

THE 1986-1990 HEPATITIS C CLASS ACTION SETTLEMENT

IN THE MATTER OF AN APPEAL FROM THE DECISION OF THE ADMINISTRATOR
DATED APRIL 8, 2013

DATE OF HEARING: July 24, 2013

CLAIMANT REPRESENTATIVE: No. 7438

IN ATTENDANCE: Claimant

FOR THE ADMINISTRATOR: Belinda Bain
Carol Miller

REFEREE: C. Michael Mitchell

DECISION

1. This is an Ontario-based claimant, claim #7438.
2. My jurisdiction in this matter is as a Referee under the Settlement Agreement. In the unique circumstances of this case, I have taken the liberty of commenting on the matter beyond my strict jurisdiction and I trust I may be excused for doing so.
3. The claimant's mother, a resident of Ontario, was approved for compensation as a result of being infected by a blood transfusion at Mount Sinai Hospital, and she died in the year 2000. She was 71 at that time. The claimant points out that his grandmother had lived until age 96 and that absent the infection received from the tainted blood, his mother could have expected to live an equally long life. The claimant, now aged 59, was approved for loss of services benefits by the fund as a dependent, since he was in fact dependant on his mother.
4. The source of the claimant's dependency appears to have been his infection from Lyme bacteria in 1987 when he was in his early thirties; he states that he nearly died as a result. He was only diagnosed late in the course of the disease and has suffered from it with a host of medical problems, the most debilitating of which is extreme fatigue.
5. The claimant appears as a bright intelligent person who has suffered a series of Job-like personal tribulations and tragedies, including losing his business and home. His sole financial sources of income until October 2012 were a disability pension from the Canada Pension Plan, which is \$606 per month, and the income from lost services under this Agreement, which I understood in 2012 to be \$13,608.27 annually. Thus, the claimant's total annual income barely exceeded \$20,880.27. After the loss of the payments for loss of services, his income was reduced to \$7,272 per annum.
6. The Income from lost services under this agreement terminated on October 1, 2012, as that was the actuarially determined date of his mother's life expectancy as determined by the actuarial life expectancy tables. Under the Settlement Agreement, the Administrator uses the Canada Life tables current at the time of death to determine the maximum period for which loss of services may be payable. Lost services payments are made only for the period of life expectancy as determined by the actuarial tables.
7. The relevant provisions of the Settlement Agreement are attached.
8. These rules limiting the payments to the actuarially determined life expectancy have been challenged at least twice in Ontario and were upheld in two Referee Decisions, numbers 8162 and 15686, the first of these being my own. The claimant, who was not represented by counsel, candidly admitted that he had read the Settlement Agreement and could find no basis for argument that

supports his appeal. He is correct in that assessment; the Administrator, and therefore the Referee, has no discretion to direct a payment beyond the life expectancy date determined by the actuarial tables.

9. What the claimant argues is that it cannot be the case that his circumstances and particular facts would have been ignored by the parties to the Settlement Agreement had they been contemplated at the time. Alternatively, he argues that, upon review now, given the financial state of the fund, it is appropriate to amend the plan or vary it to take account of his circumstances. He argues that there must be discretion, either in the Joint Committee which has responsibility for the plan or perhaps more likely with the courts or with the parties themselves, to vary or amend the Agreement to somehow take account of his circumstances and those of others like him.
10. Another way of putting the claimant's case is that his circumstances are somewhat unique, and had the parties to the original agreement been aware of his circumstances (and those of others in the same circumstances), they would have fashioned the agreement to take such circumstances into account. In this regard, in my view, he is correct - or at least, in my view, account should be taken at this juncture of his rather unique circumstances to see if it is possible and appropriate to redress the situation.
11. In my view, the circumstances of the claimant are likely relatively unique. Unlike a claim for loss of income or support as a result of the death of the primarily infected person where benefits cease on the day the primarily infected person would have turned 65 (presumably because that date is assumed to be the end of the employment period of the primarily infected person), a claim for loss of services is compensated to the deemed date of the life expectancy of the primarily infected person, according to the life expectancy tables, determined without reduction because of a pre-existing ailment or illness.
12. In the case of a child, the loss of services is presumed to continue until age 25, unless the child provides evidence that some other period of loss is appropriate.
13. The claimant's source of support until 2012 comes from this last provision in the Settlement Agreement. He would normally not have been entitled to loss of services compensation as he was a child above age 25. However, because he received services from his mother and was a dependent child of his mother, the loss of services continued until the life expectancy date precisely because he was able to convince the Administrator that a period of loss beyond age 25 was appropriate in his case. Absent such proof, the claim would have been terminated earlier.
14. In my view, the claimant's case is likely quite unique, in that adult dependent children of a primarily infected person are likely as a class to be comparatively rare. Adult dependent children without other means of support or otherwise

obtaining services beyond the actuarially determined life expectancy date of their parent are also likely to be comparatively rare.

