is a difficult procedure. When a patient is revised, there may be less bone and tissue to support a replacement implant. Revision surgery carries with it a substantial risk of serious complications and disability.

37. In June 2012, Stryker issued a recall of its Rejuvenate and ABG II devices, citing concerns for fretting and corrosion at the nodular-neck junction, which may result in adverse local tissue reactions, and the possibility of pain and/or swelling at or around the hip.

38. Prior to the recall, the Defendants were aware of problems with the Stryker Implants, but they represented to the medical community in Canada through promotional literature and through training of their sales force that the Stryker Implants were safer than other metal-on-metal hip implants, and that they had avoided design problems seen in other metal-on-metal hip implants.

39. Since the recall notice, the Defendants have advised patients who experience persistent pain following implantation with the Stryker Implants to undergo medical evaluation, including x-rays and MRIs, and a blood test to check for the presence of heavy metals released into the body.

## **THE PLAINTIFF'S' EXPERIENCES**

40. The Plaintiff Rosemary was implanted with the Rejuvenate hip implant system on May 24, 2011 at St. Michael's Hospital in Toronto.

41. Rosemary's Rejuvenate implant has suffered from fretting and corrosion causing cobalt and chromium metal to be released into her bodily tissue surrounding her Rejuvenate implant.

42. Rosemary's blood work indicates elevated levels of titanium and cobalt chrome.

43. Particulars of the damage sustained by Rosemary include:

- (a) symptoms of autonomic system dysfunction, with cold and hot sweats and temperature intolerance;
- (b) the inability to regulate the temperate of her entire right leg;
- (c) intermittent swelling, discoloration, and hypersensitivity of her hip and leg;
- (d) chronic regional pain syndrome;
- (e) difficulties with her overall nutritional status since she is often not able to eat food, resulting in the necessity of protein supplements;
- (f) the inability to bear weight independently, and the corresponding requirement of the use of walking devices including a walker, canes, and auxiliary crutches;
- (g) dependency on auxiliary crutches for outdoor walking, and on a walker for indoor walking.
- (h) at times, a total inability to walk and the corresponding use of a wheelchair;
- (i) the inability to sit for extended periods;

- (j) dependence on her husband and children for all aspects of her personal care due to the severity of pain in her hip;
- (k) fatigue;
- (l) psychological illness, including anxiety episodes with panic and depression due to her inability to engage in her normal lifestyle; and
- (m) relationships with her family and friends have suffered due to her lack of mobility, her pain and her medications.

44. Rosemary requires the use of various medications to treat her pain, but these only provide her with minimal relief.

45. Prior to her hip implant, Rosemary was a full-time teacher in an elementary school. Rosemary has been unable to work since receiving her hip implant. Rosemary has suffered and will continue to suffer lost employment income and benefits and lost opportunity to earn income as a result of the Defendants' negligence.

46. Rosemary will require extensive medical monitoring as a result of her hip implant and the Defendants' negligence. In addition, Rosemary has been put to significantly higher risk of future medical complications.

47. Rosemary requires a new hip implant, however, due to the pain and complications experienced by Rosemary as a result of the Rejuvenate hip implant system, Rosemary may be unable to undergo surgical intervention to replace the device.

48. By letter dated September 6, 2012, Rosemary was informed by her surgeon that the Rejuvenate hip implant she received had been subject to a recall notice due to fretting and corrosion. Rosemary was not aware of the recall of the Rejuvenate hip implant system by Health Canada or any problems with fretting and corrosion until she was informed by her surgeon on September 6, 2012.

49. Rosemary was not warned of the true risks associated with the use of the Rejuvenate hip implant system. Had she been so advised, she would have refused this medical product and insisted on a safer alternative treatment. But for the Defendants' negligence and unlawful conduct she would not have suffered her injuries and incurred her damages.

50. Rosemary's family and other Family Law Claimants have suffered and continue to suffer damages, including loss of income due to work absences required to attend to, care for and provide services to Class members, loss of care, guidance and companionship and expenses and special damages from loss of services formerly provided by Class members.

51. The Plaintiff Donilda was implanted with the Rejuvenate hip implant system on October 26, 2010 at Rouge Valley Centenary.

52. Donilda's Rejuvenate implant has suffered from fretting and corrosion causing cobalt and chromium metal to be released into her bodily tissue surrounding her Rejuvenate implant due to the defective design characteristics. Donilda's Rejuvenate implant has caused tremendous muscle deterioration, bone loss, and the growth of pseudotumours.

53. As a result of muscle deterioration, bone loss and pseudotumours, Donilda experienced a dislocation and catastrophic fall fracturing her acetabulum and causing the need for revision surgery to replace the Rejuvenate device. On March 17, 2015, Donilda's Rejuvenate device was removed and replaced.

54. Donilda's revision surgery was long and complicated. Much of the muscle surrounding her hip was not viable and was necrotic. There were no soft tissue attachments of the abductor mechanism to the greater tuberosity (a part of the humerus). The entire gluteus medius and gluteus minimus (two of the gluteal muscles) were necrotic and no longer attached to the greater trochanter (part of the femur). Most of the

gluteus maximus was also necrotic. It no longer had a healthy pink appearance and it appeared to be dead muscle which did not bleed when it was cut.

55. The actual bone in the greater tuberosity was also necrotic. Much of the proximal aspect of the vastus lateralis (part of the quadriceps muscle) had detached and was also necrotic. Most of Donilda's hip musculature was removed.

56. There was evidence of gross corrosion both at the neck and the housing mechanism of Donilda's Rejuvenate implant, with black material extending into the housing mechanism itself and the femoral head and neck junction.

57. Following the revision surgery, Doilda experienced enduring and intense pain. She was confined to her hospital bed for almost 4 months and could not walk during this time.

58. Particulars of the damage sustained by Donilda include:

- (a) the requirement to ensure a long and painful surgery;
- (b) the requirement to endure a lengthy hospital stay requiring total bed rest;
- (c) severe limitations on her ability to walk;
- (d) a limited appetite;
- (e) the inability to care for herself and a dependence on others to help her bathe, clean her apartment and to launder her clothes;
- (f) the requirement to take pain medication;
- (g) psychological illness, including anxiety and depression; and
- (h) relationships with her family and friends have suffered due to her lack of mobility, her pain and her medications.

59. Prior to her revision surgery, Donilda was an active volunteer at a private school and a soup kitchen, walked her dog, and often visited with friends. Donilda is no longer able to perform these tasks.

60. Donilda will require extensive medical monitoring as a result of her hip implant and the Defendants' negligence. In addition, Donilda has been put to significantly higher risk of future medical complications.

61. Donilda was not warned of the true risks associated with the use of the Rejuvenate hip implant system. Had she been so advised, she would have refused this medical product and insisted on a safer alternative treatment. But for the Defendants' negligence and unlawful conduct she would not have suffered her injuries and incurred her damages.

62. Donilda's family and other Family Law Claimants have suffered and continue to suffer damages, including loss of income due to work absences required to attend to, care for and provide services to Class members, loss of care, guidance and companionship and expenses and special damages from loss of services formerly provided by Class members.

## **THE DEFENDANT'S NEGLIGENCE**

### **(A) The Duty of Care**

63. The Defendants owed to the Plaintiffs and the Class a duty of care:

- (a) to properly design, manufacture, and test the Stryker Implants;
- (b) to label, market, distribute and sell the Stryker Implants and to ensure they were safe and free from defects prior to labelling, marketing, distributing and selling them;



- (c) to ensure that the Stryker Implants were fit for their intended or reasonably foreseeable use prior to labelling, marketing, distributing and/or selling them;
- (d) to properly supervise its employees and consultants;
- (e) to monitor, investigate, evaluate and follow up on adverse reactions to the use of the Stryker Implants throughout the world;
- (f) to warn the Plaintiffs and the Class that the Stryker Implants carried a significant risk of premature component loosening, misalignment, dislocation and fracture, and a significant risk of metal debris in the hip socket or related complaints, including metallosis and aseptic lymphocyte dominated vasculitis-associated lesion (commonly known as "ALVAL");
- (g) to ensure that physicians and surgeons were kept fully and completely informed of all risks associated with using the Stryker Implants, including the excessive risk of premature component loosening, misalignment, dislocation, fracture, and failure, the excessive risk of contracting metallosis and ALVAL and the excessive risk that the implant would have to be replaced in significantly less than 15 years;
- (h) to properly and promptly inform Health Canada and other regulatory agencies of the changing and increasing risks associated with using the Stryker Implants; and
- (i) to provide clear and proper instructions to physicians and patients, including precautions to be taken, so as to avoid injury or damage from the Stryker Implants.

**(B) Breach of Duty**

**(i) Defective Design and Insufficient Testing**

64. The Defendants breached their duty of care to the Plaintiffs and the Class as described above with respect to the design of the Stryker Implants as follows:

- (a) they improperly designed the Stryker Implants, causing them to fail well before the natural life cycle of non-metal-on-metal hip implants;
- (b) they failed to properly train and supervise their employees who were responsible for the assembly and manufacturing of the Stryker Implants;
- (c) they failed to conduct adequate tests and clinical trials initially and on an ongoing basis to determine whether the design of the Stryker Implants was defective, thereby increasing the risks of injury and harm associated with the use of the Stryker Implants;
- (d) they failed to conduct adequate tests and clinical trials initially and on an ongoing basis to determine the long term effects and degree of risk associated with using the Stryker Implants;
- (e) they were aware or ought to have been aware that the Stryker Implants were unfit and defective and ought not to have been introduced into the market place;
- (f) they failed to provide proper long-term investigations of the effects and risks of continued use of the Stryker Implants; and
- (g) they failed to fix the defects in the Stryker Implants as soon as possible after they became aware of the defects and the injuries and risks associated with their use, or to withdraw the Stryker Implants from the marketplace as soon as possible after they

became aware of the defects and the injuries and risks associated with their use.

**(ii) Defective Manufacturing**

65. The Defendants breached their duty of care to the Plaintiffs and the Class with respect to the manufacturing and assembly of the Stryker Implants as follows:

- (a) they failed to assemble and manufacture the Stryker Implants so they would operate safely and effectively without exposing their consumers to undue risks;
- (b) they used inappropriate materials to manufacture the Stryker Implants;
- (c) they failed to properly train and supervise their employees who were responsible for the assembly and manufacturing of the Stryker Implants; and
- (d) they failed to properly supervise their employees and consultants involved in the assembly and manufacture of the Stryker Implants.

