THE 1986-1990 HEPATITIS C CLASS ACTION SETTLEMENT

CLAIMANT REPRESENTATIVE: No. XXX

REQUEST FOR REVIEW BY REFEREE: C. Michael Mitchell

1. The major legal issue in this case is whether hearsay statements concerning the occurrence of a blood transfusion are admissible for the truth of their contents as a traditional exception to the hearsay rule, or whether they are admissible alternatively as a principled exception to the hearsay rule.

2. The claimant was an ironworker aged XX in August 1986 when he suffered a serious fall at work at an industrial park just outside of _____. The fall was more than 20 ft. and a load of heavy material fell on him pinning him to the ground. He suffered, among other injuries, fractures of the right and left tibia-fibula. The accident was considered to be very serious at the time The claimant's close friend, BH, who was a fellow ironworker but who was not at that worksite that day, was called by the Union to attend at the hospital because of the severity of the injuries He did so and recalled discussions at the hospital as to whether the claimant would lose his legs in the surgery that was about to take place, and his concern over the claimant's spouse making these decisions because she was a drug user whose judgement he did not consider to be reliable. The claimant's sister, CK, testified that she also attended at the hospital because of the severity of the injuries sustained by her brother, and she recalled the crying and consternation of her mother and father who were there as well. The claimant had surgery the day of the accident and surgery. He remained hospitalized at the _____ Hospital in _____ for many weeks. The injuries sustained in the accident had a profoundly long-term negative impact on his life making the claimant unable to work as an Ironworker and also harming his family and his marriage. He also has had significant physical and health problems as a result.

3. In 2019, 33 years after the accident, the applicant learned that he had Hepatitis C. Other than the alleged blood transfusion, which is the subject matter of this proceeding, which he recalled having in conjunction with his surgery and hospitalization in 1986, he had no other risk factors for sources of infection, such as IV drug use or intimate contact with infected persons.

4. The applicant filed a claim with the Administrator for compensation but the traceback material reflected no evidence of a transfusion. In response to the Canadian Blood Service request for hospital records of a transfusion, the Hospital indicated there had not been any hospital visits by the applicant before 1989 and that all admissions had been checked. The Administrator, having no evidence of a blood transfusion had no choice but to deny the claim from which decision the applicant appealed.

5. The applicant was rightly outraged at the claim by the _____ Hospital that he had never been admitted to the hospital before 1989, when he spent such a significant period of time there in 1986 and had surgery for a workplace injury that was life-changing in addition to being hospitalized for weeks.

6. The claimant applied for and received Workers Compensation benefits (now WSIB) in respect of the accident. He has a history of litigation before the Workers Compensation Appeals Tribunal (WCAT) and there were files with some of his hospital records dating back to the time of the accident in 1986 which the applicant was able to obtain. Those records left no doubt as to the facts of the accident, the serious extent of the injuries sustained, and the surgery that followed but the records did not contain any indication there had been a blood transfusion. They also did not contain other records as counsel for the administrator concedes: “The records are not complete as things such as nurses’ notes, order sheets, etc., were either never obtained or maintained by WCAT”.

7. In the period prior to the hearing in this matter, the Referee summonsed the hospital to produce the medical records of the applicant, among other things in the period when he was clearly admitted and had surgery, but it advised that neither campus of the hospital retains records that go back to the 1980s. In short, they were destroyed.

8. In the hearing in this matter, the claimant called evidence to attempt to corroborate his claim that he had a blood transfusion in 1986. He called his sister, and close friend, BH as witnesses, and they both testified in the absence of the applicant and each other, prior to the applicant testifying. This evidence was not before the Administrator when it made its decision to deny the claim.

9. The claimant says he asked the surgeon, Dr. K, if he had medical records concerning his treatment of the claimant but he did not. The claimant said Dr. K had no involvement in the transfusion. The Board sent a summons to Dr.R who the applicant said was his family physician at the time of the accident and who he said attended to him at the hospital after the surgery and on the day of the transfusion and who made the central statement in issue here. The claimant also said that he had a close personal relationship over the years with Dr. R as a result of numerous interactions between Dr. R and the claimant and his family. The claimant testified he met with Dr. R personally before the hearing and was told by Dr. R that he had no information on the claimant and acted in a way that was consistent with his not knowing the claimant. The claimant speculated Dr. R was suffering from a neurological disability. In a letter in response to the summons, Dr. R denied having any records for this patient in the period from 1986-1990 or information to indicate that he was involved in his medical care at that time. No one called Dr. R as a witness.

10. Leaving aside the evidence of the applicant that Dr. R is mistaken in his not recognizing the claimant or not recollecting his surgery and hospitalization, and is perhaps suffering from a neurological disability, it is impossible to accept Dr. R's statement in his letter that suggests he was not involved in his care, as there is independent documentation from the fracture clinic of St. Joseph's Hospital in Windsor of an appointment with Dr. K and the claimant on September 3, 1986, in the month after the surgery. Dr. K sent a copy of his report from that appointment to the Workers Compensation Board and also to Dr. R demonstrating clearly the involvement of the latter in the care of the claimant at that time. I, therefore, reject any suggestion that Dr. R was not involved in the care of the applicant at that time and his letter in response to the summons leads me to conclude that no weight is to be given to Dr. R's lack of

medical records for the claimant and no adverse inference can be drawn against the claimant because of the failure of Dr. R to testify in this proceeding. (The claimant testified Dr. R was the maker of the hearsay statement in issue in this proceeding). I have also considered this lack of reliability of Dr. R's memory as relevant to the issue of the necessity for the admission of hearsay evidence when assessing the fact that Dr. R did not testify as to the events on the day of the alleged transfusion.

11. The claimant recalls falling being the cause of the accident and his injuries, being taken by ambulance to the hospital, and being given morphine. He believes his lungs were inflated so he could breathe better and that he was not in pain but in shock. He recalled his mother, father older sister "DC", and his friend BH there. He recalls awakening in the night after the surgery around 2-3 a.m., being thirsty, only a nurse present, drinking too much water, and vomiting. Dr. K came to see him in the morning and explained the surgery and that it "went ok" and that he had a long road of recovery ahead of him. Dr. R came in later – the two doctors were not together.

