

**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 16190

- and -

The Administrator

**(On a motion to oppose confirmation of the decision of the Shelley L. Miller, Q.C.,
released on September January 21, 2008)**

Reasons for Decision

WINKLER C.J.O.:

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. This is claim for compensation pursuant to the transfused HCV Plan was brought by the Personal Representative of a deceased person who was infected with HCV.

4. The Administrator denied the claim in a letter dated May 18, 2007 on the basis that there was insufficient evidence that the deceased received blood during the Class Period. The Administrator's decision was upheld by the Referee.

5. The Personal Representative admits that none of the deceased hospital records indicate that the deceased received blood during the Class Period. However, the Personal Representative asserts that there may be missing records or that a hospital error may have been made.

Standard of Review

6. 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

7. In order to qualify for compensation pursuant to the Transfused HCV Plan, it is necessary to meet the requirements set out in the Settlement Agreement. In particular, section 3.01 of the Transfused HCV Plan specifically requires proof that the primarily infected person received a blood transfusion in Canada during the Class Period.

8. The difficulty faced by the Personal Representative in this case is highlighted by the following passages, extracted from both the decision of the Referee, and the Notice of Motion on the Appeal. As noted by the Referee at paras. 16 and 17 of her decision:

[16] I am satisfied that the Personal Representative of the deceased and the family members' belief is sincerely and honestly held that the lack of hospital records...verifying such transfusions is most probably owing to error or omission by hospital staff.

[17] However, the preponderance of evidence before me suggests that the deceased Claimant never had a blood transfusion within the Class Period and I found no evidence to suggest that there were errors committed by any medical or hospital staff.

The Personal Representative does not claim that the Referee erred in finding that there was no documentary evidence of a blood transfusion. Indeed, at para 1 of the Notice of Motion, the Personal Representative states:

We are fully aware that there was no concrete evidence of a blood transfusion at the time [of the Claimant's] illness, but our stand still remains the same. That human error on the part of the hospital caused [the Claimant] to contract the deadly virus. (Emphasis added.)

9. Under the terms of the Settlement Agreement, where a finding is made that there is no documentary evidence of a blood transfusion, the onus falls to the Claimant, or his or her Personal Representative, to establish on the balance of probabilities that such a transfusion took place.

10. However, that onus must be met by providing corroborating evidence. It is not enough to argue, as does the Personal Representative in the submissions filed on the motion, that "some of the records could have been lost or destroyed" and that "human error" played a part in the Claimant acquiring Hepatitis C. Such submissions do not rise to the level of evidence required to meet the onus on the Personal Representative in this case. There must be positive evidence of a transfusion that goes beyond speculation as to what might be contained in missing records or a generalized statement regarding the potential for "human error" in a hospital procedure or record-keeping.

Result

11. The Settlement Agreement sets out the requirements that must be met by a Claimant or a Personal Representative claiming on his or her behalf. The Referee correctly interpreted those requirements and applied them to the finding of fact that she made regarding the absence of evidence that the Claimant received blood during the Class Period.

12. 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 C.J.O.

Released:

November 25, 2008