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

BETWEEN:

Claimant File 711384

- and -

The Administrator

(On a motion to oppose confirmation of the decision of Wesley Marsden, released October 1, 2024)

BEFORE: Justice Benjamin T. Glustein

HEARD: in writing

DATE: July 10, 2025

REASONS FOR DECISION

Nature of the motion

[1] This is a motion brought by the Claimant in File 711384 (the "Claimant") to oppose confirmation of the decision of a Referee related to the administration of the Settlement Agreement for the Hepatitis C virus ("HCV") Class Action. Under the Settlement Agreement, approved by this court, individuals infected with HCV through a blood transfusion received in Canada during the Class Period were entitled to varying degrees of compensation.

[2] The Administrator denied the Claimant's claim for compensation. The Claimant's forms indicated that she had a history of non-prescription intravenous drug use. Pursuant to the Court Approved Protocol for Non-Prescription Intravenous Drug Use ("CAP"), the Administrator rejected the Claimant's claim because the evidence the Claimant provided was not sufficiently complete to permit a decision.

[3] The Referee upheld the Administrator's denial of the claim. The Referee found that the Claimant did not deliver sufficient evidence to the Administrator. The Referee relied on an expert opinion that while it was plausible that the source of the Claimant's infection was from a transfusion from an unknown donor, the Claimant was most likely initially infected with HCV from intravenous drug-use occurring in the early to mid-1980s. The Referee relied on the expert's conclusion and concluded that the Claimant failed to discharge her burden to establish her eligibility.

[4] For reasons set out below, I dismiss the motion to oppose confirmation of the Referee's decision.

Facts

Background

[5] On October 22, 1999, Justice Winkler approved a Settlement Agreement for the HCV Class Action for persons infected with HCV through a blood transfusion within the Class Period of January 1, 1986, to July 1, 1990.

[6] The Settlement Agreement established plans for compensation — namely, the Transfused HCV Plan and the Hemophiliac HCV Plan.

[7] The Transfused HCV Plan set out a process to provide compensation to persons who were infected with HCV through a blood transfusion received in Canada during the Class Period and secondarily-infected spouses, secondarily-infected children, and certain family members.

[8] On June 30, 2010, the deadline for the Transfused HCV Plan ended.

[9] On November 28, 2017, Justice Perell approved the HCV Late Claims Benefit Plan (the "Late Claims Plan"). The Late Claims Plan was for those class members unable to claim under the original plans because they did not apply before June 30, 2010 and did not otherwise meet the deadline exception requirements.

[10] The Claimant first contacted the Administrator in 2018. She was unaware of the deadline until she read about it in 2017. Based on this information, the Late Claims Referee was satisfied that the Claimant did not receive notice of the first claim deadline and had requested to make an application within a reasonable time. On April 27, 2018, the Late Claims Referee allowed the Claim to proceed, but did not consider whether the Claimant was eligible to receive compensation.[1]

[11] The Claimant informed the Administrator by letter of her recollection of the dates she received blood transfusions.

[12] In July 2020, the Canadian Blood Services ("CBS") provided the Administrator with the results of the traceback. The Transfusion Summary specified that the HCV status of the donor for one unit was negative, while the status of the donor for the other unit was unknown since the donor could not be located.

[13] CBS conducted further searches under a different name previously used by the Claimant, but no further records were found.

[14] The Claimant's file indicates that she engaged in non-prescription intravenous drug use before the Class Period. Specifically:

(a) The Treating Physician Form notes that the Claimant has a history of non-prescription intravenous drug use and states "Admits to doing IV drugs 1983-84".

[1] The Referee's decision mistakenly lists this date as 2017, but this error did not materially undermine the Referee's decision.

(b) The Statutory Declaration Form notes "False" for the following declaration: "I declare that to the best of my knowledge, information and believe, I (the HCV Infected Person) have never at any time used non-prescription intravenous drugs."

(c) A letter dated June 7, 2007 from Dr. Henry Wong states that the Claimant "had a history of alcohol abuse and IV drug use from 1980's until 1991."

(d) The Other Risk Factor Inquiry Form has "Non Prescription Intravenous Drug Use" check marked. The drug identified is "T's & R's (Ritalin)". The time period indicated is 1984. The frequency marked is "more than once". The answer to "Did you share needles?" is "NO".

