

DECISION

1. This is an Ontario-based Claimant, Claim # 12055.
2. This case falls to be determined pursuant to the provisions of section 3.01 of the Plan text, attached.
3. The Claimant is unable to prove his claim pursuant to the provisions of Article 3.01(1), and the issue in this case is whether or not the Claimant has met the provisions of Section 3.01(2), which requires corroborating evidence, independent of the personal recollection of the claimant or any person who is a family member of the Claimant, to establish on a balance of probabilities that he received a blood transfusion during the Class Period.
4. There is a heavy burden on the Claimant to demonstrate that he fits within these provisions of Section 3.01(2), but it is not an insurmountable burden. Indeed, I have previously found that a claimant met this burden, as set out in the decision re Claimant #12311 dated March 13, 2006.
5. The issue in this case is whether, on the balance of probabilities, the Claimant has shown that it is more likely than not he received a blood transfusion on May 6, 1986, which led to his contracting Hepatitis C. In 2002, the Claimant was diagnosed by Dr. Ghent as having Grade 2 to Grade 3 (mild to moderate) liver inflammation, and also Stage 4 fibrosis and cirrhosis, which is in fact severe liver damage.
6. While at the time of the diagnosis Dr. Ghent believed that the cause of the Hepatitis C was the Claimant's cocaine use in the mid-1990s, he came to that opinion before he had the results of the biopsy which showed the severe Stage 4 cirrhosis. In fact, after seeing the biopsy results, he altered his opinion on the basis that the severity of the cirrhosis was inconsistent with the cause being cocaine use in the 1990s, since it typically takes very long periods of time for such cirrhosis to develop. For this reason, Dr. Ghent came to the view that the cirrhosis was much more consistent with a blood transfusion in 1986 as the cause of the Hepatitis C, barring any other known causes of the disease. According to Dr. Ghent, even the period of time between 1986 and the time of diagnosis in early 2002 was a relatively short time frame for that degree of cirrhosis to have taken place. This was notwithstanding the presence of other factors in the Claimant's medical history which could have accelerated the cirrhosis during the 1986-2002 time period. Indeed, the cirrhosis is so severe that Dr. Ghent's evidence would put a transfusion in 1986 at the outside of the window of opportunity as to when Hepatitis C would have been contracted. Despite this, had there been credible evidence that a transfusion had occurred in all of the circumstances, I would not have concluded that no transfusion occurred in 1986 based solely on Dr. Ghent's evidence regarding the timeline for contracting the disease.

7. Thus, on the medical evidence, it seems more likely than not that the Hepatitis C was caused by a blood transfusion rather than any other of the known factors. However, it must be shown that it is more likely than not that a blood transfusion occurred in 1986. The difficulty lies with the totality of the evidence concerning whether there was a blood transfusion or not in 1986.
8. The Claimant testified that he was in a car accident on May 6, 1986 in which his small car was, in the vernacular, "totalled" when it was struck head-on by another vehicle which had lost control. The Claimant says there were police reports completed and ambulance attendants at the scene, but he was not taken to hospital. In fact, he was permitted to go home and advises that he walked home, which was only several blocks away from the scene of the accident. However, the Claimant also claims that he received lacerations on his hands and face as a result of glass from the front windshield which struck him and from banging his head against the side window of his car.
9. The morning following the accident, the Claimant says that the towel which he used to wrap his hands the day before was soaked with blood (because of the lacerations). He testified that he called his friend, BJ, to ask him to take him to the hospital. Instead, BJ's girlfriend, RT, came and took the Claimant to the hospital.
10. The Claimant says that he was admitted into the emergency room where, after a period of time, he received a blood transfusion. He recalls seeing the blood hooked up, receiving the transfusion and feeling much better that day.
11. As a result of the lacerations, the Claimant claims in his evidence to have received stitches on his hands and face at the same time as the blood transfusion, and said that there must have been approximately 30 stitches.
12. Later that afternoon, on the recommendation of his girlfriend, he went to see Dr. R.G.M. Barel because of neck and back pain he was experiencing. He does not remember whether he told Dr. Barel that he had been seen in emergency that day and had received a blood transfusion or that he had received stitches at the hospital.
13. In 2002, when he was interviewed by Dr. Ghent, who was trying to determine the nature and source of his liver disease, the Claimant responded to Dr. Ghent's question in the negative as to whether or not he had ever received a blood transfusion. On the other hand, he admitted to cocaine use in the 1990s. His explanations for giving this answer were variously that at that point he did not think that it mattered, that he was shortly thereafter truthful with Dr. Ghent, that he was very ill at the time and "who knows where my head was at", and finally that he had no explanation as to why he said no in response to Dr. Ghent's question. He did not claim to have forgotten about the transfusion. Dr. Ghent's