12. His memory is that the next day or the day after that, he was transfused. He does not think it was after the first night and it could have been one of the following days. He thinks he was in a different room from the first night and that they "had me clouded up". He thought the room was likely a semi-private room but he did not recall another patient being there. Dr. R came into the room very early, just getting light, around 7:30 or 8 a.m. His father was already in the room. His father came in and said his hemoglobin was low- and said that the claimant looked grey. Dr. R was there with an orderly and a nurse and his father. The claimant was aware he was to be given a blood transfusion and he was afraid of AIDS at the time and told Dr. R he did not want the transfusion. Dr. R reassured him the blood was tested for AIDS. Within a minute or two after that, he said his sister and BH appeared while he was being hooked up for the transfusion and Dr. R told them he was having the blood transfusion and they left. He had the transfusion and almost immediately he felt a lot better. He got the blood "Dr. R had said he needed so badly". His dad remained there while he had the transfusion. His father has since passed away.

13. The claimant found out he was diagnosed with Hepatitis C for the first time in 2019. He told his doctor at that time, Dr. C, that he must have contracted the disease from the transfusion he had in 1986 because there were no other possible causes in his view.

14. The claimant's older sister, "DC" testified. Sometime in mid-August in what she thinks was 1986, she received a call from her mother that her brother had been seriously injured and had fallen from a building. She rushed to the hospital and found out the extent of his injuries. She recalls knowing the injuries were pretty severe and she recalls the events at the hospital as being traumatic. Late that night she went home as she had two young children.

15. She thinks she tried to go up to see him the next afternoon, but she could not see him, and he was not awake. The next time she went up was early one morning after the children were taken care of. It was around 8 a.m. and she "ran into" BH, her brother's good friend, at the elevator, and they went up to see him together. Her father was there and she could see him on the other side of the bed. An aide and a nurse were also there. Her Dad was going to be coming out of the room too, but he was there. Her dad was trying to give the blood the claimant would receive. She saw someone in the room whom she was told later was Dr. R. She does not recall where he was standing but he told her and BH they could not come in as they were going to be doing a blood transfusion. He said to come back later, perhaps around noon. They said OK. Later in her evidence, she said that when they initially tried to enter there was a nurse there and they were told by someone else, an orderly or a doctor that they could not come in now as they were getting ready to perform a blood transfusion. She did not notice any equipment and was not in the room enough time to notice. She did not see them transfusing the blood – they (she and BH) were just in and out. They went downstairs for coffee, had something to eat, and returned around 11:30 a.m. After they returned to the room there was a conversation with her brother that he had lost a lot of blood in the surgery and his hemoglobin was low. She did not recognize Dr. R when she saw him as she did not know him, but her brother told her after who it was.

16. With regard to how she came to testify in this proceeding, her brother told her about the refusal of his compensation claim and she offered to help him because she and BH knew about the transfusion. She felt badly for her brother over the refusal of his compensation claim and wanted to help him, but she was not going to lie for him. The first time she talked to BH about what she and he recalled was the morning of her testimony and they did not discuss much. BH said to her do you remember the day they could not see the claimant because of the blood transfusion, as he recalled it too.

17. On cross-examination, she said she went to see her brother on the morning of the transfusion a day or two after the surgery. She recalls he was hooked up on an IV treatment but can't remember if that was the day they tried to see him in the morning before the transfusion. She did not remember when she returned to the room after the transfusion whether her brother was in good shape or under anesthetic. She was sure he was on pain medication. When she went into the room the first time early in the morning she did not converse with her brother and cannot describe the room, and whether it was an exterior or interior room. She and BH went downstairs to get coffee while they waited. They also went outside as both smoked. They waited around 4 hours until around noon before they went back upstairs. She could not remember when she found out her brother had contracted Hepatitis C.

18. BH testified he had been and still was the best friend of the claimant. They both apprenticed in the Ironworkers Union and traveled around the continent working and supporting each other from 1980 onwards. The Union called him on the day of the accident as they knew he and the claimant were best friends. It was a serious accident and BH went to the hospital right away. He said they would have amputated the claimant's legs without his being there. He ran to the claimant's wife outside the trauma room, and she was not in any state to make a decision, so he called the claimant's Dad. He remembers saying he did not think it was right for the spouse to decide as she was on drugs, and he could tell she was a heavy user. The doctors wanted to amputate. He recalls the claimant's Dad yelling they were not going to take his legs. The claimant had surgery. He thinks he stayed for most of the night.

19. BH is certain the next morning he and CK went up to see the claimant together, but this was accidental, not planned. He was not sure what condition the claimant was in. They would not let them see him as he was going to have a transfusion. He did not see him at that point but saw his Dad. His sister was upset. When they got up to the room, he and the sister were not allowed in. People were going into the room, and they stayed outside. One of the physicians said something about having a transfusion and that we could not see him until it was completed. It was a doctor (male) who said it – he looked like a doctor. It was not Dr. K who he knew from playing hockey. He has no recollection of opening the door and going into the room. He could not say where the sister and he were standing but it was just outside the room. He was pretty sure he saw the claimant's Dad. When he and the sister were approaching the room there was only the hospital staff (including a doctor), and his father. He did not see a cart of packages of blood or anything like that.

20. BH clarified that he and the sister came back to the room just after noon. It was 8:40 to 9 a.m. when they originally went downstairs. When they first arrived, it was 830 or 9 a.m. Two or three hours later they headed back up. He said he was almost sure it was the morning after the surgery. "it had to have been. Just had to have been. When I ran into DC, it was the day after the surgery - not two days."

21. When they went back to the room they went inside and saw the claimant. He could not remember but thinks he talked to the dad about whether the surgery worked, whether they could save his legs and whether the claimant would be crippled. The claimant was worried about AIDS in the blood but said they had said scanned it. BH told him not to worry about it. He thought it was strange they had not used the father's blood for the transfusion, but he did not know what happened. He believed the room was semi-private, but the claimant was the only patient.

22. Concerning how he came to provide evidence in this case, he said the claimant asked him. They had not seen much of each other as the claimant was living up north. The claimant asked if BH remembered that he was with his sister and if BH remembered

about the transfusion. BH said he remembered the AIDS part and that BH and the sister were not let into the room because of the transfusion.

23. BH said he did not talk to DC about his evidence except they discussed it on the day of the hearing - that they were at the hospital together and it was evident they both remembered the same thing about that morning.

24. On cross-examination, BH reiterated that he arrived at the hospital on the day of the alleged transfusion at around 830- 9 a.m. and they did not go back upstairs until closer to 1130-12. He was not sure if the claimant had an IV. There were quite a few tubes. There was never any discussion about how many units of blood the claimant received. After they went back to the room, the claimant mentioned the transfusion and that he was worried about AIDS. The claimant was in the hospital for over a month and BH came to visit quite a bit. He never testified in the WCAT cases and was never asked to. He learned about the Hep C diagnosis 6-7 months ago.

