DECISION

Claim No. 1000937

Province of Infection – Nova Scotia

1. The Claimant applied for compensation as a Primarily-Infected Person pursuant to the Transfused HCV Plan.

2. By letter dated June 14, 2006, the Administrator denied the claim on the basis that the Claimant had not provided sufficient evidence to establish that she had received blood during the Class Period.

3. The Claimant requested that the Administrator's denial of her claim be reviewed by a Referee.

4. The Administrator's letter of June 14, 2006 denying the claim stated in part:

> "In your original application you indicated you were transfused in 1985 and 1990 at the Victoria General Hospital in Halifax. Medical records submitted confirmed you did receive transfusions in 1985 and that you were crossmatched during a hospital admission in March 1990. A crossmatch is a procedure in which blood is requested and saved in the hospital blood bank, however it is not proof of transfusion of that blood. In cases where the claimant is having difficulty obtaining documents to support they received a transfusion between 1986

and 1990; the traceback department contacts Canadian Blood Services (CBS) to request their assistance in obtaining transfusion information directly from the hospital. The final response to this request was received from CBS in a letter received August 2005. The Queen Elizabeth II Hospital (formerly the Victoria General) confirmed they searched their records and although you were transfused in 1985 you did not receive a transfusion of blood in 1990. Since August 2005 you have been attempting to gather your medical records to support that you did receive a transfusion in 1985 [sic]. You advised that you have been unable to obtain any further records and requested a final decision on your claim. Therefore based on Article 3.01 (1a) of the 1986-1990 Hepatitis C Settlement, Transfused Plan, you do not qualify for compensation; because there is no evidence to support you received a blood transfusion between January 1, 1986 and July 1, 1990."

5. The following facts are not in dispute:

(i) The Claimant has Hepatitis C infection which was diagnosed in November 1997.

(ii) The Claimant was transfused in 1985 as a result of injuries she received in a motor vehicle accident.

(iii) The Claimant had a therapeutic abortion on March 9, 1990 at the Victoria General Hospital in Halifax and was discharged later the same day.

(iv) The Claimant was re-admitted to the V.G.H. through its Emergency Department on March 17, 1990 due to what is described in the Discharge Summary as "quite heavy bleeding with multiple clots". She was diagnosed as suffering from endometritis and was treated in hospital for five days before being discharged on March 22, 1990.

(v) The hospital records indicate that on March 17, 1990, two units of blood were crossmatched for possible transfusion to the Claimant. However, there is no indication in the hospital records that the Claimant was actually transfused.

(vi) No traceback has been carried out with respect to the two units of blood which were crossmatched and no record has been produced accounting for their ultimate use or disposition.

(vii) The hospital records indicate that the Claimant was administered ringer's lactate which is a clear IV solution.

6. Against this uncontested factual backdrop, the issue to be determined is whether the Claimant was transfused during her stay at the V.G.H. from March 17th to 22nd, 1990.

7. The Claimant maintains that she was transfused. She says that she distinctly recalls being hooked up to an IV in her hospital room and seeing the blood bag hung on the IV pole.

8. D.S. testified to the same effect. D.S. has been a friend of the Claimant since 1982. She said that she was living in Sussex, New Brunswick in 1990 but was in Halifax visiting her mother around March of that year. D.S.'s mother told her that the Claimant was in hospital so D.S. went to visit her. D.S. could not recall the date of the visit but said she knew it was close to the date of the Claimant's daughter's birthday because the daughter showed her something that she had received as a gift. The Claimant subsequently confirmed that her daughter's birthday is March 17th.

9. D.S. said that the Claimant was in a ward with another bed but could not recall whether there was anyone in the other bed. She thought the Claimant's husband was there but was not certain of that. D.S. said that the Claimant was lying in bed with an IV pole beside her. According to D.S., there was a blood bag

on the IV pole and the Claimant was being transfused. She said she had been given blood herself and she knows what it looks like.

10. Counsel for the Administrator takes the position, quite properly, that it is for me to assess whether D.S.'s evidence is sufficient to tip the balance of probabilities in favour of the Claimant. He submits that it does not quite do so, but he declined to put the matter more strongly than that.

11. This case is governed by s. 3.01 of the HCV Transfused Plan which provides, in part, as follows:

> **"3.01 Claim by Primarily-Infected Person**
>
> (1) A person claiming to be a Primarily-Infected Person must deliver to the Administrator an application form prescribed by the Administrator together with:
>
> (a) medical, clinical, laboratory, hospital, The Canadian Red Cross Society, Canadian Blood Services or Hema-Québec records demonstrating that the claimant received a Blood transfusion in Canada during the Class Period;
>
> ....
>
> (2) 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. Clearly, the Claimant has not been able to prove her claim pursuant to s. 3.01(1)(a). There is no medical record of any kind which demonstrates that she received a blood transfusion during the Class Period. Consequently, the question is whether the Claimant has satisfied the requirements of s. 3.01(2) by providing "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...she received a Blood transfusion during the Class Period".

13. It has been decided in earlier cases that, under s. 3.01(2), a claimant bears the burden of proof on the balance of probabilities. It has also been authoritatively determined that the burden of proof must be satisfied by the independent evidence without regard to the recollections of a claimant or family members. In Court File No. 98-CV-141369, Winkler R.S.J., as he then was, stated:

> "Given the express wording of s. 3.01(2), the only interpretation it will be [sic] 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."

14. In the present case, the only independent evidence proffered by the Claimant is the testimony of D.S. While D.S.'s recollection of detail is somewhat vague, this is to be expected given that the events with which we are concerned occurred over 17 years ago. However, she was very clear on the essential fact – namely, that the Claimant was receiving a blood transfusion when D.S. visited her in hospital in March of 1990. Her credibility was not shaken on cross-examination and there is no direct evidence to the contrary.

15. Weighed against D.S.'s recollection is the inference which arises by virtue of the fact that the hospital records do not indicate that the Claimant was transfused. I have no evidence before me with respect to standard procedures at the V.G.H. in 1990. However, I assume that there were such procedures and that they required all transfusions to be recorded. By the same token, however, it is not unknown for errors to occur or medical records to be misplaced or lost. As referee Mitchell stated in File No. 12311:

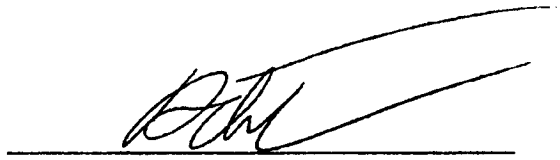
> "...in this case, the Administrator did not work in the hospital in question, and there is no actual evidence as to what the system there was or what actually transpired in the case of this patient in this hospital. Moreover, even if there was such evidence, if I were to take the records as conclusive in each and every case, there would likely be little purpose served by the notwithstanding clause and the ability of the Claimant to demonstrate on the balance of probabilities that a transfusion did take place. Rather, such a provision would, for the most part, be rendered meaningless."

16. The evidence of D.S. does not exist in a vacuum. The Claimant was hospitalized because of heavy bleeding. Two units of blood were crossmatched for potential transfusion purposes. Those units have not been accounted for in the record before me.

17. Bearing these surrounding circumstances in mind, I find that D.S.'s testimony establishes, on a balance of probabilities, that the Claimant received a blood transfusion at the V.G.H. in March of 1990.

18. Jurisdiction is retained to deal with any further issues arising out of this decision.

DATED at Halifax, Nova Scotia, this 20th day of September, 2007.



S. BRUCE OUTHOUSE, Q.C.
Referee