

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
TRIAL DIVISION**

**Citation:** *Verna Doucette v. Eastern Regional Integrated  
Health Authority*, 2010 NLTD 29

**Date:** 201002

**Docket:** 200601T2966CP

BETWEEN:

**VERNA DOUCETTE**

PLAINTIFF

AND:

**EASTERN REGIONAL INTEGRATED  
HEALTH AUTHORITY**

DEFENDANT

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**Before:** The Honourable Mr. Justice Carl R. Thompson

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**Place of Hearing:**

St. John's, Newfoundland and Labrador

**CLASS ACTIONS - SETTLEMENT APPROVAL**

**Summary:** Settlement Agreements of class members claims for ER/PR Hormone receptor alleged testing errors and payment of Plaintiffs' counsel fees and disbursements are approved.

**Appearances:**

Mr. David Klein

Mr. Chesley F. Crosbie, Q.C.

Mr. Douglas Lennox

Appearing on behalf of the Plaintiff

Mr. Daniel M. Boone

Ms. Janie L. Bussey

Ms. Janet L. Grant

Appearing on behalf of the Defendant

**Authorities Cited:**

**CASES CONSIDERED:** *Sawatzky v. Societe Chirugicale Instrumentarium Inc.*, [1999] B.C.J. No. 1814 (S.C.); *Semple v. Canada (Attorney General)*, [2006] M.J. NO. 498 (Q.B.); *Dabbs v. Sun Life Assurance Company of Canada*, (1998), 40 O.R. (3d) 429 (Gen. Div.); (1998), 41 O.R. (3d) 97 (C.A.); *Parsons v. Canadian Red Cross Society (1999)*, 40 C.P.C. (4<sup>th</sup>) 151 (Ont. S.C.); *Rideout v. Health Labrador Corporation*, 2007 NLTD 150; *Al-Harazi v. Quizno's Canada Restaurant Corp.*, [2007] O.J. No. 2819 (S.C.J.); *McCarthy v. Canadian Red Cross Society*, [2001] O.J. No. 567 (S.C.J.); *Fraser v. Falconbridge Ltd.*, [2002] O.J. No. 2383 (S.C.J.); *Baxter v. Canada (Attorney General)*, 2006 Carswell Ont. 7879, 80 O.R. (3d) 481; *Epstein v. First Marathon Inc.*, [2000] O.J. No. 452 (S.C.J.); *Healey v. Lakeridge Health Corporation*, 2010 ONSC 725; *Laferriere v. Lawson*, [1991] 1 S.C.R. 541; *Bohun v. Segal*, 2008 BCCA 23; *Gregg v. Scott*, [2005] UKHL 2; *Parsons v. Coastal Capital Savings Credit Union*, 2009 BCSC 330; *Vitapharm Canada Ltd. v F. Hoffman-La Roche Ltd.* [2005] O.J. No. 1117 (S.C.J.); *Bodnar v. Cash Store Inc.*, 2010 BCSC 145.

**STATUTE CONSIDERED:** *Class Actions Act*, S.N.L. 2001, c. C-18.1, s. 35 and 38.

**RULES CONSIDERED:** *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D, r. 7A.10(3)(a).

**TEXT CONSIDERED:** Michael Eizenga *et al.*, *Class Actions Law and Practice*, 2nd ed., looseleaf (Toronto: LexisNexis Canada, 2008).

## **REASONS FOR JUDGMENT**

**THOMPSON, J.:**

### **INTRODUCTION**

[1] The proceeding commenced by this cause of action was certified as a class action on May 28, 2007, following a hearing May 23-25, 2007.

[2] The Plaintiff seeks an order:

(a) approving the settlement of this class action and the distribution protocol pursuant to s. 35 of the *Class Actions Act* (“CAA”), S.N.L. 2001, c. C-18.1.

(b) appointing Crawford Class Action Service as the Administrator of the settlement;

(c) approving notice of the settlement to the class pursuant to s. 20 of the CAA;

(d) issuing an order directing that the Defendant release certain information to the Administrator or otherwise assist with implementation of the settlement, to ensure that the Defendant has complied with s. 35 of the *Hospital Act*, R.S.N.L. 1990, c. H-9.

(e) amending the class definition pursuant to s. 9(3) of the CAA to delete the exclusion of non-residents;

(f) amending the Statement of Claim pursuant to Rule 15 of the *Rules of the Supreme Court*, , 1986, S.N.L. 1986, c. 42, Sch. D., to delete the second paragraph of the second sentence of paragraph 20 of the statement of Claim;

(g) approving the retainer agreement between the Plaintiff and Ches Crosbie Barristers pursuant to s. 38 of the CAA, or alternatively,

(h) determining the fees and disbursements of Ches Crosbie Barristers and Klein Lyons.

[3] The Memorandum of Settlement, following from mediation October 28, 29 and 30, with Mr. George Adams, Q.C., states:

The parties agree to settle this class action on the following terms:

1. A class member will be on an advisory committee to be established by Eastern Regional Integrated Health Authority (“Eastern Health”) regarding cancer services and the implementation of the Cameron Inquiry recommendations.
2. Eastern Health will retain an external reviewer to carry out a review of the implementation of the Cameron Inquiry recommendations at the three year anniversary of the release of the Cameron Inquiry report (March 2012). A class member will participate in the selection of the reviewer.
3. A physical memorial will be established by Eastern Health in the Dr. H. Bliss Murphy Cancer Centre or in its gardens in consultation with the class members.
4. Eastern Health will establish 2 bursaries, one available for nurses and the second available for other health care workers, for the study of disclosure practices, ethics and quality processes in patient care in consultation with class members concerning the bursary names and selection process.
5. Eastern Health will issue a public apology.

6. The Plaintiffs will issue a statement acknowledging Eastern Health's good faith effort to resolve the class action.
7. Eastern Health will establish a process for meetings with individual class members regarding their particular circumstances for class members who wish to have such meetings.
8. The Defendant will pay a global sum of Seventeen Million, Five Hundred Thousand Dollars (\$17,500,000) to the class in full and final satisfaction of the claims of all class members. Within 60 days of the execution of this Memorandum of Settlement, the funds will be paid to class counsel in trust to be deposited in an interest bearing account with the interest accruing to the benefit of the class. The principal and all accrued interest will be returned to the Defendant if, for any reason, this settlement fails to become fully effective.
9. The Defendant will pay the cost of notice of settlement to class members, settlement administration and the mediation.
10. The settlement will be administered by an independent administrator agreed to by the parties.
11. The Defendant will receive a full and final release of all claims asserted on behalf of class members in the class action. The release will inure to the benefit of the Defendant, Healthcare Insurance Reciprocal of Canada (HIROC), Western Regional Integrated Health Authority, Central Regional Integrated Health Authority, Labrador-Grenfell Regional Integrated Health Authority, the Province of Newfoundland and Labrador, and all their respective agents, successors and assigns, as well as all physicians involved, directly or indirectly in the care of the class members as it relates to the subject matter of the class action.
12. The class definition will be amended to include both residents and non-residents.
13. The Statement of Claim will be amended to remove the exclusion of employed pathology staff, licensed by the Newfoundland and Labrador College of Physicians and Surgeons.

[4] Section 35 of the *Act* requires court approval of a class action settlement and states in part:

35.(1) A class action may be settled, discontinued or abandoned only with the approval of the court on terms the court considers appropriate.

...

(3) A settlement under this section is not binding unless approved by the court.

(4) A settlement of a class action or of common issues affecting a subclass that is approved by the court binds every member of the class or subclass who has not opted out of the class action, but only to the extent provided by the court.

Section 35(5) of the *Act* deals with notice of settlement to class members and states:

35(5) In dismissing a class action or in approving a settlement, discontinuance or abandonment, the court may consider whether notice should be given under section 20 and whether the notice should include:

- (a) an account of the conduct of the action;
- (b) a statement of the result of the action; and
- (c) a description of a plan for distributing settlement funds.

Section 38(2) of the *Act* deals with the approval of fees for class counsel and states:

38(2) An agreement respecting fees and disbursements between a solicitor and a representative plaintiff is not enforceable unless approved by the court, on the application by the solicitor.

[5] The Memorandum of Settlement and the Distribution Protocol for distribution of the proceeds of settlement to class members are summarized in the notice of this hearing to class members as follows:

#### Summary of the Settlement

This is a summary only. Full details of the settlement are on our website: [www.chescrosbie.com](http://www.chescrosbie.com)

Eastern Health has agreed to pay \$17.5 million to compensate class members. It also agreed to a number of reforms to its practices, including an oversight committee and a public report from an authoritative investigator on the progress of implementation of the Cameron Report recommendations, to be delivered in 2012. The settlement was negotiated with the assistance of an advisory committee composed of class members with a diversity of backgrounds, experiences and injuries. While any settlement is invariably a compromise, and while no amount of money can ever truly compensate class members for what has been lost, it is hoped that this settlement will provide a measure of solace to class members, and an assurance that Eastern Health is sincere in its efforts to make amends. It is our view, and the view of the advisory committee, that this settlement is reasonable under the circumstances, is in the best interests of class members, and represents a genuine effort by the Eastern Health at reconciliation.

If the settlement is not approved by the court, then the litigation will continue. In our view, and the view of the advisory committee, such an outcome is not in the best interests of class members. The lawsuit could continue for years with an uncertain outcome. A number of class members are in declining health. One of the benefits of this settlement is to get compensation to class members in a timely manner.

The settlement money will be paid to “Class Members” defined as:

Patients, including their estates, who underwent ER (estrogen) and PR (progesterone) receptor tests in which their breast tissue samples were tested at the Defendant’s hospital during the Class Period, but excludes all persons who opt out, or who are deemed to have opted out, of the class action. The “Class Period” is May 1, 1997 to August 8, 2005.

