

**IN THE MATER OF A REFERENCE PURSUANT TO THE HEPATITIS C
1986-1990 CLASS ACTION SETTLEMENT AGREEMENT
(Parsons v. The Canadian Red Cross et al.
Court File No. 98-CV-141369)**

BETWEEN

Claimant File 14001145

- and -

The Administrator

(On a motion to oppose confirmation of the decision of Reva Devins, released May 15, 2006)

Reasons for Decision

WINKLER R.S.J.:

Nature of the Motion

1. This is a motion to oppose confirmation of the decision of a referee appointed pursuant to the terms of the Settlement Agreement in the Hepatitis C litigation for the class period January 1, 1986 to July 1, 1990. The Claimant made a claim for compensation pursuant to the Agreement which was denied by the Administrator charged with overseeing the distribution of the settlement monies. The Claimant appealed the denial to a referee in accordance with the process set out in the Agreement. The referee upheld the decision of the Administrator and denied the appeal. The Claimant now opposes confirmation of the referee's decision by this court.

Background

2. The Settlement Agreement is Pan-Canadian in scope and was approved by this court and also approved by courts in British Columbia and Quebec. (See *Parsons v. The Canadian Red Cross Society* (1999), 40 C.P.C. (4th) 151 (Ont. Sup. Ct.)). Under the Agreement, persons infected with Hepatitis C through a blood or specified blood product transfusion, within the period from January 1, 1986 to July 1, 1990, are entitled to varying degrees of compensation depending primarily on the progression of the Hepatitis C infection.

Facts

3. The Claimant is a resident of Ontario who is infected with HCV. He has applied for compensation as a Primarily-Infected Person pursuant to the Transfused HCV Plan.

4. The Claimant initially claimed that he might have received blood during surgery relating to a bone/cartilage graft on March 15, 1990. However, his hospital records do not indicate that he received a blood transfusion in relation to this surgery and his physician, Dr. McNaull, has indicated that he did not receive blood.

5. The Claimant now argues that he likely received HCV from the bone/cartilage graft itself. Dr. Mc Naull claims that there are published reports that indicate that HCV can be transmitted as a result of bone and tendon allografts. The doctor also claims that the bone/cartilage graft was the Claimant's "only epidemiological risk factor for the acquisition of Hepatitis C".

6. In a letter dated February 27, 2003, the Administrator informed the Claimant that his application for compensation had been denied on the basis that the Claimant had not provided sufficient evidence to establish that he received blood during the class period. The Administrator's decision was upheld by the referee on May 15, 2006.

7. In submissions provided for the purpose of this motion, the Claimant provided the following comments regarding the referee's decision: "One thing that was not mentioned in decision was the fact that the donors medical records were destroyed. If he had a blood transfusion, before he died and I had this transfusion number would I be eligible". The Claimant then indicated, "I am sure there are more patients out there like me and I think the wording of the Court Approved Plan should be changed to allow those of us who contacted Hep-C in this way to be compensated".

Standard of Review

8. In a prior decision in this class proceeding, the standard of review set out in *Jordan v. McKenzie* (1987), 26 C.P.C. (2d) 193 (Ont. H.C., aff'd (1990), 39 C.P.C. (2d) 217 (C.A.) was adopted as the appropriate standard to be applied on motions by a rejected claimant to oppose confirmation of a referee's decision. In *Jordan*, Anderson J. stated that the reviewing court "ought not to interfere with the result unless there has been some error in principle demonstrated by the [referee's] reasons, some absence or excess of jurisdiction, or some patent misapprehension of the evidence."

Analysis

9. Pursuant to section 3.01 of the Transfused HCV Plan, the Claimant must prove that he "received a Blood transfusion in Canada in the Class Period". At issue is whether the definition of "Blood" includes a bone/cartilage graft.

10. The word "Blood" is defined in section 1.01 of the Transfused HCV Plan as follows:

"Blood" means whole blood and the following blood products:
packed red cells, platelets, plasma (fresh frozen and banked) and
white blood cells ...

11. There is no evidence before me to support a conclusion that a bone/cartilage graft falls within the definition of "Blood" or of a "Blood transfusion". Even if the Claimant were able to establish that his bone/cartilage donor had acquired HCV through a blood transfusion, the Claimant would not be eligible for compensation pursuant to the Transfused HCV Plan. Under the Transfused HCV Plan, an individual is only entitled to compensation for his or her HCV infection if he either acquired HCV from a blood transfusion or acquired HCV from a family member who qualified as a Primarily-Infected Person.

Result

12. In my view, the referee committed no errors in principle, with respect to jurisdiction or by misapprehending the evidence. Accordingly, the referee's decision is confirmed.



Winkler R.S.J.

Released: October 20, 2006