

**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)**

B E T W E E N

Claimant File No. 1000114

- and -

The Administrator

**(On a motion to oppose confirmation of the decision of Reva Devins, released April 2,
2004)**

Reasons for Decision

WINKLER 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 has been diagnosed with Hepatitis C. She has been hospitalized on a number of occasions, but for illness which is not generally treated by blood transfusion. In her application for compensation under the HCV Transfused Plan the Claimant asserts that she received blood transfusions in September 1988 at both St. Joseph's Hospital and Northwestern Hospital in Toronto. According to the claimant, during her hospitalization at St. Joseph's, she was given a blood transfusion to "cleanse toxins" from her system. She also asserts that she received another transfusion at Northwestern hospital as a result of a tubal pregnancy and removal of her fallopian tube.
4. The Claimant's application for compensation under the HCV Transfused Plan was rejected by the Administrator. The decision of the Administrator was appealed to a referee.
5. The Claimant was self-represented on the appeal. She did not produce any hospital or medical records as evidence of a blood transfusion at the hearing. Instead she relied on the evidence of several witnesses who testified in support of her claim. In particular, her former boyfriend and her mother gave evidence before the referee that they had seen the claimant being transfused at St. Joseph's during her hospitalization in the fall of 1988.
6. St. Joseph's provided its records, which indicated that the claimant had been hospitalized there on a number of occasions in 1988, although not in the month of September of that year.

According to the records provided by St. Joseph's, the last admission was in July of 1988 for a period of approximately 18 days.

7. Northwestern Hospital provided a statement that the Claimant had not been transfused with blood there, but was unable to provide any records from 1988 because a merger between Northwestern and another hospital meant that records for that period could not be retrieved.

8. Substantial efforts were undertaken, at the direction of the referee, to obtain any additional medical records that might assist the claimant in establishing that she had indeed received a blood transfusion during hospitalization. Those efforts failed to reveal any further documentary proof supportive of the claimant's position.

9. Although the Plan generally requires a claimant to deliver medical or other third-party documentary evidence of a blood transfusion in order to obtain compensation, s. 3.01(2) permits a claimant to establish that a transfusion occurred by alternative, "corroborating evidence independent of the personal recollection of the claimant or any person who is a Family Member of the claimant...".

10. In this case, the corroborating evidence offered by the claimant was the evidence of her former boyfriend and her mother. The referee did not find this evidence to be persuasive in the absence of any documentary evidence supporting the claimant's position. Accordingly, the appeal from the decision of the Administrator was dismissed.

11. The claimant now opposes confirmation of the decision of the referee.

Standard of Review

12. 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

13. 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.

14. The evidence of her former boyfriend was the only independent corroborating evidence of a transfusion that the Claimant was able to adduce. The rejection of this evidence was therefore fatal to the Claimants appeal. Given the nature of the Plan and its objects, Claimants must not be denied compensation on improper grounds. Here it is not clear as to what impact on the ultimate outcome the improper use of the mother's evidence may have had. Accordingly, the matter must be referred back to the referee for a rehearing.

15. Although the Claimant does not appear to have vigorously pursued the Northwestern avenue on her appeal, it also remains unclear to me how Northwestern could state categorically that the claimant did not receive a transfusion there having also stated that its records were not retrievable. In the circumstances, the Claimant will be permitted to address this issue again at the re-hearing.

15. This motion raises issues of a nature that transcend this specific case. I am not persuaded that a decision flowing from the re-hearing will provide the general guidance in the administration of the Plan that it otherwise might given that the claimant is self-represented. Therefore, pursuant to my jurisdiction under s. 10.01 of the Settlement Agreement, I am appointing Mr. William Dermody as a friend of the court with instructions to assist the Claimant in presenting her case at the re-hearing.

17. The motion to oppose confirmation is granted. The matter is referred back to the referee for a re-hearing in accordance with these reasons. The referee, the Claimant and Mr. Dermody will be advised of his appointment by the court. His accounts are to be paid by the Administrator after approval by the court.

A handwritten signature in black ink, appearing to be 'Winkler J.', written over a horizontal line.

Winkler J.