IN THE MATTER OF HEPATITIS C – CLASS ACTION SETTLEMENT 1986-1990

CLAIM FILE NO. 7033

REFEREE

Gerald J. Charney, Q.C.

APPEARANCES FOR THE ADMINISTRATOR

Carol Miller – Hep C Claims Centre
Belinda Bain - Counsel

APPEARANCES FOR THE CLAIMANT

Enio Zeppieri, Counsel

The hearing in this matter took place on June 27, 2007 at Toronto, Ontario.

DECISION

The claimant has applied as a primarily infected person having been refused status by the Administrator.

The evidence of the Claimant is that he believed he contracted Hepatitis C as a result of a blood transfusion on March 14, 1987 at Scarborough General Hospital where he was taken as a result of a gunshot wound.

There is in fact blood transfusion during that period. He received four units of blood, three of which were traced negative, and one of which was untraceable because the donor had died.

He said that was his first and only blood transfusion but he does agree that he had a history of drug use, though he said he did not use any non-prescription intravenous drugs prior to his first blood transfusion on March 14, 1987. He does acknowledge that he used non-prescription intravenous drugs in May of 1987 for the next six months with a frequency of three to four times per month. He said he stopped using them in October of 1987.

He said he used clean and sterile needles for any non-prescription intravenous drug injections. He would obtain sterile needles directly from the pharmacy where sterile needles were always available. He claimed that the drug paraphernalia was sterile on all occasions. He took all precaution necessary to avoid infections. For example he said, I would always rub my arm with alcohol prior to the injection.

He never shared needles he said with other non-prescription intravenous drug users or anyone else because he was very much aware of AIDS and other infectious diseases that could be transmitted through a shared needle.

He said that he began taking drugs early in 1985. He was snorting coke and smoking weed. He first did IV drugs maybe after New Year's 1986 he seemed to remember. Did it the first time at a party, everybody was doing it, powdered cocaine was injected. In 1985 he was smoking heroin which led to coke. There were no syringes at the time. That continued maybe twice each weekend. He really liked heroin. He got shot March 14, 1987. He also liked morphine. For cocaine he carried a kit he had his own spoon, water, syringes. At that time he would not share anything with anyone. He would give away syringes but would never share needles. He was clean after his gunshot wound for nine months. No other transfusions.

He acknowledged that his declaration was in his ex-wife's handwriting. He signed it and he checked off number 4 and 5 that said he never used drugs. That was in July of 2001. He was on medication. He had a head injury on June 2, 1989. He spent 21/2 years in the Queen Elizabeth for rehab. He was paralyzed. They had to retrain his brain. He learned to walk.

Exhibit B, signed October 22, 2001, again said he used no drugs.

On Exhibit C, page 74, he said he used crack cocaine from 1986 to 1988 but did not share needles. He signed that on December 21, 2001.

He said he was freebasing and smoking. Exhibit D, his affidavit of September 10, 2004, paragraph 6 he said is not accurate, he started using drugs earlier.

On cross-examination he agreed that he started using heroin in 1985. He was in the military and he was released in 1984/85. He went to George Brown College. He was an artist. He said his mother started him on drugs. He has had three marriages and one son and one daughter. He was hanging around a bad crowd and organized crime. He was earning his stripes, he was dealing it. He was then using heroin and cocaine.

In 1986 some Columbians came into town and met with his friend who did 17 years in jail and who supplied all of Canada and they had a party. Here he asked for the Protection of the Evidence Act which was granted.

He said he injected cocaine for the first time secretly in the bathroom. He did it secretly because he thought if he was high he might get whacked. He did not have his kit. He took a spoon from the party table which was clean. In any event he agreed that he injected cocaine perhaps 25 or 30 times. He always got his needles from his girlfriends, his mother or a drug store. His drug of choice was heroine. All documents mention cocaine over and over again never one word about heroine, therefore he lied to lawyers and lied to the doctors.

Exhibit D paragraph 5 is not true and he agreed that he lied under oath. He claimed that his head injury affected his memory. He was asked could it be that he was not remembering his drug use and that everything was not necessarily sterile and he did not always use a clean needle.

