

**IN THE MATTER OF A REFERENCE PURSUANT TO THE HEPATITIS C
1986-1990 CLASS ACTION SETTLEMENT AGREEMENT
(Parsons v. The Canadian Red Cross et al.)
Court File No. 98-CV-141369)**

BETWEEN:

Claimant File 70579

- and -

The Administrator

(On a motion to oppose confirmation of the decision of Daniel Shapiro, Q.C., released February 23, 2022)

Reasons for Decision

Perell J.:

Nature of the Motion

[1] This is a motion to oppose confirmation of the decision of a Referee appointed pursuant to the terms of the Settlement Agreement in the Hepatitis C litigation for the Class Period January 1, 1986 to July 1, 1990.

[2] By way of a Late Claim Request, the Claimant made a claim for compensation pursuant to the agreement which was denied by the Administrator charged with overseeing the distribution of the settlement monies. The Claimant appealed the denial to a Referee in accordance with the process set out in the Agreement and consistent with the HCV Late Benefits Plan. The Referee upheld the decision of the Administrator and denied the appeal. The Claimant now opposes confirmation of the Referee's decision by this court.

Background

[3] The Settlement Agreement is pan-Canadian in scope and was approved by this Court and also approved by courts in British Columbia and Quebec.¹ Under the agreement, persons infected with Hepatitis C through a blood or specified blood product transfusion during the period from January 1, 1986 to July 1, 1990 are entitled to varying degrees of compensation depending on the progression of the Hepatitis C infection.

[4] By decision dated August 16, 2016, this Court, together with the supervising courts in British Columbia and Quebec, approved an HCV Late Claim Benefit Plan for eligible individuals who missed the June 30, 2010 deadline for First Claims under the Settlement Agreement.

[5] This Court also approved guidelines for reviewing Late Claim Requests, including when a

¹ See *Parsons v. The Canadian Red Cross Society*, (1999), 40 C.P.C. (4th) 151.

request for an application should be allowed.

[6] The Claimant first contacted the Administrator in 2018 stating that he was unaware of the claims process or deadline until after it had passed. In his Late Claim Request Form, the Claimant indicated that he was an HCV Infected Person who received blood or blood products between January 1, 1986 and July 1, 1990 and contracted the Hepatitis C virus. He listed August 198X as the approximate date when a blood transfusion or blood product was received at the X Hospital.

[7] In brief reasons dated May 17, 2018, Reva Devins, Court Appointed Referee confirmed that an application form to file a Late Claim should be issued to the Claimant.

[8] The Claimant delivered his Late Claim forms to the Administrator on March 28, 2019.

Background Evidence from Claimant

[9] The Claimant is a resident of (Province) who is infected with the Hepatitis C virus (HCV). He filed a claim for compensation under the HCV Late Claims Benefit Plan (the “Late Claims Plan”) as a Primarily-Infected Person. In the Treating Family Physician Form, the Claimant’s physician identified the Claimant’s disease level as level 2, as confirmed by a PCR Test performed on April 8, 2020. At issue is whether the Claimant acquired HCV from a blood transfusion during the Class Period.

[10] In his Late Claim forms, the Claimant alleged that he received an unknown number of units of blood at the X Hospital, for treatment of injuries he sustained following an attack by five people in August 198X.

[11] In prehearing calls with the Referee, the Claimant revised his position to suggest that the transfusion may have taken place in 198X.

[12] During the course of the hearing, the Claimant revised his position again to indicate that he believed the transfusion took place in 198X. As discussed further below, police records confirm that the assault said to have given rise to the alleged transfusion occurred in May 198X.

[13] In his Statutory Declaration Form, dated March 28, 2019, the Claimant acknowledged that he has used non-prescription intravenous drugs.

[14] The Claimant testified that he believed he was in the X Hospital for about 10 days. He described injuries to his face, the back of his hands and hands. He testified that he was in a coma for several days and once awake he recalled being hooked up to intravenous. He said he was sure he lost a lot of blood in the attack and assumed he would have needed a transfusion to replace the blood.

