REFEREE'S DECISION
HEPATITIS C CLASS ACTION
JANUARY 1, 1986 – JULY 1, 1990

Claimant:	Claimant #1300017
File No.:	416611 – 25
Province of Infection:	British Columbia
Province of Residence:	Alberta
Date:	January 19, 2007

Decision

1. On January 23, 2006, the Administrator denied the claim for compensation as a Primarily-Infected Person pursuant to the Transfused HCV Plan on the basis that the Claimant had not provided sufficient evidence that he was infected for the first time with HCV by a blood transfusion received in Canada within the Class Period.

2. The Claimant requested an oral hearing by a Referee to review the decision of the Administrator.

3. An initial hearing was held on May 10, 2006 in Edmonton but was adjourned to obtain further details from medical experts whose opinions differed as to the cause of the infection.

4. Neither party disputed the following facts:

   (a) The Claimant suffers from Hepatitis C and has been diagnosed at disease Level 1;

   (b) After a motor vehicle accident on June 25th, 1987 in British Columbia, he underwent surgery for his injuries and received six units of packed red blood cells at the Vancouver General Hospital;

   (c) The Claimant currently resides in Edmonton, Alberta;

   (d) The Tran 2 completed by his physician, Dr. Glen Burchett, indicated that he had treated the Claimant for two and half years and that the Claimant had a history of non-prescription intravenous drug use;

   (e) On the Tran 3, the Claimant admitted that he had used non-prescription intravenous drugs;

   (f) Canadian Blood Services conducted a trace back of the transfused blood and reported on March 20, 2002 that the donors of the 5 units had been found to be non-reactive but the results of the remaining unit could not be determined because the donor was deceased.

5. The Claimant testified that he was born in 1957 in British Columbia.

6. His father suffered from alcoholism.

7. He testified that while he was accomplished in academic and extra-curricular activities in high school, he left home at age seventeen to pursue a musical career.

8. From his testimony, I concluded that he was highly talented and succeeded in the entertainment business.

9. However, from the way he recounted his experiences and adventures, it also appeared to me that he enjoyed both the benefits and burdens of band musicians who traveled extensively on the road in the decades between 1970 and 1990.

10. As an example, he candidly described his life in an interval when he resided and performed for about two years in Las Vegas. He had no lack of female companionship and did not deprive himself of many opportunities for casual sexual activity.

11. In addition, over this career, he had easy access to, and availed himself frequently of opportunities to experiment with, recreational drugs including marijuana, morphine, heroin, and Dilaudid. He also tried LSD on one occasion.

12. He confessed that he was probably psychologically addicted to drugs at that time.

13. In the same period, he overused alcohol increasingly in those years and on one occasion he was hospitalized due to alcohol overdose.

14. He recalled that he broke his ankle in 1984 but did not require painkillers because he had consumed so much alcohol he did not feel the pain.

15. He was unable to remember all the dates or places when and where he had toured and performed but venues included Canada, the United States, South Africa, Amsterdam, Indonesia and Singapore. He also performed on cruise ships.

16. During the course of this career, he developed a dependency upon pain killing medications and alcohol. As a result of his addictions, he could not remember all the risky activities he engaged in or over what time periods. As an example, he could not remember the totality of female sexual partners he may have had over those years of his career.

17. He candidly admitted that he was unable to recall the details of his life in the years between 1984 and 1986 due to excessive consumption of alcohol.

18. He admitted that he had been incarcerated on one occasion for being drunk and disorderly

19. He was traveling back from an engagement on the night of the motor vehicle accident that gave rise to the transfusions in question, but due severe injuries including a broken hip, broken or crushed ankle and head injury, he had no recollection of the circumstances leading up to the accident

20. He claimed there was no substance abuse as a contributing factor to this accident.

21. The Claimant did not remember being transfused and had no memory of the hospitalization for the first week. The hospital records and nurses' notes reveal he had significant difficulties psychologically during his hospitalization.

22. He also recalled recuperating at his parent's home proceeding through wheelchairs and crutches until he was able to get back on his feet.

23. He stated that he began to experience low energy and malaise a few months after this hospitalization.

24. He recalled that his mother was very concerned about the possibility of his acquiring deadly viruses due to transfusions since Vancouver at that time was reportedly rife with viruses.

