
SUMMARY OF
PLAINTIFFS' SUBMISSIONS
- HIV HAEMOPHILIAC -
LITIGATION

INTRODUCTION

1. In this coordinated litigation the Plaintiffs are, in the main, haemophiliacs who became HIV positive and in many cases have suffered the onset of AIDS. A significant number of them have died before or during the course of this litigation. The Plaintiffs so suffered as a result of treatment under the National Health Service for their haemophiliac condition. The disability was caused by the use of contaminated blood products containing the human immuno-deficiency virus (HIV). The relevant period when contaminated Factor VIII was used was from the late 1970's to the early to mid 1980's.
2. The Plaintiffs commenced this generic litigation in June 1989 and sued :
 - i) The first group of Defendants, the Government agencies - the Department of Health, the Welsh Office, the CSM and the Licensing Authority.
 - ii) The second group of Defendants - responsible for the blood products laboratory at different times, namely the North West Thames Regional Health Authority and the CBLA.
 - iii) The third group of Defendants - The Health Authorities.In addition individual statements of claim have been served by the individual Plaintiffs.

3. By October 1990 exploratory negotiations began between the Plaintiffs and the Department of Health. These negotiations lead to proposals by the Plaintiffs' advisors. These were put to the Department of Health and were being considered by November 1990. Following the appointment of the new Prime Minister the Plaintiff's proposals were accepted in principle. On the 11th December 1990, the Prime Minister and the Secretary of State for Health announced to the Commons their acceptance of the Plaintiffs' proposals.
4. The essence of the agreement reached was :
 - i) The Plaintiffs would discontinue their litigation against all the Defendants.
 - ii) The Department of Health would pay to the MacFarlane Trust the sum of £42,000,000 for the benefit of all infected haemophiliacs and their families.
 - iii) The sum was to be divided up according to broad categories of claimants.
 - iv) Payments were not to affect the recipients' entitlement to state benefits.
 - v) The Plaintiffs' reasonable costs were to be paid.
 - vi) Separate consideration would be given to the minority of cases in which there was a realistic claim of clinical mismanagement, ie, medical negligence.
 - vii) The proposals were to apply to all infected haemophiliacs whether in the litigation or not.

viii) The sums to be paid were to be paid to living Plaintiffs, and to families and dependants of infected haemophiliacs who have died.

5. The Plaintiffs were advised on these proposals by their legal advisors thereafter. The Plaintiffs have all subsequently accepted the agreement in principle. The time that has passed between December 1990 and now has been taken up with the drafting of terms which would ensure that the Plaintiffs were adequately protected, in particular as to the payments to be made to the MacFarlane Trust, as to their entitlement to state benefits, as to legal aid and costs, and as to suitable provisions for those who wish to continue with medical negligence claims arising from the particular facts of their own case.

6. This public hearing enables the Plaintiffs' advisors briefly to set out :

- i) The circumstances in which the proposals were put to the government.
- ii) An explanation as to how the Plaintiffs' proposals were devised.
- iii) The essential terms of the resulting agreement between the Plaintiffs and the Department of Health.

CIRCUMSTANCES IN WHICH THE PLAINTIFFS PROPOSALS WERE PUT TO THE GOVERNMENT.

1. There are 983 separate claims in this litigation.
2. In broad terms there are six relevant categories of claimant. These are now set out - the first figure being the total number of in each category, and the figure in brackets the number of those who have died :-
 - i) Children - 130¹⁰ (9) 228 (81)
 - ii) Unmarried adults - 231 (28)
 - iii) Married adults without dependant children - 218⁵⁸ (54)
 - iv) Married adults with dependant children - 228 (47)
 - v) Infected intimates - 27 (2)
 - vi) Family members ~~suffering psychiatric illnesses~~ - 152.
(Category G. Plaintiffs) *at risk of severe illness & death*

Four other claims are as yet unclassified.

3. Many of the claimants have already died and others face death in the near future. This is a matter of cardinal importance in this litigation. The Plaintiffs' advisors have been acutely conscious of the time scale involved if this case went to trial and then on to appeal to the Court of Appeal and the House of Lords, with a possible final Appeal to the European Court of Human Rights. The trial having been fixed for March 4th 1991, the Plaintiffs advisors considered it essential to put proposals to the Department of Health as soon as

reasonably possible following the accumulation of expert evidence and the completion of discovery from the Defendants.

