RE HIV LITIGATION

PLAINTIFFS' SUMMONS FOR DISCLOSURE OF DOCUMENTS FOR WHICH PUBLIC INTEREST IMMUNITY HAS BEEN CLAIMED

OUTLINE SUBMISSIONS OF THE CENTRAL DEFENDANTS

INTRODUCTION

1. The vast majority of the documents in categories 1-4 are documents of the Department of Health (DH).

2. There is a clear public interest in preserving these documents from disclosure and that does not appear to be challenged. That public interest is particularly strong where the documents relate to the formulation of government policy as to the allocation of resources between competing demands. (See generally the contents of the Certificate in Air Canada v Secretary of State for Trade (1983) AC 394 especially pp405-407)

3. Where documents fall within a class which enjoys public interest immunity, a party cannot waive such privilege. It is for the Court to balance the competing public interests in an appropriate case.

4. In order to persuade the Court that production should be ordered, the Plaintiffs must show:

[1] That the documents are relevant;

[2] That they are likely to assist the Plaintiffs in their case;

[3] That the public interest in their disclosure outweighs the public interest in their confidentiality.

5. In this case, there is no issue as to [1], on the Plaintiffs' pleaded case.

6. As to [2], the Court must be satisfied that the Plaintiffs are not merely on a fishing expedition. A party which cannot prove its case without these documents should not be allowed to inspect in the hope that these documents may provide something which does enable them to prove their case. In particular, the Central Defendants challenge the assertion that the documents in Categories 3 and 4 can be shown to assist. The Plaintiffs already have the Ministers' statements to Parliament, their public utterances and the letters actually written by them and on their behalf. It should not be necessary to look behind these official and public utterances to see what was in the drafts and briefings.

7. The real issue in this application is, however, the question of the balance of the competing public interests. The first stage in that is to enquire whether the Plaintiffs have a case which, as pleaded and as a matter of law, stands any real prospect of success. If the claim is purely speculative or raises issues of law which have little prospect of success, no

question of competing public interests should arise in relation to those documents which are relevant only to the speculative or "adventurous" claims.

8. It is the Defendants' case that the Plaintiffs' common law negligence claims are bad in law, particularly those relating to self-sufficiency and the allocation of resources. As to the Plaintiffs' case on Wednesbury unreasonableness, there is not a shred of evidence or of particularisation to support it, even if it could be shown as a matter of law that a Plaintiff could recover damages at common law for such alleged unreasonableness.

9. The Defendants will submit that in approaching this Application, the Court should consider the nature of the Plaintiffs' case as pleaded and should not enter into an investigation of the facts as asserted in the Statement of Claim and in the various articles appended to it, particularly when many of these facts are challenged on the pleadings. For that reason, perusal of the articles will be of limited value.

THE PLAINTIFFS' CASE

10. The Plaintiffs' pleaded case on self-sufficiency can be summarised broadly as follows:

[1] The use of blood products gave rise to an increased risk of haemophiliacs contracting hepatitis and the Central Defendants knew or should have known this [para 20];

[2] There was a greater risk of contracting hepatitis from blood that was [a] manufactured commercially; [b] made from large donor pools; [c] made from donations of paid donors; and the Central defendants knew or should have known this [paras 22-23]

[3] A similarly increased risk existed in respect of "other viral infections" and the Central Defendants knew or should have known this [paras 22A-23];

[4] As a matter of fact it was, or was reliably considered to be economically more efficient to produce Factor 8 & 9 concentrate in the United Kingdom than to import commercial concentrate and the Central Defendants knew or should have known this [paras 24-26];

[5] Estimates of the number of units of Factor 8 required to achieve self-sufficiency varied from 38-53 million in 1974 to 100 million in 1981 [para 27];

[6] In about 1975 the DH accepted the importance of achieving self-sufficiency in good time [para 28-30];

[7] Actual consumption increased from about 16 million units in 1973 to 88 million in 1987, while the NHS share grew from 2.5million in 1973 to 40 million in 1984 before reducing to 25 million in 1987 [para 31];

[8] The amounts invested in the National Blood Transfusion Service to increase production of Factor 8 were:

1975 - £0.5m

1980 - £1.25m

Nov 1981 - £21.1m

[para 32];

[9] The Blood Products Laboratory was declared unfit for good manufacturing practice in 1980 [para 33];