The settlement will be divided among Class Members according to the nature of their injuries and their medical histories. There are six compensation categories:

	Compensation Target
<b>Category 1:</b> Class Member whose test result changed from negative to positive, did not receive timely hormone therapy and suffered a breast cancer recurrence within 10 years of original diagnosis.	\$ 75,000.00
<b>Category 2:</b> Class Member whose test result changed from negative to positive, did not receive timely hormone therapy and had stage IV breast cancer at the time of initial testing.	\$ 15,000.00
<b>Category 3:</b> Class Member whose test results changed from Negative to positive, did not receive timely hormone therapy and has not suffered a breast cancer recurrence.	\$ 15,000.00
<b>Category 4:</b> Class Member whose test results changed from positive to negative as set out in the settlement and who received hormone therapy.	\$ 10,000.00
<b>Category 5:</b> Class Member who does not fit in Categories 1, 2, 3, or 4 and who has suffered a psychological injury as defined in the settlement.	\$ 5,000.00
<b>Category 6:</b> All other Class Members	\$ 1,000.00

The compensation targets are projections based on how many Class Members are expected to come forward and qualify within each category. The compensation to each Class Member could be higher or lower than the target amounts if the number of approved claims differs from the projections. Payments will be made to Class Members who fit the above descriptions. If a Class Member has died, the payment will be made to her estate. There are no separate payments for family members of the Class Member. This class action concerns incorrect hormone receptor testing; it does not include claims for a misdiagnosis of breast cancer (i.e. a change from DCIS to invasive cancer or vice versa). Patients who have such claims may pursue those claims by way of individual lawsuits.

If the settlement is approved, the court will appoint a claims administrator to distribute the compensation. Claims forms will be made available for Class Members to fill out and return to the administrator. Further notice will be given to Class Members after the settlement is approved by the court.

This is a summary only. The settlement will be governed by the settlement documents which can be viewed on our web site. If you do not have access to the

internet and would like a copy of the settlement mailed to you, please contact our office.

[6] The Legal Fees submitted for approval are also described in the same notice of this hearing as follows:

### **Legal Fees**

Our firm has a retainer agreement with the representative Plaintiff, Ms. Doucette, providing for a contingency fee of 33.3%. This percentage fee has been ratified by 348 other Class Members who signed similar agreements. We will be asking the court to approve a class counsel fee based on this retainer agreement. We will reduce the fee by the amount we were paid for work done on the Cameron Inquiry which was \$491,812.50. This works out to a fee request of \$5,335,687.50, or 30.49% of the \$17.5 million settlement. We will also be requesting reimbursements of disbursements (out of pocket expenses) of approximately \$166,507.43 to be paid out of the settlement fund. The compensation targets above are net amounts, calculated after deduction of the requested class counsel fee and disbursements.

## **THE SETTLEMENT**

### **(i) General Principles**

[7] Settlements are a product of compromise and are not held to a standard of perfection. As Schulman J. held in **Simple**, a proposed settlement need only fall within “a zone of reasonableness” to be approved. Similarly, Chief Justice Brenner of the B.C. Supreme Court in **Sawatzky v. Societe Chirugicale Instrumentarium Inc.** wrote:

All settlements are the product of compromise and a process of give and take and settlement rarely gives all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows a range of possible resolutions. A less than perfect settlement may be in the best

interest of those affected by it when compared to the alternative of the risks and costs of litigation.

*Semple v. Canada*, [2006] M.J. No. 498 (Q.B.) at para. 27

*Sawatzky v. Societe Chirugicale Instrumentarium Inc.*, [1999] B.C.J. No. 1814 (S.C.), at para. 21

*Rideout v. Health Labrador Corporation*, 2007 NLTD 150 at para. 33

[8] A court has the power to either approve or reject a settlement agreement. It may not substitute its own terms. Schulman, J. specifically cautioned that a court should be reluctant to attach conditions on approval lest the settlement be lost:

[T]he court should also consider whether the refusal of approval or attaching of conditions to approval, puts the settlement in jeopardy of being unraveled. It should be remembered that there is no obligation on parties to resume negotiations, that sometimes parties have reached their limit in negotiation, resile from their positions or abandon the effort.

*Semple v. Canada*, [2006] M.J. No. 498 (Q.B.) at para. 26

*Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.) at para. 10; affirmed (1998), 41 O.R. (3d) 97 (C.A.); leave to appeal to the Supreme Court of Canada dismissed

[9] Rule 7A.10(3)(a) stipulates that “in considering whether to approve a settlement of a class action, the court shall consider whether the settlement is fair, reasonable and made in good faith.” Courts in Canada have held the test to be whether the settlement is “fair and reasonable and in the best interests of the class as a whole.” Courts have identified the following factors that may assist in making this determination:

- (a) likelihood of recovery, or likelihood of success;
- (b) amount and nature of discovery evidence;

- (c) settlement terms and conditions;
- (d) recommendation and experience of counsel;
- (e) future expense and likely duration of litigation;
- (f) recommendation of neutral parties, if any;
- (g) number of objectors and nature of objections;
- (h) presence of good faith and absence of collusion;
- (i) degree and nature of communications by counsel and Plaintiff with class members during the litigation;
- (j) information conveying to the court the dynamics of, and the positions taken by the parties during, the negotiation; and
- (k) the risk of not unconditionally approving the settlement.

**Semple v. Canada (Attorney General)**, [2006] M.J. NO. 498 (Q.B.)  
at para. 26

**Dabbs v. Sun Life Assurance Company of Canada**, *supra*, (1998), 40 O.R. (3d) 429 (Gen. Div.) at para. 10; affirmed (1998), 41 O.R. (3d) 97 (C.A.); leave to appeal to the Supreme Court of Canada dismissed

**Parsons v. Canadian Red Cross Society (1999)**, 40 C.P.C. (4<sup>th</sup>) 151 (Ont. S.C.)

**Rideout v. Health Labrador Corporation**, 2007 NLTD 150, at para. 35

[10] In determining whether a settlement is fair and reasonable and in the best interests of the class members, an objective and rational assessment of the pros and cons of the settlement is required: **Al-Harazi v. Quizno's Canada Restaurant Corp.**, [2007] O.J. No. 2819 (S.C.J.) at para. 23.

[11] The court has a duty to safeguard the interests of absent class members, especially where those class members are being asked to surrender rights in return for a settlement that is not reflective of the damages suffered on a case by case basis: **McCarthy v. Canadian Red Cross Society**, [2001] O.J. No. 567 (S.C. J.) at para. 19.

[12] A settlement must fall within a zone of reasonableness. Reasonableness allows for a range of possible resolutions and is an objective standard that allows for variation depending upon the subject matter of the litigation and the nature of the damages for which the settlement is to provide compensation: **Parsons v. The Canadian Red Cross Society**, supra, at para. 70; **Semple v. Canada (Attorney General)**, supra, at para. 27; **Sawatzky v. Societe Chirurgicale Instrumentarium Inc.**, [1999] B.C.J. No. 1814 (S.C.) at paras. 21-22; **Haney Iron Works Ltd. v. Manulife Financial**, [1998] B.C.J. No. 2936 (S.C.) at para. 25; **Rideout v. Health Labrador Corp.**, supra, at para. 33;

[13] A settlement does not have to be perfect, nor is it necessary for a settlement to treat everybody equally: **Fraser v. Falconbridge Ltd.**, [2002] O.J. No. 2383 (S.C.J.) at para 13; **McCarthy v. Canadian Red Cross Society**, [2007] O.J. No. 2314 (S.C.J.) at para. 17.

## (ii) The Role of the Court

[14] In **Baxter v. Canada (Attorney General)**, 2006 Carswell Ont. 7879, 80 O.R. (3d) 481, Winkler, R.S.J. (as he then was), stated:

Whenever a proposed settlement comes before the court for approval in circumstances where the subject matter clearly has broader social and political implications, it is useful to review the court's role and, by extension, the proper limits of its jurisdiction. The court must review the settlement on established legal principles, to determine whether it is fair, reasonable and in the best interests of the class as a whole. As stated in *Parsons v. Canadian Red Cross Society*, [\[1999\] O.J. No. 3572](#) (Ont. S.C.J.), at para. 77:

...it must be remembered that these matters have come before the court framed as class action lawsuits. The parties have chosen to settle the issues on a legal basis and the agreement before the court is part of that legal process. The court is therefore constrained by its jurisdiction, that is, to determine whether the settlement is fair and reasonable and in the best interests of the classes as a whole in the context of the legal issues. Consequently, extra-legal concerns even though they may be valid in a social or political context, remain extra-legal and outside the ambit of the court's review of the settlement.

On a settlement approval motion, the court's review is not directed toward the merits of the action but rather is concerned with whether the settlement meets the criteria for court approval. Thus, in accordance with this approach, the record must explain in general terms the alleged wrongs and the factual background supporting the claims. This is consistent with the position that the settlement represents a compromise in which the defendants are not admitting liability but rather are joining with the plaintiffs in presenting the compromise to the court as a fair resolution of the outstanding issues. Consequently, on a motion of this nature supported by a record of this type, it is not appropriate for the court to make findings of fact on the merits of the litigation from which the settlement emanates. Instead, the court must examine the settlement in the context of the record before it. That examination includes a review of the allegations underlying the claims, the defences advanced in response and any objections to the settlement, to determine whether the settlement is "fair, reasonable and in the best interests of the class as a whole".

### **(iii) The Role of the Parties**

[15] The parties proposing the settlement bear the onus of satisfying the court that it ought to be approved: **Epstein v. First Marathon Inc.**, [2000] O.J. No. 452 (S.C.J.) at para. 39; **Dabbs v. Sun Life Assurance Co. of Canada**, [1998] O.J. No. 1598 (Gen. Div.) at para 7.

[16] On an application to approve a settlement in a class proceeding, all parties and their counsel are obliged to provide full and frank disclosure of all material information. In **McCarthy v. Canadian Red Cross Society**, [2001] O.J. No. 2474 (S.C.J.), Winkler, J., (as he then was), stated at paras. 19-21:

The Court is obligated to carefully scrutinize proposed settlements in a class proceeding. Nonetheless, where settlement proposals are advanced on uncontested motions, in my view, there is a positive obligation on all parties and their counsel to provide full and frank disclosure of all material information to the Court. This is a well developed principle of law in respect of ex parte motions for injunctive relief but the underlying concerns it addresses are equally applicable in the context of unopposed motions in class proceedings or on motions where there is the appearance of a risk of collusion among the parties.

