

IN THE MATTER OF A REFERENCE
UNDER THE HCV LATE CLAIMS BENEFIT PLAN
ESTABLISHED PURSUANT TO
THE JANUARY 1, 1986 – JULY 1, 1990
HEPATITIS C CLASS ACTIONS SETTLEMENT
AND SUBSEQUENT ORDERS

Claim Number:	70579
Province of Alleged Infection:	(Province)
Province of Residence:	(Province)
Fund Counsel Representing Administrator:	John Callaghan
Referee:	Daniel Shapiro, Q.C.
Dates of Teleconference Hearing:	November 28, December 17, 2021, Final Submissions February 11, 2022
Date of Decision:	February 23, 2021

DECISION

A. Introduction

[1] By way of Late Claim Request Form dated March 14, 2018,¹ the Claimant, a (Province) resident then 61 years of age, applied for compensation as an HCV Infected Person pursuant to the HCV Late Claims Benefit Plan (the “Plan”). The Claimant is unrepresented.

[2] In his Late Claim Request Form, the Claimant (a) checked off “yes” beside the statement, “I am a HCV Infected Person who received blood or blood products between January 1, 1986 and July 1, 1990 and contracted the Hepatitis C virus”: (b) indicated August 1987 as the approximate date when a blood transfusion or blood product was received; (c) stated that the transfusion was received at X Hospital, (City), (Province); (d) stated “When I got Hep C I just know that I was clean when I went into hospital in 198X and the next time my blood was checked I had Hep C”, and stated (e) he did not know when he first received notice or became aware of the deadline that applied to make a claim to the 1986-1990 Hepatitis C Settlement.

[3] On May 17, 2018, Court-Appointed Referee Reva Devins issued a Decision² permitting the Claimant to file an application form to file a Late Claim, finding that the Claimant did not receive timely notice of the First Claim Deadline and then requested an application within a reasonable time after the HCV Late Claims Benefit Plan came into force.

¹ The Updated Appeal file for the Claimant consists of a total of 199 pages, all of which were provided to the Claimant. The Late Request Application is found at pages 17-23.

² Appeal file, page 24

[4] Pursuant to the terms of the Plan, the “Class Period” (January 1, 1986 to and including July 1, 1990) is the only period of time in respect of which compensation may be available. Further, while there are many possible sources of infection with respect to the Hepatitis C Virus (“HCV”), the Plan only provides compensation for individuals who received transfusions during the Class period of defined blood products, generally, but with an exception, where the donors have been tested and found to be infected with the HCV.

[5] The Claimant’s General Claimant Information Form, dated March 28, 2019,³ states that he: (a) was infected with the HCV through a Blood transfusion received in Canada between January 1, 1986 and July 1, 1990; (b) never received a Blood transfusion outside of Canada; (c) received Blood transfusions in Canada twice in his lifetime; (d) put a “?” mark beside the question “How many times have you received Blood Transfusions in Canada prior to 1986; and (e) was transfused twice during the Class Period.

[6] The Claimant’s Statutory Declaration Form, dated March 28, 2019,⁴ declared, to the best of his knowledge, information and belief:

2. I have never at any time used non-prescription intravenous drugs. “False”

3. I was not infected with the Hepatitis Non-A Non-B or the Hepatitis C virus prior to January 1, 1986. “True”

6. The place where I received my first Blood Transfusion in Canada during the period January 1, 1986 to July 1, 1990 is: (City), (Province).

[7] The Treating Physician Form, completed by the Claimant’s general practitioner on March 9, 2021⁵ states that HCV is present in the Claimant’s blood as demonstrated by the PCR Test performed.⁶ The Blood Transfusion History Form, completed by the Claimant on April 8, 2020⁷ provides the date of Blood Transfusion at X Hospital (City) as “09-8X” and states, under “Medical Condition Which Led to Blood Transfusion” – “Beat up by 5 people, in a coma 4 or 5 days.”