evidence was that he did not learn until 2005, three years later, of the Claimant's assertion that he had received a blood transfusion in 1986.

14. RT testified. She had known the Claimant for 21 or 22 years through her common-law husband, BJ, who was friends with the Claimant. While they socialized a little bit, it was not much. If there was a close relationship between RT and the Claimant, it was not obvious from the evidence.
15. She testified that he was in a motor vehicle accident in May, 1986 and that he called either her or BJ on May 7, 1986 to ask that he be taken to hospital. She testified that she attended at his home and that he had cuts on his face and on his hands and that she saw blood on the towels he was using to wrap his hands. She said she took him to St. Joseph's Hospital in London and went into the emergency room with him. She says she stayed out in the waiting room, but "popped her head in" a couple of times into the area where he was being kept. She did not see a transfusion being administered, but says that he told her that he would be receiving a transfusion and she said she did then see staff bring a bag of blood into the room. She asked how long he was going to be there, and when she was told it would be a couple of hours, she said she was going to leave and go to the mall and that she would come back, which she did. She says she did not take him anywhere else that day and did not take him to see Dr. Barel, but it was implicit through her evidence that she did take him home (or somewhere equivalent) from the hospital as she was clear that was why she returned to the hospital.
16. While RT was cross-examined, it was not put to her that she had made up the story in order to help her friend. Nor was it demonstrated that there was a relationship between her and the Claimant such that she could be considered "a friend" who was, in counsel for the Administration's submission, giving her evidence to help out a friend.
17. There is no record whatsoever of the Claimant being admitted to hospital on that date or any other date. There are also no records of any transfusion on that date. In this regard it should be noted that a subpoena was issued for the production of all hospital records and none were produced because it was said that there was no record of a hospital visit, or a transfusion.
18. Two medical legal reports relating to the May 6, 1986 accident were found in the medical records of the Claimant's former physicians, and a letter from counsel for the Claimant to one of the physicians at that time in relation to the accident was also found. None of those documents refer to lacerations, a visit to the emergency department, or to a transfusion. They do, however, refer to a visit to Dr. Barel on May 7, 1986, and one refers to the claimant reporting that he saw Dr. Barel on the morning of May 7, 1986.

19. Assessing the totality of the evidence of the Claimant and RT, the evidence of the Claimant was difficult to credit. Counsel explained that there were a number of factors operating in this regard, including recent surgery within three weeks of testifying, other surgery and a stroke. Whatever the reason for the difficulties in the evidence of the Claimant, he did not have a particularly convincing or credible explanation as to why the injuries he claimed to have received in the motor vehicle accident were not treated in the hospital on the day of the accident or by the ambulance attendants, but only required treatment the next morning. He also did not have an understandable reason for not being forthright with Dr. Ghent in 2002, if he was not telling Dr. Ghent the truth with respect to the transfusion at the same time that he freely admitted to the cocaine use. It is difficult to ascribe this lack of credibility only to recent medical problems. The evidence of RT, on the other hand, while brief and somewhat vague in the details, nonetheless did not appear to be contrived.