As Sharpe J. states aptly in *United States of America v. Friedland*, [1996] O.J. No. 4399 (Gen. Div.) at para 26 "The Judge hearing an ex parte motion and the absent party are literally at the mercy of the party seeking injunctive relief. The ordinary checks and balances of the adversary system are not operative." Sharpe J. then adopts a statement from a British Columbia decision, [1996] B.C.J. No. 1885, that "there is no situation more fraught with potential injustice and abuse of the Court's powers than application for an ex parte injunction."

By comparison, a class proceeding by its very nature involves the issuance of orders or judgments that affect persons who are not before the Court. These absent class members are dependent on the Court to protect their interests. In order to do so, the Court must have all of the available information that has some bearing on the issues, whether favourable or unfavourable to the moving party. It is the obligation of counsel to provide that information in a manner that is consonant with the duty to make full and frank disclosure. Moreover, that information must be provided in a manner that is not misleading or even potentially misleading. In most class proceedings, voluminous records develop as a consequence of the complexity of the litigation. The Court is not equipped, nor should it be required, to engage in a forensic investigation into the material or to mine the record to inform itself. Counsel must direct the Court to all relevant information that would impact on the Court's determination. This is especially important where the motion is for the approval of settlement agreements, class counsel fees or consent certifications for the purpose of settlement.

In **Baxter v. Canada (Attorney General)**, (2006), 83 O.R. (3d) 481 (S.C.J.) at para. 33, Winkler, J., reconfirms this position.

[17] The court is entitled to sufficient evidence to permit the judge to exercise an objective, impartial and independent assessment of the fairness of the proposed settlement: **Dabbs v. Sun Life Assurance Co. of Canada**, [1998] O.J. No. 1598 (Gen. Div.) at para. 15; **McCarthy v. Canadian Red Cross Society**, [2001] O.J. No. 567 (S.C.J.) at para. 19.

**(iv) Review of Factors for Reasonableness of Settlement**

[18] I will now review the factors appropriate to a determination of whether a settlement is fair and reasonable and in the best interests of the class as a whole.

**(a) Likelihood of Recovery or Likelihood of Success**

The affidavit of Darlene Russell, filed January 25, 2010, stated at paragraphs 42 and 43, in part:

The facts bearing on negligence required an understanding of events which unfolded over a period of years and an understanding of relevant medicine and the workings of an industry, namely a tertiary healthcare institution with a billion dollar annual budget, affiliated with a university medical school and responsible for a complicated and exquisite laboratory process. Achievement of understanding of the many facts of the case required a level of organization and study which challenged the capabilities of all concerned. One measure of this is that the mediator in the exercise of his professional judgment, took until 2:30 PM of the first day of the mediation to summarize by PowerPoint the various briefs and demonstrate to the parties that he understood the factual, scientific and legal positions.

As class action lawyers pressing claims for damages, we were additionally challenged by the need to analyze, understand and apply difficult scientific evidence bearing on the question of factual causation, and the interaction of this evidence with the equally difficult law of causation. This produced the need for several complex briefs as preparation for the mediation; factual, legal and scientific. I attach a brief summary of the legal and scientific briefs in order to illustrate the breadth and complexity of the issues, although this can be inferred as well from the summary of the Defendant filed herein. I believe that all professionals associated with the eventual resolution of the action would agree that it was at the extreme end of the spectrum of complexity for civil actions. The uncertainties produced risk in every direction.

[19] This action was certified on a very limited basis in the context of the proposed method by which the Plaintiff showed a common issue could be advanced. It was clear from the onset that the advancement of the claims of the class members was to be immersed in technical medical issues and opinions and subject to significant variables from class member to class member. Counsel agreed in case management meetings that this proceeding presented the most complicated of issues and evidentiary content likely to be found in any civil cause of action.

[20] The parameters within which the parties attempted the identification of causation to support liability were wide and variable. The standard of testing, which was a preliminary primary issue touching upon causation and liability, was also a variable and subject of wide differences of opinion. The Defendant did later accept there was a breach of a standard of testing. Still, however, both objective and subjective criteria in professional laboratory analysis were present, as was subsequent treatment in reliance upon such analysis.

[21] Opinions received in reviewing patient treatment were often less than definitive in passing on treatment protocols when viewed in the context of the information standards available at the relevant times.

[22] The affidavit of Darlene Russell, filed January 25, 2010, states:

Dr. Goodyear confirmed to me and other members of our legal team in telephone consultations and in personal meetings that he was expressing his conclusion on the situation where a patient had an original falsely negative test result for hormone receptor status, and was later retested to be positive. In such a situation, the question arises whether the patient would have chosen not to have chemotherapy if the option of anti-hormone treatment were made available. While some patients might make this choice, much would depend on not just the objective prognostic and predictive features present in the pathological analysis of the disease, but also on the unique personal circumstances of the patient and on his or her values and priorities, and as well on the individual practice preferences and predilections of the oncologist which would influence the advice given. The great majority of women would choose to take chemotherapy even if it influenced their chances of avoiding recurrence of the

disease by a very small amount. This advice was confirmed by Dr. Katia Tonkin, oncologist. This advice indicated to the legal team that to attempt in individual cases to prove retrospectively on a balance of probabilities that a patient would have opted not to take chemotherapy in the absence of a false negative ER/PR test result, was problematic and uncertain.

[23] The affidavit of Janie Bussey, filed January 25, 2010, Appendix A, states at pages 4, 5, and 6:

### **Legal Position**

#### *Mental Distress*

The overwhelming majority of class members in this case have experienced neither physical harm, nor even the risk of future harm, as a consequence of the Defendant's admitted failures respecting laboratory testing. This majority includes those patients whose test results were regarded as positive in accordance with specified cut-offs and were not retested; those patients who were apparent conversions on application of the cut-offs but who had nevertheless been treated with Hormone Therapy from original diagnosis; those patients whose tests were confirmed negative on Mt. Sinai retesting; and the family members of all of those categories of patients. All these approximately 2553 patients received the appropriate medical treatments and therefore their claims relate only to mental distress ("Mental Distress Claimants").

To demonstrate compensable mental distress, the Plaintiff must establish that she has suffered "some recognizable psychiatric or psychosomatic condition attributable to the defendant's negligence": *Mustapha v. Culligan of Canada*, 2008 CanLII 27 (S.C.C.), *Hodder v. Waddleton*, 1990 Can LII 2630 (NL C.A.), *Vanek v. Great Atlantic & Pacific Company of Canada*, 1999 CanLII 2863 (ON C.A.). In the class action context, these claims must be individually proven by each of the class members: *Burnett v. St. Jude Medical Inc.*, 2009 BCDC 82; *Marie-France Cyr v. Ville de Ste-Adele, et al.*, 2009 QCCS 2827. Only a very small percentage of the Mental Distress Claimants might prove their claims.

Of importance, the test for mental distress also requires that the mental distress for which compensation is claimed is a foreseeable consequence of the defendant's tortious conduct. *Hercules Management Ltd. v. Ernst and Young*, 1997 CanLII 345 (S.C.C.) at 685-687. For the Positives and the Apparent Conversions Already Treated, the claim for mental distress arises out of the Defendant's conduct which resulted in other patients receiving incorrect test results and, as a result, not being

offered hormone receptor therapy. However, both the Positives and Apparent Conversions Already Treated would have understood that the problems with the testing had resulted in some patients not being offered the drug Tamoxifen. In fact, both these groups were receiving hormone receptor therapy. In other words, the claim would be that the Defendant owed a duty to the patients in these two groups to organize the laboratory in such a way so as to avoid others receiving incorrect test results.

The group of Patients whose Treatment Changed but they did not suffer a recurrence of their cancer claim damages for mental distress similar to the Mental Distress Claimants and for the anxiety associated with the risk of a future recurrence. It is the Defendant's position that proof of damage is an essential element in a claim in negligence and that neither the risk of future illness nor anxiety about the possibility of that risk materializing creates a cause of action: *Grieves v. F.T. Everard & Sons, et al.*, [2007] UKHL 39, [2008] 1 A.C. 281.

[24] In **Healey v. Lakeridge Health Corporation**, 2010 ONSC 725, Perell, J., determined that uninfected persons who did not test positive and were not diagnosed with a recognizable psychiatric illness caused by the TB notification did not have a cause of action for psychological injury as a result of their being notified of exposure to TB. Perell, J., states at paragraphs 253-257:

It must be emphasized that the proper question is not whether Lakeridge should have reasonably foreseen that the Uninfected Persons would have experienced psychological injuries less than a recognizable psychiatric illness. In my opinion, the question of the foreseeability of compensable harm must respect the law's standard of compensable harm.

I appreciate that Chief Justice McLachlin's judgment in *Mustapha* may have led the Plaintiffs to submit that the question for the court was whether it was reasonably foreseeable to Lakeridge that a person with ordinary fortitude would suffer a serious harm, which is the language that she used. However, in *Mustapha*, it was a given that the serious harm satisfied the recognizable psychiatric illness threshold for a compensable injury. It does not make sense to me to ask simply whether it was reasonable foreseeable that Lakeridge would foresee serious harm if that serious harm would be below the threshold of a compensable injury. In my opinion, the proper question to ask is whether it was reasonably foreseeable to Lakeridge that it would cause a legally compensable harm.

Once it is recognized or accepted that a defendant will not be responsible for all emotional harm inflicted on a plaintiff, it is a policy issue for the courts to determine what level of harm is compensable and what level of harm is not. And it seems to me that these policy considerations, be they employed as a part of the *Anns* duty of care analysis, or as

part of the compensable harm analysis, or as part of the foreseeability of harm analysis, must work together toward the same end. All of the policy explorations are aimed at deciding when it would be fair and just to make a defendant liable for causing a certain type of harm to a plaintiff.

As it happens, the evidence in this case confirms that the Uninfected Persons did not suffer a recognizable psychiatric illness but suffered what Dr. Maunder described as psychological injuries. Be that as it may, what actually happened is relevant but not determinative because if the evidence had of been that the Uninfected Persons had suffered recognizable psychiatric illness, the question would remain whether this outcome was reasonably foreseeable to Lakeridge.

Applying these principles to the case at bar, in my opinion, from a legal perspective, there is no genuine issue requiring a trial that it would not be reasonably foreseeable to Lakeridge that the Uninfected Persons who had been notified of exposure to TB and who eventually tested negative would suffer a recognizable psychiatric illness.

