

**IN THE MATER OF A REFERENCE PURSUANT TO THE HEPATITIS C
1986-1990 CLASS ACTION SETTLEMENT AGREEMENT
(Parsons v. The Canadian Red Cross et al.
Court File No. 98-CV-141369)**

BETWEEN

Claimant File 1382

- and -

The Administrator

**(On a motion to oppose confirmation of the decision of C. Michael Mitchell, released
September 15, 2005)**

Reasons for Decision

WINKLER R.S.J.:

Nature of the Motion

1. This is a motion to oppose confirmation of the decision of a referee appointed pursuant to the terms of the Settlement Agreement in the Hepatitis C litigation for the class period January 1, 1986 to July 1, 1990. The Claimant made a claim for compensation pursuant to the Agreement which was denied by the Administrator charged with overseeing the distribution of the settlement monies. The Claimant appealed the denial to a referee in accordance with the process set out in the Agreement. The referee upheld the decision of the Administrator and denied the appeal. The Claimant now opposes confirmation of the referee's decision by this court.

Background

2. The Settlement Agreement is Pan-Canadian in scope and was approved by this court and also approved by courts in British Columbia and Quebec. (See *Parsons v. The Canadian Red Cross Society* (1999), 40 C.P.C. (4th) 151 (Ont. Sup. Ct.)). Under the Agreement, persons infected with Hepatitis C through a blood or specified blood product transfusion, within the period from January 1, 1986 to July 1, 1990, are entitled to varying degrees of compensation depending primarily on the progression of the Hepatitis C infection.

Facts

3. The Claimant is an Ontario resident who is infected with HCV. At issue is whether the Claimant acquired HCV from a blood transfusion during the Class Period.

4. The Claimant argues that she received a blood transfusion in July 1986 at the Ottawa General Hospital after giving birth to a child. The following summary of the Claimant's evidence is taken from the referee's decision of September 15, 2005:

6. On July 26, 1986, the Claimant underwent a long labour at the Ottawa General Hospital. She recalls being awoken by a nurse after she had the baby on the morning of July 27th, and seeing the nurse putting up a pack of blood. The nurse said that the Claimant's platelets were low and that she needed a transfusion. The nurse advised her that her iron was low and they were giving her a "pick up" to bring her iron levels up. The Claimant says she was in the recovery room or case room, and no one else was there. On her return home, the Claimant started getting dizzy spells and became severely ill, and she was subsequently advised that she had suffered a stroke. The Claimant had previously been very healthy. The Claimant's health deteriorated significantly for a long period of time, but the Claimant did not discover until the year 2000 that she had Hepatitis C. When the Claimant was diagnosed with Hepatitis C, from her stand point, all of her previous lengthy illnesses began to make sense since no one had previously been able to diagnose a possible source of her medical difficulties.

7. The Claimant recalled discussing the transfusion with another patient who had given birth at the same hospital, and the Claimant made strenuous efforts to find this individual. She also made significant efforts to discover any history or hospital records regarding a blood transfusion or any history of hospital records being destroyed. Ultimately, the Claimant developed the view that it was not intended or necessary for her to get a transfusion, and she was in fact transfused in error.

...

9. On cross-examination, the Claimant testified in considerable detail as to the circumstances in which she was transfused, including that the blood was given to her in her left arm, in a clear plastic bag which was more square than rectangle ...

10. The Claimant's mother testified that she visited her daughter in the hospital and that she spoke to a nurse regarding the transfusion. When the mother asked why her daughter was being transfused, she was told that her daughter had experienced a very long, hard labour, and the blood would make her feel better and stronger ...

5. The Claimant's hospital records do not indicate that the Claimant received blood. Carol Miller, a nurse who testified on behalf of the Administrator, claimed that the factors that would normally be present had blood been transfused were absent from the Claimant's hospital charts.

6. The Claimant argues that her hospital records contained errors, inconsistencies and gaps. Most notably, the records contained crossed-out entries with notes indicating "error wrong chart". Accordingly, she argued that the records were unreliable, and that her blood transfusion may have accidentally been recorded on someone else's records.

7. The Claimant indicated that she believed that she received blood while on either the second or fifth floor of the Ottawa General Hospital. Information was sought regarding blood transfusions on those floors of the Hospital during the relevant time. In a letter dated March 22, 2005, Madelyn Morgan of the Hospital indicated that all units of blood issued to the second and fifth floors between July 25, 1986 and July 27, 1986 have been accounted for.

8. The Administrator denied the Claimant's application for compensation pursuant to the Transfused HCV Plan on the grounds that there was insufficient evidence that the Claimant received blood during the Class Period. The Administrator's decision was upheld by the referee.

9. The Claimant now moves to oppose confirmation of the referee's decision.

Standard of Review

10. In a prior decision in this class proceeding, the standard of review set out in *Jordan v. McKenzie* (1987), 26 C.P.C. (2d) 193 (Ont. H.C., aff'd (1990), 39 C.P.C. (2d) 217 (C.A.) was adopted as the appropriate standard to be applied on motions by a rejected claimant to oppose confirmation of a referee's decision. In *Jordan*, Anderson J. stated that the reviewing court "ought not to interfere with the result unless there has been some error in principle demonstrated by the [referee's] reasons, some absence or excess of jurisdiction, or some patent misapprehension of the evidence."

