

Amended this 15 day of July 2010
pursuant to order of Rule 26.02(1)
dated the day of 20
Beth McLaran
Registrar

Court File No.: 52030\10

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

ANN SCHWOOB, KIRK ALTON and CHRISTINE LOVELACE

Plaintiffs

- and -

BAYER INC., BAYER A.G., BAYER SCHERING PHARMA A.G., BAYER CORPORATION,
BAYER HEALTHCARE, LLC, and BAYER HEALTHCARE PHARMACEUTICALS INC.

Defendants

Proceeding under the *Class Proceedings Act, 1992*

AMENDED STATEMENT OF CLAIM

TO THE DEFENDANTS

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

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

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date March 10, 2010

Issued by

Original signed by
"Beth McLaren"

Local registrar

Address of court office St. Catharines Court House
59 Church Street
St. Catharines, ON L2R 7N8

TO: **BAYER INC.**
77 Belfield Road
Etobicoke, ON
M9W 1G6

AND TO: **BAYER A.G.**
Postfach D - 51368
Leverkusen, Germany

AND TO: **BAYER SCHERING PHARMA A.G.**
Müllestrasse 178 - 13353
Berlin, Germany

AND TO: **BAYER CORPORATION**
100 Bayer Road, Building 4
Pittsburgh, PA
15205 USA

AND TO: **BAYER HEALTHCARE, LLC**
555 White Plains Road
Tarrytown, NY
10591 USA

AND TO: **BAYER HEALTHCARE PHARMACEUTICALS INC.**
6 Westbelt
Wayne, NJ
07470 USA

CLAIM

1. The Plaintiffs, Ann Schwoob, Kirk Alton and Chirsine Lovelace, claim on behalf of themselves and others similarly situated in Canada:
 - (a) an order certifying this proceeding and appointing them representative plaintiffs for the class;
 - (b) pecuniary and special damages in the amount of \$500,000 for each person prescribed Yasmin and/or Yaz or as aggregated following a trial on the common issues;
 - (c) non-pecuniary damages in an amount to be assessed for each person who was prescribed Yasmin and/or Yaz;
 - (d) in the alternative to the claim for damages, an accounting or other such restitutionary remedy disgorging the revenues realized by the Defendants from their sales of Yasmin and Yaz;
 - (e) damages pursuant to the *Family Law Act*, R.S.O. 1990, c F.3 s.61 and similar legislation in other provinces as listed in Schedule "A", where applicable, in the amount of \$100,000 for each such plaintiff;
 - (f) punitive, aggravated, and exemplary damages in the amount of \$20,000,000;
 - (g) the costs of distributing all monies received to class members;
 - (h) prejudgement interest in the amount of 10% compounded annually or as otherwise awarded by this Honourable Court;
 - (i) costs on a substantial indemnity basis, plus applicable taxes; and

- (j) such further and other relief as this Honourable Court may deem just.

THE PLAINTIFFS

2. The Plaintiffs Ann Schwoob and Kirk Alton are individuals residing in Vineland, Ontario.
3. Kirk is the spouse of Ann and is pursuing his claim in that capacity.
4. The Plaintiff Christine Lovelace is an individual residing in Halifax, Nova Scotia.

THE DEFENDANTS

5. Bayer Inc. is a Federal corporation with its head office in Etobicoke, Ontario. Bayer Inc. is a wholly owned subsidiary of Bayer A.G. At all material times, Bayer Inc. was engaged in the business of designing, manufacturing, developing the formula for, preparing, processing, inspecting, testing, packaging, promoting, marketing, distributing, labelling, and/or selling for a profit, either directly or indirectly through an agent, affiliate, predecessor or subsidiary, Yasmin and Yaz in Canada. The development of Yasmin and Yaz for sale in Canada, the conduct of clinical studies, the preparation of regulatory applications, the maintenance of regulatory records, the labelling and promotional activities regarding Yasmin and Yaz, and other actions central to the allegations of this lawsuit, were undertaken by Bayer Inc. in Ontario and elsewhere.
6. Bayer Corporation is a U.S. corporation formed in the State of Indiana with its principle place of business located in Pittsburgh, Pennsylvania. Bayer Corporation is a wholly owned subsidiary of Bayer A.G. At all material times, Bayer Corporation was engaged in the business of designing, manufacturing, developing the formula for, preparing, processing, inspecting, testing, packaging, promoting, marketing, distributing, labelling, and/or selling for a profit, either directly or indirectly through an agent, affiliate, predecessor or subsidiary, Yasmin and Yaz in Canada.

