IN THE MATTER 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 1702

- and -

The Administrator

(On a motion to oppose confirmation of the decision of Michael Mitchell, released on November 23, 2006)

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 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 theperiod 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 of his deceased father, who passed away unexpectedly in 1995 following surgery for a fractured hip.

4. After his death, the deceased's family learned that the deceased had received a blood transfusion during surgery in 1989 from a donor who subsequently tested positive for the Hepatitis C virus ("HCV").

5. A claim for compensation was made on June 7, 2000. The Administrator denied the claim in a letter dated August 15, 2001 on the basis that there was insufficient evidence to establish that HCV caused the deceased's death. The Administrator's decision was upheld by a referee on November 23, 2006.

6. The Claimant opposes confirmation of the referee's decision. At issue in this motion is whether HCV materially contributed to the deceased's death.

7. At the hearing before the referee, Dr. W.T. Depew, a professor of Medicine at Queen's University, testified. Dr. Depew analyzed the deceased's medical records and set out his findings in an e-mail to the Claimant. In this email, he stated the following:

> On examining the copies of all the medical records I find no evidence that [the deceased] suffered from clinically overt chronic hepatitis C. The admitting histories and physicals done during his hospital stays in 1992 and 1995 do not identify any clinical symptoms of underlying liver disease or portal hypertension and the physical exams do not identify enlargement of the liver or the spleen or the presence of any other peripheral sign of either chronic parenchymal liver disease or portal hypertension. A limited set of liver status tests obtained in 1992 are well within the normal range. The simple liver status tests obtained at his admission in 1995 were also within the normal range providing no biochemical clue that he had underlying substantial parenchymal liver damage.
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> [The deceased's] demise in 1995 was driven by post operative complications including septicemia and accompanying acute respiratory distress syndrome. This culminated in multiple system organ failure. There /vere [*sic*] some clear cut changes in liver tests towards the end of the admission but these changes are clearly related to the sepsis and multiple organ failure and could not be blamed on pre-existing chronic hepatitis C.
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> Regrettably, the record does not contain any information that would allow me to state with any measure of confidence that chronic hepatitis C contributed materially to [the deceased's] death. The difficult thing with chronic hepatitis C however is that it may be present and progress silently without any clue. Indeed, the disease may progress to cirrhosis without demonstrating any obvious clinical signs. Cirrhosis can also be present even when the usual types of liver status tests are within the normal range. Accordingly, I could not conclude that [the deceased] did not have any liver damage from chronic hepatitis C. The only way to determine this would have been pathologic examination of the liver either by liver biopsy or at post mortem. I am not aware that either of these investigations were undertaken in [the deceased's] case.exam [*sic*].
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> If [the deceased] acquired hepatitis C at the time of his transfusions in 1989 there would have been adequate time for the virus to have caused damage to the point of cirrhosis in the ensuing sixteen years up to his death. Unfortunately, there is absolutely nothing in the record which would enable anyone to state with any confidence that he suffered from such a process. Indeed, the bulk of the evidence suggests that

> progressive significant liver disease due to chronic hepatitis C infection was not present.

8. In addition, two physicians, Dr. Rudan and Dr. Prihar, provided testimony. Dr. Rudan was the surgeon who operated on the deceased in 1995 and Dr. Prihar also cared for the deceased during the period leading up to his death. Both doctors agreed with Dr. Depew's findings. The referee summarized their evidence as follows:

> Both Dr. Rudan, the surgeon, and Dr. Prihar, the primary Resident Physician assigned to the case in the teaching hospital, gave evidence and were cross-examined. They both agreed with the opinion of Dr. Depew. They testified that essentially, during the surgery, the patient aspirated large amounts of bilious fluid and as a result, had a septicemia, with accompanying pneumonia, which resulted in "acute respiratory distress syndrome". Despite three months of intensive efforts to assist the patient, there was "multiple system organ failure" resulting in his passing. Neither of the physicians who were involved in his care and treatment are of the opinion that the events that occurred would have been any different whether or not [the deceased] had Hepatitis C. According to them, it was not a factor at all in his condition, assuming [the deceased] had the disease.
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> Based on all of the evidence, there is no basis to conclude in this case that Hepatitis C contributed to the death of [the deceased]…

9. In written submissions provided in support of this motion, the Claimant stated, among other things, that: "Three physicians could not rule out the possibility that the [deceased] had Hepatitis C and neither could they rule out the possibility it could have been a factor in his demise."

10. The Claimant also relies on progress notes from hospital chart of the deceased dated September 3and 5, 1995, which indicate that the deceased was suffering from jaundice in the period leading up to his death. He asserts that this establishes that the deceased was suffering from liver disease at the time of his death.

