



ON READING the motion records, filed, including,

- (a) the motion records of the plaintiffs containing:
  - (i) the affidavit of Margaret Adella Fitzgeorge sworn February 8, 2006, transcript and exhibits from cross-examination on October 17, 2007;
  - (ii) the affidavit of Sally Anne Georgiu sworn January 23, 2006 and transcript from cross-examination on October 16, 2007;
  - (iii) the affidavit of Herbert Bruce Heron sworn April 30, 2007 and transcript from cross-examination on October 16, 2007;
  - (iv) the affidavit of Adrien Lefrancois sworn January 21, 2006 and transcript from cross-examination on October 22, 2007;
  - (v) the affidavit of Cynthia Ann Quenneville sworn January 24, 2006 and transcript from cross-examination on October 16, 2007;
  - (vi) the affidavit of William Fitzgeorge sworn February 8, 2006 and transcript from cross-examination on October 17, 2007;
  - (vii) the affidavit of George Georgiu sworn January 23, 2006;
  - (viii) the affidavit of Robert Quenneville sworn January 24, 2006 and transcript from cross-examination on October 17, 2007;
  - (ix) the affidavits of Jay Strosberg sworn January 18, 2006 and April 30, 2007, transcript and exhibit from cross-examination on October 17, 2007; and

- (x) the affidavit of Dr. Geddes Frank Owen Tyers sworn February 22, 2006, transcript and exhibits from cross-examination on October 25, 2007;
  - (xi) the transcript and exhibit from the cross-examination of Randy Del Nuernberg on November 2, 2007;
  - (xii) the transcript and exhibit from the cross-examination of Dr. Michael H. Kim on November 1, 2007; and
  - (xiii) the transcript from the cross-examination of Dr. Albert M. Drukteinis on November 1, 2007;
- (b) the motion records of the defendants containing:
- (i) the affidavit of Randy Del Nuernberg sworn August 15, 2007, transcript and exhibit from cross-examination on November 2, 2007;
  - (ii) the affidavit of Dr. Michael H. Kim sworn August 14, 2007, transcript and exhibit from cross-examination on November 1, 2007; and
  - (iii) the affidavit of Dr. Albert M. Drukteinis sworn August 14, 2007, transcript and exhibits from cross-examination on November 1, 2007;

ON HEARING the submissions of counsel for the plaintiffs and counsel for the defendants,

1. THIS COURT ORDERS that this action be and is hereby certified as a class proceeding.

2. THIS COURT ORDERS that the Patient Class is defined as:

All persons who were implanted in Canada with one or more of the following defibrillators:

<b>Device Name</b>	<b>Model</b>
Ventak Prizm 2 DR	1861
Contak Renewal	H135
Contak Renewal 2	H155
Contak Renewal 4	H190 and H195
Contak Renewal 4 HE	H197 and H199
Contak Renewal 4 AVT	M170 and M175
Contak Renewal 4 AVT HE	M177
Ventak Prizm AVT	1900
Vitality AVT	A135 and A155

3. THIS COURT ORDERS that the Family Class is defined as:

The spouse, child, grandchild, parent, grandparent or sibling of a Patient Class member as defined in s. 61 of the *Family Law Act*, R.S.O., c. F.3, as amended.

4. THIS COURT ORDERS that Margaret Adella Fitzgeorge, Sally Anne Georgiu, Adrien Lefrancois and Cynthia Ann Quenneville be and are hereby appointed as the representative plaintiffs of the Patient Class.

5. THIS COURT ORDERS that William Fitzgeorge, George Georgiu and Robert Quenneville be and are hereby appointed as the representative plaintiffs of the Family Class.

6. THIS COURT DECLARES that the causes of action asserted on behalf of the Patient Class are ~~declarations~~ negligence, conspiracy and waiver of tort.

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7. THIS COURT DECLARES that the relief sought by the Patient Class and Family Class is that claimed in subparagraphs 2(b) to (i) and subparagraphs 3(b) to (d) of the fresh as amended consolidated statement of claim.

