

Schedule A

**DISTRIBUTION PLAN AS AMENDED**

**INTERPRETATION**

1. In this Distribution Plan:
  - (a) **“Action”** means the action *Audra Jeanette Bellaire et al. v. Salim Daya et al.*, court file no. 04-CV-281230 CM commenced in the **Court** in Toronto;
  - (b) **“Administrator”** means Sutts, Strosberg LLP and its successor appointed from time to time by the **Court**;
  - (c) **“Arbitrator”** means Reva Devins and her successor appointed from time to time by the **Court**;
  - (d) **“Claims Bar Date”** means May 30, 2008, or such later date as fixed by the **Court**;
  - (e) **“Claim Form”** means the claim form and required supporting documents to be approved by the Court for use under this **Distribution Plan**;
  - (f) **“Class Counsel”** means Scarfone Hawkins LLP, Stanley Tick and Associates and Sutts, Strosberg LLP;
  - (g) **“Class Members”** means those women who underwent a Tompkins metroplasty performed by **Daya** at **the Hospital** during the period January 1, 1990 to March 31, 2004, inclusive;
  - (h) **“Court”** means the Ontario Superior Court of Justice;
  - (i) **“Daya”** means Dr. Salim Daya;
  - (j) **“Deadline for Opting Out of the Action”** means March 31, 2008, or such later date as fixed by the **Court**;
  - (k) **“Family Class”** or **“Family Class Members”** means the living spouse, child, grandchild, parent, grandparent or sibling (as defined in s. 61 of the *Family Law Act*, R.S.O. 1990, c. F.4) of each **Class Member** who was alive on the date the **Class Member** first underwent a Tompkins metroplasty performed by **Daya** at **the Hospital** in the period January 1, 1990 to March 31, 2004, inclusive;

- (l) **“Fund Counsel”** means Randy Bennett and his successor appointed from time to time by the **Court**;
- (m) **“Hospital”** means Hamilton Health Sciences Corporation;
- (n) **“Judgment”** means the order of the Honourable Madam Justice Hoy approving the settlement of this **Action** and implementing this **Distribution Plan**;
- (o) **“Master List”** means the list of 185 **Class Members** described in paragraph 18;
- (p) **“Parties”** means the plaintiffs and defendants in the **Action**;
- (q) **“Schedule derived from the Master List”** means the schedule listing each **Class Member** named on the **Master List** who did not successfully opt out of the **Action**;
- (r) **“Schedule derived from the Supplementary List”** means the schedule listing each **Class Member** named on the **Supplementary List** who did not successfully opt out of the **Action**;
- (s) **“Settlement Amount”** means the initial amount of \$9,900,000 and such other amounts as may hereinafter become payable as provided in paragraphs 19 to 21 of this **Distribution Plan**; and
- (t) **“Supplementary List”** means the supplemental list of 4 **Class Members** described in paragraph 18.

#### **APPOINTMENTS**

- 2. The Arbitrator is appointed to decide all disputes arising under this Distribution Plan in a summary manner. In this Distribution Plan:
  - (a) the Arbitrator has the jurisdiction to deal with all disputes requiring a determination including, without limitation, the jurisdiction to determine any question of fact, law or mixed fact and law;

- (b) the Arbitrator shall establish the summary procedure to determine each dispute and may enter into such mediation and arbitration proceedings as she establishes; and
  - (c) all decisions of the Arbitrator shall be in writing and shall be final and conclusive and there shall be no appeal therefrom whatsoever.
- 3. Fund Counsel is appointed to make those decisions arising under this Distribution Plan in respect of claims for additional compensation and to defend his decisions before the Arbitrator, if they are disputed. All decisions of Fund Counsel shall be in writing.
- 4. The Administrator is appointed to hold the Settlement Amount and all accrued/accruing interest, receive and process Claim Forms and other documentation as provided in the Judgment and this Distribution Plan, maintain all necessary records, provide such calculations as are required and perform necessary accounting functions including satisfying all tax requirements, report to the Court as required, make payments as directed by the Judgment, this Distribution Plan and further Court order and perform such other duties as implementation of the Judgment and Distribution Plan may require.