[8] The Claimant authorized the Plan Administrator to initiate a traceback procedure regarding any and all blood products received by the Claimant in Canada. The Traceback Report dated July 8, 2021,⁸ provided by the Canadian Blood Services, states:

Hospital:	X Hospital, (City) (Province) Yes,
Blood Bank Records Searched:	1980-01 to 2021-06-18

³ TRAN 1, pp. 58-62

⁴ TRAN 3, pp. 71-73

⁵ TRAN 2, pp. 101-108

⁶ The PCR test, dated May 14, 2021, is at p. 117

⁷ TRAN 5, pp. 112-113

⁸ pp. 119-120

Patient's Health Records Searched: Last 10 years
Results of Search: No record of this person's admission to hospital

[9] The Administrator wrote the Claimant on July 12, 2021⁹ advising that his Late Claim for Compensation under the HCV Late Claims Benefit Plan was denied, for the following reasons:

... You have not provided sufficient evidence to support your Late Claim that (you) received Blood (Transfused) during the Class Period.

You submitted a Transfusion History Form where you indicated that you were transfused in 198X at X Hospital, (City) (Province), because of trauma. A traceback was initiated for X Hospital... Blood Bank records were searched from 1980-01 to 2021-06-18. The results of the search were that there was no record of your admission to hospital.

Based on this information your claim must be denied based on Article 3.01 (1a) of the 1986-1990 Hepatitis C Settlement Agreement, Transfused Plan; because there is no evidence to support that (you) received a Blood transfusion between January 1, 1986 and July 1, 1990.

[10] The Claimant submitted a Request for Review dated August 12, 2021,¹⁰ checking off: "I wish to have the Administrator's decision reviewed by "Arbitrator?" His grounds for review were:

The hospital gave me Hep C and threw the files for me away after 10 years.

[11] I am the court-appointed Referee and Arbitrator for (Province). In a teleconference with the Claimant, Fund Counsel and the Plan Administrator shortly after the file was referred to me in September 2021, having discussed the differences between a review by Referee versus Arbitrator, the Claimant advised that as he wished to preserve his right to have my ultimate decision reviewed by the Court, he preferred to proceed by Reference instead of Arbitration. The matter proceeded on that basis.

[12] Given the significant health and safety issues associated with Covid-19, the parties agreed that an in-person hearing was not practical. As the Claimant had no access to a computer or smartphone, it was agreed that all proceedings would be conducted by teleconference.

[13] However, before proceeding further with the reference, on September 27, 2021, I signed a Summons¹¹ directing the (Province) Health Authority ("XHA"), which owns and operates X Hospital (XH), (City), to release any records for the

⁹ pp. 9, 10

¹⁰ pp. 7, 8

¹¹ pp. 121-122

Claimant during the Class Period, and, due to the conflicting dates provided by the Claimant, 1985 as well. XHA replied on September 28, 2021:¹²

A thorough inspection of the transfusion records for all (City)-based hospitals – XX Hospital, XXX Hospital and XH – for the period January 1, 1986 through July 1, 1990 has identified no results for (Claimant).

[14] XHA provided its record retention policies,¹³ stating that Patient Records are to be retained until “Last date of service/discharge or deceased + 10 years,” but noting that this retention period is not sufficient for all categories of patient records (e.g., transfusions, immunizations, communicable diseases, etc.) After this response was provided to the Claimant, in a further teleconference, as the Claimant stated he was not sure whether the transfusion may have taken place in 198X, I issued a further Summons to XHA covering health records and blood bank records for the Claimant for 198X. The XHA replied on November 2, 2021:¹⁴

... I have searched the transfusion records of this patient four times and included all three (City) hospitals to ensure I did not miss anything.

The only visits with transfusion testing performed at XUH was August 24, 29, 197X and September 3, 197X. Please be aware that transfusion medicine laboratory does keep records for 50 years.

I could find transfusion testing performed at XX Hospital Feb 13, 200X and February 14, 200X with RBC units issued from XXH. The unit numbers are...

Please note that these were found on a search of XXH not XH as requested and past the timeframe of the request submitted to me.

... When I say “testing” we do perform a group and screen, in 2002 at XXH. (Claimant) received 4 units of red blood cells... I can find no record of any testing or transfusion of any blood product or component in 1985-1990.

