

CLASS ACTION – Hepatitis C 1986-1990

Request for Review # 1200222

DECISION

In December 2001, the Claimant submitted a claim for compensation under the Transfused HCV Plan, which is an integral part of the 1986-1990 Hepatitis C Settlement Agreement. She submitted her claim as personal representative of her husband who had died in March 1999. The Claimant pointed out in her submitted documents that her husband had received several transfusions during the 1986-1990 period and that he had contracted Hepatitis C as a result of one of them.

Thus, the Claimant stated in the General Claimant Information Form (TRAN 1) that her husband had received "hundreds, but 66 official (transfusions)" during his life. In reply to question 13, namely "how many blood transfusions did the HCV Infected Person receive in Canada during the period between January 1, 1986 and July 1, 1990?", the respondent wrote "10 or 40 +".

Again in December 2001, Dr. Bernard Elfassy signed the Treating Physician Form (TRAN 2), confirming that the Primarily Infected Person had effectively received a transfusion during the period from January 1, 1986 to July 1, 1990. The Claimant chose to add, by affixing her initials to the same document, that he rather had had "multiple" transfusions.

In the Declaration form by the HCV Infected Person or that of his/her Personal Representative (TRAN 3), the Claimant stated that her spouse had received numerous transfusions, in November 1986, at the Jewish General Hospital. Later on, the Claimant clarified her statement by specifying that the transfusions had been received during a hospitalization at the Jewish General Hospital (Sir Mortimer B. Davis) from November 12, 1986 to December 13, 1986. The Claimant also added that the Institution's files had been purged, at an unspecified date.

In the Blood Transfusion History Form TRAN 5, the Claimant wrote, under the heading entitled "Number of transfused blood units", "multiples transfusions 64 and more and many more".

In spite of all this, the Fund Administrator rejected this claim, because he considered that there was "insufficient proof of first infection during the Class Action Period". The Claimant was informed of this refusal by letter dated January 27, 2005. It is further to that decision that the Claimant submitted, on March 15, 2005, a Request for Review that I had to examine in my capacity as Referee.

Under Section C, Question 5 of the Request for Review, the Claimant stated that she wished to provide the Referee with further documents in support of her appeal, namely:

- "a) A complete file from her husband (J.G.H.): 4,500 pages. Following the judge's decision (Access Commission).
- b) Key documents reorganized in proper sequence (legal action)."

On page 2 of a supplementary handwritten document, she added:

"Supplementary insertion of documents 4,500 pages = J.G.H.'s file. Many errors have contaminated my husband and have killed him. One doctor knows that."

Again on the Request for Review, the Claimant wrote:

- "1- Human contact helps clear up what is vague or obscure.
- 2- It also helps the innocent heart to speak the truth and an experienced observer cannot miss it.
- 3- Thanks to human contact, I had access to the complete file, which had been "cruelly" denied for a long period of time (Access to Information Commission.) "

The Claimant stated in her Request for Review that she wanted an in-person hearing and, in addition to her testimony, she said that she wanted to call the following persons as witnesses:

- her son;
- Mrs. Lucie Dubord, identified as "the person in charge of my husband's file at the Jewish General Hospital";
- Mrs. Bonnie Selcer, identified as "Blood Bank, Senior Manager", Jewish General Hospital);
- Mrs. Huguette Demers, Ex-director of Héma-Québec;
- Mrs. Pierrette Duguay, "the person responsible for my husband's file while he was alive, Héma-Québec ".

This was the context when I wrote to the Claimant, on March 22, 2005, asking her, amongst other things, if she felt she was ready for the Hearing of this case, because I had noted that she had already asked the Administrator for some deadline extensions which had been granted.

The Claimant indicated, as early as March 23, 2005, during a telephone conversation with my assistant, that she was not ready to proceed, that she had to examine some 7,000 pages of important documents and that she had been delayed in this exercise by construction work at her house. Following this call and a long fax which I received a few days later, I informed the Claimant that I agreed to postpone her Request for Review and that I was adjourning the case until September 2005.