8. THIS COURT DECLARES that the common issues are:

1. Did any of the defendants owe a duty of care to the Patient Class? If so, what was the standard of care? Did any of the defendants breach the standard of care? Were any of the defendants negligent? If so, who, when and why?
2. Did the defendants, or any of their officers, directors, employees, servants, conspire? If so, who conspired with whom, when, where, why and for what purpose?
3. Can all or part of the Patient Class elect to "waive the tort" and require the defendants to account for the gross revenue, or alternatively, the net income from the sale of the Defibrillators in Canada? If part but not all of the Patient Class can elect, which part or parts of the Patient Class can elect? For whose benefit is the accounting to be made? Should the subrogated claims of the provincial health insurers be included in the accounting? Are the defendants constructive trustees over the gross revenue or the net income? What amount is held in a constructive trust and by whom?
4. Can the damages of the Patient Class be determined, in whole or in part, on an aggregate basis? If so, who should pay what amount, to whom and why?
5. Are the Patient Class members entitled to an award of punitive damages against one or more of the defendants? If so, against whom and in what amount? Should punitive damages be assessed in the aggregate? If so, in what amount and how should punitive damages be distributed?
6. Should the defendants, or any or them, pay prejudgment and postjudgment interest, at what annual interest rate, and should the interest be compound interest?
7. Should the defendants, or any of them, pay the costs of administering and distributing any monetary judgment and/or the cost of determining eligibility and/or the individual issues? If so, who should pay what costs, why, in what amount and to what extent?

9. THIS COURT ORDERS that the plaintiffs' litigation plan be and is hereby approved in the form attached as Schedule 1 to this order.

10. THIS COURT ORDERS that a Patient Class member and a Family Class member may only opt out of this class action by sending a written election to opt out, signed by him or her, addressed to Howie & Partners, Chartered Accountants, by pre-paid mail or courier, at 3063 Walker Road, Windsor, Ontario, Canada N8W 3R4, Attention: Guidant Class Action; or by fax to 519.250.1929; or by email to [sisaac@howieandpartners.com](mailto:sisaac@howieandpartners.com), which election must be received by Howie & Partners before 5:00 p.m. ET, on a date to be fixed by further order of this court.

11. THIS COURT ORDERS that if a Patient Class member opts out of this class action, his or her Family Class members shall be deemed to have opted out of this class action.

12. THIS COURT ORDERS that no person may opt out a minor or a mentally incapable Patient Class member or Family Class member without the permission of the court after notice to The Children's Lawyer and/or the Public Guardian and Trustee, as the case may be.

13. THIS COURT ORDERS that, after the expiration of the opt-out period, Sarkis Isaac of Howie & Partners shall report to the court and parties by affidavit and advise as to the names and addresses of those persons, if any, who have opted out of this class action.

14. THIS COURT ORDERS that the notice of certification of the action as a class proceeding, attached as Schedule 2 (“Notice”), be and is hereby approved.

15. THIS COURT ORDERS that the Patient Class members and the Family Class members shall be given notice of the certification of this action in the following manner (the “Notice Program”):

- (a) the defendants shall:
  - (i) post the Notice on their website [www.guidant.com](http://www.guidant.com);
  - (ii) by a date to be fixed by further order of this court, mail the Notice to the last known addresses of each of the Patient Class members; and
  - (iii) by a date to be fixed by further order of this court, mail the Notice to the electrophysiologists and cardiologists who, according to the defendants’ records, treated the members of the Patient Class;
- (b) plaintiffs’ counsel shall:
  - (i) post the Notice on their website at [www.guidantclassaction.ca](http://www.guidantclassaction.ca);
  - (ii) request that the operators of the websites of the Canadian Cardiovascular Society at [www.ccs.ca](http://www.ccs.ca) and the Heart and Stroke Foundation at [www.heartandstroke.com](http://www.heartandstroke.com) post the Notice on their websites;
  - (iii) provide the Notice to any person who requests it; and
  - (iv) provide a recorded message on the toll-free telephone line maintained by plaintiffs’ counsel.

16. THIS COURT ORDERS that the mailing of the Notice to the Patient Class members as required by subparagraph 15(a)(ii) shall be deemed to be a mailing of notice to the Family Class members.

17. THIS COURT DECLARES that the Notice Program satisfies the requirements of section 17 of the *Class Proceedings Act, 1992* and is the best notice practicable under the circumstances.