25. He was treated at that time by a Doctor O'Brien Bell and made a claim for accident benefits from his motor vehicle insurer. The claim was ultimately settled in the spring of 1991 for benefits that continued from 1987 and 1992.

26. He did remember attending a detoxification center in 1988 in Vancouver and attending a treatment center thereafter.

27. Subsequent to his accident, the Claimant acquired an engagement on a cruise ship.

25. The Claimant admitted in 1991 being in the company of people who injected drugs and due to the type of interactions during that interval, candidly admitted to the remote possibility of infection through such activity.

28. Dr. O'Brien Bell has since retired. The Claimant testified that either his records were not well-kept or not well-maintained and the Claimant was unable to locate any of them when he made his inquiries in 1995.

29. The Claimant married his wife on July 19th of 1991.

30. Under close questioning by me, he testified that he never injected heroin and did not use a needle when he experimented with drugs in his teenage years.

31. He insisted he did not begin to inject drugs until about 1992 or 1993. Later in his evidence, he testified the drug injection period extended between 1993 and 1994.

32. He testified that he was paranoid about becoming infected and claimed that when he began his own practice of intravenous drug injections, he was very hygienic, very secretive, always injected alone and used clean syringes he would acquire from the drug store.

33. He testified that he had successfully battled his alcohol and drug addictions and at the time of the hearing, presented convincingly as a person who was fully recovered from his previous addictions.

34. He and his wife report that they have had a strong union together and he now has achieved much stability since becoming sober.

35. He noted that he had been in a monogamous relationship since 1991, he had since a secured a responsible position in the construction industry, owned of a residential property and put aside sizeable savings.

36. These achievements were the result of his successful battle with his former addictions.

37. He contended that he acquired the Hepatitis C infection from the deceased donor who may have been infected at the time of the donation.

38. His spouse also testified at the hearing that since her nearly sixteen years of marriage to the Claimant she had lived through some of the Claimant's periods of alcohol and drug abuse.

39. She denied she ever used needles herself.

40. She testified that he would not socialize with and did not like to be in the presence of other people when he was intoxicated by drugs.

41. She said that he would stop by a drug store to ensure he had clean needles.

42. She said his intravenous drug use started in about 1992. On the one hand, she said that he would try to hide his drug use even from her but, on the other hand, she recalled seeing him inject drugs in their kitchen while she washed dishes.

43. The Claimant testified that he ceased the use of alcohol and drugs on January 20 of 1997.

44. The chart notes of Dr. Burchett dated April 27, 1998 indicated that the Claimant was attending, at the urging of his wife, who was concerned about the possibility of infection from a blood transfusion in 1987. The doctor's note reads as follows:

> "Of note does have a past history of IV drug use as well, although only did it when he was significantly inebriated. Thinks he used clean needles but he is not sure of the sterility of the entire operation. Had been clean for two to three years for IV drug use and 15 months of alcohol."

45. One of the doctors' notes indicated the Claimant had reported IV drug use between 15 and 50 occasions.

46. The Claimant disputed that he had injected intravenous drugs on as many as 50 occasions but admitted at the hearing that he could not now remember how many occasions he had engaged in intravenous drug use.

47. He admitted that he never discussed with any health professional the features and risks of intravenous drug use between the years of 1992 to 1997.

48. The Claimant relied on an opinion from Dr. Mark Joffe, a consultant whose opinion as to the cause of the infection was included in Dr. Burchett's chart.

49. The notes from Dr. Joffe dated March 18th of 1989, state as follows:

> "Currently he feels completely well with normal energy level. He performs vigorous physical activity three times per week. He had no abdominal pain and no symptoms suggested of extra-Hepatic manifestations of Hepatitis C. Following his MVA, he developed addictions to prescriptions medications including Talwin, Percodan and Tylenol 3. Over a two year period between 1993 and 1994, he used injection drugs three times per week. This consisted of Dilaudid and Morphine. He is adamant that he used clean needles and never injected in the presence of other injection drug users.

50. Dr. Joffe's notes went on to include specific advice to the Claimant never to share items that may be contaminated with blood such as razors or toothbrushes and discussed the issue of sexual transmission of Hepatitis C.

