

**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 15726

- and -

The Administrator

**(On a motion to oppose confirmation of the decision of Shelley L. Miller, Q.C.,
released December 15, 2005)**

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 the Personal Representative and former spouse of a deceased HCV infected person who passed away on December 17, 1992. The Claimant seeks compensation pursuant to the Transfused HCV Plan.

4. On September 19, 2005, the Administrator denied the Claimant's request for compensation on the grounds that HCV did not contribute to the death of the deceased. The Administrator's decision was upheld by a referee on December 15, 2005.

5. The deceased's medical certificate of death stated that "the causes of death were pulmonary metastasis (2 months) and bladder cancer (3-4 years)".

6. The Claimant accepts that her spouse had been diagnosed with bladder cancer in the late 1980s or early 1990s but contends that he would have beaten the cancer had he not been weakened as a result of his HCV infection.

7. In a letter between two of the deceased's physicians, Dr. Bain and Dr. Venner, dated August 20, 1992, Dr. Bain wrote:

... We had initially seen [the deceased] with acute Hepatitis in early August. The lab investigations that we have done have shown hepatitis C positivity ... His symptoms seem to be resolving with some improved sense of well being and a slight increase in his energy level and decreased level of jaundice.

...

He has a 50% chance of clearing the hepatitis on his own, and if he does not clear hepatitis, chances are the enzymes will bounce up and down, but we will simply monitor these ...

8. In 2005, Dr. Bain responded to the question of whether the deceased's infection with HCV materially contributed to his death by writing: "Not to my knowledge. I've not seen him for 13 yrs".

9. Dr. Venner prepared a report at the request of the Claimant, which is dated August 12, 2005. In this report, Dr. Venner wrote: "it would not appear that Hepatitis C contributed to [deceased's] cancer which I would suspect was the mostly likely cause of his death." However, the doctor also noted that he was not aware of "what happened between October and December with regard to the Hepatitis C" and it does not appear that the deceased was in Dr. Venner's care at the time of his death.

10. The Claimant has not provided any medical evidence to establish that the death of the deceased was caused by HCV.

Standard of Review

11. 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

12. Section 3.05(1) of the Transfused HCV Plan provides:

3.05(1) – A person claiming to be the HCV Personal Representative of a HCV Infected Person who has died must deliver to the Administrator, within three years after the death of such HCV Infected Person ... an application form prescribed by the Administrator together with:

(a) proof that the death of the HCV Infected Person was caused by his or her infection with HCV;

...

13. Although the passage of time diminishes somewhat the reliability of the evidence and opinions provided by Dr. Venner and Dr. Bain in 2005, the letter from Dr. Bain to Dr. Venner in 1992 was contemporaneous with the deceased's treatment for Hepatitis C. The circumstances in which it was created attest to its inherent reliability. As such it provided strong evidence that the Claimant's HCV infection was reasonably under control several months prior to his death.

14. In addition, to the extent that the more recent evidence provided by Dr. Bain and Dr. Venner can be relied on, their evidence suggests that HCV did not contribute to the death of the deceased. This is consistent with certificate of death issued in respect of the deceased, which similarly does not indicate that HCV contributed to the death.

15. The onus is on the Claimant to prove that HCV caused the death of the deceased. Here, the Claimant has been unable to produce any evidence in support of her contention. In consideration of the absence of evidence in support of the Claimant's position and the medical evidence to the contrary, the referee was justified in making the finding that HCV did not contribute to the death of the deceased.

Result

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



Winkler R.S.J.

Released: May 19, 2006