20. In any event, I find that on the balance of probabilities, the Claimant was not able to show that it was more likely than not that he received a blood transfusion on May 7, 1986. My reasons for this are as follows:
 - (i) Records of transfusions and medical records generally are stored in different locations in hospitals, and it seems inherently unlikely that had the Claimant been admitted or seen at the hospital and received a transfusion, that there would be no medical records either of the hospital visit or of the transfusion.

 - (ii) In this case, the absence of any medical record of an admission or visit to hospital or his being seen at the hospital on May 7 or a blood transfusion is significant. While in other cases there may be an absence of records of a blood transfusion during a hospital stay, there is typically at least some threshold evidence met that the Claimant was in fact admitted or seen at an institution. Here that threshold is not met. While it is not impossible for the Claimant to overcome such an absence of records by clear and credible evidence, in this case the Claimant's story is undermined by the very improbability of his story. It seems inherently unlikely that the nature of the injuries which he claims were sustained, namely, lacerations which required extensive stitching on his hands and face, which were ultimately said to be so serious as to require a blood transfusion, nonetheless did not require treatment or taking him to the hospital on the day of the car accident. It seems inherently unlikely that the response of the police, and the ambulance attendants who also attended at the scene, would have been to allow him to walk home with lacerations that the next day required thirty stitches. It seems improbable that the Claimant would simply have gone home with no treatment and then put towels on his hands which wound up the next morning being soaked in blood, losing so much blood as to require a transfusion.

- (iii) Even if the circumstances themselves seem improbable, if there was some documentary evidence to support the fact that there was a hospital visit on May 7, 1986, it would be somewhat easier to accept the assertion that a blood transfusion occurred, but the inherent improbability of the story together with the absence of any documentary record makes it difficult for the Claimant to convince me on the balance of probabilities that a blood transfusion occurred.
- (iv) It is central to the Claimant's story that he received laceration injuries from a motor vehicle accident on May 6 and was not treated for them until May 7 and that the lacerations were serious enough to require both stitching and a blood transfusion. It is clear, however, from a medical legal report admitted into evidence that on the very same day as the transfusion was said to have occurred, May 7, 1986, the Claimant saw a Dr. Barel. The fact is that the Claimant evidently retained legal counsel with respect to his injuries shortly after the accident. By June 20, 1986, a scant six weeks after the accident, counsel had a medical legal report from Dr. Barel which records the fact of an accident on May 6, 1986 and a visit to Dr. Barel by the Claimant the very next day on May 7. In the medical legal report, the patient was said on May 7 to have moved slowly and taken time to straighten up, complained about pain in his neck and back which had started right at the accident and became more serious after an hour and had worsened since. It reports the symptoms were severe enough to warrant a prescription of Percocet tablets. Although we do not have the clinical notes of the visit on May 7, there is no mention whatsoever in the medical legal report of lacerations to the face or hands, or of stitching, no report of the patient being seen in emergency at St. Joseph's Hospital on the very date of the visit to Dr. Barel, and there is certainly not any reference to the patient having received a blood transfusion on the very same day that he saw Dr. Barel.
- (v) Thus, while it is central to the Claimant's assertion that a transfusion occurred on May 7, it seems inherently improbable to me that he would have been seen on the same day by Dr. Barel but that the medical legal report would contain no reference to anything which would substantiate or corroborate any injuries other than soft tissue injuries, or which would corroborate in some way a visit to the hospital emergency department, or a transfusion on that very same day.
- (vi) Unfortunately, the Claimant's legal file was no longer in existence, having been destroyed in accordance with the Law Society Rules. However, a letter dated May 8, 1987 from counsel for the Claimant to Dr. Barel, which was retrieved from the medical file, refers to the June 20th letter from Dr. Barel referred to above. The letter from counsel asks for Dr. Barel's opinion with respect to the Claimant having "recovered completely".