He did not answer that question.

On re-examination he said he does not remember sharing needles but he acknowledged that it could have happened.

His sister gave evidence and said that around the period of 1984 to 1988 or 1989 she would see him weekly. They were close. She found that he was using cocaine. They had discussions with respect to needle use. She was very concerned that he would be getting AIDS with needles. She said he would never be that stupid. He said his needles were always packaged. She believed him when he said that because they had a brutally honest relationship. She was not sure when he took up intravenous drugs. She acknowledges that she is receiving Workers' Compensation for a head injury and that her memory is seriously affected.

On cross-examination she acknowledged that she was firstly upset when she found out he used drugs. She told him to stop and he did not listen. On the other hand, she said she never saw him do drugs therefore all of her information is from the Claimant.

The Administrator called Dr. Gary Garber who is qualified as an expert on Hepatitis C and indeed his qualifications were not challenged nor could they have been. He is the Head of Infectious Diseases at Ottawa Hospital and a Professor of Medicine in the Department of Medicine and the Department of Biochemistry, Microbiology & Immunology at the University of Ottawa.

The Administrator is mandated to send the information and the documentary information to an expert for review and on this basis he was asked

for a written report which he produced on October 24, 2005 and is filed as Exhibit 3 – Dr. Garber, in which he confirmed that the 41 year old male Claimant was diagnosed with Hepatitis C in 1998 and was found to be viral RNA positive. In addition, Dr. Garber was called as a witness.

Dr. Garber noted the past medical history of the Claimant.

1. On October 8, 1986 he was seen at Scarborough General Hospital with a diagnosis of abdominal pain and set home.
2. On October 18, 1986 he was seen again at Scarborough General Emergency for vomiting and weakness. Diagnosed with gastritis.
3. On March 14, 1987 he was brought to Scarborough General Hospital following a gunshot wound to the abdomen. The doctor noted that he used cocaine that morning, in the initial History and Physical the doctor wrote "Ingesting cocaine earlier this morning. During the episode, he became despondent and shot himself." The doctor also stated that "He has never had hepatitis or any serious infectious diseases."
4. On March 16, 1987 he was assessed by a psychiatrist who noted in his consult that the Claimant was admitted to the hospital two years before with a cocaine overdose.
5. On March 23, 1987 the doctor wrote in progress notes "1/4 to ½ gram of coke/day".
6. On May 2, 1987 he was readmitted to hospital for closure of his colostomy. The doctor noted in his admission history that the Claimant's

past history of cocaine abuse and indicated he apparently had not used since his injury.

7. On July 3, 1989 he was admitted to Scarborough General and Toronto Western for observation because of a head injury. The doctor wrote on the admission history "All he remembers is being driven away by a couple of men possibly being beaten up and then awakening to find needle marks in his antecubital fossa claiming that he had been injected with cocaine. He said this is not his work, that usually he is more gentle". Clinical notes from Toronto Western indicate that he had needle tracts to both antecubital fossa. Urine drug screen results were positive for cocaine.
8. On March 20, 1991 he was admitted to Downsview Rehabilitation Centre with list of diagnosis as follows: Craniocerebral injury, Left Epidural hemata, Craniotomy with evacuation of the hematoma, organic mental impairment and impaired hearing on right side.
9. On January 14, 1993 he was admitted to Northwestern General Hospital because of cocaine abuse. The doctor noted he signed himself out of the hospital the following day.
10. On June 7, 1993 Dr. Arndt wrote a letter summarizing the patient's history for Workers Compensation Board. The doctor wrote "In his quest for relief from his problems unfortunately, also found himself abusing cocaine which temporarily made him feel better."
11. On July 13, 1993 to October 12, 1993 he was admitted to the Queen Street Mental Health Centre for treatment. Under the heading Past

History in the admission history the doctor wrote, "He has been using different street drugs including heroin and most recently crack cocaine. He had hepatitis in 1989." Under the heading of personal history the doctor stated "He was reportedly a rebellious adolescent and because involved in criminal gang activity and heavy drug use".