**PAYMENT AND ALLOCATION OF THE SETTLEMENT AMOUNT**

- 5. The defendants shall pay \$9,900,000 to the Administrator for deposit into an escrow account on or before the date of publication of the notice of the fairness

hearing. The Administrator shall hold the Settlement Amount in trust in an interest bearing account with one of the Schedule 1 banks.

6. If the proposed settlement is not approved by the Court or the Judgment does not become a final order, the Administrator shall return the Settlement Amount and all accrued interest to the defendants in the proportions they contributed. If the monies held by the Administrator in the escrow account are returned to the defendants, the taxes payable on the accrued interest shall be their responsibility.
7. If the proposed settlement is approved by the Court and upon the Judgment becoming a final order, the monies held by the Administrator are released from escrow and their release shall constitute payment by the defendants of the Settlement Amount except as hereinafter provided in paragraphs 19 to 21.
8. Following the release of the monies from escrow, the Administrator shall continue to hold the Settlement Amount and all interest accrued or accruing thereon in trust in a single interest bearing account with one of the Schedule 1 banks. However, the Administrator shall keep accounting records and accounts as if the monies held in the trust account were notionally held in four separate funds.
9. The Administrator shall notionally allocate the initial sum of \$9,900,000 into four funds as follows:

(a)	the "Base Fund" in the amount of	\$	6,845,000
(b)	the "Additional Compensation Fund" in the amount of	\$	880,000
(c)	the "Administrative Costs Fund" in the amount of	\$	175,000
(d)	the "Class Counsel Fund" in the amount of	\$	<u>2,000,000</u>
	Total	\$	9,900,000

10. The Administrator shall notionally allocate any interest accrued on the Settlement Amount to each fund at the time the monies are released from escrow and thereafter monthly *pro rata* to the balance notionally held in each fund on the last business day of each month.
11. The Administrator shall pay such amounts as the Court shall direct to Class Counsel from the Class Counsel Fund on account of costs upon receipt of the Court's order.
12. The Administrator shall pay such amounts as the Court shall direct to the Arbitrator, the Fund Counsel and the Administrator from the Administrative Costs Fund on account of their costs upon receipt of the Court's order.
13. Any surplus in the notional accounts for the Base Fund, the Administrative Costs Fund and the Class Counsel Fund after all payments required from those funds have been made shall be added to the monies in the notional account for the Additional Compensation Fund.

14. The Administrator shall not pay out any monies from the trust account except in accordance with the Judgment and this Distribution Plan, without further order of the Court made on notice to or consent of the Parties.
15. Except as provided in paragraphs 6 and 16, all taxes payable on any interest which accrued or accrues on the Settlement Amount while in the hands of the Administrator shall be the responsibility of the Class Members and shall be paid by the Administrator from the interest earned.
16. If Class Counsel is paid any portion of the interest which accrued or accrues on the Settlement Amount, any taxes payable on that portion of the interest paid to Class Counsel shall be the responsibility of Class Counsel.

**ADDITIONAL SETTLEMENT AMOUNT**

17. The Parties agreed to the settlement of this Action in principle for the sum of \$9,900,000 based upon:
  - (a) the Hospital's without prejudice estimation that 185 women are Class Members; and
  - (b) Class Counsels' belief that less than 80% of the Class (148 Class Members) would claim under this Distribution Plan.
18. The Hospital subsequently determined that four of the initial 185 patients thought to be Class Members did not have a Tompkins metroplasty. The Hospital also

identified eight additional patients as Class Members. The Parties have agreed that the four patients who did not have a Tompkins metroplasty shall be deleted from the Hospital's list of Class Members and replaced by four of the additional Class Members subsequently identified. This list shall be known as the "Master List" of Class Members and shall consist of 185 names. The remaining four Class Members shall be placed on a list known as the "Supplementary List" of Class Members. The total number of Class Members identified on the Master List and the Supplementary List is 189.