7. Bayer Healthcare Pharmaceuticals Inc., as successor in interest of Bayer Pharmaceuticals Corporation, is a wholly owned subsidiary of Bayer Corporation, incorporated in the state of Delaware, with its principal place of business located in Wayne, New Jersey. Prior to January 1, 2008, Bayer Pharmaceuticals Corporation was a wholly owned subsidiary of Bayer Corporation. Bayer Healthcare Pharmaceuticals Inc. was created by the integration of Bayer Healthcare and Berlex Laboratories. Bayer Pharmaceuticals Corporation's principal place of business was located in West Haven, Connecticut. At all material times, Bayer Healthcare Pharmaceuticals was engaged in the business of designing, manufacturing, developing the formula for, preparing, processing, inspecting, testing, packaging, promoting, marketing, distributing, labelling, and/or selling for a profit, either directly or indirectly through an agent, affiliate, predecessor or subsidiary, Yasmin and Yaz in Canada.
8. Bayer Healthcare, LLC is a U.S. corporation formed in the State of Delaware with its principle place of business located in Montville, New Jersey. Bayer Healthcare, LLC was involved in the integration of Bayer Healthcare and Berlex Laboratories. At all material times, Bayer Healthcare, LLC was engaged in the business of designing, manufacturing, developing the formula for, preparing, processing, inspecting, testing, packaging, promoting, marketing, distributing, labelling, and/or selling for a profit, either directly or indirectly through an agent, affiliate, predecessor or subsidiary, Yasmin and Yaz in Canada.
9. Berlex Laboratories International, Inc. was a U.S. corporation formed in the State of Delaware with its principle place of business in Montville, New Jersey. Berlex Laboratories International, Inc. was integrated with Bayer Healthcare, leading to the creation of Bayer Healthcare Pharmaceuticals, Inc. Prior to being integrated with Bayer Healthcare to create Bayer Healthcare Pharmaceuticals, Inc., Berlex Laboratories

International Inc. and Berlex Canada Inc. were engaged in the business of designing, manufacturing, developing the formula for, preparing, processing, inspecting, testing, packaging, promoting, marketing, distributing, labelling, and/or selling for a profit, either directly or indirectly through an agent, affiliate, or subsidiary, Yasmin and Yaz in Canada.

10. Bayer Schering Pharma A.G., formerly known as Schering A.G., is a German corporation with its principle place of business in Berlin, Germany. Bayer Schering Pharma A.G. is the successor to Schering A.G. Bayer Schering Pharma A.G. is the current owner of the Canadian patents relating to Yasmin and Yaz. At all times relevant herein Bayer Schering Pharma A.G. either directly or indirectly through an agent, affiliate, predecessor or subsidiary, was in the business of designing, testing, manufacturing, distributing and promoting Yasmin and Yaz.
11. Bayer A.G. is a German corporation with its principal place of business in Leverkusen, Germany. At all times relevant herein Bayer A.G. either directly or indirectly through an agent, affiliate, predecessor or subsidiary, was in the business of designing, testing, manufacturing, distributing and promoting Yasmin and Yaz. Bayer A.G. is the parent/holding company of all other named Defendants.
12. The business of each of Bayer Inc., Bayer Corporation, Bayer Healthcare Pharmaceuticals Inc., Bayer Healthcare, LLC, Bayer Schering Pharma A.G., and Bayer A.G. (collectively "Bayer") are inextricably interwoven with that of the other and each is the agent of the other for the purposes of designing, manufacturing, developing the formula for, preparing, processing, inspecting, testing, packaging, promoting, marketing, distributing, labelling, and/or selling for a profit Yasmin and Yaz in Canada.

13. In bringing this action on behalf of a class of people in Canada who were prescribed Yasmin and/or Yaz, to be further defined in the motion for certification, the Plaintiffs plead and rely upon the provisions of the *Class Proceedings Act, 1992*, S.O. 1992, c.6, the *Negligence Act*, R.S.O. 1990, c. N-1, as amended, and regulations thereunder, and the *Food and Drugs Act*, R.S.C. 1985, c. F.27 and regulations thereunder.