12. On August 31, 1998 he was seen by Dr. Arndt and he indicated that the Claimant told him he had contacted hepatitis C. The doctor noted his past preferred drug was heroin and that he had blood transfusions in the past.
13. On May 7, 1998 Dr. Rosenhal indicated in office notes that LFTs were elevated. He also noted IV drug use of cocaine and heroin 1986-1987.
14. On May 21, 1998 Dr. Rosenhal noted Hep A & C positive.
15. On June 25, 1998 first assessed by Dr. El Khashab who indicated in her office the history of blood transfusion and remote history of IV drug use in 1986.
16. On December 9, 1998 he was reassessed by Dr. El Khashab who noted his liver biopsy results of Chronic Hepatitis grade 2 state 2 with absence of cirrhosis. She is recommending that he start Interferon and Ribavirin.
17. On April 5, 2004 he was reassessed by Dr. El Khashab who indicted in a letter to his family doctor that he had not yet started treatment and was being assessed for same again.
18. In May 2004 he started Pegetron Rx. Pertinent Lab results can be found in pages 290-350.
19. On August 19, 2004 HCV RNA below detection limit.

In 1991 he had a work related injury. He fell off a scaffold and had an epidural hematoma and was subsequently found to have residual damage with subsequent follow-ups with places such as the psychiatrist at Queen Street Medical Heath Centre, etc.

It was recorded that he was abusing cocaine to make himself feel better and had a past history of using cocaine and heroin.

In 1998 after his hepatitis C was diagnosed he had a liver biopsy that showed grade 2 fibrosis and was to start on Interferon Ribavirin therapy but this was delayed by a number of years as he was travelling.

He subsequently was treated in 2004. Between 1998 and 2004 he had progressive increases in liver function tests that seemed to respond quite nicely while he was on Pegylated Interferon and Ribavirin therapy. His viral load had fallen to undetectable at week 12 and at the end of the treatment. We do not have his six month post-treatment follow-up which should be available in November 2005.

All of this is complicated by a conflicted story of his non prescription drug usage. He initially filed that he had never used IV drugs then he wrote he did use crack cocaine from 1986 to 1988 and did not use needles. Then there were others where he did use intravenous needles but only in 1987. We have documentation of multiple times in his medical history where he had a prolonged use of cocaine including overdosing use of heroin documented several times in

the chart. Interesting as well although he was known to be hepatitis B surface antigen negative in the 80's, he is surface antibody as well as core antibody positive indicating that in fact he was infected with hepatitis B at some time which he spontaneously cleared. This again would indicate his likely exposure to infected blood and body fluids.

Clearly there is objective evidence that individuals can acquire hepatitis C through non prescription drug use that does not require needles. The sharing of paraphernalia and preparatory equipment as well can spread the disease. His history of drug use is over a prolonged period of time including needles and not needles and as well, the hepatitis B test does suggest exposure to infected blood and body fluids. However, this has to be placed on balance with the likelihood that a single unit of blood could not be traced or tested would be positive with hepatitis C. On the balance of probabilities it is far more likely that he would have been infected over his multiple years of exposure to non prescription drugs in comparison to a single unit of blood. Similarly, the pattern of his disease is showing fibrosis in 1998 with progressive liver involvement would suggest that his infection with hepatitis C could very likely have pre-dated his blood transfusion.

Dr. Garber's evidence was essentially fleshing out his report. He explained that the diagnosis regarding his liver showed that his liver damage was around 15 years after exposure. It was assessed as stage 2 fibrosis, it is unusual to see that earlier than 15 years. Since he had a blood transfusion in 1987 it

would be unlikely to have caused hepatitis C since it was only 11 years, not 15 years.