18. THIS COURT ORDERS that immediately after the expiration of the opt-out period, the defendants shall provide to plaintiffs' counsel:

- (a) the full names and last known addresses of each Patient Class member who did not opt out of this class action;
- (b) the names and address of each Patient Class member's cardiologist and electrophysiologist as identified in the defendants' records; and
- (c) the names and last known addresses of the Patient Class members whose mailed Notice was returned to the defendants.

19. THIS COURT ORDERS that the information provided by the defendants to the plaintiffs' counsel, as directed in paragraph 18, includes personal information that shall be treated as confidential information by plaintiffs' counsel and their respective employees, agents, experts and consultants and the Ontario Ministry of Health and Long-Term Care, to whom plaintiffs' counsel may deliver this information.

20. THIS COURT ORDERS that forthwith after expiration of the opt-out period:

- (a) the defendants shall file with the court an affidavit confirming their compliance with paragraph 15(a); and
- (b) plaintiffs' counsel shall file with the court an affidavit confirming their compliance with paragraph 15(b).

21. THIS COURT ORDERS that the parties may make written costs submissions as to costs within 21 days and any written reply shall be delivered within a further 7 days.

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JUSTICE

ENTERED AT / INSCRIT À TORONTO  
ON / BOOK NO:  
LE / DANS LE REGISTRE NO.:

AUG 07 2008

AS DOCUMENT NO.:  
À TITRE DE DOCUMENT NO.:

PER / PAR: J.F.

**SCHEDULE 1**

**PLAINTIFFS' REVISED LITIGATION PLAN**

**CLASS COUNSEL AND THE RESOURCES AVAILABLE TO PROSECUTE THE ACTION**

1. The plaintiffs' counsel group is comprised of Sutts, Strosberg LLP and Lerner LLP ("Class Counsel"), both firms having the requisite knowledge, skill, experience, personnel and financial resources to prosecute this class action.
2. Class Counsel anticipate that prosecuting this action will require:
  - (a) reading, organizing, profiling, scanning, managing and analyzing documents;
  - (b) the analysis of complex legal issues; and
  - (c) extensive expert evidence.
3. The plaintiffs intend to apply to the Class Proceedings Fund for funding.

**THE COMPOSITION OF THE CLASS**

4. The Patient Class is defined as:

All persons who were implanted in Canada with one of the following Guidant Defibrillators:

<b>ICD and CRT-D</b>	<b>Model</b>
Ventak Prizm 2 DR	1861
Contak Renewal	H135
Contak Renewal 2	H155
Contak Renewal 4	H190 and H195
Contak Renewal 4 HE	H197 and H199
Contak Renewal 4 AVT	M170 and M175
Contak Renewal 4 AVT HE	M177
Ventak Prizm AVT	1900
Vitality AVT	A135 and A155

5. The Family Class is defined as:

The spouse, child, grandchild, parent, grandparent or sibling of a Patient Class member as defined in s. 61 of the *Family Law Act*, R.S.O., c. F.3, as amended.

**REPORTING TO AND COMMUNICATING WITH PUTATIVE CLASS MEMBERS**

6. Based on the information provided by the defendants, there are about 1,992 class members.
7. Class Counsel have developed a website for this proposed class proceeding at <http://guidantclassaction.ca> (the “website”). Current information on the status of the action is posted on the website and will be updated regularly. Copies of some of the court decisions and other information relating to the action are or will be accessible at the website.
8. The website contains a communication webpage, a feature that permits putative class members to submit inquiries to Class Counsel. Any inquiries are sent

directly to a designated member of Class Counsel who will promptly respond to inquiries.

9. The website lists a toll-free telephone number for Class Counsel which will contain a recorded message providing information regarding the litigation. The recorded message will be updated as required.
  
10. The website also includes the direct-dial telephone number for a designated person with Class Counsel, permitting putative class members to make inquiries to a live person if they wish to do so.

#### **LITIGATION SCHEDULE**

11. The plaintiffs will ask the case management judge to set a litigation schedule for:
  - (a) the completion of pleadings;
  - (b) the documentary production and delivery of affidavits of documents by both the plaintiffs and the defendants;
  - (c) the examinations for discovery;
  - (d) the delivery of experts' reports; and
  - (e) the trial of the common issues.
  