(e) On December 1, 2020, the Claimant swore an affidavit stating "When I lived in Winnipeg in 1985, I tried cocaine about five times… A friend injected me with cocaine intravenously twice, with a clean needle of my own that we did not share… the other three times my sister injected me. I never learned how to inject myself… I did not like the cocaine and have not used it again."

[15] On August 16, 2022, Dr. Curtis Cooper, Professor of Medicine at the University of Ottawa, provided an opinion based on his review of the Claimant's medical record. Dr. Cooper's opinion states that "It seems most likely that this patient was initially infected with HCV as a consequence of IDU [injection drug use] occurring in the early to mid-1980s. However, it is plausible that transfusion A8-82006 was a source of HCV exposure".

The Administrator's decision

[16] On September 12, 2022, the Administrator denied the Claimant's claim for compensation. The Administrator was not satisfied that the body of evidence was sufficiently complete to permit it to make a decision:

> The Administrator carefully reviewed all the material that you provided to support your Late Claim and any additional investigation and concluded as follows:
>
> Both you on your Statuary Declaration Form and the doctor who completed your Treating Physician Form indicated that you had a history of non-prescription intravenous drug use. You confirmed this information in your Other Risk Factor Form.
>
> On September 2020, the Administrator notified you in writing that your claim would be rejected unless you returned the Further Evidence of First Infection Form in which you indicate whether you want to provide further evidence which establishes on the balance of probabilities that the Primarily-infected Person was infected for the first time with HCV by a Blood transfusion received in Canada between January 1, 1986 and July 1, 1990. You indicated that you did want the 6 months to provide such evidence. Your file has been sent to an Independent Medical Expert and his conclusion was that "It seems most likely that this patient was initially infected with HCV as a consequence of intravenous drug use occurring in the early to mid 1980's.; [*sic*] However, it is plausible that transfusion A8-82006 was a source of HCV.

> The IDU "CAP" paragraph 10 reads as follows: "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" [*sic*] Based on this your claim is rejected as the evidence you provided is not sufficiently complete to permit a decision.
>
> As you may already know, every claim for compensation is reviewed and approved based on our review of documentation confirming a series of different but related proven facts; i.e. we first look for proof of infection with HCV and next proof of the HCV Infected Person having received a Blood transfusion or taken Blood during the class period, etc. As soon as a claim submission fails to meet one of several approval criteria as set out in the Settlement Agreement, the claim must be denied. It is important to note that in some cases, the subsequent claim evaluation steps were not completed after determining the need to deny the claim. Should you opt to appeal our decision to deny your claim and should you succeed on appeal, any and all pending evaluation steps will have to be completed.

The Referee's decision

[17] The Claimant brought a Request for Review. The Claimant was given the opportunity to provide additional evidence at a case conference before the hearing was scheduled but declined to do so.

[18] The Referee heard the appeal on September 23, 2024. The Claimant testified that she only used non-prescription intravenous drugs on five occasions. The Referee noted that the Claimant did not testify that this drug use occurred after she received the transfusions.

[19] On October 1, 2024, the Referee issued their decision upholding the Administrator's denial of the Claimant's claim for compensation.

[20] The Referee referred to the provisions of the Transfused HCV Plan and the CAP, the Claimant's medical records, the independent medical expert opinion of Dr. Cooper, and the Claimant's testimony.

[21] The Referee found that the Administrator conducted a thorough review and investigation before denying the Claimant's claim and that there "is ample file information which indicates that the Claimant used intravenous drugs before she received the transfusions in 1986."

[22] The Referee noted that the onus is on the Claimant to establish that she was infected with HCV for the first time with HCV by the 1986 transfusion from the unknown donor. While it was at most plausible that the transfusion from the unknown donor was the source of the infection, this was "not enough under the Plan to tip the scales in the Claimant's favour".

[23] The Referee held that in "this case, the Claimant did not deliver sufficient evidence to the Administrator, nor did she adduce any witnesses or documentary evidence at the hearing to discharge her burden of proof."

[24] The Referee accepted Dr. Cooper's opinion "that the Claimant was most likely initially infected with HCV as a consequence of intravenous drug use occurring in the early to mid-1980's."