[15] The Claimant requested an opportunity to attempt to contact a cousin to serve as a potential witness to seeing blood products attached to the Claimant at XH in 198X. He also asked for and was granted time to request the (City) Police Service file regarding the incident in which he was beaten, to confirm the date of admission to XH. When we reconvened by teleconference on November 29, 2021, the Claimant advised that his cousin was not available to testify that day as he was working, but that he still wanted to arrange to have him testify. We agreed to reconvene on December 17, 2021 for this purpose. In the meantime, the Claimant provided his testimony by telephone, under solemn affirmation, on November 29, 2021. Ultimately, while the Claimant’s cousin did not testify, on December 17, 2021, TE, a friend of the Claimant, testified by telephone.

¹² pp. 130, 147, 151-156

¹³ pp. 129-144; especially at p. 140

¹⁴ pp. 149-151

B. Issue

[16] There is no dispute that the Claimant has been diagnosed with HCV infection. However, the issue in this case is whether the Claimant has proven on a balance of probabilities that he received a Blood Transfusion in Canada during the Class Period. Put another way, has the Claimant established grounds for reversing the denial of the Claim by the Administrator?

C. Testimony

Claimant

[17] In chief, the Claimant testified that he got “stomped on” by five guys and knocked out by an 18” crescent wrench. “They really laid the boots to me.” He was in a coma for four or five days and does not know when he received blood. He believes this was in August 198X. It was the same year his son started kindergarten, as they had moved from the country into the city so his son could start school. His son was born on December 2, but he is not sure of the year. He believes his son is now 35. In pre-hearing calls, he said he wasn’t sure whether his XH hospitalization was in 198X and 198X, as this hinged on when his son started kindergarten.

[18] The Claimant thinks he was in XH for about 10 days. The guy that sat with him throughout this time is dead. He is sure he lost much blood in the incident and assumes he would have needed a transfusion to replace the blood. He was bleeding from his face, the back of his head and hands while he laid on X Avenue, (City) for about half an hour before the ambulance arrived. When he regained consciousness at XH, he thinks he received blood because he believes he was hooked up to intravenous but does not know for sure it was for blood or for medication and food. He believes there was a bag of blood on the stand beside his bed, which he believes they changed a couple of times, as they did with the other bags. He doesn’t remember any discussions with doctors or hospital staff about blood. He was also sent by ambulance to (City) Hospital for surgery on his fingers. He does not recall any bags of fluid being hooked up to him while in the ambulance to (City) Hospital or when he regained consciousness after surgery. He does not believe he received blood at (City) Hospital. Because he was so badly beaten up, he doesn’t remember everything clearly. “My head is not 100%.” He has been in a coma three times and hurt badly. When he was 7, he fell out of a hayloft onto a barn floor. At age 13, he was thrown off the back of a station wagon at 80 MPH into a house.

[19] In cross-examination:

- The hayloft incident happened at his uncle’s farm in (City) around 196X.

- The station-wagon incident happened in 197X or 197X– when reminded of the XHA records from 197X, he acknowledged it likely happened in 197X. They were playing tag with four cars. When they stopped at a red-light, someone would run out and tag one of the other cars. A drunk’s vehicle went flying through the intersection of X Avenue and C Street, (City) and hit them. There were 12 people in the car the Claimant was in. He was on the tailgate as he was the “tagger”. On impact, he was thrown violently off the back of the vehicle, hitting a house with his knee. He was in XH for 7 weeks, having suffered a badly broken hip. The bottom of his leg was paralyzed – he had “drop-foot”. They put him in the morgue as they thought he was dying.
- In the incident when he was beaten up in the 1980s, he and one BP were in the bar at the C Restaurant, in M Mall, (City) BP started throwing glasses and beer bottles at the bartender. The Claimant left the bar and stopped at BP’s house on P Avenue and A Avenue on his way home, to ask BP why he did this, not intending to start a fight. BP, who he understands was high on LSD, along with his group, “laid the boots” to him and left him for dead in the middle of the street, while the Claimant’s friend (K) ran away. BP got sentenced to 90 days in jail. People told the Claimant he was in a coma for 4 of 5 days. His next memory after being left for dead was regaining consciousness at XH. He is not sure if it was 198X, 198X or 198X. It was the Xth of (Month). Nobody in his family will tell him when his son started school. His application stated he was transfused 2 times during the Class Period. The bags of blood were smaller and square, compared to the food bags, which were longer with more fluid. He remembers talking to a nurse because he has a rare (RH+) blood type. He was hooked up to a bag of blood which was removed before he was moved to (City) Hospital. His fingers were badly lacerated after he smashed another guy with a beer bottle on the side of his head, which he likely kept between his legs while he was driving. At (City) Hospital, when he regained consciousness after surgery, he believes he was again hooked up to blood, which was removed when he was transported back to XH. He was vague on this. When he got back to XH, he thinks all the bags were hooked up again, including blood. He got pain medications through an IV bag. Blood was in a separate bag beside the IV bag – but there was one needle going into his arm with two hoses and two sets of fluid going into that arm, including blood. His cousin P came to see him at XH, along with the Claimant’s little brother (with whom P was staying), the claimant’s sister and brother-in-law. P lived in (City) but came to (City) for work that summer. The Claimant agreed that by the time he went to (City) Hospital, the bleeding