19. Provided that more than 148 of the women named on the Schedule derived from the Master List of Class Members submit Claim Forms on or before the Claims Bar Date, then Daya shall forthwith pay \$35,000 for each woman named on the Schedule derived from the Supplementary List of Class Members who submits a Claim Form on or before the Claims Bar Date and pay \$2,000 for the claims of each additional group of Family Class Members, to a maximum of 4 additional base payments or \$148,000.
  
20. Provided that more than 148 of the women named on the Schedule derived from the Master List of Class Members submit Claim Forms on or before the Claims Bar Date, then the Hospital shall forthwith pay \$35,000 for each woman not named on either the Schedule derived from the Master List of Class Members or the Schedule derived from the Supplementary List of Class Members who submits a Claim Form on or before the Claims Bar Date and is determined by the

Arbitrator to be a Class Member and pay \$2,000 for the claims of each additional group of Family Class Members.

21. All monies payable pursuant to paragraph 19 and/or paragraph 20 shall:
  - (a) forthwith be paid to the Administrator;
  - (b) constitute an additional Settlement Amount;
  - (c) be deposited into the trust account held by the Administrator; and
  - (d) be notionally allocated to the Base Fund.

#### **OPT OUT REFUNDS**

22. In the event one or more of the women named on the Master List of Class Members submits an opt out request prior to the Deadline for Opting Out of the Action and commences or continues a separate action against the defendants, or any one of them, in respect of a Tompkins metroplasty, the defendants may request that the amount of \$35,000 in respect of each such Class Member and \$2,000 in respect of her group of Family Class Members, if any, be refunded from the Base Fund. This request shall be made by the defendants providing a Direction to Pay executed by their counsel in respect of each such successful opt out to the Administrator along with a copy of the respective originating process on or before the later of July 31, 2008 or sixty days after the Claims Bar Date. For greater certainty, no opt out refund may be claimed or shall be paid for any of the 4 women named on the Supplementary List of Class Members, nor for any woman not named on the Master List of Class Members.

23. The Administrator shall forward any issue of eligibility for the opt out refund to the Arbitrator and the defendants. The defendants shall have standing to participate where there is an issue of eligibility for the opt out refund. The Arbitrator shall determine eligibility for the opt out refund in a summary manner and provide her written decision to the defendants and the Administrator.
24. The Administrator shall pay each opt out refund to the defendants as directed in the Direction to Pay as soon as practicable after approving the request for an opt out refund or after the receipt of the Arbitrator's decision approving the request for an opt out refund.

#### **COMPENSATION UNDER THIS DISTRIBUTION PLAN**

25. Each Class Member determined to be entitled to compensation under this Distribution Plan shall be paid \$35,000 from the Base Fund. For greater certainty, a Class Member shall only be entitled to one payment of \$35,000 from the Base Fund even if a second Tompkins metroplasty was performed in the period January 1, 1990 to March 31, 2004.
26. Each Class Member determined to be entitled to compensation under this Distribution Plan and determined to have experienced one or more of the additional complications/interventions listed on the chart at Revised Appendix A shall be entitled to additional compensation to a maximum of \$20,000. A Class

Member who underwent a second Tompkins metroplasty may claim additional compensation for the second procedure.

27. The Family Class Members of each Class Member determined to be entitled to compensation under this Distribution Plan shall be paid as a group, in total, \$2,000 from the Base Fund. For greater certainty, no group of Family Class Members shall be paid more than \$2,000 under any circumstances.
28. Each Family Class Member who is a minor child of a Class Member determined to be entitled to compensation under this Distribution Plan shall be allocated a \$250 payment out of the \$2,000 payment to the group of Family Class Members.

#### **CLAIMS PROCESS**

29. Each Class Member who does not opt out of the Action must submit a Claim Form to the Administrator on or before the Claims Bar Date to be entitled to be paid compensation under this Distribution Plan.
30. The Claim Form submitted by a Class Member is deemed to include the claims of all of her Family Class Members. To claim compensation for her Family Class Members, the Class Member must identify on her Claim Form all of her Family Class Members entitled to claim and undertake to the Court that she has done so.

31. If a Class Member is:
  - (a) deceased, the Claim Form must be submitted by her estate trustee; or
  - (b) a mentally incapable person, the Claim Form must be submitted by her Guardian of Property or her Attorney for Property.
  
