

**IN THE MATTER OF AN APPEAL PURSUANT TO THE HEPATITIS C
PRE-1986/POST-1990 CLASS ACTION SETTLEMENT AGREEMENT
(McCarthy, et al. v. Canadian Red Cross Society
Court File No. 98-CV-143334)**

BETWEEN

Claimant File 07-00464

- and -

The Administrator

(On an appeal of the decision of D. McGillis, Q.C., released on December 22, 2008)

Reasons for Decision

WINKLER C.J.O.:

Nature of the Appeal

1. This is an appeal of a decision of an Appeals Officer appointed pursuant to the terms of the Settlement Agreement in the pre-1986/post-1990 Hepatitis C litigation. 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 an Appeals Officer, who upheld the decision of the Administrator and denied the appeal.

Background

2. The Settlement Agreement is Pan-Canadian in scope. Under the Agreement, persons infected with Hepatitis C in Canada through a blood or specified blood product transfusion prior to January 1, 1986 and from July 2, 1990 to September 28, 1998 are entitled to varying degrees of compensation.

Standard of Review

3. Paragraph 30 of the court approved *Rules for Appeals* document that was court approved pursuant to the Settlement sets out the following standard of review:

The Court shall interfere with an Appeals Officer only:

- a. on a matter of law;
- b. where an Appeals Officer has exceeded his or her jurisdiction; or

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- c. where the decision of an Appeals Officer is patently unreasonable.

4. Subsequent to the court approval of the *Rules for Appeals*, the Supreme Court of Canada released its decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, in which the court held that the standard of review of patent unreasonableness shall no longer be applied on judicial reviews. As a result of this decision, the standard of review on judicial reviews must be either reasonableness *simpliciter* or correctness.

5. Although appeals under the Settlement do not constitute judicial reviews, the standard of review set out in paragraph 30 of the *Rules for Appeals* is similar to the standard of review that had been applied in judicial review cases prior to the *Dunsmuir* decision. In light of the *Dunsmuir* decision, it is now appropriate to apply a standard of reasonableness *simpliciter* rather than patent unreasonableness when assessing the decisions of Appeals Officers, notwithstanding the wording of paragraph 3(c) of the *Rules for Appeals*.

Facts

6. The Claimant is an Ontario resident who has been diagnosed with Hepatitis C. The Claimant seeks compensation under the Settlement Agreement as a Primarily-Infected Person.

7. It is the Claimant's position that he received a blood transfusion while undergoing spinal surgery in May 1984. The Claimant's medical records confirm that the Claimant was admitted to the Ottawa Civic Hospital on May 6, 1984 and that he underwent spinal surgery on May 9, 1984. The records also show that six units of blood were cross-matched for the Claimant. The only issue on this appeal is whether the Claimant received a blood transfusion during the surgery.

8. Several of the hospital records contain either direct statements or indicia that the Claimant did not receive a blood transfusion. This includes a detailed report regarding the Claimant's operation dated May 9, 1984, in which the surgeon wrote, "[t]he patient did not receive any transfusions and his postoperative condition was satisfactory". It also includes a record entitled "Operating Room Nurses Record", in which a "no" box was checked off next to the words "Blood for Transfusion". Another record contains a handwritten notation dated May 11, 1984 indicating "6 bags cancelled".

9. The Claimant's theory is that a blood transfusion was commenced and then aborted after the Claimant experienced a reaction to the transfusion. In his attempt to prove this theory, the Claimant has prepared extensive written submissions, including a 15 page, single spaced, type-written submission that he provided to the court in support of this appeal. Although I have reviewed and considered all of the Claimant's arguments, I do not propose to set out all of these extensive arguments in this decision. Instead, I will provide an overview of what I consider to be the more significant components of the Claimants' submissions.

10. One item of significance is the fact that the claimant appears to have been given an injection of adrenaline by the surgeon during the surgery. Since adrenaline is a well known stimulant, one would have thought that its use during an operation would have garnered a remark from the surgeon in his post operative report instead of being found only in the nurse's report.

11. Picking up the trail and support from the injection of adrenaline, the Claimant's submissions then go to interpretations of the hospital records, including one that appears to be a blood bank form. The Claimant focuses on a line on the form that appears to have the words "PREVIOUS TRANSFUSION" pre-printed on the left side above the line and the word "REACTION" pre-printed on the right side above the line. There is handwriting directly below the word "REACTION". I find this handwriting to be more-or-less illegible, but this may be because I have been provided with a poor replication of the form. The Claimant believes that the handwritten notation is a signature and date, and he may well be correct. This form also contains what appears to be the handwritten notation "-R". The Claimant argues that this record is evidence that he received a blood transfusion, and that he had a reaction to the transfusion. It is his position that the "-R" notation means that he was transfused using his right arm.

12. The Claimant also relies on a notation in a hospital record dated May 9, 1984 that appears to states "check x match 4 units blood from 2 days ago please." The Claimant argues that this record is evidence that two of the six units that were cross-matched were used.

13. The Claimant argues that various other notations in his hospital record are consistent with his theory. For example, he relies on a reference in one hospital record that refers to a "blood warmer". He also relies on records that indicate that he received Heparin, an anti-coagulant drug and adrenaline during the surgery. There is also a notation in a record that indicates that the Claimant had an estimated blood loss of "400".

14. The Claimant's claim was denied by the Administrator, and the Administrator's decision was upheld by an Appeals Officer.

15. The Claimant has received compensation relating to his Hepatitis C infection under the Ontario Hepatitis C Assistance Plan. This Plan is unrelated to the plan established under the Settlement Agreement.

Analysis

16. There is conflicting evidence in this case regarding whether the Claimant received a Blood transfusion. On one hand, there is a surgeon's report that specifically indicates that the Claimant did not receive a transfusion. On the other hand, there is extensive evidence that appears to be consistent with the Claimant's theory that he received at least part of a blood transfusion, including:

- a) the notation next to the word "REACTION" on what appears to be a blood bank form;
- b) the notation indicating "check x match 4 units blood from 2 days ago please", when earlier records indicate that 6 units were cross-matched;
- c) a reference to a blood warmer; and
- d) a record that indicates that the Claimant received an adrenaline shot.
- e) the notation that indicates that the Claimant had an estimated blood loss of "400".

17. If there was no blood transfusion, as claimed in the surgeons report, then it is difficult to understand why a notation was made next to the word "REACTION" on the blood bank form. It is also difficult to explain the discrepancies in the number of units of blood referred to in the medical records.

18. There is no easy way to reconcile the conflicting evidence. Perhaps the notation next to the word "REACTION" and the notation to "check x match 4 units blood" (as opposed to 6 units) were in error. Or, perhaps the surgeon indicated that no blood was transfused because a blood transfusion was aborted part way through after it caused a reaction to the claimant.

19. Regardless of whether the claimant is correct in his interpretation of the evidence, the fact that the records are sufficiently unclear as to be amenable to more than one interpretation some 25 years later, in my view, renders them unreliable as a basis for rejection of the Claimant's claim.

20. In my view, this is a case where the principle that, with respect to class membership, if an error is to be made it should be on the side of inclusion rather than exclusion should be invoked. I am not convinced, in consideration of the totality of the evidence, that justice would be done were this claim to be rejected.

Result

21. The Claimant is entitled to compensation under the Settlement Agreement as a Primarily Infected Person. The Claimant's claim is hereby remitted to the Administrator, who shall determine the amount of compensation payable to the Claimant, and shall make arrangements to pay out this amount.


Winkler C.J.O.

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