I therefore had a notice delivered to the Claimant on October 13, 2005, to the effect that her Request for Review would be heard at my office in Montreal on December 5 and 6, 2005. Further to this notice, I received from the Claimant a five-page letter by telefax on November 10, 2005, another one of seven pages on November 24, 2005, and yet another one of five pages the same day, i.e., on November 24, and finally another one-

page letter on December 2, 2005. To avoid any misunderstanding, I forwarded a copy of those letters to the Fund Counsel. During all this period, the Claimant also communicated with my assistant, Mrs. Sylvie Trudeau, by telephone, on November 9, on November 22, on November 24 (2 calls), on November 30 and on December 2, 2005.

The Hearing began as planned in the morning of December 5, 2005.

To accommodate the Claimant, I ensured that the original file of her deceased husband at the Jewish General Hospital had been sent to me in order that the Claimant and, if required, the Fund Counsel, could consult them.

Mrs. **Annie Jacques**, Medical Records Administrator at the Jewish General Hospital, testified and confirmed that she had in her possession what she described as being the complete original file. She did however recognize readily that the file regarding the period of 1977 and before had been purged, but as for the 1986 and 1987 hospitalizations, she felt that the file was complete.

I adjourned the Hearing from 11:00 AM until 2:00 PM during this first day to allow the Claimant, as she had asked me, to get acquainted with the original file. At the resumption of her oral examination led by the Claimant, Mrs. Jacques provided the transfusion details as described in the file, transfusions which the Claimant's husband would have received there:

- 1986: Two transfusions (November 19), one transfusion (November 20), three other transfusions (November 20);
- 1987: One transfusion (April 20), one transfusion (April 21);

- 1988: One transfusion (September 30), one transfusion (October 1) plus albumin transfusions during a hospitalization in November 1988.

Thus, Mrs. Jacques's testimony referred to six transfusions in 1986, two in 1987 and two in 1988, plus the albumin transfusions.

The Hearing was then suspended after which the Claimant explained to me that she still wanted to call various other witnesses, and explained to me why. In her list, the following names appeared again: Lucie Dubord, Bonnie Selcer, Pierrette Duguay and Huguette Demers. But there were also those of Sylvie Tremblay – a Héma-Québec nurse, Dr. Patricia McMillan who had cared for her husband in 1999, Dr. John Hoffer who had cared for her husband in 1998 and Dr. Marc Germain – Medical Director of Héma-Québec.

Moreover, I indicated to the Claimant at the end of the Hearing of December 5, 2005, that I considered it inappropriate for her to communicate by telephone with the undersigned or with whomever at my office, and I ordered her to stop calling.

On December 13, 2005, I wrote to the Claimant, informing her that her Request for Review would continue on February 15 and 16, 2006, and I also informed her, after having reexamined the list of persons that she had told me she wanted to call as witnesses, that I was taking steps to try to ensure that such persons would be present at the Hearing.

I effectively wrote to the Director of professional services of the Jewish General Hospital and to the Vice-President of legal affairs at Héma-Québec, to obtain information and ensure that, inasmuch as reasonably possible, the witnesses that the Claimant wanted would appear at the Hearing.

On December 14, 2005, the Claimant sent me a three-page fax, enjoining me to convene all her witnesses without exception. She also confirmed having left, that same day, three messages on my office answering machine. Incidentally, she had left three other messages, the same day, with my assistant.

I wrote to the Claimant on January 20, 2005 (corrected to read January 20, 2006) asking for some information about the doctors whom she wanted to call as witnesses. I also informed the Claimant that someone had mentioned to me that Mrs. Demers was now living in the Philippines and, moreover, that Mrs. Duguay no longer worked at Héma-Québec, and that I had been informed that she was seriously ill. Thus, I indicated that Mrs. Demers and Mrs. Duguay would not be available for the resumption of the Hearing.

The Claimant wrote to me on January 26, 2006 saying that she was sorry that Mrs. Duguay was sick, and then sent me a fax on February 2, 2006. I wrote to the Claimant on February 7, 2006, and I take the liberty to reproduce an extract from that letter:

[Translation] "I note in your letter of February 2 that you are worried as to whether you will have enough time to prepare your written or oral submissions. Be assured that I shall grant you all the time reasonably required to allow you to prepare your written or oral submissions and that I shall grant you all the time required to allow you to provide submissions which you deem appropriate, in as much as they are relevant to our argument. If necessary, we will set a new date for the Hearing, so that you and Me Kark can effectively provide your submissions."

