

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *HCV Settlement Agreement Claim #15930*,  
2010 BCSC 917

Date: 20100629  
Docket: C965349  
Registry: Vancouver

**In the Matter of the HCV 1986-1990**

**Transfused Settlement Agreement**

**Re Claim No. 15930**

**(Proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50)**

Before: The Honourable Mr. Justice Pitfield

## **Reasons for Judgment**

Counsel for the Applicant:	Self-Represented
Counsel for the Defendants:	William A. Ferguson
Written Submissions Received:	May 7, 2010
Place and Date of Judgment:	Vancouver, B.C. June 29, 2010

***Introduction***

[1] The Claimant is the Executor of his deceased son's estate. The Claimant opposes confirmation of a referee's decision made pursuant to the 1986-1990 Transfused HCV Settlement Agreement which upheld the administrator's determination that the cost of a transplant procedure and out-of-pocket expenses incurred by the deceased in respect of treatment for Hepatitis C would not be reimbursed.

[2] The Claimant says that the referee misapprehended the evidence and erred in her interpretation of the provisions of the Settlement Agreement pertaining to the reimbursement of out-of-country procedure costs and out-of-pocket expenses.

[3] I have reviewed the material submitted by Fund Counsel, the referee's reasons for decision, and the Claimant's detailed and thorough submissions in relation to the errors alleged to have been made. For the reasons that follow, I have concluded that the referee's decision should be confirmed.

***Factual Background***

[4] In 1988, the deceased, then 19, was injured in a motor vehicle accident. He suffered serious orthopaedic and head injuries. In the course of treatment he received one or more blood transfusions by which means he was infected with Hepatitis C. The infection was not diagnosed until 2002. He applied for benefits under the Settlement Agreement and his application was approved.

[5] The deceased developed cirrhosis of the liver and by 2005, he had end-stage liver disease. He was advised by a medical practitioner to abstain from the consumption of alcohol on which he had become dependent subsequent to the accident. He was assessed by the B.C. Transplant Society as a potential liver transplant recipient. In the course of the assessment he was advised of the Society's alcohol abstinence requirements. He found he was unable to abstain from the consumption of alcohol as required and he failed to qualify as a transplant candidate as a result.

[6] The deceased was subsequently assessed by a clinic in the United States. He was advised that abstinence from the consumption of alcohol for a period of six months was a pre-condition to a liver transplant, and that residents of the United States would be given precedence over foreigners.

[7] In the late spring of 2007, the deceased travelled to China where he received a transplant on September 11. He returned to Vancouver on October 10. He was admitted to hospital on October 11, treated for various aspects of his disease, and released. He returned to the hospital on December 27. Tests performed at the time indicated that liver function was abnormal. The deceased died on January 10, 2008 of a fungal infection likely contracted in China.

[8] The Claimant applied for reimbursement of the costs incurred for treatment in China in reliance upon Articles 4.06 and 4.07 of the Settlement Agreement:

4.06 An approved HCV Infected Person who delivers to the Administrator evidence satisfactory to the Administrator that he or she has incurred or will incur costs for generally accepted treatment and medication due to his or her HCV infections which are not recoverable by or on behalf of the claimant under any public or private health care plan is entitled to be reimbursed for all reasonable past or present or future costs so incurred to the extent that such costs are not costs of care or compensation for loss of services in the home provided.

- (a) the costs were incurred on the recommendation of the claimant's physician; and
- (b) if the costs are incurred outside Canada, the amount of compensation cannot exceed the lesser of the amount of compensation payable if the costs had been incurred in the Province or Territory where the claimant resides or is deemed to reside and the actual costs.

4.07 An approved HCV Infected Person who delivers to the Administrator evidence satisfactory to the Administrator that he or she has incurred or will incur out-of-pocket expenses due to his or her HCV infection that are not recoverable by or on behalf of the claimant under any public or private health care plan is entitled to be reimbursed for all reasonable costs so incurred provided:

- (a) out-of-pocket expenses will include (i) expenses for travel, hotels, meals, telephone and other similar expenses attributable to seeking medical advice or generally accepted medication or treatment due to his or her HCV infection and (ii) medical expenses incurred in establishing a Claim; and

- (b) the amount of the expenses cannot exceed the amount therefor in the guidelines in the Regulations issued under the *Financial Administration Act* (Canada) from time to time.

