

DECISION

Claim No. 2695

Province of Infection – Ontario

1. The Claimant applied for compensation as a Primarily-Infected Person pursuant to the Transfused HCV Plan.
2. By letter dated July 2, 2004, the Administrator denied the claim on the basis that the Claimant had not provided sufficient evidence to establish that she had received blood during the Class Period.
3. The Claimant requested that the Administrator's denial of her claim be reviewed by a Referee.
4. The Administrator's letter of July 2, 2004 denying the claim stated in part:

“In your original application you indicated you thought you were transfused at the Toronto General Hospital in March or April 1989. There were no documents submitted to support this statement. In cases such as this, when the claimant is having difficulty obtaining documents to support they received a transfusion during the class period, the traceback department contacts

Canadian Blood Services (CBS) to request their assistance in obtaining transfusion information directly from the hospital. The final response to this request received from CBS confirmed the Toronto General Hospital searched their blood bank records from 1982 until 2002 and you were not transfused. Therefore, you do not qualify for compensation, based on Article 3.01 (1a) of the 1986-1990 Hepatitis C Settlement Agreement; because there is no evidence to support you received a blood transfusion between January 1, 1986 and July 1, 1990.”

5. In the Request for Review filed by the Claimant, she outlined the following reasons for wanting to have the Administrator’s decision reviewed:

“That I was transfused in 88-89 at Toronto General hospital during liver surgery for CA. I had 1 transfusion that was the 1st surgery. I became so ill 3 months after – upper right quadrant pain – seen several DRS on this matter – also I was told I lost 1/2 teaspoon blood that is incorrect – liver surgery – it’s a major organ for blood.”

6. At my request, Fund Counsel obtained copies of the Claimant’s medical reports from the Toronto General Hospital in the early fall of 2004. Copies of the medical reports in question were provided to the Claimant and to me on October 22, 2004. These reports contained no indication that the Claimant had been transfused during the Class Period.

7. A conference call was held with the Claimant, Fund Counsel and the Appeal Coordinator on June 10, 2005. The focal point of discussion during the telephone conference was the fact that the medical records produced to date did not indicate that the Claimant was transfused during the Class Period. The Claimant stated that she had personally attended at the Toronto General Hospital to review her medical files. She stated that they were in complete disarray but that she saw an O.R. chart which contained a note to the effect that she had received a transfusion on February 16, 1988. However, she did not make a copy of the chart and it is not in the records which were subsequently produced by the hospital. The Claimant said that she jotted down the information on a piece of paper. She agreed to provide the note to Fund Counsel who forwarded it to me. The material portion of the note reads as follows:

“Transfusion
* Date 16 / 02 / 88
Location # 10 E S 53520”

8. On July 19, 2005, Fund Counsel filed a written submission on behalf of the Administrator and provided a copy to the Claimant. The submission reiterated the position of the Administrator that the records produced by the

Toronto General Hospital, while disclosing that the Claimant had had two surgeries there during the Class Period, did not indicate that she had been transfused in connection with those surgeries. Fund Counsel acknowledged that the Claimant had been cross-matched for blood on both occasions but he contended that the records clearly showed that no transfusion was necessary and that, consequently, the cross-matched units were not used.

9. A further telephone conference was held on August 23, 2005. The Claimant continued to insist that she had been transfused and, in order to obtain greater clarity on that issue, it was agreed that the records of the blood bank at the Toronto General Hospital would be summonsed to determine what had happened to the units which were cross-matched in preparation for the Claimant's surgeries. Later the same day, I issued a summons to the director of the blood bank at the Toronto General Hospital requiring production of all blood bank records relating to the Claimant during the period January 1, 1986 to July 1, 1990. For convenience, the records were to be delivered care of Fund Counsel.

10. In response to the summons, Fund Counsel received the following letter dated September 22, 2005:

“...Re: Hepatitis C Class Actions settlement
[Claimant’s name]

Dear Mr. Callaghan,

Enclosed please find copies of all our Blood Bank records pertaining to this patient, as requested in your letter of August 24, and the attached Summons. I expect that some explanation of these documents might be helpful to you in your assessment.

This patient had three surgical operations in the Toronto General Hospital, in November 1984 [prior to the Class Period], in February 1988 and in April 1988. On each of these occasions, blood was crossmatched (that is, tested to ensure it was compatible with the patient), and held in reserve in case it would be needed either during the operation or shortly thereafter. The number of units tested and reserved in this way was 2, 4 and 6 respectively. These units are identified by the unique 5 or 6 digit numbers on the requisitions labelled with her name [Claimant’s name]. On all of these occasions, however, the units originally crossmatched for her were not required and were transfused to other patients, as indicated on the other patient requisitions attached. The patient names have been obliterated but the chart numbers (which are unique to individual patients) are different from that of [Claimant’s name].

It is not uncommon for blood which is requested for surgery, not to be needed in the actual event. This would appear to have been the case here. These records show that all the units were transfused to other patients and there is no indication that [Claimant’s name] received a blood transfusion.

I trust that this information will suffice.

Yours sincerely,

David M.C. Sutton MD, FRCP(C)
Medical Director, Transfusion Medicine ”

11. The records attached to Dr. Sutton's letter confirm that all of the units cross-matched for the Claimant's surgeries, including the surgery that preceded the Class Period, were ultimately transfused to other patients.

12. On November 1, 2005, I requested by letter that the Claimant and Fund Counsel advise me whether they wished to make any further written submissions with respect to this matter. Having received no response, a reminder letter was sent to the Claimant and Fund Counsel on November 21, 2005.