On February 9, 2005 (corrected to read February 9, 2006), a Mrs. Tanguay, a Medical Records Manager at the Jewish General Hospital, informed my assistant that Mrs. Dubord was on maternity leave and could not appear as a witness. Mrs. Tanguay indicated that she was the Medical Records Manager at the Jewish General Hospital and that she could come to testify on the contents of the file. She indicated that she would have the original file with her, if this were deemed necessary.

On February 14, 2006, the Claimant sent me a fax saying that she did not want to see Mrs. Tanguay. The Claimant also left a telephone message with my assistant saying to her that she did not want Mrs. Tanguay to testify.

Thereupon, the Hearing resumed on February 15, 2006.

However, the Claimant had left a message in my voice mailbox early in the morning of February 15 saying that she would not be present. I decided, at the opening of the Hearing, to call the applicant by phone, in the presence of the Fund Counsel and of the Jewish General Hospital and Héma-Québec's Counsel, and I indicated to the Claimant that if she did not appear, I would consider that she had waived her right to be heard. She finally showed up at my office at 1:00 PM on February 15.

The Claimant then called as witness **Dr. Marc Germain**, Vice-President of human tissues at Héma-Québec. He explained the test results appearing on the chart concerning the identified donors. The chart was attached to a letter signed by the Vice-President of medical affairs at Héma-Québec and dated June 17, 2005, which can be found under Tab 18 of the submission provided by the Fund Counsel. The traceback, which had been initiated in February 1998 by the Canadian Red Cross at the request of the Transfused Person, had been completed by Héma-Québec. This organization had, as per requirements in such cases, checked with the hospital to have it confirm the list of products that had been transfused to the Claimant's husband. Dr. Germain explained that according to information obtained from the Montreal Jewish General Hospital's Blood Bank, the Claimant's husband had received seventeen blood products between November 19, 1986 and March 10, 1993, of which 10 transfusions from 1986 until 1990, and such transfusions can all be found in the list of verified products and tested donors by Héma-Québec, list reproduced under Tab 18 of the submission documents provided by the Fund Counsel. In my estimation, this list corresponds to the testimony presented to me, but is strongly disputed by the Claimant.

For each of the units transfused to the Claimant's husband, the following information can be found: the dates of the donations subsequent to the donations in question which have been subjected to an Hepatitis C traceback and the traceback tests conducted for each donation. All the traceback test results for all donors related to the traceback turned out to be negative.

Moreover, at the end of this second day of the Hearing, I refused to have Dr. John Hoffer testify for the Claimant, considering that his testimony concerning the care provided in 1998 could only be of an expertise nature, and also because I did not see any relevance for the care and transfusions received from 1986 until 1990. Incidentally, the Claimant had just called Dr. McMillan to testify on the same questions.

The Hearing was then adjourned until May 9, 2006 for additional testimonies and if required, for the presentation of arguments by the parties. Incidentally, a written notice was sent to the Claimant, for that purpose, on February 17, 2006.

The Claimant wrote to me on May 1, 2006 asking me to defer the Hearing planned for May 9 explaining that an incident had occurred some days earlier during which the Claimant would have been bothered by tar vapors from a work project near her residence.

Later that same day, she informed me, and I quote: "I shall come to the Hearing on May 9, 2006, God willing and not because of you. "

On May 3, I received another fax and the Claimant wrote to me then: "I ask you not to disturb me on Tuesday, by sending me a subpoena, or by disturbing my son. If I do not come, it is because I will have important reasons."

The Claimant did not show up on May 9 in spite of the telephone message that I left her that same morning at her home telephone number, and in spite of the fax that I sent her that same morning.