Dr. Garber also pointed out that in his hepatitis B test, it was clear that he was infected and cleared and that test was done in the late 1990's, and that hepatitis B is only acquired through blood or bodily fluids, most likely sperm. It is unlikely that he acquired this through the blood transfusion because the blood was tested for that, but he does not know when he acquired it. Exposure to hepatitis B would likely lead to exposure to hepatitis C. Dr. Garber pointed out that the medical records show a long IV drug use which is now admitted. There was not a lot of information in 1983 and 1984 or 1985 when testing became available for HIV. There was almost nothing out there suggesting to use clean needles. That changed after 1986 but not before. And in fact, people started using clean needles mostly from 1988 onwards. There were no needle exchange programs.

Question, how did he get hepatitis C? Dr. Garber said that there is now good evidence that sharing needles, sharing straws for snorting, and that if hep C is on needles it is almost 100% to get it over a prolonged period of time. The likelihood is that you are much more likely to contact hep C that way than from a unit of untested blood. In all probability he was infected around 1983 or 1984 based on a biopsy. Sharing needles at that time was common.

On cross-examination Dr. Garber agreed that there are exceptions to the 15 year rule re stage 2. When asked if drug use skewed the timeline, he still thought 15 years was a minimum and the skewing is not drug use but alcohol

which causes prior damage to the liver. There is no evidence of earlier liver damage and he agreed it does not take a lot of blood to get infected with hepatitis C. He also said that sharing needles was not part of the discussion in 1986 it happened later.

ARGUMENT

Counsel for the claimant argued that this claim should be allowed for the following reasons.

Firstly, to the best of his recollection he never shared needles because of the AIDS scare.

Secondly, he started in 1986 and Dr. Garber's evidence re 1986 or March 1987 is of little significant difference and there is no evidence that the drugs had any import on his getting hepatitis C. Therefore, based on the claimant's evidence it is most likely he received hepatitis C through a blood transfusion.

Counsel for the Administrator said that the onus is on the claimant to prove that the blood caused the infection and it was not caused by drug use. She states that the claimant has serious memory problems and on a number of occasions he has lied under oath and that his evidence is completely unreliable. It is not clear when he started injecting himself and could well have been before 1986. Dr. Garber's evidence strikes unfortunately two blows against the claimant. Firstly, that in the period when the claimant so carefully explained that he would never share needles because he was afraid of AIDS there was no AIDS

scare regarding shared needles at that time and it probably didn't happen until 1988. Secondly, Dr. Garber is convinced that on a large balance of probabilities, that the claimant was infected well prior to the drug transfusion. In addition, there is the evidence of the hepatitis B which would in fact include a lifestyle that is very likely to cause hepatitis C.

DECISION

It is my view that the claimant's evidence is unreliable for the following reasons. Firstly, his memory is seriously impaired and therefore not entirely reliable. Secondly, even with his impaired memory, he has on a number of occasions, misled his doctors, his lawyers, and has sworn affidavits which he knew were false. There is no chance that the claimant believed that he did not engage in drug use and that he did not inject himself with drugs. The only question is when and how.

I am satisfied that Dr. Garber's evidence as to the timeline for developing hepatitis C was such that it would have been extremely unlikely for him to develop the level that he had gotten to if it had been merely the blood transfusion that had first caused him to be infected with hepatitis C in 1987. Together with his evidence that prior to about 1988 there was virtually no knowledge in the AIDS community that shared needles were extremely dangerous. In result then, I reject the claimant's evidence that he used clean needles because he was afraid of AIDS in 1986 and perhaps in 1985.

The evidence of the claimant's sister is of no value. It is at best, hearsay.

Even with the above, it should be pointed out that a person claiming to be a primarily infected person under 301 claim must deliver to the Administrator an application form prescribed by the Administrator together with a statutory declaration by claimant including a declaration that he or she has never used non-prescription intravenous drugs, and it goes on to say in paragraph 3,

> Notwithstanding the provision of section 3.01(1)(c), quoted above, 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.

I find that on the balance of probabilities, it was most likely that the claimant was infected with hepatitis C because of his intravenous drug use.

In result then, the claim is dismissed.

DATED at Toronto, this 6th day of August, 2008.

"Gerald Charney"
Gerald J. Charney, Referee