32. If a Family Class Member is:
  - (a) under the age of 18, she/he must be represented by her/his parent(s)/person(s) with custody; or
  - (b) a mentally incapable person, she/he must be represented by her/his Guardian of Property or her/his Attorney for Property.
  
33. As soon as practicable, the Administrator shall report to the Court and the Parties by sealed affidavit. The affidavit delivered by the Administrator shall:
  - (a) list those Class Members who submitted a Claim Form to the Administrator on or before the Claims Bar Date who were named in the Schedule derived from the Master List of Class Members;
  - (b) list those Class Members who submitted a Claim Form to the Administrator on or before the Claims Bar Date who were named in the Schedule derived from the Supplementary List of Class Members;
  - (c) list those claimants who submitted a Claim Form to the Administrator on or before the Claims Bar Date who were not named in the Schedule

derived from the Master List of Class Members or the Schedule derived from the Supplementary List of Class Members; and

- (d) advise whether 148 or more women who were named in the Schedule derived from the Master List of Class Members submitted a Claim Form to the Administrator on or before the Claims Bar Date.

34. The Court shall by order approve distribution from the Base Fund for:

- (a) those Class Members named in the Schedule derived from the Master List of Class Members or the Schedule derived from the Supplementary List of Class Members who submitted a Claims Form before the Claims Bar Date; and
- (b) their Family Class Members;

if all requirements under this Distribution Plan have been satisfied.

35. Payments from the Base Fund will be made by the Administrator as soon as practicable after receipt of the Court order approving distribution.

#### **ISSUES OF ELIGIBILITY UNDER THE DISTRIBUTION PLAN**

36. The Administrator shall provide a copy of the Claim Form of any claimant:

- (a) whose name did not appear on the Schedule derived from the Master List of Class Members or the Schedule derived from the Supplementary List of Class Members; or
- (b) concerning whom there is any other issue of eligibility;

to the Arbitrator and to the defendants and advise the claimant or her counsel in writing. The defendants shall have standing to participate where there is an issue of eligibility. The Arbitrator shall determine eligibility for compensation under the Distribution Plan in a summary manner and provide a written decision to the claimant or her counsel, the defendants and the Administrator.

37. Any additional payments required from the Base Fund as a result of the Arbitrator's decision on eligibility will be made by the Administrator as soon as practicable after receipt of the Arbitrator's decision.

#### **PAYMENTS FROM THE BASE FUND**

38. Payment for the Class Member will be made to the Class Member or, if applicable, to her qualified representative as described in paragraph 31.
39. Except as provided in paragraph 40, payment for the group of Family Class Members shall be made to the Family Class Member designated on the Claim Form if:
- (a) she/he undertakes to the Court to receive the monies in trust for all Family Class Members; and
  - (b) a division of the monies has been agreed to by all Family Class Members and her/his qualified representative as described in paragraph 32 if anyone is under the age of 18 and/or a mentally incapable person.

The Arbitrator shall decide to whom the Family Class Members' payment will be made and/or the division of the monies among the group of Family Class Members if the required designation and/or undertaking has/have not been made to the Court.

40. Payment for each Family Class Member who is:
  - (a) under the age of 18 shall be made to the Court until the person reaches the age of 18; and
  - (b) a mentally incapable person shall be made to her/his qualified representative as described in paragraph 32.
  
41. The Administrator shall provide a copy of each Claim Form with any issues concerning Family Class Members and/or persons under age 18 and/or persons who are mentally incapable to the Arbitrator and advise the Family Class Members and/or the qualified representatives, as the case may be, in writing. The Arbitrator shall decide the issues in a summary manner and provide a written decision to the Family Class Members and/or qualified representatives, as the case may be, and to the Administrator.
  
42. Any payments required from the Base Fund as a result of the Arbitrator's decision on Family Class Members and/or persons under the age of 18 and/or persons who are mentally incapable will be made by the Administrator as soon as practicable after receipt of the Arbitrator's decision.