to the hands must have stopped while he was in a coma for 4 or 5 days. The doctors later reconstructed his hand.

- The Claimant does not recall why he had blood transfusions in 200X. There was no big accident at that time.
- The Claimant was diagnosed with HCV through blood testing at a (City) clinic twenty years ago. He did not know about the HCV claims process and his ability to bring a claim until about 3 years ago when he heard about a young Hutterite boy who took HCV back to his colony. He never saw a Hepatologist or HCV specialist, either in (City) or (Province). His GP is in (City) , 70 miles away. Every second day, he sees a nurse who wraps his legs, which are infected. One is fluorescent red. The slightest scratch causes infection and swelling. He thinks this may be related to diabetes. His legs, chest and face are swollen and his hands are so swollen he can't make a fist.

TE

[20] Following the Claimant's testimony on November 29, 2021, the Claimant asked for time in order to arrange for a potential witness, TE, to testify. On December 17, 2021, Mr. E was affirmed to give evidence on the Claimant's behalf. Mr. E, a friend of the Claimant since age 12, is a truck driver in (City) , (Province). He lived in (City) in the late 1980s and worked as an apartment building caretaker. He heard that the Claimant had been beaten by the P brothers and had a concrete patio block dropped on his face repeatedly. This was during the summer or perhaps fall. There was no snow on the ground. He believes this was something like 198X, as he connects this to his son being born in 198X. He lived in (City) for four years, having recently moved from (City). The first time he saw the Claimant in hospital was probably the day after he was admitted, when he and a friend, RG (who they have lost track of and can no longer find), visited him at X Hospital. The Claimant was unconscious and unrecognizable. It was shocking seeing his friend in that condition. He recalls seeing the Claimant hooked up to poles on either side, with tubes leading to both arms, one hanging clear fluid and the other a bag of blood. These bags were IV bags, about 8" in length and 5" wide and had a "Red Cross" sign on them. He is certain he saw blood. He believes the Claimant was in hospital for weeks and recalls seeing him at least 6 to 8 times. He recalls seeing the blood bag on more than the first visit but cannot remember how late into the hospitalization he saw this. He took photos of the Claimant early in his hospitalization that he gave to the Claimant over 20 years ago and did not keep copies.

[21] In cross-examination:

- He believes he told hospital staff he was the Claimant's brother in order to get in to see him the first time. As he recalls this was the day after the beating. He could not speak to him on that occasion as the Claimant was totally unconscious. He did not get to stay long, maybe 10 minutes, and did not speak to any nurses or doctors.
- The Claimant regained consciousness a day or two later and told TE who had beaten him.
- He could not say whether the Claimant was still getting blood by the 6th or 7th visit as it was too long ago, but he knows for certain that if he didn't receive blood he would be dead. He finds it hard to believe that there are no hospital records confirming his attendance.
- He has discussed this claim a number of times with the Claimant, starting about 6 months ago, but not in detail. They talk all the time.
- Two brothers, RS and TS, were also visitors and although he thinks they still live in (City) , has lost track of them.
- The Claimant's sister visited him, as did his brother (now deceased).
- So far as he can remember, the Claimant was in the same hospital throughout. He is not aware of any surgeries that the Claimant may have had over the course of his hospitalization at XH.
- He does not know the Claimant's cousin P.

C. Conclusion

[22] The Claimant has not established grounds for reversing the Administrator's denial of the claim.