The foregoing serves to confirm the concern of the parties of the limited ability of the class to meet its obligation of proof of causation and damage in claims for compensation for psychological injury.

[25] The affidavit of Janie Bussey, filed January 25, 2010, Appendix A, continues:

#### Physical Harm

The physical harm claimed by the class members in this case is not the fact of an incorrect result in an ER/PR test, or even the treatment decisions made on the basis of such tests, but, rather, the adverse outcomes for the course of each patient in respect of cancer. Each of the class members who allege such harm must demonstrate that the testing error was both factually and legally causative of this adverse outcome. The essential test for causation is the “but for” test, wherein the plaintiff must prove on the balance of probabilities that his or her injury would not have occurred but for the negligence of the defendant: *Athey v. Leonati*, [1996] 3 S.C.R. 458.

In very rare circumstances Canadian courts will depart from the “but for” test for causation and apply the “material contribution” test. To apply this latter standard it must be impossible to use the “but for” test. As there is evidence available to

the parties which is sufficient to make a determination on the “but for” test for causation, no recourse needs to, or ought to, be made to the “material contribution” test: *Bohun v. Segal*, (2008) BCCA 23 (CanLII), *Bowes v. Edmonton (City of)* (2007) ABCA 347 (CanLII). In the medical context, Canadian courts have refused to compensate plaintiffs for the lost chance of a better outcome or the increased risk of a negative outcome: *Laferriere v. Lawson*, [1991] 1 S.C.R. 541. With respect to causation, compensating for mere lost chance or increased risk, without proof that it was “more likely than not” that such an injury was, or would necessarily be, caused by the defendant’s negligence, would undermine the requirements of causation inherent to the Canadian law of negligence.

The patients in the Treatment Change with recurrence group cannot prove on a balance of probabilities that they would have received Tamoxifen if their test results had been correct at first instance and that, had they received the drug Tamoxifen, their cancer would not have recurred. The effectiveness of Tamoxifen in the treatment of breast cancer has been the subject of numerous studies. The EBCTCG meta-analysis of 194 randomized trials of early breast cancer therapy provided good data on the efficacy of Tamoxifen compared to no Tamoxifen for important outcomes including the probabilities of breast cancer recurrence and of breast cancer mortality. After 5 years of Tamoxifen in ER positive women the 5 year probability recurrence was 11.0% in node negative women versus 21.1% in those who did not receive Tamoxifen, whereas the comparable results in node positive women was 24.7% versus 40.8%. Thus the absolute reduction was 9.1% in node negative versus 16.1% in node positive women: *EBCTCG (2005) Effects of chemotherapy and hormonal therapy for early breast cancer on recurrence and 15 year survival: An overview of the randomized trials Lancet 2005; 365 (9472): 1687-717.*

The patients in the Treatment Change with no recurrence group have not suffered any physical harm to date. Furthermore, because of the passage of time, this group is probably no longer at any increased risk of future recurrences due to not being originally treated with hormonal therapy. There are no Canadian cases which suggest that a mere increased risk of future harm, without any present and actual damage of injury, is itself damage or injury warranting compensation. In England, the House of Lords has definitively stated that the risk of future injury alone is not actionable: *Grievs, supra, Gregg v. Scott*, [2005] UKHL 2 [2005] 2 A.C. 176.

[26] The affidavit of Darlene P. Russell, filed January 25, 2010, states at paragraph 6(c):

*Discussion of relevant issues of law* – The medical and epidemiological issues were extremely complex and their interaction with the law was more complex again. Perhaps the most difficult issues arose from the law of causation in tort and the but-for test. The Plaintiff's epidemiology placed the increased risk of a recurrence of breast cancer at distant sites, imposed by the failure to receive Tamoxifen, at 50% for 10 years from the date of diagnosis. Canadian law does not (yet) recognize damages in medical negligence for loss of chance, although many Commonwealth and United States courts do.

[27] Based upon the view of counsel on both sides outlined above, it is clear that they all recognized that likelihood of recovery and success was very questionable and faced an enormous challenge in preparation, time and ultimate proof of causation and compensable harm. Counsel forecast some two years for further litigation before another attempt at settlement might be feasible and seven years to complete litigation with appeals. I find this to be unacceptable for the class members affected by a serious illness.

[28] I have reviewed the question of the problems inherent in establishing liability for related family members claiming psychological injury. The Plaintiff has not obtained settlement for the members of the class who were related to deceased or injured patient members of the class. Potential claims of these related members for loss of care, guidance and companionship was included in the class definition upon certification.

[29] As noted, the Notice of this hearing has stated that there are no separate payments for family members of the class member.

[30] A synopsis of the legal issues facing the Plaintiff in this regard is set out in the affidavit of Janie Bussey, filed January 25, 2010, Appendix A:

*Family Claims*

There is no action in common law and not statutory action by an estate to recover damages other than pecuniary losses which might have been recoverable at the

suit of the deceased. The Survival of Actions Act expressly excludes recovery for non-pecuniary or exemplary damages which might have been recoverable at the suit of the deceased.

The Newfoundland and Labrador Fatal Accidents Act provides for a right of recovery in situations where the death of a person is caused by the wrongful act or neglect of another. The action is available in circumstances where the deceased would have been entitled to maintain an action if the claimant was alive. As a result, fatal accident actions are subject to the same requirements that the estate prove a causal connection between the conduct of the defendant and the death of the deceased. Recovery is limited to pecuniary losses which would include damages for loss of care, guidance and companionship suffered by spouses, partners and dependent children. Absent exceptional circumstances of demonstrated dependency, damages for loss of care, guidance and companionship are not recoverable for the benefit of adult children.

There is no compensation in Newfoundland and Labrador for loss of care, guidance and companionship experienced by family members of injured persons in non-fatal accident cases. In this province courts have accepted that claims for loss of consortium at the suit of the spouse of an injured person are part of the common law of this jurisdiction. However, such awards have been held to be restricted to amounts which are not substantial, and are subject to individual proof.

## **(b) Amount and Nature of Discovery Evidence**

[31] The affidavit of Darlene Russell filed January 25, 2010, states at paragraph 3 in part:

The process of preparing a claim for monetary relief involved review and reporting on many individual patient charts performed by our consulting oncologists Dr. Michael Goodyear, Halifax, and Dr. Katia Tonkin, Calgary, and also by Dr. Charles Hutton. I and Mr. Crosbie and Ms. Taylor also read many charts and met with many class members. Our records disclose that we collectively reviewed 81 charts and 66 of these were reported on in writing by the experts. These reviews enabled us to develop an understanding of patterns of injury and patterns of damages claims for eventual negotiation of categories of monetary compensation, often referred to as a “compensation grid”. Our investigations enabled us to decide that some categories of claim were impractical or unfeasible to pursue.

[32] The Public Inquiry by Madame Justice Margaret A. Cameron served to disclose substantial information on its record.

[33] The certification hearing had earlier presented data through responses to interrogatories.

[34] The affidavit of Janie Bussey, filed January 25, 2010, Appendix A, pages 1 and 2 states:

*Chart Review*

*(i) Identification of the Charts to Review*

The Newfoundland and Labrador Centre for Health Information (“NLCHI”) was engaged by the Government of Newfoundland and Labrador (“the Government”) in June 2007. NLCHI’s mandate was to identify all patients who received ER/PR breast cancer testing at Eastern Health from 1997-2005 and construct a database of original test results, retest results, patient contact information and patient communications (“the Database”). It should be noted that for some patients, the Database contains more than 1 record.

The Database includes the original raw ER and PR scores as stated in each patient’s pathology report as well as each patient’s retest results. These raw scores were used as the basis for other fields within the Database. The ER and PR results were categorized based on various cut offs and time frames.

The Database did not include any information about any particular patient’s type of cancer, treatment protocol following diagnosis, or outcome. As part of the preparation for medication, the Defendant’s solicitors proceeded to review those patient charts where the ER/PR test result apparently changed from negative to positive. These patients may be described as the “Apparent Conversions”.

The Defendant used the following broad parameters to identify the Apparent Conversions: Original ER or PR test result was less than 30% (a negative result) and the Mt. Sinai retest result for ER or PR was 10% or greater (a positive result).

Using these parameters, a query was run on the Database with patients grouped according to their ER and PR status. The patients identified for review were those who had negative original ER or PR results but, when retested, their ER or PR

retest result converted to positive. The identified patients fell into one of the three following categories: ER positive and PR negative; ER negative and PR positive; and ER positive and PR positive.

At the commencement of the chart review, the Database contained retest results for 1,023 patients. 516 charts were identified for review. The charts were then reviewed with a focus on all pathology reports and the notes from the patients' treating physicians.

In the Fall of 2008, in order to definitively identify all patients who had ER/PR testing performed, NLCHI reviewed 10,000 pathology reports extracted from electronic laboratory records by searching for the word "breast" and identified an additional 65 cases. The 65 patient charts were reviewed using the same criteria as that used for the identification of the patients from the Database.

(ii) Data Extracted

The Defendant's solicitors completed two forms for each chart reviewed. The information extracted was objective data that came directly from the chart and left no room for subjectivity or interpretation. The sample forms used are attached to this correspondence as "Appendix A".

Of the 581 charts reviewed, the Defendant's solicitors identified patients who were considered as outliers. These 96 patients included those who passed away from causes unrelated to their cancer, were stated in the medical charts as confirmed negative or positive on retest (but were picked up by the chart review due to the use of the broad parameters described above in identifying charts), were LCIS or DCIS on diagnosis, whose original test was conducted by biochemical assay, only had information available from the Cancer Registry, or they were elderly and did not receive any treatment following surgery. Thus, there were 485 Apparent Conversions whose charts were reviewed and the patients were categorized.

*Categorization of Claims*

The class can first be subdivided into two significant groups: those whose specimens were not retested at Mt. Sinai because their original test results would have been considered positive by appropriate standards ("the Positives") and those whose specimens were retested because their test results may have been considered negative. There were approximately 1800 Positives.

The patients whose specimens were retested can again be subdivided. The first subgroup is composed of patients whose hormone receptor retest results confirmed that they were hormone receptor negative ("the Confirmed Negatives").