THE DRUG

14. Yasmin and Yaz are oral contraceptives manufactured by Bayer, indicated in Canada for the prevention of pregnancy and treatment of moderate acne vulgaris in women (16 years of age or older for Yasmin and 14 years of age or older for Yaz) who have no known contraindications to oral contraceptive therapy, desire contraception, and have achieved menarche.
15. Yasmin was approved by Health Canada on December 10, 2004 and Yaz was approved by Health Canada in late 2008. Yasmin and Yaz are two of the largest selling contraceptives worldwide. Yasmin was the third most prescribed oral contraceptive in Canada in 2008. Worldwide sales of Yasmin and Yaz in 2008 were approximately \$1.8 billion.
16. Yasmin and Yaz are combination oral contraceptives, containing both an estrogen and progestin component. The estrogen component, ethinyl estradiol, is common to many combination oral contraceptives. The progestin component used in Yasmin and Yaz, is drospirenone, and is unique to these two oral contraceptives. Drospirenone is considered to be a fourth generation progestin.
17. Yasmin contains 3.0 mg of drospirenone and 0.030 mg of ethinyl estradiol. Yaz contains 3.0 mg of drospirenone and 0.020 mg of ethinyl estradiol. Yasmin is taken for 21 days followed by 7 days of placebo. Yaz is taken for 24 days followed by 4 days of placebo.

THE RISKS

18. Drospirenone is a spironolactone analog and can cause elevation of potassium levels (hyperkalemia) and a decrease in sodium levels (hyponatremia) due to its potassium-sparing diuretic effects. Potassium is a key control in the electrical system of the heart and elevated levels can cause arrhythmias which can lead to stroke, deep vein thrombosis, pulmonary embolism, heart attack, or sudden death. Because drospirenone can act like a diuretic, it can also cause dehydration which can lead to kidney stones and gall bladder disease and/or removal.
19. Because drospirenone is used as the progestin component, the risk of suffering from stroke, deep vein thrombosis, pulmonary embolism, heart attack, or gall bladder disease and/or removal, is substantially higher among women who use Yasmin or Yaz compared to women who use second generation oral contraceptives with a first or second generation progestin component.
20. During the brief time that Yasmin and Yaz have been sold, hundreds of reports of injury and death have been reported to health regulatory agencies in association with these products.
21. In April 2002, the British Medical Journal reported that the Dutch College of General Practitioners recommended that second generation birth control pills be prescribed in lieu of Yasmin, due to the adverse event reports of 40 women who experienced venous thrombosis associated with their use of Yasmin.
22. An August 2008 study published in the British Medical Journal stated that oral contraceptives containing drospirenone (Yasmin and Yaz) carry a 6.3 times increased risk of deep vein thrombosis or pulmonary embolism. When compared to women taking some other type of birth control, the increased risk was nearly four times more among users of Yasmin and Yaz.

23. Notwithstanding the well documented safety hazards associated with using Yasmin and Yaz, Bayer failed to conduct meaningful post-market surveillance.
24. On March 26, 2010, Bayer announced it would be updating the Yasmin label in the European Union to include the results of recent epidemiological studies with respect to venous thromboembolism.
25. On April 7, 2010, the FDA approved new label changes for Yasmin and Yaz in the United States with respect to the risk of blood clots.
26. 24.—Bayer marketed Yasmin and Yaz as providing the same efficacy as other second generation oral contraceptives in preventing pregnancy, with the additional benefits of treating acne and/or menstrual symptoms.
27. 25.—Bayer aggressively marketed Yasmin and Yaz without adequately disclosing the increased safety hazards associated with using Yasmin and Yaz as compared to second generation oral contraceptives.
28. 26.—The Food and Drug Association (“FDA”) in the United States sent Bayer warning letters regarding their aggressive and controversial marketing efforts. Bayer has been warned at least three times by the FDA, in 2003, 2008 and 2009, for misleading the public through the use of ads which overstate the efficacy of Yasmin and Yaz, and minimize serious risks associated with the drugs. Most recently, the FDA issued Bayer a warning letter for overstating Yaz’ ability to improve womens' moods and clear up acne in television commercial advertisements. In addition, the FDA required Bayer to run a multi-million dollar television advertisement campaign to correct these misleading claims, as well as disclose the risks of hyperkalemia and other health problems associated with Yaz use. The FDA also directed Bayer to address false claims that Yasmin and Yaz were approved to treat Premenstrual Syndrome and all forms of acne.

