

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

NO: 500-06-000016-960

DATE: December 15, 2004

PRESIDING JUDGE: THE HONORABLE NICOLE MORNEAU, SCJ

DOMINIQUE HONHON

Petitioner

V.

ATTORNEY GENERAL OF CANADA

AND

ATTORNEY GENERAL OF QUEBEC

AND

THE CANADIAN RED CROSS SOCIETY

Defendants

AND

CLAIMANT ESTATE NO 5542

APPELLANT

JUDGMENT TO REEXAMINE A REFEREE'S DECISION
1986-1990 Hepatitis C Settlement Agreement
Transfused Plan

[1] The Appellants' father died on January 23, 2001, at 84 years of age. His hospital record (page 70) reveals that he died of a "liver tumor" caused by a "post-transfusion" cirrhosis. The hepatitis C had been diagnosed in 1996.

[2] His daughters submitted to the Administrator a claim as "HCV Personal Representative" of a deceased HCV Infected Person, pursuant to the Transfused HCV Plan (Schedule A).

[3] On June 26, 2002, the Administrator rejected their claim for compensation under the 1986-1990 HEPATITIS C SETTLEMENT AGREEMENT, on the basis that all donors of the blood units received during the Class Period had tested anti-HCV negative. On January 16, 2004, the Referee allowed the Administrator's decision. The Appellants now request a review of his decision by the court.

[4] Convinced that their father was infected by one of the two blood transfusions received in March 1989, the Appellants did everything they could to reconstruct his medical record, in order to prove that such was really the case. Incidentally, the Referee recognized that they had accomplished a tremendous task.

[5] For his part, the Fund Counsel indicates in his written submission:

On the General Claimant Information Form (TRAN 1), the Appellants state that their father received a blood transfusion between January 1, 1986 and July 1 1990, that is, during the Class Period.

Moreover, on the Blood Transfusion History Form (TRAN 5), it is specified that Mr. ...received two (2) units of blood in March 1989 at Hôpital St-Luc de Montréal (# 152721 and # 149239).

An investigation conducted by Héma-Québec, at the Administrator's request, has allowed tracing back the donors of the two (2) units of blood received (...), more specifically on March 31, 1989. However, this investigation confirms that the two (2) donors in question tested anti-HCV negative.

[6] As part of the admission of evidence, the Counsel indicates the following:

The Administrator does not dispute the fact that Mr. ... was HCV infected and had contracted chronic hepatitis C accompanied by a compensated cirrhosis.

Furthermore, the Administrator does not dispute the fact that Mr. ... received (2) units of blood (# 152721 and # 149239) at the time of a blood transfusion during the Class Period.

Finally, the Administrator does not dispute the fact that Mr. ... died as a result of his HCV infection.

[7] The Fund Counsel describes the Administrator's role, emphasizing that he has no discretionary power to allow a claim when the required proof is not provided. He argues that the latter cannot ignore nor modify the terms of the Settlement Agreement and that the same is also true for the Referee. It goes without saying that it is also the case for the Superior Court hearing this case.

[8] He adds that the burden of proof lies with the Claimant who must demonstrate, on the balance of probabilities that the Administrator's decision regarding the claim for compensation was not made, in accordance with the Settlement Agreement. He emphasizes that according to paragraph 3.04(l):

Notwithstanding any other provision of this Agreement (the Transfused Plan), if the results of a Traceback Procedure demonstrate [...] that none of the donors or units of Blood received by a Primarily-Infected Person [...] during the Class Period is or was HCV antibody positive, [...] the Administrator **must** reject the Claim of such HCV Infected Person [...].

[9] For his part, the Referee points out that there is no evidence supporting the fact that the Claimants' father had received any other transfusion outside the Class Period. Proof shows that he only received two units of blood in March 1989.

[10] On pages 2 to 5 of his decision, the Referee writes the following:

What has this terrible Hepatitis C illness to do with the life of this man, that was apparently untarnished? What is the source of it? And even in the face of a blood transfusion investigation, which proves to be negative, are there sufficient elements to be satisfied that HCV is the result of one or the other of the 1989 transfusions?

A long discussion took place before me which was first supported by letters from the Hepatologist who treated the Claimant's father (exhibits A-7 and A-8) to the effect that traceback tests completed by the Red Cross at the time or by Héma-Québec are not necessarily reliable; the donor, who was HCV positive in 1989, could have recovered from his Hepatitis C and could have been free of the markers when he was tested some twelve (12) years later.

To ensure that I had access to all relevant evidence, I invited the Claimant, after the July 31, 2003 hearing to complete her evidence by calling her expert witnesses to the hearing as I invited the Fund Counsel to call his expert witnesses in order to better clarify the position put forward by the Fund side. The hearing thus resumed on November 7, 2003 and I then heard Dr. Jean-Pierre Villeneuve, a renowned Gastroenterologist and Hepatologist, the Physician who had been called to testify by the Claimant. The Fund Counsel chose not to call any expert witnesses preferring rather to rely on the already submitted documentation.

According to Dr. Villeneuve, the clinical history of the Claimant's father is compatible with the HCV contracted at the time of one of the 1989 transfusions.