There were approximately 550 Confirmed Negatives. The second subgroup would be regarded as significantly different. Their test results changed from apparently negative to positive in accordance with the appropriate cut-offs. As noted above, these were described as the Apparent Conversions and there were 485 such patients.

The Apparent Conversions were subdivided in accordance with their clinical treatment based on original testing. Approximately 203 of the 485 Apparent Conversions were offered Tamoxifen by their treating physician(s) and opted to take the drug for the recommended course of five years (“the Normal Course”). Therefore, there was no effect on the clinical treatment of this group (“Apparent Conversions Already Treated”).

The remaining 282 of the 485 Apparent Conversions were either not offered Tamoxifen or were offered Tamoxifen but did not take Tamoxifen in the Normal Course. It is this group who may have missed potentially beneficial treatment (“the Treatment Changes”). Most of these patients were offered treatment with hormonal therapy following the retesting in 2005.

The patients in the Treatment Changes group may be subdivided further into two groups by outcome. The first group, composed of 188 patients, have not experienced a recurrence of their cancer. Their claims against the Defendant are for alleged increased risk of recurrence and damages associated with that alleged increased risk.

The second group of Treatment Changes is composed of 94 patients. These patients are really the core of the litigation. A small number of this group, 19 patients, had metastatic disease on diagnosis, and therefore would appropriately be considered differently due to the purpose for which hormone receptor therapy might have been utilized in their treatment. Some of the 75 remaining patients suffered a local recurrence of their disease and have been successfully treated; others unfortunately suffered more significantly and some have passed away.

In summary the categories and population of each category may be summarized as follows:

Positive – approximately 1800 patients

Confirmed Negative – approximately 550 patients

Apparent Conversion Already Treated – 203

Treatment Change with no recurrence – 188

Treatment Change with recurrence – 94 patients, 19 of the 94 patients had metastatic disease on diagnosis

[35] I conclude that the parties had substantial information available in order to reasonably assess their respective positions.

**(c) Settlement Terms and Conditions**

[36] The Plaintiff has referred me to three cases dealing with medical diagnoses, the legal burden of proof that a plaintiff is required to meet, damages awarded and the basis for such awards.

[37] The Supreme Court of Canada assessed damages at \$17,500 in a case where a doctor had negligently failed to make a timely diagnosis of breast cancer from which the plaintiff died. The evidence was that better, earlier treatment would have measurably increased her chances of survival, but that this statistical benefit fell short of a 51% improvement in her odds of survival. The Supreme Court of Canada held that the plaintiff was entitled to modest compensation for the pain and suffering she endured in knowing that she had lost the benefit of pain reducing therapies. She was not compensated for her loss of chance at survival. **Laferriere v. Lawson**, [1991] 1 S.C.R. 541.

[38] Similarly, the B.C. Court of Appeal awarded \$25,000 in compensation to a woman whose breast cancer was not diagnosed in a timely way. Without proof that better therapies offered a 51% improved chance of survival, the plaintiff's damages were limited to compensation for mental anguish arising from knowledge of the delayed diagnosis. **Bohun v. Segal**, 2008 BCCA 23.

[39] The House of Lords denied compensation for patients who could not prove that better therapies would have offered a 51% improved chance of survival. **Gregg v. Scott**, [2005] UKHL 2.

[40] The Plaintiff's brief, in support of the compensation available in the settlement, states at paragraphs 59 – 73:

59. Given this caselaw, compensation of \$75,000 (net), to Category 1 claimants is an excellent result and speaks to the Plaintiff's ingenuity in dealing with the challenges of proving causation. It should be noted that this will be paid to both living claimants, and to estate representatives. From available statistics, it appears that at least 36% of the class is deceased. The Newfoundland and Labrador *Fatal Accidents Act* allows only for pecuniary loss in cases of wrongful death.

Russell Affidavit, Exhibit 17

60. Category 2 claimants are persons whose cancer was already at stage IV at the time of treatment. They receive estimated compensation of \$15,000. Their cancer had already progressed beyond any point where hormone therapy could offer hope, although it may have eased their suffering through improved quality of care.
61. Category 3 claimants are persons who originally tested as negative, but converted to positive on retesting, and did not receive timely hormone therapy but whose cancer has not recurred. In the absence of this settlement, the Defendant could argue at trial that such persons have not suffered an injury. The Plaintiff disagrees, but acknowledges that there is risk. The settlement provides estimated compensation of \$15,000 to these individuals.

Bussey Affidavit, Exhibit A

62. Provision is also made in the settlement for individuals in category 3 who suffer a recurrence of cancer within 10 years of original diagnosis. Such persons would receive compensation as a Category 1 claimant. The Plaintiff's epidemiologist, Dr. Kirsh, projects that six Category 3 claimants may suffer a recurrence between now and March 31, 2014, which would be past the 10 year anniversary for such class members from their original diagnosis.

Russell Affidavit, Exhibit 21

63. Category 4 claimants are persons who initially tested positive and received hormone therapy, but who subsequently were found to be negative on retesting. Hormone therapy is not without its risks. Such persons who

received unnecessary treatment will receive estimated compensation of \$10,000.

64. Category 5 and 6 claimants are persons with claims for mental distress. While their test results remained unchanged, and their treatment remained unchanged, their faith in the medical system was shaken, and they reasonably feared for their health. Such class members may receive an estimated \$5,000 upon documented proof of a psychological injury suffered between October 5, 2005 (the date when news about the Defendant's testing became public) and October 30, 2009 (the date of the settlement agreement). In the absence of such proof, class members may receive estimated compensation of \$1000.

65. There was risk for the Category 3, 5 and 6 claims. In the absence of this settlement, the Defendant could argue at trial that these claims, or many of them, do not clear the threshold for proof of psychological injury established by the Supreme Court of Canada in *Mustapha v. Culligan of Canada*.

*Mustapha v. Culligan of Canada*, 2008 CanLII 27 (S.C.C.) [Tab 19]

66. In a British Columbia class action involving a passenger ferry which sank, the court conducted 6 individual trials for class members seeking damages for mental distress and trauma suffered as a result of the sinking. A number of class members received zero damages for their claims. One class member recovered \$12,000 in general damages for psychological injury. In another class action, this one a settlement involving the implantation of an allegedly defective medical device, class members sought damages for, among other things, mental distress. The settlement provided compensation for psychological injury of between \$3,000 and \$10,000 with proof of injury.

*Kotai v. Queen of the North*, [2009] B.C.J. No. 2022 (S.C.) [Tab 16]

*Burnett v. St. Jude Medical Inc.*, [2009] B.C.J. No. 2403 (S.C.) [Tab 4]

67. Compensation for Category 5 and 6 claimants under this settlement is comparable to, or better than, the results in *Kotai* and *Burnett*. Class members may receive \$5,000 with documented proof of treatment from a medical professional. Class members without such proof may still receive \$1,000. It is reasonable to assume that many class members suffered, but did not seek professional counseling. Such resources are not always available. Those class members still receive compensation under this settlement.

68. The compensation targets in the distribution protocol are consistent with information available as to number of class members by category. There are 75 Category 1 claimants, 19 Category 2 claimants, 188 Category 3 claimants, and a handful of Category 4 claimants. Less certain are the number and relative proportions of Category 5 and 6 claimants. To protect the compensation to be paid to each category, the settlement monies will be divided into two funds: Fund A to cover Categories 1 to 4, and Fund B to cover Categories 5 and 6. Fund A should be adequate to pay claimants in its category, and Fund B may also be adequate, or even conservative, depending on the number of class members asserting claims. The Funds are dynamic in that if there is less demand for Fund B excess funds may be used to increase compensation for claimants in Fund A, and vice versa.

Bussey Affidavit, Exhibit A, pg 3  
Russell Affidavit, Exhibit 3

69. The categories are not complicated and do not require elaborate proof. Class members should be able to determine, from their own knowledge of their medical history, where they fit in. The process by which a class member establishes a claim will not be difficult. The class member signs and returns a claim form to the Administrator. The claim form contains a signed authorization for the Administrator to obtain that class member's medical records, if necessary. The Administrator then confirms that person's membership in the class, and the category of compensation to be paid to them.
70. The relative ease of this claims process is an important feature of the settlement. It helps to speed payment of claims to class members with a minimum of effort on the part of class members. To further expedite the process, the settlement provides for an immediate, interim payment of \$37,500 to Category 1 claimants upon acceptance of the claim by the Administrator. These class members are those where cancer has recurred. Every effort is being made to get compensation to them as quickly as possible. For other class members, payment will be made as soon as all the claim forms are in so that settlement funds can be distributed proportionately.

Russell Affidavit, Exhibit 3, paras. 4-8

71. The settlement provides an appeal process for class members who disagree with the decision of the Administrator. The settlement permits the Administrator to hold back some funds in reserve while such appeals are pending so that appeals do not delay payment to the other class members.

There is also a reserve for Category 3 claimants who suffer a recurrence of cancer and move up to Category 1.

Russell Affidavit, Exhibit 3, paras. 9, 18 and 22

72. While the provisions for compensation are important, the settlement is broader than that. A recurring objective voiced by class members was that any settlement should also confer non-compensatory benefits upon the class. The settlement meets that objective as it includes the establishment of an Eastern Health advisory committee regarding cancer services and implementation of the Cameron Inquiry recommendations with a class member on that committee, an external review of Eastern Health's progress in implementing Cameron Inquiry recommendations, a physical memorial to be established in consultation with class members, a public apology by Eastern Health, and the establishment of a process for meetings with individual class members for class members who wish to have such meetings. These are important benefits that exceed the jurisdiction of this court to compel.

Russell Affidavit, para. 51, Exhibit 1, Settlement Agreement, paras. 2, 3, and 5

73. Compensation under the settlement is not paid directly to family members for their derivative claims of loss of consortium and loss of guidance, care and companionship on account of a relationship with a primary class member. There would be added administrative costs in identifying such persons, and these costs may be disproportionate to the value of such claims, which may be modest or legally uncertain. Instead, the settlement pays compensation directly to the primary class member, or to their estate, providing an indirect benefit to class members with derivative claims.

[41] In the face of the burden of proof that these claims faced and based upon the comparative compensation available in the cases to which I am referred, I have to conclude these compensation outcomes as within a reasonable range of outcomes in the circumstances.