25. The claimant's current medical doctor, Dr. C, produced her latest notes on January 29, 2022. Her notes first mention a transfusion as a risk factor for HCV on January 6, 2022, after the evidence, in this case, was concluded. Other notes refer to HCV and a "previous history of work injury" but not to a transfusion. In a written communication to the Referee she conveyed the following:

> Please be advised that The Claimant and I had an initial conversation regarding his hepatitis C diagnosis on December 17, 2019. At this visit, his son was also present. As I am sure you can imagine, the visit was quite emotional for the patient and his son provided support. We had a long discussion regarding possible risk factors for hepatitis C contraction and the patient remembered receiving a transfusion after he suffered a workplace accident. This was the only identifiable risk factor in our discussion.
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> The Claimant requested that I communicate this note to you directly.

DECISION AND ANALYSIS

26. Admission as a class member is governed by the Settlement Agreement and accompanying Plans. This claim is governed by s 3.01(2) of the Transfused Plan which reads:

> (2) Notwithstanding the provisions of Section 3.01(1)(a), 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.

27. The Rules for Arbitration/Reference established under the Agreement provide as follows:

> 19. If an oral hearing with evidence is requested by one or more of the parties because the requesting party wishes to lead oral evidence, the Arbitrator/Referee orders an oral hearing with evidence, the following rules will apply, unless the Arbitrator/Referee makes an order to the contrary:
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> > (c) subject to issues of privilege, an Arbitrator/Referee may accept all oral or written evidence as the Arbitrator/Referee, in his or her discretion, considers proper, whether admissible in a Court of law or not;

28. The provision of s. 3.01(2) places the onus on the claimant to provide “corroborating evidence” of a transfusion which must be “independent” of the claimant or of a Family Member “establishing on a balance of probabilities” that he received a transfusion during the class period. The claimant has provided evidence from his sister and his friend.

29. Fund counsel made the following written submissions regarding the evidence of BH:

28. Chief Justice Winkler has opined that only the independent evidence may be considered when weighing the criteria in section 3.01(2). In Claimant File No. 1382, he said:

> "Given the express wording of s. 3.01(2), the only interpretation it will be bear (sic) is that the evidence independent of the personal recollection of the Claimant or a Family Member is the determining factor. If the independent evidence establishes on a balance of probabilities that the Claimant received blood in the class period then the claimant has met the burden. If not, then the Claimant must be rejected. The personal recollections of either the Claimant of Family Member are not to be considered." (Decision 1382, para 15, attached)

29. Given the court's interpretation, the requirements of s 3.01(2) can only be met if [BH's] evidence can establish a transfusion on a balance of probabilities. [BH] testified that he never saw the transfusion. He never saw into the room. He says he was told by a person he believed to be a doctor that there was a transfusion taking place (which is not quite consistent with the sister who said a transfusion was to take place) and he later spoke to [the claimant] about his concerns regarding HIV and a transfusion. However, there is no first-hand evidence by {BH] as to seeing the transfusion. The evidence is second-hand at best and does not provide the requisite proof to meet the requirements of the agreement or s. 3.01(2).

30. A similar situation arose in Claim File No XXX. In that case, the claimant sought to prove the transfusion using "corroborating evidence". He testified his girlfriend would provide evidence to what she was told by hospital staff about his transfusion of which there was no other admissible evidence. The Referee accepted that the girlfriend would testify to having been told of the transfusion even

though she was not called as a witness. The claim was denied for other reasons and the claimant sought a review of the decision. On the judicial review, Justice Winkler commented on the concept of "corroborating evidence" as follows:

> "With respect to the concept of "corroborating evidence", I am troubled by the referee's decision with respect to the consideration of testimony that might have been given by a witness who was not called to testify. Apparently, there was a statement made by the claimant that a former girlfriend would testify that she was told by hospital staff that the claimant had been given a large transfusion of blood during one of his hospital visits. The claimant's former girlfriend was not called to testify. The referee indicates in his reasons that he "accepts" that the claimant's girlfriend would testify as stated by the claimant but ultimately finds that any such evidence would be contradicted by the hospital records and the expert evidence. In this respect, the referee erred in considering what amounted to double or possibly triple hearsay as evidence at all. I would not regard it as meeting the threshold of corroborating evidence as contemplated by section 3.01(2). However the error was in favour of the claimant and did not prejudice him as a result. (emphasis added) (Decision XXX, para 19, attached)

> 31. Like the evidence in the above case, [BH's] evidence is not direct testimony of a transfusion. He did not see the transfusion. He was only told that one was to take place by a person he believed to be a doctor. Any evidence from Mr. [claimant] afterward of his concern of HIV would also be hearsay and would not provide evidence of a transfusion. While her testimony is excluded as she is a Family Member, Ms. [CK]'s evidence is also hearsay.

30. I agree with the comments of Chief Justice Winkler in File XXX that evidence of the independent witness is the determining factor and the evidence of the claimant and

CK cannot be considered when it comes to determining whether a transfusion occurred. Fund counsel suggests the evidence of CK is excluded and I do not accept this submission. The section does not provide that the evidence of the claimant or family members is inadmissible, nor does the Chief Justice. Indeed, in some circumstances, the independent evidence must, under the words of section 3.01(2) be corroborative and there must therefore be some evidence of which it is corroborative. Therefore, the evidence of the claimant and the sister, while it cannot be determinative and not considered when it comes to determining if there was a transfusion, is necessary in this case in order to have some evidence)that can include from the claimant and/or his sister), that a transfusion occurred, which is capable of being corroborated independently. Thus, while I cannot under section 3.01 (2) accept the evidence of the claimant as determinative or even persuasive that there was a transfusion, I can and do accept the evidence that he was transfused but only for the purpose of it being corroborated by the evidence oi BH. For example, I do not find the evidence of the claimant, in this case, to be not credible, but if I did, and found it was deceptive and an invention to advance the claim, whether there was corroborating evidence or not would be irrelevant because even if the independent evidence was credible, I would not give effect to the claim in circumstances where I did not believe the claimant that a transfusion occurred. As another example, where the independent evidence is that the person saw the transfusion occurring, the evidence of the claimant that s/he was transfused might be unnecessary, but it still would not be inadmissible.

