

No rubber stamp on settlement: judge

By BARR SWEET
THE TELEGRAM

Justice Carl Thompson said Tuesday he would not simply rubber stamp a \$17.5-million class-action settlement of the breast cancer testing scandal.

After a day-long presentation of the settlement terms and legal fee proposal in Supreme Court, Thompson said it is his obligation to give the settlement proposal a "proper analysis." He didn't give a date when his decision would be ready. No cheques can be issued until Thompson gives his approval to the settlement between Eastern Health and some 2,800 patients affected by a scandal in which tests to determine treatment options were botched.

Widower Darryl Howell sat in the back of the courtroom all day on behalf of his wife, Donna. She died just a month before Eastern Health settled the class action.

The most affected of the class members — those who have had a recurrence of cancer due to the errors — would have received almost immediate cheques of \$37,500 had the settlement been approved Tuesday.

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For some, time is crucial because of their health.

"No amount of money can bring my wife back," said Howell, who was part of an advisory committee of plaintiffs in the three-day mediation to settle the case and now wants priority given to those sick patients still living.

"But there are people still alive who could use that money to do stuff."

Class-action lawyer Ches Crosbie had hoped Thompson's decision would have been ready Tuesday. It's now hoped the approval will only be a few weeks coming.

"For some people who are ill, the prospect of receiving money was a bright prospect in an otherwise bleak landscape," he previously told Thompson in court.

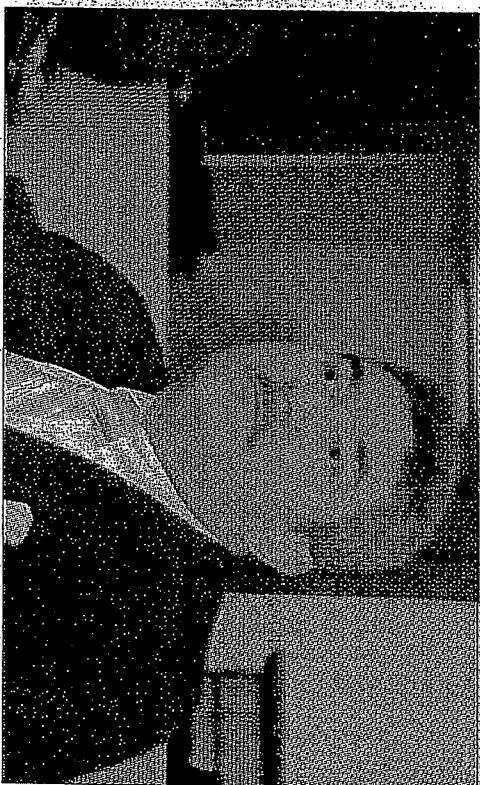
Some 425 patients received the wrong results from hormone receptor testing from the immunohistochemistry lab in St. John's between 1997 and 2005. The errors were discovered in 2005 and the health authority became embroiled in a scandal over disclosure of the rate of error and handling of the debacle.

An inquiry — separate from the class action — was launched in 2007 and resulted in a scathing report by Justice Margaret Cameron.

Of the 2,800 members in the class action, 36 per cent of the patients are now deceased, although not all deaths are associated with the testing errors. The patients involved in the class action range from those who were simply tested during the period the errors occurred to those whose test result changed on retesting, did not receive timely hormone

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Darryl Howell sits in Supreme Court in St. John's Tuesday during a hearing on the class-action settlement between Eastern Health and those affected by the breast cancer testing scandal. Howell was there on behalf of his wife, Donna, who died of cancer just a month before Eastern Health settled the class action.

— Photo by Joe Gibbons/The Telegram

therapy and suffered a breast cancer recurrence within 10 years of the original diagnosis. Proposed payout amounts range between \$1,000 and \$75,000.

Patients who are in the highest category of harm were to receive the initial \$37,500 cheque, and the remainder of the \$75,000 later. Those in five other categories of harm would receive their money six months after approval.

Thompson also has to approve the contingency fee for legal costs — \$5.3 million. Not all that money will go to Ches Crosbie's law firm. He has to pay 25 per cent to Vancouver-Toronto law firm Klein Lyons, co-counsel in the case. There will also be taxes on the legal fees and \$500,000 that was paid to Crosbie's firm as part

of the Cameron Inquiry is being put towards the settlement.

Lawyer David Klein presented the proposal to Thompson Tuesday, describing it as a "remarkable case" that drove social change — playing a role in sparking the inquiry and improved health-care funding to fix problems in the system.

During a break in the proceedings Howell said he has no problem with the legal fees. "They are consistent. He supports the terms of the settlement, which include non-monetary items such as an external reviewer to check up on Eastern Health's progress on Cameron Inquiry recommendations in 2012 and a memorial to the patients.

"I had to be here today because of my wife. She wanted to see the clo-

sure done on this — to see everybody was dealt fairly, and I feel today they have been," Howell said of the terms of the settlement. "I'm satisfied. I'm glad they are going to have a plaque at the Health Sciences (Centre) with my wife's name and the other clients' surnames on it."

Donna Howell, an obstetrics and gynecology nurse who died at age 53, had supported the case from the start, despite her illness.

Howell was one of the breast cancer patients who attended Newfoundland and Labrador Supreme Court hearings in February 2008 when Eastern Health tried to quash the release to the Cameron Inquiry of a set of reports by experts brought in to investigate hormone receptor testing practices.

That case was heard in a different courtroom, but her husband took up the watch Tuesday.

"Sorry, it's still too soon," he said as he paused in questioning by reporters to regain his emotions.

Another matter to be settled is the case of roughly 10 people who had a misdiagnosis of cancer who were not included in the class-action settlement. Lawyer Bern Coffey — who was also an inquiry co-counsel — now represents Janet Henley-Andrews, who up until the settlement last fall thought she would be part of the class action.

She now wants to pursue a lawsuit over her misdiagnosis and doesn't want the wrapping up of the class action to prevent that. Both were in court Tuesday, but they aren't trying to stop the settlement.

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