I then wrote a letter on May 11, 2006 to inform the Claimant that I had decided that her proof had been foreclosed and that she could not call any other witness in this case. I added to the letter of May 11:

[Translation] "You can send me, at my Montreal office, a written submission explaining why you consider that the Fund Administrator's decision is wrong and why I should uphold your Request for Review. This written submission must be received, at my office, **at the latest on Friday June 9, 2006, at 5:00 PM**, failing this you will be foreclosed. I indicated to Me Kark that if she wished to avail herself of her right, she would have the opportunity to reply to your written submission, by tabling her own written arguments at the latest on July 7, 2006, at 5:00 PM. If required, you will then have a fifteen (15) day retort right after receipt of Me Kark's notes."

I did not receive anything except for a five-page fax on June 8, 2006 in which the Claimant:

- Accused me of having distinguished myself by my decision to ignore what she called the prosecution witnesses and to have had them replaced by secondary witnesses;
- Blamed me for having delayed answering her faxed letter of February 14 (I had answered her letter of 1:00 PM at 4:42 PM);
- Blamed me for having convened in Lucie Dubord's place, the Medical Records Manager of the Jewish General Hospital, Mrs. Louise Tanguay, adding some unfriendly remarks about Mrs. Tanguay;
- Accused me of manipulating the information and of omitting to tell the truth;
- Spoke about a plethora of Goliaths, lawyers and witnesses;

- Concluded her fax, and I quote an extract from it: "the case exceeds your jurisdiction and, naturally, that of Me Kark. God will pass judgment in less than 7 years. My husband will see to it, as he has already done."

I provided this lengthy narrative of the facts in order to explain the context in which the Hearing of this Request for Review took place and finally aborted on May 9, 2006.

Nevertheless, I reviewed carefully some 600 or 700 pages of the hospital file, which had been forwarded to me, the file as prepared by the Fund Administration and the stenographic transcription of all testimonies provided in this case.

Even if the Claimant did not testify as such before me, I retain the explanations which she gave all along her oral examinations and interventions, that she felt that her husband had received, beyond what had been documented in her deceased husband's hospital file, other transfusions in November, 1986, in April, 1987, in September and October, 1988, and again other transfusions in 1991.

The Claimant repeatedly declared that the Jewish General Hospital's file had been purged or altered in such a way that what we had for the 1986-1990 period was but a pale reflection of the reality.

Therefore, **Annie Jacques**, testified as Medical Records Representative of the Jewish General Hospital. Mrs. Jacques had been working at the Medical Records Unit since 2001. She evidently had not worked there during the 1986-1990 period, but she testified before me that the Claimant's deceased husband's file at the Jewish General Hospital, since 1986 was complete. As mentioned previously, she had indexed a total of ten transfusions for the 1986-1990 period, i.e. six in 1986 (November 19 and 20), two in 1987 (April 20 and 21), two in 1988 (September 30 and October 1), as well as two albumin transfusions in 1988.

She mentioned that there had been no other transfusions for the 1986-1990 period and completed her testimony by saying that the file appeared to be complete.

Dr. Marc Germain explained the summary chart for the different donors and tests that had been conducted, and explained the Traceback Procedure, talking about three rules, i.e. the transfused product must be associated to its donor, the test must be conducted at least twelve months after the said donation, and finally, the second generation Elisa technique or better must be used for the test.

Dr. Germain indicated that such rules had been followed in this case.

Dr. Patricia McMillan, an Internal Medicine, Anesthesia and Intensive Care Specialist, testified at the Claimant's request and confirmed that she had met the Claimant's husband from March 12 to 15, 1999. She described him as being a very sick man, who was then in a coma and was not responding to stimuli. She described him as a very complex patient and mentioned that he must have undergone more than forty surgeries during his various admissions at the Jewish General Hospital.

Dr. McMillan was an impressive, sincere, full of compassion witness for his former patient and for the Claimant, but nothing in his testimony allows me to think that the Claimant's husband received more transfusions than what was documented on the file.

Sylvie Tremblay, a Client Service Nurse for donors and receivers, at Héma-Québec. She had been working at Héma-Québec since 1998 and it appeared to me that she was straightforward in answering the Claimant's questions without wanting to hide anything. However, she had only a limited knowledge of the facts that the Claimant wished to talk about and her testimony was not too helpful. She did however confirm that she worked in the Medical Department and often had to do donor tracebacks, and that she was satisfied that with all such verifications, she could ensure that the identified donor could be traced back to a specific blood donation.