31. Aside from the evidence of the claimant that he was transfused, which I do not rely on as determinative or even persuasive to determine that there was a transfusion, there is a further question of whether the evidence of the claimant or his sister regarding other facts can be accepted, including that a doctor and in particular Dr. R was present when BH and CK tried to enter the room, and that a nurse and aide were also present. I do not understand the Chief Justice’s comment that the evidence of the claimant or family members is not to be considered to apply all of their evidence but to their evidence regarding whether a transfusion took place. If none of their evidence could be considered, their evidence would not be admissible at all which is not the case,

and indeed, as I have said, there must in this case be evidence from at least one of them that is capable of corroboration. That evidence, as I have already said, must be credible if the corroborating evidence is to be determinative, and the narrative facts other than those directly concerning the transfusion, from the claimant or his family cannot simply be ignored. For example, here, the evidence of the claimant that Dr. R was present and made the statement to the visitors about a transfusion taking place (or was about to take place) means that in determining the admissibility of the hearsay evidence I must consider whether efforts were made to obtain the evidence of Dr., which I have. I cannot do that exercise vital to determine the admissibility of the evidence, without taking into account the evidence of the claimant regarding the fact that Dr. R was present.

32. I find as a fact that it is more probable than not that there was a physician present in the claimant's hospital room when BH and CK approached and that it was Dr. R. BH saw and heard someone who looked like a doctor, and was not Dr. K, tell them they could not enter because they were going to perform a blood transfusion and they should return around noon. In a visit to a hospital room where a visitor is denied entry by someone dressed in a way that is consistent with being a physician, that is a reasonable conclusion. CK said a person who was later identified to her by her brother as Dr. R was the person who denied them entry, although she also said that person was not the nurse and was either an orderly or a doctor. The claimant said Dr. R was present and was the person who did not allow BH and CK to enter and made the statement about the transfusion taking or about to take place.

33. If I am wrong and the evidence of the claimant and his sister cannot be considered for any purpose and is essentially inadmissible on anything related to the event of a transfusion, that is still not fatal to this case. I find as a fact based on the evidence of BH alone that hospital staff prevented the entry to the hospital room of BF and CK and said that they were unable to enter because a blood transfusion was being administered or about to be administered and they should return around noon. Whether or not the statement was made by Dr. R or simply by hospital staff, there is the main question in this case as to whether that statement is admissible as a

traditional exception to the hearsay rule or on the basis that it comes within the principled exception to the hearsay rule.

34. In this regard, the Chief Justice's comments in File NO _____ are in my view not binding on me. First, the Referee found against the applicant on this point and so the comments of the Chief Justice are obiter dictum. The issue of the admissibility and use of the hearsay evidence was not before him. Second, the evidence of the potential witness, who never even testified, was theoretical and assumed. Unlike the actual evidence before me of the actual circumstances of this case, that potential evidence could not be evaluated as to whether it constituted an exception to the hearsay rule or whether it was sufficiently reliable and necessary that it would be admissible under the principled exception to the hearsay rule even if it did not meet one of the traditional exceptions. Here there was actual evidence and there is a specific context that I can evaluate. Third, in that case, no one noted the existence of Rule 19 which allows the adjudicator to admit evidence even if not admissible in a court setting.

35. Fourth, I concede that the decision of the Chief Justice makes clear he would not find the evidence to be even admissible, much less persuasive, as he considered it to be double or even triple hearsay and therefore presumptively inadmissible and not to be relied upon. Importantly, however, the view of the Chief Justice is at odds with many other decisions of the Ontario Court of Appeal and the Supreme Court of Canada in the last two decades none of which were referred to by Chief Justice Winkler. Most of those cases involve criminal law but I have also reviewed the article of now Paciocco J.A. analyzing the application of the developments in the law of hearsay to civil cases.

36. The main exception to the hearsay rule arising out of the *res gestae* doctrine is spontaneous utterances and most of the cases deal with this issue. The second major exception arising out of that doctrine is declarations accompanying and explaining relevant acts. In this case, the statements of the health care personnel would not qualify as spontaneous utterances because that doctrine relates to statements made in connection with exceptional, exciting, and shocking circumstances which this was

not. However, this statement might qualify as an exception to the hearsay rule of statements accompanying and explaining relevant acts.

37. The two major cases of the Ontario Court of Appeal dealing with a statement accompanying and explaining relevant acts are *R. v. Sheri* 2004 CanLII 8529 (ON CA), and the much more recent case of *R. v. Camara*, 2021 ONCA 79 (CanLII). In *R. v. Sheri*, the statement of the accused in issue was one where the accused's brother heard him telling his grandmother that he had shaved his beard because he had cut it errantly and so decided to shave it off. The Crown was inferring that the accused shaving his beard the day of the killing was reflective of his state of mind, it being uncommon for religious Muslims to shave their beards. The Court said:

> [107] In J. Sopinka, S.N. Lederman, A.W. Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto, Butterworths, 1998) the authors describe two situations in which the courts have properly invoked the *res gestae* doctrine to admit utterances offered for their truth: (1) declarations accompanying and explaining relevant acts, and (2) spontaneous exclamations. Here, Mr. Khan's utterance could not qualify under the second heading, as it was not the result of a startling occurrence or excitement-provoking event.
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> [108] As for the first heading, this court set out the parameters of admissibility in *R. v. J.E.F*. (1993), 1993 CanLII 3384 (ON CA), 85 C.C.C. (3d) 457 at para. 30 as follows:
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> > The words are considered to be so interrelated to a fact in issue that they become a part of the fact itself. To qualify, the words must introduce the fact in issue, explain its nature, or form in connection with it one continuous transaction. [emphasis added]
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> [109] In this instance, there was no clear evidence concerning the proximity of Mr. K's utterance to his prior action. Moreover, even if it could reasonably be inferred that Mr. K spoke to his grandmother

> soon after shaving his beard, his words were not so inter-related with his actions as to form one continuous transaction. Rather, they were an after-the-fact explanation given in response to his grandmother's inquiry and they lacked the circumstantial guarantees of reliability associated with the *res gestae* exception. Put another way, it is possible in the circumstances that Mr. Khan was simply making an excuse to his grandmother.

38. In *R. Camara supra*, the Court dealt with statements made by a security guard, who did not testify at the trial, as to the presence of a gun. His statements reported by others which were" I got the gun", or " there's a gun" or "gun gun" were admitted as both spontaneous utterances but also as words explaining the relevant act of finding the gun. The Court said:

> [65] The brief remarks attributed to S.F., such as "I got the gun", "There's a gun", or "Gun, gun", were contemporaneous with recovery of the weapon. They were, by all accounts, spontaneous. They also explained a relevant act by S.F.– the finding of a gun. As such, they were properly admissible either as beyond the reach or within an exception to the hearsay rule: *R. v. Sheri* (2004), 2004 CanLII 8529 (ON CA), 185 C.C.C (3d) 155 (Ont. C.A.), at paras. 107-10.

