THE 1986-1990 HEPATITIS C CLASS ACTION SETTLEMENT

IN THE MATTER OF AN APPEAL FROM THE DECISION OF THE ADMINISTRATOR DATED February 27, 2004

DATE OF HEARING: May 8, 2008

IN ATTENDANCE:

CLAIMANT: #15418

FOR THE ADMINISTRATOR: John Callaghan
Carol Miller

REFEREE: C. Michael Mitchell

DECISION

1. This is an Ontario-based Claimant file, claim #15418.

2. The Claimant applied for compensation as a primarily infected person pursuant to the Transfused HCV Plan.

3. The Administrator denied the claim on the basis that there was no evidence of a transfusion during the Class Period.

4. The Claimant requested the Administrator's denial of a claim be reviewed by a Referee.

5. An oral hearing took place on May 8, 2008.

6. Medical records were summonsed prior to the hearing and, because of possible confusion over the proper name of the claimant and the baby in the hospital records, further records were summonsed and produced subsequent to the hearing. A conference call was held with the parties on December 8, 2010. There was no evidence in any of the files that the claimant received a blood transfusion on September 19, 1986, or on any other date.

7. Since there is no record of a transfusion in the hospital records, the provisions of the Plan Agreement prohibit an adjudicator from relying solely upon the evidence of a claimant or of a family member with respect to the occurrence of a blood transfusion. Independent evidence is required.

The Claimant's Evidence

8. The Claimant testified that on or around September 19, 1986, during the course of a caesarian section, or during her recovery from it, or both, she received transfusions of blood, which she believes was the source of her HCV infection. In fact, the claimant recalled three transfusion bags hanging from a pole. There is no issue that the claimant suffers from HCV infection. There is no evidence of drug use, or other activity, which would be the source of infection, and the claimant denied any such use.

9. The claimant testified that she felt scared while she was in the delivery room at the hospital, because she was older (than most expectant mothers), and she was told the baby had his umbilical cord around his neck and it was therefore necessary to perform a cesarean section. That is when Dr. Easton, an obstetrician and gynecologist, became involved in her treatment. She recalls that when she awoke after the procedure, she had "bags" on her. The staff would not allow her go out and smoke because of the bags. She recalls being told that she had lost a lot of blood and the staff kept putting ice on her arms because they were swollen.

10. She remembers she was in the hospital longer than normal and thinks she was there nine or ten days. The hospital records indicate a stay of seven days.

11. The claimant recalls receiving blood after the operation on one day only. She had the procedure at 4:59 a.m. on September 19, and when she woke up in the recovery room, she asked if the baby was alive. Her son was in another room and she recalls the medical staff “hooking stuff up to me in the recovery room.” However, she remembers the blood transfusion taking place only in the patient room and not in the recovery room. The claimant was clear that she received the transfusion “right at the beginning”, meaning after the procedure. It occurred, on her evidence, on September 19, which was the day of the visit from her parents and from JM.

12. On cross examination, the claimant said she had the procedure at 4:59 a.m. and was in the recovery room for 13 or 14 hours. When she awoke, she asked whether the baby was alive. Despite being “pretty dozy,” she remembers wiping the inside of her mouth and being hooked up and something on the top of her hand. She thinks there were three separate bags and remembers they were dark red. She remembers going from the recovery room to a room “down the hall,” and she remembers walking with a pole with the intravenous hooked up to her.

13. In the room itself, she recalls there was a Chinese man, and her mother and father were in the waiting room. She recalls asking for her baby, but the staff would not give him to her. There was “a black lady” also in the room and other visitors. She was dozy for a long time, likely for most of that morning, and thinks that every time she woke up, she received a needle with Demerol. She said she

threw up from the Demerol and was “dozy in and out”. She remembers eventually seeing the baby and what he looked like. She thinks the IV was on her hand and that the pole was silver. She recalls seeing blood on her hand. She believes the staff had to put another needle in, and remembers bleeding. She remembers there were three bags at different times and one was square with blood in it. She remembers one long bag with “clear stuff in it,” and the bag of blood was smaller. She said she thinks there were three bags but was not really sure. She testified that the staff changed the bag of blood and the thinks she had three units of blood. She does not remember how long each transfusion took and she does not recall if the last unit was before or after she saw her baby. They also gave her antibiotics and she recalls her arm was swollen and they put cold packs on it.