12. The plaintiffs may also ask that the litigation schedule be amended from time to time, as required.

**DOCUMENT EXCHANGE AND MANAGEMENT**

13. The defendants possess most, if not all, of the documents relating to the common issues such as, applications and reports to regulatory authorities, including medical device reports to the FDA, testing results, design considerations, design changes, marketing procedures and documents relating to corporate and management structure. These documents will be produced to Class Counsel through the normal production, cross-examination and examination for discovery processes. The plaintiffs will produce all documents in their possession.
14. The plaintiffs will ask the court to order the defendants to produce documents and depositions relating to liability that were or are produced in the U.S. class action(s) whether or not they are covered by a U.S. protective order.
15. Class Counsel anticipate and are able to handle the intake and organization of the large number of documents that will likely be produced by the defendants. Class Counsel will use data management systems to organize, code and manage the documents.
16. If required, the documents may be maintained on a secure, password-protected internet website for the purpose of access by members of Class Counsel via the world wide web.

17. The same data management systems will be used to organize and manage all relevant documents in the possession of the plaintiffs, although, the plaintiffs have virtually no documentation relating to the common issues other than what is available in the public domain.

**PLAINTIFFS' EXPERT**

18. The plaintiffs have retained Dr. Frank Tyers, an expert in cardiology and cardiovascular-related implantable medical devices, to interpret field-specific documentation, opine on standard of care-related issues and medical device design issues, provide assistance as needed to Class Counsel and produce reports as required.

**THE FOLLOWING TERMS OF THIS PLAN PRESUPPOSE THE COURT CERTIFIES THE ACTION AS A CLASS PROCEEDING**

**NOTICE OF CERTIFICATION AND OPT-OUT PROCEDURE**

19. The plaintiffs believe that the defendants have the name and address for each putative class member and the particulars of where, when and which defibrillator was implanted from the medical device implant card. The plaintiffs ask the court to order the defendants to produce this information to Class Counsel to allow a direct mailing of the notice of certification to the class members. Alternatively, the defendants can effect the mailing of the notice. After the expiration of the opt-out period, the defendants should deliver to Class Counsel a list of the names,

addresses of all Class Members who do not opt-out and their physicians' names and addresses after the expiration of the opt-out period.

20. The court will be asked to:
  - (a) set an opt-out date ninety (90) days after the date of publication of the notice of certification (the "Notice");
  - (b) settle the form and content for the notification of certification and the opt-out period generally in accordance with the form attached hereto as Schedule 1 (the "Notice"); and
  - (c) settle the means by which notice of the certification and the opt-out period will be given("Notice Program").
  
21. The plaintiffs propose that the Notice be disseminated in accordance with the following Notice Program:
  - (a) if the court decides on a direct mailing, mailed by Class Counsel or Guidant to the last known address of the class members identified in the defendants' medical device implantation records and other warranty or complaint registration programs for the defibrillators;
  - (b) mailed by Class Counsel or the defendants to all treating electrophysiologists and implanting and explanting cardiologists in Canada who treated all Class Members as identified by the defendants with a request that they bring it to the attention of their patients;
  - (c) posted on Class Counsel's website;
  - (d) posted by the defendants on their website [www.guidant.com](http://www.guidant.com);
  - (e) posted on the websites of the Canadian Cardiovascular Society and the Heart and Stroke Foundation at [www.ccs.ca](http://www.ccs.ca) and [www.heartandstroke.com](http://www.heartandstroke.com) respectively, if they consent;
  - (f) available orally by recorded message at Class Counsel's toll-free telephone line; and
  - (g) delivered by Class Counsel to any person who requests it.

22. To the extent that a significant number of addresses of class members are no longer current, as reflected by the number of notices returned as undeliverable. Class Counsel may consult the various relevant health ministries for assistance in identifying the current addresses. If the defendants mail the notices, they will also provide full particulars of all returned notices mailed to persons who do not opt-out to Class Counsel at the expiration of the opt-out period.
23. The plaintiffs will pay for the costs of the Notice Program in the first instance except for any costs incurred by the defendants in mailing the Notice.
24. The mailing of a Notice to a Patient Class Member should be deemed to be notice to his/her Family Members.
25. The plaintiffs propose the following opt-out procedure:
  - (a) a person may opt out of the class proceeding by sending a written election to opt-out to a person designated by the court before a date fixed by the court;
  - (b) no person may opt out a minor or a person who is mentally incapable without leave of the court after notice to the Children's Lawyer and/or the Public Guardian and Trustee, as appropriate;
  - (c) no Patient Class Member and no Family Class Member may opt out of the class proceeding after the expiration of the opt-out period set by the court except by court order; and
  - (d) if a Patient Class Member opts out of the class proceeding his/her Family Members will be deemed to have also opted out.

