

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *HCV Settlement Agreement Claim No. 1300143*,
2004 BCSC 697

Date: 2004525
Docket: C965349
Registry: Vancouver

IN THE MATTER OF THE HCV 1986-1990 TRANSFUSED SETTLEMENT AGREEMENT RE: CLAIM NO. 1300143

Before: The Honourable Mr. Justice Pitfield

Reasons for Judgment

Counsel for the Claimant:

Self-Represented

Counsel for the British Columbia Fund:

William A. Ferguson

Submissions Received from Fund Counsel:

July 11, 2003

Submissions Received from Claimant

None
Vancouver, B.C.

[1] The Claimant is the executor of the estate of his deceased spouse who died October 5, 1999. She had suffered from Hepatitis C. The Claimant submitted a claim on behalf of the estate under the 1986-1990 Transfused HCV Settlement Agreement in his capacity as personal representative of a primarily-infected person. The Administrator rejected the claim because the traceback procedure indicated that a donor of blood with which the deceased had been transfused before the commencement of the class period which extended from January 1, 1986 to July 1, 1990, had tested positive for the HCV antibody so that infection could not be attributed solely to a transfusion within the class period.

[2] The Claimant appealed to a Referee who upheld the Administrator's decision. As permitted by the provisions of the Transfused HCV Plan, the Claimant applied to oppose confirmation of the Referee's decision.

[3] The delay in providing this decision in response to the Claimant's application results from the fact that the documentation pertaining to the application was inadvertently misplaced in the court. The oversight was not discovered until May 2004 in response to an inquiry from Fund Counsel.

[4] The material facts for purposes of this application are the following. The deceased was transfused with ten units of blood in January 1982, and one unit of blood in March 1982 at a British Columbia hospital. One of the donors of the blood transfused in 1982 tested positive for the HCV antibody on December 4, 2000.

[5] The deceased was transfused with four units of blood in January 1985 and six units of blood in March 1988 at another British Columbia hospital. One of the donors of the blood transfused in 1988 and therefore within the class period tested positive for the HCV antibody.

[6] The complication in this case arises because of the identification of a HCV antibody positive donor before and during the class period.

[7] The Administrator justified the rejection of the claim by reference to Article 3.04(1) of the Transfused HCV Plan. That Article compels rejection if the traceback procedure endorsed by the court as part of the settlement process identifies a HCV antibody positive pre-class period donor.

[8] The Claimant relies on Article 3.04(2) of the Plan which permits a primarily-infected person to prove infection, for the first time, by a transfusion in the class period notwithstanding the result of the traceback procedure that identified a pre-class period donor as HCV antibody positive. The Claimant is concerned about the fact that the status of a blood donor in 1982 is being determined by reference to a test of that donor conducted some eighteen years later. The concern is understandable. Simply stated, it is impossible to know whether the 1982 donor who tested positive in 2000 was, in fact, HCV antibody positive in 1982, or became so at a later date. The blood of the donor in question was transfused as whole blood. No components of the blood were supplied to others. The lookback process cannot be used to track the history of other recipients of that donor's blood or blood products. Because of the mandatory requirement in Article 3.04(1) and the inability to prove an exception under Article 3.04(2), the Transfused HCV Plan may inappropriately operate to the Claimant's detriment.

[9] The settlement concluded with the defendants was designed and intended to operate for the benefit of persons infected in the class period for the first time. It was not intended to compensate those infected outside the class period. The settlement resulted from extensive

negotiations on behalf of the parties to the litigation. Those who were infected by the Hepatitis C virus were ably represented by counsel in that process. The parties settled upon the criteria by which claims were to be established. The court has no discretion to depart from the Settlement Agreement even in circumstances where the result flowing from the application of its terms may appear to be inequitable. The court is governed by the terms of the Settlement Agreement as is every member of the Class and every party to the Agreement.

[10] There is nothing to indicate that the traceback procedure followed by Canadian Blood Services in this case was improperly pursued. The 1982 donor was tested in the year 2000 and found to be positive in the manner contemplated by the traceback procedure protocol approved by the court in conjunction with the Settlement Agreement. The assumption that a person currently HCV antibody positive would be regarded as HCV antibody positive at the time of donating blood was agreed to by the parties at the time the Transfused HCV Plan was settled. The assumption may work to the detriment of some, as in this case, just as it may work to the advantage of others should they have received a transfusion of blood donated in the class period by an individual who was not infected at the time of donation but who became infected after the close of the period and before traceback.

[11] While the Referee concluded that Article 3.04(2) might have application in the circumstances, it is my opinion that it cannot. The exception in Article 3.04(2) is directed at permitting a Claimant to prove infection by means of a blood transfusion notwithstanding negative traceback results. It cannot be construed to provide an exception to the mandatory denial of a claim in the event of a positive traceback in respect of a pre-class period donor.

[12] The Claimant's application to oppose confirmation of the Referee's decision must be dismissed.

"Mr. Justice Pitfield"