[25] Accordingly, the Referee upheld the Administrator's denial of the Claimant's claim.

Motion to oppose confirmation

[26] On November 9, 2024, the Claimant brought a motion to oppose confirmation of the Referee's decision.

[27] The Claimant's Notice of Motion provides:

> …I reread all the "expert" opinions in my file. Yes – there [are] date inconsistencies in my story – but who remembers all of their life events? I pursued this class action on my understanding that I did not use IV drugs within the time frame of this class action. My medical [Dr.] David Kyle – there was no medical history that I used IV drugs prior to 1986. Why is it so easily accepted that I was infected for the 1st time with HCV by a blood transfusion? Because the donor was unknown – a decision was based that the "plausible" theory was not accepted. Note I gave birth to 2 daughters in 1991 & 1995. When [doctors] said I could no longer have children...

Standard of review

[28] The standard of review set out in *Jordan v. McKenzie* (1987), 26 C.P.C. (2d) 193 (Ont. H.C., aff'd (1990), 39 C.P.C. (2d) 217 (C.A.) applies to this motion. This standard has been adopted, in prior decisions under the Settlement Agreement arising out of this class proceeding, as the appropriate standard to be applied on motions by a Claimant opposing confirmation of a Referee's decision.[2]

[29] This *Jordan* standard of review provides that the reviewing court "ought not to interfere with the result unless there has been some error in principle demonstrated by the [Referee's] reasons, some absence or excess of jurisdiction, or some patent misapprehension of the evidence."

Analysis

[30] I confirm the disposition of the Referee's decision and dismiss the appeal. The Referee's decision does not disclose a material error in principle, some absence or excess of jurisdiction or a patent misapprehension of the evidence.

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[2] Reasons for Decision of Winkler C.J.O, Claimant File 7518 dated March 25, 2010 (On a motion to oppose confirmation of the decision of Daniel Shapiro, Q.C., released July 13, 2006), at para. 14; Reasons for Decision of Perell J., Claimant File 7438, dated December 16, 2013 (On a motion to oppose confirmation of the decision of the Referee, C. Michael Mitchell, released on November 14, 2013), at para. 7; *HCV Settlement Agreement Claim No. 11910,* 2004 BCSC 1431, at para. 2.

[31] To qualify for compensation as a Primarily-Infected Person ("PIP") under the Transfused HCV Plan, pursuant to s. 3.01(1), a person claiming to be a PIP "must deliver to the Administrator an 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 transfusion in Canada during the Class Period;
>
> (b) an 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 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 transfusion in Canada during the Class Period and at the time of delivery of the application hereunder.

[32] However, notwithstanding the provisions of s. 3.01(1)(c), where a Claimant "cannot comply with the provisions of Section 3.01(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 transfusion in Canada during the Class Period" (see Appendix A).

[33] The CAP applies to specific enumerated circumstances: when there is an admission that the HCV Infected Person used non-prescription intravenous drugs; when there is no specified declaration that the HCV Infected Person has never used non-prescription intravenous drugs; or despite receipt of the specified declaration, there is other evidence that the HCV Infected Person has used non-prescription intravenous drugs (See Appendix B).

[34] When the CAP applies, s. 2(b)(i) requires that the Administrator be satisfied on a balance of probabilities that the HCV Infected Person was infected with HCV for the first time by a blood transfusion received in Canada in the Class Period.

[35] Section 3 of the CAP provides that the burden to prove eligibility is on the Claimant.

[36] Section 9 of the CAP states that "[t]he 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."

[37] Section 10 of the CAP provides that "[i]n 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."

[38] The Claimant's file, including her declaration, indicated that she used non-prescription intravenous drugs.

[39] Accordingly, the Claimant bore the burden to establish on a balance of probabilities that she was infected for the first time with HCV by a blood transfusion during the Class Period.

[40] The Administrator denied the Claimant's claim because the body of evidence was not sufficiently complete in all the circumstances of the particular case to permit the Administrator to make a decision. The CAP provides prescriptively that where this is the case, "the Administrator shall reject the claim". The Administrator conducted a diligent review and investigation of the Claimant's case before reaching this conclusion.