13. On November 23, 2005, Fund Counsel filed a supplementary submission which stated, in part:

"1. Subsequent to our previous submissions, we have now received the medical records of [Claimant's name] from the Toronto General Hospital including the Blood Bank records.

2. Canadian Blood Services ('CBS') earlier reported that there were no records evidencing a transfusion, although blood was cross-matched for [Claimant's name]. The Blood Bank records were summonsed to ensure that the cross-matched blood was not inadvertently transfused to [Claimant's name]. After conducting an inquiry, Dr. David Sutton, the Medical Director, Transfusion Medicine at University Health Network, reported as follows:

This patient had three surgical operations in the Toronto General Hospital, in November 1984, in February 1988 and in April 1988. On each of these occasions blood was crossmatched (that is, tested to ensure that it was compatible with the patient) and held in reserve in case it

would be needed either during the operation or shortly thereafter. The number of units tested and reserved in this way was 2, 4 and 6 respectively. These units are identified by the unique 5 or 6 digit numbers on the requisitions labelled with her name [Claimant's name]. On all of these occasions, however, the units originally crossmatched for her were not required and were transfused to other patients as indicated on the other patient requisitions attached. The patient names have been obliterated but the chart numbers (which are unique to individual patients) are different from that of [Claimant's name].

It is not uncommon for blood which is required for surgery, not to be needed in the actual event. This would appear to have been the case here. These records show that all the units were transfused to other patients and there is no indicated [sic] that [Claimant's name] received a blood transfusion.

3. It is clear from the report provided by Dr. Sutton and the attached documentation that the cross-matched blood was not administered to [Claimant's name] but was administered to other patients.

4. In addition, the medical records received do not provide any indication that [Claimant's name] was transfused."

14. On December 16, 2005, a letter was sent to the Claimant requesting that she advise whether she intended to respond to Fund Counsel's supplementary submission, failing which the matter would be decided on the basis of the information already on file. No response has been received from the Claimant to the December 16, 2005 letter, or to the previous letters of November 1, 2005 and November 21, 2005.

15. Justice Winkler, in a recent judgment on a motion by Claimant 1000015 to oppose confirmation of the decision of a referee appointed pursuant to the terms of the Hepatitis C 1986-1990 Class Action Settlement Agreement, made the following observations about the burden of proof in a case such as the present one:

“11. The Settlement Agreement is clear on the issue of eligibility. A claimant must establish that he or she has both infection with the Hepatitis C virus and receipt of Blood during the class period. Generally, the method by which receipt of Blood is established is through the submission of the medical, clinical, hospital or laboratory records of the claimant. (See s. 3.01(1) (a) of the Transfused Agreement)

12. Where the claimant’s medical records do not indicate the receipt of blood during the class period, the claimant may still be able to establish that he or she received Blood during that time pursuant to s. 3.01(2) which provides:

3.01(2) ...if a claimant cannot comply with the provisions of Section 3.01(1)(a), the claimant must deliver to the Administrator corroborating evidence independent of the personal recollection of the claimant or any person who is a Family Member of the claimant establishing on a balance of probabilities that he or she received a Blood transfusion in Canada during the Class Period.

13. In this case, the claimant did not have the supporting medical records demonstrating that he received a Blood transfusion and therefore was attempting to establish a transfusion on alternate evidence under s. 3.01(2). However, the important thing to note about s. 3.01(2) is that the claimant bears the onus of proof on the balance of probabilities. The referee determined that the claimant did not satisfy the onus and therefore upheld the decision of the administrator.”

[emphasis added]

16. Later in the decision, Justice Winkler stated:

“18. The claims and appeal processes set out in the Agreement are designed so that claimants can represent themselves. In my view, it would be consistent with this objective for referees to address conflicting evidence in their reasons and elaborate as to why particular evidence was preferred. In this case, the underlying records do not indicate that the claimant received a Blood transfusion during any of his visits to the hospitals. It is unfortunate that some records in this case may have been produced after a denial of their existence but having now been produced, the records do not indicate that a blood transfusion was given to the claimant. Similarly, it is not enough to suggest as the claimant does, that the circumstances of the production render the integrity of the records suspect. S. 3.01(2) requires corroborating, or affirmative, evidence of a blood transfusion rather than a demonstration that some of the existing records are either incomplete or conflicting. Establishing the latter would be helpful for credibility purposes when a referee had to weigh the information, or lack thereof, contained in the records against evidence to the contrary but there must still be admissible corroborating evidence that the claimant received Blood, notwithstanding the existence of records indicating otherwise.”

[emphasis added]

17. Unfortunately for the Claimant, she has been unable to establish that she received a blood transfusion during the Class Period. The medical records do not indicate that she was transfused. In fact, they indicate the opposite. Consequently, the onus was on the Claimant to supply corroborating evidence, independent of her personal recollection, to establish on a balance of probabilities that she received a blood transfusion during the Class Period. This she was not

able to do. Certainly, the note which the Claimant made when she reviewed her medical records does not satisfy the onus. It is not an independent source of corroborating evidence because it was written by the Claimant herself. Moreover, it places the date of the alleged transfusion three days prior to the actual date of her surgery in February of 1988. The Claimant has always maintained that she was transfused during surgery, not several days beforehand. Further, and perhaps most importantly, all cross-matched units have been accounted for.

Under these circumstances, I have no alternative but to uphold the Administrator's denial of the Claimant's request for compensation.

DATED at Halifax, Nova Scotia, this 7th day of February, 2006.

S. BRUCE OUTHOUSE, Q.C.
Referee