FOR SOLICITORS

# JUDGMENT

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(QUEEN'S BENCH DIVISION)

Royal Courts of Justice
20th September, 1990

Before:
LORD JUSTICE RALPH GIBSON
LORD JUSTICE BINGHAM
and SIR JOHN MEGAW

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re HIV HAEMOPHILIAC LITIGATION

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Draft judgment to be handed down on THURS 19-IX-90 at 10.00 a.m. Confidential to Counsel and their instructing solicitors, but the substance may be communicated to clients not more than one hour before the giving of judgment.

***THIS IS AN UNREVISED JUDGMENT. IT IS MADE AVAILABLE ON THE CLEAR UNDERSTANDING THAT IT IS TREATED AS SUCH. THE OFFICIAL VERSION OF THE JUDGMENT WILL BE AVAILABLE FROM THE SHORTHAND WRITERS ONCE IT HAS BEEN APPROVED BY THE JUDGE.***

JUDGMENT

**LORD JUSTICE RALPH GIBSON:**

This is an appeal by the plaintiffs and a cross-appeal by the Department of Health, one of the defendants, against the order of Mr Justice Rougier of 31st July 1990 whereby he directed production to the court of a number of documents but refused to direct production of other documents. The documents are listed in a certificate given by the Permanent Under Secretary of State at the Department of Health in which immunity from disclosure of the documents is claimed on the grounds of public interest. The appeal and cross-appeal are brought with the leave of the judge. The plaintiffs ask that this court should order production of some additional documents. The Department of Health submits that there should be no order for production of any of the documents.

In the action the plaintiffs, who are haemophiliacs, or the wives and children of haemophiliacs, claim damages for personal injuries which are alleged to have been caused by the breach of statutory duty and negligence of the defendants. In consequence of the alleged breaches of duty it is said (among other grounds of claim) that many of the haemophiliac plaintiffs were treated with Factor VIII concentrate imported from the U.S.A. which was infected with Human Immuno-deficiency Virus ("HIV") and, therefrom, those plaintiffs, and in some cases their wives and children, have become infected with HIV and either have developed or will develop Acquired Immune Deficiency Syndrome ("AIDS").

**The Litigation**

There are now 962 plaintiffs in this litigation. The majority are haemophiliacs who have suffered infection by HIV. Of them 76 have died and the claims are pursued by their representatives; 50 have contracted AIDS; and 326 are suffering from AIDS-related complex ("ARC"). Of the 962 plaintiffs, 730 are haemophiliacs and 177 are intimates of haemophiliacs, namely wives or children; and the remaining 55 plaintiffs are as to the majority haemophiliacs and as to the remainder their intimates. As to the 177 intimates, 23 have been infected by HIV, one has AIDS, and 11 have contracted ARC. There is some uncertainty as to precise numbers and categories of the plaintiffs at this time because the plaintiffs are represented by 70 separate solicitors and the detailed information with reference to the plaintiffs has not yet been fully collated. The trial of the action, which is fixed for March 1991 and is expected to require some 26 weeks for the hearing, will be of the claims of certain plaintiffs in various categories whereby it is intended that the main issues on liability and causation will be determined and, if relevant, decisions will be made as to their claims on the issue of damages.

There are a large number of defendants but the present appeal is between the plaintiffs and the Department of Health only, because the Department alone holds the documents in question. The Central Defendants, as they are described in the action, are the Department of Health and the Welsh Department; the Licensing Authority established under the Medicines Act 1968; and the Committee on the Safety of

Medicines established under an order made under section 4 of the Medicines Act 1968. The remaining defendants, of which there are 220, are all the Regional Health Authorities; all the District Health Authorities; and certain special authorities, including the Central Blood Laboratories Authority.

The re-amended main statement of claim of the plaintiffs, which does not deal with the facts relating to individual plaintiffs, extends to 117 pages. The appendices, which contain particulars of the facts and matters (mainly references to articles in learned journals) upon which the plaintiffs rely for proof of relevant knowledge or means of knowledge on the part of the defendants, contain another 61 pages. On the issue of "self sufficiency", as it has been called, the plaintiffs' basic contention is that the failure of the Central Defendants to achieve self sufficiency in blood products for England and Wales was a breach of duty owed to the plaintiffs individually which caused many of the haemophiliac patients to be treated with Factor VIII concentrate imported from the U.S.A. which was infected with HIV. The following summary of the plaintiffs' allegations on that issue is intended to be no more than a sufficient description for the purposes of this appeal:

(i) The use of blood products, including Factor VIII for treatment of haemophiliacs, gave rise to an increased risk of those treated contracting hepatitis from the presence of viruses in the products;

(ii) 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;

(iii) There was a similarly increased risk in respect of "other viral infections" apart from hepatitis, including HIV;

(iv) It was economically more efficient to produce Factor VIII concentrate in the United Kingdom than to import commercial concentrates;

(v) the matters set out in (i) to (iv) above were known to, or should have been known to, the Central Defendants;

