

**THE 1986-1990 HEPATITIS C CLASS ACTION SETTLEMENT**

IN THE MATTER OF AN APPEAL FROM THE DECISION OF THE ADMINISTRATOR  
DATED MAY 26, 2009

DATE OF HEARING: January 7, 2010

IN ATTENDANCE: Claimant #6686

FOR THE ADMINISTRATOR: John Callaghan  
Carol Miller

REFEREE: C. Michael Mitchell

## BACKGROUND

1. This is an Ontario-based claim by the Estate of Claimant # 6686.
2. The deceased passed away on July 27, 1990. In the approximate 10-year period prior to that time, she was transfused on many occasions and received approximately 195 units of blood. The family of the deceased who appeared at the hearing submit that it only makes sense, from a practical standpoint, to conclude that their mother was infected with Hepatitis C given the number of units of blood that she was given over the last decade of her life and the fact that the blood system was tainted. They also submit that she had medical conditions that were consistent with Hepatitis C given that there was a diagnosis in her medical record of cirrhosis.
3. The family also relied on the decision of the Ontario Hepatitis C Assistance Plan Review Committee which awarded the family \$25,000 in a decision dated January 16, 2007, wherein the Review Committee concluded that the deceased contracted Hepatitis C as a result of a transfusion or transfusions and found that the likelihood that the deceased had Hepatitis C which contributed to her death was at least equal to that which would support the opposite view. Therefore, it found that the death of the deceased was caused, at least in part, by Hepatitis C.
4. In this case, the Administrator denied the claim because the estate was unable to provide proof pursuant to Article 3.01(b) of the Settlement Agreement, that the deceased was infected with Hepatitis C. In this regard, the deceased was never tested for this disease; therefore there were no test results to deliver to the Administrator demonstrating the necessary degree of proof of disease as required by the Settlement Agreement.
5. Since the deceased in this case was never tested for the HCV antibody, it was open to the family of the deceased to provide evidence of: "(a) liver biopsy consistent with HCV in the absence of any other cause of chronic Hepatitis; (b) an episode of jaundice within three months of the blood transfusion in the absence of any other cause; or (c) a diagnosis of cirrhosis in the absence of any other cause."
6. The Administrator in this case found that, while there was evidence of cirrhosis, the medical evidence did not indicate that the cause was Hepatitis C or the absence of any other cause.

## DECISION

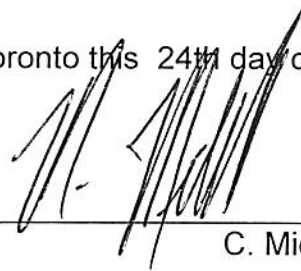
7. It is clear that there is no test result to indicate the deceased was infected with Hepatitis C. A medical report dated May 30, 1990 by Dr. Dominic Amato, a clinical hematologist, reports that the deceased had a type of myelodysplastic disorder, which is characterized by refractory anemia. This required many blood transfusions, as a result of which she developed iron overload (transfusional hemosiderosis) involving a number of organ systems.
8. On reviewing the file for the Ontario Hepatitis C Assistance Plan in 2006, Dr. Morris Sherman, a Hepatologist at the University Health Network, indicated that the deceased had a myelodysplastic disorder requiring multiple transfusions, and that this condition was unrelated to Hepatitis C. The medical records indicated evidence of liver disease. On review of the medical records, Dr. Sherman found that "she died of causes unrelated to liver disease or Hepatitis C".
9. Dr. Sherman also noted that the medical records included the suggestion that cirrhosis of the liver was present. Under the terms of the Settlement Agreement, a diagnosis of cirrhosis in the absence of any other cause would be sufficient to entitle the estate of the deceased to compensation. However, according to Dr. Sherman, there is no way to distinguish whether or not the cirrhosis was caused by Hepatitis C and there were other equally valid possibilities:

You are wondering whether any of the features seen on biopsy may help with the diagnosis of Hepatitis C. The major findings are of cirrhosis, iron overload and inflammation. Of these three features, both the inflammation and the cirrhosis can be caused by Hepatitis C. However, they can also be caused by an iron overload. There is no way to distinguish these possibilities.
10. Dr. Sherman also found that, whether or not the deceased was infected with Hepatitis C, the information suggested she did not have a disease related to Hepatitis C and the Hepatitis C was unlikely to have caused or accelerated her death.
11. In sum, in this case, there is no direct evidence that the deceased had Hepatitis C because no such test was conducted. Moreover, there is no diagnosis of cirrhosis "in the absence of any other cause" because the medical evidence shows that the cirrhosis may well have been caused by the iron overload. For these reasons, the decision of the Administrator in this case is upheld.
12. It was stated, both in numerous documents in the file and orally at the hearing, that the estate had been unable to gather all of the many medical records of the deceased. The possibility that a different specialist might come to a different conclusion than Dr. Sherman was also raised.

13. The Referee was prepared to adjourn the proceedings to allow a subpoena to be issued to attempt to obtain all the medical records in order to determine whether some previously unproduced evidence existed that would be helpful to the claims of the estate. The family members of the deceased declined this opportunity since they had already spent so many years and so much effort in this matter, and wished to have the case determined based on the record available in the file as it stood. For similar reasons, they did not wish to attempt to see if it was possible to obtain a different opinion from a different medical expert.
14. As indicated earlier, the Ontario Hepatitis C Plan Review Committee awarded compensation to the estate, and it is important to indicate how that process differs from the Settlement Agreement under which this claim must be adjudicated.
15. The Ontario Hepatitis C program is not governed by the same Settlement Agreement as this claim. In the Ontario program, adjudicators and the Review Committee are to apply a civil standard of proof in determining entitlement; namely the question to be determined is whether on the balance of probabilities, it is more likely than not there is an entitlement. Further, adjudicators and the Review Committee are required to apply "a benefit of the doubt" provision, which provides that "conclusive proof is not required to establish a fact in support of the claim. Where the evidence for or against the fact is approximately equal in weight, the decision will be made in favour of the applicant".
16. Section 14(2) of the Ontario program also provides that, in determining whether a person's death was caused by HCV, it will be presumed the death was so caused, "where the cause of death is listed in Schedule A". Schedule A set out as follows: "indications of death caused by Hepatitis C: liver failure, cirrhosis, jaundice, bleeding esophageal varices, bacterial peritonitis, liver cancer".
17. Applying those legal provisions and entitlements to the facts of this case, the Review Committee found that there was sufficient evidence to conclude that the deceased was infected with Hepatitis C and that the likelihood that the deceased had Hepatitis C which contributed to her death was at least equal to any evidence that would support the opposite view. Accordingly, the Review Committee found that the death was caused, at least in part, by Hepatitis C.
18. The Review Committee relied heavily on the above terms of the Ontario Plan, which are significantly different from the Settlement Agreement. In particular, the Settlement Agreement does not contain a "benefit of the doubt" provision, nor is there a presumption that death is caused by HCV where there is cirrhosis. Indeed the language of the Settlement Agreement is very different, as I have outlined above. I find that, because of these differences, but also because of my own understanding of Dr. Sherman's evidence, it is not possible for me to come to the same legal or factual conclusions as the Review Committee.

19. Given that the deceased was never tested for Hepatitis C, the legal question in this case is, in essence, whether there is an "absence of any other cause" given the diagnosis of cirrhosis. Here there is credible evidence of another possible cause of cirrhosis, namely iron overload. I cannot ignore the medical evidence of Dr. Sherman and find for the claimant. If there was no other possible cause of cirrhosis in this case, the estate would have been entitled to compensation based on that finding. Unfortunately, those are not the facts and the decision of the Administrator is upheld.

DATED at Toronto this 24<sup>th</sup> day of June, 2010

A handwritten signature in black ink, appearing to read 'C. Mitchell', written over a horizontal line.

C. Michael Mitchell  
Arbitrator