26. The plaintiffs will ask the court to appoint Sarkis Isaac, an accountant with Howie & Partners in Windsor, to receive the opt-out form from any Patient Class Member or Family Class Member opting out of the class action and, within thirty (30) days after the expiration of the opt-out period, to deliver to the court and the parties an affidavit listing the names of all persons who have opted out of this class action. Mr. Isaac has previously been appointed by the court to fulfill these tasks.

#### **EXAMINATIONS FOR DISCOVERY**

27. Class Counsel will examine for discovery at least one representative from each of the defendants and estimate that, subject to undertakings and refusals, these examinations will take seven (7) days being:
- (a) one (1) day each for Guidant Canada Corporation and Guidant Sales Corporation;
  - (b) two (2) days for Guidant Corporation; and
  - (c) three (3) days for Cardiac Pacemakers Inc..
28. The plaintiffs may ask the court for an order allowing them to examine multiple representatives of the defendants, particularly Cardiac Pacemakers Inc., if necessary.

28A. The defendants will examine the representative plaintiffs for discovery if the choose to do so.

**CLARIFICATION OF COMMON ISSUES**

29. Following certification, examinations for discovery and the exchange of expert opinions and before the trial of the common issues, the plaintiffs may ask the court for an order to clarify and/or redefine the common issues, if required.

**MOTIONS**

30. Although no motions other than those indicated in this plan are currently anticipated by the plaintiffs, additional motions may be required and will be scheduled as the case progresses.

**DISPUTE RESOLUTION**

31. The plaintiffs are willing to participate in mediation or non-binding alternative dispute resolution efforts if the defendants are prepared to do so.

**TRIAL OF THE COMMON ISSUES**

32. The plaintiffs will ask the court to hold the trial of the common issues six (6) months after the completion of examinations for discovery, undertakings and any motions for refusals.

**THE FOLLOWING TERMS OF THIS LITIGATION PLAN PRESUPPOSE THAT THE COURT DETERMINES THE COMMON ISSUES RELATING TO LIABILITY IN FAVOUR OF THE PATIENT CLASS AND THE FAMILY CLASS**

**ASSESSMENT OF DAMAGES**

33. Assuming that the common issues are resolved by judgment in favour of the Patient Class, the plaintiffs will ask the court to award damages to the Patient Class Members in the following manner or such other manner as the court may direct:
- (a) damages in an amount to be determined and distributed as provided in the Guidant Compensation Plan attached as Schedule A; or
  - (b) at the election of the plaintiffs, an aggregate amount representing the defendants' income from the sale of the defibrillators on account of damages such amount to be allocated and distributed as provided in the Guidant Compensation Plan attached as Schedule A; and
  - (c) global punitive damages to be allocated and distributed as provided in the Guidant Compensation Plan attached as Schedule A.
34. Assuming that the common issues are resolved by judgment in favour of the plaintiffs, the court will be asked to settle the form and content of a notice of

resolution of the common issues (the “Notice of Resolution”) and to set a date by which Patient Class Members and Family Class Members will be required to file their claims with a person designated by the court.

**NOTICE OF RESOLUTION OF COMMON ISSUES**

35. The plaintiffs will ask the court to order that the Notice of Resolution be distributed substantially in accordance with the Notice Program set out at paragraph 21, except that the Notice of Resolution will not be mailed to any Patient Class Member who validly opted out in accordance with the procedure set out herein.

**REVIEW OF THE LITIGATION PLAN**

36. This plan will be reconsidered and may be revised under the continuing case management authority of the court, if required, both before and after the determination of the common issues.

## PLAINTIFFS' REVISED COMPENSATION PLAN

### OVERVIEW

1. The purpose of this Guidant Compensation Plan is to:
  - (a) pay compensation to individuals whose claims are accepted under the plan and to their Family Members for out-of-pocket expenses, losses and personal injury in accordance with the terms and conditions herein; and
  - (b) to provide a cy-près distribution of any excess funds for research projects in Canada in education and outreach having to do with heart and stroke to benefit, among others, affected individuals who are not identified or do not pursue a claim.
  