D. Submissions

Fund Counsel

[23] In order to give the Claimant an opportunity to fully learn the position of Fund Counsel, to be as responsive as he could in his submissions, after providing written submissions,¹⁵ Fund Counsel made oral submissions first. Before oral submissions, I issued a Summons to the (City) Police Service (XPS), requiring it to produce "all records of an incident which occurred relating to an assault by Mr. BP on (Claimant) during the time of 1985-1989." The XPS responded with its remaining file, which confirmed that BP was charged with assaulting the Claimant within the Class Period on (Month)8-9, 198X, not (Month) 198X as the Claimant testified to. Fund Counsel also located and provided a

¹⁵ Appeal file, pp. 161-170

“Court Brief” from the (City Newspaper) , reporting on an incident involving BP, also in (Month) 198X, about which more will be said below.

[24] The burden is on the Claimant to establish on a balance of probabilities that he received a blood transfusion during the class period. In this case, he cannot utilize the traditional methods as there is no record of a transfusion. Rather, the evidence from the hospitals and XHA is that blood bank records do exist and are kept for 50 years. There were no records of a transfusion of (Claimant) during the Class Period, although records before and after the class period exist. Given the negative traceback, Section 3.01Tran of the Plan provides an alternate manner of proof notwithstanding the inability to provide the documents listed in Article 3.01(1)Tran. Article 3.01(2) was intended to allow claimants to provide corroborating evidence to establish a transfusion. The condition was that the corroborating evidence had to be independent of the claimant or his family member. In essence, the independent evidence must be capable of establishing on a balance of probabilities that there had been a transfusion. Fund Counsel’s submissions, provided before the XPS records were available, continue:

... the evidence of TE does not corroborate the evidence of the Claimant. Their evidence largely passes each other, like ships in the night. Claimant describes an event many days after TE. TE describes a 10- minute attendance when Claimant was in a comma.

In the end, the Referee must assess TE and his evidence. The Referee would ordinarily assess whether the decision of the Administrator on this issue of credibility was reasonable. However, the Administrator did not get the opportunity to make its own determination as to TE’s evidence as it was not available at the time the Administrator made its decision. As a result, it is for the Referee to make his own assessment. The Referee will need to consider:

- i. Was TE’s recollection clear and concise enough to persuade him on a balance of probabilities that he witnessed Claimant receive a transfusion? To this end, the recollection of TE was a blur on all other occasions but he says he saw on this one 10 minute attendance that Claimant had a transfusion in one arm and IV in the other. He recollected that Claimant was fairly bloodied as he had a concrete block dropped on him (which was not described by Claimant who said he was hit with a crescent wrench). TE spoke to no nurse or doctor and therefor had no medical confirmation that what he saw was a blood transfusion. TE was a caretaker and not a medical person. TE speaks of attending the hospital 8 times with Claimant in hospital for over 8 weeks. Claimant says he was in hospital 10 days.
- ii. When and if did this event happen: TE says after 198X when his son was born, perhaps 198X-198X. Claimant has said 198X, in his application he said 198X and later testified it was 198X but marked it off his grandson going to school which could be as late as 199X. Claimant could not obtain, for reasons that are not clear, any record of this incident from the police. Claimant has to

prove on a balance of probabilities not only a transfusion, but one that occurred during the class period. In an attempt to clarify the date, Fund Counsel searched the local Star Phoenix to see whether the event was reported. The closest excerpt found was a report on court proceedings that BP, his brother and one other were charged with assault. The event happened at the Coachman. There is no mention of Claimant and, of course, Claimant's incident happened outside BP's residence not at the Coachman. The event reported took place (Month) 198X, not in (Month) as reported by Claimant.

[25] Fund Counsel further points out, in the event I conclude, on the basis of the testimony of the Claimant and his witness, that the Claimant was transfused during the Class Period, that does not end the matter. Rather, given the Claimant's admitted history of intravenous drug use, following investigation by the Administrator, the Claimant would need to additionally meet the criteria of the Court Approved Protocol, Non-Prescription Intravenous Drug Use (revised December 2017) in order to be eligible to receive compensation.

Claimant

[26] The Claimant maintains that the testimony of TE corroborates his testimony that he was transfused at XH in 198X. He also says he is confident that he did not have the HCV when he went into XH but that he had it when he left.