29. ~~27.~~ Bayer hired *The Hills* reality star Lo Bosworth to promote Yaz in Canada. A Bayer press release dated January 20, 2009, issued in Canada, which targeted “Gen Yers”¹, states that Yaz may help reduce the symptoms experienced around the time of their period although Yaz is not indicated for that use and has not been shown to be effective for that use. The press release includes a quote from a family physician stating “The availability of this new low-dose pill provides women with the benefits of reduced menstrual symptoms.” Similar to the advertising in the U.S. that the FDA took issue with, the Canadian press release also states that Yaz treats acne, but does not specify the type of acne it is indicated to treat. The press release also states that Yaz was found to be safe and well tolerated without warning of the increased risks associated with Yaz use compared to second generation oral contraceptives.

30. ~~28.~~ At all material times, Bayer, through its servants and agents, failed to adequately warn physicians and consumers, including the Plaintiffs and putative class members, that the risk of developing stroke, deep vein thrombosis, pulmonary embolism, heart attack, or gall bladder disease and/or removal associated with using Yasmin and/or Yaz is significantly higher compared to the risk of developing stroke, deep vein thrombosis, pulmonary embolism, heart attack, or gall bladder disease associated with the use of second generation oral contraceptives.

31. ~~29.~~ Bayer did not provide adequate safety data to Health Canada with respect to Yasmin and Yaz. Bayer knew or should have known that Yasmin and Yaz were unsafe, defective, unreasonably dangerous, and not fit for their intended purposes.

32. ~~30.~~ At all materials times, Bayer knew or should have known that the risks of using Yasmin and/or Yaz included severe and life threatening complications and side effects.

¹ Persons born in the 1980s and 1990s

33. ~~31.~~ At all material times, Bayer, through its servants and agents, negligently, recklessly and/or carelessly marketed, distributed and/or sold Yasmin and Yaz without adequate warnings of the products' serious side effects and unreasonably dangerous risks.

THE PLAINTIFFS' EXPERIENCES

34. ~~32.~~ The Plaintiff, Ann Schwoob, was prescribed Yasmin by her family physician and commenced using Yasmin in or about June 2009.

35. ~~33.~~ In or about August 2009, Ann began suffering from intense chest pains. On August 10, 2009, Ann went to the emergency department of West Lincoln Memorial Hospital in Grimsby, Ontario. The treating physician at West Lincoln Memorial Hospital believed Ann may have been suffering from pneumonia. Still experiencing intense chest pains, Ann returned to the emergency department of West Lincoln Memorial Hospital again two days later where she was again told she was suffering from pneumonia.

36. ~~34.~~ Ann's condition failed to improve and as a result, she attended a walk-in clinic on or about August 14, 2009. The walk-in clinic physician advised Ann to immediately go to Hamilton General Hospital. At Hamilton General Hospital, Ann was diagnosed as having suffered from a pulmonary embolism. Ann ceased using Yasmin shortly thereafter.

37. ~~35.~~ Ann was required to remain in Hamilton General Hospital for approximately one week. While in hospital, Ann received blood thinner injections every day. When she was released from hospital, Ann was required to continue to take blood thinner injections twice daily for an additional week as well as commence warfarin² therapy. Ann continues to take warfarin and attend specialists with respect to this incident.

38. ~~36.~~ Ann used Yasmin in accordance with the package label and consumer information pamphlet, and in the manner it was intended to be used.

39. ~~37.~~ Ann was in excellent health prior to her use of Yasmin.

40. ~~38.~~ In the time period before and during Ann's use of Yasmin, she received no or inadequate warnings about the increased risk of developing stroke, deep vein thrombosis, pulmonary embolism, heart attack, or gall bladder disease and/or removal associated with Yasmin use as compared to use of second generation oral contraceptives.

41. ~~39.~~ Had Ann been aware of the increased risk of developing stroke, deep vein thrombosis, pulmonary embolism, heart attack, or gall bladder disease and/or removal from using Yasmin as compared to second generation oral contraceptives, she would never have used Yasmin. But for Bayer's wrongful conduct, Ann would not have incurred her damages.

42. ~~40.~~ The Plaintiff, Christine Lovelace, was prescribed Yaz by her gynecologist and commenced using Yaz in or about February 2009. When the gynecologist recommended Yaz, she stated that Yaz may also help Christine with her acne, but it did not.

