

(1989J 3593)

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

BEFORE:

The Honourable Mr Justice Ognall

RE: HIV HAEMOPHILIAC LITIGATION

INSTRUCTIONS TO COUNSEL
TO ADVISE IN CONSULTATION
ON 7TH SEPTEMBER 1989

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B E F O R E :

The Honourable Mr Justice Ognall

RE: HIV HAEMOPHILIAC LITIGATION

INSTRUCTIONS TO COUNSEL

COUNSEL has herewith:-

- ✓ 1. The Main Statement of Claim
- ✓ 2. Court Orders dated 29/6/89 and 25/7/89
3. Previous Instructions
4. Historical Summary of AIDS in Haemophiliacs 1981-1985 and Documents referred to in it
5. Publications and documents referred to Master Statement of Claim (To Follow)
- ✓ 6. Notes of Counsel with Counsel's Report dated 1989
1. Comments on the Master Statement of Claim on behalf of The Licensing Authority and the CSM.
1. Counsel is instructed in this matter on behalf of the four Government Defendants, namely (1) The Secretary of State for Health; (2) The Licensing Authority (3) The Committee on Safety of Medicines and (4) The Secretary of State for Wales.

The Main Statement of Claim has been served (Doc 1) and the Defence, it is likely, will be served by 1st *November* 1989, although Mr Justice Ognall is going to determine the date for doing so on 23rd October 1989. Any application for Further and Better Particulars before service of the Defence is to be made by 28th September 1989.

2. In so far as the Secretary of State for Wales is concerned, the Treasury Solicitor is acting for him in this litigation and the Legal Department of the Welsh Office is representing the Welsh Regional Health Authorities. Subject to Counsel's views in this matter, it is proposed that this arrangement should continue unless it is envisaged that there may be a conflict of interest in the Welsh Office acting for the Welsh Regional Health Authorities. If necessary, arrangements can be made for the Welsh Health Authorities to be separately represented. So far as the English Regional Health Authorities are concerned, Instructing Solicitor understands that so far they have not been able to agree to be represented jointly and to co-ordinate representation.

3. With regard to the Special Health Authorities: (a) Hammersmith & Queen Charlotte; (b) The Hospital for Sick Children (Great Ormond Street); (c) The Central Blood Transfusion Laboratory, and (d) Bethlehem Royal Hospital & The Maudsley Hospital, it is understood that they may form their own group for representation.

4. The Plaintiffs' solicitors have been informed that the Department of Health & Social Security will accept responsibility for the act and omissions of the Lister Institute and the North West Regional Health Authority for the period October 1979 to December 1982 during which it acted as a caretaker for the Blood Products laboratory.

3. The Main Statement of Claim it seems deals with four main points:-

(a) Reference is made to the published documents relating to AIDS and the state of knowledge. It is apparent that the knowledge relating to history of Aids is not great and is limited.

(b) The magnitude of the special risk of hepatitis to haemophiliacs was or should have been known to the Defendants and that they failed to appreciate sufficiently or at all the risk of infection with hepatitis. It is

suggested that if steps were taken e.g. by eliminating the need to use imported (non-heat treated) commercial Factor VIII; prohibiting the use of imported (non-heat treated) Factor VIII; See pages 116 and 117 of Doc 1. It would appear that it is question of law whether the harm which was foreseen or could have reasonably been foreseen could have been effectively prevented. It would be a question of medical evidence whether the steps suggested in the Statement of Claim to prevent risk of hepatitis to haemophiliacs could have been effective if Factor VIII was heat-treated.

- (c) It is alleged that the Defendants failed to achieve self-sufficiency for England and Wales in blood products made from blood donated and processed in England and Wales - see pages 109/110 of Statement of Claim; that they failed to devote any significant capital expenditure to the Blood Products Laboratory and permitted BPL to deteriorate to such an extent that in 1980 it was declared unfit for good manufacturing practice. It is contended that the policy was wrong and that the available resources were not properly utilised, and that England and Wales should have been self-sufficient in producing Factor VIII. If the policy was wrong the question arises, can the Plaintiffs claim damages *for negligence,* if wrong policy was adopted?
- (d) Licensing Authority should have revoked licences and prohibited use of Factor VIII on children.

4. At the consultation on 9th September 1989 it is suggested that the question of applying to the Court for striking out certain paragraphs of the Statement of Claim be considered: (a) on the basis that where it is alleged that the Government policy was wrong or that the resources were not properly utilised, does not disclose reasonable cause of action, and, (b) on the basis of causation and damage, i.e. there is no cause of action unless the Plaintiff can prove that he or she is infected by HIV positive, and, (c) whether the Government Defendants owed any duty of care and whether there has been a breach

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of that duty in the light of the Court of Appeal's decision in Hill v Chief
Constable of West Yorkshire (1987) 2 W.C.R. 1126, and the Privy Council's
decision in Yellar Keen Yeo v Attorney General of Hong Kong (1988) A.C. 175.

Yuen Kun Yeo