E. Analysis

[27] The requirements for proof of a transfusion under the Late Claims Benefit Plan are the same as for the Transfused and Haemophiliac Plans. The provision in s. 3.01 provides as follows:

ARTICLE THREE ELIGIBILITY TO MAKE A LATE CLAIM AND REQUIRED PROOF FOR COMPENSATION

3.01A Eligibility to make a Late Claim

(1) A person desiring to make a Late Claim under this HCV Late Claims Benefit Plan must be determined to be eligible to make a Late Claim in accordance with the provisions of Appendix E of this HCV Late Claims Benefit Plan ... whose Late Claim was accepted by the Administrator under this HCV Late Claims Benefit Plan.

3.01Tran Late Claim by Primarily-Infected Person

(1) A person claiming to be a Primarily-Infected Person who is determined eligible to make a late claim pursuant to Appendix E of this HCV Late Claims Benefit Plan must deliver to the Administrator a Late Claim application form prescribed by the Administrator together with:

(a) **medical, clinical, laboratory, hospital, The Canadian Red Cross Society, Canadian Blood Services or Hema-Québec records demonstrating that the claimant received a Blood (Transfused) transfusion in Canada during the Class Period;**

(b) a HCV Antibody Test report, PCR Test report or similar test report pertaining to the claimant;

(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 1 January 1986, (iii) as to where the claimant first received a Blood (Transfused) 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 (Transfused) transfusion in Canada during the Class Period and at the time of delivery of the Late Claim application hereunder.

(2) Notwithstanding the provisions of Section 3.01Tran(1)(a), if a claimant cannot comply with the provisions of Section 3.01Tran(1)(a), the claimant must deliver to the Administrator corroborating evidence independent of the personal recollection of the claimant or any person who is a Family Member of the claimant establishing on a balance of probabilities that he or she received a Blood (Transfused) transfusion in Canada during the Class Period.

(3) Notwithstanding the provisions of Section 3.01Tran(1)(c), if a claimant cannot comply with the provisions of Section 3.01Tran(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 (Transfused) transfusion in Canada during the Class Period.

(emphasis added throughout)

[28] In this case, the proof required in subsection 3.01Tran (1)(a) has not been provided. Instead, the Claimant must rely on subsection 3.01Tran (2). That subsection states that the **“claimant must deliver to the Administrator corroborating evidence independent of the personal recollection of the claimantestablishing on a balance of probabilities that he ... received a Blood (Transfused) transfusion in Canada during the Class Period.”**

[29] Fund Counsel referred to my decision in Claim 11567,¹⁶ in which I noted, at paragraph 26, which I adopt for the purposes of this decision, that it is useful to bear in mind other decisions which bear specifically on the issue of the importance of the court approved Traceback Protocol in the overall functioning of the Plan, including:

¹⁶ Appeal file, pp. 171-187

Confirmed Referee Decision #39 – February 6, 2002, John P. Sanderson, Q.C., Referee, as upheld on June 14, 2002 by a decision of the court having jurisdiction in the Class Action (The Honourable Mr. Justice Pitfield.)

Confirmed Referee Decision #29 – December 21, 2001, Shelly Miller, Q.C., Referee

Confirmed Referee Decision #42 – March 11, 2002, Judith Killoran, Referee

Confirmed Referee Decision #59 – September 18, 2002, Martin Hebert, Referee

Arbitrator Decision #54 – August 15, 2002, Vincent R.K. Orchard, Arbitrator

Arbitrator Decision #40 – February 16, 2002, Tanja Wacyk, Arbitrator

[30] In 11567, I further addressed in detail the burden on claimants to overcome a negative traceback, in particular at paragraphs 29 through 36, which I do not repeat here, but which I adopt for the purposes of this decision.

[31] As in every civil proceeding, it is necessary to assess both the credibility and the reliability of each witness. The distinction between those two concepts was set out in *R. v. S. (W.)*:¹⁷

We all know from our personal experiences as trial lawyers and judges that honest witnesses, whether they are adults or children, may convince themselves that inaccurate versions of a given event are correct and they can be very persuasive. The issue, however, is not the sincerity of the witness but the reliability of the witness' testimony. Demeanour alone should not suffice to found a conviction where there are significant inconsistencies and conflicting evidence on the record.