51. The Administrator asked for the opinion of Dr. Gary Garber, a professor and head of the Division of Infectious Diseases at the University of Ottawa and the Ottawa Hospital. I accept that Dr. Garber qualifies as "medical specialist experienced in treating and diagnosing HCV".

52. The Hepatitis C Claims Center wrote to Dr. Garber on October 11, 2005 detailing factors observed in the materials on behalf of the Claimant. Of note is the fact that the Claimant in Affidavits signed July 4 and September 2 of 2004 deposed that he used non-prescription drugs starting in 1994 and continuing sporadically until 1997.

53. In the Claimant's wife's Affidavit dated September 3, 2004, she stated that he used 25 to 50 times in that time period.

54. The Claimant's medical history reported to Dr. Garber included the facts that

    (i) on June 28, 1987, the Claimant was seen by a psychiatrist who noted the Claimant denied the use of street drugs but was a heavy user in the past but stated he had been relatively dry for eight months.

    (ii) The family doctor noted in his chart on April 27th of 1998 that the Claimant reported a past history of intravenous drug abuse and he thought he used clean needles but was unsure of the sterility.

    (iii) He reported that he had been clean of intravenous drugs for two to three years. (between 1995 to 1998).

(iv) The family doctor noted the ALT readings were mildly elevated in April of 2004.

55. Fund Counsel submitted a medical opinion from Dr. Garber who opined that the most likely cause of the infection was the intravenous drug use.

56. Dr. Garber's report dated October 27, 2005 indicated he had reviewed the Claimant's chart and noted that

(a) The Claimant reported he had been attending Alcoholics Anonymous for a period of one year prior to the motor vehicle accident giving rise to the transfusion.

(b) The Claimant had been forthright about his use of intravenous drugs but conceded he would not verify the sterility of all the equipment he may have used.

(c) the Claimant's wife reported he had used unwrapped syringes.

57. Dr. Garber underlined the fact that there was no evidence that the Claimant had received an infected unit of blood.

58. Dr. Garber opined that the risk of acquiring infection for a single unit of blood was quite small but the injection of drugs over a prolonged period of time even with the use of sterile needles could still give rise to the transmission of disease.

59. Dr. Garber desired confirmation as to whether the Claimant was Hepatitis C Viral RNA positive and under that assumption, he concluded that the multiple exposures to injection drug use would be the more likely source of infection compared to a single, untraced unit of blood.

60. He even suggested a repeat liver biopsy to give an indication of the progression of the disease.

61. In his testimony, the Claimant stated that he was unprepared to endure the risks of a liver biopsy for the small informative benefit it would provide.

62. On January 4, 2006 Dr. Garber received additional laboratory reports that the Hepatitis C Virus PCR RNA results were positive.

63. Dr. Garber concluded from this result that the Claimant had on-going infections with Hepatitis C but likely had not been previously infected with Hepatitis B. He said, however, the latter result had not helped to differentiate the likely cause of exposure.

64. Dr. Garber concluded that as far as 1999 the Claimant had minimal damage to his liver that made it far more likely he was exposed during a prolonged period of injection drug use compared to a single unit of blood.

65. I asked Dr. Garber a series of questions through e-mail that requested he reconsider his conclusion based on other assumptions. He responded to me that under my proposed assumptions, his opinion would remain unchanged.

66. He advised that there was considerable data now ascribing transmission of Hepatitis C infection through the water used to dissolve the injectable drug from the straw used in snorting and from presumed traces of blood on paraphernalia associated with IV drug use. He stated

> "it takes only one 'breach' in sterility to confer an infection and the more times one injects, the greater the risk."

He went on to say that the more an individual has used injectable drugs, the higher the likelihood that breaches have occurred and the greater likelihood that he would not recall that event. He also noted that the literature indicates that it usually takes 15 years to observe significant damage to the liver related to Hepatitis and the liver damage could occur in a heavy drinker. He agreed that as 15 percent of infected persons do not progress to liver damage, many can be infected considerably longer with no obvious clinical or pathological changes.

67. I also asked Dr. Joffe a series of questions through email that similarly requested he reconsider his conclusion based on other assumptions I posed.