39. Later in the judgment the Court said:

> [83] *Res gestae* is a long-established concept in the law of evidence. Despite its antiquity, its precise doctrinal significance at common law eludes clarity and precision. In translation for forensic purposes, it approximates "the events at issue in the litigation". This adds little to our basic concepts of relevance and materiality. Its passing would not be mourned. All the more so when we have substituted principle for shibboleth.

[84] Whether they are received as a true exception to the hearsay rule - thus as evidence of the truth of what was said - or as original evidence not reached by the hearsay rule, statements admitted under *res gestae* include:

> i. spontaneous statements or excited utterances;
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> ii. statements accompanying and explaining an act which can be properly evaluated as evidence only if considered in conjunction with the statement; and
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> iii. statements relating to a physical sensation or mental state, such as intention or emotion.
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> See, *Sheri*, at paras. 107-10. See also, *Criminal Justice Act* 2003 (UK), s. 118(1), para. 4.

[85] The excited utterances aspect of *res gestae* posits a mind so dominated by the event that the statement can be regarded as an instinctive reaction to that event thus giving the declarant no real opportunity for reasoned reflection or concoction. Contemporaneity of the statement with the event is a matter of degree. For the statement to be spontaneous, it must be so closely associated with the event which has excited the statement that it can fairly be said that the declarant's mind remained under the domination of that event. In other words, the trigger mechanism for the statement – the event – was still operative. Spontaneity and contemporaneity are guarantors of reliability: *R. v. Andrews*, [1987] A.C. 281 (H.L.), at pp. 300-1.

[86] In connection with statements accompanying and explaining an act, the act must be relevant in the absence of the statement. The justification for admitting the statement is that it may explain the precise significance of the act by showing its nature or the state of

> mind that accompanied it. See, for example, *R. v. Kearley*, [1992] A.C. 228 (H.L.), at p. 246.

40. This exception to the hearsay rule has been noted in a more recent edition of the evidence text cited by the Court in *R v. Sheri supra*. In *Sidney N Lederman, Michelle K Fuerst, & Hamish C Stuart, The Law of Evidence in Canada*, 6th ed, (Toronto: LexisNexis, 2022) the authors state:

> ¶6.339
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> There are three basic situations in which the courts have properly invoked the *res gestae* doctrine to admit utterances offered for their truth. This may be categorized as:
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> > (1) Declarations of bodily and mental findings and conditions;
> > (2) Declarations accompanying and explaining relevant acts; and
> > (3) Spontaneous exclamations

41. In my view the statement directing the visitors that they should not enter the hospital room because of a transfusion that was taking place or was about to take place and that they should return in several hours explains the act of not allowing them entrance to the room. It does introduce the fact in issue, namely the transfusion, and the statement forms part of the continuous transaction of the visitors attempting to enter and being refused entry while providing them with a reason for being denied entry and a time frame for returning. In short, it meets the criteria for constituting an exception to the hearsay rule and is admissible for the truth of its contents.

42. In the alternative, if this finding is incorrect, then in my view the statement is admissible under the principled exception to the hearsay rule which requires that the party wishing to rely on the statement satisfy the onus of establishing the necessity of admitting the statement and its reliability. The law related to this exception is most recently described by the Ontario Court of Appeal in *R. v. MacKinnon,* 2022 ONCA 811:

ii. The Principled Exception for Admission of Hearsay Evidence

[52] If hearsay evidence does not fall under a traditional hearsay exception, such as spontaneous utterance, it may still be admitted as a principled exception if sufficient indicia of necessity and threshold reliability are established on a balance of probabilities: *Bradshaw*, at para. 23; *R. v. Blackman*, 2008 SCC 37, [2008] 2 S.C.R. 298, at para. 33.

[53] Necessity is established, for instance, where the declarant is dead: *Blackman*, at para. 34; *R. v. Candir*, 2009 ONCA 915, 250 C.C.C. (3d) 139, at para. 57, leave to appeal refused, [2012] S.C.C.A. No. 8.

[54] Threshold reliability can be established through:

> i. adequate substitutes for testing the truth and accuracy of the statement (procedural reliability);
>
> ii. circumstantial or evidentiary guarantees that the statement is inherently trustworthy (substantive reliability); or
>
> iii. a combination of elements of both procedural and substantive reliability: *Bradshaw*, at paras. 27, 30 and 40; *McMorris*, at paras. 26-27. The trial judge must identify the specific hearsay dangers presented by the statement, consider how they can be overcome, and decide whether the hearsay is "sufficiently reliable to overcome the dangers arising from the difficulty of testing it": *Khelawon*, at para. 49; *Bradshaw*, at para. 26.

[55] If the hearsay danger relates to the declarant's sincerity, truthfulness will be the issue; if the hearsay danger is memory, narration, or perception, accuracy will be the issue: *Bradshaw*, at

para. 44. The trial judge must be able to rule out any plausible alternative explanations for the hearsay statement on a balance of probabilities: *Bradshaw*, at para. 49.

[56] The statement must be "so reliable that contemporaneous cross-examination of the declarant would add little if anything to the process": *Bradshaw*, at para. 31, citing *Khelawon*, at para. 49.

[57] In *Bradshaw*, the Supreme Court addressed the issue of when corroborative evidence can be relied on by a trial judge in deciding whether to admit hearsay evidence under the principled exception. Justice Karakatsanis, for the majority, held that "[t]o determine whether the statement is inherently trustworthy, the trial judge can consider the circumstances in which it was made and evidence (if any) that corroborates or conflicts with the statement": *Bradshaw*, at para. 30.

[58] The circumstances in which a hearsay statement was made may, on their own, enable the trial judge to rule out any plausible alternative explanations for the statement on a balance of probabilities, bearing in mind the specific hearsay dangers associated with the statement: see *Bradshaw*, at paras. 3, 44 and 47. In such cases, extrinsic evidence need not be considered to determine admissibility because substantive reliability has been established and the statement is admissible. Any other extrinsic evidence that tends to corroborate (or contradict) the hearsay statement, if admissible, will go to ultimate reliability, not threshold reliability. It is for the trier of fact to decide how much reliance is to be placed on the hearsay statement in the context of the entire evidence which may include evidence that supports or undermines the proffered truth in the hearsay statement: *Khelawon*, at para. 50.

[59] However, if substantive reliability is not met after examining the circumstances in which the statement was made, trial judges may

turn to corroborative evidence to establish substantive reliability provided that the corroborative evidence is “trustworthy” and shows that “the only likely explanation for the hearsay statement is the declarant’s truthfulness about, or the accuracy of, the material aspects of the statement”: *Bradshaw*, at paras. 38, 44, and 50.