**(iii) Failure to Warn**

66. The Defendants breached their duty of care to the Plaintiffs and the Class with respect to their duty to warn of the defects in the design and manufacture of the Stryker Implants as follows:

- (a) they failed to properly label, distribute, market and sell the Stryker Implants and failed to ensure they were safe and free from defects prior to selling or distributing them;

- (b) they failed to ensure that the Stryker Implants were fit for their intended or reasonably foreseeable use prior to labelling, marketing, distributing and selling them;
- (c) they failed to properly train and supervise their employees and consultants involved in labelling, marketing, distributing and selling them;
- (d) they were aware or ought to have been aware that the Stryker Implants were unfit and defective and ought not to have been introduced into the market place;
- (e) they labelled, marketed, distributed and sold the Stryker Implants without adequately disclosing the risks associated with using the Stryker Implants;
- (f) they failed to give Health Canada complete and accurate information concerning the Stryker Implants by failing to disclose the problems with the Stryker Implants on a timely basis or at all;
- (g) the failed to properly and promptly inform Health Canada and other regulatory agencies of the changing and increasing risks associated with using the Stryker Implants;
- (h) they failed to adequately warn the Plaintiffs, the Class and their physicians and surgeons of all the risks then known or which were reasonably foreseeable in using the Stryker Implants;
- (i) with knowledge that the Stryker Implants posed significant risk of premature failure, of contracting metallosis and ALVAL, of a significant risk of premature component loosening, misalignment, dislocation and fracture, and that the implants would have to be replaced in significantly less than 15 years, they failed to warn the Plaintiffs and the Class and instead continued to sell, market and distribute the Stryker Implants throughout Canada;

- (j) they failed to warn the Class and their physicians and surgeons about the need for comprehensive regular medical monitoring to ensure early discovery of complications from the use of the Stryker Implants set out above;
- (k) they failed to adequately monitor, evaluate, follow up and act promptly upon adverse reactions and high revision rates in Stryker Implants in Canada and throughout the world;
- (l) they failed to establish any adequate procedures to educate their sales representatives respecting the risks associated with the Stryker Implants;
- (m) they continued to distribute and sell the Stryker Implants notwithstanding that the FDA and Health Canada had received numerous complaints involving patients with Stryker Implants;
- (n) they failed to promptly recall the Stryker Implants; and
- (o) they failed to provide clear and proper instructions to physicians and patients, including precautions to be taken, so as to avoid injury or damage from the Stryker Implants.

67. The defects and risks associated with the Stryker Implants were in the Defendants' exclusive knowledge and control. The extent of the defects and risks was not known and could not have been known to the Plaintiffs or the class. The injuries of the Plaintiffs and the Class would not have occurred but for the negligence of the Defendants in failing to ensure that the Stryker Implants were safe for use or, in the alternative, for failing to provide an adequate warning of the risks associated with the Stryker Implants to the Plaintiffs, the Class and to their physicians.

68. The Defendants were aware or ought to have been aware of the high degree of complication and failure rates associated with the Stryker Implants from the outset.

69. The Defendants were aware or ought to have been aware of the defects in the manufacture and design from the outset.

**(C) Regulatory Duties**

70. The Plaintiffs pleads and rely upon the following statutes and regulations which were breached by the Defendants:

- (a) *Food and Drugs Act*, R.S.C. 1985, c. F-27, s.20(1); and
- (b) the *Medical Devices Regulations*, SOR/98-282, s. 9, 10-13, 15-18, 59- 61.1 and 64-65.1.

71. The Defendants' common law duties are informed by the *Medical Devices Regulations*, SOR/98-282. Pursuant to those regulations, each of the Defendants is a "manufacturer". They designed and assembled the Stryker Implants, attached their trade name to it, labelled it and assigned it a purpose.

72. The regulations impose continuous obligations on the Defendants, commencing at licensing and continuing thereafter. They require the Defendants to ensure the safety of the Stryker Implants before selling them, and to continuously monitor the safety of the Stryker Implants thereafter, monitoring any complaints from doctors, hospitals and patients, keeping up with any new developments in the scientific literature, conducting further testing as necessary, and promptly taking corrective actions, including issuing a warning or recall, if new information becomes available which later alters the Stryker Implants' risk profile.

73. Pursuant to s. 9 of the *Medical Devices Regulations*, the Defendants were required to maintain objective evidence to establish the safety of the Stryker Implants. The Defendants breached this section. They failed to adequately obtain such information before licencing and they failed to promptly update such information thereafter.

74. Pursuant to s. 10 of the *Medical Devices Regulations*, the Defendants were required to identify the risks of the Stryker Implants, to eliminate or reduce those risks if possible, and to provide safety information with the Stryker Implants concerning those risks which remained. The Defendants breached this section. They failed to eliminate the risk that the Stryker Implants would prematurely fail and cause injury, and they failed to warn against this risk.

75. Pursuant to s. 11 of the *Medical Devices Regulations*, the Defendants were required to assess the risks of the Stryker Implants against their benefit, and to not sell a product whose risks outweigh its benefits. The Defendants breached this section. The risk of the Stryker Implants outweighed their benefits.

76. Pursuant to s. 12 of the *Medical Devices Regulations*, the Defendants were required to ensure that the Stryker Implants were effective for the uses for which they were represented. The Defendants breached this section. The Stryker Implants were not effective.

**(D) Causation**

77. The Plaintiffs plead that they and the other Class members would not have had the Stryker Implants implanted had they been aware of the true risks and defects. There were safer, economically feasible alternative implants available in the marketplace. The propensity of the Stryker Implants to injure those who were implanted far outweighed any value to their use. In fact, there was no value to their use.

78. The Defendants' negligence in the design, manufacture and selling of the defective Stryker Implants led to the damages sustained by the class.

**(E) Damages**

79. The Plaintiffs and the Class have suffered and will continue to suffer damages as a direct result of the Defendants' negligence including, but not limited to:

- (a) enduring or having to endure painful medical procedures to implant the Stryker Implants;
- (b) enduring or having to endure painful medical procedures to explant the Stryker Implants;
- (c) enduring or having to ensure painful medical procedures to implant new hip replacement systems that are free of defects;
- (d) personal injury, including immobility, pain, inflammation, swelling, scarring, pseudo-tumours and other adverse effects and complications associated with the Stryker Implants and the adverse effects of the diseases which necessitated the implant of the Stryker Implants in the first place;
- (e) severe emotional distress related to the pain and suffering associated with defective Stryker Implants;
- (f) psychological injury and illness;
- (g) the risk of death or other serious injuries;
- (h) costs associated with replacing the Stryker Implants;
- (i) costs associated with monitoring the Stryker Implants;
- (j) out-of-pocket expenses incurred by the Class Members or for their benefit; and
- (k) loss of income.

80. Members of the Class who do not require revision surgeries to remove their Stryker Implants will nonetheless suffer damages from the cost of additional monitoring of their Stryker Implants, including, but not limited to, frequent physician visits, blood tests, diagnostic imaging and will suffer physical, psychiatric and psychological injuries as well.



81. The Plaintiffs and the other Class Members have suffered injuries which are permanent and lasting in nature, including diminished enjoyment of life as well as the need for lifelong medical treatment, monitoring and/or medications.

82. As a result of the Defendants' conduct described above, the Family Law Claimants have suffered damages, including, but not limited to:

- (a) actual expenses reasonably incurred for the benefit of Class Members;
- (b) travelling expenses incurred while visiting Class Members during treatment or recovery;
- (c) loss of income or the value of services provided for Class Members where services, including nursing and housekeeping, have been provided; and
- (d) compensation for loss of support, guidance, care and companionship that they might reasonably have expected to receive from Class Members.

83. All relevant provincial and territorial health insurers have incurred expenses with respect to the purchase of the Stryker Implants and the medical treatment of the Plaintiffs and the Class as a result of the Defendants' negligence. Consequently, the health insurers have suffered and will continue to suffer damages for which they are entitled to be compensated by virtue of their direct right of action or right of subrogation in respect of all past and future insured services. This action is maintained on behalf of all provincial and territorial health insurers.

84. The above described damages were foreseeable as a result of the Defendants' actions.

**(F) Punitive Damages**

85. The Plaintiffs claim punitive damages as a result of the egregious, outrageous and unlawful conduct of the Defendants and, in particular, their callous disregard for the health and lives of vulnerable patients in Canada. In particular, the Defendants' conduct in continuing to manufacture and/or market, sell and distribute the Stryker Implants after obtaining knowledge they were failing and not performing as represented and intended showed complete indifference to or a conscious disregard for the safety of others justifying an award of punitive damages in a sum which will serve to deter the Defendants from similar conduct in the future.

**REAL AND SUBSTANTIAL CONNECTION WITH ONTARIO**

86. The Plaintiffs plead that this action has a real and substantial connection with Ontario because, among other things:

- (a) the Defendants distribute and sell their products in Ontario and derive substantial revenue from such sales;
- (b) the Defendant, Stryker Canada Corp.'s head office is in Hamilton, Ontario;
- (c) the application to Health Canada for permission to market the Stryker Implants in Canada was made in Ottawa, Ontario;
- (d) the defendants hold the licence to patents for the Stryker Implants which patents are registered with the Canadian Intellectual Property Office in Ottawa;
- (e) the trademarks for the Rejuvenate and ABG II were registered with the Canadian Intellectual Property Office in Ottawa;
- (f) the Defendants advertised their products, including the Stryker Implants, in Ontario;
- (g) the tort was committed in the province;

- (h) the Plaintiffs and other Class members were implanted with their Stryker Implants and sustained consequent damages in Ontario; and
- (i) the Defendants, are necessary and proper parties to the action.

87. The Plaintiffs plead and rely on s. 17.02(g), (h), (o) and (p) of the *Rules of Civil Procedure* permitting service outside Ontario in respect of the foreign Defendants.

88. The Plaintiffs pleads and relies upon the following health care statutes with respect to those subrogated claims of Class members:

- (a) *Health Insurance Act*, R.S.O. 1990, c.11-6;
- (b) *Health Care Cost Recovery Act*, S.B.C. 2008, c.27;
- (c) *Alberta Health Care Insurance Act*, R.S.A. 200, c.A-20;
- (d) *Hospitals Act*, R.S.A. 2000, c. 11;
- (e) *Department of Health Act*, R.S.S. 1978, D-17;
- (f) *Health Services Insurance Act*, C.C.S.M., C.1135;
- (g) *Hospital Services Act*, R.S.N.B. 1973, c.11-9;
- (h) *Health Services and Insurance Act*, R.S.N.S. 1989, c.197;
- (i) *Hospital and Diagnostic Services Insurance Act*, R.S.P.E.I. 1988, c. H-8;
- (j) *Hospital Insurance Agreement Act*, R.S.N.I. 1990, c.11-7;
- (k) *Hospital Insurance and Health and Social Services Administration Act*, R.S.N.W.T. 1988, c.T-3; and
- (l) *Hospital Insurance Services Act*, R.S.Y. 2002, c.112.

