# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***HCV Settlement Agreement Claim #5714,*** 2006 BCSC 919

Date: 20060614
Docket: C965349
Registry: Vancouver

**In the Matter of the HCV 1986-1990**

**Transfused Settlement Agreement**

**Re Claim No. 5714**

Before: The Honourable Mr. Justice Pitfield

## Reasons for Judgment

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| Counsel for the Claimant: | Self-Represented |
| Counsel for the British Columbia Fund: | William A. Ferguson |
| Written Submissions Received from Fund Counsel: | April 6, 2006 |
| Written Submissions received from Claimant: | None |
| Place of Hearing: | Vancouver, B.C. |

[1] Claimant 5714 opposes confirmation of a Referee's decision dismissing an appeal from the Administrator's determination that she was not entitled to compensation under the 1986 -1990 Settlement Agreement, Transfused HCV Plan. The Claimant is the legal personal representative of her father who died February 28, 2001, from a drug overdose. The Administrator denied the claim on the basis that the Claimant had not proved, on a balance of probabilities, that the deceased, who was admittedly a non-prescription intravenous drug user, was infected with the Hepatitis C virus for the first time by a blood transfusion received in the Class period.

[2] The Referee upheld the Administrator's determination. It is settled that the standard of review to be applied on an application to oppose confirmation of a Referee's decision is reasonableness. The court ought not to intervene unless there has been some error in principle, some absence or excess of jurisdiction, or some patent misapprehension of the evidence: *HCV Settlement Claim No. 11910*, 2004 BCSC 1421.

[3] The evidence in relation to this claim discloses that the deceased was infected with the Hepatitis C virus. He was a non-prescription intravenous drug user at the time of his death. He received a blood transfusion in the Class period. The court-approved traceback procedure resulted in a determination that all but one of 15 donors of the transfused blood was not infected with the Hepatitis C virus. A single donor could not be located, with the result that no determination could be made with respect to that donor. If that donor had been located and had tested negative for the Hepatitis C virus, the Claimant would not have been eligible for

benefits as her father's legal personal representative because he would not have derived the infection from a blood transfusion. In circumstances where a donor of transfused blood cannot be located, or the traceback procedure identifies a donor who was infected with the Hepatitis C virus, and the person by, or in respect of whom, a claim is made was a non-prescription intravenous drug user, the court-approved Settlement Agreement places the onus of proving infection for the first time by a blood transfusion in the Class period on the claimant. Article 3.01 of the Transfused HCV Plan provides as follows:

> 3.01 Claim by Primarily-Infected Person
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> (1) A person claiming to be a Primarily-Infected Person must deliver to the Administrator an application form prescribed by the Administrator together with:
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> ...
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> (c) a statutory declaration of the claimant including a declaration (i) that he or she has never used non-prescription intravenous drugs, (ii) to the best of his or her knowledge, information and belief, that he or she was not infected with Hepatitis Non-A Non-B or HCV prior to January 1986, (iii) as to where the claimant first received a Blood transfusion in Canada during the Class Period, and (iv) as to the place of residence of the claimant, both when he or she first received a Blood transfusion in Canada during the Class Period and at the time of delivery of the application hereunder.
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> …
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> (3) Notwithstanding the provisions of Section 3.01(1)(c), if a claimant cannot comply with the provisions of Section 3.01(1)(c) because the claimant used non-prescription intravenous drugs, then he or she must deliver to the Administrator other evidence establishing on a balance of probabilities that he or she was infected for the first time with HCV by a Blood transfusion in Canada during the Class Period.

[4] The issue in this case is whether the Referee erred in principle or patently misapprehended the evidence when concluding that he should uphold the Administrator's determination that the Claimant had not satisfied the eligibility criteria stipulated by the Transfused HCV Plan. The Referee stated his conclusion in paragraphs 38 through 40 of his reasons as follows:

> 38. It is clear that the Administrator followed carefully the CAP [court-approved protocol] and conducted the investigation meticulously as required. The Administrator obtained an independent medical opinion from Dr. Garber. The Administrator reviewed all available medical and clinical records. There was no identification of a Class Period Blood transfusion from an HCV anti-body positive donor. One of the donors could not be located. Therefore the Traceback was inconclusive. The evidence of whether IV Drug Use took place only after the Blood transfusion in March, 1989 was equivocal: there was clear evidence that IV Drug Use took place as early as 1990/1991, and there was some evidence that IV Drug Use may have taken place before then and before the Blood transfusion in the Class Period. There was no reasonably reliable evidence that IV Drug Use was limited to a single occasion with unshared sterile equipment (s. 12f of the CAP). In favour of the Claimant, there was no medical history of Hepatitis B before the Class Period (s. 12g of the CAP). There is reasonably reliable evidence that IV Drug Use took place over a long period of time on more than one occasion or was done with non-sterile or shared equipment (s. 13c of the CAP). There was uncontradicted medical evidence before the Administrator that the Deceased's HCV infection was more consistent with IV Drug Use than the Class Period Blood transfusion (s. 13b of the CAP).
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> 39. I am satisfied that the Administrator carefully considered the totality of the evidence in accordance with paragraphs 8-13 of the CAP. There was evidence that IV Drug Use took place on more than one occasion and may have been done with non-sterile or shared equipment. The Committee concluded that the Deceased's HCV history was more consistent with infection by IV Drug Use than infection by Class Period Blood transfusion. In coming to its decision the Administrator relied upon Dr. Garber's letter and of course would have had regard to the evidence I referred to in paragraphs 26 to 36 of my Decision.
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> 40. I agree with Fund Counsel that the Administrator followed the plan and the CAP in conducting the required investigation and came to

> a conclusion on the totality of the evidence that the Claimant had not met the eligibility criteria. The Administrator was not satisfied that the Claimant had shown on a balance of probabilities that the Deceased was infected by HCV for the first time by a Blood transfusion received in Canada in the Class Period. Applying a standard of correctness, I conclude the Administrator's decision has not been shown to be incorrect in any way. No error of law or fact has been shown. No misapprehension of the evidence has been shown. Indeed, I find the Administrator was correct in applying the plan, the CAP and in assessing the totality of the evidence on a balance of probabilities. I uphold the Administrator's denial of the Claim.