[32] In evaluating the evidence provided by the Claimant and TE, I have to consider whether that evidence is both credible and reliable. By "credible" I mean: was the witness honestly trying to tell the truth? By "reliable" I mean: was the witness able to give accurate testimony? Some factors I may look at, to determine whether I can rely on a witness's testimony, include:

- its consistency over time—does the story change significantly between tellings;
- its consistency with other known facts; and
- whether the story told by the claimant makes sense in the context of what a reasonable and informed person would recognize as likely, in that place and in those conditions.

¹⁷ (1994), 90 C.C.C. (3d) 242 (Ont. C.A.), leave to appeal to S.C.C. refused 93 C.C.C. (3rd) vi, at p. 250

[33] I will consider these factors in relation to the testimony of both witnesses.

[34] As to the Claimant, at various times throughout his claim, he stated the year of alleged transfusion as 198X (pre-hearing teleconferences), 198X(hearing) and 198X (application). While these inconsistencies may have been highly problematic for him, the (City) Police Services records obtained by Summons and the “Court Brief” from the (City Newspaper) ¹⁸ confirm that the incident said to have given rise to the alleged transfusion occurred in 198X. These documents are sufficient to allow me to draw an inference corroborating a foundational element that claimants must establish – that the claim falls within the class period.

[35] At the same time, there are many other internal and external inconsistencies regarding the Claimant’s testimony that must be acknowledged.

[36] First and foremost, while patient health records from XH for 198X no longer exist, and the hospital policy pertaining to this has been provided, Blood Bank Records are kept for 50 years. No plausible basis has been advanced upon which to suggest that these records are incomplete, inaccurate, destroyed, or were improperly searched. To the contrary, Blood Bank records contain transfusion records for the Claimant from (Month) and (Month) 197X and from 200X. This reinforces the reliability of the Blood Bank records (or more precisely, lack of records) for the Claimant during 198X.

[37] Further, the Claimant was adamant that the assault occurred in (Month) even going so far as to provide a specific date in (Month) when undisputed records place the incident in May of 198X. The Claimant asserts that he was transfused 4 to 5 days after awaking from a coma. It would seem rather unlikely that, had a transfusion been required, it would still have been required 4 to 5 days after admission to hospital. The Claimant’s evidence about going to (City) Hospital for hand surgery is vague and inconsistent insofar as a possible blood transfusion in association with that hospitalization is concerned. The Claimant hoped his cousin would be able to testify in support of his claim, but was unable to locate him. The Claimant does not recall any discussion with any health professional about a blood transfusion. Had a transfusion occurred, this would have been a significant event, in all probability prompting discussion.

[38] While not decisive, although the “Court Briefs” indicates that the Claimant’s assailant was charged with “assault causing bodily harm”, substantiating some injury, the (City) Police records of the incident do not spell out anything that would cause a reader to understand that the injuries sustained by the Claimant in this assault were sufficiently serious to put the Claimant into a lengthy coma. The officer’s notes in this regard simply read: “– face cut – swollen, - right hand cut – swollen, strong smell booze, very dirty.” There is no reference to injuries to the back of the head, as the Claimant testified to.

¹⁸ p. 188

[39] Finally, much to his credit, the Claimant was candid in acknowledging that he 'doesn't remember everything clearly', which he attributes in part to being beaten up in 198X, and in part ('My head is not 100%'), due to having been in a coma three times and hurt badly, starting at age 7. Particularly in the context of the at times confusing and contradictory testimony provided, I am unable to place much, if any, reliance on the Claimant's testimony regarding transfusion.

[40] In short, given these numerous and serious inconsistencies, I cannot conclude that the Claimant's testimony was sufficiently clear, convincing and cogent to assist him in meeting the balance of probabilities test set out by the Supreme Court of Canada in ***F.H. v McDougall***.¹⁹

[41] It is necessary to assess the evidence of each witness independently from the other. Turning to the evidence of TE, I note that it was inconsistent with that of the Claimant in that he testified that the Claimant was hospitalized for much longer (eight weeks) than the Claimant himself testified to (ten days). TE understood the Claimant repeatedly had a concrete block smashed into him, while the Claimant testified that he was hit with a monkey wrench. Given that the testimony occurred some 36 years after the fact, it would be difficult for anyone's memory, much less a lay person who had not spoken to any of the Claimant's health care providers, to be reliable in terms of the detail of what they had seen that long ago. Nevertheless, the conversations that took place between the Claimant and TE in the lead-up to TE's testimony, while not suggesting collusion, certainly created a high risk of inadvertent cross-contamination of evidence, which I am satisfied probably occurred here.

