

**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 1000015

- and -

The Administrator

**(On a motion to oppose confirmation of the decision of Gerald J. Charney, released
November 26, 2003)**

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 a resident of Richmond Hill, Ontario who has been diagnosed

with HCV.

4. The Claimant submits that he may have received blood in May 1986 either in an ambulance or in the emergency room at Toronto East General Hospital. The Claimant also alleges that he received blood in 1987 either in an ambulance or at York Finch Hospital (now part of Humber River Regional Hospital) after he was injured in a fight.

5. A Traceback Procedure was conducted by Canadian Blood Services to determine whether the Claimant received blood during the Class Period. Pursuant to the Traceback Procedure, certain hospitals provided information to Canadian Blood Services regarding the Claimant, including the following:

- a) In a letter dated August 2, 2000, a representative of Humber River Regional Hospital stated: "... we have searched the Emergency Room Records of [the Claimant] for the date of July 24, 1987 and have found NO record of a blood transfusion given in our facility formerly known as York Finch General Hospital".
- b) In a letter dated November 29, 2001, a representative checked off a box that indicated that the hospital was unable to provide information regarding the Claimant because "There is no recorded contact with Humber River Regional Hospital – Finch Avenue Site". There is no indication as to whether this letter was in response to a request for information relating to a specific range of dates or to all dates.
- c) On January 17, 2002, a representative of Toronto East General and Orthopaedic Hospital completed a Canadian Blood Services "Traceback Notice" form by checking off the boxes that indicated "Not transfused" and "No records found for this patient".
- d) On April 25, 2002, a representative of North York General Hospital completed a Canadian Blood Services "Traceback Notice" form by checking off the box that indicated "Hospital Records available; No record of admission to this hospital".
- e) On August 30, 2002, a representative of the Toronto Western Hospital – Western Division completed a Canadian Blood Services "Traceback Notice" form by checking off the box that indicated "Patient record available; Not transfused."

6. On February 3, 2003, the Administrator denied the Claimant's application for compensation pursuant to the Transfused HCV Plan on the grounds that the Claimant failed to provide sufficient evidence to support his claim that he received blood during the Class Period. In making this decision, the Administrator relied on the results of a Traceback Procedure.

7. The Administrator's decision was upheld by a referee in a decision dated November 26th, 2003. The referee relied on the results of the Traceback Procedure. In addition, the Referee noted that according to expert testimony, the Claimant's hemoglobin levels during his hospitalization in 1986 and 1987, as set out in the hospital records, did not necessitate a blood transfusion.

8. In his decision, the referee accepted that had the Claimant's girlfriend given evidence at the hearing, she would have testified that she had been told by one of the doctors at York Finch Hospital that the Claimant had lost $\frac{3}{4}$ of his blood supply. However, he rejected evidence that $\frac{3}{4}$ of the Claimant's blood had been lost on the grounds that this evidence was contradicted by all of the laboratory results noted on the Claimant's file.

9. In submissions provided for the purpose of this motion, the Claimant noted that Toronto East General Hospital does not have an ambulance report that he is aware of and no record of treatment in the two days leading to surgery. He also noted that records from the Toronto Western Hospital indicate that he had been transferred from North York General Hospital.

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. The Settlement Agreement is clear on the issue of eligibility. A claimant must establish that he or she has both infection with the Hepatitis C virus and receipt of Blood during the class period. Generally, the method by which receipt of Blood is established is through the submission of the medical, clinical, hospital or laboratory records of the claimant. (See s. 3.01(1) (a) of the Transfused Agreement)

12. Where the claimant's medical records do not indicate the receipt of Blood during the class period, the claimant may still be able to establish that he or she received Blood during that time pursuant to s. 3.01(2) which provides:

3.01(2) ...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.

13. In this case, the claimant did not have the supporting medical records demonstrating that he received a Blood transfusion and therefore was attempting to establish a transfusion on alternate evidence under s. 3.01(2). However, the important thing to note about s. 3.01(2) is that the claimant bears the onus of proof on the balance of probabilities. The referee determined that the claimant did not satisfy the onus and therefore upheld the decision of the administrator.