[15] The Claimant could not remember any discussions with doctors or hospital staff about receiving blood. He said the friend who was present with him throughout his stay is now dead, however, he confirmed he had other visitors to the hospital, including a cousin, his brother, sister and brother-in-law. None of these people were available to confirm the Claimant’s testimony.

[16] The Claimant called a friend, TE to testify in support of his claim. TE testified that he and the Claimant had been friends since childhood and that he recalled visiting the Claimant in the hospital following the assault. TE believed the incident took place in either 198X or 198X. TE stated that he was able to visit the Claimant on the first day of his hospital stay by telling the hospital personnel that he was the Claimant’s brother. TE testified that he saw blood being administered in

one of the Claimant's arms and he saw an IV drip set up in his other arm. TE could not remember if the blood was given in the Claimant's left or right arm. TE said that he believed that the Claimant was in the hospital for 6 to 8 weeks and that he visited him about 8 times or more during the stay. TE could not confirm whether he saw the Claimant receiving blood during his later visits with him.

Results of Traceback Search and Decision of Administrator

[17] On July 8, 2021, Canadian Blood Services provided the Administrator with the results of a traceback procedure initiated with the consent of the Claimant. The Traceback Report confirmed the following:

- a. Blood bank records at the Royal University Hospital were searched for the period between January 1980 and June 18, 2021;
- b. A search for the Claimant's health records at the hospital was conducted going back for a period of 10-years; and
- c. The results of the search found that no record of the Claimant's admission to the hospital was available.

[18] On July 12, 2021, the Administrator advised the Claimant that his claim was denied on the basis that there was not sufficient evidence to support the assertion that he had received blood during the Class Period.

[19] The Claimant delivered a Request for Review on August 12, 2021. His grounds for review were: "The hospital gave me Hep C and threw the files for me away after 10 years."

Decision of the Referee

[20] Daniel Shapiro, Q.C. was the court-appointed Referee and Arbitrator for (Province) assigned to address the Claimant's request. Before the hearing, the Referee sought further information from the XX University Hospital regarding the Claimant's records. The Referee signed a summons directing the (Province) Health Authority, which owns and operates the XX University Hospital, to release any records for the Claimant during the Class Period, and for 198X as well.

[21] The (Province) Health Authority responded to the summons and advised:

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

[22] The Health Authority also provided the Referee with its record retention policies, which provides that Patient Records are to be retained until the last date of service/discharge or deceased, plus 10 years.

[23] The Referee provided this information with the Claimant who advised that he was not sure whether the transfusion may have taken place in 198X and so the Referee issued a further summons to the Health Authority for health records and blood bank records for the Claimant for 1985.

[24] The (Province) Health Authority responded to the further summons by advising:

- a. The transfusion records for the Claimant were searched four times and included all three (City) hospitals.

- b. The only visits with transfusion testing performed at the X Hospital was August 24, 29, 197X and September 3, 197X.
- c. The transfusion medicine laboratory keep records for 50 years.
- d. There were records for transfusion testing performed at St. Paul's Hospital on February 13 and 14, 2002.

[25] Following receipt of the information from the Health Authority, the Referee convened a hearing in November 2021. At the hearing, the Referee received oral evidence from the Claimant and TE, as summarized above.

[26] The Referee released his decision on February 23, 2022. In it, the Referee concluded that on the basis of the evidence before him, the Claimant had not established grounds for reversing the Administrator's denial of the claim.

[27] On March 28, 2022, the Claimant delivered to Fund Counsel a Notice of Motion. The Claimant set out the following reason for opposing the Referee's decision:

I oppose the Referee's decision because at first I was lead to believe that Daniel Shapiro was working for me and then I found out at the end that he could and did oppose the decision and did not agree to pay me anything at all. The hospital gave me hepatitis while I was there and insist I wasn't even in the hospital.

