

THE 1986-1990 HEPATITIS C CLASS ACTION SETTLEMENT

IN THE MATTER OF AN APPEAL FROM THE DECISION OF THE ADMINISTRATOR
DATED FEBRUARY 3, 2003

DATE OF HEARING: May 12, 2004, February 14, 2005
Conference Calls January 20, 2005, February 27, 2004

IN ATTENDANCE:

CLAIMANT: #1382
Family of Claimant

FOR THE ADMINISTRATOR: John Callaghan
Carol Miller

REFEREE: C. Michael Mitchell

DECISION

1. This is an Ontario-based Claimant, claim #1382.
2. The Claimant applied for compensation as a primarily infected person pursuant to the transfused HCV Plan.
3. The Administrator denied the Claim on the basis that there was no evidence of a transfusion during the Class Period.
4. The Claimant requested that the Administrator's denial of the claim be reviewed by a Referee.
5. Oral hearings took place on May 12, 2004 and February 14, 2005. Subsequent to the second day of hearing, additional material was obtained by the parties and submitted to the Referee. No further arguments were filed with the Referee but emails from the Claimant's family were subsequently received and the parties have asked that a decision now be rendered.
6. On July 26, 1986, the Claimant underwent a long labour at the Ottawa General Hospital. She recalls being awoken by a nurse after she had the baby on the morning of July 27th, and seeing the nurse putting up a pack of blood. The nurse said that the Claimant's platelets were low and that she needed a transfusion. The nurse advised her that her iron was low and they were giving her a "pick-up" to bring her iron levels up. The Claimant says she was in the recovery room or case room, and no one else was there. On her return home, the Claimant starting getting dizzy spells and became severely ill, and she was subsequently advised that she had suffered a stroke. The Claimant had previously been very healthy. While she was hospitalized for approximately a week after the stroke, and was followed up by a neurosurgeon, no one could determine the cause of the stroke. The Claimant's health deteriorated significantly for a prolonged period of time, but the Claimant did not discover until the year 2000 that she had Hepatitis C. When the Claimant was diagnosed with Hepatitis C, from her stand point, all of her previous lengthy illnesses began to make sense since no one had previously been able to diagnose a possible source of her medical difficulties.
7. The Claimant recalled discussing the transfusion with another patient who had given birth at the same hospital, and the Claimant made strenuous efforts to find this individual. She also made significant personal efforts to discover any history or hospital records regarding a blood transfusion or any history of hospital records being destroyed. Ultimately, the Claimant developed the view that it was not intended or necessary for her to get a transfusion, and she was in fact transfused in error.
8. At the time of the hearing, the Claimant was working full time, but suffers from a variety of medical problems for which she is required to take medications which

have difficult side effects, and for many years she was only able to work irregularly. The Claimant noted she is often very ill and fatigued, and has lost the enjoyment of life as she knew it. Moreover, she has encountered severe depression and she is often in constant pain without any real quality of life. At various points, the Claimant has been extremely ill, with difficulty walking and coping with any daily activities.

9. On cross-examination, the Claimant testified in considerable detail as to the circumstances in which she was transfused, including that the blood was given to her in her left arm, in a clear plastic bag which was more square than rectangle, and that she concurrently had an IV in. The Claimant also described the appearance of the nurse, but could not recall her name (which is hardly unusual given the length of time that has passed and because there was no particular reason for the Claimant to recall it).
10. The Claimant's mother testified that she visited her daughter in the hospital and that she spoke to a nurse regarding the transfusion. When the mother asked why her daughter was being transfused, she was told that her daughter had experienced a very long, hard labour, and the blood would make her feel better and stronger. She testified that this conversation occurred very early in the morning. She recalled few details of the blood bag, except that she saw it hanging and attached to her daughter's arm. She did not recall seeing an IV bag at the same time, but recalled seeing it later after the blood transfusion was completed. She also expressly remembered speaking to her daughter about the blood transfusion. The mother had no recollection of telling anyone outside the family about the blood transfusion. She did not remember the precise layout of the floor of the hospital or which nurse was present, but does recall that it was between 6:30 and 7:00 in the morning. The Claimant's mother recalls being in the Claimant's room and at the hospital that morning for five to six hours.
11. Carol Miller, who is an experienced nurse employed by the Administrator, gave evidence as to the general practice regarding blood transfusions at the various hospitals in which she worked during her career (up to 1986). None of the circumstances she encountered at other hospitals when blood was administered (which Ms. Miller found to be common practice at the hospitals in which she worked) were found in the Claimant's medical records. On the other hand, Ms. Miller was unable to say whether the practices with which she was familiar were, in fact, the practices at the Ottawa General Hospital at the relevant period in 1986. Ms. Miller also reviewed the Claimant's hospital charts and, in her view, there was nothing in the charts consistent with a blood transfusion, and the factors that would normally be present had blood been transfused (eg., the checking of vital signs every hour, etc.) were absent from the chart. Furthermore, there was no indication that there had been a significant loss of blood warranting a transfusion, although this would be consistent with the Claimant's theory that she was wrongly transfused.

