THE 1986-1990 HEPATITIS C CLASS ACTION SETTLEMENT

IN THE MATTER OF AN APPEAL FROM THE DECISION OF THE ADMINISTRATOR DATED APRIL 1, 2001

DATE OF HEARING: October 25, 2005

IN ATTENDANCE:

CLAIMANT: #9836

FOR THE ADMINISTRATOR: William Ferguson
Carol Miller

REFEREE: C. Michael Mitchell

DECISION

1. This is an Ontario-based claimant, claim #9836.

2. The Claimant in this case is a 31 year old woman who received blood transfusions on three occasions; once as a child, once in 1977 after a motor vehicle accident, and then in 1987 with respect to a hemorrhage post-tonsillectomy.

3. She is hepatitis C antibody positive and PCR positive.

4. Suffice to say that the Claimant had, according to her medical records, a very difficult early life, involving a motor vehicle accident in which her parents suffered greatly as did she, and consequently she encountered numerous other very substantial difficulties in her life.

5. The blood that was administered in 1977 cannot be traced back and, with respect to the blood transfusions within the relevant class period from 1986 to 1991, one of the units administered in 1987 had a negative traceback, and the other could not be found.

6. The Claimant has acknowledged, and her medical records indicate, a history of injection drug use. But for the admitted drug use, in the case of a negative traceback, the Claimant would have been accepted as eligible for compensation. However, under the Court-approved protocol respecting non-prescription, intravenous drug use, the following provisions apply:

> Applicability of CAP
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> 1. This CAP applies where:
>
> a. there is an admission that the HCV Infected Person used non-prescription intravenous drugs; ...
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> Eligibility Criteria Where This CAP Applies
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> 2. The Administrator must be satisfied on the balance of probabilities that:
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> a. the HCV Infected Hemophiliac or person with Thalassemia Major was infected with HCV for the first time by Blood received in Canada; or
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> 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;
>
> ii. by a Spouse who is a Primarily-Infected Person/Opted-Out Primarily-Infected Person; or

iii. by a Parent who is an HCV Infected Person/Opted-Out HCV Infected Person; as the case may be.

3. The burden to prove eligibility is on the claimant. The Administrator shall assist the claimant by advising what types of evidence will be useful in meeting the burden of proof in accordance with this CAP.

Additional Investigations

8. If the claim is not rejected under the Traceback CAP, the Administrator shall perform the following additional investigations:

a. obtain such additional information and records pursuant to s. 3.03 as the Administrator in its complete discretion considers necessary to inform its decision; and

b. obtain the opinion of a medical specialist experienced in treating and diagnosing HCV as to whether the HCV infection and the disease history of the HCV Infected Person is more consistent with infection at the time of the receipt of Blood, the Class Period Blood transfusion(s) or the secondary infection or with infection at the time of the non-prescription intravenous drug use as indicated by the totality of the medical evidence.

9. The Administrator shall weigh the totality of evidence obtained including the evidence obtained from the additional investigations required by the provisions of this CAP and determine whether, on a balance of probabilities, the HCV Infected Person meets the eligibility criteria.

10. In weighing the evidence in accordance with the provisions of this CAP, the Administrator must be satisfied that the body of evidence is sufficiently complete in all of the circumstances of the particular case to permit it to make a decision. If the Administrator is not satisfied that the body of evidence is sufficiently complete in all of the circumstances of the particular case to permit it to make a decision, the Administrator shall reject the claim.

7. In this case, the Administrator obtained the opinion of a medical specialist, Dr. Garber, who also testified by telephone and was cross-examined. The Claimant gave evidence and was also cross-examined, along with the Administrator, Ms. Carol Miller.

8. In her affidavits filed in this case, the Claimant indicated that she did not use non-prescription drugs prior to her blood transfusion in April, 1987 at the age of 13. She stated she first started using non-prescription intravenous drugs "periodically during those years, moderately" from 1989 to 2001. Although she clarified in her

oral evidence that the IV drug use started in late 1994 or early 1995, the Claimant deposed that when she used non-prescription intravenous drugs she obtained the needles through needle exchange agencies in British Columbia. She deposed that she never shared needles with any other individuals during the time that she used non-prescription intravenous drugs.

