

**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)**

B E T W E E N :

Claimant File 1400386

- and -

The Administrator

**(On a motion to oppose confirmation of the decision of Daniel Shapiro, Q.C.,
released January 27, 2002)**

Reasons for Decision

Perell 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.
2. 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.
3. This matter has been outstanding for a long time. Following the release of the Referee's decision in January 2002, the then Court Monitor made contact with the Claimant to assist him with the preparation of the materials required to oppose the confirmation of the Referee's decision. Over the course of the next several years, the Court Monitor exchanged correspondence with the Claimant, however, the Court Monitor was unable to secure confirmation from the Claimant that he was satisfied that his file was complete and that it could be forwarded to the Court. The last correspondence exchanged between the then Court Monitor and the Claimant was in June 2007.
4. After that time, this appeal became dormant and was not brought to the attention of the new Court Monitor or the Court until late 2015. In early 2016, the current Court Monitor confirmed with the Claimant and his family that he wished to have his appeal brought forward to the Court and that he had no further documents or submissions to make.

Background

5. 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). Under the agreement, persons infected with Hepatitis C through a blood or specified blood product transfusion during the period from January 1, 1986 to July 1, 1990 are entitled to varying degrees of compensation depending principally on the progression of the Hepatitis C infection.

Facts

6. The Claimant is a Saskatchewan resident who is infected with HCV. The question upon which this motion turns is whether the Claimant acquired HCV from a blood transfusion during the Class Period.

7. In or around November 1989, the Claimant was admitted to Plains Health Centre in Regina Saskatchewan. Following an examination of his symptoms, it was recommended that the Claimant undergo a median sternotomy, which is an incision through the sternum. As part of this procedure the Claimant's sternum was wired shut.

8. At his hearing before the Referee, the Claimant testified that it was during this procedure that he received tainted blood. He recalled a nurse coming into his room with multiple bags of blood, prior to his surgical procedure. He explained that he received blood before and during the surgery, and recalls seeing four (4) bags of blood in total. Further, the Claimant recalled being advised by a doctor before the procedure that he would require blood given his anemia and slow blood coagulation.

9. After the surgery, while recovering at home, the Claimant choked on a piece of toast which, in turn, ripped the sternum wires. This unfortunate event resulted in the need for an additional surgery, which took place on November 13, 1989. The Claimant testified that it is possible that he may have also received blood during this second procedure at the same hospital.

10. The Claimant's hospital records do not indicate that he received blood transfusions during these procedures. Although the Claimant's hospital records indicate that two units of blood were set aside for the Claimant in relation to the first procedure, these records indicate that these units of blood were not used.

11. A traceback investigation confirmed that these two units of blood were in fact transfused to another patient later that month.

12. During the hearing before the Referee, the Claimant made much of the fact that the hospital records found in relation to the median sternotomy only refer to two units of blood being set aside, where as he believed that four units were set aside. The Claimant testified and reiterated in his submissions to this Court that the hospital hid information, that he has received information from hospital employees that has been contradictory, and that hospital records have been tampered with.

13. Carol Miller is a nurse and the Claims Centre Coordinator for the Administrator. She provided evidence during the hearing of this matter. As summarized by the Referee in his decision, Ms. Miller testified with regard to the Claimant's hospital records, including the hemoglobin levels and information about the amount of blood loss during

the surgery. Ms. Miller explained that the records were inconsistent with the Claimant's belief that he received blood.

14. At his hearing and on this motion to oppose the Referee's decision, the Claimant relies on a letter dated June 28, 1999 from Dr. WS. In the letter, Dr. WS, now deceased, states as follows:

The above named individual received a blood transfusion in 1989 in the Plains Hospital in Regina, Saskatchewan and serial testing in the last four years has been positive for Hepatitis C.

15. At the hearing before the Referee, the Claimant acknowledged that Dr. WS obtained the information about the transfusion from the Claimant himself. However, the Claimant also testified and repeated in his submissions before this Court that Dr. WS told him that he had made calls to the Plains Hospital to confirm the fact of the transfusion.

16. The Claimant's application for compensation pursuant to the Settlement Agreement was denied by the Administrator on March 19, 2001 on the grounds that the Claimant had not provided sufficient evidence to support his claim that he received blood during the Class Period. The Administrator's decision was upheld by a Referee on January 7, 2002.

17. In his decision, the Referee found that while the Claimant is infected with Hepatitis C, the probable source of that infection was not established in the evidence presented.

Standard of Review

18. In a prior decision in this class proceeding, the standard of review set out in *Jordan v. Mackenzie*, (1987), 26 C.P.C. (2d) 193 (Ont. H.C.), aff'd (1999), 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*, Justice Anderson stated that the reviewing court "ought not to interfere with the results unless there has been some error in principle demonstrated by the [referee's] reasons, some absence or excessive jurisdiction, or some patent misapprehension of the evidence."

Analysis

19. In order to qualify for compensation as a primarily infected person under the Transfused HCV Plan, section 3.01 of the Plan requires the Claimant to provide evidence that he received a blood transfusion in Canada during the Class Period. Section 3.01(1)(a) provides in part:

(1) A person claiming to be a Primarily-Infected Person must deliver to the Administrator an application form prescribed by the Administrator together with:

(a) medical, clinical, laboratory, hospital, The Canadian Red Cross Society, Canadian Blood Services or Hema-Québec records demonstrating that the claimant received a Blood transfusion in Canada during the Class Period.

20. Where a Claimant is unable to provide proof of transfusion as required under section 3.01(1)(a), section 3.01(2) provides that, "...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.”

21. Since the Claimant has been unable to produce records that confirm he received Blood during the Class Period, his claim can only succeed if he meets the requirements set out in section 3.01(2).

22. As the Referee concluded following a thorough review of the evidence available, the Claimant has been unable to offer any evidence to corroborate his claim that he received a transfusion during his surgery in November 1989 or at any other time during the Class Period.

23. The Claimant’s own recollections as retold during the hearing before the Referee and as reproduced in his submissions to this Court cannot be considered as independent evidence of a transfusion.

24. The letter from Dr. WS does not meet the evidentiary requirement of s. 3.01(2). The Claimant acknowledged that the information contained in the letter came from the Claimant himself and without more information from Dr. WS directly or even from his records, the letter itself does not satisfy the evidentiary standard.

25. Although, the Claimant adamantly believes that he was transfused in November 1989 and that the hospital records that suggest otherwise are incomplete or have been tampered with, there is nothing in the material before the Referee or the materials before this Court that support such a contention. Rather, the hospital records show that while blood products were ordered for the Claimant in advance of his surgery, they were not used. The traceback report confirms that the same blood products initially obtained for the Claimant were in fact used on other patients.

26. In sum, the Claimant has been unable to provide any significant corroborating evidence that is “independent of the personal recollection of the Claimant or any other person who is a Family Member”. Moreover, the Claimant’s allegations of tampering and hiding evidence have not been substantiated. Accordingly, the Referee’s decision must be upheld.

Result

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



Justice Perell