[9] On September 15, 2008, the administrator of the Settlement Agreement advised that reimbursement would not be made because:

1. No recommendation had been obtained from a treating physician to the effect that the transplant had to take place out of the country; and
2. The Settlement Agreement did not permit the administrator to reimburse that part of the costs that were covered by a public or private health care plan.

[10] In respect of the second point, the administrator observed that provincial Medical Services Plan staff had declined to consider reimbursement because:

...[the] appropriate standard of care (liver transplant services) was available in British Columbia and elsewhere in Canada and the [Transplant Society] did assess [the deceased] as a candidate for a liver transplant, however, [the Transplant Society] subsequently refused to put [the deceased] on the transplant waitlist due to the results of the assessment.

[11] The Claimant sought a review of the decision by a referee as permitted by the Settlement Agreement. An oral hearing was conducted on April 15, 2009. The referee's decision upholding the administrator's determination was released on October 20, 2009.

### ***The Referee's Decision***

[12] The referee considered evidence submitted by the Claimant from Dr. Yoshida, a gastroenterologist to whom the deceased had been referred, and Dr. Lichtenstein, the deceased's family doctor who had become such in early 2007.

[13] From the evidence of the gastroenterologist, the referee concluded that a liver transplant was a generally accepted treatment for Hepatitis C. The cause of the deceased's death was not the liver transplant but an unusual fungal infection likely contracted in China. The evidence, both in the form of affidavits and testimony, led

the referee to conclude that the gastroenterologist had not recommended that the deceased undergo a transplant procedure in China, although the doctor testified that he was not opposed to the deceased going to China for that purpose and would not say "no", should he want to go.

[14] I see no basis on which to interfere with the referee's conclusion that Dr. Yoshida's discussions with the deceased cannot be construed as, and did not amount to, a "recommendation" for purposes of Article 4.06 of the Settlement Agreement.

[15] The referee reviewed Dr. Lichtenstein's evidence and, in particular, her evidence that she did not tell the deceased to go to China for a transplant and it was not an idea she recommended to him. She agreed that she told the deceased that if he had the means, he should go to China for a transplant as he had nothing to lose.

[16] The referee summarized her view of the evidence in the following terms:

Having heard the evidence of both Drs. Yoshida and Lichtenstein, both of them seemed uncomfortable with the question of whether they recommended the liver transplant in China. They both indicated that there was no other choice for the deceased, but that it is not the same thing as a recommendation on their part. In my opinion, the evidence of Drs. Yoshida and Lichtenstein falls short of establishing that the costs of the liver transplant in China were incurred "on the recommendation of the claimant's treating physician". Dr. Lichtenstein specifically said that she did not recommend the transplant as the patient had already made the decision to have it in China. Dr. Yoshida similarly said he would not have said "no" to the decision, but again, this, in my opinion, falls short of a recommendation.

I therefore conclude that the costs of the liver transplant in this case were not incurred on the recommendation of either Drs. Lichtenstein or Yoshida.

[17] The conclusion reached by the referee in relation to the question of whether a recommendation had been made by either the gastroenterologist or the family physician was appropriate given all of the evidence that was adduced in the proceeding before her. It follows that the claim for reimbursement of the costs of the procedure must fail because the condition prescribed by Article 4.06(a) of the Settlement Agreement has not been satisfied.

[18] The referee also considered that the question of whether the out-of-country medical treatment that was received was of a kind and quality that would be acceptable in Canada was relevant. Because the treatment that was received had not been recommended, independent consideration of the point was not required. For purposes of Article 4.06, the inadequacy of the procedure performed in China is reflected in the fact that neither practitioner was prepared to recommend it.

[19] Article 4.07 does not provide an independent base for the claim that any portion of the deceased's costs should be reimbursed. It cannot be construed to impose an obligation on the administrator to reimburse expenses that are related to an individual's choice to resort to a treatment or procedure that is not of a generally accepted quality and kind from a Canadian perspective when he does not qualify for an acceptable quality and kind of treatment or procedure in Canada.

[20] In all of the circumstances, I am satisfied that the application to oppose confirmation of the referee's decision must be dismissed.

"Mr. Justice Pitfield"