15. In this Settlement Agreement, the parties clearly contemplated that dependent children would sometimes require continuation of support for lost services well beyond age 25. In my view, if they had turned their mind to the fact that a need for services of a dependent child might continue beyond the actuarially determined life expectancy date, they likely would have made provision for benefits, or some portion of them, to continue at least until our society's social welfare systems provided some additional level of support.
16. The claimant convincingly argues that his mother was willing to sign onto and approve the Settlement Agreement precisely because she believed, as he did, that its provisions meant that her dependent disabled son would be taken care of under the Agreement after her death, if she died as a result of the infection from tainted blood (as she did). In fact, because of the use of the actuarial tables, and the fact that the claimant remains disabled and without income (beyond his small CPP pension) at age 59, there is a gap of at least six years between the life expectancy date of his mother and the date he is eligible for an old age security pension. It seems to me that it is reasonable to think that a gap like that would not have been permitted had the parties explicitly considered the possibility of this occurring.
17. Another way of addressing this question is to ask whether the parties explicitly contemplated that a permanently disabled dependent child of a deceased primarily infected person, who died as a result of the infection, would be left helpless in terms of support for services between the actuarially determined life expectancy date of the primarily infected person, and the time other support becomes available through the old age security pension and guaranteed income supplement available to all Canadians with 10 years of residence at age 65. If they did not so contemplate, or even if they did and the funds are now available in the plan to deal with this matter, it is appropriate that the issue should be addressed.
18. This Settlement Agreement was likely fashioned with a complete understanding of the fabric of Canada's social welfare system where from age 65, the combination of old age security pension (today \$550.99 monthly) and the guaranteed income supplement (\$747.11 monthly) for a single person produces a total income of \$1,298.10 monthly or \$15,577.20 annually. In other words, if the claimant were 65 today he would receive these minimum amounts from the state, as the CPP disability pension ceases at that date.
19. There are at least three obvious ways for the appropriate authority to resolve this matter or for the parties to consider. Unquestionably, there are others options as well. One obvious solution would be to permit the loss of services benefits to be paid indefinitely for the life of the dependent. In tort law, this likely occurs in some

settlements and is perhaps appropriate and affordable here if the fund is sufficiently robust at this stage. A second possibility, given that benefits were only payable for the actuarial life expectancy of the primarily infected person, would be that benefits could simply be extended to the date the dependent turns 65 and becomes eligible for old age security benefits. A third possibility would be to limit the benefits payable up to age 65 to the difference between the CPP pension in this case (or other income in other cases) and the amount of the full old age security benefit would be if the dependent was age 65. This option would be based on the theory that, because this extended benefit is an additional benefit to what was available in the Settlement Agreement, it should be capped at the same level that full old age security provides (less other sources of income).

20. In any event, as I have already said, the number of dependent children who experience this support gap as I have defined it is likely to be very small. Spouses of a primarily infected person are typically much closer in age to the primarily infected person and therefore, as of the life expectancy date, it is highly probable spouses will themselves be at or above age 65 and therefore entitled to old age security (assuming they require a financial substitute for lost services). Consequently, there are likely to be many fewer spouses, if any, in the circumstances of the complainant than there are dependent children in this situation.
21. In my view, all of these options should be considered and a solution should be found for the claimant and others like him, if at all possible. His current circumstances with virtually no income are completely inconsistent with the notion that the Settlement and the tortious conduct it purported to remedy addressed his mother's much shortened life and her consequent ability to provide for her dependant son in a reasonable fashion. His vital interests and his mother's are not met by the result I am compelled to render here.
22. I would respectfully request that the Administrator's counsel and the Administrator bring this decision to the attention of the Joint Committee.
23. The claim is dismissed.

DATED at Toronto this 14th day of November, 2013



C. Michael Mitchell
Referee

Terms of the Settlement Agreement

16. The Administrator will use the most current Canada Life Tables to calculate a notional life expectancy of the deceased HCV Infected Person without reduction for pre-existing ailments or illness (including HCV) to determine the maximum period loss of services may be payable.
17. Loss of services will be paid to Dependants for the calculated life expectancy of the deceased HCV infected Person, so long as the Spouse who is Dependant remains alive or there is a Child who is Dependant who continues to qualify for payments. Loss of services payments will cease upon death of the Spouse who is a Dependant unless there is a Child who continues to qualify for payments as a Dependant.
18. Where the Dependant claiming is a Child, the loss of services will be presumed to continue until his/her 25th birthday unless the Child provides evidence satisfactory to the Administrator that some other period of loss is appropriate.