May 15, 2014

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**SCHEDULE "A"**  
**PROVINCIAL STATUTES RE FAMILY MEMBER CLAIMS**

**ALBERTA**

*Tort-feasors Act*, R.S.A. 2000 c. T-5

**Loss of consortium through injury**

2.1(1) When a person has, either intentionally or by neglect of some duty existing independently of contract, inflicted physical harm on a married person and thereby deprived the spouse of that married person of the society and comfort of that married person, the person who inflicted the physical harm is liable in an action for damages by the spouse or in respect of the deprivation.

2.1(2) The right of a spouse to bring the action referred to in subsection (1) is in addition to, and independent of, any right of action that the married person has, or any action that the spouse in the name of the married person has, for injury inflicted on the married person.

*The Domestic Relations Act*, R.S.A. 2000, c. D 10.5, was repealed by RSA 2003, c.F-4.5 [Family Law Act].

In addition the following Act applies:

*Fatal Accidents Act* , R.S.A. 2000, c. F-8,

2. Action for damages. When the death of a person has been caused by a wrongful act, neglect or default that would, if death had not ensued, have entitled the injured party to maintain an action and recover damages, in each case the person who would have been liable if death had not ensued is liable to an action for damages notwithstanding the death of the party injured.

Persons entitled to benefits

3(1)An action under this Act

(a) shall be for the benefit of the spouse, adult interdependent partner, parent, child, brother or sister of the person whose death has been so caused, and

(b) shall be brought by and in the name of the executor or administrator of the person deceased,

and in the action the court may give to the persons respectively for whose benefit the action has been brought those damages that the court considers appropriate to the injury resulting from the death.

3(2) If there is no executor or administrator, or if the executor or administrator does not bring the action within one year after the death of the party injured, then the action may be brought by and in the name of all or any of the persons for whose benefit the action would have been, if it had been brought by or in the name of the executor or administrator.

3(3) Every action so brought shall be for the benefit of the same persons and is as nearly as possible subject to the same regulations and procedure as if it were brought by and in the name of the executor or administrator.

#### Damages for bereavement

8(1) In this section,

(a) "child" means a son or daughter, whether legitimate or illegitimate;

(b) "parent" means a mother or father.

8(2) If an action is brought under this Act, the court, without reference to any other damages that may be awarded and without evidence of damage, shall award damages for grief and loss of the guidance, care and companionship of the deceased person of

(a) subject to subsections (3) and (4), \$75 000 to the spouse or adult interdependent partner of the deceased person,

(b) \$75 000 to the parent or parents of the deceased person if the deceased person, at the time of death,

(i) was a minor, or

(ii) was not a minor but was unmarried and had no adult interdependent partner, to be divided equally if the action is brought for the benefit of both parents, and

(c) \$45 000 to each child of the deceased person who, at the time of the death of the deceased person,

(i) is a minor, or

(ii) is not a minor but is unmarried and has no adult interdependent partner.

8(3) The court shall not award damages under subsection (2)(a) to the spouse or adult interdependent partner if the spouse or adult interdependent partner was living separate and apart from the deceased person at the time of death.

8(4) [Repealed 2002, c. A-4.5, s. 36(5)(c).]

8(5) A cause of action conferred on a person by subsection (2) does not, on the death of that person, survive for the benefit of the person's estate.

## **MANITOBA**

*Fatal Accidents Act*, C.C.S.M. c. F50, as amended

Similarly applicable to spouses, children and other defined family members only upon death of benefactor.

## **NEW BRUNSWICK**

*Fatal Accidents Act*, R.S.N.B. 1973, c.F-7

Similarly applicable to spouses, children and other defined family members only upon death of benefactor.

## **NEWFOUNDLAND**

*Fatal Accidents Act*, R.S.N.L. 1990, c.F-6

Similarly applicable to spouses, children and other defined family members only upon death of benefactor.

## **NOVA SCOTIA**

*Fatal Injuries Act*, R.S.N.S. 1989, c.163, amended 2000 c.29, ss9-12

Similarly applicable to spouses, children and other defined family members only upon death of benefactor.

## **ONTARIO**

*Family Law Act*, R.S.O. 1990, c. F.3

### **Right of dependants to sue in tort**

61. (1) If a person is injured or killed by the fault or neglect of another under circumstances where the person is entitled to recover damages, or would have been entitled if not killed, the spouse, as defined in Part III (Support Obligations), children, grandchildren, parents, grandparents, brothers and sisters of the person are entitled to recover their pecuniary loss resulting from the injury or death from the person from whom the person injured or killed is entitled to recover or would have been entitled if not killed, and to maintain an action for the purpose in a court of competent jurisdiction. R.S.O. 1990, c. F.3, s. 61 (1); 1999, c. 6, s. 25 (25); 2005, c. 5, s. 27 (28).

### **Damages in case of injury**

(2) The damages recoverable in a claim under subsection (1) may include,  
(a) actual expenses reasonably incurred for the benefit of the person injured or

killed;

(b) actual funeral expenses reasonably incurred;

(c) a reasonable allowance for travel expenses actually incurred in visiting the person during his or her treatment or recovery;

(d) where, as a result of the injury, the claimant provides nursing, housekeeping or other services for the person, a reasonable allowance for loss of income or the value of the services; and

(e) an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the person if the injury or death had not occurred. R.S.O. 1990, c. F.3, s. 61 (2).

## **PEI**

*Fatal Accidents Act*, R.S.P.E.I 1988, c.F-5, as amended

Similarly applicable to spouses, children and other defined family members only upon death of benefactor.

## **QUÉBEC**

*Civil Code of Québec* (S.Q. 1991, c. 64), Articles 454, 1457, 1607, 1609, 1614, 1615, 1616, 2926 and 2930.

## **SASKATCHEWAN**

*Fatal Accidents Act*, R.S.S. 1978, c.F-11 as amended

Similarly applicable to spouses, children and other defined family members only upon death of benefactor.



## **SCHEDULE "B"**

### **LEGISLATION**

#### **1. NORTHWEST TERRITORIES**

*Hospital Insurance and Health and Social Services Administration Act*,  
R.S.N.W.T. 1988, c. T-3,

Current to Gazette Vol. XXVII:10 (October 31, 2006)

##### **Section 19**

##### **19(1) Subrogation**

Where insured services have been provided to an insured person in respect of an injury resulting from a wrongful act or omission of another, the Minister is subrogated to the rights of the insured person against any other person for the recovery of the full amount of the cost of providing the insured services.

##### **19(2) Enforcement**

The Minister may enforce the rights subrogated under subsection (1) by

(a) bringing an action in the name of the Minister or in the name of the insured person; and

(b) effecting a settlement at such time and for such amount as the Minister considers appropriate.

R.S.N.W.T. 1988, c. 126 (Supp.), s. 10; 2002, c. 17, s. 6 (Sched. F, item 4)

#### **2. NUNAVUT**

*Hospital Insurance and Health and Social Services Administration Act*,  
R.S.N.W.T. 1988, c. T-3

Current to Gazette Vol. 8:10 (October 31, 2006)

##### **19(1) Subrogation**

Where insured services have been provided to an insured person in respect of an injury resulting from a wrongful act or omission of another, the Minister is subrogated to the rights of the insured person against any other person for the recovery of the cost of the insured services provided.

### **19(2) Enforcement**

The Minister may enforce the rights subrogated under subsection (1) by

- (a) bringing an action in the name of the Minister or in the name of the insured person; and
- (b) effecting a settlement at such time and for such amount as the Minister considers appropriate.

R.S.N.W.T. 1988, c. 126 (Supp.), s. 10

## **3. YUKON**

*Hospital Insurance Services Act*, R.S.Y. 2002, c. 112,

Current to Gazette Vol. 25:10 (October 15, 2006)

### **10. Subrogation**

On the provision of insured services to an insured person in respect of an injury resulting from a wrongful act or omission of another person, the Government of the Yukon shall be subrogated to all rights of the injured person for the purpose of recovering the cost of those insured services, and may bring an action either in its own name or in the name of the insured person for the recovery of the amount thereof and effect a settlement of the claim.

## **4. BRITISH COLUMBIA**

*Hospitals Insurance Act*, R.S.B.C. 1996, c. 204 [en. 1994, c. 37, s.4; am. 1996, c.24, s.1(3)]

Current to Gazette Vol. 49:19 (October 20, 2006)

### **25. Third party liability**

**25(1)** If, as a result of the wrongful act or omission of another, a beneficiary suffers personal injuries for which the beneficiary receives hospital services paid for by the government, the beneficiary has the same right to recover the sum paid for the services against the person guilty of the wrongful act or omission as the beneficiary would have had, had the beneficiary been required to pay for the services personally.

**25(2)** On the beneficiary recovering the sum or part of it under subsection (1), the beneficiary must pay it at once to the minister.

**25(3)** The minister may order that a commission be paid for money recovered under subsection (1) and the amount of the commission and the conditions under

which it may be paid must be in accordance with the rules prescribed by the Lieutenant Governor in Council.

**25(4)** The government is subrogated to the rights of the beneficiary to recover sums paid for hospital services by the government, and an action may be maintained by the government, either its name or the name of the beneficiary, for the recovery of the sum paid for hospital services as provided in subsection (1).

**25(5)** It is not a defence to an action brought by the government under subsection (4) that a claim for damages has been adjudicated on unless the claim included a claim for the sum paid for hospital services, and it is not a defence to an action brought by a beneficiary for damages for personal injuries that an action taken by the government under subsection (4) has been adjudicated on.

**25(6)** No release or settlement of a claim or judgment based on a cause of action for damages for personal injuries in a case where the injured person has received hospital services paid for is binding on the government unless the minister or a person designated by the minister has approved the settlement in writing.

**25(7)** The Lieutenant Governor in Council may, by regulation, limit or define the circumstances that give rise to a cause of action under this section.

**25(8)** This section applies to claims for hospital services arising after a day to be set by the Lieutenant Governor in Council.