[5] I am satisfied that the Referee did not err in principle or misapprehend the evidence in any manner that would cause me to conclude that his decision should not be confirmed. The Referee's conclusion that the evidence was not sufficient to prove infection for the first time by a blood transfusion on the balance of probabilities was reasonable.

[6] The state of the evidence with respect to the deceased's intravenous drug use was the following. The deceased was a non-prescription intravenous drug user at his death. The deceased had used intravenous drugs for ten years prior to his death. One of the deceased's attending physicians made a clinical note on June 22, 1999, stating that the deceased was "a rather poor historian [who] lives alone in the downtown eastside and has been using IV cocaine for 8-9 years". If the report of eight years of intravenous cocaine use were accurate, the start date would have been some time in 1991. If the reference to nine years were accurate, the start date would have been some time in 1990, possibly before the closing of the Class period on July 1, 1990. There was no persuasive evidence that the deceased's intravenous drug use did not begin more than 10 years before his death.

[7] The Claimant testified that the deceased told her that his drug use began in January 1998, to combat the effect of his illness. That report is in conflict with the content of the clinical note made by a physician in June 1999, and the Claimant's acknowledgment through counsel that intravenous drug use had commenced much earlier.

[8] Other evidence relating to the question of when the deceased commenced intravenous drug use was summarized by the Referee as follows:

> It will never be known with precision when the Deceased began IV Drug Use. Claimant's counsel does not dispute the truth of the contents of the references in the medical evidence to IV Drug Use going back to 1990/1991. The Claimant gave evidence that the Deceased told her that the IV Drug Use began in January 1998; however, I conclude that the Deceased was not particularly forthcoming about his IV Drug Use. As Dr. Tindall has noted, the Deceased was a "poor historian". Indeed the Claimant did indicate in her appeal (pp. 472-475, Claim file, July 11, 2005) that she actually did not know when her father commenced his IV drug use. That comment has the ring of truth. The Deceased told her his IV Drug Use began in 1998; the records which remain extant indicate 1990-1991. It is obvious that the Deceased was not particularly accurate in the information he provided about something he may not have wished to discuss. Although the Deceased claimed that he always used clean needles and paraphernalia and a needle exchange; he did present in June 1999 with a heart infection that is related to using unclean needles. In addition, there is the statement in the Coroner's Judgment of Inquiry attributed to the Claimant that the Deceased's drug addiction began when he was 20 years of age. That would have been approximately 1954, well before the Blood transfusion in 1989. Moreover, the records indicate that the only IV Drug Use was with cocaine, yet the Coroner concluded that he died from a combination of alcohol, cocaine and heroin. The inconsistencies in the evidence about the Deceased's IV Drug Use affect the weight of the totality of the evidence and no doubt did not assist the Claimant in satisfying the onus of proof.

[9] In my view, no weight should have been attached to the statement in the coroner's judgment of inquiry suggesting that the deceased became addicted to drugs when he was 20 years of age. The coroner attributed that evidence to the Claimant. There is no indication that she was examined or cross-examined on the statement. That being the case, the reliability of the hearsay cannot be assessed. While the proceeding before the Referee is less formal than a court proceeding and the rules of evidence are more relaxed, in my judgment it would be inappropriate to rely on the statement in the reasons of some other proceeding to the Claimant's detriment.

[10] Similarly, limited weight should be given to the expert opinion stating that it was more likely than not that the deceased was infected with the Hepatitis C virus through intravenous drug use rather than a blood transfusion. The question of proof on the balance of probabilities was the very question to be answered by the Administrator. It was within the expert's area of expertise to say, as he did, that there were several aspects of the deceased's health that had been compromised by intravenous drug use. With respect, it was not within the expert's area of expertise to offer an opinion on the likelihood that the missing donor would have tested negative. That opinion is speculative. In any event, the question of whether, in all the circumstances, it was more likely that the deceased was infected by a blood transfusion rather than unsafe and non-sterile intravenous drug practices was one to be answered by the Administrator. The answer was not one to be provided by an expert.

[11] In my opinion, reliance on the coroner's judgment and the expert's opinion did not result in an unreasonable determination by the Referee. There was an abundance of other evidence to support the Administrator's finding that the deceased had failed to use sterile intravenous drug use techniques and had likely been an intravenous drug user in the Class period. It was reasonable to conclude that the prolonged history of intravenous drug use and the failure to adhere to sterile techniques more likely caused the infection which was diagnosed in 1997 than did the blood received from the single donor, among a total of 15, who could not be located for testing. At the very least, the fact of infection for the first time by a blood transfusion was not proved on the balance of probabilities. Given the state of the evidence, any conclusion to the contrary would have been unreasonable.

[12] The application to oppose confirmation of the Referee's decision must be dismissed.

"Mr. Justice Pitfield"