11. Additionally, the Personal Representative has made allegations to the Court Monitor concerning the conduct of the referee. He claims that after the panel denied compensation, the referee told the deceased's family that had they chosen to proceeded by way of arbitration, the referee would have granted compensation and that such a decision would have been final (i.e. not subject to appeal).

Standard of Review

12. 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

13. Pursuant to section 3.05 of the Transfused HCV Plan, the Claimant, as the Personal Representative of a deceased person, bears the onus to establish, on the balance of probabilities, that the "the death of the HCV Infected Person was caused by his or her infection with HCV".

14. Unfortunately, a liver biopsy was not performed. As a result, none of the doctors who testified were able to conclusively determine that HCV had not materially contributed to the deceased's death. Understandably, the Claimant may feel as though he has been unfairly penalized: a liver biopsy was not ordered due to the lack of information available at the time, not as a result of a failure on the part of the deceased, his family or his doctors.

15. Nevertheless, there is virtually no evidence to support the Personal Representatives' theory that HCV materially contributed to the deceased's death. Indeed, the evidence is to the contrary. In particular, there is the testimony of Dr. Depew. Although set out in full above, it is worth reiterating Dr. Depew's conclusion on this issue:

> [The deceased's] demise in 1995 was driven by post operative complications including septicemia and accompanying acute respiratory distress syndrome. This culminated in multiple system organ failure. There /vere [*sic*] some clear cut changes in liver tests towards the end of the admission but these changes are clearly related to the sepsis and multiple organ failure and could not be blamed on pre-existing chronic hepatitis C.
>
> Regrettably, the record does not contain any information that would allow me to state with any measure of confidence that chronic hepatitis C contributed materially to [the deceased's] death.

16. Dr. Depew's conclusion accords with the testimony of Dr. Rudan and Dr. Prihar, as well as the deceased's medical records, including his Medical Certificate of Death, which listed the immediate cause of death as "Respiratory Failure", and the antecedent cause of death as "Aspiration Pneumonia".

17. The fact that three doctors may not have been able to completely rule out the possibility that HCV materially contributed to the deceased's death is not sufficient to fulfill the requirements set out in section 3.05.

18. The Claimant relies upon progress notes demonstrating that the deceased suffered jaundice in the days leading up to his death. It is important to note that these progress notes were reviewed by Dr. Depew. Clearly, he did not find them decisive on the main issue before the referee, i.e. whether HCV materially contributed to the deceased's death. Although the progress notes may have provided insight into the deceased's possible infection with HCV, given that the reference proceeded on the assumption that the deceased was infected with the disease, such insight was not material to the referee's analysis.

19. I note that this appeal has been delayed while the Claimant has attempted to find additional evidence in the form of a contrary medical opinion that might cast doubt on the expert evidence presented at the hearing. However, it appears that the Claimant has been unable to obtain any such evidence and has now asked that the appeal be determined.

20. The Claimant also alleges in submissions made in relation to this appeal that the referee made certain comments to the deceased's family at one of the hearings. In particular, he alleges that the referee informed the deceased's family that had they chosen the arbitral process, he would have granted compensation and that the award would have been final and not subject to appeal.

21. Communications between persons in adjudicative positions and claimants unrepresented by counsel always raise concerns over the risk of miscommunication. The reasons for these concerns are demonstrated in the allegations made by the Claimant. However, in my view, it is not necessary to address these allegations beyond making the following general observations.

22. The facts of a particular claim govern its outcome. Furthermore, the decision of a referee, arbitrator or the court must be in accordance with the provisions of the settlement. Neither has the jurisdiction to stray from its terms. Therefore, choosing to proceed by way of reference, as opposed to arbitration, will affect the manner of the proceedings, not the result.

23. Additionally, this court maintains a supervisory role to ensure that the settlement is administered in accordance with its terms. Despite the wording of the Transfused HCV Plan, an arbitration cannot produce an unassailable result. Indeed, pursuant to the *Arbitration Act*, 1991, S.O. 1991, c. 17, an arbitrator's decision remains subject to the ultimate jurisdiction of the court. In other words, if an arbitrator's decision is contrary to the terms of the Transfused HCV Plan, the court maintains jurisdiction to overturn the decision. Similarly, pursuant to the provisions of the *Class Proceedings Act, 1992,* S.O. 1992, c.6 the court maintains a supervisory role in the administration and implementation of settlements in class proceedings.

24. In the instant matter, the referee's decision is clearly based upon the evidence available and the terms of the Transfused HCV Plan. In my view, given the evidence that was presented at the hearing, the result is correct. There would have been no evidentiary basis for a different result, even if the matter had proceeded by way of arbitration. Accordingly, I find that the communication, whatever its nature, is irrelevant to the outcome.

Result

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

Winkler, C.J.O.

Released: April 24, 2012