[60] In other words, while corroborative evidence may provide trial judges with additional evidentiary guarantees of the statement’s inherent trustworthiness, it is not a prerequisite and its absence does not, by itself, raise a concern about the substantive reliability of the statement. Another appellate court has drawn a similar conclusion: see *Hall* (MBCA), at paras. 79-85.

[61] There are strong policy reasons for limiting the use of corroborative evidence in this manner. For example, as noted by the court in *Bradshaw*, if a trial judge is entitled to consider any extrinsic evidence that corroborates any part of a hearsay statement when assessing its threshold reliability, the *voir dire* could become an unwieldy trial within a trial. There is also a risk that flawed inculpatory hearsay evidence could be admitted simply because there is strong evidence of the accused’s guilt: *Bradshaw*, at para. 42; *R. v. Laure*, 2018 YKCA 9, 47 C.R. (7th) 133, at para. 93, aff’d 2019 SCC 25, [2019] 2 S.C.R. 398.

[62] To summarize, the focus at the admissibility stage is on threshold, not ultimate reliability. The *Starr/Mapara* framework for determining the admissibility of hearsay evidence may be further developed as follows:

> i. Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The onus is on the party tendering the evidence to show that it meets the requirements of a traditional exception or the principled approach.

ii. Evidence that falls under a traditional exception to the hearsay rule is presumptively admissible as traditional exceptions embody circumstantial guarantees of trustworthiness. (In the case of a spontaneous utterance exception, the inherent reliability stems from the requirement that the statement was made contemporaneously with a startling event that dominates the mind.)

> a. In “rare cases” however, evidence falling within an existing traditional exception may be excluded because there are “special features” such that the hearsay statement does not meet the requirements of the principled approach in the particular circumstances of the case. The onus rests on the party resisting admission.
>
> b. In the context of the spontaneous utterance exception, the basis for asserting a “rare cases” exception includes circumstances of gross intoxication, highly impaired vision, and exceptionally difficult viewing conditions, which are sufficiently grave that the trial judge cannot exclude the possibility of error or inaccuracy on a balance of probabilities. However, the “rare cases” exception does not include weaknesses that go to the ultimate reliability of the evidence or reliability concerns that are inherent in the traditional exception.

iii. Hearsay evidence that does not fall under a traditional exception may still be admitted under the principled approach if sufficient indicia of necessity and threshold reliability are established on a *voir dire* on a balance of probabilities. This is established by satisfying the following criteria:

> a. Threshold reliability (or reliability for the purpose of admission into evidence only) may be established through procedural reliability, substantive reliability, or both.
>
> b. To establish procedural reliability, there must be adequate substitutes for testing the evidence and

> negating the hearsay dangers arising from a lack of oath, presence, and cross-examination. Procedural reliability is concerned with whether there is a satisfactory basis to rationally evaluate the statement.
>
> c. To establish substantive reliability, the circumstances surrounding the statement itself must provide sufficient circumstantial or evidentiary guarantees that the statement is inherently trustworthy. This is a functional inquiry. Substantive reliability is concerned with whether there is a rational basis to reject alternative explanations for the statement, other than the declarant's truthfulness or accuracy. Where hearsay evidence has sufficient features of substantive reliability, there is no need to consider any extrinsic evidence that corroborates or conflicts with the statement. Courts should be wary not to turn the principled approach into a "rigid pigeon-holing analysis": *Khelawon*, at paras. 44-45.
>
> d. If substantive reliability is still lacking after examining the circumstances surrounding the statement, trial judges can rely on corroborative evidence to establish substantive reliability only if the corroborative evidence meets the criteria set out by the Supreme Court in *Bradshaw*.
>
> e. The process set out in *Bradshaw* is as follows: (i) identify the material aspects of the hearsay statement tendered for its truth, (ii) identify the hearsay dangers raised, (iii) consider alternative, even speculative, explanations for the statement, and (iv) determine whether the corroborative evidence led at the *voir dire* rules out these alternative explanations such that the only remaining likely explanation for the statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement.

43. I have also had regard to the following extracts from *The Principled Use Of Hearsay In Civil Cases: A Technical Guide To Avoiding Technicality* 2009 87-2 *Canadian Bar Review* 277, 2009 CanLIIDocs 138, David M. Paciocco, J.A.:

> i. The necessity requirement exists out of recognition that hearsay will typically be more problematic than in-court testimony because it will be more difficult to assess. In an

> important sense, the necessity requirement reflects pragmatic resignation. In *R. v. Khelawon*, Charron J. remarked:
>
> > The criterion of necessity is founded on society's interest in getting at the truth. Because it is not always possible to meet the optimal test of contemporaneous cross-examination, rather than simply losing the value of the evidence, it becomes necessary in the interests of justice to consider whether it should nonetheless be admitted in its hearsay form.

ii. Understood in this way, the "necessity" requirement is in substance no more than a best evidence requirement. As Charron J. explained in *Couture*, "The criterion of necessity is intended to ensure that the evidence presented to the court be in the best available form, usually by calling the maker of the statement..."

iii. Any references in the case law to "necessity" have to be read in light of the standard admonition that "necessity" means "reasonably necessary. "As intimated by Kukurin J. in the foregoing passage, the term "reasonably necessary" imposes a best efforts requirement. In *R. v. F.*(W.J.), McLachlin J. remarked that "it is a matter of whether, on the facts before the trial judge, direct evidence is not forthcoming with reasonable effort

iv. Taken together, the "best evidence" and "reasonable efforts" components of the necessity requirement mean that if the party calling the hearsay evidence can reasonably offer a better brand of proof in place of the hearsay that is presented, it should do so, failing which the necessity requirement will not be met.

v. It is my view that the best way to take into account the particular context of the case when applying the principled exception is to

permit the relevant characteristics of the case to influence the necessity determination, but to conduct the reliability assessment initially in disregard of the context. Where a basic threshold of reliability is met so that a responsible assessment of the evidence can be reasonably be made, the context should be examined as part of the discretionary assessment of the balance of probative value and prejudice to determine whether, given the dangers that remain in accepting hearsay in place of original evidence, it is appropriate to do so given the seriousness of the case, the centrality of the issue the evidence informs, the consequences that the evidence could have for the parties, and the policy interest being pursued by the law in the case at hand.

