

## THE 1986-1990 HEPATITIS C CLASS ACTION SETTLEMENT

IN THE MATTER OF AN APPEAL FROM THE DECISION OF THE ADMINISTRATOR  
DATED May 13, 2005

CLAIM NO: 15588

DATE OF HEARING: By Conference Call July 13, 2006

IN ATTENDANCE: Claimant  
John Callaghan, Fund Counsel  
Carol Miller, R.N., Appeal Coordinator

ARBITRATOR: C. Michael Mitchell

## DECISION

1. This is an Ontario-based Claimant, claim # 15588.
2. AH was a Primarily Infected Person under the plan, and passed away in September, 2004. His sister, GH, was entitled to claim under the Hemophiliac HCV Plan, as she qualified as a Family Member of her deceased brother. Shortly after her brother passed away, GH contacted the Plan Administrator to begin the process of making an application. She received a claim number, but had to obtain further documentation in order to prove that she was the sister of the deceased. She was also required to prove that her brother had passed away and therefore had to obtain the death certificate. She took steps to do both of these things prior to her unfortunate passing on March 4, 2005 as a result of an emergency heart procedure. The documentation to prove that AH had died and that GH and AH were siblings arrived after GH passed away. Accordingly, the claimant, SH, submitted this claim on behalf of the Estate of GH.
3. The Claims Administrator argues that the application must be filed by a Family Member and the prescribed form must be filed within the specified time limits. The Administrator argues that the Estate of the person entitled to make the claim or that (as in this case) initiated the claim, does not qualify as a Family Member under the rules of the Plan.
4. Article 3.06 provides as follows:

A person claiming to be a Family Member referred to in clause (a) of the definition of Family Member in Section 1.01 of a HCV Infected Person who has died must deliver to the Administrator, within two (2) years after the death of such HCV Infected Person or within two years after the Approval Date or within one year of the claimant attaining his or her age of majority, whichever event is the last to occur, an application form prescribed by the Administrator...
5. In support of its argument, the Administrator relies upon the decision of Arbitrator John P. Sanderson, Q.C. in Decision #224. In that case, the Primarily Infected Person's brother was entitled to make a claim, but he passed away before making one. A claim was submitted on behalf of the brother's Estate.
6. While there was evidence that the eligible sibling had intended to make a claim but did not as a result of confusion and miscommunication, the Arbitrator held that the application could only be filed by the Family Member during the prescribed time limits, and that the Estate was not entitled to make an application:

It is clear that the Claimant's husband met the definition of "sibling". However, in this case it is not the sibling who is applying; it is the

Estate of the sibling who is the Claimant. Section 3.07 requires that the application must be filed by the Family Member, and the prescribed form must be completed by the Family Member within the specified time limits. While the time limits were met, the other required conditions were not.

7. In a later decision dated July 13, 2006, Decision #248, Referee Jacques Nols came to a contrary conclusion based on similar facts. There, the 87 year old mother of a Primarily Infected Person passed away six weeks after the death of her daughter, without making an application. The mother's Estate submitted the application. In holding that the Estate was entitled to make the application and it was entitled to compensation, the Referee held as follows:

The Administrator and the Fund Counsel argue that the Estate cannot be considered as a "Family Member" of an HCV Infected Person as defined in Section 1.01 of the Plan. On a strictly literal basis, this proposal seems to be reasonable, but one needs to replace in its context the proper role of an Estate, which is to continue the juridical legal personality of the deceased.<sup>1</sup> Thus, an Estate is "a vehicle, a medium or an instrument" allowing the exercise of the only rights enjoyed and held by the deceased while alive. Such being the case, rejecting this claim on the basis that the "Estate" and not the "person" for whom such an Estate is available does not qualify as "Family Member", evades the real question in this case and does not, in my view, comply with the intention of *the Plan generally and with Section 1.01(a) in particular*.

...