Bonnie Selcer, a nurse and " Transfusion Safety Manager" at the Jewish General Hospital. She stated that she was charged by the records management section to find out how many transfusions the Claimant's husband had received. During her investigative work in August 2000, she traced back a total of seventy-seven blood products, of which sixty-four would have been fresh products (transfused blood) and thirteen products which she described as stable products (such as albumin), and that would have been for the duration of all the Claimant's husband's hospitalizations. She stated having compared the list with Héma-Québec's list and that for the period covered by the Héma-Québec traceback, the two lists were identical. Examined for a long while by the Claimant and cross-examined by the Fund Counsel, Mrs. Selcer confirmed having traced back ten blood transfusions from 1986 to 1990, and closed her testimony by saying that she "went through" the whole Claimant husband's file, and that all that she found as blood products were identified on her list.

Following my examination of the note transcriptions from the various witnesses, of the Fund Administration file and of the relevant sections of the hospital file for the 1986-1990 period, and of my personal notes, I must conclude that, during the period covered by the current Plan, the Claimant's husband received ten blood transfusions and that following the traceback investigation conducted by Héma-Québec, all the donors proved to be negative.

Paragraph 3.04 (1) of the HCV Transfused Plan stipulates that if the results of a Traceback Procedure indicate that none of the donors is or was HCV antibody positive, "the Administrator must reject the claim of such HCV infected person."

Paragraph 3.04 (2) of the same Plan stipulates that the Claimant may prove that he was HCV infected for the first time by a blood transfusion, notwithstanding the results of the Traceback Procedure. In this case, this proof was limited to the Claimant's self-report to the effect that her husband had received more transfusions than the ones which had

been documented in the file and that the file had either been purged or tampered with, and that there had been some “conspiracy” between the hospital and Héma-Québec. I did not see anything in the testimonies and in the file before me that allowed me to believe that someone wished to hide something, and in spite of the Claimant’s forceful criticism, I concluded that during the 1986-1990 period, her husband had received ten blood transfusions at the Jewish General Hospital. I found no other transfusion, whether at the Jewish General Hospital or elsewhere, for the period covered by the current Plan.

In order to overrule the traceback results, the Claimant would have had to provide me with very persuasive and objective proof to the contrary. This has not been the case here. The proof submitted did not appear to me to be sufficient to justify our overruling the negative traceback results.

I consider that the Claimant has not provided, by balance of evidence or otherwise, the required proof that her husband had been infected by a blood transfusion received during the period covered by the current Plan, i.e., from 1986 to July 1990.

The Claimant testified before me with resolve and I do not doubt that she has been greatly affected not only by the terrible disease which killed her husband, but also by all the other health problems which ruined the last years of their life as a couple which, without any doubt, appeared to have been a strong relationship. The Settlement Agreement cannot however apply to all cases and is a compromise reached in order to compensate those who meet the terms and conditions of the Agreement. I therefore conclude that the Claimant has not met the terms and conditions of the Agreement, as she has not been able to establish, by balance of evidence or otherwise, that her husband contracted the disease following a blood transfusion received in Canada during the Agreement period, i.e., from January 1, 1986 to July 1, 1990.

Evidently, I am aware of the fact that the Federal Legislator has announced that it wishes to establish a new programme which could compensate, under certain

conditions that obviously remain to be defined, those individuals who contracted Hepatitis C following blood transfusions received prior to January 1, 1986 or after July 1, 1990. Without in any way whatsoever presuming what decision could be rendered were this Claimant to refer her case to this Funding Program to be established, I at least drew the Claimant's attention to the future existence of another such Fund so that she could, in this regard, make decisions which she would consider to be appropriate.

At this time therefore, regarding the specific 1986–1990 period, I conclude that the Administrator's decision to reject this claim was well founded and I confirm such a decision. I therefore reject this Request for Review.

Montreal, September 29, 2006

Jacques Nols
Referee