12. Extensive documentation was filed consisting mostly of hospital records, and a document summary filed by the Claimant. The Claimant's submissions attempted to cast doubt on the veracity and credibility of the hospital records. While the Claimant's arguments in this regard were extensive, they can be illustrated by her assertions that the records are contradictory with respect to the use of forceps in the delivery and the presence of sutures, do not contain any notations for the critical time period during which the Claimant states she was transfused, and contain notations indicating the existence of symptoms consistent with the need for a transfusion, as well as the existence of symptoms consistent with the administration of a transfusion. In addition, the Claimant noted that the files contain several erroneous entries, which were apparently made and crossed out, and notations of a recording error consistent with the entries having originally been made in the wrong chart. The inference the Claimant drew from these contradictions and errors was that the information with respect to the Claimant's transfusion was likely made on another chart and wrongly administered to her. The Claimant also submitted various materials documenting the prevalence of mistakes and negligence in hospital settings generally.
13. The written opinion of Dr. Pinkerton, Chief Pathologist at Sunnybrook Hospital, was also admitted in evidence. Dr. Pinkerton could find nothing in the Claimant's hospital records or in the recording of her vital signs and medication that would lead to a suggestion that she had received a transfusion of blood or had adversely reacted to it. Dr. Pinkerton did not exclude the possibility that a transfusion may have gone unrecorded but, as I understand his opinion, there was nothing in the records which would lead to the conclusion that a transfusion had taken place.
14. After the first day of hearing, efforts were made to obtain further hospital records, and these records were subsequently produced. At the second day of hearing, the Claimant provided the names of nurses and physicians who attended her at the hospital in July 1986 and the parties agreed that a letter would be sent out to these individuals to see if they remembered anything with respect to this matter. Following further legal argument, the Administrator (essentially at the request of the Claimant) obtained additional information from the physicians involved at the time of the hospitalization. This information was given by way of letter (and without cross-examination) in order to obviate the necessity of calling the physicians as witnesses. In the letters, all the physicians stated that they had no recollection of the events which took place in 1986.
15. Since there is no record of a blood transfusion taking place in the relevant time period, the only legal basis upon which the Claimant can succeed is under section 3.01(2) of the Transfused HCV Plan:

3.01 (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.

This subparagraph requires, where there is no proof of a transfusion, that the Claimant have corroborating evidence, independent of her personal recollection or that of a family member, establishing on the balance of probability that she received a blood transfusion in Canada during the Class Period. Under the terms of section 3.01(2), to which I am compelled to adhere, the Claimant's own evidence and that of her mother that they witnessed a transfusion taking place is not sufficient to justify a finding of fact that there was a transfusion. Rather, there must be some additional independent evidence of a transfusion. In my view, the nature of such independent evidence can vary, and it is not necessarily limited, for example, to another witness who saw the transfusion. Rather, it is possible, as the Claimant has attempted to make out, that a claimant's medical records may establish a likelihood that a transfusion was necessary in particular circumstances, even where the transfusion is not explicitly recorded. However, in this case, based on the medical evidence before me, I cannot find any independent evidence in the medical records to corroborate the evidence of the Claimant and her mother. Moreover, I have no basis on which to reject the evidence of Dr. Pinkerton when he states that:

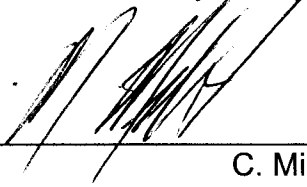
"I can find nothing in the medical and nursing notes, nor in the recording of vital signs or medications, to lead to any suggestion that a transfusion of any blood product occurred, or that symptoms or signs were present to suggest an adverse transfusion reaction had occurred".

16. If there was additional independent evidence of a transfusion from a source other than the Claimant or a family member (such as another independent witness who purported to have seen the transfusion), or there was other credible evidence of a transfusion, then Dr. Pinkerton's evidence and the fact that the hospital records do not indicate that a transfusion occurred or likely occurred, would have to be weighed against that independent evidence. It may well be that, on a balance of probabilities, a Claimant could make out a case in those circumstances. In that regard, the alleged errors and weaknesses in the state of the medical records, including their inconsistencies and alleged unexplained or inexplicable contradictions, might undermine the reliability of the records. However, absent any other evidence of a transfusion, except from the Claimant herself and a family member (which, by virtue of the Settlement Agreement, I am not allowed to rely on as the sole basis for finding that a transfusion occurred), and in the face of the expert medical opinion that the records are not consistent with a transfusion having taken place, the fact that the records may

otherwise be inconsistent or contain errors does not lead to an inference that a transfusion occurred. I have carefully reviewed the reasons in Confirmed Referee decisions 96 and 150, as well as Unconfirmed Referee decisions 185 and 190, all of which dealt with situations in which an evidentiary basis for finding corroborating evidence of a transfusion independent of the evidence of the family members existed. Unfortunately, I must conclude that no such corroborating evidence exists here.

17. This is a very difficult and tragic circumstance. The Claimant has no record of intravenous drug use or any other activity which would have led to the contraction of Hepatitis C. The Claimant has severe medical difficulties as a result of contracting Hepatitis C and she has no explanation for the disease other than the transfusion which she states she witnessed. The Claimant, with the support of her family, has gone to great efforts to try to demonstrate that a transfusion took place and that the hospital records are unreliable and erroneous, and she is extremely frustrated and angry with the rules and the process that must be followed here. Nonetheless, there is no legal basis upon which I can find that the Administrator erred in rejecting the Claimant's application for compensation pursuant to the precise rules of this settlement as they were drafted by the parties.

DATED at Toronto this 15th day of September, 2005



C. Michael Mitchell
Referee