14. The claimant appeals on two main grounds, namely, that there were “too many discrepancies” with the “hospital reports” and that there were missing hospital and ambulance records. Notwithstanding any other aspect of the referee’s decision, a finding in favour of the claimant on either or both grounds would not be sufficient to meet the onus under s. 3.01(2) of the Agreement. On a motion to oppose confirmation of a referee’s decision, this court may interpret the Agreement but it cannot alter or amend it. The claimant has not met the burden to avail himself of s. 3.01(2) and accordingly, his motion must be dismissed and the decision of the referee confirmed.

15. In some respects, I believe that the grounds of appeal raised by the claimant may also be a more general indication that the appeals process, particularly at the referee stage, would benefit from direction from the court.

16. Because of the grounds of set out in the notice of motion, I have reviewed the documentary material presented in evidence during the hearing in detail. The failure of the referee to offer any elaboration in his reasons with respect to his findings on the existing hospital records appears to be the underpinning of at least part of the claimant’s motion. I agree with the claimant that there are discrepancies in the documentary material. However, my review indicates that the discrepancies are between the records themselves and the subsequent reporting letters provided by the hospitals in question to the Administrator and to Canadian Blood Services pursuant to its traceback investigation.

17. For example, one hospital responded to a traceback request by indicating that it had no recorded contact with the claimant, in the face of detailed hospital records indicating exactly the opposite. Another reported no record of an admission to its facilities, while again providing records that the claimant received treatment at the hospital. Still another hospital responded on a request form that the claimant was not transfused there while also indicating that it had no records for the claimant. It is difficult to reconcile an affirmative statement which apparently would require resort to records with a statement indicating that those very records do not exist.

18. The claims and appeal processes set out in the Agreement are designed so that claimants can represent themselves. In my view, it would be consistent with this objective for referees to address conflicting evidence in their reasons and elaborate as to why particular evidence was preferred. In this case, the underlying records do not indicate that the claimant received a Blood transfusion during any of his visits to the hospitals. It is unfortunate that some records in this case may have been produced after a

denial of their existence but having now been produced, the records do not indicate that a blood transfusion was given to the claimant. Similarly, it is not enough to suggest as the claimant does, that the circumstances of the production render the integrity of the records suspect. S. 3.01(2) requires corroborating, or affirmative, evidence of a blood transfusion rather than a demonstration that some of the existing records are either incomplete or conflicting. Establishing the latter would be helpful for credibility purposes when a referee had to weigh the information, or lack thereof, contained in the records against evidence to the contrary but there must still be admissible corroborating evidence that the claimant received Blood, notwithstanding the existence of records indicating otherwise.

19. With respect to the concept of "corroborating evidence", I am troubled by the referee's decision with respect to the consideration of testimony that might have been given by a witness who was not called to testify. Apparently, there was a statement made by the claimant that a former girlfriend would testify that she was told by hospital staff that the claimant had been given a large transfusion of blood during one of his hospital visits. The claimant's former girlfriend was not called to give evidence. The referee indicates in his reasons that he "accepts" that the claimant's girlfriend would testify as stated by the claimant but ultimately finds that any such evidence would be contradicted by the hospital records and the expert evidence. In this respect, the referee erred in considering what amounted to double or possibly triple hearsay as evidence at all. I would not regard it as meeting the threshold of corroborating evidence as contemplated by s. 3.01(2). However, the error was in favour of the claimant and did not prejudice him as a result.

20. Finally although it is a moot point in this appeal, it would also be a good practice where a referee considers "expert" evidence, if the identity and qualifications of the expert were set out in the reasons.

Result

21. The claimant has not met the burden of providing corroborating evidence of a blood transfusion pursuant to s. 3.01(2) of the Settlement Agreement. The motion to oppose confirmation is dismissed.



Winkler R.S.J.

Released: December 05, 2005