14. When asked whether she recalled receiving an IV before the procedure she said she thinks she did.

15. The claimant was visited in the hospital by her friend JM. The claimant’s parents also visited, but they are no longer alive. The claimant has known and been a close friend of JM for over 21 years as of the time of the hearing. They lived in an attached house beside each other in Toronto, and they used to have coffee and tea together. Later, both moved to another community outside Toronto. According to the claimant, JM visited her on the first day at the hospital, September 19, and did not stay long, perhaps a half hour. The visit took place

not in the recovery room, but in the patient's room. The claimant recalled that the nurse who treated her was someone she had known in school, and the claimant was shocked to see her there. The claimant said she asked JM "awhile back when I got these papers" if she remembered [the blood transfusion], and she said she did. The claimant said that this conversation likely took place in March of 2007, and then again about a week prior to the hearing.

JM's Evidence

16. JM testified that she and the claimant have been best friends for years. The friendship began around 1984. They met through a friend and were almost like sisters. For the past few years JM lived close to the claimant, mostly in Scarborough for a long time. The families were not friends, but her daughter and son were friends with the claimant's children. In the summers they were at the beach at each other's places. Whatever beach they decide to go to, they have a trailer park and both have trailers there where they spend lot of time every weekend in the summer.

17. JM said that when she went to the hospital to see the claimant on the afternoon of September 19, she saw the claimant receiving a blood transfusion. She saw the bag hooked up and the blood going into the claimant and asked why she was getting a blood transfusion. All the claimant told her was that she had lost a lot of blood. JM saw only one bag of blood during her visit, which was about a half hour. JM was there alone and saw no one else. When she was leaving, the

claimant's brother was coming in. JM went to the room where the babies slept, and saw the claimant's baby.

18. JM thought the claimant raised the issue of her blood transfusion in 2007. JM said the claimant told her she had gotten "Hep C" from the blood transfusion and asked if JM would give a statement if necessary. The claimant asked what JM remembered. JM replied that all she remembered is that when she came to see the claimant, the bag of blood was hooked up. When asked how long JM had known that the claimant had Hep C, she responded that the claimant told her she had filed a claim but "she never really talked about it before that". Very little evidence about JM's knowledge of, and involvement in, the claimant's disease, or her knowledge of this claim, or her knowledge or involvement in the legal issues in this case was presented or was forthcoming under cross examination.

19. JM knows the claimant's brother and sister but never discussed this issue with them.

20. JM thinks there were perhaps six beds in the patient's room but could not remember if there were other people there and did not remember the layout of the room.

21. JM recalls that the claimant was hooked up to the IV on the pole and that the claimant could walk and take it with her. They went down the hall to a lounge to smoke, and the claimant took the bag of blood with her. The claimant expressed

nervousness about the blood transfusion at the time, but JM does not remember that the claimant was “dozy.” JM herself had received two blood transfusions in the past. She described the bag attached to the claimant as the normal bag that blood comes in "10 x 4” and it was clear so that she could see that there was blood in the bag.

Carol Millar’s Evidence

22. Evidence was given with respect to the medical records by Carol Millar, the representative of the administrator and a qualified nurse. The procedure in question was a lower segment caesarian section. There is space on the medical record for a reason for a transfusion to be entered, and there is no entry there. The records clearly show that a cross match request for blood was made. This is a routine request and is done in case blood is needed. If blood was given, Millar testified one would expect to see a note on the bottom half of the patient’s chart with the signatures of two nurses. The standard of procedure is that two nurses check the blood type and both sign the requisition.