**(d) Recommendation and Experience of Counsel**

[42] In **Rideout v. Health Labrador Corp**, 2007 NLTD 150, 2007 CarswellNfld 268, Russell, J., noted the experience of the same Plaintiff's counsel as in this action. He stated at paragraphs 71-76:

**71** The Plaintiff has been represented by two experienced litigation firms, Ches Crosbie Barristers of St. John's, and Klein Lyons of British Columbia.

**72** The information provided at the certification hearing describes Plaintiff's counsel, Ches Crosbie, as being admitted to the Newfoundland and Labrador Bar in 1983, and an experienced trial lawyer in this jurisdiction, especially in the fields of personal injury law and medical malpractice and, since the introduction of the Act, in class actions.

**73** Plaintiff's counsel has retained the experienced class action firm of Klein Lyons to assist with this litigation. The certification application described that firm as having years of experience with class actions. It was stated that that firm successfully brought the first certified class proceeding in British Columbia in 1995 and since then had been involved in a wide range of class actions of both provincial and multi-provincial scope, including contaminated blood, TMJ Implants, heart pacemakers, diet pills, flood damage, food poisoning, securities violations and consumer claims, and has successfully obtained compensation for its clients. David Klein, a partner in that firm, is described in the firm's website as being ranked as one of Canada's top class action litigators; President of the Trial Lawyers Association of British Columbia in 1998-1999; author of two books; and a member of the British Columbia, Ontario and Washington State Bars. He appeared with Ches Crosbie on the certification hearing.

**74** Ches Crosbie Barristers has been a pioneer in the field of class actions in this Province and Klein Lyons has been successfully prosecuting class actions in Canada since the onset of class proceedings litigation in British Columbia and Ontario.

**75** Both firms concur in their recommendation of this settlement and this is certainly a factor in favour of its approval by the Court.

**76** In **Dabbs**, *supra*, the Court in describing the significance of the recommendation of Class counsel stated at para. 32:

"32 The fact that this settlement is strongly recommended by experienced class counsel is certainly a factor in its favour. The recommendation of class counsel is clearly not dispositive as it is obvious that class counsel have a significant

financial interest in having the settlement approved. Still, the recommendation of counsel of high repute is significant. While class counsel have a financial interest at stake, their reputation for integrity and diligent effort on behalf of their clients is also on the line. ..."

[43] As well, in **Rideout**, supra, Defendant's counsel, Stewart McKelvey, was the same as in this action. Stewart McKelvey is recognized as a long established and highly qualified Atlantic Provinces firm. The members of that firm who represent the Defendant are experienced litigation counsel. They have appeared in other class action proceedings in this Court involving substantial and complex issues.

[44] As I have noted from the outset, both parties have the burden to satisfy the court that their settlement proposal ought to be approved. As well, disclosure responsibilities are high in an application to approve a class action settlement. As noted, in complex cases, the submissions of experienced counsel bear significantly on the court's assessment of the reasonableness and fairness of the settlement to all class members.

#### **(e) Future Expense and Likely Duration of Litigation**

[45] The affidavit of Darlene Russell, filed January 25, 2010, states at paragraphs 52, 53, and 54, in part:

52. Had the matter not settled, it would likely have required another two years of litigation before the circumstances matured for another attempt at settlement. The outcome of trial would be particularly uncertain owing to the complexity of the scientific and legal issues, and appeal would be virtually certain. Leave to Appeal to the Supreme Court of Canada would likely be sought, and owing to the centrality of the test for causation as a legal issue, would stand a reasonable prospect of attracting the attention of the Supreme Court of Canada. This process could be expected to take in the order of six or seven years.

53. Time is not on the side of class members and we were aware of class members passing away on a frequent basis. An unfortunate example was Donna Howell, who was false negative and did not receive Tamoxifen, and died from a recurrence of her cancer one month before the mediation. Ms. Howell's spouse Darryl Howell was a member of the advisory committee at the mediation, and has filed an affidavit herein.
54. I am advised by my review of email correspondence from Vicki Kirsh, Ph. D., a qualified epidemiologist employed with Cancer Care Ontario, and do believe that 6 of the class members who did not receive timely hormone therapy and have not yet suffered a recurrence are likely to suffer a recurrence with ten years of their original diagnosis.

Counsel for the Plaintiff submits:

77. In the absence of a settlement, it is counsel's assessment that this litigation could drag on for many more years, through discoveries, multiple interlocutory motions and appeals, trial, and then more appeals. After the resolution of the common issues, there is also the possibility that individual issues would remain with respect to the nature of each class member's injury or loss. In such an event, further delay would be introduced into the resolution of each class member's claim. Counsel estimate that if fully litigated, this action could take up to 7 more years to resolve.

Russell Affidavit, para. 52

[46] I have already noted the unacceptable litigation time-line for class members experiencing a serious illness. The cost of this future litigation, in view of the questionable likelihood of success, was equally unacceptable.

#### **(f) Recommendation of Neutral Parties**

[47] George Adams, Q.C., a recognized mediator in Canada, prepared for and mediated the settlement agreement.

**(g) Presence of Good Faith and Absence of Collusion**

[48] Plaintiff's counsel submits:

Class Counsel pursued this claim through a contested certification hearing and two other contested applications, document discovery, attendances at the Cameron Inquiry, and settlement negotiations with the Defendant. The settlement negotiations involved hard fought, good faith bargaining before an experienced mediator.

Russell Affidavit, para. 6

There is no evidence of collusion. The Representative Plaintiff received advice and input from an advisory committee formed in October of 2009 made up of class members who represented the interests of various categories of harm which the settlement proposes to compensate.

Russell Affidavit, para. 37

[49] I accept Plaintiff counsel's submission on the presence of good faith and the absence of collusion in their conduct of the claim and in the settlement negotiations.

**(h) Degree and Nature of Communications by Counsel on the Representative Plaintiff with Class Members During the Litigation**

[50] The affidavit of Darlene P. Russell, filed January 25, 2010, states at paragraph 37-40, in part:

37. I and the other lawyers in my office had personal meetings to give attention, and sometimes extensive attention, to the needs and concerns of at least 30 class members. We formed an advisory committee for the purpose of receiving guidance in our conduct of representation at the Cameron Inquiry, with a membership of five, with whom we met

periodically during the Inquiry. We formed a separately constituted advisory committee to Verna Doucette for the purpose of assisting in the conduct of negotiations during the mediation. Our staff spoke extensively with class members by telephone and fielded many inquiries, including by email. Although much communication was individualized, we periodically communicated on a class-wide basis, at least with those members for whom we had contact information. A list of the occasions on which we sent either general emails or general letters is as follows:

December 22, 2006  
May 18, 2007  
May 25, 2007  
May 28, 2007  
July 5, 2007  
October 9, 2007  
October 10, 2007  
October 16, 2007  
November 13, 2007  
January 18, 2008  
January 22, 2008  
January 30, 2008  
February 20, 2008  
February 25, 2008  
March 11, 2008  
March 17, 2008  
April 7, 2008  
April 8, 2008  
April 18, 2008  
June 19, 2008  
September 4, 2008  
December 16, 2008  
February 27, 2009  
March 2, 2009  
March 4, 2009  
March 9, 2009  
March 10, 2009  
March 24, 2009  
April 6, 2009  
May 25, 2009  
May 25, 2009  
September 17, 2009  
September 21, 2009  
September 22, 2009  
September 25, 2009

October 6, 2009  
October 30, 2009  
November 2, 2009  
December 23, 2009  
January 6, 2010

38. Mr. Crosbie used our firm website ChesCrosbie.com and his blog as a means of communication with class members, including as a means for them to share their views and opinions with each other by way of making comment on his blogs. I am informed by my review of a Google Analytics document and do believe that as of January 18, 2010, the relevant pages of our site were viewed 2580 times after October 30, 2009, the date of settlement.

Google Analytics, **Exhibit "16"**

39. I have reviewed records kept by our office administrator Sheri Geehan, and do believe that since October 30, 2009 our office has received the following inquiries and responded in the following way:

EMAIL: We sent responding emails to 20 class members.

TELEPHONE: We spoke by telephone to at least 45 class members.

MAILED LETTER: We sent letters to 4 class members.

40. Our office had contact information for only a portion of class membership and therefore we used public communications through news releases and interviews with the press as a means of communication with the broad class. We also sought to use media communications judiciously as a means of maintaining public sympathy and support for class members and their claims.

This affidavit also serves to confirm Plaintiff counsel's submission as follows:

35. There has been constant communication with class members throughout this litigation to keep them informed of progress. There have been meetings, mailings, telephone calls and periodic email updates to class members. Class Counsel has maintained a blog providing interactive communication between counsel and class members, and even fostering communication among class members.

Russell Affidavit, paras. 37-40 and 72-75

[51] Based upon these representations, I have to conclude that communications by counsel with the representative Plaintiff, the committee formed and class members in general were satisfactory.

**(i) Information Conveying to the Court the Dynamics and the Position Taken by the Parties During the Negotiations**

[52] This factor has been extensively reviewed under factors (a) and (c). A synopsis of the downside of the relief available to class members is outlined in Plaintiff's brief at paragraph 85 as follows:

Any settlement is the product of compromise. There are a number of factors which weighed in the Representative Plaintiff's considerations as to whether to recommend this settlement and at the forefront of these was a concern that if the parties were to proceed to trial, the Representative Plaintiff could not be sure of eventual success. The legal position outlined in Defence counsel's December 17, 2009 letter is illustrative of the legal arguments the Defendant might have pursued at trial. These arguments include:

- (a) for most of the class members there was no loss that was compensable at law as, in the Defendant's view, increased risk of recurrence was not compensable and neither was loss of chance;
- (b) for family class members of a deceased class member, compensation for losses suffered was limited by statute to losses of a pecuniary nature and there could be no recovery for adult children in respect of dependency or loss of guidance, care and companionship;
- (c) for family class members of an injured but not deceased class member, there can be no recovery;
- (d) for class members who experienced a compensable loss, which the Defendant defined narrowly as experiencing a recurrence of breast cancer, this loss was not compensable without individual proof of causation. The arguments marshaled on this point in the Defendant's Brief suggest that this issue would have been hotly contested in each individual case of recurrence; and

- (e) in respect of damages for mental distress, the Defendant argued that no damages could be had for mental distress arising out of breach of contract as no contract existed between the parties, and that damages for mental distress as a result of tortious conduct could only be had if a class member met the stringent test laid down in *Mustapha*, which would involve individual proof of loss and causation.

