

CLASS ACTION – Hepatitis C '86-'90
Request for Review number 5577

DECISION

On May 23, 2001, the Claimant submitted a claim for compensation, pursuant to the 1986-1990 Hepatitis C Settlement Agreement. The Claimant indicated in his claim that he believed he was infected by the Hepatitis C virus after having received a blood transfusion in Canada during the Class Period.

The Claimant indicated that he had received 36 units of blood following a heart surgery at the Hôpital Hôtel-Dieu, in Montreal, in 1988.

Dr. Marc Poliquin, Hepatologist and Gastroenterologist, completed the Treating Physician's Form and confirmed that the disease had reached level 5. However, in Section F, Part 1, he indicated that the Claimant had made use of non-prescription intravenous drugs. The Form completed by this Physician also made reference to a bacterial endocarditis contracted "following the use of an intravenous drug in 1988".

The Claim submitted pursuant to the 1986-1990 Hepatitis C Settlement Agreement was rejected by the Administrator who stated that he could not accept that the Claimant had been HCV infected for the first time after having received blood in Canada during the Class Period.

On January 16, 2005, the Claimant signed a Request for Review, asking that the Administrator's decision be reviewed by an Arbitrator. Therefore, it is in this capacity that I examined the present file and that I render this decision.

Regrettably, the Claimant died before I could hear this Request for Review, and the Administrator of the Estate continued the procedures. An in-person hearing was held on July 19, 2005.

I then heard the wife of the Administrator of the Estate. This lady is a long-time friend of the Claimant. She said that she had known the Claimant since 1968 and had met with him at least on a weekly basis for more than 20 years. She describes herself and her husband as the "Claimant's substitute family". Mr. Antonin Fortier, the claims examiner at the Hepatitis C Claims Center also testified at the request of the Fund's Legal Adviser. Mr. Fortier explained the evaluation work done on the claim and the steps that led to the Administrator's decision.

In the HCV Infected Person's Declaration Form (Tran 3) completed by the Claimant in May 2001, he answered Yes to question 4 (Section B): " I declare to the best of my knowledge that the HCV Infected Person has not at any time used non-prescription intravenous drugs."

One can wonder if the Claimant may have misunderstood the question and have gotten lost with the negative wording of the question related to the use of the words "ever" and "at any time". It is worth mentioning that for the very next question, he checked False to the question: "I declare to the best of my knowledge, that the HCV Infected Person was not infected by the Non-A Non-B hepatitis or by HCV before January 1, 1986."

On June 15, 2001, the Claimant completed a new Tran 3 Form where the answers to questions 4 and 5 were inverted. The Claimant then answered False to the question, which stated, "that the HCV Infected Person never had at any time used non-prescription intravenous drugs."

In June 2001, the Administrator forwarded to the Claimant a form entitled "Other Risk Factor Inquiry Form". In the Section entitled "Other Surgeries or Trauma", the Claimant wrote, " Replaced heart mitral valve, due to improper consumption".

In the Section entitled "Intra-Nasal Drug Use", the Claimant did not check or write anything.

However, in the Section entitled "Non-Prescription Intravenous drug Use", the Claimant indicates "Cocaine, December 1986 – September 1988". He also indicates that he has not shared intravenous syringes and also checks the box "More than 30 times". It must be noted that on the form, there is no box suggesting a number higher than "X 30".

Knowing that the Claimant had received 36 blood products in November 1988 during his hospitalization at the Hôpital Hôtel-Dieu in Montreal, Hema-Québec proceeded to certain verifications and retraced the great majority of donors. Thirty-two turned out negative, two refused to cooperate and two remained untraceable. The Fund's Legal Adviser did not challenge the fact that the Claimant had received transfusions, nor even the number of such transfusions. Therefore, we have four donors (out of 36) about whom there is no information.

Section 1 a) of the Protocol approved by the courts concerning the use of non-prescription intravenous drugs is applicable:

"Where there is an admission that the HCV Infected Person used non-prescription intravenous drug."

Section 2 of the same Protocol reads as follows:

" The Administrator must be satisfied on the balance of probabilities that:

(...)

b) The HCV Infected Person was infected with HCV for the first time:

i. By a Blood transfusion received in Canada in the Class Period

(...)"

Finally, Section 3 of the Protocol confirms that "The burden to prove eligibility is on the Claimant."