23. The hospital records contain an entry providing for the administration of 125 cc per hour of Demerol and femergen, which is pain and anti-nausea medication, after the caesarian section. There is a record of an order for an antibiotic medication, and medication, on subsequent days, was prescribed for pain and to assist in sleeping. Miller testified that it is standard practice, when the abdomen

is opened, to prescribe antibiotics as a prophylaxis because of the risk of infection, and it is administered three times.

24. Tests were done to measure hemoglobin and to see whether blood was required by the patient. The records indicate that the claimant's reading on the test was 136 on September 18, and normal would be a range of 116-155 or 165 for a female. This level dropped to a reading of 103 on September 21, which is the only other date a test is recorded in the records. Miller testified that in her experience, while this reading was below normal, such a drop is normal, and is the reason the claimant was put on iron medication later in her stay. This level of hemoglobin is not something that would normally require a transfusion, according to Miller. She noted that if a transfusion had been given on September 18, then the hemoglobin reading would have been checked again on September 19, and there was no such record. In other words, I understood that if blood was administered on September 19th as alleged by the claimant, then a test would have normally been administered the next day to ensure the transfusion had the desired effect. There is no evidence of such a test being administered until September 21.

25. According to Miller's understanding of the medical records, the physician's record of the procedure recorded that two cups of blood was lost. Miller testified that she did not think this was considered excessive, and it is equivalent to a little less

than two units of blood. This level of blood loss is not minimal but she estimates that it also includes other fluids.

26. The medical records include an anesthetic record, which shows the site of the IV on the left hand. There is an area of the record for the administration of blood to be recorded, and this area was blank. There is also, here, however, no indication of blood loss at all as there was in the surgeon's records, so I give the absence of a record of transfusion here no weight. Also, if blood was administered after the procedure, Miller stated it would not be in the anesthetist's record.

Medical Records Obtained Post-Hearing

27. As indicated above, the medical records made available through the summons process confirm that the claimant was a patient at the hospital at the time and date claimed in respect of the birth of her son. However, not only is there no record of a blood transfusion, but the medical records and notes of Dr. Easton describe a failed epidural anesthesia, followed by general anesthesia. When delivery could not be accomplished without undue force being applied, there was resort to operative delivery by cesarean section. However, the records are clear that there was an estimated 500 cc blood loss and there is no record of a transfusion being necessary. There is a record of IV solution, ringer lactate, being administered. The location on the medical records where a blood transfusion would normally be recorded in the recovery room contains no reference to a transfusion. The usual trace-back protocols reveal no blood transfusion.

28. The surgeon's note records the following:

Surgeon's Report

Due to failed epidural anesthesia, the patient was prepared under general anesthesia in the usual fashion. The bladder was drained of approximately 50 cc of clear urine. The Kielland forceps were applied without difficulty and rotation to the occiput anterior from left occiput transverse diameter accomplished with ease. Traction however, failed to result in descent of the presenting part without undue force being applied. The decision was made to proceed with operative delivery.

The patient was reprepped and draped. The peritoneal cavity was entered through a low midline incision. The bladder peritoneum was incised through the bladder reflected inferiorly following which a transverse lower segment Cesarean section was carried out with delivery of a healthy male infant.

The placenta and membranes were removed intact. The uterine was closed in two layers using running locked #1 chromic catgut suture. The bladder peritoneum was reapproximated with 2-0 chromic catgut. Hemostasis was secured. The adnexa and posteriro surface of the uterus were normal. The abdominal wall was closed in the usual fashion using skin clips for skin.

Estimated blood loss was 500 cc. The patient tolerated the procedure well and left the operating room in good condition with a Foley catheter in situ. [sic]

CONCLUSION

29. I have not been persuaded in this case that a blood transfusion was administered to the claimant. I recognize that the hearing was held more than twenty-two years after the alleged transfusion, and one cannot expect with that passage of time a compelling account of the details surrounding the transfusion either from the claimant or from a witness. However, and making allowances for that obvious fact, at the end of the day I must be persuaded by the on the totality of the evidence that it is more likely than not that a transfusion was administered.