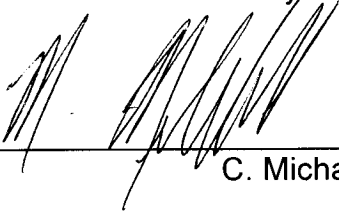
... In this context and in view of the fact that this claim has been submitted by and for the benefit of the Estate of the mother of the HCV Infected Person, that the claim was submitted within the 2 year period stipulated in Section 3.07 of the Plan and that such a claim deals exclusively with the exercise of a right included in the estate of a person who is a "Family Member of the Infected Person" at the time of her death on September 14, 2003, I allow this Request for Review and this, for the compensation stipulated in Section 6.02(d) of the Plan.

1. For example, *Sauvageau et al. c. Dr. Leroux et al*, C.S., Joliette District, 705-05-001048-969, August 14, 1996, pages 7, 10 and 11; *Driver c. Coca-Cola Ltd.*, [1961] R.C.S. 201, pages 204 to 208; *Pantel c. Air Canada* [1975] 1 R.C.S. 472, pages 478 and 479; Baudouin J.-L et Deslauriers P., *La responsabilité civile*, 6e ed., Les Editions Yvon Blais inc., 2003, page 363; art. 625 al. 1, *Code civil du Quebec*.

8. In my view, the approach and reasoning of Referee Nols is to be preferred. The intention of the Plan was that designated family members of a Primarily Infected Person were entitled to compensation provided that the application was made within the proper time frame and they could demonstrate their entitlement (in the sense that they could prove their designated family member relationship and that the Primarily Infected Person had died).
9. The heart of the contractual entitlement is the right to compensation to the Family Member at the time of passing of the Primarily Infected Person. That right, in a sense, becomes vested in the Family Member at the time of the Primarily Infected Person's death. The timing of the application and the proof of death and family relationship are only administrative details surrounding the exercise of that vested right. Thus, I agree that the Estate essentially stands in the shoes of the Family Member and is entitled to submit the claim for compensation that the Family Member would have been entitled to make. The reasoning that would deny the Estate compensation on the basis that the Family Member had not actually completed and submitted an application prior to the Family Member's death seems highly technical and not in keeping with the primary overall intent of the Settlement Agreement, which was to provide compensation to designated Family Members adversely affected by the death of a Primarily Infected Person. I do not read the Settlement Agreement as providing an entitlement only to a Family Member who is alive at the time the application is made to the Administrator or alive at the time the Administrator makes the decision. Rather, the entitlement arises to every designated Family Member who is alive at the time of the Primarily Infected Person's death.
10. On the basis of this reasoning, it would not matter if, as in the case of Decision #248, the elderly mother of the Primarily Infected Person passed away within six weeks of the passing of the Primarily Infected Person and thus did not have time to make the application, or whether, as in Decision #224, the Family Member had intended to make the application but was confused as to how it would be done, or whether, as in the instant case, the Family Member had actually commenced the application process prior to the Family Member's death.
11. Alternatively, to the extent that those facts are considered material, this case is distinguishable from Decision #224 and # 248 because in this case, the Family Member, GH, actually commenced the application process prior to her death, and indeed received a claim number from the Administrator. Thus, her application was recognized and commenced prior to her death. Presumably, if she had the relevant birth and death certificates available at that moment, she could have immediately filed the completed application and the claim would have been allowed by the Administrator, even had she died after making it. In this case, the legal result should not and cannot be different simply because GH was not able to immediately comply with the technicalities of the section in submitting the proper documentation and passed away unexpectedly before the documentation was available.

12. In short, on an equitable basis, the Family Member here did everything reasonable to comply with the requirements to assert her rights, including contacting the Administrator and receiving a claim number, which recognized her entitlement provided she submitted the proper documentation in the relevant time period. It is not in keeping with the overall purpose and intent of the Settlement Agreement to deny compensation simply because she passed away shortly after commencing the claims process.
13. I find that the Administrator is required to pay the Claimant the amounts to which GH was entitled, and is directed to do so forthwith.