9. The Claimant deposed she had a number of criminal convictions, including in the relevant period from 1998 through 2001. These were for driving while impaired, driving while disqualified, and possession of a schedule 1 substance. In a subsequent affidavit, the Claimant deposed that when she received non-prescription intravenous drugs, and obtained needles from the needle exchange programs, she was provided with clean containers of water, and that to the best of her knowledge, the drug paraphernalia that she used or obtained from the needle exchange program were clean and sterile.

10. In her *viva voce* evidence, the Claimant said she first became involved with drugs, drinking and smoking "pot" in grade 9. She moved from the use of soft drugs to harder drugs. Eventually, prior to her getting pregnant for the first time in late 1994 or early 1995, she started using needles. The Claimant indicated that she did not ignore the requirements for safety when she mainlined drugs, and never used needles, except from the needle exchange or from a store. The person who introduced her to this form of drug use taught her how to be safe. Generally in her evidence, the Claimant indicated that she only used drugs a few times, and that she used drugs a lot less then has been made out - presumably by Dr. Garber, the expert retained by the Administrator, in his affidavit. The Claimant denied that she used drugs at great risk to her fetus. She indicated that she only used them in her first trimester, until the time that she had a positive pregnancy test, after which she "tried to clean herself up". She said none of her children were born with symptoms of drug use.

11. Given the Claimant's indication of not having used IV drugs that often, she was asked by her counsel to explain how it was that she was in "detox", and why she found it necessary to go to "detox". The Claimant indicated that she did so in order to stop using drugs. She indicated that she had developed a dependency and could not get rid of it on her own but that, despite this dependency, she had not been tempted to use dirty needles. The Claimant indicated that she was both drug free and alcohol free now, and has not used any alcohol or drugs since October of 2001.

12. The Claimant presently resides in Niagara Falls, lives with her common law husband and children aged 4 and 2, and maintains two jobs.

13. Generally speaking, with one exception, the Claimant agreed with the information in her medical file and as set out by the physicians. She disagreed in particular

with Dr. D's statement in her medical records. I did not need to give weight to that particular note in reaching my decision.

14. The Claimant admitted that she had a history of heavy alcohol use. The Claimant said she never did mainline drugs for very long. She did not feel that she met the typical profile of an addict or an alcoholic.

15. In her application filed in May, 2002, the Claimant indicated she used cocaine periodically from 1999 to 2001, and never shared needles, but she indicated that she did engage in non-prescription IV drug use on more than 30 occasions.

16. Dr. Garber is an acknowledged expert in infectious diseases. In his opinion, he concluded that the Claimant had "extensive drug use for a prolonged period of time" -- an issue that became the subject of cross-examination. He said that there is significant anecdotal data coming out of the Vancouver Needle Exchange Program, which has indicated that, despite needle exchange programs, hepatitis C and HIV has been on a continuous rise in that population. In his opinion, the reliability of patients who indicate that they always use clean needles is difficult to verify because of the unreliable nature of the individuals when they are actively using injection drugs. With respect to the statistics, he stated that the likelihood of a unit of blood being infected was approximately 1 in 10,000 from what he saw in the literature, and for needles, it was not as well defined. However, he concluded (as a result of the data he was familiar with) that 30%-60% of people who are involved with drugs over any extensive period can, in a very short period of time, become infected with hepatitis C as a result of intravenous drug use. In conclusion, therefore, Dr. Garber concluded, based on the balance of probabilities, the Claimant's likely exposure to hepatitis C from injection drug use over a prolonged period of time would be significantly larger than the likelihood of a single unit of untested blood being the source of her infection.

17. On cross-examination, Dr. Garber said that, in some cases, people with hepatitis C can be noticed as having symptoms within 3 months, if it is acute. Usually, however, that occurs in no more than 15% of the infected population. One usually sees signs of this disease 15 years or more after the exposure. This depends upon whether people consume significant amounts of alcohol and other variables. People can contact hepatitis C and it not become evident for 15 years.

18. When asked about his conclusion that the Claimant had extensive drug use, the doctor testified that, when he looked at the history of the patient, there were multiple references in the medical history to use of cocaine and heroine over several years. He testified that the cocaine use of 1 to 3 grams per day over a month in a half was not occasional. He indicated that, to the extent social

services had been involved with the baby the Claimant gave given birth to, that baby had been "addicted".