Dr. Villeneuve challenges the traceback conducted by Héma-Québec by raising two hypotheses to explain how one or the other of the donors could have tested negative when tested, but still transmitted Hepatitis C to the Claimant's father.

According to the first hypothesis, a donor was HCV infected when he gave blood, but he recovered thereafter and lost the antibodies. According to this expert, about 25% of the people who contract Hepatitis C recover and about one third of those 25% are free of the antibodies ten to twenty years after having had an acute infection. The donor could therefore possibly fall in this $\pm 8\%$.

The other hypothesis suggests that one of the donors was HCV positive without having the antibody. It appears that, in this case, the possibility of such a situation would be less than 1%.

However, Dr. Villeneuve recognizes that the Claimant's father could have contracted Hepatitis C from other sources, for example, during one or the other of his surgical procedures, but he considers that the "preponderance of the evidence" rather favors the transfusions.

Dr. Villeneuve also recognizes that the fact that the Claimant's father contracted a liver cirrhosis as early as 1996, i.e., seven (7) years after his transfusions, was somewhat surprising, since it takes about twenty (20) years on average to develop a cirrhosis. He explains that as the Claimant's father was old, as certain studies indicate that the illness generally evolves more quickly in men than in women and as people infected through transfusions can evolve more quickly than other infected people, these are as many factors that can explain how a liver cirrhosis was contracted that early.

As mentioned above, before discovering the first problems that can be related to Hepatitis C, I found that the Claimant's father was hospitalized several times and had at least five (5) surgical procedures, for an appendectomy in 1943, for a cholecystectomy in 1962, for an intestinal surgery in 1975, for a surgery following an aneurysm rupture in 1989 and for a pacemaker implant in 1991. Also, during the same period, he underwent invasive examinations such as a colonoscopy.

Through analysis of all this evidence and documentation, I conclude that it is possible that the Claimant's father contracted the Hepatitis C at the time of one of the March 1989 transfusions. Unfortunately, I cannot be sufficiently convinced to ignore the wording of Section 3.04(1). Section 3.04(1) of the Transfused HCV Plan (1986-1990) provides that if results of a Traceback Procedure show that none of the donors is or was anti-HCV positive, the Administrator must reject this HCV infected person's claim. It is therefore on this basis that the Administrator rejected the request for compensation.

On the other hand, Section 3.04(2) provides that the Claimant can prove that he had been infected for the first time following a transfusion, despite the Traceback Procedure results.

The Fund Counsel and I had long discussions during this Request for Review hearing on how to interpret Section 3.04(2) and on the Claimant's burden of proof. If one wants Section 3.04(2) to mean anything, the Claimant, in certain circumstances, even without having access to the donors' personal files, must be able to discharge this burden of proof. Thus, I do not believe that it is sufficient for the Fund side to argue that there are no known reasons of infection for ten, fifteen or twenty percent of the infected persons and that it is an answer to all contrary argument, nor an invalidating argument against all claims.

I read with great interest the decision made by my colleague, Referee Robert S. Montgomery, Q.C. of April 16, 2003 (# 93) where he chose to allow a Request for Review, considering that there were no explanations for the presence of Hepatitis C other than that of the transfusion. In part due to the medical and surgical history of the Claimant's father, in part due to the evidence submitted by both sides, I cannot come to the same conclusion in this case, as I cannot either be satisfied that the Claimant has discharged the burden of proof under Section 3.04(2).

(Emphasis added)

[11] Here, the Referee quotes an extract of an October 9, 2003 decision by my colleague, the Honorable Justice Pitfield of the British Columbia Supreme Court, in the Claim file No. 1300773, stating:

[9] In sum, there must be some persuasive evidence provided by the Claimant to establish on the balance of probabilities that the source of the infection was from the blood products received during the Class Period."

[12] The Referee continues on :

As in the case of the Referee and Mr. Justice Pitfield, the two judges involved in Case # 1300773, I did not find any evidence to prove, on the balance of probabilities or otherwise, that the Claimant's father had been HCV infected for the first time, following a blood transfusion received during the Class Action Period. Specifically, I cannot find in the otherwise very well presented explanations of Dr. Villeneuve, the elements that can satisfy me that the Claimant has proven, despite the Traceback Procedure results, that her father had been HCV infected for the first time following one of the blood transfusions received in 1989.

I must remind the Claimant and her sister that the Settlement Agreement cannot necessarily cover all cases, that it represents an agreed-upon compromise, with its strengths and weaknesses, aimed at compensating those who meet the terms and conditions of the Agreement. This Agreement tries to

compensate those Claimants who are eligible, but also to protect the Fund assets against Claimants who are not entitled to compensation.

[13] In spite of all the sympathy that the position of the Claimant and her sister inspire, and the tremendous efforts that they have spent on reconstructing their father's medical record, this court has no more discretion than the Fund Administrator and the Referee, to ignore the terms of the Agreement. It must allow the previous decisions.

ON THAT GROUND, THE COURT:

ALLOWS the Administrator's and the Referee's decisions;

REJECTS the appeal;

ALL THIS, without costs.

**ORIGINAL SIGNED BY
NICOLE MORNEAU, SCJ**

Me Catherine Mandeville
MCCARTHY TÉTRAULT
Fund Counsel

The Claimant's Estate number 5542

Hearing Date: June 22, 2004