R.S.B.C. 1996 (Supp.), c. 204, s. 10

## **5. ALBERTA**

*Hospitals Act*, R.S.A. 2000, c. H-12

### **Part 5 – Crown's Right to Recover Health Costs**

#### **Division 1 – Crown's Right of Recovery**

##### **s 62. Crown's right of recovery**

**62(1)** If a beneficiary receives health services for personal injuries suffered as a result of a wrongful act or omission of a wrongdoer, the Crown has the right to recover from the wrongdoer the Crown's cost of health services

(a) for health services that the beneficiary has received for those personal injuries, and

(b) for health services that the beneficiary will likely receive in the future for those personal injuries.

**62(2)** If a beneficiary is contributorily negligent, the Crown is entitled to recover 100% of the Crown's cost of the beneficiary's health services less a percentage

for the beneficiary's contributory negligence as determined under sections 63 and 64.

**62(3)** Notwithstanding this Division, the Crown does not have a right to recover the Crown's cost of health services provided to a beneficiary if

- (a) the beneficiary's personal injuries are caused by an act or omission of a wrongdoer in the use or operation of an automobile, and
- (b) the wrongdoer is, when the injuries are caused, insured under a motor vehicle liability policy.

## **6. SASKATCHEWAN**

*Department of Health Act, R.S.S. 1978, c. D-17*

Current to Gazette Vol. 102:44 (November 3, 2006)

### **19. Liability of certain third parties and insurers**

**19(1)** In this section:

- (a) [Repealed 1997, c. 34, s. 9.]
- (b) "**health services**" means:
  - (i) insured services within the meaning of The Saskatchewan Medical Care Insurance Act;
  - (ii) inpatient services or outpatient services provided in a hospital or any other health facility;
  - (iii) services provided pursuant to section 10 that a physical therapist is authorized to provide; or
  - (iv) any other services prescribed in the regulations.

**19(2)** Where, as a result of the negligence or other wrongful act of any other person, a beneficiary suffers personal injuries for which the beneficiary receives health services, the beneficiary has the same right to recover the cost of those services from the person guilty of the negligence or other wrongful act as the beneficiary would have had if he or he had been required to pay for the health services.

**19(3)** On the provision of health services to a beneficiary mentioned in subsection (2), the minister shall be subrogated to all rights of recovery of the beneficiary from any person with respect to the cost of those health services and may bring an action in the name of the beneficiary to enforce those rights.

**19(4)** Nothing in subsection (2) or (3) restricts the right of the beneficiary to recover any sum with respect to the personal injuries in addition to the cost of health services received by the beneficiary.

**19(5)** Where a beneficiary brings an action to recover any sum with respect to the personal injuries mentioned in subsection (4), the beneficiary shall, on behalf

of the minister, include in his or her claim a claim for the cost of health services received by the beneficiary.

**19(6)** Except with the written consent of the minister, no action mentioned in subsection (5) shall be settled without provision being made for payment in full of the cost of health services received by the beneficiary.

**19(7)** The cost of health services received by a beneficiary shall be determined in accordance with the following:

(a) where the health service is an insured service within the meaning of The Saskatchewan Medical Care Insurance Act, the cost of the health service is equal to the amount to be paid for that type of service as set out in the regulations made pursuant to that Act;

(b) subject to clause (c), where the health service is an inpatient service or an outpatient service provided to the beneficiary in a hospital or other health facility, the cost of the health service is to be calculated on the basis of the daily rate for that type of service set by the department for the purpose of charging other provinces or territories of Canada for the provision of that service to residents of those provinces or territories while they are in Saskatchewan;

(c) where the health service is provided outside a hospital by a physical therapist who is under contract to, or is an employee of, the department or a regional health authority or an affiliate, as defined in The Regional Health Services Act, the cost of the health service is to be calculated on the basis of the rate for that type of service set by the department; or

(d) where the health service is a service that is prescribed in the regulations, the cost of the health service is to be calculated in the manner set out in the regulations.

**19(8)** On recovering all or any part of the cost of health services received by the beneficiary, the beneficiary shall immediately pay the amount recovered to the minister.

**19(9)** The minister may bear the proportion of the taxable costs payable by a beneficiary conducting an action mentioned in this section that bears the same ratio to the total of those costs as the amount claimed on behalf of the minister bears to the total amount claimed, but the portion of the taxable costs borne by the minister shall not exceed 50% of the amount claimed on the minister's behalf.

**19(10)** An insurer who is liable to indemnify the person guilty of the negligence or other wrongful act mentioned in subsection (2) shall pay to the minister the lesser of:

(a) the amount for which the insurer is liable; and

(b) the cost of the health services received by the beneficiary.

**19(11)** A payment to the minister pursuant to subsection (10) shall, to the extent of the amount paid, discharge the liability of the insurer to the person guilty of the negligence or other wrongful act mentioned in subsection (2).

**19(12)** Notwithstanding anything in The Automobile Accident Insurance Act, where a beneficiary mentioned in subsection (2) receives benefits pursuant to Part VIII of that Act, the insurer within the meaning of that Act shall pay to the minister the cost of health services received by the beneficiary determined in accordance with subsection (7), unless the minister agrees otherwise.

1995, c. 10, s. 2(3); 1997, c. 34, s. 9; 2002, c. R-8.2, s. 73(6)

## **7. MANITOBA**

(a) *Manitoba Public Insurance Corporation Act*, C.C.S.M. c. P215

Current to Gazette Vol. 135:44 (November 4, 2006)

### **s.26: Subrogation**

#### **26(1) Subrogation**

Upon making any payment of benefits or insurance money or upon assuming liability for such payment, the corporation is subrogated to and shall be deemed to be an assignee of all rights of recovery against any other person liable in respect of the loss, damage, injury, or death of every person to whom, or on whose behalf, or in respect of whom, the benefits or insurance money are to be paid; and the corporation may enforce those rights of recovery as provided in subsection (6) to the extent that the corporation has paid or has assumed liability to pay the benefits or insurance money.

#### **26(2) When rights of subrogation apply**

The rights conferred upon the corporation under this section apply only where the loss, damage, injury, or death for which the corporation has paid or has assumed liability to pay benefits or insurance moneys is caused or contributed to by the fault of

- (a) a person who, at the material time, was driving a motor vehicle
  - (i) while not qualified to drive a motor vehicle; or
  - (ii) while not authorized by law to drive a motor vehicle; or
  - (iii) that was not designated in an unexpired owner's certificate; or
  - (iv) that was towing an unregistered trailer that was required to be registered under *The Drivers and Vehicles Act*; or
  - (v) while under the influence of intoxicating liquor or drugs to such an extent as to be for the time being incapable of the proper control of the motor vehicle; or
- (b) a person who, at the material time, was driving or operating a motor vehicle or trailer without the consent, express or implied, of the owner thereof or who otherwise is not a person entitled to the benefit of subsection 38(4); or
- (c) a person whose fault did not consist of acts or omissions in the ownership, use, or operation of a motor vehicle or trailer; or
- (d) a person not the owner of a vehicle causing the loss, damage, injury or death or sustaining the loss or damage who at the material time is engaged in the

business of selling, repairing, servicing, storing or parking automobiles or the servant or agent of any such person.

**26(3) No reduction of liability**

The liability of any of the persons mentioned in subsection (2) is not limited, restricted, or reduced by reason of this section; but in every case to which this section applies, the liability for the loss, damage, injury, or death and the damages recoverable therefor shall be determined and assessed as fully as if section 38 had not been enacted.

**26(4) Liability of other persons**

Every person who, either alone or together with others, is, or apart from this Act would be, liable for loss, damage, injury, or death caused by the fault of a person mentioned in subsection (2) shall, for the purpose of this section, be liable to the same extent as the person mentioned in subsection (2).

**26(5) Non-application to owner**

Subsection (4) does not apply to an owner of a motor vehicle or trailer where loss, damage, injury, or death is caused by fault on the part of a driver or operator of that motor vehicle or trailer who, at the material time, was not the owner, and

- (a) was living with and was a member of the family of the owner, if the owner proves that the driver or operator had acquired possession of the motor vehicle or trailer without the consent, express or implied, of the owner; or
- (b) if the owner proves that he has observed and performed the terms and conditions of a plan insofar as those terms and conditions relate to third party liability insurance and are required to be observed and performed by him.

**26(6) Power of corporation in enforcing rights to which it is subrogated**

For the purpose of enforcing the rights of recovery to which the corporation is subrogated and of which it is deemed to be an assignee under subsection (1) the corporation may

- (a) bring a separate action in its own name to recover from the person liable in respect of the loss, damage, injury, or death the amount of benefits and insurance money that it has paid or for which it has assumed liability; or
- (b) join with any other person who has a cause of action for the loss, damage, injury, or death in respect of which benefits and insurance money have been paid or for which the corporation has assumed liability, to bring, upon such terms as may be agreed to by that person, one action in the name of that person for all damages that may be recoverable in respect of that cause of action.

**26(7) Person may bring action in own name**

Where the corporation brings a separate action under clause (6)(a), a person who has a cause of action in respect of the loss, damage, injury, or death for which the corporation has paid or assumed liability for benefits or insurance money may bring action in his own name for the damages recoverable by him; but he may recover only the amount by which the damages exceed the benefits and insurance money.

**26(8) Rights of corporation not to be prejudiced**

The commencement of an action or other proceeding by any person in respect of loss, damage, injury, or death shall not prejudice the right of the corporation to bring, at any time prior to judgment in that action or other proceeding, a separate action under clause 6(a) and subsection (7) applies to such action.

**26(9) Compromising of claims restricted**

Upon being notified in writing that the corporation has made or is making a claim or bringing an action or other proceeding under this section, no person shall negotiate or effect a compromise, settlement, or satisfaction of any claim of that person to the prejudice of the claim of the corporation; and a person receiving such a notice who has received benefits or insurance money

(a) shall enter into such agreements and execute such documents as the corporation may reasonably request to further secure the rights conferred upon the corporation under this section; and

(b) shall not interfere in any negotiations for compromise or settlement or in, except as provided in subsection (7), the action or proceeding; but, whenever requested by the corporation, shall aid in securing information and evidence and the attendance of any witness, and shall co-operate with the corporation, except in a pecuniary way, in any action or other proceeding or in the prosecution of an appeal.