19. When asked about people who say they used only clean needles, Dr. Garber said there are people who use cocaine recreationally, or needles twice a month, for example, on a planned basis, like going out to a bar. Even amongst those, Dr. Garber maintained there were people who would get exposure to hepatitis C because when one uses drugs one makes mistakes and people share needles, and also share water. He maintained that you can use clean needles and still be exposed to hepatitis C. Dr. Garber said that he wished he could say that people who insist they used only clean needles comprised a lower percentage of those who contracted hepatitis C, but in his experience, their history of use would be unreliable because of their cravings. While Dr. Garber personally agreed that if an individual were to only use sterile needles and water, it was theoretically possible that hepatitis C would not be transmitted, but he considered that situation to be unlikely in reality.

20. With respect to the examination of the reports on the Claimant's liver, Dr. Garber was of the view that had the Claimant's exposure to hepatitis C occurred in 1987 with the blood transfusions, it is likely that now, 15 years later, there would be evidence of inflammation, especially with individuals who had an extensive use of alcohol, as the Claimant did. In this case, the Claimant's liver only had elevated levels on one occasion, which meant it was more likely that she had been exposed to hepatitis C in the 1990's through IV drug use than through the transfusion that had occurred in 1987. What is not present in the Claimant's case is an ongoing state of inflammation of the liver function, and it was only elevated on one occasion. In 2001, the Claimant was diagnosed with hepatitis C by virtue of a test, and not by virtue of symptoms that she was facing. In Dr. Garber's view, the symptoms were more consistent with an exposure in the 1990's, especially in the period 1998-2001, then they were with exposure in 1987.

21. The Claimant's medical records contain the following information:

    (a) January 1, 1994, "heroin abuser, snorting", indicating also symptoms of heroin withdrawal;

    (b) January 24, 1994, there is an indication of "heroin withdrawal";

    (c) November 18, 1994, "depression, sleeping and crying all the time. No energy"...;

    (d) December 19, 1994, "kicked out, broke up with boyfriend, panic attacks, anxious";

(e) January/February 2, 1995, "pregnant, substance abuse, cocaine IV last used 4 days ago";

(f) March 14, 1995, "went to Vancouver detox centre and stayed two days. Quit cocaine and heroin, suffering from withdrawal, feeling hot and cold and achy".

(g) May 24, 1995, "she has a history of drug abuse such as cocaine, heroin, marijuana in the first three months of pregnancy. She also used alcohol at the beginning of the pregnancy;

(h) September 29, 1995, "I was told from Dr. _____'s office that she used IV cocaine and other drugs during her early pregnancy. She is a frequent substance abuser, but she denies it only from the first trimester. Obvious IV drug use signs in the anticupital sasa, etc."

(i) September 30, 1995, substance abuse including cocaine, probably later in pregnancy then she admitted. "Symmetrical IUGR with ultrasound yesterday. Increased heart rate variability." (This was an inter-uterine growth retardation that Dr. Garber referred to in his oral evidence.

(j) September 4, 1996, "...strong history of maternal substance abuse, symmetrical IUGR with severe oligohydramnios. Ultimately, the baby did extremely well, and I think continues to do so". "... She has not apparently used any drugs at all since I last saw her";

(k) October 15, 1999, Seen in emergency, "Heroin addiction. Since she lost custody of her children. Would like admission until detox available. Able to go to detox, bed available in Vancouver."

(l) November 8, 1999, "Detoxing - was in detox for 3 days. Cocaine and heroin IV, smoking coke crack. Haven't used heroin 7-8 days, off coke 2 days";

(m) November 15, 1999, "Doing IV drugs. Now swelling left elbow, left cubital fofsa abscess";

(n) January 11, 2000, "Says she has stopped heroin use 2 days ago, has symptoms of withdrawal - tired, stomach upset, anxious, shaky. I mentioned detox centre to her as doing withdrawal should be supervised (she has done this before). She got upset;

(o) A date between January 2000 and April 2000, Coming off heroin, restart detox;

(p) May 11, 2000, "Anxious, doing drugs - heroin, etc.";

(q) Medical report dated June 27, 2002, "The patient quit drinking about 9 months ago, but previously in her late teens and 20's was a heavy alcohol consumer by her own admission. The patient had done IV drugs from 1999 to 2001. She also had tattoos on different occasions for over 8-9 years.