DATED at Toronto this 24th day of July, 2008

  
\_\_\_\_\_  
C. Michael Mitchell  
Arbitrator

**CLASS ACTION - Hepatitis C 1986-1990  
Request for Review # 14655**

**DECISION**

On May 3<sup>rd</sup>, 2004, this Claimant completed a claim's form for the Estate of the deceased mother of the HCV Primarily-Infected Person.

The Administrator of the 1986-1990 Hepatitis C Claims Center informed the Claimant by letter dated June 4, 2004, that her claim was rejected on the basis that as the Representative for the Estate of the mother of the HCV Infected Person, she did not meet the definition of "Family Member" as provided in Section 1.01 a) of the HCV Transfused Plan [hereinafter referred to as "the Plan"].

It is about this decision by the Administrator that the Claimant is submitting a Request for Review and I must now render this decision as a referee.

I sent a letter to the Claimant in order notably to ask her to confirm her intention to testify or to have other witnesses testify before me. The Claimant forwarded to me, by letter dated August 4, 2004, some information and confirmed that she would not testify before me, having "nothing more to add" to the case. On September 3, 2004, I therefore confirmed to the Claimant that, for her part, the file was complete and that the decision to be rendered on her Request for Review would be based on documents and information provided up to that time. Finally, I confirmed to the Claimant that there would be no hearing in this case unless she advised me in writing to hold one within a period of 30 days following September 13, 2004. On the expiry date, I had received no such request from the Claimant.

On March 3, 2005, further to the 1986-1990 Hepatitis C Settlement Agreement, the Compensation Fund Counsel forwarded to me his written submission, of which a copy was sent to the Claimant in order to allow her to react to it, if appropriate. The Claimant did not react to the Fund Counsel's submission. Thus, I render this decision on the basis of the documents and information forwarded to me by the Claimant and the written submission provided by the Fund Counsel.

The HCV Primarily-Infected Person died on July 29, 2003 and her mother, for whom this claim is submitted, also died on September 14, 2003. No steps or action regarding this Agreement were undertaken during the period of 6 weeks between the death of the Primarily-Infected Person and that of her mother.

The file as submitted to me contains little information as to why no action has been taken during those 6 weeks, but the woman's age, the pain resulting from the death of her daughter, then her own illness appear to me as a reasonable explanation for the fact that no claim was initiated by or in the name of the mother before her death. She was then 87 years old.

As Estate Administrator for the mother of the Primarily-Infected Person, the Claimant submits this claim for the benefit of the Estate of her mother and describes the latter as a "Family Member" of the HCV Infected Person.

Section 3.07 of the Plan stipulates the following:

**" 3.07 Claim by Family Member**

A person claiming to be a Family Member referred to in clause (a) of the definition of Family Member in Section 1.01 of a HCV Infected Person who has died must deliver to the Administrator, within two years after the death of such HCV Infected Person or within two years after the Approval Date ... an application form prescribed by the Administrator together with:

[...]

b) proof that the claimant was a Family Member referred to in clause (a) of the definition of Family Member in Section 1.01 of the HCV Infected Person."

According to Section 1.01 of the same Plan, " Family Member" of a HCV Infected Person means:

**"1.01 Definitions**

[...]

a) the Spouse, Child, Grandchild, Parent, Grandparent or Sibling of a HCV Infected Person;

[...]

unless any person described above opts out of the Class Action in which he or she would otherwise be a Class Member."

This claim in favor of the Estate of the mother of the Infected Person was rejected by the Fund Administrator on the basis that a "Family Member of the Estate" of the deceased mother of the HCV Infected Person does not meet the definition of "Family Member of the HCV Infected Person " as provided in Section 1.01 a) of the Plan. Such being the case, it appears, in my view, that the more relevant question that must be raised in this case is whether the remedy that the mother of the HCV Infected Person chose not to seek while she was alive or that she simply did not seek while she was alive (because of her health condition or for some other reason) can now be validly exercised by and on behalf of her Estate?