2005, c. 37, Sched. A, s. 158(5)

(b) *The Health Services Insurance Act*, R.S.M. 1987, c. H35

Current to Gazette Vol. 135:44 (November 4, 2006)

**Section 97**

**97(1) Definition of past and future insured services**

In this section,

**"future cost of insured services"** means the estimated total cost of the future insured hospital, medical or other health services made necessary as the result of a bodily injury that will probably be required by an insured person after the date of settlement or, where there is no settlement, the first day of trial; ("coût futur des services assures")

**"past cost of insured services"** means the total cost of the insured hospital, medical or other health services made necessary as the result of a bodily injury and provided to an insured person up to and including the date of settlement or, where there is no settlement, the first day of trial. ("coût antérieur des services assures")

**97(2) Action by insured person for cost of insured services**

When, as a result of the negligence or other wrongful act or omission of another person, an insured person suffers bodily injuries for which he or she receives insured hospital, medical or other health services under this Act, and he or she is



not entitled to receive compensation under Part 2 of *The Manitoba Public Insurance Corporation Act*, the person may, subject to section 101, bring an action against and recover from that other person

(a) the past cost of the insured services; and

(b) the future cost of insured services;

for which the person, if he or she were not an insured person, would be legally liable to pay.

**97(3) Cost of hospital services**

For the purpose of this section, the cost of insured hospital services shall be the per diem rate approved by the minister.

**97(4) Certificate**

For the purpose of an action referred to in this section, the minister may issue one or more certificates that set out

(a) the insured hospital, medical or other health services that an insured person has received for bodily injuries suffered as a result of the negligence or other wrongful act or omission of another person; and

(b) the cost of those services.

**97(5) Admissibility of certificate**

A certificate under subsection (4) is admissible in evidence as proof, in the absence of evidence to the contrary, of the facts stated in the certificate without proof of the minister's appointment or signature.

1991-92, c. 8, s. 20; 1992, c. 35, s. 37; 1993, c. 36, s. 6(3); 2001, c. 21, s. 10

**8. ONTARIO**

*Health Insurance Act*, R.S.O. 1990, c. H.6

Current to Gazette Vol. 139:47 (November 25, 2006)

**Section 30 & 31: Subrogation**

**30(1) Subrogation**

Where, as the result of the negligence or other wrongful act or omission of another, an insured person suffers personal injuries for which he or she receives insured services under this Act, the Plan is subrogated to any right of the insured person to recover the cost incurred for past insured services and the cost that will probably be incurred for future insured services, and the General Manager may bring action in the name of the Plan or in the name of that person for the recovery of such costs.

**30(2) Payment by Plan recoverable by insured**

For the purposes of subsection (1), the payment by the Plan for insured services shall not be construed to affect the right of the insured person to recover the

amounts so paid in the same manner as if such amounts are paid or to be paid by the insured person.

**30(3) Cost of hospital services**

For the purposes of this section, the cost of insured services rendered to an insured person in or by a hospital or health facility shall be at the rate charged by the hospital or health facility to a person who is not an insured person.

**30(4) Exception**

Despite subsection (1), the Plan is not subrogated to the rights of an insured person in respect of personal injuries arising directly or indirectly from the use or operation, after the 21st day of June, 1990 and before the day section 267.1 of the Insurance Act comes into force, of an automobile in Canada, the United States of America or any other jurisdiction designated in the Statutory Accident Benefits Schedule under the Insurance Act.

**30(5) Exception**

Despite subsection (1), the Plan is not subrogated to the rights of the insured person, as against a person who is insured under a motor vehicle liability policy issued in Ontario, in respect of personal injuries arising directly or indirectly from the use or operation, after section 29 of the Automobile Insurance Rate Stability Act, 1996 comes into force, of an automobile in Ontario or in any other jurisdiction designated in the Statutory Accident Benefits Schedule under the Insurance Act.

**30(6) Definition**

In subsection (5),

**"motor vehicle liability policy"** has the same meaning as in the **Insurance Act**.

1993, c. 10, s. 53; 1996, c. 21, s. 51

**31(1) Subrogated claim included in action**

Any person who commences an action to recover for loss or damages arising out of the negligence or other wrongful act of a third party, to which the injury or disability in respect of which insured services have been provided is related shall, unless otherwise advised in writing by the General Manager, include a claim on behalf of the Plan for the cost of the insured services.

**31(2) Recovery paid to Ontario**

Where a person recovers a sum in respect of the cost of insured services, the person shall forthwith pay the sum recovered to the Minister of Finance.

2006, c. 19, Sched. L, s. 11(5)

**9. NEWFOUNDLAND**

*Medical Care Insurance Act*, 1999 S.N. 1999, c. C5.1

Current to Gazette Vol. 81:46 (November 17, 2006)

**s 19. Recovery of costs for services**

**19(1)** This section applies where insured services are provided to an injured or disabled person, in this section referred to as the "insured person", with respect to an injury or disability where the injury or disability was caused by, or contributed to by, or results from an occurrence other than a motor vehicle accident in which the person, whose fault, negligence or other wrongful act or omission caused, contributed to or resulted in the injury or disability, in this section referred to as the "tortfeasor", is insured at the date of the accident, by a policy of insurance through a licensed insurer carrying on business in the province.

**19(2)** An insured person who receives insured services in respect of an injury or disability caused or contributed to by or resulting from the fault, negligence or other wrongful act or omission of a tortfeasor has the same right to recover the cost of those insured services from the tortfeasor as he or she would have had if the person had himself or herself been required to pay for the services.

**19(3)** An insured person who, under subsection (1), recovers from another person the whole or a part of the cost of insured services shall, on recovery from that other person, pay to the minister the amount recovered and the minister may, if the amount so recovered is not paid to it within a reasonable time, recover the amount from the insured person as a debt due the Crown.

**19(4)** Where the cost of insured services referred to in subsection (1) is paid, or an agreement has been entered into covering payment, by the minister to a person, physician or professional medical corporation or where the services are provided by a person employed in the department, the minister is subrogated to all rights of recovery of or on behalf of the insured person against the tortfeasor and may bring an action in his or her own name or in the name of the insured person to enforce those rights against the tortfeasor in respect of the cost of the insured services.

**19(5)** The rights conferred upon the minister by subsection (4) shall not be considered to restrict other rights of recovery of the insured person in respect of the injury or disability referred to in subsection (1) for loss or damage not the subject of insured services and if the insured person starts an action in respect of that loss or damage he or she shall include a claim on behalf of the minister for the cost of the insured services provided to the insured person.

**19(6)** It is not a defence to an action brought by the minister under subsection (4) that a claim for damages has been adjudicated upon unless that claim included a claim for the sum paid for insured services, and it is not a defence to an action for damages for personal injuries brought by an insured person that an action taken by the minister under subsection (4) has been adjudicated upon.

**19(7)** A release or settlement of claim which includes the cost of insured services is not effective unless the minister has consented to the release or settlement or unless the minister is satisfied with the provisions of the release or settlement.

**19(8)** The costs of an action by or on behalf of an insured person in which a claim has been included on behalf of the minister under subsection (5) shall be borne by the minister in the same proportion as the claim of the minister for the cost of insured services provided bears to the total claim by or on behalf of the insured person in the action.

**19(9)** If within 2 months after the last act or omission which caused the injury or disability of an insured person an action has not been started by or on behalf of that person under subsection (1) for the recovery of damages arising out of the injury or disability, the minister upon service of notice on the insured person may start an action in his or her own name or in the name of that person for the recovery of the cost of the insured services, and before trial of the action that person may join in the action another claim arising out of the same occurrence upon the conditions as to costs or otherwise that to the court may seem just and may in that case effect settlement of that claim.

**19(10)** A liability insurer shall pay to the minister an amount referable to a claim for recovery of the cost of insured services that would otherwise be payable to an insured person and payment of that amount to the minister discharges the liability of the insurer to pay that amount to the insured person or to a person claiming under or on behalf of the insured person.

**19(11)** For the purpose of subsection (10) a "liability insurer" means a person regularly engaged in the business of underwriting risks in respect of negligence.

**19(12)** Where as a result of a claim under this section there are insufficient funds to provide complete recovery to an insured person for his or her losses or injury and to pay the cost of insured services, that person and the minister shall share to that extent in proportion to their respective losses in a recovery, but nothing in this provision prevents the minister from waiving in whole or in part its share of an amount recovered where in the opinion of the minister the circumstances so warrant.

**19(13)** For the purpose of this section,

(a) "**insured services**" means insured services as defined in the regulations made under this Act;

(b) "**participating province**" means a participating province as defined by the *Canada Health Act* (Canada); and

(c) the cost of insured services provided is,

(i) in the province, or a participating province, the cost as established by the minister, and

(ii) elsewhere than in the province or a participating province, the cost calculated

at a rate which, in the opinion of the minister, is fair having regard of the services provided.

2001, c. 9, s. 24

**10. PEI**

*Hospital and Diagnostic Services Insurance Act*, R.S.P.E.I. 1988, c. H-8

Current to Gazette Vol. 132:47 (November 25, 2006)

**Section 14:**

**14(1) Definitions**

In this section

- (a) "**injured person**" means a person who has suffered injury due to the negligent or wrongful act or omission of another person;
- (b) "**other person**" means the person who appears to have been negligent or committed a wrongful act or omission that resulted in injury to the injured person.

**14(2) Right to claim for insured services**

Subject to section 65.1 of the *Insurance Act* R.S.P.E.I. 1988, Cap. I-4, an injured person who receives insured services pursuant to this Act

- (a) shall have the same right to claim for the cost of the insured services against the other person, as the injured person would have had if the injured person had been required to pay for the insured services; and
- (b) shall include a claim for the cost of insured services received pursuant to this Act, where the injured person makes a claim against the other person.

**14(3) Payment of damages to Minister**

Where, pursuant to subsection (2) a person recovers damages attributable to insured services received pursuant to this Act, the person shall, within 20 days, pay those damages to the Minister.

**14(4) Subrogation**

The Minister is subrogated to the right of the injured person to claim against the other person pursuant to subsection (2).

**14(5) Minister's action**

Where an injured person

- (a) recovers damages against the other person by court order or by settlement but does not pay to the Minister the amount attributable to a claim for the cost of the insured services; or
  - (b) does not claim the cost of insured services against the other person,
- the Minister may maintain an action against the injured person for the recovery of the cost of insured services provided pursuant to this Act.

**14(6) Not binding against Minister, unless**

An adjudication of the injured person's claim against the other person shall not be binding against the Minister unless the claim included the cost of insured services provided pursuant to this Act.