vi. In particular, the necessity principle – the search for whether hearsay is the best way to get the declarant's version of events before the court – can be adjusted to take account of the needs of the case, including that what is at stake is a civil dispute. More specifically, contextual considerations can be used to determine what efforts to secure the original evidence can reasonably be expected of a litigant given the nature of the case and the costs of doing so, if civil litigation is to be kept relevant, accessible and fair.

vii. As for the reliability requirement, in order to ensure a minimum level of trustworthiness or reasonable assessability it should be conducted initially without regard to the civil litigation context. Only after a minimum level of trustworthiness or assessability – that which would permit a rational and reasonable choice by a trier of fact to credit the hearsay evidence – is identified, should the contextual circumstances of the specific case be considered. In this way context-specific considerations will not be permitted to inspire the reception of unreliable proof. Context-specific considerations can therefore best be balanced when considering whether to employ the exclusionary discretion. More specifically, the probative value of the hearsay, as revealed by its indicia of reliability, should be balanced

> against the dangers that remain in accepting hearsay in place of original evidence given that it will be an imperfect substitute. The risk that this prejudice presents can be measured by considering the seriousness of the case, the centrality of the issue the evidence informs, the consequences that the evidence could have for the parties, and the policy interest being pursued by the law in the case at hand.

44. As the trier of fact in this case, as matters developed in the hearing, the task of determining threshold reliability and ultimate reliability was not separated. The oral evidence was heard quickly over several hours. The claimant did not have counsel and there was no objection to the admissibility of the evidence by Fund Counsel, (quite rightly in my view). It was left to the written argument to set out the concerns about the admissibility and reliability of the evidence, although none of the issues concerning *res gestae* and its exceptions or the principled exception dealt with in this decision were addressed in writing either.

45. Further, in my view, one has to distinguish between the reliability of the statements made by the health care personnel, and likely the physician, from the evidence of BH as to his recollection of the statement being made. The latter is properly influenced by his abilities to recollect over the passage of time, his credibility, and any motive for providing his evidence as he did, all of which are legitimate factors for the Board to take into account in assessing the veracity of his evidence. This is completely distinguishable from assessing the reliability of the statements of the hospital staff if one accepts that the statements were made. I would illustrate this by comparing the reliability of a statement reportedly made by a declarant who likely would have had difficulty seeing or who might have had a strong motive to mislead, which is the concern of this reliability criterion going to admissibility, as opposed to the reliability or credibility of the witness who testifies as to what the declarant said, whose evidence may be thought to be unreliable because of his/her capacity to hear or to recollect the statement allegedly made or for any number of other reasons.

46. Paiocco J. A. wrote that “Only after a minimum level of trustworthiness or assessability – that which would permit a rational and reasonable choice by a trier of fact to credit the hearsay evidence – is identified, should the contextual circumstances of the specific case be considered. In this way, context-specific considerations will not be permitted to inspire the reception of unreliable proof.” Applying this, I deal first with the reliability criterion. In my view, there are few real concerns about its substantive reliability. The person making the statement was very likely the physician and indeed Dr. Ranjit, but it may have been the nurse or the aide. None of them would have had a reason of any kind to lie or mislead or to be in error about the fact that a transfusion was being administered or about to be administered. One would not be surprised if the admonition not to enter a hospital room but to return later was not accompanied by revealing any medical information about the patient, but neither is it surprising that the visitors to a seriously injured patient who had surgery the day before would be given a reason for their not being admitted and for how long they would have to wait to return. In the words of Mckinnon, there is “a rational basis to reject alternative explanations for the statement, other than the declarant’s truthfulness or accuracy”. In the circumstances, if I believe and accept that the statement was made, there is no rational basis to doubt the truth of the statement.

47. In accepting that the statement is substantively reliable, I have also had regard to the comments of the Supreme Court of Canada in *R. v. Bradshaw,* 2017 SCC 35 (CanLII), that it is not necessary for reliability to be established with absolute certainty:

> [31] ….Rather, the trial judge must be satisfied that the statement is “so reliable that contemporaneous cross-examination of the declarant would add little if anything to the process” (*Khelawon*, at para. 49). The level of certainty required has been articulated in different ways throughout this Court’s jurisprudence. Substantive reliability is established when the statement “is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken” (*Smith*, at p. 933); “under such circumstances that even a skeptical caution would look upon it as trustworthy” (*Khelawon*, at para. 62, citing Wigmore, at p. 154);

> when the statement is so reliable that it is "unlikely to change under cross-examination" (*Khelawon*, at para. 107; *Smith*, at p. 937); when "there is no real concern about whether the statement is true or not because of the circumstances in which it came about" (*Khelawon*, at para. 62); when the only likely explanation is that the statement is true (*U. (F.J.)*, at para. 40).

48. In my view, the statements meet this threshold. If there were medical records about the care of the claimant but no records regarding a transfusion, cross-examination might yield results, but where the hospital records were destroyed and the available records do not contain notes or records such as those relating to a transfusion, cross-examination would add little if anything. The health care professionals involved, even if identifiable, are most unlikely 36 years later to recall anything about a normal transfusion said to have taken place in normal circumstances on a particular patient. The act here is preventing the entry of visitors to the patient's room, and the explanation given is done spontaneously and immediately and can be relied upon. The statement is made by medical or hospital personnel and there is no motive for concoction or deception and no likelihood of error.

49. The requirement of necessity for the admission of the statement is also met here for several reasons. Of course, it would be far preferable if there were hospital records, but this is a stronger case than one where hospital records are available but there is no record of admission or if there are records, they record the admission and treatment but do not contain a record of a transfusion. Here there are some records in the WCB files from the hospital files which prove the admission and the surgery occurred but there are no ancillary records such as notes or evidence of tests or other procedures such as a transfusion. In other words, the records are incomplete here and the original hospital records have been destroyed. This makes the admission of this evidence necessary.