68. I received a report from Dr. Joffe dated October 10th of 2006 which indicated that his letter of March 3, 1999 to Dr. Burchett was providing an assessment of the Hepatitis C and the extent of the liver disease for consideration of therapy and was not intended as an opinion to identify the duration of, or cause of, the infection. Dr. Joffe indicated he could provide no further insight into the source of the Claimant's Hepatitis C.

69. In his final report of December 8th, 2006, Dr. Joffe stated that the cause of the infection "remains unanswerable." He stated that the Claimant provided a history of injection drug use in seclusion (i.e. alone) and in the absence of other users of injection drugs. Dr. Joffe stated that while this is infrequent in his experience, he has certainly met other injection drugs users who relayed identical histories. He said they are frequently high functioning individuals who are able to carry on relatively normal lives though recreationally injecting drugs secretly and alone.

70. He said there was no indication that the Claimant had potential for secondary gain at the time this information was collected and he did not know if the Claimant was aware of the potential for compensation.

71. Dr. Joffe noted that the risk of acquiring Hepatitis C from blood in Toronto between 1984 and 1988 was 1.5% to 3%. He did not know whether the risk from blood transfusion in Vancouver was higher, lower or the same in 1987.

72. Dr. Joffe agreed with Dr. Garber's conclusions based on the statistical probability that injection drug use is a more likely source of infection than blood transfusion.

However, Dr. Joffe noted that this Claimant said he never used injection drugs in the presence of others and he never shared injection drug paraphernalia. He also considered it would raise suspicions if the Claimant had relayed a different history to another individual.

73. Dr. Joffe noted that the one further piece of information that could help resolve the issue was a look back involving other recipients of the untested donor which could clarify whether other recipients from this donor acquired Hepatitis C or not.

74. Fund Counsel did in April of 2006 inquire of Canadian Blood Services whether the deceased donor was suspect in any other trace backs regarding any Claimant with Hepatitis C. He was advised that in fact the deceased donor was in one other trace back case for a different recipient. In that instance there were 43 products transfused, 20 of which were cleared. In the case of 12, the donors could not be located. In the case of a further 7, there were no CBS records for 1979. In the case of two, the donors did not provide any test results or specimen for testing and in the case of the final two, both donors were deceased including the deceased donor involved in the instant case.

72. Fund counsel also submitted previous decisions for my consideration. I noted with interest the reasons for decision of C. Michael Mitchell in the case of Claimant #9836. Referee Mitchell there discounted some of Dr. Garber's conclusions considered them to be highly relevant in respect of his analysis of the actual medical history and medical file of that particular claimant.

(a) At paragraph 27 he noted that Dr. Garber's evidence was that the IV drug use by the Claimant over those years was much more than occasional and the Claimant had a difficult and troubled period as a young person struggling with serious problems with life wherein a **slavish** adherence to only the very safest methods of IV drug use was not obvious apart from the self-serving retrospective statements of the Claimant at this time.

(b) Dr. Garber also gave evidence as to the inferences to be drawn from the tests performed on the claimant's liver over the years. He found that the levels of the claimant's liver were only elevated on one occasion.

(c) Referee Mitchell then concluded that the claimant had not been able to overcome the conclusion reached by Dr. Garber that the symptoms which she demonstrated in terms of her liver function were more consistent with an exposure of Hepatitis C during the period when she was using intravenous drugs than they were with an exposure in 1987 which was the occasion of the transfusion which could not be traced back.

(d) In the result, Referee Mitchell upheld the Administrator's decision.

73. A decision of Referee Daniel Shapiro on March 21, 2006 also concerned a claimant who had admitted non-prescription intravenous drug use and who may

have received two additional units of blood not documented in the records and which therefore could not be the subject of trace back.

(e) In that case, Referee Shapiro examined the medical history of the claimant, examined the medical opinion and noted the conduct of the Administrator in considering factors such as timing back on the disease progression of medical evidence and the like.

(f) Referee Shapiro noted on page 12 of his reasons that because the diagnosis of HCV was only made in 2003, the only certainty was that the claimant was infected at some point before 2003 which therefore reduced the issue to a consideration of possibilities and probabilities.