43. ~~41.~~ On or about September 5, 2009, Christine began suffering from paralysis down her right side and an inability to communicate. Christine went to the emergency department of Lillian Fraser Memorial Hospital in Tatamagouche, Nova Scotia. Lillian Fraser Memorial Hospital did not have the proper equipment to diagnose and/or treat Christine so she was transferred to Colchester Regional Hospital in Truro, Nova Scotia. Christine remained in Colchester Regional Hospital for approximately 48 hours. Christine was advised by a doctor at Colchester Regional Hospital to immediately cease using Yaz, which she did.

44. ~~42.~~ After being released from the Colchester Regional Hospital, Christine was referred to a neurologist. The neurologist performed a procedure called magnetic resonance imaging ("MRI") which showed that Christine had suffered from a type of stroke called transient ischemic attack ("TIA").

45. ~~43.~~ Christine used Yaz in accordance with the package label and consumer information pamphlet, and in the manner it was intended to be used.

46. ~~44.~~ Christine was in excellent health prior to her use of Yaz.

47. ~~45.~~ In the time period before and during Christine's use of Yaz, she received no or inadequate warnings about the increased risk of developing stroke, deep vein thrombosis, pulmonary embolism, heart attack, or gall bladder disease and/or removal associated with Yaz use as compared to use of second generation oral contraceptives.

48. ~~46.~~ Had Christine been aware of the increased risk of developing stroke, deep vein thrombosis, pulmonary embolism, heart attack, or gall bladder disease and/or removal from using Yaz as compared to second generation oral contraceptives, she would never have used Yaz. But for Bayer's wrongful conduct, Christine would not have incurred her damages.

49. ~~47.~~ Kirk Alton and other class members have suffered and continue to suffer damages including loss of care, guidance and companionship as well as financial expenses and special damages due to the wrongful conduct of Bayer.

CAUSES OF ACTION

50. ~~48.~~ Bayer at all material times owed a duty of care to the Plaintiffs to:

- (a) ensure that Yasmin and Yaz were fit for their intended or reasonably foreseeable use;

- (b) conduct appropriate testing to determine whether and to what extent use of Yasmin and Yaz posed serious health risks, including the risk of developing stroke, deep vein thrombosis, pulmonary embolism, heart attack, or gall bladder disease and/or removal;
- (c) properly, adequately, and fairly warn the Plaintiffs and their physicians that use of Yasmin and Yaz carry an increased risk of developing stroke, deep vein thrombosis, pulmonary embolism, heart attack, or gall bladder disease and/or removal compared to second generation oral contraceptives;
- (d) ensure that prescribing physicians were kept fully and completely warned and informed regarding all risks associated with Yasmin and Yaz;
- (e) monitor, investigate, evaluate and follow up on adverse reactions to the use of Yasmin and Yaz; and
- (f) properly inform Health Canada and other regulatory agencies of the increased risks of developing stroke, deep vein thrombosis, pulmonary embolism, heart attack, or gall bladder disease and/or removal, associated with the use of Yasmin and Yaz.

51. ~~49.~~ Bayer negligently breached its duty of care.

52. ~~50.~~ The Plaintiffs state that their damages were caused by the negligence of Bayer. Such negligence includes but is not limited to the following:

- (a) Bayer failed to ensure that Yasmin and Yaz were not dangerous to recipients during the course of their use and that the drugs were fit for their intended purpose and of merchantable quality;

- (b) Bayer failed to adequately test Yasmin and Yaz in a manner that would fully disclose the magnitude of the risks associated with their use, including but not limited to the increased risk of developing stroke, deep vein thrombosis, pulmonary embolism, heart attack, or gall bladder disease and/or removal;
- (c) Bayer, both before and after Yasmin and Yaz were approved by Health Canada, failed to give Health Canada complete and accurate information as it became available;
- (d) Bayer failed to conduct any or any adequate follow-up studies on the efficacy and safety of Yasmin and Yaz;
- (e) Bayer failed to conduct any or any adequate long-term studies of the increased risks of continued use of Yasmin and Yaz;
- (f) Bayer failed to provide the Plaintiffs, their physicians and Health Canada with proper, adequate, and/or fair warning of the increased risks associated with use of Yasmin and Yaz, including but not limited to the increased risk of developing stroke, deep vein thrombosis, pulmonary embolism, heart attack, or gall bladder disease and/or removal;
- (g) Bayer failed to warn the Plaintiffs, their physicians and Health Canada about the need for comprehensive regular medical monitoring to ensure the early discovery of side effects related to using Yasmin and Yaz;
- (h) Bayer failed to adequately monitor, evaluate and act upon reports of adverse reactions to Yasmin and Yaz in Canada and elsewhere;

