

CLAIM #14390

Province of Infection: Ontario

Province of Residence: Ontario

IN THE MATTER OF A REFERENCE
TO REVIEW THE DECISION OF THE ADMINISTRATOR
UNDER THE HEPATITITS C (86-90) CLASS ACTIONS SETTLEMENT

REFEREE: Reva Devins

APPEARANCES: Claimant
Colleen E. Butler, Counsel for the Claimant

Belinda A. Bain, on behalf of the Fund
Carol Miller

DECISION

1. The Claimant, an Ontario resident at the time of infection, submitted an application for compensation as a Primarily Infected Person under the 1986-1990 Hepatitis C Settlement Agreement (the “Settlement Agreement”) HCV Transfused Plan (the “Plan”). Her claim was approved in March 2005 and benefit payments began.
2. In November 2013 the Claimant was advised that a donor of blood she received in 1982 had tested positive for HCV. She was further advised that, in accordance with Article 3.04 of the Settlement Agreement, the Administrator rejected her previously accepted claim because she had not proven that she was infected for the first time by a blood transfusion received during the Class Period.
3. The Claimant requested that a Referee review the decision of the Administrator. An in person hearing was convened, however, the matter was adjourned to permit further inquiries of the Canadian Blood Services (“CBS”). The parties subsequently provided their final submissions in writing.

Settlement Agreement

4. For the purposes of this Reference, the relevant provisions of the Plan provide:

3.04 Traceback Procedure

- (1) Notwithstanding any other provision of this Agreement, if the results of a Traceback Procedure demonstrate that one of the donors or units of Blood received by a HCV-Infected Person or Opted-Out Infected Person before 1 January 1986 is or was HCV antibody positive or that none of the donors or units of Blood received by a Primarily-Infected Person or Opted-Out Primarily Infected Person during the Class Period is or was HCV antibody positive, subject to the provisions of Section 3.04(2), the Administrator must reject the Claim of such HCV Infected Person and all Claims pertaining to such HCV Infected Person or Opted-Out HCV Infected Person including Claims of Secondarily-Infected Persons, HCV Personal Representatives, Dependents and Family Members.

- (2) A claimant may prove that the relevant Primarily-Infected Person or the Opted-Out Primarily Infected Person was infected, for the first time, with HCV by a Blood Transfusion received in Canada during the Class Period or that the relevant Secondarily-Infected Person or Secondarily-Infected Person who opted out of the Class Action in which he or she would otherwise be a Class Member was infected for the first time with HCV by his or her Spouse who is a Primarily-Infected Person or Opted-Out Primarily-Infected Person or Parent who is a HCV Infected Person or Opted-Out HCV Person, notwithstanding the results of the Traceback Procedure. For greater certainty, the costs of obtaining evidence to refute the results of the Traceback Procedure must be paid by the claimant unless otherwise ordered by a Referee, Arbitrator or Court.

Facts

5. The Claimant received two transfusions, one in December 1982 and another on August 25, 1989; she tested positive for the Hepatitis C antibody on September 25th, 2003.
6. On March 22, 2005, CBS wrote to the Administrator, enclosing a Traceback Report that indicated that the donor of a unit of blood that the Claimant received on August 25, 1989, tested positive for HCV with respect to blood donated on June 5, 1990. There were no positive test results at that time for the donor or units of blood that the Claimant received in 1982. The Claimant was therefore approved for compensation under the Plan, at disease level 5. She received a fixed payment, which included reimbursement for drug therapy and out of pocket expenses; she continued to receive further payments for reimbursement of expenses and loss of income.
7. On August 13, 2013, CBS advised the Administrator that an updated Traceback report showed that the donor of blood received by the Claimant in 1982, donated blood on July 27, 2013 and subsequently tested positive for HCV. The parties requested further information from the CBS regarding the donor and it confirmed that the subject donor had not made any donations between December 2, 1982 and July 27, 2013. Therefore, CBS was not in possession of any other results. Nor did

they have any further information regarding the HCV status of the other recipient of the 1982 blood donation from this donor.