At first, I note that the Plan does not clearly deal with this question and the decisions to which the Fund Counsel is referring in his submission seem, in my view, to be a relatively weak argument to support his case. My role as referee is to ascertain that the decision of the Fund Administrator is the result of an adequate application of the Plan as well as its stated eligibility criteria. In order to do so, while knowing that the Plan is not a testamentary instrument, I consider it appropriate to be guided by certain legal considerations raised by the courts on estate matters.

Having reviewed the documents forwarded to me by the Parties and having examined the relevant sections of the Plan, it is acknowledged that the mother of the Primarily-Infected Person, following her death on July 29, 2003, was eligible as a "Family Member" according to Section 1.01 a) of the Plan. However, this woman, a "Family Member" as defined in the Plan, died some 6 weeks later without submitting a claim under Section 3.07 of the Plan. However, her eligibility to submit such a claim arose at the time of the death, on July 29, 2003, of her infected daughter. Such being the case, can her Estate seek such remedy?

The Administrator and the Fund Counsel argue that the Estate cannot be considered as a "Family Member" of an HCV Infected Person as defined in Section 1.01 of the Plan. On a strictly literal basis, this proposal seems to be reasonable, but one needs to replace in its context



the proper role of an Estate, which is to continue the juridical legal personality of the deceased<sup>1</sup>. Thus, an Estate is "a vehicle, a medium or an instrument" allowing the exercise of the only rights enjoyed and held by the deceased while alive. Such being the case, rejecting this claim on the basis that the "Estate" and not the "person" for whom such an Estate is available does not qualify as "Family Member", evades the real question in this case and does not, in my view, comply with the intention of the Plan generally and with Section 1.01 a) in particular.

I understand from this file that this Claimant, who is the sister of the HCV Infected Person, has already submitted a personal claim as "Family Member" of the Infected Person and that she was effectively compensated according to Section 1.01 a), 3.07 and 6.02 e) of the Plan. The Administrator and the Fund Counsel seem to give a certain weight to the fact that this Claimant has already received a monetary compensation as Family Member. As far as I am concerned, this situation does not appear to be relevant in my ruling on this Request for Review.

It then involved seeking personal remedy, while in this case, the action for which the Estate of the mother of the Infected Person is seeking remedy relates only to this Estate and its heirs. In this context and in view of the fact that this claim has been submitted by and for the benefit of the Estate of the mother of the HCV Infected Person, that the claim was submitted within the 2 year period stipulated in Section 3.07 of the Plan and that such a claim deals exclusively with the exercise of a right included in the estate of a person who is a « Family Member of the Infected Person" at the time of her death on September 14, 2003, I allow this Request for Review and this, for the compensation stipulated in Section 6.02 d) of the Plan.

As for the expenses, no proof or documents having been forwarded to me and no representation having been made to me, this Request for Review is allowed without costs.

The amount in dispute, according to Section 6.02 d) of the Plan, being less than \$10 000, this decision will have to be considered in accordance with Appendix C, Section 3, as being an arbitration case and thus, final and not subject to appeal.

---

<sup>1</sup> For example, *Sauvageau et al. c. Dr Leroux et al.*, C.S., Joliette District, 705-05-001048-969, August 14, 1996, pages 7,10 and 11; *Driver c. Coca-Cola Ltd.*, [1961] R.C.S. 201, pages 204 to 208; *Pantel c. Air Canada* [1975] 1 R.C.S. 472, pages 478 and 479; Baudouin J.-L. et Deslauriers P., *La responsabilité civile*, 6<sup>e</sup> éd., Les Éditions Yvon Blais inc., 2003, page 363; art. 625 al.1, *Code civil du Québec*.