**CLAIM FOR ADDITIONAL COMPENSATION FOR SPECIFIC  
COMPLICATIONS/INTERVENTIONS**

43. Each Class Member who provides evidence satisfactory to Fund Counsel that she:
- (a) experienced one or more of the specific complications/interventions listed on the chart attached as Revised Appendix A;
  - (b) the complications/interventions were experienced within the time limits designated in Revised Appendix A; and
  - (c) the complications/interventions were caused or contributed to by the Tompkins metroplasty performed by Daya at the Hospital in the period January 1, 1990 to March 31, 2004;
- shall be entitled to be paid additional compensation. For greater certainty, except as provided in paragraph 44, the Class Member must provide medical evidence that the specific complications/interventions she experienced were caused or contributed to by the said Tompkins metroplasty.
44. A Class Member who makes a claim for additional compensation because she underwent a second Tompkins metroplasty will only be required to provide medical evidence that the second procedure was performed by Daya at the Hospital in the period January 1, 1990 to March 31, 2004.

45. The maximum amount that any Class Member may be paid out of the Additional Compensation Fund is \$20,000, regardless of the type and number of additional medical complications/interventions she claimed.
  
46. If there is an insufficient amount in the Additional Compensation Fund to pay the aggregate of all additional compensation awarded to Class Members, the payment to each Class Member entitled to additional compensation will be reduced *pro rata*.
  
47. To support the claim for additional compensation, the Class Member must provide:
  - (a) the opinion of a medical expert in the form provided with the Claim Form;  
and
  - (b) copies of only those portions of her medical records which indicate the relevant complications/interventions and the timing of the complications/interventions; or
  - (c) such other medical record or report as is acceptable to Fund Counsel.If a Class Member does not have her medical records in respect of the Tompkins metroplasty, she may request them from the Hospital.
  
48. The Administrator shall provide to Fund Counsel a copy of each Claim Form that claims additional compensation along with the medical documentation submitted by the Class Member.

49. Upon receipt of a Claim Form with a claim for additional compensation, Fund Counsel shall review the medical information submitted and determine:
- (a) if specific complications/interventions were experienced within the designated time limits;
  - (b) whether the specific complications/interventions experienced within the designated time limits were caused or contributed to by the Tompkins metroplasty performed in the period January 1, 1990 to March 31, 2004; and
  - (c) the award payable as additional compensation, subject to any pro-ration which may subsequently be required if the monies available in the Additional Compensation Fund are insufficient to pay all such awards in full.
50. Fund Counsel shall provide a written decision to the Class Member or her counsel and the Administrator.
51. The decision of Fund Counsel shall be final unless the Class Member or her counsel submits a dispute of the decision to the Administrator within 15 days of the date the Fund Counsel's decision was sent.
52. The Administrator shall forward any dispute of Fund Counsel's decision to the Arbitrator and to Fund Counsel. The Arbitrator shall determine the dispute in a

summary manner and provide a written decision to the Class Member or her counsel, Fund Counsel and the Administrator.

53. If the Arbitrator upholds Fund Counsel's decision, the Class Member shall be required to pay \$500 in costs from any amounts which may remain owing to her from the settlement compensation. If the Arbitrator does not uphold Fund Counsel's decision, the Class Member shall be paid \$500 in costs, subject to pro-ration, from the Additional Compensation Fund.
  
54. As soon as practicable after the Administrator has completed all of the necessary calculations to determine what each Class Member who is entitled to additional compensation will be paid from the Additional Compensation Fund, the Administrator shall, by motion on notice to the Class Members who were awarded additional compensation or their counsel and to Class Counsel, report to the court by sealed affidavit:
  - (a) the Class Member's name;
  - (b) the specific complications/interventions the Class Member was determined to have experienced;
  - (c) the amount of additional compensation payable for those specific complications/interventions up to the maximum amount; and
  - (d) the pro-rated amount payable on account of additional compensation from the Additional Compensation Fund, if pro-ration is required.