8. The Claimant testified that she had a blood transfusion in 1982 during the course of surgery to extract her wisdom teeth. She had some bruising and swelling immediately following the surgery, but experienced no other symptoms. She subsequently worked full time, married and became pregnant with her first child in 1989. The pregnancy was normal, with no unusual symptoms. The Claimant was investigated for a blood disorder that caused prolonged bleeding, however, she had no other complications during the pregnancy. She delivered her child by emergency Caesarian section, during which she received blood products.
9. The Claimant became pregnant with her second child in 1993 and began to develop lesions and experience intense itching on her arms and legs towards the end of her first trimester. She was eventually diagnosed with cholestasis of pregnancy. The condition improved slightly after the delivery of her child, but did not resolve fully for several years. Her doctors had expected the condition to abate after delivery and told her that they did not know why she was continuing to experience symptoms.
10. In 2003, the Claimant's doctor told her that she might have been exposed to HCV and advised her to be tested for the virus. She tested positive, received treatment and it was only after her HCV treatment in 2004 that her lesions and itchiness entirely went away.
11. The Claimant also submitted copies of three medical articles¹ discussing the relationship between Intrahepatic Cholestasis of Pregnancy (ICP) and Hepatitis C infection. The Claimant did not call an expert to testify to these findings and it was agreed that they would be submitted for information purposes only. The articles

¹ Intrahepatic Cholestasis of Pregnancy as an Indicator of Liver and Biliary Diseases: a Population-Based Study, Ropponen et al., *Hepatology* April 2006: 723-728; Intra-hepatic cholestasis of pregnancy in hepatitis C virus infection, Paternoster et al, *Acta Obstet Gynecol Scan* 2002: 81: 99-103; Intrahepatic cholestasis of pregnancy and hepatitis C virus: A criminal conspiracy? Erlinger, *Clinics and Research in Hepatology and Gastroenterology* (2014):38, 250-251.

confirmed that the cause of cholestasis of pregnancy was unknown and that it is an extremely rare condition, observed in approximately 1% of pregnancies. Symptoms and abnormalities typically resolve within, at most, 4 weeks of delivery, but may reoccur in subsequent pregnancies. All three articles also identified an association between Hepatitis C and ICP and concluded that ICP during pregnancy can be an indicator of more serious underlying disease.

Submissions

12. Counsel for the Claimant submitted that the evidence regarding the Claimant's symptoms during her pregnancy establishes that she was most likely first infected in the Class Period: whereas she had no symptoms in her first pregnancy in 1989, she was diagnosed with ICP, a condition connected to Hepatitis C, during her second pregnancy.

13. Counsel also argued that there is no conclusive proof that the 1982 donor was infected at the time of donation. Counsel suggested that an inference should be drawn that the 1982 donor, if positive for the HCV antibody in 1982, would have surfaced in the system earlier than 2013. Moreover, while there is a delay of 31 years between the 1982 donation and the donor's subsequent positive HCV test, there is no delay with respect to the 1989 donor, who tested positive ten months after the donation that was transfused to the Claimant.

14. Fund Counsel submitted that the Administrator's decision to deny the claim must be assessed on the strict wording of the Settlement Agreement. Article 3.04 of the Plan requires the Administrator to reject the claim where the Claimant received a blood product prior to the Class Period from a donor who tested HCV antibody positive, unless the Claimant can produce evidence to establish on a balance of probabilities, that he or she was infected for the first time by a blood transfusion received in Canada during the Class Period.

15. Fund Counsel took the position that the evidence adduced by the Claimant in this case was insufficient to establish that she had been infected with HCV as a result of the blood transfusion she received in 1989. Counsel did not dispute the evidence provided by the Claimant regarding the symptoms she experienced during her two pregnancies. Counsel also acknowledged that the journal articles that the Claimant submitted suggest an increased incidence of ICP among women infected with HCV. However, Counsel submitted that the journal articles were not introduced or interpreted by experts and should therefore be given very little weight.
16. Fund Counsel also disagreed with the suggestion made by the Claimant's counsel that an inference should be drawn that the 1982 donor, if positive, would have surfaced before 2013. The donor did not donate blood between 1982 and 2013 and was previously listed as untraceable.
17. With respect to the relevant case law, both counsel agreed that the approach taken to the interpretation of Article 3.04(2) by Mr. Justice Winkler in Decision 137 is to be preferred, so that it is open to the Claimant to rely on the exception set out therein.

Decision

18. The Claimant applied for compensation under the terms of the Hepatitis C 1986-1990 Class Action Settlement. The terms of the settlement provide a detailed outline of who is eligible for compensation from the Fund and how eligibility is established. Generally, it is intended to provide compensation to individuals who were first infected with HCV from the Canadian blood supply during the Class Period, defined as January 1, 1986 to July 1, 1990. Individuals infected outside of that period, or through another source, are not eligible for compensation.
19. The Claimant in this case received two blood donations: one in 1982, which is outside of the Class Period, and another in 1989, within the Class Period. The 1989 donor tested positive for HCV several months after the Claimant received their

blood products. The Traceback on the 1982 donor was inconclusive and the Claimant was accepted as an eligible Class Member.