Montreal, July 13, 2006

Original signed by

Jacques Nols Referee

## DECISION

Claim ID: 15307

1. On February 23, 2005, the Administrator denied the claim for compensation of the Claimant filed on the basis of qualifying as a Family Member of a deceased HCV Primarily Infected Person under the transfused HCV Plan. The claim was denied on the grounds that the Claimant did not qualify under the definition of Family Member in accordance with Section 3.07 of the Plan.
2. The Claimant requested that the Administrator's denial of her claim be reviewed by an Arbitrator.
3. Following a pre-hearing telephone conference call and an exchange of correspondence, the Claimant submitted documentation in support of her claim, which has been reviewed and considered in connection with these proceedings. The Claimant was given a full opportunity to provide additional information and to make her submissions and representations.
4. The relevant facts are not in dispute and can be summarized as follows:
  - (a) The Claimant's brother-in-law passed away May 6, 2003. At the time of death, he was a Primarily Infected Person. There is no question or issue that HCV contributed to his passing.
  - (b) The Claimant's husband passed away September 22, 2004. No claim as a Family Member had been made by him concerning his brother's death, as at the time of his own death.
  - (c) On November 24, 2004 a claim was submitted by the Claimant, seeking compensation for a Family Member on behalf of her husband's Estate.
  - (d) The Administrator determined that while the Claimant's husband fell within the definition of Family Member as defined in Section 3.07 of the Settlement Agreement and could have made a proper claim had he filed before he passed away, the Estate of a Family Member does not fall within the required definition and thus denied the claim.
5. The Claimant, on behalf of her husband's Estate, has provided information to the effect that there was confusion and miscommunication between relatives of her husband as to who would assist him in making a claim on his own behalf.

Unfortunately, he passed away before making any such claim. She submits that since he intended to make a claim and would have done so if he had been given the correct information, the claim should succeed because she is simply carrying out his intentions on behalf of his Estate.

6. Unfortunately for the Claimant, I am obliged to find the claim cannot succeed. Section 3.07 of the Agreement reads in part as follows:

*3.07 A person claiming to be a Family Member referred to in clause (a) of the definition of Family Member in Section 1.01 of a deceased HCV Infected Person must deliver to the Administrator, within two (2) years after the death of such HCV infected person or within two (2) years after the Approval Date or within one (1) year of the claimant attaining his or her age of majority, whichever is the last to occur, an application for prescribed by the Administrator...*

Clause (a) of the definition of Family Member in Section 1.01 reads as follows:

*"Family Member" means:*

*(a) The Spouse, Child, Grandchild, Parent, Grandparent or Sibling of a HCV Infected Person;*

It is clear that the Claimant's husband met the definition of a "sibling". However, in this case it is not the sibling who is applying; it is the Estate of the sibling who is the Claimant. Section 3.07 requires that the application must be filed by the Family Member, and the prescribed form must be completed by the Family Member within the specified time limits. While the time limits were met, the other required conditions were not.

7. While I consider the circumstances to be unfortunate, I do not have any discretion to ignore the terms of the Settlement Agreement.
8. Based on these facts, it is clear the Administrator's decision to deny the claim must be sustained.
9. It is the role and responsibility of the Administrator, under the settlement agreement, to administer the Plan in accordance with its terms. The Administrator has an obligation under the Plan to review each claim to determine whether the required proof for compensation exists. The words of Article 3.07 of the Plan are clear and unambiguous that the Administrator has no alternative but to reject the claim in circumstances such as these. The Administrator has no discretion to allow a claim where the required proof that the Claimant herself is a Family Member, as defined, has not been produced. The Administrator must

administer the Plan in accordance with its terms and he does not have the authority to alter or ignore the terms of the Plan. An Arbitrator, called upon to review a decision of the Administrator is also bound by the terms of the Plan and can not amend it or act contrary to its terms.

10. I acknowledge the personal feelings and frustrations of the Claimant in having her claim rejected. It is understandable that she feels as she does regarding the circumstances. Unfortunately, while that is an unsatisfactory result for her, neither the Administrator nor an Arbitrator appointed under the Plan has the authority or discretion to Award her claim.
11. Accordingly, for the reasons set out above, I find that the Administrator has properly determined that the Claimant was not entitled to file a claim for compensation under the Plan. I therefore find that the Administrator's decision must be sustained.

Dated at Vancouver, British Columbia, this 10th day of February 2006.



---

John P. Sanderson, Q.C.  
Arbitrator