2. Compensation for personal injury and for Family Members' claims will be determined by an assessment of damages based upon the ordinary legal principles applied in courts and upon the terms of this plan.

### DEFINITIONS

3. In this plan, all capitalized terms have the meanings ascribed to them in the fresh as amended consolidated statement of claim, or the following meanings:
  - (1) **"Claim Form"** means a document approved by the court to be completed by the claimant for submission to the administrator;
  - (2) **"Family Members"** means the following living relatives of a **Class Member**, claiming under this plan, who suffered damages caused by a Defibrillator:

- (a) spouse or same-sex partner;
  - (b) children;
  - (c) parents;
  - (d) siblings;
  - (e) grandparents; or
  - (f) grandchildren.
- (3) **“Patient Class Members”** means all persons who were implanted in Canada with one of the Defibrillators;

#### SUPERVISION BY THE COURT

4. The court shall issue orders in such form as are necessary to implement and enforce the provisions of this plan and supervise the ongoing administration and operation of this plan. Without limiting the generality of the foregoing, the court shall:
- (a) set a claims deadline by which date claimants will be required to file their claims;
  - (b) approve the Claim Form which will ask claimants to:
    - (i) provide information with respect to the implantation and explanation of their defibrillators, details of special damages and prescribed supporting documentation and specify whether the total claim of the Patient Class Member and his or her Family Class Members, if any, is:
      - (1) \$10,000 or less; or
      - (2) between \$10,001 and \$50,000; or
      - (3) more than \$50,000;
    - (ii) identify Family Members, the nature of the relationship, details of special damages and services rendered and prescribed supporting documentation;
  - (c) appoint an administrator to hold the recovered monies, if necessary, in accordance with investment guidelines approved by the court and to implement this plan by receiving, evaluating and paying compensation claims in accordance with protocols approved by the court;

- (d) appoint a referee to review any issues as to eligibility and conduct the assessments of damages for Patient Class Members and Family Class Members and determine causation, if in dispute; and
- (e) if necessary, determine the recipients, proportions and manner of any cy-près distribution.

#### **RECOVERED MONIES**

5. Any recovered monies shall be paid to the administrator in trust and invested until such time as they are required to be paid out by further court order.

#### **COSTS**

6. Class counsel fees, disbursements and applicable taxes shall be paid out of the monies recovered after approval by the court and shall constitute a first charge upon and shall be paid as the first payments from the monies recovered.

7. The costs of the appointees implementing and overseeing this plan shall be paid by the administrator from the recovered monies after approval of the court and shall constitute a second charge upon the recovered monies.

#### **ELIGIBILITY**

8. The Claim Form shall be deemed to be a statement of claim and shall be delivered to the administrator, who, if the defendants are participating in the assessment process, shall deliver a copy of it and any supporting documentation to the defendants.

9. The defendants shall have thirty (30) days after receipt of the Claim Form, or such other time period set by the court, to file with the administrator a written opposition to all or part of each claim. The written opposition shall state the reasons for the opposition and shall be deemed to be a statement of defence.

10. The administrator shall determine if a claimant is a Patient Class Member by virtue of having been implanted with a Defibrillator and therefore eligible to claim under this plan. The administrator shall communicate its reasons for approving or denying a claimant's eligibility to the claimant and to the defendants in writing.

11. The claimant or the defendants may request the administrator's eligibility decision be referred to the referee for review.

#### **REVIEW OF ELIGIBILITY BY THE REFEREE**

12. Any review of eligibility shall proceed in such manner as the referee directs and the referee shall have the power to award any costs of the review. The review of eligibility is solely directed to the issue of whether or not the claimant was implanted with a Defibrillator and therefore is a member of the Patient Class. As a matter of clarification, any issue of causation will be dealt with subsequently.

13. Where any review of eligibility is required, the referee shall prepare reasons for decision which shall forthwith be provided to the claimant, the defendants,

the administrator and filed with the court. The reasons for decision will be deemed to be confirmed upon the expiration of 10 days from its filing with the court unless the defendants or the claimant files a notice with the court within that time period stating that he or she opposes their confirmation.

