

**IN THE MATTER OF HEPATITIS C – CLASS ACTION SETTLEMENT 1986-  
1990**

**CLAIM NO. 1000380**

**ARBITRATOR**

**Gerald J. Charney, Q.C.**

**APPEARANCES FOR THE ADMINISTRATOR**

**Belinda Bain, Counsel  
Carol Miller – Hep C Claims Centre**

**APPEARANCES FOR THE ESTATE OF THE DECEASED**

**Representative for the Claimant  
Claimant (FBO the Estate)**

## DECISION

This claim is brought under the 1986-1990 Hepatitis C Settlement Agreement on behalf of deceased's estate. The administrator stated that the claim was denied because the estate has been unable to provide the necessary proof as required under Section 3.01 of the Plan, that the deceased was in fact infected with HCV.

This matter was heard in Ottawa on April 6 and October 11, 2005 wherein each party called evidence as to the condition of the deceased prior to her death and what caused her death.

The estate was given a choice as to whether I should rule based on the evidence that had been called, which was completed on the April 6th date, or whether the estate wished to hear from an independent doctor, in this case Gary E. Garber, MD FRCPC FACP, Professor of Medicine, University of Ottawa, Head Division of Infectious Diseases, The Ottawa Hospital.

The estate wished to hear from Dr. Garber. Dr. Garber provided the parties with a CV that shows him to be extraordinarily well qualified to deal with this matter. His current position is Professor, Department of Medicine, and the Department of Biochemistry, Microbiology & Immunology University of Ottawa. He is Head, Division of Infectious Diseases, Department of Medicine, University of Ottawa and Ottawa Hospital. He has done extensive post-graduate work from 1980 through June 2001. He is a fellow of the Royal College of Physicians and Surgeons of Canada in internal medicine, Diplomat of the American College of Physicians, Certificate of Special Competence – Infectious Diseases Royal

College of Physicians of Canada, Fellow of the American College of Physicians, Fellow of the Infectious Disease Society of America and has received many awards and honours. He has hospital privileges at Ottawa Hospital, Children's Hospital of Eastern Ontario, Ontario Cancer Foundation. From 2005 on, he is a member of the Ontario Advisory Committee on Hepatitis C. In addition, Dr. Garber has published extensively in the field. Some 120 publications either by himself or in collaboration with others.

The evidence disclosed as follows:

1. That the deceased passed away on March 18, 1988.
2. Medical records produced by the claimant indicate that the deceased received treatment for cancer of the colon in 1967, following which she had a colostomy and radiation therapy. In 1984, the deceased became jaundiced, was admitted to hospital for investigation, and underwent a right nephrectomy for presumed radiation damage. In April 1987, the deceased was again admitted to hospital in connection with vomiting and abdominal pain. (Claim File, pages 44 and 47)
3. In late April or early May, 1987, the deceased received a blood transfusion because of low haemoglobin (Claim File, pages 23 and 42) On May 28, 1987 a further four (4) units of blood were crossmatched to be "given when ready" to the deceased. (Claim File, page 17)

This blood could have given her hepatitis C as it was tainted.

Section 3.05(1)(b) of the Plan provides as follows:

(1) A person claiming to be the HCV Personal Representative of a HCV Infected Person who has died must deliver to the Administrator, within three years after the death of such HCV Infected Person...an application form prescribed the Administrator together with:

(b) unless the required proof has already been previously delivered to the Administrator:

(i) if the deceased was a Primarily-Infected Person, the proof required by Sections 3.01 and 3.03

Section 3.01 of the Plan provides:

(1) A person claiming to be a Primarily-Infected Person must deliver to the Administrator an application form prescribed by the Administrator together with:

(b) an HCV Antibody Test report, PCR Test report or similar test report pertaining to the claimant;

The representative on behalf of the claimant stated as follows.

1. She had received tainted blood.
2. That the deceased developed jaundice in the early fall of 1987. She had received the blood May 28, 1987.
3. There were some medical records that were destroyed.
4. That she was a North American Indian and the colour change was quite evident.

Her husband said that up until the June surgery of 1987 she always had good recovery and looked good in July of 1987, cooking and maintaining the home. The hospital records were difficult to locate because that hospital was closed as an active treatment centre and the records of the family doctor were transferred and destroyed.

They state the despite the fact that the medical records stated that there was jaundice in 1984, the husband asserts that there was no jaundice in 1984 it was just a doctor stating she was jaundiced three years earlier. There is no evidence and if there is evidence it will not be true.

In 1984 she had a kidney removed which was damaged from cobalt treatment in 1967. It also states there was no heart murmur which was present

in the records and they believe that they had the wrong patient. In result, it is asserted on behalf of the estate that after getting the infected blood she quickly deteriorated as a result of hepatitis C and the evidence of that was the fact that she was jaundiced and that she had always recovered very quickly in the past. Effectively she died 10 months after received the blood.

There seems to be no issue in my view that it was the right patient that they were talking about. On page 47 of the nursing notes there is a heart murmur. In terms of whether there was jaundice or not the husband's evidence is that he was there every day and that there was no jaundice then, that is in 1984.

For the purposes of this case, I will assume that there was no jaundice in 1984 and that there was jaundice in 1987.

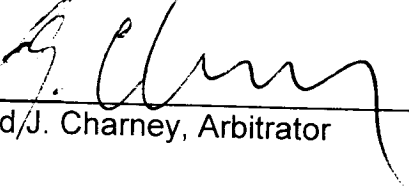
We turn then to the evidence of Dr. Garber, who in his evidence, tried to be as sympathetic as possibly to the estate. He stated that she was in the hospital because she had cancer. The cancer was not caused by hepatitis C and that the jaundice, if any, was surely caused by an invasion of the liver by the cancer. It was a metastasized cancer. Hepatitis C can only cause cancer in the liver because of scerossis and that normally takes 15 to 20 years. He said he could find no proof that she was suffering from hepatitis C. He said it was not a picture of hepatitis C and he was categorical. He said regardless of whether she had hepatitis C or not, which he believes she did not have, she would have died in exactly the same way.

In result I am faced with two questions. Did she have hepatitis C, and if she did, did it contribute to her death?

Based on all the evidence I heard and on the opinion of Dr. Garber, I find that she did not have hepatitis C and that if she did have hepatitis C it was not a contributor to her death.

In result then, the claim is dismissed and the decision of the Administrator is upheld.

DATED at Toronto, this 11th day of January, 2006.

  
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Gerald/J. Charney, Arbitrator