However, the letter does not ask for any further information to be put into the medical legal report with respect to any lacerations or other injuries besides soft tissue injuries to the neck and back. The letter from counsel also does not mention a blood transfusion nor a visit to the emergency department. One might suppose that the absence of any reference in a letter to Dr. Barrel to these injuries or to a transfusion could be explained by the fact that counsel would have had a record from a physician in the emergency department who saw the Claimant there. However, if counsel had such a report from the hospital, surely there would have been some hospital record of the visit or documents sent to counsel that would have been produced by the hospital. Again, as indicated above, no records were produced by the hospital because it said there were none.

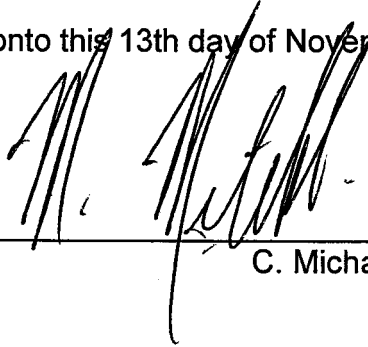
- (vii) It seems likely that had counsel for the Claimant at that time been aware of lacerations and a blood transfusion, counsel would have asked for Dr. Barel's report to include this information in his medical legal report because surely, even if the lacerations and the blood transfusion were irrelevant for purposes of compensation or for purposes of establishing pain and suffering, at a minimum it would be relevant to show the severity of the collision, which would have been a relevant issue to a claim for neck and soft tissue injuries. While I would agree that the absence of any reference in this letter from counsel to Dr. Barel of other injuries or a transfusion is hardly determinative and somewhat speculative, the absence of any reference in the medical legal report of Dr. Barel and the correspondence of counsel to Dr. Barel that supports the existence of lacerations or an emergency visit, or a transfusion, is at the very least odd, and calls into question the veracity of the assertion that a transfusion took place and that there were lacerations which required stitching.
- (viii) More telling is a further medical legal report dated September 10, 1986 from an orthopedic surgeon which records a medical exam of the Claimant on September 10, 1986 and a history taken by the physician at that time which records the accident, the car being totalled, stiffness in the neck and irritations in the back, going home, having a restless night, and "did call Dr. Barel, his family physician, in the morning and was examined by him on the 7th of May" [emphasis added]. According to this report, Dr. Barel found "that there was discomfort and pain in his neck and back and movements of his neck were done carefully and there was some rigidity in the shoulder area and also some discomfort in the lower back." This letter did not record any information with respect to lacerations to the hands or face or being seen in emergency at St. Joseph's, also on May 7, 1986, nor was there any reference in that report to heavy bleeding on the hands overnight, or to a blood transfusion, and instead of recording a visit to

emergency to receive a transfusion in the morning of May 7, the Claimant apparently reported a visit to Dr. Barel the morning of May 7.

- (ix) It is troubling that when the orthopedic surgeon saw the Claimant in September, 1986, the Claimant evidently referred to having been seen by Dr. Barel on the morning of May 7th, and referred to the events of the accident and the time frame without any reference whatsoever to being seen in emergency, or to lacerations, or to a blood transfusion.
 - (x) In the totality of the documentary evidence from that time which is available, the absence of any reference in any of the three documents that is corroborative of the Claimant's assertions, and which in fact calls those assertions into question, is troubling.
 - (xi) Finally, and most importantly, when in early 2002 the Claimant was asked by Dr. Ghent, who was trying to assess and diagnose the seriousness of the illness, whether he had ever had a blood transfusion, the Claimant said no. On the other hand, in response to the question from Dr. Ghent as to whether he had ever used drugs or cocaine, he admitted freely to cocaine use in the mid-1990s.
 - (xii) It seems to me to be inconsistent that the likelihood of a transfusion having taken place in 1986, that when Dr. Ghent asked the Claimant about this matter in 2002, that the Claimant would have lied. While in his evidence the Claimant said that he had later decided to be honest with the doctor, there was no reason to be dishonest with Dr. Ghent about a transfusion since it was not a matter either to be ashamed of or worried about because of some legal concern about the legality of having a blood transfusion. In this regard, the Claimant told Dr. Ghent the truth with respect to his cocaine use, and it is not obvious to me that the Claimant felt that there was some reason to lie or to obfuscate about a transfusion. The evidence from the Claimant's own mouth to his physician in 2002, therefore, seems most consistent with the Claimant's own understanding of the facts as of 2002, namely, that he had never had a transfusion.
21. The finding that the Claimant failed to establish, on a balance of probabilities, that it was more likely than not that the transfusion occurred leaves the question of the source of the Claimant's Hepatitis C unanswered. Dr. Ghent stated that, in his experience, this question cannot be answered in perhaps 5% of his cases. Decisions of arbitrators and referees have noted that the medical literature refers to a much more significant percentage of cases, up to 20%, are left unexplained. Thus, the inability in this case to conclude that the Claimant's Hepatitis C was caused by cocaine use or as a result of some other cause, does not lead to the inexorable conclusion that a blood transfusion must have occurred, particularly in light of the evidence available regarding the alleged transfusion.