(g) Referee Shapiro noted that among the risk factors considered would include the fact that the claimant engaged in unprotected sexual activities although it was not known whether such activity was specifically with Hepatitis C carriers.

(h) Referee Shapiro also noted there was no testimony from the claimant to explain the discrepancies in his report of drug use. While he claimed to have only used sterile needles and denied sharing needles, Referee Shapiro felt his reliability as a historian in that regard was very much open to question.

(i) In the result, Referee Shapiro concluded that the facts before him raised only possibilities and did not rise to the level of probabilities required by the plan and the CAP.

74. I also noted the decision of Referee Orchard on January 25, 2006 in the case of Claim #57141. He noted that Mr. Justice Pitfield in HCV Settlement Claim #11910, reported at 2004 BCSC 1421, and adverted to the standard of review of Winkler J. in confirming Referee Decision #2, November 27, 2001, at paragraph 6 as follows:

> "The review in Court 'ought not to intervene unless there has been some error in principle, some absence or excess of jurisdiction, or some patent misapprehension of the evidence.'"

(a) Referee Orchard also considered the principles of the standard of review of administrative decisions set out by the Supreme Court of Canada that required a "pragmatic and functional approach" to the standard of review.

(b) Referee Orchard noted a broad right of appeal to an arbitrator or referee, a degree of expertise of the IDU committee, the purpose of the settlement agreement, the plan and the CAP and a question of mixed law and fact.

(c) He concluded the standard of review of the Administrator's decision to deny the claim is the standard of correctness. In that decision, the evidence was that the deceased had informed the Claimant that he had always used sterile drug paraphernalia and did not share needles.

(d) The Claimant stated that she knew her father had a history of non-prescription IV drug use but did not know when he commenced his use. The deceased in that case was found by the Coroner to have died of cocaine, heroin and alcohol poisoning. The Coroner noted that the Claimant had relayed to him that the deceased became addicted to drugs when was 20 years old.

(e) In that case however, the deceased sustained a heart infection in June of 1999 related to using unclean needles. In that case, the Referee found inconsistencies in the evidence about the deceased's IV drug use that affected the totality of the evidence.

(f) In that case, the Referee was satisfied that the Administrator followed the plan and the Cap and that the Administrator's decision had not been shown to be incorrect in any way.

75. Having these decisions in mind, I now turn to the case at hand.

76. The Hepatitis C Class Action provides that when a Claimant has used non-prescription intravenous drugs, he must provide "other evidence establishing on a balance of probability that he or she was infected for the first time with HCV by a blood transfusion in Canada during the Class Period."

77. A Court Approved Protocol ("CAP") was approved which provides that the Administrator must be satisfied on a balance of probabilities that the HCV person was first infected with HCV by a blood transfusion received in Canada in the Class Period. The burden of proof is on the Claimant. The CAP requires that the Administrator conduct a trace back, which was done. When the trace back is either negative or inconclusive, the Administrator is instructed under Section 7 of the CAP to perform additional investigation a prescribed under Section 8 of the CAP.

78. Section 8 of the CAP requires that the Administrator:

> "Obtain the opinion of a medical specialist experienced in treating and diagnosing HCV as to whether the HCV injection and the disease history of the HCV infected person is more consistent with infection at the time of the receipt of blood, the Class Period blood transfusions or the secondary infection or with infection at the time of a non-prescription non-intravenous drug use as indicated by the totality of the medical evidence.

79. It is my obligation as adjudicator to weigh the totality of the evidence obtained from additional investigations and determine whether or not on the balance of probabilities the infected person meets the eligibility criteria. In doing so, I must also take into account the opinion of medical specialists as to whether the infection and the disease history of the HCV infected person is more consistent with an infection at the time of the receipt of the blood or with an infection at the time of the non-prescription intravenous drug use as indicated by the totality of the medical evidence.

80. I note that Dr. Garber was specifically requested to opine on the issue of causation. Dr. Garber was of the view that it was more probable that the infection resulted from intravenous drug use, and after review of Dr. Joffe's conclusions, who had the benefit of personal contact with the Claimant, Dr. Garber's conclusions were nevertheless unchanged.