[10] Between 1970 and the mid-1980s, pool sizes increased from approx 200 to approx 15,000 [para 35];

[11] From about 1976, the Protein Fractionation Centre in Scotland was capable of producing all or a substantial proportion of the additional Factor 8 & 9 requirements of England & Wales and the Central Defendants knew or should have known this [paras 36-37];

[12] The NBTS was managed by RHAs with little or no central administration or coordination [para 38];

[13] The DH:-

{1} Should have achieved self-sufficiency earlier;

{2} Failed to devote enough capital expenditure to the BPL;

{3} Failed to create an effective and integrated NBTS removed from RHA funding;

{4} Failed to assess future needs for blood products and to set appropriate targets;

{5} Failed to expand the spare production capacity in Scotland;

{6} Failed to instruct or advise Health Authorities to approach commercial blood manufacturers to fractionate plasma from volunteer donors in England & Wales;

[para 83 (a)-(m)B];

[14] The DH has not acted within the limits of the discretion conferred by statute, properly exercised and/or have acted unreasonably and so as to frustrate the objects

of the statute conferring the discretion.

11. The Plaintiffs' case on self-sufficiency presupposes:

[1] That the DH owes a duty of care to individual Plaintiffs;

[2] That decisions relating to the allocation of resources and of priorities give rise to a cause of action by individual plaintiffs at common law;

[3] That the Plaintiffs can prove Wednesbury unreasonableness in addition to the pleaded facts and negligence;

[4] That Wednesbury unreasonableness can give rise to a claim for damages at common law.

12. The Defendants' case on these matters can be summarised as follows:-

[1] No cause of action lies against the DH for breach of statutory duty in respect of either the National Health Services Acts or the Medicines Act 1968;

[2] Any duties that are owed by the DH are owed to the public at large and to Parliament and not to individual Plaintiffs;

[3] There is not sufficient proximity between the DH in exercising its functions under the National Health Services Acts, in particular when deciding on matters of policy, or

the implementation of policies, to give rise to a duty of care to individual Plaintiffs.

Donoghue v Stevenson [1932] AC 562

Yuen Kum-Yu v AG of Hong Kong [1987] 2 AER 705

[4] The fact that only a small group of identifiable Plaintiffs is involved does not alter the principle to be applied.

[5] It would not be just and reasonable to impose a duty of care towards individual Plaintiffs and/or it would be contrary to public policy to impose such a duty. Policy decisions are such that Ministers and officials already have a sufficiently difficult balancing exercise without having to consider the possibility of civil litigation.

Peabody Fund v Sir Lindsay Parkinson [1985] AC 210

Jones v Dept of Employment [1988] 1 AER 725

Mills v Winchester Diocesan Board of Finance [1989] 2 AER 317

Yuen Kum Yu v AG of Hong Kong (supra)

Hill v Chief Constable [1989] 1 AC 53

Davis v Ratcliffe [1990] 1 WLR 821

Rowling v Takaro Properties [1988] AC 473

[6] These considerations apply particularly where Ministers have to allocate scarce resources between different demands, where they are balancing competing

public interests. Such decisions are not suitable for investigation in civil proceedings and should be regarded as "non-justiciable".

Dorset Yacht co v Home Office [1970] AC 1004

Anns v Merton LBC [1978] AC 728

Rowling v Takaro Properties (supra)

[7] The Plaintiffs' case as pleaded is concerned with decisions of policy and funding which are not justiciable or where there is no duty of care. Therefore, the balance between competing public interests should not arise because the Plaintiffs have not shown that they have a good arguable case on the law.

se, in particular:

[1] The encouragement of research into heat treatment [para 83(s)];

[2] The failure to fund and introduce heat treatment earlier [para 83 u)];

[3] The failure to introduce screening tests earlier [para 83(ad)];

[4] The failure to do more to reduce the risk of hepatitis [para 83 (af)

14. However, there are also strands of operational decisions involved in these matters, so that policy considerations against

imposing liability do not apply so clearly as with pure resource and policy decisions. The same arguments apply to these advices and to the documents described as 1(b) in the Certificate as above, although with somewhat less weight.

15. Conclusion It is submitted that the balancing exercise should result in a refusal to disclose those documents which relate tp olicy decisions, and in particular those relating to self-sufficiency and resource allocation.

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JUSTIN FENWICK