- (i) Bayer failed to provide any or any adequate updated and/or current information to the Plaintiffs, their physicians and/or Health Canada respecting the increased risks of Yasmin and Yaz as such information became available from time to time;
- (j) Bayer failed to provide adequate warnings of the potential increased risks of Yasmin and Yaz as compared to second generation oral contraceptives on package labels;
- (k) Bayer failed to provide adequate warnings of the increased risks associated with Yasmin and Yaz, including the increased risk of developing stroke, deep vein thrombosis, pulmonary embolism, heart attack, or gall bladder disease and/or removal in all persons using Yasmin and/or Yaz, on the customer information pamphlets in Canada;
- (l) Bayer, after noticing problems with Yasmin and Yaz, failed to issue adequate warnings, timely recall the drugs, publicize the problem and otherwise act properly and in a timely manner to alert the public, including adequately warning the Plaintiffs and their physicians of the drugs' inherent dangers, including but not limited to the danger of developing stroke, deep vein thrombosis, pulmonary embolism, heart attack, or gall bladder disease and/or removal in all persons using Yasmin and/or Yaz;
- (m) Bayer failed to establish any adequate procedures to educate their sales representatives and prescribing physicians respecting the increased risks associated with using Yasmin and Yaz;
- (n) Bayer represented that Yasmin and Yaz were safe and fit for their intended purpose and of merchantable quality when they knew or ought to have known that these representations were false;

- (o) Bayer misrepresented the state of research, opinion and medical literature pertaining to the purported benefits of Yasmin and Yaz and their associated risks, including the increased risk of developing stroke, deep vein thrombosis, pulmonary embolism, heart attack, or gall bladder disease and/or removal in all persons using Yasmin and/or Yaz;
- (p) the misrepresentations made by Bayer were unreasonable in the face of the risks that were known or ought to have been known by Bayer;
- (q) Bayer failed to timely cease the manufacture, marketing and/or distribution of Yasmin and Yaz when they knew or ought to have known that these drugs caused an increased risk of developing stroke, deep vein thrombosis, pulmonary embolism, heart attack, or gall bladder disease and/or removal;
- (r) Bayer failed to conform with applicable disclosure and reporting requirements pursuant to the *Food and Drugs Act* and its associated regulations;
- (s) Bayer failed to properly supervise its employees, its subsidiaries and its affiliated corporations;
- (t) Bayer actively encouraged and/or affirmatively failed to take effective steps to discourage aggressive dispensation of Yasmin and Yaz;
- (u) Bayer breached other duties of care to the Plaintiffs and putative class members, details of which breaches are known only to Bayer; and
- (v) in all of the circumstances of this case, Bayer applied callous and reckless disregard for the health and safety of the Plaintiffs and putative class members.

53. ~~51.~~ Yasmin and/or Yaz were defective because it they are unreasonably dangerous, beyond the dangers which could reasonably have been contemplated by the Plaintiffs,

putative class members, or their physicians. Any benefit from using Yasmin and/or Yaz was outweighed by the serious and undisclosed risks of its use when used as Bayer intended. There are no individuals for whom the benefits of Yasmin and/or Yaz outweigh the risks, given that there are many alternative products that are at least as efficacious as Yasmin and Yaz and carry far less and/or less serious risks than Yasmin and Yaz.

54. ~~52.~~—The risks associated with use of Yasmin and Yaz, including increased risk of developing stroke, deep vein thrombosis, pulmonary embolism, heart attack, or gall bladder disease and/or removal in all persons using Yasmin and Yaz, were in the exclusive knowledge and control of Bayer. The extent of the risks were not known and could not have been known to the Plaintiffs. The Plaintiffs' injuries would not have occurred but for the negligence of the Defendants in failing to ensure that Yasmin and Yaz were safe for use or, in the alternative, for failing to provide an adequate warning of the increased risks associated with using Yasmin and/or Yaz to the Plaintiffs and to the Plaintiffs' physicians.