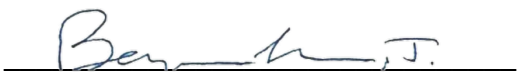
[41] I am sympathetic to the challenge faced by the Claimant to discharge her burden. However, the plan and the CAP are unambiguous. The Claimant failed to meet her onus to establish her eligibility. She did not satisfy the Administrator on a balance of probabilities that she was infected with HCV for the first time by a blood transfusion received in Canada in the Class Period. The Administrator reasonably concluded that the evidence provided was not sufficiently complete to permit the Administrator to make a decision and accordingly rejected her claim.

[42] Dr. Cooper's opinion supports the conclusion that the Claimant was most likely infected with HCV from injection drug use ("IDU"). Dr. Cooper noted that multiple medical records comment on IDU occurring from the 1980s to 1991. The traceback conducted indicated that two units of packed red blood cells were administered on November 9, 1986. One unit tested negative while the other could not be tested. Dr. Cooper also stated that there "was no report of the onset of acute hepatitis in the period immediately following these transfusions". Although Dr. Cooper acknowledged that it was plausible that the transfusion from the unknown donor was a source of HCV exposure, he found that it seems most likely that the Claimant was initially infected with HCV as a consequence of IDU use in the early to mid-1980s. Both the Administrator and the Referee reasonably considered Dr. Cooper's independent medical report in dismissing the Claimant's claim.

[43] The Referee's decision upholding the Administrator's decision was justified and reasonable in the circumstances. It does not disclose any material error in principle, jurisdiction or a patent misapprehension of the evidence.

Result

[44] For these reasons, the motion to oppose the Referee's decision is dismissed.



B. Glustein J.

Appendix A – Relevant Provisions of the Transfused HCV Plan

ARTICLE THREE

REQUIRED PROOF FOR COMPENSATION

3.01 Claim by Primarily-Infected Person

(1) A person claiming to be a Primarily-Infect ed Per son must deliver to the Administrator an 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 transfusion in Canada during the Class Period;

(b) an 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 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 transfusion in Canada during the Class Perio d and at the time of delivery of the application hereunder.

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

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

Appendix B – Court Approved Protocol

CAP - NON-PRESCRIPTION INTRAVENOUS DRUG USE

(Sections 3.01(1)(c) and (3), 3.02(1)(a) and (2) or 3.05(5) of the Transfused HCV Plan and Sections 3.01(1)(c) and (3), 3.02(1)(a) and (2) or 3.04(5) of the Hemophiliac HCV Plans)

Applicability of CAP

1. This CAP applies where:
    a. there is an admission that the HCV Infected Person used non-prescription intravenous drugs;
    b. there is no s.3.01(1)(c), 3.02(1)(c), 3.04(5) or 3.05(5) declaration that the HCV Infected Person has never used non-prescription intravenous drugs; or
    c. despite receipt of a s. 3.01(1)(c) or 3.02(1)(c), 3.04(5) or 3.05(5) declaration, there is other evidence that the HCV Infected Person has used non-prescription intravenous drugs.

Eligibility Criteria Where This CAP Applies

2. The Administrator must be satisfied on the balance of probabilities that:
    a. the HCV Infected Hemophiliac or person with Thalassemia Major was infected with HCV for the first time by Blood received in Canada; or
    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.

TRACEBACK

4. The Administrator shall conduct a Traceback under the Traceback CAP, unless:
    a. in the case of a Hemophiliac or person with Thalassemia Major, the HCV Infected Person was a regular recipient of Blood prior to his/her attaining the age of 18; or
    b. in the case of a person claimed to be a Secondarily-Infected Person, the person has no history of blood transfusion.
5. If the Traceback CAP does not apply, the Administrator shall perform the additional investigations required by paragraph 8 below.

6. If the result of a traceback investigation is such that the Traceback CAP requires the Administrator to reject the claim of the HCV Infected Person, the Administrator shall reject the claim.

7. The Administrator may not accept a claim based on the results of a traceback investigation without performing the additional investigations required by the provisions of paragraph 8 below.

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 nonprescription 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.