Analysis

11. Since the Claimant has been unable to produce records that confirm that she received blood at the time alleged, her claim can only succeed if she meets the requirements of section 3.01(2) of the Transfused HCV Plan. Section 3.01(2) states:

Notwithstanding the provisions of Section 3.01(1)(a), if a claimant cannot comply with the provisions of Section 3.01(1)(a), the claimant must deliver to the Administrator corroborating evidence independent of the personal recollection of the claimant or any person who is a Family Member of the claimant establishing on a balance of probabilities that he or she received a Blood transfusion in Canada during the Class Period.

12. Accordingly, in order to successfully invoke this section, it is not enough for the Claimant or a Family Member to provide information regarding a personal recollection of a blood transfusion. For a Claimant to succeed under 3.01(2), he or she must provide independent evidence which establishes "on a balance of probabilities" that the Claimant received blood during the Class period. In other words, the personal recollections of the Claimant or Family Members are not to be considered in a determination made pursuant to s. 3.01(2). The independent evidence is to be the deciding and conclusive factor.

13. The proper interpretation of this section has clearly been a matter of some confusion. As one example, the Claimant has referred me to decision #249, in which Referee Leitch reviewed a previous decision of this court in the course of an analysis of the test under section 3.01(2). The relevant portion of Referee Leitch's decision states:

23. The Administrator questioned the validity of the Claimant's testimony and that of her witnesses but did not dispute the admissibility of the testimony of the Claimant's mother and sister as members of her family. Nevertheless, the admissibility of this type of testimony was recently questioned by Judge Winkler's comments in File number 1000114, dated November 8, 2004, in which he granted a request to dispute decision # 138 rendered by Referee Reva Devins. Judge Winkler wrote:

The referee was bound by the provisions of the Plan to reject the evidence of the mother of the Claimant. As a Family member as defined by the Plan, the evidence of the mother could not be used as corroborating evidence to establish the claim. However, I find that the referee's reliance upon the mother's evidence to reject the evidence of the former boyfriend to constitute an error in principle. If the evidence is inadmissible to establish a claim, it must similarly be inadmissible as a basis for rejection.

24. With all due respect to him, I think that the words chosen by the Honorable Judge could cause some confusion. Section 3.01(2) of the Plan does not create any impediment to the admissibility of the Claimant's testimony or of that of his Family members to the effect that the Claimant received a Blood transfusion during the Class Period. It only requires that such testimony "be accompanied by independent corroborating evidence of the personal recollection of the claimant or of any person who is a Family Member of the claimant". It would evidently be impossible to explain how Section 3.01(2) distinguishes between the admissibility of the Claimant's testimony and that of the Family members, when it couldn't be alleged that the Claimant's testimony is not admissible at the hearing held to determine his right to receive compensation under the Plan.

25. In my opinion, the correct interpretation of Section 3.01(2) is the one that Referee Jacques Nols invoked in his confirmed decision # 151 of June 25, 2004:

I interpret the restriction imposed by the '*independent of the personal recollection...of any person who is a Family Member*' of Section 3.01(2) as meaning that if only the family members testify, this in itself does not constitute sufficient and acceptable evidence. On the other hand, if such independent evidence exists, this evidence will be added to the testimony of the family members, thereby adding to the weight of these testimonies. [emphasis added]

14. The interpretation of s. 3.01(2) of Referee Leitch, and that of Referee Nols he relied upon, are incorrect. In some part this may arise from a misreading of the wording of the section. In paragraph 24 of the passage excerpted above, Referee Leitch relies on an unattributed quotation implying that under s. 3.01(2), the independent recollections of the Claimant and his or her Family Members must "be accompanied by independent corroborating evidence of the personal recollection of the claimant or of any person who is a Family Member of the claimant". This quotation was not taken from section 3.01(2), and is in fact inconsistent with the express wording of section 3.01(2).

15. Given the express wording of s. 3.01(2), the only interpretation it will bear is that the evidence independent of the personal recollection of the Claimant or a Family Member is the determining factor. If that independent evidence establishes on a balance of probabilities that the Claimant received blood during the Class Period then the claimant has met the burden. If not, then the Claim must be rejected. The personal recollections of either the Claimant or Family Members are not to be considered.

16. In this case, after an extensive review of the material provided by the Claimant and her additional submissions in support of her motion, it is clear that the only evidence

that is "independent of the personal recollection of the claimant or any other person who is a Family Member" is evidence relating to corrections and alleged errors and inconsistencies in the hospital records. Although this evidence raises some questions about the accuracy the hospital records, the existence of such errors is not sufficient to establish on the balance of probabilities that the Claimant received blood. Moreover, the Claimant has herself admitted in her submissions in support of this motion that "there is nothing in her medical chart which indicates that a transfusion took place."

Result

17. In my view, the referee committed no errors in principle, with respect to jurisdiction or by misapprehending the evidence before him. Accordingly, the referee's decision is confirmed.



Winkler R.S.J.

Released: December 18 / 06