22. Having regard to all the circumstances set out above, the Claim is dismissed.

DATED at Toronto this 13th day of November, 2007

A handwritten signature in black ink, appearing to read 'C. Michael Mitchell', is written over a horizontal line.

C. Michael Mitchell
Referee

1.06 Residence

A Class Member is deemed to be resident in the Province or Territory where he or she ordinarily resides or, if the Class Member resides outside of Canada, in the Province or Territory where the relevant Primarily-Infected Person or Opted-Out Primarily-Infected Person first received a Blood transfusion during the Class Period. A HCV Personal Representative will be deemed to be resident in the Province or Territory where the relevant HCV Infected Person is, or was deemed to be, resident.

1.07 Currency

All references to currency herein are to lawful money of Canada.

1.08 Appendices

The following are the Appendices to this Plan:

- Appendix A - Social Benefits Legislation;
- Appendix B - Release;
- Appendix C - Reference Rules; and
- Appendix D - Arbitration Rules.

ARTICLE TWO PURPOSE AND EFFECT OF PLAN

2.01 Purpose

The purpose of this Plan is to provide compensation to Class Members on the terms and subject to the conditions set out herein.

2.02 Binding Effect

This Plan is binding on all Class Members.

ARTICLE THREE REQUIRED PROOF FOR COMPENSATION

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;
- (b) an HCV Antibody Test report, PCR Test report or similar test report pertaining to the claimant;
- (c) a statutory declaration of the claimant including a declaration (i) that he or she has never used non-prescription intravenous drugs, (ii) to the best of his or her knowledge, information and belief, that he or she was not infected with Hepatitis Non-A Non-B or HCV prior to 1 January 1986, (iii) as to where the claimant first received a Blood transfusion in Canada during the Class Period, and (iv) as to the place of residence of the claimant, both when he or she first received a Blood transfusion in Canada during the Class Period and at the time of delivery of the application hereunder.

(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.

(3) Notwithstanding the provisions of Section 3.01(1)(c), if a claimant cannot comply with the provisions of Section 3.01(1)(c) because the claimant used non-prescription intravenous drugs, then he or she must deliver to the Administrator other evidence establishing on a balance of probabilities that he or she was infected for the first time with HCV by a Blood transfusion in Canada during the Class Period.

3.02 Claim by Secondarily-Infected Person

(1) A person claiming to be a Secondarily-Infected Person must deliver to the Administrator an application form prescribed by the Administrator together with:

- (a) evidence demonstrating on the balance of probabilities that the claimant was infected with HCV for the first time by a Spouse who is a Primarily-Infected Person or an Opted-Out Primarily-Infected Person or by a Parent who is an HCV-Infected Person or an Opted-Out HCV Infected Person including a statutory declaration of the claimant declaring that (i) he or she never used non-prescription intravenous drugs and (ii) to the best of his or her knowledge, information and belief, he or she was not infected with Hepatitis Non-A Non-B or HCV prior to 1 January 1986;
- (b) an HCV Antibody Test report, a PCR Test report or similar test report pertaining to the claimant; and