

CLASS ACTION – Hepatitis C 1986-1990

Request for Review no. 14133

DECISION

The Claimant is a 39-year-old young man who unfortunately contracted Hepatitis C, a disease that was diagnosed in 2003.

Having received in April 1987, 11 units of blood during a hospital stay at the Hôpital du Sacré-Cœur de Montréal following a traffic accident, the Claimant submitted a claim in accordance with the Transfused HCV Plan.

His claim was rejected by letter dated January 27, 2005, on the basis that there was insufficient evidence of a first infection during the Class Action Period.

Uncertain as to whether the Claimant was requesting an oral hearing, I wrote to him on February 28, 2005, but my letter remained unanswered. I therefore wrote to him on April 21, 2005, advising him that the date for the hearing was set for June 28, 2005, but I was then told that the Claimant had decided to request a review based on a study of his file as constituted. Therefore it is on this basis that I undertook to examine this matter. Not having access to certain information that seemed essential to me, I took the initiative to advise the parties, by letter dated June 15, 2005, that it seemed to me to be appropriate to proceed with an oral hearing in this case. The Claimant, who lives many hundred kilometers North-West of Montreal where the hearing would have taken place, preferred a teleconference, and I therefore proceeded as requested on July 18, 2005.

Following this hearing, I thought it would be useful to obtain and examine certain additional medical files, and the Claimant agreed to sign the forms to allow me to get them. Therefore, a copy of the files, which I obtained, was subsequently forwarded to

the Claimant. I indicated in my transmittal letter that failing to receive any comment or representation within 15 days of receipt of my letter, I would understand that the Claimant considered that the file was complete and that I would proceed and render my decision on the basis of the documentation and information collected. More than two months have gone by since forwarding my letter without having received any additional comment from the Claimant.

Therefore, here is my decision.

As mentioned above, the Claimant had received 11 units of blood between April 10 and April 14, 1987. The Claimant stated that these were the only transfusions he received during his life and that there was no proof to the contrary.

However, I found a detailed Héma-Québec report dated March 4, 2005, establishing that all donors of all units of blood received by the Claimant were subsequently found to be negative. In fact, 9 donors came back to give more blood whereas another had to be reached and was invited to undertake the tests. All proved to be negative. Finally, a unit coming from a 1987 donor had been kept in a serum bank and was tested in 2000. This unit again turned out to be negative.

Nowhere do I find in the pre-1986 files any proof of particular risk factors such as tattoos or the use of injection drugs without prescription. I know however that the Claimant had to undergo several surgical procedures between the 1987 transfusions and his 2003 diagnosis of the HCV infection. Thus, he would have undergone between 1992 and 1997, 2 surgeries to the shoulder, followed by a colonoscopy and a vasectomy.

Section 3.04(1) of Appendix A (Transfused HCV Plan) reads as follows:

“(1) Notwithstanding any other provision of this Agreement, if the results of a Traceback Procedure demonstrate that one of the donors or units of Blood

received by a HCV-Infected Person or Opted-Out HCV Infected Person before 1 January 1986 is or was HCV antibody positive or that none of the donors or units of Blood received by a Primarily-Infected Person or Opted-Out Primarily Infected Person during the Class Period or was HCV antibody positive, subject to the provisions of Section 3.04(2), the Administrator must reject the Claim of such HCV Infected Person and all Claims pertaining to such HCV Infected Person or Opted-Out HCV Infected Person including Claims of Secondarily-Infected Persons, HCV Personal Representatives, Dependants and Family Members.”

Section 3.04(2) of the same Appendix A stipulates that a Claimant may prove that he was infected for the first time with HCV by a Blood transfusion received in Canada during the Class Action Period ‘notwithstanding the results of the Traceback Procedure”.

I already stated in another decision that section 3.04(2) imposes on the Claimant a heavy burden that is difficult to satisfy. However, it must not be impossible.

I have also read with great interest the decision by Mme Justice Morneau, of the Superior Court of Quebec of December 15, 2004 related to Claimant 1200309. I take the liberty to reproduce here paragraph 17 and other paragraphs from that decision:

"[Translation] [17] Such being the case, section 3.04 (2) of the Transfused HCV Plan constitutes an exception to section 3.04 (1). It provides that despite the traceback test results, a Claimant can prove that he had been infected by the Hepatitis C virus for the first time, through a blood transfusion received during the Class Action Period. One has to examine the burden of proof placed on the Claimant as well as the nature of the proof that could contradict the traceback procedure results.

[18] As already explained by the undersigned who reiterated what Mr. Justice Pitfield had said on section 3.04(2):

[Translation] [22] This section rather provides that there could exist a proof which would establish that the source of the infection, on the balance of probabilities, resulted from a transfusion received during the Class Action Period. (...)

[Translation] [23] The type of proof which a Claimant could be required to provide during an appeal includes at least his personal and family medical history as well as a detailed proof on all aspects of his lifestyle, including proof that he could not have been infected by needles or injections, no matter the reason for which they would have been used. This list is not exhaustive and rather tends to indicate the procedure which must be followed when one wants to try to refute the traceback procedure results.

[19] In this case, the proof meets the prescribed criteria. To require more, the court should remove section 3.04(2). It cannot do that. It did not want to do it either, because the agreed to Settlement is aimed at compensating the Class Action members. "

These guidelines having been established, I have analyzed the documentary as well as the verbal evidence put before me.

Without having had the advantage of seeing the Claimant testify before me, I retain from his testimony during a teleconference call that he is currently 39 years old, that he has had the same and only spouse for 22 years and that he denies having had any homosexual relations. He has no tattoos, was never imprisoned and did not make use of intravenous or other drugs without prescription. He answered in a clear voice and without hesitation all the questions that were put to him.

It could be tempting to conclude that the Claimant has satisfied the burden of proof by demonstrating that he had had a regular life, and therefore that there was no other logical source of the HCV infection except for the blood received in 1987. Regrettably

for the Claimant, I consider that the criterion which the HCV Settlement Agreement (1986-1990) imposes on me is more stringent and that in this case, the Claimant did not succeed in proving to me, as required by the Plan, that he was infected by a blood transfusion received during the Class Action Period.

Having reviewed the evidence, I estimate that I must apply Mr. Justice Pitfield's comments in case number 53 (Decision of May 9, 2003):

[16] A simple denial by a Claimant of personal history or actions that have been identified as potential non-transfusion sources of HCV infection will not suffice. The reliability of the assertion, which is subjective in nature, would need to be tested by reference to all the known objective evidence. One of the pieces of objective evidence is the results of the traceback which is based on the application of and/or adherence to the approved traceback protocol. Contradictory objective evidence would have to be very persuasive should the traceback result have to be refuted.

In this case, in spite of the Claimant's testimony, I consider that there is no such very persuasive evidence, particularly in the context where the Claimant had to undergo 4 invasive procedures between the time of the last transfusion and the discovery of the Hepatitis C infection.

Thus, I consider that the Administrator's decision was well founded and I maintain such a decision.

Montreal, January 18, 2006

Jacques Nols
Referee