Affidavit of Janie Bussey, Exhibit A

[53] Defence counsels' position throughout negotiations was that the Defendant admitted a breach of a standard of care, but that breach did not warrant a conclusion of liability in face of expressed problems with causation and damages. The Defendant also settled on the basis that it viewed class members' quantum of damages as settled as to any other unnamed defendants directly involved in the testing error such as pathologists and physicians.

[54] I am satisfied that, based upon my review of counsels' representations and the evidence provided, the foregoing review reasonably discloses the dynamics of issues impacting upon the interests of the Plaintiff and Defendant in a settlement.

#### **(j) Number and Nature of Objections**

[55] The notice of the settlement approval application required objections to be sent to the offices of the Plaintiff's counsel three days prior to the hearing date of November 2, 2009.

[56] The supplementary affidavit of Darlene P. Russell, sworn and filed January 28, 2010, attests that she has no personal knowledge of an objection being served at her office. It is significant that no class member has objected to the settlement.

## **DISPOSITION ON SETTLEMENT APPROVAL**

[57] The foregoing review outlines the legal framework by which the court's jurisdiction in these proceedings is engaged. By this framework, the settlement must be assessed as to its reasonableness and fairness to the Class as a whole.

[58] The foregoing review of the evidence and the submissions of competent counsel for both sides support a determination in favor of approval. I have examined each of the factors appropriate to this application; none present any basis negating approval. No objections have been filed. Both counsel, throughout, vigorously advanced their clients' positions. An arms-length mediation with the parties physically separated effected the resolution.

[59] In my view, the evidence and counsels' submissions confirm the complexity of litigation and time inherent in the full advancement of these claims. The estimate of 7 years to complete is not unreasonable, but is, as noted, unacceptable. Even if the case could have been successfully further advanced, at some point the claims would have to be litigated on an individual basis.

[60] I accept as reasonable the decision to exclude compensation for the claims of related family members.

[61] As noted, the likelihood of success, as presented by the evidence and counsel, if lengthy litigation ensued, appears to have been very much in jeopardy.

[62] Counsel have had considerable documented and *viva voce* evidence and medical opinion available to them. They have canvassed the law, against which they have assessed the evidence with care and proficiency. Future expense, in view of the length of further litigation, has to be anticipated as being high.

[63] Counsel and the parties have acted in good faith. There is no evidence of collusion.

[64] Plaintiff's counsel have maintained adequate communication with class members.

[65] This settlement was the product of a compromise as are all settlements; they rarely accomplish for all parties what they want. In this case, the parties have obtained funds in recognition of a loss to each of them, publicly acknowledged. They have received an acknowledgment of a wrong and what it meant to class members. Class members have secured lasting memorials. They have succeeded in having an understanding of a very complicated issue impacting upon their lives made available to their families, friends, and communities. They have brought about significant responses from the Defendant in its recognizing its obligations. This recognition is a feature inherent in the rationale by which class actions have come to be recognized and are now codified in our law.

[66] The settlement is a fair and reasonable compromise in the circumstances and was concluded in good faith.

### **THE NOTICE, THE PROTOCOL AND THE ADMINISTRATOR**

[67] I accept and approve the notice, the protocol and the appointment of the nationally known firm of Crawford Class Action Services.

### **INCLUSION OF PATIENTS RESIDENT IN ST. PIERRE AND MIQUELON**

[68] Counsel initially asked that the membership in the class be amended to include non-residents. Counsel confirm that the action was intended to include all

patients subject of diagnosis by the Defendant; as well, the Settlement Agreement so intended.

[69] In oral submissions, counsel agreed that patients resident of St. Pierre and Miquelon be included as these were the only non-residents who were known, and that rather than seek the amendment, they would agree that the settlement apply to those persons.

### **INCLUSION OF CLAIMS FOR VICARIOUS LIABILITY; INCLUSION OF OTHER PARTIES**

[70] Counsel ask that the Statement of Claim be amended to remove the exclusion of claims for vicarious liability at paragraph 20. As this application candidly discloses, Plaintiff's counsel pleaded vicarious liability but then strategically and specifically excluded this claim in the interests of facilitating the application for certification. Plaintiff's counsel were concerned that this would attract third party joinder of physicians by the Defendant, who might later seek to decertify.

[71] The Settlement Agreement calls for a release of all physicians involved directly or indirectly in the case of class members as it relates to the subject matter of this class action.

[72] In case management proceeding the hearing and in the hearing, counsel diligently responded to the Court's concern that all rights of class members, other than ER/PR testing, be preserved and not be released. The wording of the draft order and counsel's confirmation of their revised agreed positions on the record served to satisfy the Court's caution in this regard. Consequently, the parties agree that the Order shall include the following:

The Memorandum of Settlement constitutes a full and final release of any claim, liability, right, demand, suit, matter, obligation, damage, loss or cost, action or cause of action, in law or in equity, that any of the **Class Members** has, had or may have, whether known or unknown, accrued or which may hereafter accrue, asserted or unasserted, regardless of legal theory, and regardless of the type or amount of relief or damages claimed, that are or may be asserted now or in the future by **Class Members** arising out of **ER/PR Testing** that have been or may be asserted by or on behalf of the **Class Members** as against the Defendant and **Other Released Parties**. For greater certainty, the terms **Class Member**, **ER/PR Testing** and **Other Released Parties** are defined as follows:

- a. **Class Member** means a person who falls within the class definition, as amended, and did not opt out but includes a person who subsequently revoked the decision to opt out on or before October 27, 2009;
- b. **ER/PR Testing** means a hormone receptor test, conducted at one of the Defendant's or **Other Released Parties'** facilities during the Class Period, used to determine whether and to what extent a particular patient's cancer cells have estrogen ("ER") and/or progesterone ("PR") receptors. For the purposes of this release **ER/PR Testing** is a process which starts immediately after a patient's tissue is removed from the patient's body and includes the fixation of the tissue specimen, the antigen retrieval process, the preparation of hormone receptor test slides and their accompanying control slides, the interpretation of the hormone receptor test slide and/or the control slide by a pathologist and the interpretation of the reported hormone receptor test result by an oncologist or other treating physician in an evaluation of the available treatment options for a patient and any and all treatment decisions based in whole or in part thereon and the timely and accurate communication to **Class Members** as to retesting of **ER/PR Testing**.
- c. **Other Released Parties** includes:
  - i) the Defendant's general liability insurers the Healthcare Insurance Reciprocal of Canada (HIROC), the Western Regional Integrated Health Authority, the Central Regional Integrated Health Authority, the Labrador-Grenfell Regional Integrated Health Authority, the Province of Newfoundland and Labrador, and all their respective servants, agents, officers, directors, managers, employees, representatives, partners, attorneys, insurers, reinsurers, subrogees, their associated, affiliated and subsidiary legal entities and their legal predecessors, successors, and assigns; and

ii) the Defendant's respective servants, agents, officers, directors, managers, employees, representatives, partners, attorneys, insurers, reinsurers, subrogees, their associated, affiliated and subsidiary legal entities and their legal predecessors, successors, and assigns; and iii) all physicians involved in the care of **Class Members** as to **ER/PR Testing**.

## **UNRESOLVED CLAIMS**

[73] Counsel advise that ten class members were identified by the Defendant in the process of re-testing to have issues arising out of misdiagnosis of their condition based on reading of the histology, e.g. diagnosis of DCIS when invasive cancer was present, or diagnosis of invasive cancer when only DCIS was present. Notice has been given that the settlement does not include compensation in respect of claims for misdiagnosis. Consequently, counsel agree that these class members will not forego any compensation in this respect and are at liberty to review any separate claim against any parties providing them professional treatment.

## **REQUEST FOR ORDER THAT DEFENDANT RELEASE INFORMATION TO ASSIST IMPLEMENTATION OF AGREEMENT**

[74] Counsel have agreed in case management that I have reasonably expressed concern as to the Court's jurisdiction to grant such an order. Counsel have agreed that they can proceed to effect the settlement without it.

## **APPROVAL OF LEGAL FEES AND DISBURSEMENTS PURSUANT TO AGREEMENT**

[75] The application seeks approval of the Plaintiff counsel's legal fee of \$5,335,687.50, being 30.4896% of the amount of settlement based upon an Agreement between Representative Plaintiff and her counsel dated June 18, 2007, authorizing a fee of up to 33.3% of the settlement amount.

[76] The affidavit of Darlene P. Russell, filed January 25, 2010, attests that 345 class members have executed and returned fee agreements specifying a 33.3% contingency fee.

[77] Counsel for Plaintiff advised in oral presentations that the balance of disbursements after reimbursement of those related to the Cameron Inquiry were approximately \$172,000.00. The disbursements as of January 10, 2010 are \$151,812.09 and as of January 14, 2010, are \$12,912.00 for each of Plaintiff counsel's firms respectively.

[78] In **Parsons v. Coastal Capital Savings Credit Union**, 2009 BCSC 330, Garson, J., states at paragraph 9:

The test for approving a retainer agreement under the *Class Proceedings Act* and the fee to be rendered pursuant to it is one of fairness and reasonableness, in reference to the factors set out in the oft-cited decision in *Yule v. Saskatoon (1955), 1 D.L.R. (2d) 540* (Sask. C.A.). The object of the fee approval requirement is to ensure that the fee charged to the class is fair and reasonable and that class counsel is appropriately compensated.

*Endean v. Canadian Red Cross Society*, [2000] B.C.J. No. 1254 (S.C.) at para. 21, 31 - 38

*Reid v. Ford Motor Co.* at para 28

Given the object of the *Class Proceedings Act*, the Court must ensure that Plaintiff's counsels who take on risky class actions on a contingent basis are adequately rewarded for their efforts and that hindsight is not used unfairly in the assessment of the reasonableness of the proposed fees. If proposed fees are to be reduced, some principled basis must be identified for doing so.