4. By October 1990 the Plaintiffs legal advisors had considered :

- i) The 150,000 documents revealed on discovery, and in particular those further documents within that total which had been disclosed by the Department of Health following the decision of the Court of Appeal in September 1990. In those proceedings the Plaintiffs claim for discovery of these further documents succeeded despite the Defendants' reliance on public interest immunity.
- ii) The views of the many experts that were consulted in the United Kingdom, the United States of America, Australasia, and Europe. Their expertise involved all areas of this litigation including virology, haematology, hepatology, epidemiology, and the history of, and medical learning about, AIDS.
- iii) The mass of medical and scientific literature on the issues in the claim.

5. The Plaintiffs' advisors thereafter decided that proposals should be put to the Department of Health with a view to concluding this litigation if that were capable of achievement on satisfactory terms.

6. In considering the factual and legal issues the Plaintiffs' advisors had regard to :

i) Factual issues at the heart of the case namely :

a) Self sufficiency - The allegation that the Department of Health should have made England and Wales self sufficient in blood products prior to the advent of AIDS so that it was not necessary to import such products from America.

b) The reasons why self sufficiency was not achieved involving consideration of delay and reasonableness of conduct on the part of the Department.

c) Causation - Whether if the Plaintiffs had been treated only with NHS Factor VIII concentrate, they would have avoided being infected with HIV.

d) The history of the onset of AIDS and appreciation of it by the Department of Health together with action to be taken.

ii) Brief summary of the facts :

Self-sufficiency. We contended that the Defendants, in particular the Department of Health, failed in the 1970's to make England and Wales self-sufficient in blood products such as Factor VIII concentrate. They had adopted a policy of self-sufficiency in 1974 in part

because imported products carried a higher risk of causing hepatitis than NHS products. Yet they failed to carry this policy through by investing money in the Blood Products Laboratory at Elstree, or in the underused facilities at Liberton in Scotland.

The principle argument on the Defendants' side was that within the proper confines of Government finances there was never enough money to make the necessary capital investment, nor did the circumstances and thinking at the time demand it. Therefore they did not act unreasonably in failing to do so. The facts are complicated, but we consider there was significant evidence to support the allegation that the question of the required capital was never properly addressed. Nevertheless even if such an allegation had been proved we had the gravest reservations whether we could prove that such fault amounted to Wednesbury unreasonableness.

The AIDS crisis. We alleged that the Defendants did not react quickly enough to the AIDS crisis; for instance, they should have banned imported blood products, and introduced heat treating ^{much} much sooner. We also made criticisms of delay in introducing screening and testing of blood donors. However, AIDS was a bolt from the blue, and its full impact could not really be gauged until it was too late. The evidence shows that the Defendants

generally reacted reasonably promptly to the AIDS crisis, in accordance with the advice of knowledgeable medical advisors, and at much the same speed as any other country did. We do not believe there was a significant chance of succeeding on this issue.

iii) Legal issues :

- a) Foreseeability of HIV infection and of (subsequently) developing AIDS.
- b) The duty of care and Wednesbury unreasonableness.
- c) Causation.

(The legal issues to be dealt with by Rupert Jackson Q.C.)

Having made such assessment the Plaintiffs put their proposals to the Government in October 1990 which led to the Governments acceptance of them in principle on the 11th December 1990.

HOW THE PLAINTIFFS PROPOSALS WERE DEvised

1. Quantifying the Claims:

- i) In assessing the value of the Plaintiffs' claims the Plaintiffs' advisors considered :
 - a) The general advice of an AIDS physician
 - b) A number of individual cases
 - c) The questionnaire returns giving details of quantum for the vast majority of Plaintiffs and cross checks on them.
 - d) The current English law on the principles of damages.

- ii) General damages were assessed having regard to the symptoms suffered by, and the prognosis of, the Plaintiffs as to physical and mental disability.
 - iii) Care costs and special damages were taken into account for the period during which such care might be required after the onset of AIDS.
 - iv) Loss of earnings were taken into account having regard to national average earnings, and for the period after the onset of AIDS.
 - v) Dependency and loss of earnings in the lost years were also considered in the light of established legal authorities such as Pickett -v- British Rail [1980] AC136, Harris -v- Empress Motors [1984] 1WLR212 and Housecroft -v- Burnett [1986] 1WLR332.
 - vi) It was considered appropriate to treat the members of haemophiliac families who had become infected with HIV in the same way as unmarried adult haemophiliacs.
 - vii) Family members who had suffered psychiatric disorder were a separate category.
2. The two categories at (vi) and (vii) above, and particularly the last, involved issues of foreseeability,

remoteness, and entitlement to recover damages of considerable complexity.