The Claimant seems to have answered all the questions and provided all the documents required. Thus, he signed, in August 2004, an affidavit confirming that he had made use of intravenous drugs before his first blood transfusion. He adds that he obtained syringes at the pharmacy, where he held himself out to be a diabetic. He also said: "I always sterilized my drug devices at each occasion with alcohol and bottled water." (We know from the notes which we find almost everywhere in the hospital files, namely the Hôpital Pierre Boucher files, that the Claimant would have made frequent use of intravenous drugs.)

We find, in a clinical report on infectious diseases at the Hôpital Hôtel-Dieu, in Montreal on September 25, 1988, a note stating that the Claimant "says that he has not borrowed syringes". The same document also indicates that the Claimant would have had sexual relations with one or several partners of either sex. In several places on the hospital file, he is described as being bisexual. Also, there is a long note written by a Cardiologist at Hôpital Hôtel-Dieu, in Montreal, dated November 25, 1988: " cocaine

addict for three years with a current (illegible) weekly injection. Bisexual...". It is also mentioned that he traveled to South America and Jamaica.

Moreover, in accordance with the Protocol rules, the Administrator obtained a written opinion from Dr. Gary E. Garber, described in his report as "Professor and Head, Division of Infectious Diseases, University of Ottawa / The Ottawa Hospital".

Dr. Garber concludes that there is a probability that the Claimant was infected by Hepatitis C through intravenous drug use ("the most likely source of Hepatitis C would similarly be through injection drug use"). He adds that there is not enough evidence to support the fact that his advanced hepatic disease is caused by blood transfusions received when the valve replacement surgery was performed in 1988. Dr Garber also underlines in his report that the Claimant had indicated having being infected by Hepatitis B in 1988.

I heard the witnesses, revised and examined the documents which were forwarded to me, particularly the medical and hospital files, Dr Garber's report, the different forms completed by the Claimant and his doctors, and the affidavit signed by the Claimant. I read the written observations submitted by the Fund's Legal Adviser and heard the representations of the Fund's Legal Adviser. I also heard the representations of the wife of the Administrator of the Estate who testified before me and presented verbal arguments in a structured and eloquent way.

Paragraph 9 of the Protocol approved by the courts concerning the use of intravenous drugs provides that the Administrator must "determine if, according to the balance of probabilities, the person who claims to be an HCV Infected Person satisfied the eligibility criteria."

As eloquent and sincere as the lady who testified before me could have been as friend of the Claimant and as representative of the Estate, I have to question her real knowledge of the Claimant's history. The latter would have mentioned to her his use of drugs only before his surgery in 1988 and he would have told her that he had used intravenous drugs from February 1988 until November 1988. Those are the same dates that appear on the affidavit completed by the Claimant on August 31, 2004. Moreover, on June 10, 2001, the Claimant signed the "Other Risk Factor Inquiry" Form where he indicated having used non-prescription intravenous drugs for a considerably longer period, i.e. from December 1986 until September 1988.

Also, it is clear that she did not know about the homosexual relations of this long-time friend.

I also see in a cardiology clinical note from the Hôpital Pierre Boucher which seems to be dated September 24, 1988: "no known heart disease, no diabetes, no high blood pressure, no tobacco, cocaine addict (\pm clean syringes)."

I must also note that the Claimant did not complete the Section entitled "Intra-Nasal Drug Use" of the document forwarded to him by the Administrator in 2001. Maybe it is because the form was in English, while the Claimant was French-speaking, but he nonetheless managed to check the other boxes. One can also wonder why the Claimant would have decided not to complete this part of the form, because it seemed that the injections appeared to be of more interest to the Administrator, but to say the least, one must note that there is here some deviation from what would be a complete disclosure.

Additional investigations called for by the Protocol approved by the courts were undertaken, but in spite of additional proof and inquiry, the Administrator determined that on the balance of probabilities, the Claimant did not satisfy the eligibility criteria.

The Administrator could not conclude that the Claimant had been HCV infected for the first time, following the receipt of blood in Canada during the Class Period. On looking at the evidence and in trying to apply it to the Protocol approved by the courts concerning the use of non-prescription intravenous drugs, I also arrive at the conclusion that on the balance of probabilities, the Claimant had not convinced me that he had been HCV infected for the first time following a blood transfusion and therefore, I feel that the Claimant did not meet the eligibility criteria.

Having examined the evidence and heard the representative of the Claimant's Estate, I conclude that the Administrator's decision was well founded and I reject the Request for Review.

Montreal, August 18, 2005

Jacques Nols
Arbitrator