DAMAGES

55. ~~53.~~—The Plaintiffs' and other putative class members' injuries and damages were caused by the negligence of Bayer, their servants and agents.

56. ~~54.~~—As a result of Bayer's negligence, the Plaintiffs have suffered and continue to suffer serious personal injuries and pain and suffering.

57. ~~55.~~—As a result of the conduct of Bayer, the Plaintiffs and other class members suffered and continue to suffer expenses and special damages, of a nature and amount to be particularized prior to trial.

58. ~~56.~~—Some of the expenses related to the medical treatment that the Plaintiffs and class members have undergone, and will continue to undergo, have been borne by the various provincial health insurers including the Ontario Health Insurance Plan (“OHIP”). As a result of the negligence of Bayer, the various provincial health insurers have suffered and will continue to suffer damages for which they are entitled to be compensated by virtue of their right of subrogation in respect of all past and future insured services. These subrogated interests are asserted by the Plaintiffs and the putative class members pleading and relying upon the statutes listed in Schedule “B”.

59. ~~57.~~—The Plaintiffs claim punitive, aggravated and exemplary damages for the reckless and unlawful conduct of Bayer.

WAIVER OF TORT

60. ~~58.~~—In the alternative to damages, in all of the circumstances, the Plaintiffs plead an entitlement to “waive the tort” and claim an accounting or other such restitutionary remedy for disgorgement of the revenues generated by Bayer as a result of their sale of Yasmin and Yaz, due to the drugs’ unfitness for purpose and/or Bayer’s failure to properly bring the increased risks associated with Yasmin and Yaz to the attention of the Plaintiffs, putative class members, and their physicians, as well as other wrongful conduct as laid out in paragraphs 50 – 52.

61. ~~59.~~—As a direct, proximate, and foreseeable result of Bayer’s acts and otherwise wrongful conduct, the Plaintiffs and putative class members were economically harmed by purchasing and using an oral contraceptive that had increased risks but was not more efficacious. Bayer profited and benefited economically from the sale of Yasmin and Yaz prescribed to the Plaintiffs and putative class members who suffered corresponding harm, and as a result Bayer was unjustly enriched by the monies they received from selling the drugs.

62. 60.—Bayer voluntarily accepted and retained these profits and benefits with full knowledge and awareness that, as a result of their wrongdoing, the Plaintiffs and putative class members were not treated with a product of the quality, nature, fitness, or value that Bayer had represented or that the Plaintiffs and putative class members could reasonably expect.

63. 61.—It would be unreasonable for Bayer to retain the profits or money received from the sale of Yasmin and Yaz because the Plaintiffs and putative class members did not, in fact, receive a safe and effective product.

SERVICE OUTSIDE OF ONTARIO

64. 62.—The Plaintiffs plead and rely on section 17 (g), (h), (o) and (p) of the Rules of Civil Procedure, allowing for service *ex juris* of the foreign defendants. Specifically, this originating process may be served without court order outside Ontario in that the claim is:

- (a) in respect of a tort committed in Ontario (rule 17.02(g));
- (b) in respect of damages sustained in Ontario arising from a tort or breach of contract wherever committed (rule 17.02(h));
- (c) against a person outside Ontario who is a necessary and proper party to this proceeding properly brought against another person served in Ontario (rule 17.02(o)); and
- (d) against a person carrying on business in Ontario (rule 17.02(p)).

PLACE OF TRIAL

65. ~~63.~~The Plaintiffs propose that this action be tried in St. Catharines, Ontario.

March 10, 2010

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Solicitors for the Plaintiffs

SCHEDULE A

PROVINCIAL STATUTES -- 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) 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.

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

Action for damages

2 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.

(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) 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.

(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.

(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.

(4) Repealed 2002 cA-4.5 s36.

(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.

Other Provinces: see the following Acts

Manitoba

Fatal Accidents Act, C.S.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.N.S.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 Accidents 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.

Prince Edward Island

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.

SCHEDULE B

SUBROGATION LEGISLATION

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)

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

***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.

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

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.

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 she 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)



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 cooperate 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)

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 assurés*")

"**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 assurés*")

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

***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)

Medical Care Insurance Act, 1999 S.N. 1999, c. M-5.1,
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

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

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



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.

Ann Schwoob et al. v. Bayer Inc. et al.

Court File No: 52030\10

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at St. Catharines
Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

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