22. In this case, the burden to prove eligibility is on the Claimant under the Court Approved Protocol. In terms of the requirements on the adjudicator, these would appear to be the same as those for the Administrator. In other words, I must weigh the totality of the evidence obtained, including the evidence obtained from the additional investigations (mainly the medical opinions), and determine whether or not on balance of probabilities, the infected person meets the eligibility criteria. Moreover, what must be taken into account is the opinion of the medical specialist whether the infection and disease history of the HCV infected person is more consistent with an infection at the time of the receipt of the blood, or the with an infection at the time of the non-prescription intravenous drug use, as indicated by the totality of the medical evidence.

23. In this case, I attach very little weight at all to Dr. Garber's relaying of “anecdotal” evidence, "coming out of the Vancouver needle exchange program". In my view, that is not evidence which is pertinent particularly given the Claimant's statement that she always used clean needles. It is also not particularly reliable evidence just because Dr. Garber is an expert who has set out “anecdotal evidence”.

24. Nor in this case have I attached any weight to Dr. Garber's view as to "a general unreliability of patients who indicate that they always use clean needles” because of his apparent opinion that anyone who uses IV drugs is virtually necessarily unreliable. If that allegedly “expert” evidence were applied in every case regardless of the facts or circumstances, no-one who had ever engaged in IV drug use would ever be able to make out a case on the balance of probabilities, and I do not think that is what was intended by the Court-Approved Protocol.

25. Finally, I am very reluctant to give overriding weight to Dr. Garber's general reliance on the statistical probability of a blood transfusion as compared to the statistical probability of infection from IV drug use because once again to do so as a general overriding matter would appear to make it virtually impossible for any IV drug user to sustain a claim, rather I can only conclude from the Court-Approved Protocol that while the onus is on claimants who have IV drug use to persuade a medical expert and the adjudicator on the balance of probabilities, and this is a difficult task, I do not conclude that it is necessarily insurmountable.

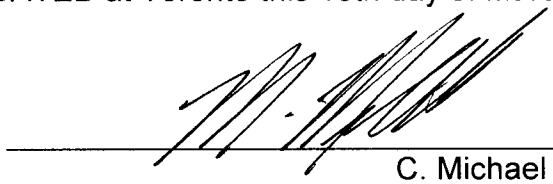
26. On the other hand, Dr. Garber's analysis of the actual medical history and medical file of this particular claimant is highly relevant. In my view, the nature of the medical expert evidence that is asked for and required in these cases is expert evidence based upon an understanding and interpretation of the medical file and medical history of the particular claimant concerned, including, perhaps, expert evidence of the reliability of the particular individual, given that individual's medical history.

27. In this case, Dr. Garber characterized the Claimant's indulgence in the use of IV drugs as "extensive". I agree with counsel for the Claimant that the use of that word is not particularly helpful. However, the point of Dr. Garber's evidence was that the IV use by this Claimant over those years was much more than occasional and the Claimant had a difficult and troubled period as a young person struggling with serious problems in life, wherein a slavish adherence to only the very safest methods of IV drug use is not obvious, apart from the self-serving retrospective statements of the Claimant at this time.

28. Moreover, Dr. Garber did give uncontradicted expert medical evidence with respect to the proper inferences to be drawn from the Claimant's specific medical history, and her specific file. In particular, Dr. Garber gave evidence as to the inferences to be drawn from the tests performed on the Claimant's liver over the years. In this regard, Dr. Garber found that the levels in the Claimant's liver were only elevated on one occasion. In my view, the Claimant has not been able to overcome, as she must, the conclusion reached by Dr. Garber that the symptoms which she demonstrated in terms of her liver function were more consistent with an exposure to hepatitis C during the period when she was using intravenous drugs than they were with an exposure in 1987 which was the occasion of the transfusion which cannot be traced back.

29. In this case, given the onus of proof on the Claimant, I cannot on the totality of the evidence before me find that the infection and disease history of the HCV-infected Claimant is more consistent with the infection at the time of the receipt of the blood than it is with the use of non-prescription intravenous drugs. In the result, the Administrator's decision is upheld.

DATED at Toronto this 13th day of March, 2006



C. Michael Mitchell
Referee