#### **DETERMINATION OF CAUSATION AND THE ASSESSMENT OF DAMAGES**

14. It may be possible to categorize and value claims in accordance with a grid according to the nature and severity of the damage with an election to claim additional amounts in respect of serious personal injury. However, until a profile of the Patient Class is available, it is not possible to provide particulars of such a procedure at this time and the following procedure assumes that all claims will be individually assessed.

15. If a claimant is a Patient Class Member eligible to claim under this plan, he or she shall be entitled to an assessment of damages, including determination of any issues of causation, by a referee to determine the amount of his or her damages. The defendants may participate in the assessment of damages.

16. If a claimant is a Patient Class Member eligible to claim under this plan, the Family Member(s) of the claimant may also have his/her/their damages assessed at the assessment of damages, but not otherwise.

17. Each claim under this plan asserts a subrogation claim for insured services as provided in the *Health Insurance Act*, R.S.O. 1990, c. H-6, as amended, or the equivalent legislation in other provinces and territories of Canada.

18. The assessment of damages, including determination of any issues of causation, may be done in writing or oral hearing depending upon the nature and complexity of the claim and the seriousness of the personal injury.

19. The court will be asked to give directions as to a hearing or hearings for the adducing of generalized and expert evidence which will be applicable to all claims individually assessed by the referee.

20. A claimant may deal with and appear at an assessment of damages in person or with counsel or such other representative as he or she may designate in writing.

21. The referee:

- (1) shall establish the procedures to be followed, including whether the assessment shall proceed in writing or by oral hearing, to order affidavits of documents and examinations for discovery, if necessary, depending upon whether or not the claim of the Patient Class Member and his or her Family Class Members are asserted at more than \$50,000, and to award prejudgment interest in the calculation of damages; and
- (2) has the power to award costs of the assessment to the claimant.

22. The Referee's proposed procedures will be tendered to the court for approval, on notice to the parties.

23. Following any assessment of damages, the referee shall prepare reasons for decision which shall forthwith be provided to the Patient Class Member and the Family Class Member, the defendants, the administrator and filed with the court. The reasons for decision on an assessment of damages shall be deemed to be confirmed upon the expiration of 10 days from the filing with the court unless the defendants or the Patient Class Member files a notice with the court within that time period stating that he or she opposes the confirmation. If the Patient Class Member opposes confirmation, his or her Family Member(s) may also oppose confirmation, but not otherwise.

#### **DISTRIBUTION PROCESS**

24. As soon as practicable after the damages assessments and appeals therefrom are completed, the administrator shall by motion, on notice to Class Counsel and the defendants, report to the court the proposed distribution for each Patient Class Member and Family Class Member including his or her prorated share of any punitive damages award and/or prejudgment interest award.

25. No distribution to eligible Patient Class Members or Family Members shall be made until authorized by the court. The administrator may make an interim distribution if authorized by the court.

26. Each eligible Patient Class Member and Family Member shall sign such documents as the administrator may require in accordance with any protocol approved by the court as a condition precedent to receiving any distribution.

**INSUFFICIENT RECOVERED MONIES**

27. In the event there are insufficient monies recovered to satisfy all awards, the court will be asked to give further instructions to ensure that there are no priorities amongst eligible Patient Class Members.

**CY-PRÈS DISTRIBUTION**

28. The residue from the recovered monies (and any interest that has accrued thereon) after payment of all legal fees and expenses, administrative costs, personal injury awards, Family Members' awards and any taxes shall be distributed cy-près for research projects in Canada in education and outreach having to do with heart and stroke to benefit, among others, Patient Class Members who are not identified or do not pursue a claim. The cy-près shall be distributed in such manner to such recipients and in such proportions as is determined by the court.

**FINAL REPORT**

29. After the administrator makes the final distribution to Patient Class Members, Family Class Members and to any cy-près recipients, the administrator shall make its final report to the court in such manner as the court directs and receive its discharge.



ADRIEN LEFRANCOIS et al  
Plaintiffs and GUIDANT CORPORATION et al  
Defendants

Court File No: 05-CV-292387CP

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding Under the *Class Proceedings Act, 1992*

Proceeding commenced at TORONTO

**ORDER**

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