[28] The Claimant's motion was forwarded to this court for consideration.

Standard of Review

[29] In a prior decision in this class proceeding, the standard of review set out in *Jordan v. Mackenzie*,² was adopted as the appropriate standard to be applied on motions by a rejected Claimant to oppose confirmation of a Referee's decision. In *Jordan*, Justice Anderson stated that the reviewing court "ought not to interfere with the results unless there has been some error in principle demonstrated by the [referee's] reasons, some absence or excessive jurisdiction, or some patent misapprehension of the evidence."³

Analysis

[30] The requirements for proof of a transfusion under the Late Claims Benefit Plan are the same as for the Transfused HCV plan. Section 3.01 requires the Claimant to provide evidence that he received a blood transfusion in Canada during the Class Period.

[31] Section 3.01(1) provides as follows:

(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;

² (1987), CarswellOnt 573 (Ont. H.C.), aff'd (1989), 39 C.P.C. (2d) 217 (C.A.)

³ See also *Zeitoun v. Economical Insurance Group*, 91 O.R. (3d) 131, aff'd 2009 ONCA 415

(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 167 time with HCV by a Blood (Transfused) transfusion in Canada during the Class Period (emphasis added)

[32] In the present circumstances, the Claimant has been unable to satisfy the requirements of section 3.01(1), as he has been unable to produce records that confirm he received blood during the Class Period. The hospital records that were produced, with the assistance of the Referee and Fund Counsel, did not assist the Claimant.

[33] Since the Claimant is unable to rely upon the medical records available, his claim can only succeed if he meets the requirements set out in section 3.01(2). That subsection states that the *“claimant must deliver to the Administrator corroborating evidence independent of the personal recollection of the claimant ... establishing on a balance of probabilities that he or she received a Blood (Transfused) transfusion in Canada during the Class Period.”*

[34] The Referee received oral evidence from both the Claimant and his friend to support the Claimant’s contention that he received blood during the Class Period. The Referee undertook a thorough review and assessment of the evidence received and concluded that based on the numerous and serious inconsistencies in the evidence presented, he could not conclude that the testimony received was sufficiently clear, convincing, and cogent.

[35] By way of example, the Referee noted that at various times throughout his claim, the Claimant stated the year of the alleged transfusion as 198X, 198X and 198X. Further, the Claimant was adamant that the assault which led to his hospitalization and blood transfusion took place in August, when undisputed records place the incident in May of 198X. The Claimant asserted that he was transfused 4 to 5 days after awaking from a coma. The Referee concluded that 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. Finally, the Claimant could 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.

[36] With respect to the evidence of TE, the Referee concluded that the evidence was inconsistent with the Claimant’s memory of his assault and subsequent hospitalization. The

Referee further concluded that even if he found TE's evidence to be clear and convincing, TE testified to the Claimant being "hooked up to a bag of blood" shortly after the Claimant was hospitalized, while still in a coma. TE 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 Referee concluded that:

(t)he 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.

[37] Having considered the evidence before the Referee and his decision, I find that the Referee committed no errors in principle, with respect to the jurisdiction or by misapprehending the evidence before him.

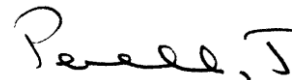
[38] In his Notice of Motion, the Claimant suggests that he was "led to believe" that the Referee was working for him.

[39] While the Referee directed the Administrator to obtain additional information from the hospital and the relevant police service, there is nothing in the record before me to suggest that the Referee held himself out as the Claimant's advocate or that he led the Claimant to believe that he was working for him.

[40] In the Administrator's letter denying the claim, the Administrator set out the Review by Referee process and invited the Claimant to contact them if he had any questions. It does not appear that the Claimant was confused by the process or by the Referee's role. I am not satisfied that the Referee's management of the Claimant's review was improper.

Result

[41] For the reasons set out above, the Referee's decision is confirmed.



Justice Perell