81. On the other hand, the initial report of Dr. Joffe was not specifically prepared address the issue of causation. When Dr. Joffe was specifically requested to opine on this issue at my request, he noted that his opinion, which was that it likely resulted from the transfusion, depended on a determination of the credibility of the Claimant viewed retrospectively and not at the time he initially saw the Claimant.

82. In particular, Dr. Joffe's was based on one interview conducted more than seven years ago for the purpose of collecting information to conduct a clinical assessment and formulate a management plan not at the time to determine the potential routes of transmission of the virus or weigh the evidence in favour of one or other cause of the infection.

83. I viewed the opinions of both Dr. Garber and Dr. Joffe to be worthy of consideration. In the case of Dr. Joffe's opinion I noted that it was dependant on a finding of credibility of the Claimant.

84. While I have considered the above mentioned decisions in the 1886-1990 Class Action Settlement and have referenced the aspects that I thought were worthy of mention, ultimately I found those other decisions of no assistance in reaching my decision because the facts in all of those cases are markedly different than the case before me.

85. While I have also considered the conflicting medical opinions, I noted that ach depended upon a determination of the credibility of the Claimant and I therefore took some pains to question in detail the Claimant's substance use and abuse as well as the potential of other risk factors that may have been implicated in his contracting of the Hepatitis C virus.

86. As mentioned earlier, I judged the Claimant was as candid as he could be about his high risk activities from age 17 until 1997. His life style as a successful and popular musician typically involved late night entertainment with friends and

strangers. He traveled frequently nationally and internationally and was very socially and sexually active throughout his entertainment career.

87. In addition, he admitted seriously abusing alcohol such that he was unable to remember considerable time periods in his life, particularly before the accident leading the blood transfusion. In these periods of time, he also abused drugs.

88. At about the time of the subject accident, he had begun attempts to battle his addiction to alcohol. Not atypically, his battle involved periodic triumphs and setbacks and for some time after the accident, he chose to treat his continuing emotional difficulties with intravenous drugs.

89. Since 1997 to the date of the hearing, according to his testimony, which I accept, he has successfully achieved sobriety both in terms of alcohol and substance abuse. Part of his rehabilitation, according to his testimony, was the necessity of consistently telling the truth in all matters.

90. With this background, the Claimant asserted at the hearing that his IV drug use occurred within a two year period and that he must have become infected before that interval of time.

91. When questioned about the apparent inconsistencies between the statements given to his health professionals and the evidence he gave at the hearing, the Claimant prevailed upon me to accept the evidence he gave at the hearing as the most thorough and accurate account of his IV drug use.

92. Having regard to all the information before me including the Claimant's oral testimony and the medical records, it would appear that the IV drug use that he recalls occurred either between 1992 and 1993 or between 1993 and 1994 or between 1994 or 1997.

93. However, the Claimant freely admits to a high risk lifestyle leading to drug and alcohol additions that left him without memory of all his activities for long periods of time during a number of years before the transfusions.

94. While I am satisfied that the Claimant experienced a number of epiphanies after the accident leading to the transfusion which caused him to take greater care for his health, it is also evident to me from his testimony that he did not avail himself of the most up to date medical information about the risks he was continuing to run even in the years after the transfusions.

95. Most tellingly, he candidly admitted to the possibility that he may have become infected from others in his social circle who were engaging in IV drug use.

96. I conclude that while the Claimant has a *bona fide* belief that the infection must have derived from the transfusion, this belief must be balanced by his own admitted inability to account for all the other high risk sources for his infection.

97. In that regard, his evidence did not satisfy me that the virus may not have been transmitted from a sexual partner in one of the many venues to which he traveled, or during an injection by a social contact during one of his alcoholic experiences for which he has no memory or whether the virus could have been contracted through even one careless injection of drugs on his own.

99. I am satisfied that the Administrator performed all of its obligations under the plans. The Administrator weighed the totality of the evidence and decided on the balance of probabilities that the HCV-infected person did not meet the eligibility criteria.

100. In the result, I must conclude that the Claimant has not satisfied the burden of proof upon him to provide evidence that it is more probable that his infection resulted from the transfusion than from another cause.

101. In the result, I uphold the decision of the Administrator.

Dated January19 2007.

Shelley L. Miller, Q.C. Referee

EDMDOCS|SHMILLER|1357238-1