50. A second consideration respecting necessity is that there is a highly relevant witness available who might be able to testify as an independent party as to the facts of what

occurred respecting a transfusion when he was present in August 1986. In that respect the claimant has attempted to obtain this evidence and met with Dr. R, who stated, for whatever reason, he could not assist. More than that the Referee issued a summons to Dr. R for documents relating to his care of the claimant. He responded by indicating he had no records for this patient in the period from 1986-1990 or information to indicate that he was involved in his medical care at that time. I find this statement ambiguous. Does he mean to infer that he has records from a later or earlier period, or that they have been destroyed, or that the claimant was never a patient? Whatever the inference, there is clear independent evidence he was directly involved in the care of the patient concerning the accident which gave rise to the surgery, but in light of his statements which suggested he was not involved in the care of the claimant and has nothing he can offer, his failure to testify or inability to testify because he has no recollection, makes the admission of this evidence of BH necessary. The claimant was clear that Dr. R was present when the transfusion was administered, that he visited him, and he was unhelpful to the point of not recognizing or remembering him leading the claimant to speculate that Dr. R was suffering from a cognitive disability. In these circumstances, it was open to Fund Counsel to call Dr. R as a witness for whatever assistance he could provide to the Referee but he did not. I do not draw any inference at all from this but simply say that I think the claimant acted reasonably in seeking out the evidence of Dr. R and deciding it was not useful to call him, leaving it open to Fund Counsel to call him. For example, Fund Counsel could have provided Dr. R with the available medical records including the report of Dr. K copied to Dr. R at the time and asked if that triggered any memory. The fact that neither party chose to call Dr. but the claimant made efforts to see if he had relevant evidence makes it necessary in my view in the interests of justice to admit the evidence of BH under the principled exception to the hearsay rule.

51. Further adding to the requirement for necessity are three other factors. First, the claimant's father who was clearly present at the relevant times has passed. His evidence, while it could not have been determinative or corroborative, would have been admissible. Second, in this particular case, the evidence of two relevant

witnesses cannot be determinative or corroborative because of the limitations imposed by section 3.01(2). In the absence of hospital records, and the limitations on the evidence of the claimant and family members, the availability of any evidence is limited making what is available more necessary. And although the Settlement Agreement imposed limitations, it also permitted a referee to admit hearsay evidence, and it contemplated corroborative evidence of independent persons. There is nothing in the Settlement Agreement to suggest that evidence had to be limited to direct evidence of having seen a transmission being administered. Finally, in terms of corroborating witnesses, even assuming for the moment the nurse and the aide could recollect the events of a particular transfusion on a particular patient 36 years later, the name of the nurse and the aide who worked that day on that ward on that patient could not now be obtained in any reasonable fashion, thus making the evidence necessary as well.

52. In *McLellan v. Dickinson*, 2002 BCSC 1639 (CanLII), a negligence action, the plaintiffs were permitted to rely on statements for the truth of their contents made by nurses to the plaintiff and another person present at the birth of a child that when her water broke there was “poop” from the baby in the water. The statement was deemed to be necessary, in part, because the hospital records had been destroyed, the nurses were unable to recollect anything, and a person who confirmed that the plaintiff's mother had told her this after getting a phone call from the mother, was deceased. In regards to reliability, notwithstanding that the statements were made 23 years earlier, no one could say who made the statement, or whether the person who made the statement made it from first-hand observation or based on what someone else said, the evidence was admitted. The Court said it was not determinative that the identity of the person making the statement could not be specified, and the issue of double hearsay was speculative. The issue in admitting the evidence was the reliability of the nurses and the statements the nurses made in circumstances that negated the possibility that the nurses were untruthful or mistaken. The issue going to the admissibility of the statements and their reliability was not the trustworthiness of the witnesses testifying as to what the nurses said.

53. In this case, there is only an issue of who made the statement if the evidence of the claimant is not admissible even for the purpose of determining who was present. If that evidence cannot be taken into account the evidence of BH is that a doctor made the statement and this case mirrors the situation in *McLellan*. As in that case, the medical records have been destroyed, it is practically impossible to identify or locate the nurse or aide who were present, and doubtful they could remember anything about what occurred 36 years ago. In my view, even if the medical records had been shown to Dr. R, he is unlikely after 36 years to recall a particular transfusion on a patient he does not recognize in the absence of a medical record.

54. Finally, in terms of admissibility, I also admit the statement of BH that when he returned to the room around noon the claimant told him he had been transfused and that he was afraid of contracting AIDS. The evidence that he had a transfusion is admissible on the principled exception for the same reasons as given above. It is necessary and also reliable because in the circumstances the claimant had no reason to lie at that time or to be in error. More importantly than its reliability, however, the claimant testified in this proceeding and while he was cross-examined it was not put to him that he had not had a transfusion or was too medicated to know what had occurred. The statement of the claimant that he was afraid of AIDS is also admissible as an exception to the hearsay rule being a statement of the claimant's mental condition of fear at the time. There would be no reason to be afraid of AIDS if a transfusion had not taken place.

55. I have not given any weight to the statement of the claimant to his physician in 2019 that he had been transfused at the time of the surgery other than that the claimant did offer it. If he had failed to do so, it could support a finding,(which I was not asked to make) that he had concocted the story, But I give no weight to the prior consistent statement as tending to show there was a transfusion.

56. Even though I have admitted the evidence of BH, it remains to be determined whether or not it is reliable in itself and whether BH was a credible witness. The first factor in assessing his evidence is that he was and is the closest friend of the claimant and is

thus disposed to assist him. Of course, the evidence of a close friend is naturally suspect to some extent as wanting to support the serious medical claim of that close friend. In that regard, one also has to keep in mind that the evidence of independent persons is contemplated in the Settlement Agreement. Once the evidence of claimants and their families is ruled out as being determinative, the next group of likely witnesses is actual hospital staff who are unlikely to recall these events, even recent ones, in the absence of records. The only significant class of witnesses that remains is likely the close friends of claimants who are likely to be the ones to visit the hospital and to recall a transfusion. Here the closest friend, BH, is likely to recall these events because they were traumatic and notable. As a close friend, he was told of the accident by the Union, rushed to the hospital, dealt with the issue of possible amputation, spent much of the night there, and was likely to visit to actually see his friend following surgery at the earliest opportunity. He did not support the evidence of the claimant or his sister that the transfusion and the visit occurred two or more days after the surgery but testified he was certain it was the next day. He was far more credible on this point than the claimant and his sister. BH did not try to embellish his evidence by claiming he knew the name of the MD who made the statement, and unlike CK who contradicted herself on who made the statement, he was clear. He did not seek to claim he had seen the transfusion taking place. He did not deny that the claimant had asked him whether he remembered the events and to testify and he did not deny that he spoke with CK on the same day about their evidence before giving his testimony. Moreover, their evidence differed, and I conclude they did not attempt to give consistent evidence or concoct their evidence. Further, BH recalled speaking to the claimant after he and CK returned to the room and recalled the fear the claimant expressed that he may have contracted AIDS as a result of the transfusion. I frankly thought that these and other details were beyond the capacity of BH to contrive, and I found him to be credible. His credibility was not challenged on cross-examination, and the burden of the argument of Fund Counsel was that his evidence was inadmissible as hearsay, an objection I have rejected.

57. The appeal is upheld.

DATED at Toronto this 9th day of January 2023.

C. Michael Mitchell