Examples of Additional Investigations

11. Examples of the evidence the Administrator may require to inform its decision include the following:

    a. an independent medical examination with a physician of the Administrator's choice, to obtain opinion evidence on any medical issues which the Administrator believes will assist in making its decision;

    b. the medical and clinical records from any or all hospitalizations and treating physicians for the HCV Infected Person for such time frame as the Administrator considers relevant;

    c. the donation history, transmissible disease information, deferral codes or the results of any lookbacks pertaining to blood donated by the HCV Infected Person available from Canadian Blood Services and/or Hema-Quebec;

d. an affidavit from the HCV Infected Person and a person who knew the HCV Infected Person at the time he/she used non-prescription intravenous drugs describing:

   i. whether the drug paraphernalia used was sterile;

   ii. whether the HCV Infected Person shared needles; and

   iii. the best estimate of the number occasions and time period during which the HCV Infected Person used non-prescription intravenous drugs;

e. a consent to conduct a criminal records search of HCV Infected Person; and

f. an affidavit or interview of any person the Administrator believes may have knowledge about the non-prescription intravenous drug use or disease history of the HCV Infected Person.

Results of the Investigations

12. Although none of these factors may prove conclusive in any individual case because the Administrator must consider the totality of the evidence, the following factors are examples of evidence that would be supportive of a finding that the person claimed to be an HCV Infected Person is eligible:

    a. identification of a Class Period Blood transfusion from an HCV antibody positive donor;

    b. the HCV Infected Person was under the age of 18 at the time of the receipt of Blood for the Hemophiliac or the Class Period Blood transfusions;

    c. reliable evidence establishes that the non-prescription intravenous drug use took place after July 1, 1990;

    d. an HCV disease history which is more consistent with the timing of:

       i. the receipt of Blood for the Hemophiliac;

       ii. the Class Period Blood transfusion(s) for which an HCV antibody positive donor has been located or for which the status of the donor remains unknown; or

       iii. the alleged secondary infection;

       than with the time of non-prescription intravenous drug use;

    e. reasonably reliable evidence that the non-prescription intravenous drug use history is subsequent to the receipt of Blood for the Hemophiliac, or the date of Class Period Blood transfusion(s), or the date of alleged secondary infection;

    f. reasonably reliable evidence that the non-prescription intravenous drug use was limited to a single occasion and was done with sterile equipment which was not shared; and

    g. no medical history of unspecified Hepatitis, Hepatitis B or Non-A, Non-B Hepatitis prior to the date of the receipt of Blood for the Hemophiliac, the Class Period Blood transfusion(s) or the date of alleged secondary infection.

13. Although none of these factors may prove conclusive in any individual case because the Administrator must consider the totality of the evidence, the following are examples of evidence that would not be supportive of a finding that the person claimed to be an HCV Infected Person is eligible:

    a. failure to identify a Class Period Blood transfusion from an HCV antibody positive donor;

    b. an HCV disease history which is more consistent with infection at the time of nonprescription intravenous drug use than with the timing of:

        i. the receipt of Blood for the Hemophiliac;

        ii. the Class Period Blood transfusion(s) for which an HCV antibody positive donor has been located or for which the status of the donor remains unknown; or

        iii. the alleged secondary infection;

    c. reasonably reliable evidence that the non-prescription intravenous drug use took place on more than one occasion or was done with non-sterile or shared equipment;

    d. a medical history of unspecified Hepatitis, Hepatitis B or Non-A Non-B Hepatitis prior to the date of the receipt of Blood for the Hemophiliac, or the Class Period Blood transfusion(s) or the date of alleged secondary infection;

    e. a refusal to permit the Administrator to interview any person the Administrator believes may have knowledge about the non-prescription intravenous drug use or disease history of the HCV Infected Person;

    f. a CBS or Hema-Quebec donor file which indicates that the HCV Infected Person:

        i. tested positive for the antibodies to Hepatitis B; or;

        ii. had donated blood prior to the Class Period and the pre-Class Period blood donations or recipients of the pre-Class Period blood donations have subsequently tested positive for HCV antibodies; and

    g. the file is in any other way consistent with infection with HCV by non-prescription intravenous drug use prior to the receipt of Blood for the Hemophiliac, or the Class Period Blood transfusion(s), or the date of alleged secondary infection.