55. If the Administrator determines it is practicable, the notice to be provided for the purpose of paragraph 54 need only include a description of the nature of the motion, the date, time and place of the motion and the information that the complete motion record shall be available in a secure location accessible only to persons receiving notice of the motion at the website [www.dayaclassaction.com](http://www.dayaclassaction.com). In which case, the Administrator will forthwith post the motion record in PDF format in a secure location on the website.
56. No distribution from the Additional Compensation Fund shall be made by the Administrator until authorized by the Court. The Administrator shall make the payments from the Additional Compensation Fund as soon as practicable after receiving Court approval. A copy of the Court order authorizing the payments from the Additional Compensation Fund shall be provided to each Class Member who is receiving a payment from the Additional Compensation Fund at the time the payment is sent.

#### **COUNSEL FEES**

57. No fees for the services of a Class Member's counsel may be calculated on any amount the Class Member is paid except the amount paid out of the Additional Compensation Fund.

**DIRECTIONS TO PAY A CLASS MEMBER'S COUNSEL**

58. The Administrator shall honour a Direction to Pay a Class Member's counsel as soon as practicable, provided:
- (a) the direction is signed by the Class Member;
  - (b) it specifies how the fee was calculated; and
  - (c) the fee is calculated only on the amount the Class Member is paid out of the Additional Compensation Fund.
59. The Administrator shall not honour any other Direction to Pay a Class Member's counsel.
60. If the Administrator determines a Direction to Pay a Class Member's counsel does not comply with the provisions of paragraphs 57 and 58, the Administrator shall forward the Direction to Pay a Class Member's counsel to the Arbitrator on notice to the Class Member and her counsel. The Arbitrator shall decide whether the Direction to Pay a Class Member's counsel will be honoured by the Administrator in a summary manner and provide her written decision to the Class Member, her counsel and the Administrator.
61. As soon as practicable, the Administrator shall pay such Directions to Pay a Class Member's counsel as ordered by the Arbitrator.

**DISTRIBUTION OF SURPLUS, IF ANY**

62. If there is any notional surplus in the Additional Compensation Fund or any other fund after payment of all approved awards and expenses, the balance shall be divided on a *per capita* basis among all of the Class Members admitted to participate in this Distribution Plan and payment distributed to the Class Members as soon as practicable by the Administrator.

## REVISED APPENDIX A

Class Members may claim additional compensation if they experienced any one or more of the following specific medical complications/interventions caused or contributed to by the Tompkins metroplasty performed by Daya at the Hospital during the period January 1, 1990 to March 31, 2004. A Class Member who claims additional compensation for a second Tompkins metroplasty need only prove it was performed by Daya at the Hospital in the indicated timeframe.

ADDITIONAL COMPLICATION/INTERVENTION	TIME PERIOD INTERVENTION TOOK PLACE	COMPENSATION
Wound dehiscence (wound from the Tompkins metroplasty splitting open)	Within three months of Tompkins metroplasty	\$3,500
D&C (dilation and curettage) for any condition other than early pregnancy loss	Within six months of Tompkins metroplasty	\$3,500
D&C (dilation and curettage) as a result of early pregnancy loss	Within twelve months of Tompkins metroplasty	\$3,500
Umbilical hernia repair	Anytime after Tompkins metroplasty	\$3,500
Hysterectomy	Anytime after Tompkins metroplasty	\$10,000
Salpingectomy (removal of fallopian tube)	Anytime after Tompkins metroplasty	\$10,000
Laparoscopy to treat ectopic pregnancy	Anytime after Tompkins metroplasty	\$10,000
Stillbirth by caesarian section as a result of premature labour	Anytime after Tompkins metroplasty	\$10,000
Surgical repair as a result of Tompkins metroplasty, including repair of improper closure of incision	Anytime after Tompkins metroplasty	\$10,000
Second Tompkins metroplasty	In the period January 1, 1990 to March 31, 2004	\$10,000

Note that:

- (a) certain medical complications/interventions must have occurred within the time period following the Tompkins metroplasty, as indicated above;
- (b) the maximum additional compensation that may be paid is \$20,000, regardless of the type and number of additional medical complications/interventions claimed; and
- (c) if the aggregate of all additional compensation awards to the Class Members exceeds the amount available in the Additional Compensation Fund, the payments to individual Class Members will be reduced pro rata.