**14(7) Not a defence, unless**

The settlement or release of an injured person's claim against the other person shall not be binding against nor be a defence against the Minister's claim under this section unless

- (a) the claim included the cost of insured services provided pursuant to this Act; and
- (b) the Minister has approved the settlement or release in writing.

**14(8) Approval not releasing Minister's claim**

The Minister may give written approval to a settlement by the injured person which does not settle or release the claim of the Minister for cost of the insured services provided pursuant to this Act.

**14(9) Net amount prorated**

Subject to the regulations, where the net amount recovered pursuant to this section is insufficient to cover both the damages of the injured person and the cost of insured services provided pursuant to this Act, the injured person and the Minister shall share the recovery in proportion to their respective losses, unless the Minister agrees otherwise in writing.

**14(10) Insurer to provide information**

Every liability insurer, at the Minister's request, shall provide information to the Minister respecting

- (a) a claim made against an insured person by a person who received insured services pursuant to this Act; and
- (b) the terms and conditions of any settlement entered into by an insured person and a person who received insured services pursuant to this Act.

**14(11) Claim against liability insurer**

Where an injured person makes a claim against a liability insurer respecting injuries that included the provision of insured services under this Act, the liability insurer shall pay to the Minister the cost of the insured services, which shall discharge the insurer of liability for those insured services.

**14(12) Where Insurance Act applies**

Subsection (11) does not apply where subsection 65.1(7) of the Insurance Act R.S.P.E.I. 1988, Cap. I-4 applies.

**14(13) Certificate prima facie proof**

In an action pursuant to this section, a certificate signed on behalf of the Minister shall be prima facie proof

- (a) that the person named in the certificate has received insured services pursuant

to this Act in the amount showing in the certificate; and

(b) and of the office, authority and signature of the person signing, without proof of the person's appointment, authority or signature.

**14(14) Minister may approve recovery fees**

The Minister may approve the payment of recovery fees as prescribed, in respect of the injured person's claim for the cost of insured services received pursuant to this Act.

1993, c. 30, s. 61(8)(e); 1997, c. 22, s. 30(5)(k); 1999, c. 29, s. 3

**11. NOVA SCOTIA**

*Health Services and Insurance Act*, R.S.N.S. 1989, c. 197

Current to Gazette Vol. 30:21 (November 10, 2006)

**Section 18:**

**18(1) Right of recovery by injured person**

Where, as a result of the negligence or wrongful act or omission of another, a person suffers personal injuries for which the person received insured hospital services, benefits under the Insured Prescription Drug Plan, ambulance services to which the Province has made payment, home-care services, care for a person in a home for special care or child-care facility to which the Province has made payment, insured professional services under this Act, or any other care, services or benefits designated by regulation, including the future costs of any such care, services or benefits, the person

(a) has the same right to recover the sum paid for the care, services or benefits against the person who was negligent or was responsible for the wrongful act or omission as the person would have had if that person had been required to pay for the care, services or benefits; and

(b) if the person makes any claim for the personal injuries suffered against the person who was negligent or who was responsible for the wrongful act or omission, shall claim and seek to recover the costs of the care, services or benefits.

**18(2) Payment to Minister**

Where, under subsection (1), a person recovers a sum in respect of insured hospital services, benefits under the Insured Prescription Drug Plan, ambulance services to which the Province has made payment or insured professional services received by him under this Act, he shall forthwith pay the sum recovered to the Minister.

**18(3) Subrogation of Crown**

Her Majesty in right of the Province shall be subrogated to the rights of a person under this Section to recover any sum paid by the Minister for insured hospital services, benefits under the Insured Prescription Drug Plan, ambulance services to which the Province has made payment or insured professional services

provided to that person, and an action may be maintained by Her Majesty, either in Her own name or in the name of that person, for the recovery of such sum.

**18(4) Defence excluded**

It shall not be a defence to an action brought by Her Majesty in right of the Province under subsection (3) that a claim for damages has been adjudicated upon unless the claim included a claim for the sum paid for insured hospital services, benefits under the Insured Prescription Drug Plan, ambulance services to which the Province has made payment and insured professional services and it shall not be a defence to an action for damages for personal injuries brought by a person who has received insured hospital services, benefits under the Insured Prescription Drug Plan, ambulance services to which the Province has made payment or insured professional services that an action taken by Her Majesty under subsection (3) has been adjudicated upon.

**18(5) Settlement or judgment not binding**

No release or settlement of a claim or judgment based upon a cause of action for damages for personal injuries in a case where the injured person has received insured hospital services, benefits under the Insured Prescription Drug Plan, ambulance services to which the Province has made payment or insured professional services under this Act shall be binding upon Her Majesty unless the Minister or a person designated by him has approved the release or settlement in writing.

**18(5A)** Subject to subsection (5C), where, as a result of a claim pursuant to this Section,

(a) the claim is settled or a judgment is obtained; and

(b) insufficient funds are available to provide complete recovery to the injured person for the injured person's losses and injuries and to pay the costs of the care, services and benefits referred to in subsection (1),

the injured person and Her Majesty in right of the Province shall share pro rata in proportion to their respective losses in any recovery in accordance with the terms and conditions prescribed by regulation.

**18(5B)** No person acting on their own behalf or on behalf of another person, shall, without the approval in writing pursuant to subsection (5C) of the Minister, make a settlement of a claim based upon a cause of action for damages for personal injuries in a case where the injured person has received care, services or benefits referred to in subsection (1) unless at the same time the person makes a settlement to recover the same pro rata proportion in respect of the cost of the care, services and benefits referred to in subsection (1) as the injured person is to recover in respect of the person's losses and injuries.

**18(5C)** Where a person who makes a claim pursuant to subsection (1) has obtained an offer for a settlement whereby the same pro rata proportion of the cost of the care, services and benefits referred to in subsection (1) would be recovered as the injured person would recover in respect of the person's losses



and injuries but, in the opinion of the Minister or a person designated by the Minister, the offer would not provide sufficient recovery in respect of the care, services and benefits referred to in subsection (1), the Minister or a person designated by the Minister may approve, in writing, a release or settlement whereby the person making a claim pursuant to subsection (1) makes a settlement of a claim in respect of the person's injuries or losses without making a settlement in respect of the cost of the care, services and benefits referred to in subsection (1), but the written approval is not binding on Her Majesty in right of the Province in relation to a claim made pursuant to subsection (5) in respect of the cost of the care, services and benefits referred to in subsection (1).

**18(5D)** Every liability insurer carrying on business in the Province shall provide the Minister, when requested to do so, information relating to

(a) a claim made against an insured person by a person who received any of the care, services or benefits referred to in subsection (1); or

(b) the terms and conditions of any settlement entered into by an insured person and a person who received any of the care, services or benefits referred to in subsection (1).

**18(5E)** Notwithstanding any other provision of this Act, the Minister may, in accordance with the regulations, authorize the payment of a fee to a barrister and solicitor who makes a claim on behalf of an injured person and recovers a sum in respect of the cost of care, services or benefits referred to in subsection (1) that are received by the injured person.

**18(6) Payment by liability insurer**

Where a person whose act or omission resulted in personal injuries to another is insured by a liability insurer, the liability insurer shall pay to the Minister any amount referable to a claim for recovery of the cost of insured hospital services, benefits under the Insured Prescription Drug Plan, ambulance services to which the Province has made payment and insured professional services that would otherwise be paid to the insured person and payment of that amount to the Minister discharges the liability of the insurer to pay that amount to the insured person or to any person claiming under or on behalf of the insured person.

**18(7) Amount payable**

For the purposes of this Section, the sum paid for insured hospital services that are received by an injured person shall be an amount equal to the charges of the hospital in which the services were provided, at rates approved by the Minister, that the insured person would have been required to pay if he was not entitled to receive the services as insured hospital services under this Act.

**18(8) Certificate as prima facie proof**

In an action under this Section a certificate of a person designated by the Minister as to the sum paid for insured hospital services, benefits under the Insured Prescription Drug Plan, ambulance services to which the Province has

made payment or insured professional services received by an injured person is admissible in evidence and is prima facie proof of that sum.

**18(9)** [Repealed 2002, c. 5, s. 24(3).]

**18(10)** This Section applies except where personal injury has occurred as the result of a motor vehicle accident in which the person whose act or omission resulted in the personal injury is insured by a policy of third-party liability insurance on or after the date this subsection comes into force.

**18(11)** The Minister may impose a levy to be paid by each motor vehicle insurer with respect to each vehicle insured by that insurer for the purpose of recovering insured hospital services, benefits under the Insured Prescription Drug Plan, ambulance services to which the Province has made payment or insured professional services pursuant to this Act incurred by third parties as a result of personal injury in motor vehicle accidents.

**18(12)** Within sixty days after the coming into force of subsections (10) to (20), the Minister shall estimate the levy applicable to the end of the calendar year and so inform the Superintendent of Insurance.

**18(13)** Within ninety days of the coming into force of subsections (10) to (20), the Superintendent of Insurance shall notify the insurers of the estimate and the insurers shall remit payment forthwith.

**18(14)** Commencing no later than the fifteenth day of January, 1993, and by the fifteenth day of January of each subsequent year, the Superintendent of Insurance shall give notice to the insurers of the estimate and the insurers shall remit to the Superintendent the amount estimated in equal quarterly payments commencing on the thirty-first day of March, 1993, such quarterly payments to be payable within sixty days following the end of each quarter.

**18(15)** Upon receipt of the funds payable by insurers pursuant to subsections (10) to (20), the Superintendent of Insurance shall credit the amount to the recovery account identified by the Minister.

**18(16)** The Minister shall annually re-evaluate the accuracy of the levy estimate in the following year.

**18(17)** The Minister shall advise the Superintendent of Insurance of the adjustments and the Superintendent shall give notice to the insurers of the adjustments.

**18(18)** Where the adjusted amount is greater than the estimate, the insurers shall remit payment forthwith.

**18(19)** Where the adjusted amount is less than the estimate, the insurers account shall be credited with the surplus.

**18(20)** No interest is payable on the surplus or deficit resulting after the calculation of the adjusted amount.

**18(21)** For greater certainty, in subsections (2) to (8) "insured hospital services" includes any care, services or benefits for which costs have been or may in the future be paid by the Minister in relation to negligence or a wrongful act or omission including, without limiting the generality of the foregoing, ambulance services to which the Province has made payment, home-care services, care for a person in a home for special care or child-care facility to which the Province has made payment and any services prescribed in the regulations as insured hospital services for the purpose of this subsection.

