

Interviewer: Ches Crosbie has become known as the lawyer behind several class action lawsuits in this province. He's involved in a lawsuit against the provincial government by people who've been in moose vehicle accidents, and he was successful in obtaining compensation from Eastern Health for breast cancer patients who were misdiagnosed. Now, Crosbie is representing the plaintiffs in a New Brunswick court case involving cancer misdiagnosis, but the court in that province has so far dismissed Crosbie's efforts to mount a class action lawsuit. Ches Crosbie joins me this morning. Good morning, Mr. Crosbie.

Ches Crosbie: Good morning.

Interviewer: Now, the New Brunswick case involves 23,000 specimens taken over a period of 12 years, but only about 110 of them led to a misdiagnosis. Can you tell me a bit more about what happened to the lead plaintiff in the lawsuit you want to pursue?

Ches Crosbie: Well, Mr. Wilson is an example of someone who his specimen was misread twice, eventually had a third biopsy, and was diagnosed with prostate cancer. And when the scandal broke open in 2007 and the hospital corporation decided to send out the 23,000 specimens, they came back as having been misread – the earlier ones. So his treatment for prostate cancer was delayed, and it became more extensive and more intrusive than it should have been, although he seems to be okay right now, speaking to him yesterday.

Interviewer: How is this case similar to or different from the breast cancer testing scandal in this province?

Ches Crosbie: Yeah, it is different in the sense that here in Newfoundland, the breakdown occurred at the level of a whole university department of pathology, at the lab for doing sophisticated procedures in pathology for the whole province. So I guess it had the attention of the whole province on it, and was a rather intense political issue. In New Brunswick, there's a smaller regional hospital serving more remote area of the province, and ___ _ _ with a catchment of maybe 20,000 people, and even though the numbers of people affected were really quite extensive, it never captured the imagination and the attention of the province the way it did here.

Interviewer: So what has happened now, most recently, with this?

Ches Crosbie: Well, as with any class action, you have to get certified by the court. That's a big deal, because if you're not certified, you're not

a class action, and it means if people want to proceed with claims, they have to do it individually. Not getting certified is a major issue, because in something as complicated as medical and hospital malpractice, people by and large just aren't going to do it unless they can do it banded together in the form of a class action. So it really is a significant justice access kind of issue.

And, what happened here, I guess, you mentioned the number of specimens. That's actually 17,500 – Sorry, 15,700 people is what that amounts to. The statistic, I think, 105 or 110 cancer cases – that comes from a government press release a few years ago, and the work we've done shows that it's way more than that. There's around about 1,000 people potentially medically harmed by the delay. We don't know how many exactly until we get a chance to look at the charts. So it's, in some ways – Well, it does involve injury to far more people than what occurred here in Newfoundland, so those are some of the contrasts.

Interviewer: So what did the court say in refusing to certify the class action?

Ches Crosbie: Well, they said that there's – We argued for a duty on the part of doctors, pathologists, to their patients that they be and maintain competence. Competency just means that you, as a professional, as a lawyer, as a doctor, as whatever, have the skill and knowledge that are required to be able to exercise your profession to the requisite level. Our allegation was this fellow Menon was not competent, and we set it up that way, because that's how we could establish a duty owed by Menon to everybody in the class, and not have the same degenerate down into individual examinations of individual pathology.

If we could establish he didn't possess the skill and knowledge necessary to be a pathologist, which we believe to be the case, then we would have established that there's no point in looking at his individual pathological or pathology examinations. And that was what was at issue, is coming up with a common issue. Now, this is novel. This would be a novel proposition of law in a novel duty, but the principle, well established, is that you're supposed to be able to go to trial on something that's novel as long as it's arguable. And that part was not applied by the judge.

Interviewer: So the Court of Queens bench, in looking over the ruling yesterday, I noticed that the ruling was that it's not the duty of a court to determine whether a doctor is competent to practice medicine. So how do you counter that?

Ches Crosbie: Well, by pointing out to the court of appeal what the law actually is. We (*laughter*) obviously don't agree, and I think most Canadians would be quite surprised to learn that their doctor does not owe them a duty of competence. In fact, strangely the judge also, at the same time, found that the hospital owes a duty to hire competent medical personnel. So if that duty exists, why wouldn't the duty on (*laughter*) the part of the doctor to be competent exist? Probably agree with me, that seems a little incongruous.

Interviewer: So you mentioned an appeal. Is that the next step?

Ches Crosbie: Oh, yes.

Interviewer: What will you do?

Ches Crosbie: Well, what I'm doing now, which is filing another sub-appeal and instructions to these clients and getting the appeal brought on as quickly as possible. We regard this as being a matter of the application of settled principles of law. There's nothing controversial. The claims themselves may be based on novel propositions, but they're entitled to go to trial, because they are arguable and deserve a hearing, and that's a subtle principle from the Supreme Court of Canada on down, established for many years, and in our respectful submission, the judge did not follow that.

Interviewer: If things remain the same and you're not successful on appeal, what could that potentially mean for other cases involving cancer misdiagnosis?

Ches Crosbie: Yeah, you put your finger on something. Every few months, there seems to be a new scandal reported in the news. The latest one this year was out in Alberta, involving pathology. There have been scandals in Ontario involving sort of mass pathology problems, and elsewhere, so it's a recurrent problem that doesn't seem to be going away, and this case is a kind of I guess test case, or canary in the coalmine for these kind of recurrent pathology scandals that are breaking out now in our country.

Interviewer: So you are concerned about the implications of this particular ruling.

Ches Crosbie: Oh, yes, I mean these duties have never had to be proposed before the advent of class actions in the last ten years or so, or 20 years at most in Ontario, so it's not surprising that lawyers were content to propose duties of care on doctors in relation to individual cases.

Now, something more has to be done. Duties of care have to be found, that doctors owe, to, across the board, to many people, if class actions are going to be a mode, a valid mode, or a viable mode, of delivering access to justice to large numbers of people who otherwise won't have it.

[End of Audio]