[42] To be clear, I do not suggest that either witness did not make an honest effort to be truthful in his testimony. However, TE's evidence, like that of the Claimant, is simply not sufficiently reliable to meet the test set out in ***McDougall***.

[43] Decisively, even if I found both witness' testimony clear, convincing and cogent, which I do not, TE testified to the Claimant being "hooked up to a bag of blood" shortly after the Claimant was hospitalized, while still in a coma. That is, he testified to seeing a bag of blood at a different time than the Claimant testified to, which was to the effect that he saw a bag of blood 4 or 5 days after being hospitalized, when he came out of his coma. The testimony of TE is not corroborative of that of the Claimant, on the central issue in this case. In the end, there was no period of time for which both witnesses provided testimony that the Claimant was hooked up to a bag of blood. This does not allow the Claimant to meet the burden Article 3.01 Tran (2) of the Plan places on him, to overcome the negative Traceback result in this case.

[44] The Claimant is unquestionably convinced that he contracted HCV from his 198X XH stay. I have no reason to doubt the honesty with which these views are

¹⁹ 2008 SCC 53 (CanLII)

held. However, the Plan requires more than a Claimant's honest conviction to meet the burden upon him.

[45] In short, given the negative Traceback, a reverse onus applies: the burden of proving infection from the blood transfusion remains squarely on the Claimant. While it is indeed *possible* that other aspects of the Claimant's 198X hospitalization may be responsible for his HCV infection, this is not the test under the Plan, in two important respects:

- (a) The standard of proof under the Plan is not proving that it was *possible* that the transfusion caused the infection; the burden of proof is that of the *balance of probabilities* – the Claimant must prove that it is ***more likely than not*** that his infection was caused by a Blood transfusion during the Class Period; and
- (b) The Claimant is further of the view whether his infection was occasioned as a result of the transfusion or other aspects of his hospital stay, it is covered by the Plan. However, this is not what the Plan states. HCV is spread by many forms of blood-to-blood contact, some of which could indeed have occurred for other reasons during his hospital stay, or other events. There are numerous possible sources of infection unrelated to Blood transfusion. Thus, even if it were proven that a procedure undertaken during the Claimant's 1986 hospital stay, whether by means of a surgical device, instrument or medical / hospital equipment, was responsible for the transmission of the virus (which it has not been), this would not bring these facts into the scope of the Plan. It is only where the infection was specifically caused by ***transfused Blood*** during the Class Period that the right of compensation arises.

[46] While there was indeed *some* evidence adduced in this case that a Referee could certainly consider on the issue of whether or not the Claimant had "refuted the results of the Traceback Procedure," in my respectful view, the evidence does not rise to the level of overcoming the Blood Bank records and Traceback results in this case.

[47] In the end, the Administrator's denial of the Claimant's request for Compensation must be upheld. In the circumstances, I am unable to find that the Administrator has failed to properly apply the terms of the Plan to these facts. Even with the additional testimony supplied at the hearing, which was not available to the Administrator at the time it reached its decision to deny the claim, I find that the Claimant has failed to meet the burden upon him to establish that he was probably infected with HCV for the first time as a result of a 198X Blood transfusion.

[48] The appeal must therefore fail. The Claimant is not entitled to receive compensation.

[45] I should add that even in the event that the Claimant had succeeded in meeting the burden upon him to establish a blood transfusion during the Class Period, that would not in and of itself result in a compensation award in this case. Instead, this would only have resulted in the matter being remitted to the Administrator to apply the Court Approved Protocol for individuals with a history of non-prescription intravenous drug use.

F. Decision

[46] Upon careful consideration of the Settlement Agreement, Plan, documentary and oral evidence tendered, the Administrator's denial of the Claimant's application for compensation is upheld.

[47] I would like to express my appreciation to the parties for their assistance and courtesy shown to one another and to me throughout.

Dated at (City), (Province) this 23rd day of February 2022.



Daniel Shapiro, Q.C., C. Arb., Referee