1992, c. 20, s. 12; 2002, c. 5, s. 24

## **12. NEW BRUNSWICK**

*Hospital Services Act*, R.S.N.B. 1973, c. H-9

Current to Gazette Vol. 164:1901 (November 29, 2006)

**10(1)** Where, as a result of the negligence or wrongful act of another, a person suffers personal injuries for which he receives entitled services under this Act or the regulations, he

(a) shall have the same right to claim and to recover the cost of the entitled services against the person who was negligent or who did the wrongful act as he would have had if he, himself, had been required to pay for the entitled services, and

(b) if he makes any claim for the personal injuries suffered against the person who was negligent or who did the wrongful act, shall claim and seek to recover the cost of the entitled services.

**10(2)** Where under subsection (1), a person either acting for himself or on behalf of another person, recovers a sum in respect of entitled services received under this Act or the regulations, he shall as soon as practicable pay such sum recovered to the Minister.

**10(3)** Where, as a result of the negligence or wrongful act of another, a person suffers personal injuries for which he receives entitled services under this Act or the regulations and he does not claim against the person who was negligent or who did the wrongful act, Her Majesty the Queen in right of the Province may maintain an action in her own name or in the name of the injured person for recovery of the cost of the entitled services.

**10(4)** Where, as a result of the negligence or wrongful act of another, a person suffers personal injuries for which he receives entitled services under this Act or the regulations and a claim is made against the person who was negligent or who did the wrongful act but the person making the claim, either acting on his own behalf or on behalf of another person, does not

- (a) claim for the cost of the entitled services,
- (b) if a release is given or the claim is settled, obtain a written approval of the release or settlement in accordance with subsection (9) or (10), or
- (c) pay any sum recovered in respect of the entitled services to the Minister in accordance with subsection (2),

Her Majesty the Queen in Right of the Province may maintain an action in her own name against the person making the claim, whether acting on his own behalf or on behalf of another person, for recovery of the cost of the entitled services.

**10(5)** It shall not be a defence to an action brought by Her Majesty under subsection (4) that a release has been given, a claim has been settled or a judgment obtained unless

- (a) the claim included a claim for the cost of the entitled services, and
- (b) if a release is given or the claim is settled, the Minister has under subsection (9) or (10) approved the release or settlement.

**10(6)** Where the Minister approves in writing a release or settlement under subsection (10), Her Majesty the Queen in right of the Province may continue the action or maintain an action in her own name for recovery of the cost of the entitled services.

**10(7)** Subject to subsection (10), where, as a result of a claim under this section

- (a) the claim is settled or a judgment is obtained, and
  - (b) insufficient funds are available to provide complete recovery to the injured person for his losses and injuries and to pay the cost of the entitled services,
- the injured person and Her Majesty the Queen in right of the Province shall share pro rata in proportion to their respective losses in any recovery in accordance with the terms and conditions prescribed by regulation.

**10(8)** No person, acting for himself or on behalf of another person, shall, without the approval in writing under subsection (9) or (10) of the Minister make a settlement of a claim based upon a cause of action for damages for personal injuries in a case where the injured person has received entitled services under this Act or the regulations unless at the same time he makes a settlement to recover the same pro rata proportion in respect of the cost of the entitled services as the injured person is to recover in respect of his losses and injuries.

**10(9)** No release or settlement of a claim or judgment based upon a cause of action for damages for personal injuries in a case where the injured person has received entitled services under this Act or the regulations is binding upon Her Majesty unless the Minister has approved the release or settlement in writing.

**10(10)** Notwithstanding subsection (9), where a person who makes a claim under subsection (1) has obtained an offer for a settlement whereby the same pro rata proportion of the cost of entitled services would be recovered as the injured person would recover in respect of his losses and injuries but, in the opinion of the Minister, the offer would not provide sufficient recovery in respect of the

entitled services, the Minister may approve in writing a release or settlement whereby the person making a claim under subsection (1) makes a settlement of a claim in respect of his injuries or losses without making a settlement in respect of the cost of the entitled services but the written approval is not binding on Her Majesty in relation to a claim made under subsection (6) in respect of the cost of the entitled services.

**10(11)** Where a person whose negligent or wrongful act resulted in personal injuries to another is insured by a liability insurer carrying on business in the Province and a claim made in respect of those personal injuries does not include a claim for the cost of the entitled services received by the injured person under this Act or the regulations, the liability insurer shall pay to the Minister the cost of the entitled services and payment of that amount to the Minister discharges the liability of the insurer to pay the cost of the entitled services in any subsequent claim to the insured person or any person claiming under or on behalf of the insured person.

**10(12)** Every liability insurer carrying on business in the Province shall provide the Minister, when requested to do so, information relating to  
(a) a claim made against an insured person by a person who received entitled services under this Act or the regulations, or  
(b) the terms and conditions of any settlement entered into by an insured person and a person who received entitled services under this Act or the regulations.

**10(13)** In an action under this section a certificate signed or purporting to be signed by or on behalf of the Minister shall be accepted by all courts  
(a) as conclusive proof  
(i) that the person named in the certificate has received entitled services,  
(ii) that the amount recorded in the certificate is the cost of the entitled services received by the person named in the certificate, and  
(iii) of the office, authority and signature of the person signing or purporting to sign the certificate, without proof of his appointment, authority or signature, and  
(b) as prima facie proof that the entitled services were received in respect of the personal injuries suffered.

**10(14)** This section applies except where the personal injuries occurred as a result of the use or operation of a motor vehicle registered in the Province.

1960-61, c.11, s.10; 1975, c.28, s.1; 1985, c.13, s.2; 1986, c.42, s.1; 1988, c.18, s.2; 1992, c.81, s.2.

**10.01** The Minister may, in accordance with the Insurance Act, impose a levy for the purpose of recovering the cost of the entitled services provided to persons under this Act as a result of personal injuries arising out of the use or operation of a motor vehicle registered in the Province.

1992, c.81, s.3; 2003, c.21, s.5.

**10.1** Notwithstanding any other provision of this Act, the Minister may, in accordance with the regulations, authorize the payment of a fee to a barrister and solicitor who makes a claim on behalf of an injured person and recovers a sum in respect of the cost of entitled services in accordance with section 10.

1988, c.18, s.3.

**11** In the event of conflict between any provision of this Act and any provision of any other Act of New Brunswick, the provision of this Act prevails.

1960-61, c.11, s.11.

### **13. QUÉBEC**

*Health Insurance Act*, R.S.Q., chapter A-29 Division 11.02, section 18:

#### **Subrogation.**

18. 1° The Board shall be ipso facto subrogated in the right of recovery of any person who benefits from insured services, against any third person to the extent of the insured services furnished or to be furnished in respect of injury caused by the fault of such third person. The person must furnish to the Board any information required to establish the liability of the third person or the claim of the Board.

#### **Contributory negligence.**

2° In case of contributory negligence the amount of such subrogation shall be subject to reduction in the same proportion as the insured person's right of recovery.

#### **Notification to the Board.**

2.1° An insurer of a third person's liability shall notify the Board in writing as soon as he begins negotiations to settle a claim for damages in compensation for any injury susceptible of entailing the payment of insured services.

#### **Discharge.**

3° An insurer of a third person's liability shall not discharge his obligation to indemnify the latter of his liability to the Board under this section, otherwise than by payment to the Board.

#### **Undertaking prohibited.**

4° An undertaking by a person benefiting from insured services to discharge a third person's or an insurer's liability to the Board under this section or to save

them harmless from such liability is without effect and is deemed unwritten in any agreement, transaction or release.

**Rights acquired; prescription.**

5° The rights acquired by the effect of the subrogation contemplated in this section shall form part of the domain of the State from and after the time when such rights arise, and shall be subject to the rules applicable to the rights forming part thereof; however, the right of action resulting therefrom shall be prescribed three years from the date on which the Board became aware of the facts giving rise thereto.

**ROSEMARY RITLOP ET AL.**  
Plaintiffs

- and -

**STRYKER CANADA LP ET AL.**

Defendants

Court File No. CV-14-504302-OOCP

***ONTARIO***  
**SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

Proceeding under the *Class Proceedings Act*, 1992

**AMENDED STATEMENT OF CLAIM**

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**James Newland LSUC#: 23502M**  
**J. Daniel McConville LSUC#: 55310I**  
Tel: 416-599-7900 /Fax: 416-599-7910

**Lawyers for the Plaintiff**



## SCHEDULE “C”

### Were you implanted with a Stryker Rejuvenate Modular Hip System?

If so, this notice may affect your legal rights. Please read carefully.

The Ontario Superior Court has certified a class action for people who were implanted with a Stryker Rejuvenate Modular Hip System (“Rejuvenate Modular”) in Canada. If you were implanted with a Rejuvenate Modular, you may be a class member. **Please note that this Notice does not relate to any other Stryker hip implant system, including the Rejuvenate Monoblock Hip System.**

### Who are the class members?

The Class is defined as:

- (a) all persons who were implanted in Canada with the Stryker Rejuvenate Modular Hip System and were resident in Canada at the time of implant;  
and
- (b) all other persons who, by reason of his or her relationship to one or more of the above, have standing to sue pursuant to section 61(1) of the *Family Law Act*, R.S.O. 1990, c. F3 or the equivalent legislation in other provinces and territories.

The Rejuvenate Modular hip system is an artificial hip implant.

### What the Class Action Is About?

The lawsuit seeks financial compensation for class members. This lawsuit alleges that the Defendants were negligent in designing, manufacturing, distributing and selling the Rejuvenate Modular (the “Proceeding”). The Proceeding alleges, among other things, that the Rejuvenate Modular suffers from fretting and corrosion at its modular-neck junction which results in adverse local tissue reactions as well as pain and swelling at or around the hip and the need for possible revision surgery. The Court has not yet made any finding as to the merits of the Proceeding. The Defendants deny the allegations made in the Proceeding.

The Representative Plaintiffs are Donilda Lackner and Rosemary Ritlop. The law firms representing the Class are Koskie Minsky LLP, Klein Lawyers and Stevenson Whelton MacDonald & Swan LLP.

### PARTICIPATION IN AND EXCLUSION FROM THE CLASS

If you are a class member, **you will automatically be included** in this class action, unless you opt out in the manner described below. If you do not wish to opt out, you are not required to take any further steps at this stage.