20. All of that changed in 2013 when the 1982 donor donated blood again and tested positive for HCV. Based on the directive in Article 3.04(1), the Administrator concluded that the Claimant was no longer an eligible Class Member. Counsel for both the Claimant and the Fund agreed that in order to qualify as an eligible Class Member, the Claimant must prove, on a balance of probabilities, that she was first infected with HCV as a result of her transfusion in 1989, in accordance with Article 3.04(2)².
21. Having considered the evidence presented in this matter and the submissions of counsel, I am satisfied that the Claimant has established that it is more likely that she was infected during the Class Period, notwithstanding evidence that the donor of blood that she received outside the Class Period tested positive for Hepatitis C in 2013.
22. I agree with Fund Counsel that I should not draw any inferences regarding the likely timing of the 1982 donor's infection; that is, whether it was before or after the Claimant's receipt of their blood. The CBS is the only source of infection data and the 1982 donor had no contact with the agency between 1982 and 2013: there was no record of donation and they were previously listed as untraceable. Nor was there any other historical data of assistance, such as the HCV status of other recipients of blood products from the 1982 donor. It is impossible to know why the 1982 donor stopped donating blood or why they returned in 2013. In any event, there is simply nothing on which a proper inference can be drawn regarding their likely state of infection in 1982.

² While there have been contradictory decisions regarding the proper interpretation of Article 3.04(2) and whether it was available in circumstances where there is a positive traceback in respect of a pre-class donor, both Counsel agreed that the decision of Mr. Justice Winkler in Decision No. 137 is to be preferred.

23. While the mere passage of time does not establish that one donor was more likely to have infected the Claimant than the other, I do not consider it to be totally irrelevant. There is no evidence that the first donor was infected in 1982 when the Claimant received their blood and no evidence of infection for over 30 years. In contrast with this gap, the donor of blood received by the Claimant in 1989 tested positive for HVC within a year of donation. Although I appreciate that the first donor did not donate blood between 1982 and 2013 and that CBS had no opportunity to test their blood, the extremely lengthy intervening period does leave significant room for a subsequent date of infection whereas there is a known window of infection for the second donor that is proximate in time to the Claimant's transfusion in the Class Period.
24. If there was no other evidence to support the conclusion that the Claimant was more likely infected by the subsequent donation of blood in the Class Period, then the passage of time, even three decades, would not satisfy the requirements of Article 3.04(2). However, in this case there is other evidence to support my conclusion. After the Claimant's transfusion in 1982 she had a normal pregnancy with her first child, with no unusual symptoms. After her second transfusion, from a known HCV infected donor, the Claimant became pregnant for a second time. During this pregnancy she experienced cholestasis of pregnancy (ICP), an unusual condition that has been flagged in the literature as a possible marker for the presence of HCV. The condition did not respond in the normal manner and did not spontaneously resolve post pregnancy, but persisted until the Claimant was treated for HCV.
25. Fund Counsel submitted that I should give little weight to the medical journals chronicling the increased likelihood of ICP in pregnant women with HCV because it was submitted as information only and was not tendered by an expert who could explain its significance. I accept that I must be extremely careful in considering this information, however, as Fund Counsel has acknowledged, I find that I am entitled to consider it in assessing the likelihood that the Claimant was infected for the first time by blood she received in 1989.

26. The very significant passage of time between the pre-class blood donation and subsequent identification of the donor as HCV positive inevitably leaves the Claimant at a disadvantage in marshaling evidence to establish the likely timing of her first infection. The best available evidence is the unique circumstances of the Claimant's health before and after receiving the two blood transfusions and the medical information regarding her symptoms.
27. When the evidence is viewed in its entirety, I am satisfied that it is more likely that the Claimant was first infected during the Class Period when she received blood products from a donor confirmed to be infected with the HCV antibody shortly after the Claimant received their blood. This conclusion is consistent with the symptoms that the Claimant experienced in her two pregnancies and the literature suggesting a link between those symptoms and HCV.
28. I have determined that the evidence is sufficient to establish on a balance of probabilities that the Claimant was more likely to have been infected by the blood transfusion she received in 1989, which was during the Class Period. I therefore find that the Claimant is an eligible Class Member and is entitled to continue to receive compensation under the Plan. I will remain seized in the event that there are any issues arising from the interpretation or implementation of my decision.

Dated February 11, 2016

A handwritten signature in black ink, appearing to read "R. Devins", with a long horizontal flourish extending to the right.

Reva Devins, Referee