3. Categories :

- i) There were three alternative methods of assessment:
 - a) Each claimant to receive the same amount.
 - b) Each claim to be separately evaluated in the traditional manner with full medical and financial detail.
 - c) Categories of Plaintiffs determined in the way set out at page 4 above, namely 6 broad classes.

The Plaintiffs' advisors considered the first alternative to be unfair, and the second to be impracticable in terms of time and cost. Categorisation in the manner set out was therefore devised as being the appropriate and equitable basis of assessment despite the fact that in such categorisation some claimants would not receive their full entitlement while others would receive more. The categorisation was based on the premise that the categories would apply whether the haemophiliac was alive or had already died.

4. Conclusion : The Plaintiffs' advisors having assessed damages in the manner set out above concluded that £42,000,000 was reasonably acceptable as an overall settlement of all haemophiliac claims whether in the litigation or not. In addition to this sum was the

protection of Social Security Benefits which would have otherwise have been lost to the claimants because of the lump sum payments. Finally protection as to costs was sought so as to ensure that no Plaintiff, whether legally aided or paying privately, should suffer any diminution in the amount received by them because of legal costs.

ESSENTIAL TERMS OF THE RESULTING AGREEMENT

1. The Department of Health are to pay to the MacFarlane Trust the following sums as soon as reasonably possible in respect of each category :
 - i) Infants - £21,500 each
 - ii) Single adult - £23,500 each
 - iii) Married adult (including stable relationships) without dependant children - £32,000 each
 - iv) Married adult (including stable relationships) with dependant children - £60,500
 - v) Infected intimates :
 - a) Adults or married infants - £23,500 each
 - b) Unmarried infants - £21,500
 - vi) Family members who have suffered psychiatric disorder (category G Plaintiffs) - £2,000.

For this purpose the Department of Health will provide the trust with the sum of £42,000,000.

It is to be noted that in addition :

- a) The protection of state benefits involves a very substantial sum. *By the way, it may well be*
- b) In late 1989 the Government paid £24,000,000 to the MacFarlane Trust for the benefit of infected haemophiliacs.

2. The Secretary of State for Health will procure that there are to be laid before Parliament by the 30th July 1991 regulations providing that sums derived from the new MacFarlane Trust will be ignored in assessing entitlement to Social Security benefits of the beneficiaries of the Trust and certain others. The Secretary of State for Health will use his best endeavours to ensure that such regulations having been laid, are approved and brought into being within a reasonable time thereafter.

*Law
now*

3. The Plaintiffs' costs are to be paid on a basis which will result in every Plaintiff recovering the sums to be paid to them in full without deduction for any legal costs.

4. Special provision is made to permit Plaintiffs who so intend to continue medical negligence claims against the appropriate Defendants.

5. Payments are made on the basis that the dependants of dead haemophiliacs in the same category as the living will receive payments in the same amount as the living.
6. Upon these terms the Plaintiffs will discontinue their litigation against all the Defendants.

CONCLUSION

1. The Plaintiffs in this case have suffered the most terrible tragedy as a result of treatment administered to them by the National Health Service. Their predicament has aroused the widespread sympathy of the public and particularly those concerned with this litigation.
2. However, their claim is based on legal arguments which are novel. The Courts apply the law impartially and in this area the principles that have to be applied are defined. It is not sufficient to prove mere negligence, the Plaintiffs would probably have to show that the Department of Health had acted unreasonably in the Wednesbury sense. The Plaintiffs would also have to prove causation which the Defendants strongly contest. These matters amount to formidable obstacles in the path of a successful and speedy conclusion to this litigation.

3. The damages assessed by the Plaintiffs' advisors are based upon established principles of English law. They represent that which in our view the law would provide by way of damages as against that which the citizen might think appropriate on a moral basis.

4. The amounts then to be paid, and the preservation of state benefits, represent a fair assessment of the risks of this litigation for those Plaintiffs.

5. Having regard to all these circumstances the Plaintiffs' advisors had no hesitation in advising settlement based on an offer of £42,000,000 for all haemophiliacs and other Plaintiffs with the other substantial benefits as to social security payments and costs. The current figures as to acceptance are :

Awaiting supporting documents	less than 24
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Awaiting acceptance of category by Govt	[55]
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Notice of acceptance received	842
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Awaiting notice of acceptance	5/101
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Notice discontinuance received	53 44
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847 power
app.

Thus far about 90% of the Plaintiffs have indicated their willingness to accept. The litigation has therefore come to an end. These submissions have set out the relevant history that lead to the conclusion of this unique litigation.

DANIEL BRENNAN Q.C.

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