**IF YOU ARE A CLASS MEMBER WHO WAS NOT IMPLANTED WITH A REJUVENATE MODULAR AND WISH TO EXCLUDE YOURSELF FROM THE CLASS PROCEEDING** (“opt out”) you must likewise deliver a written notice to Crawford Class Action Services at 3-505, 133 Weber St N, Waterloo, ON, N2J 3G9, specifying your desire to opt out of the class action. Notice of your decision to opt out must be received by Crawford Class Action Services within 90 days of **[insert date that is 90 days after Hospital Notice Order]**.

MOVE  
PARA

**IF YOU ARE A CLASS MEMBER WHO WAS IMPLANTED WITH A REJUVENATE MODULAR AND YOU WISH TO EXCLUDE YOURSELF FROM THE CLASS PROCEEDING** (“opt out”) you must deliver a written notice to Crawford Class Action Services at 3-505, 133 Weber St N, Waterloo, ON, N2J 3G9, specifying your desire to opt out of the class action. Notice of your decision to opt out must be received by Crawford Class Action Services within 90 days of **[insert date that is 90 days after Hospital Notice Order]**. You may use the Opt-Out Form attached hereto if you wish. If you opt out of the Proceeding, your family members will also be deemed to have opted out.

**ANY JUDGMENT OBTAINED ON THE COMMON ISSUES IN THIS ACTION, WHETHER FAVOURABLE OR NOT, WILL BIND ALL CLASS MEMBERS WHO DO NOT OPT OUT OF THIS ACTION.**

## **PRIVACY**

If you do not opt out of this Proceeding, your identity may be disclosed to the parties to this class action and their lawyers. If you opt out of this Proceeding, Crawford Class Action Services will not disclose your identity to any party or lawyer unless you are suing or later sue the Defendants, in which case Crawford Class Action Services may disclose to the Defendants and their lawyers that you opted out of this Proceeding. Crawford Class Action Services may also disclose to the Hospital where you were implanted that you have opted out of this Proceeding so you can be removed from any list of Class Members that receive future notices.

## **FINANCIAL CONSEQUENCES**

The Representative Plaintiffs have entered into a fee agreement providing that Class Counsel's legal fees for work on the common issues will be paid from the amounts that Class Members who do not opt out recover, plus applicable taxes, disbursements and interest. If the class action does not succeed, Class Members are not responsible for any legal fees or disbursements. The fee agreement must be approved by the court.

If the common issues are determined in favour of the Class, individual Class Member's participation will be required in order to establish individual claims. If individual proceedings are pursued by any Class Member, he or she may have to bear the costs of such individual proceedings. Class Members will have the opportunity at that time to decide whether to make an individual claim.

The Representative Plaintiffs are potentially liable for the Defendants' costs of any common issues trial. Class Members are not liable for the Defendants' costs of the common issues trial, but each Class Member is potentially liable for the Defendants' costs of any individual proceeding that Class Member chooses to pursue thereafter if unsuccessful.

The Representative Plaintiffs have obtained financial support from the Class Proceedings Fund in respect of the Proceeding. As a result, the Representative Plaintiffs will be indemnified for any costs order in favour of the Defendants, and there will be a levy that reduces the amount of any award or settlement funds to which Class Members may become entitled. The levy is the sum of (i) the amount of any financial support provided by the Fund, and (ii) 10 per cent of the amount of any award or settlement funds, if any, to which one or more persons in the Class is entitled.

For further information you may contact:

Class counsel telephone 1-888-502-7460 or email [strykerclassaction@kmlaw.ca](mailto:strykerclassaction@kmlaw.ca). Further information can also be obtained at the class action website <http://kmlaw.ca/cases/stryker-implants/>.

**Any questions about the matters in this Notice should not be directed to the Court, because it's administrative structure is not designed to address this type of inquiry.**

## **SCHEDULE "D"**

### **Opt-Out Form**

#### **Stryker Rejuvenate Modular Hip System Class Action**

If you want to be excluded from this class action and you are a Class member who was implanted, you may use this form to do so. Your notice must be received by Crawford Class Action Services at the following address by the opt out deadline which is [insert date that is 90 days after the Hospital Notice Order] to be effective:

#### **Crawford Class Action Services**

3-505, 133 Weber St N  
Waterloo, ON  
N2J 3G9

Please fill in your name and address:

Name:

Street:

Telephone:

Province:

Postal Code:

I represent that I received a Stryker Rejuvenate Modular Hip System. I hereby opt-out of the Stryker Rejuvenate Modular Hip System Class Action and confirm that I do not wish to be bound by or benefit from any judgment or settlement in it.

I understand that by opting out, I take full responsibility for the resumption of the running of any relevant limitation period that might bar any claim by me, and for taking all necessary legal steps to protect any claim I may have.

Signature: \_\_\_\_\_

Date Signed: \_\_\_\_\_

To opt out, this form must be properly completed and received at the below address no later than [insert date that is 90 days after the Hospital Notice Order].

Please mail your Opt Out Form to:

#### **Crawford Class Action Services**

3-505, 133 Weber St N  
Waterloo, ON  
N2J 3G9

## **SCHEDULE “E”**

Dear Sir/Madam,

Re: Your Stryker Rejuvenate Modular Hip Implant

We are the court-appointed Class Counsel in a national class action lawsuit certified by the Ontario Superior Court concerning people who were implanted with a Stryker Rejuvenate Modular Hip Implant in Canada.

The Ontario Superior Court has ordered this letter and the enclosed notice be mailed by health care institutions to people who have been implanted with a Stryker Rejuvenate Modular Hip Implant.

The enclosed notice may affect your rights. Please read it carefully. Your name and private information has not been disclosed to us and we do not represent you merely by sending you this letter. However, if you do not opt out of this Proceeding as set out in the attached notice, we will represent you and your name may be disclosed to us.

Yours very truly,

●

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE ) DAY, THE  
JUSTICE BELOBABA ) DAY OF , 2015

B E T W E E N:

ROSEMARY RITLOP and DONILDA LACKNER

Plaintiffs

- and -

STRYKER CANADA LP, STRYKER CANADA CORP., STRYKER  
CANADIAN MANAGEMENT INC., HOWMEDICA OSTEONICS  
CORPORATION c.o.b. as STRYKER ORTHOPEDICS and  
STRYKER CORPORATION

Defendants

Proceeding under the *Class Proceedings Act*, 1992

**ORDER  
(HOSPITAL NOTICE OF CERTIFICATION)**

**THIS MOTION**, made by the Plaintiffs for an order requiring that Hospitals give notice of certification of this class proceeding as set out below, was heard on \_\_\_\_\_, 2015.

**ON READING** this Court's Certification Order dated \_\_\_\_\_, the Plaintiffs' Motion Record dated \_\_\_\_\_, the affidavit of Crawford Class Action Services ("Crawford") confirming that the said Motion Record was provided to the Hospitals (as defined in the said Certification Order), and on hearing the submissions of counsel for the Plaintiffs, the Hospitals having been served by regular mail and not appearing:

1. **THIS COURT ORDERS** that service of the Motion Record dated \_\_\_\_\_, on the Hospitals, as defined in the Certification Order, by regular mail be and the same is

hereby deemed effective as of [insert date 5 days after being sent to the Hospitals by regular mail].

2. **THIS COURT ORDERS** that the said Hospitals shall, within 14 days of receipt of this order, check the healthcare number in the provincial healthcare system for each person implanted at the Hospital with a Stryker Rejuvenate Modular Hip System to confirm each person's current address, if it is reasonably possible to do so, and mail a copy of the Notice of Certification and Explanatory Letter approved in the Certification Order and attached as Schedule "A" hereto to the updated address that the Hospital has for each person implanted at the Hospital with a Stryker Rejuvenate Modular Hip System.
3. **THIS COURT ORDERS** that, within 7 days after the Notice of Certification and Explanatory Letter are mailed, the Hospitals shall each provide a written report to Crawford indicating the number of persons to whom Notice of Certification and Explanatory Letter were mailed, and the date(s) on which they were mailed.
4. **THIS COURT ORDERS** that within 30 days after the Notice of Certification and Explanatory Letter are mailed, the Hospitals shall each provide to Crawford copies of the Notice of Certification and Explanatory Letter that were returned by Canada Post ("Returned Notices").
5. **THIS COURT ORDERS** that upon receipt of the Returned Notices, Crawford will perform additional searches for such Class Members using Whitepages.ca, 411.ca, reverse address checks and other search engine checks.
6. **THIS COURT ORDERS** that within 1 week of being provided with the Returned Notices in accordance with paragraph 4, if Crawford locates new and/or different addresses for the Class Members that were sent Returned Notices, Crawford shall send the Notice of Certification and Explanatory Letter to these new and/or different addresses (the "Additional Notices").
7. **THIS COURT ORDERS** that Crawford provide Class Counsel and the Defendants with a report of which Hospitals responded, the number of persons to whom each Hospital reported giving the notice, the number of reported Returned Notices and the number of

Additional Notices provided by Crawford, and the identities of any Hospitals, if any, that did not respond, within 52 days from the date of this Order; such report shall be kept confidential and is not to be filed with the Court, absent further order or a written direction jointly signed by lawyers for both the Class and the Defendants.

8. **THIS COURT ORDERS** that the reasonable costs of the Hospitals for compliance with this Order shall be paid by the Representative Plaintiffs.
  9. **THIS COURT ORDERS** that Crawford keep the names of Hospitals and of persons who send it opt-out notices confidential, except as otherwise ordered by this Court, with the following exceptions:
    - (a) Crawford may advise the Defendants whether a specific Class Member who has made a written demand of the Defendants or commenced a lawsuit against them in any jurisdiction, sent Crawford an opt-out notice, and when such notice was received by Crawford;
    - (b) for each Class Member who has opted out, Crawford shall advise the Hospital where the Class Member was implanted that the Class Member has opted out for the purposes of removing such Class Member from any future mailing list; and
    - (c) in accordance with paragraph 7 above.
  10. **THIS COURT ORDERS** that Crawford preserve all information it receives from Hospitals, and all opt-out notices it receives, until permitted to dispose of such information by further order of the this Court or by written direction jointly signed by lawyers for both the Class and the Defendants.
  11. **THIS COURT ORDERS** that there shall be no costs of this motion to any party.
-



## **SCHEDULE "A"**

**ROSEMARY RITLOP ET AL.**  
Plaintiffs

- and -

**STRYKER CANADA LP ET AL.**

Defendants

Court File No. CV-14-504302-OOCP

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

Proceeding under the *Class Proceedings Act*, 1992

**ORDER**  
**(CERTIFICATION)**

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