*Endean v. Canadian Red Cross Society*, [2000] B.C.J. No. 1254 (S.C.) at para. 85-88

In assessing the reasonableness of the proposed fee, the amount payable under the Retainer Agreement is the starting point for the application for the Court's judgment. The issue for the Court is not to fix a fee by consideration of all the evidence but to decide whether the agreement operates reasonably in the context given the fee proposed.

*Commonwealth Investor Syndicate Ltd. v. Laxton*, [\[1994\] B.C.J. No. 1690](#) (C.A.) at para. 47

The proposed fee of 30% of the Settlement Fund is consistent with contingency fees approved in other B.C. class actions, which generally range from 15% to 33%. The B.C. Courts have noted that under the U.S. authorities, there is a presumptively reasonable rate of 30% which is adjusted for special circumstances.

*Endean v. Canadian Red Cross Society*, [\[2000\] B.C.J. No. 1254](#) (S.C.) at para. 77-79

*Knudsen v. Consolidated Foods Brands Inc.*, [\[2001\] B.C.J. No. 2902](#) (S.C.) at para. 39

*Harrington v. Dow Corning Corp.*, [\[1999\] B.C.J. No. 320](#) (S.C.) at para. 14

*White v. Canada (Attorney General)*, [\[2006\] B.C.J. No. 760](#), [2006 BCSC 561](#) at para. 36

[79] In **Vitapharm Canada Ltd. v F. Hoffman-La Roche Ltd.** [2005] O.J. No. 1117 (S.C.J.), P.A. Cumming, J., stated at paragraphs 58-60:

The CPA has the following three principal goals:

- (a) judicial economy, or the efficient handling of potentially complex cases of mass wrongs;
- (b) improved access to the courts for those whose actions might not otherwise be asserted (put otherwise, potentially meritorious claims might have legal costs implications so disproportionate to the amount of each claim that plaintiffs would not be able to pursue their legal remedies without the assistance afforded by the statute); and
- (c) modification of the behaviour of actual or potential wrongdoers who might otherwise be tempted to ignore legal obligations.

See generally *Western Canadian Shopping Centres Inc. v. Dutton*, [\[2001\] 2 S.C.R. 534](#) at paras. 27-29.

The realization of the foregoing objectives is achieved by providing appropriate rewards to counsel prepared to assume the manifold risks of

the litigation. Professor Garry Watson of Osgoode Hall Law School of York University has expressed the need for adequate compensation for class counsel in the context of the CPA:

This [issue of compensation] is a vitally important subject, not just because it determines what will go into class counsel's pocket but because it will determine whether or not the legislation is successful. In the final analysis whether or not the Class Proceedings Act will achieve its noble objectives will largely depend upon whether or not there are plaintiff class lawyers who are prepared to act for the class and hence bring the actions. This in turn depends on two factors [:] (a) the level of monetary reward given to class counsel, and (b) the predictability and reliability of the award. In the final analysis, both of these aspects are crucial. Class actions will simply not be brought if class counsel are not adequately remunerated for the time, effort and skill put into the litigation and the risk they assume (under contingency fee arrangements) of receiving nothing. Equally important is that such remuneration be reasonably predictable i.e., that class counsel can take on class actions with a reasonable expectation that in the event of success they will receive reasonable remuneration. It is vital to the viability of class actions that class counsel not be met on "judgment day" with judicial pronouncements (issued with the "benefit" of hindsight) that class counsel "spent too much time, had hourly rates that were too high and in any event were conducting a case which was not really risky at all" and awarded a low base fee and a niggardly multiplier - except in very clear cases. Garry D. Watson, Q.C., "Class Actions: Uncharted Procedural Issues" (Address to the Canadian Institute Seminar in Class Actions, 4 October 1996) at 3-4.

A frequently quoted passage supporting the introduction of contingency fee arrangements in class proceedings is found in the Report of the Ontario Law Reform Commission on the then-proposed legislation:

Under the kind of fee arrangement permitted by the Act, the class lawyer will receive a fee only in the event of success. If he agrees to act on this basis, the class lawyer will be assuming a risk that, after the expenditure of time and effort, no remuneration may be received. It is essential that the successful lawyer be compensated for accepting the risk of non-payment. Otherwise, lawyers very likely will refuse to act for classes on this basis and will insist on the usual solicitor and client cost arrangements, in which case potential representatives may be unable or unwilling to retain them. Ontario Law Reform Commission, Report on Class Actions, vol. 3 (Toronto: Ministry of the Attorney General, 1982) at 737.

[80] Michael Eizenga, *Class Actions Law and Practice*, 2nd ed., looseleaf (Toronto: LexisNexis Canada, 2008), states at pages 13-23 and 13-24:

In both the United States and Canada there has been growing criticism of the lodestar/multiplier method and a shift towards the simpler percentage method: *In Re Chrysler Motors Corp.* Overnight E.P.Lit, 736 F.Supp. 1007 (E.D.Mo 1990), at 1009; *In Re Activision Securities Litigation*, 723 F.Supp. 1373 (N.D. Cal 1989), at 1375. One argument generally put forward is that the time consuming lodestar/multiplier method generally produces an amount equivalent to approximately 30 per cent of the settlement or judgment fund, which could be arrived at more efficiently by using a percentage method from the start. It has been argued that the use of a percentage calculation in determining a class counsel fee properly places the emphasis on the quality of representation, and the benefit conferred on the class. In short, a percentage-based fee rewards “one imaginative, brilliant hour” rather than “one thousand plodding hours”: *In re Warner Communications Securities Litigation*, 618 F.Supp. 735 (S.D.N.Y. 1985), adopted by Cumming, J. in *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 (S.C.J.), at para. 107. Winkler, J.’s (as he then was) analysis of this issue in *Crown Bay Ltd. Partnership v. Zurich Indemnity Co. of Canada* squarely addresses the benefits of a percentage-based fee arrangement:

A contingency fee arrangement limited to the notion of a multiple of the time spent may, depending upon the circumstances, have the effect of encouraging counsel to prolong the proceeding unnecessarily and of hindering settlement, especially in those cases where the chance of some recovery at trial seems fairly certain. On the other hand, where a percentage fee, or some other arrangement such as that in *Nantais*, is in place, such a fee arrangement encourages rather than discourages settlement. In the case before this court the settlement averted to a seven to ten day trial. Fee arrangements that reward efficiency and results should not be discouraged. *Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada*, [1998] O.J. No. 1891, 40 O.R. (3d) 83 (Gen. Div.).

The above thoughts were echoed by the court in *Stone Paradise Inc. v. Bayer Inc.*, which observed, “(I)t is important to encourage in litigation and to discourage unnecessary work or the prolonging of litigation that might otherwise increase docketed time.” *Stone Paradise Inc. v. Bayer Inc.*, [2005] O.J. No. 5657 (S.C.J.), at para. 15.

Similarly, Smith, J. commented in *Endean*:

(I)t must be remembered that good counsel can often achieve with a minimal effort what it might take less skilful counsel a great deal of time to achieve...Good counsel should not be penalized for their acuity and efficiency by basing their fees only on the amount of time that it took them to accomplish their clients' objectives. *Endean v. Canadian Red Cross Society*, [2000] B.C.J. No. 1254 (S.C.J.), at para. 74.

It should also be noted that even when the multiplier method is used, the percentage of the potential fee awarded as compared to the quantum of the settlement or judgment becomes a significant factor in determining an appropriate multiplier. *Serwaczek v. Medical Engineering Corp.*, [1996] O.J. No. 3038, 3 C.P.C. (4th) 386 (Gen. Div.); see also *Gagne v. Silcorp Ltd.*, [1998] O.J. No. 4182, 41 O.R. (3d) 417 (C.A.), at p. 424 O.R.

[81] In ***Bodnar v. Cash Store Inc.***, 2010 BCSC 145, G. Dickson, J., stated at paragraph 26:

When the court assesses the reasonableness of a proposed fee, the amount payable pursuant to the retainer agreement is the starting point for analysis. The issue for determination is whether the agreement operates reasonably in the context, given the fee proposed. Contingency fees approved in class actions in British Columbia have typically ranged from 15% to 33%: *Endean, supra*, at paras. 77-79; *Knudsen, supra*, at para. 39; *White v. Canada (Attorney General)*, [2006 BCSC 561](#) at para. 36; *Parsons v. Coast Capital Savings Credit Union*, [2009 BCSC 330](#), at paras. 9-10; *Commonwealth Investor Syndicate Ltd. v. Laxton*, [\[1994\] B.C.J. No. 1690](#) (C.A.) at para. 47.

As noted, the Defendant's position was that, while it admitted breach of a standard of care in the testing process that did not warrant a conclusion of liability. In view of the causation features inherent in the nature of the illness, the variable interpretations available in the testing process, the range of professional opinions as to the choice of medical treatments possible despite the errors, and the statistical evidence suggesting strongly the limited ultimate effect on the time for recurrence of the illness, proof of the causal connection of the testing to a resulting injury

became very risky litigation. Even if the factual basis to advance the common issue on certification was correct, the action had a very long litigation road left to travel.

[82] There was no clamour by litigation counsel to take on the case. The technical evidentiary issues, the uncertainty of liability, the defences available, the time required to advance the case, the patient claims that would ultimately have to be assessed on an individual basis and the financial exposure of class counsel would have made this less than attractive to counsel and presented a daunting undertaking.

[83] It may be that the compensation from the Cameron Inquiry assisted counsel both in the public disclosure obtained and the funding of some of the work of class counsel. At the same time, the work of class counsel at the Inquiry was necessitated by the Inquiry itself. Plaintiff's counsel reduced their fee by the amount paid for that work.

[84] There are no features presented by which I can conclude that the contingency fee historically used in this Province in individual proceedings and accepted by this Court in a class proceeding in **Rideout**, supra, and within the range accepted nationally and internationally in class proceedings should be reduced in this case. The Contingency Fee Agreement not to exceed 33.3% of settlement proceeds operates reasonably in the context of this case.

[85] The Fee Retainer Agreement and the resulting fees and disbursements are approved.

**FINAL ORDER**

[86] The draft order, concluded verbally in the oral hearing in the event of these approvals, when finalized by me, shall issue.

**OTHER**

[87] I thank all counsel involved in this matter for their diligence and professionalism throughout.

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Justice