30. Here the claimant's evidence was somewhat scattered and I have also allowed for the fact that she did not have counsel to help organize her thoughts. She gave the strong impression, however, that following this difficult procedure, when she was subject to full anesthetic, she was medicated, in pain, dozy and not in the best position to determine the precise nature of the fluids that were administered to her. There is no doubt in this case that fluids were administered to her. The only issue, and the critical issue in this case, is whether any of those fluids were blood or were only the IV medications that were prescribed on the chart.

31. The burden of the claimant's evidence is that the transfusion was necessary because she had lost a lot of blood during the procedure. This puts additional focus on the evidence concerning the procedure itself. The notes of the surgeon are very clear, and while they describe the amount of blood loss, clearly on his

note, that loss was not sufficient to require a transfusion. One would expect that if it had been, the surgeon would have no reason for not noting the necessity of a transfusion in conjunction with his noting the amount of blood loss. In other words, given that the surgeon's notes directly address the issue of the fact of, and the quantum of, blood loss, if a transfusion had been administered or if it had been necessary to monitor the need for a transfusion in the aftermath of the procedure, one would expect some corresponding notation to be addressed in the surgeon's note. Moreover, all of the medical records are silent on the occurrence of a transfusion, where that information would normally be recorded if one had been administered. In the circumstances of this case, where the medical records otherwise portray an accurate record of the claimant's treatment, it is not likely that three units of blood would have been administered and that there would have been a failure to note the basic relevant information in the medical records, as required by normal practice.

32. In some cases, the overall circumstances might lend themselves to a conclusion that the particular medical records are untrustworthy or suspect, or simply not of sufficient weight given the credibility of other countervailing evidence. Here, for example, there was an indication of a lower level of hemoglobin with at least the possibility of a required blood transfusion, which might in other circumstances have made a transfusion at least possible. However, here the blood test which revealed a low level of hemoglobin occurred on September 21, after the alleged transfusion. In this case, while there is an allegation of blood being administered,

it is not merely that the records do not note any blood transfusion, but the surgeon's notes describe the blood loss and the absence of any reference to a transfusion leads to the strong conclusion in my mind that one was not required.

33. In this case, I conclude that the medical records, including specifically the surgeon's notes, accurately portray the procedure and medications administered to the claimant. The doctor's surgical records are clear about the procedure, about the amount of blood loss, and about the patient tolerating the procedure well. As set out above, the only evidence aside from the direct notation of the loss of blood during the procedure that is suggestive of a possible need for a transfusion is the low hemoglobin reading of 103, which is below normal for a female. However, that test was administered on September 21, and according to the claimant and to JM, the transfusion occurred on September 19. There is, therefore, no evidence from these medical records from which I could reasonably infer that a transfusion might have occurred.

34. Given the evidence from the medical records, is the evidence of JM such that it leads me to conclude, independently, or taken together with the evidence of the claimant, that a transfusion was administered on September 19th, 1986? Although the claimant was clearly dozy and somewhat confused at the time of the alleged administration of blood, JM was not. JM gave clear evidence of the administration of blood to her friend at the time of her visit to the hospital on September 19. Clearly, JM was aware that this evidence was required in order

for her friend's claim to succeed. I do not say that JM's evidence was not truthful, but I find it less credible to the extent it did not explain when and how JM learned of her friend's suffering from HCV infection, the possible relationship of the illness to the transfusion which JM says she witnessed, and how and what she learned from her friend regarding the legal issue in this case. Bearing in mind that JM testified that she and the claimant were such close friends, almost like sisters, one would have expected that if JM had been an eye witness to the injustice of a failure of the medical records to record the truth of the transfusion, her evidence about her involvement in the issue of whether there was or was not a transfusion would have been more extensive and more credible than what was presented. Instead, she testified that the two of them merely discussed it twice and with great brevity. I did not find that convincing.

35. At the end of the day, I am simply not persuaded that a transfusion took place.

36. The claim is dismissed.

DATED at Toronto this 4tht day of December, 2012

C. Michael Mitchell
Referee