(vi) Estimates of the number of units of Factor VIII required to achieve self sufficiency for the National Health Service in the United Kingdom (and thereby to avoid the risks from using imported commercially manufactured products) varied from 38-53m in 1974 to 100m in 1981;

(vii) In about 1975 the Department of Health accepted the desirability of achieving self sufficiency in good time;

(viii) Actual consumption of units of Factor VIII increased from about 16m units in 1973 to 88m in 1987, while the N.H.S. share (i.e. produced by the N.H.S.) grew from 2.5m in 1973 to 40m in 1984 before temporarily reducing (because of the introduction of heat treatment) to 25m in 1987;

(ix) The amounts of money invested in order to increase production of blood products including Factor VIII were in 1975 £.5m in the National Blood Transfusion Service; in 1980 £1.25m

and in 1981 £21.1m in the Blood Products Laboratory of the N.H.S. at Elstree;

(x) The Blood Products Laboratory was declared unfit for good manufacturing practice in 1980;

(xi) Between 1970 and the mid-1980s, the sizes of donor pools within the National Health Service production increased from approximately 200 to approximately 15,000;

(xii) From about 1976 the Protein Fractionation Centre in Scotland was capable, with some further investment, of producing all or a substantial proportion of the additional Factor VIII and IX requirements of England and Wales as the central defendants knew or should have known;

(xiii) The National Blood Transfusion Service was managed by Regional Health Authorities with little or no central administration or co-ordination;

(xiv) The Department of Health:

(a) should have achieved self sufficiency in the United Kingdom in blood products at an earlier date;

(b) failed to devote enough capital expenditure to the B.P.L.;

(c) failed to create an effective and integrated N.B.T.S. removed from R.H.A. funding;

(d) failed to assess future needs for blood products and to set appropriate targets;

(e) failed to expand the spare production capacity in Scotland;

(f) failed to instruct or to advise health authorities to approach commercial blood manufacturers to fractionate plasma from volunteer donors in England and Wales;

(xv) The Department of Health by the acts and omissions alleged were guilty of breaches of statutory duty and of negligence which caused the injuries to the plaintiffs by infection from contaminated blood products;

(xvi) Insofar as any act or omission occurred in the purported exercise of a discretion under statutory powers the Department of Health has not acted within the proper limits of the discretion conferred by statute, and/or has acted unreasonably and so as to frustrate the objects of the statute conferring the discretion.

Further issues are raised on the plaintiffs' allegations to the effect that, by separate breaches of duty, a number of plaintiffs were treated with Factor VIII or Factor IX concentrates which caused them to be infected with HIV. In summary those allegations are:

(i) Warnings and screening: despite warning signs, which were known to or should have been known to the defendants, that the AIDS epidemic might reach this country and create grave danger for the plaintiffs, the defendants failed to do what they should have done to exclude blood donors in this country who were at high risk of AIDS and they failed to use such tests

as were available to screen donors so as to prevent the taking of infected blood.

(ii) Heat treatment: it was known by the late 1970s that heat treatment of blood products gave protection against hepatitis B. Heat treatment was available by 1983, heat treated Factor VIII concentrate was commercially available in this country from autumn 1984 and available from the National Health Service from April 1985 but should have been available at an earlier date.

(iii) Other steps: imported commercial concentrates should have been banned from early 1983; licences granted under the Medicines Act 1968 should have been suspended, revoked, or varied; blood products from sources safer than those of commercial suppliers in the U.S.A. should have been required to be used in the N.H.S.; the size of donor pools within the N.H.S. system was allowed to become far too large; and other safer forms of treatment for haemophiliacs should have been imposed or encouraged for all or at least some of the plaintiffs such as Cryo precipitate or Desmopressin.

With reference to these allegations also the plaintiffs rely upon the assertion that, insofar as any act or omission occurred in the purported exercise of a discretion under statutory powers, the Department of Health did not act within the proper limits of the discretion conferred by the statute, and/ or acted unreasonably and so as to frustrate the objects of the statute conferring the discretion.

The case of the Department of Health, apart from disputing much of the plaintiffs' case on the facts, includes the following main contentions:

Firstly, it is said that no cause of action lies against the Department for breach of statutory duty in respect of any of the provisions of the National Health Services Acts or of the Medicines Act 1968;

Secondly, that any duties that are owed by the Department are owed to the public at large and to the Crown and not to individual plaintiffs;

Thirdly, that there is not sufficient proximity between the Department of Health in exercising its functions under the National Health Service Acts, in particular when deciding on matters of policy or upon the implementation of policies, so as to give rise to a duty of care to individual plaintiffs;

Fourthly, that it would not be just and reasonable to impose a duty of care towards individual plaintiffs and that it would be contrary to public policy so to do; because policy decisions are such that ministers and officials already have a sufficiently difficult balancing exercise without having to consider the possibility of civil litigation;

Fifthly, those considerations apply with particular force where ministers have to allocate scarce resources between different demands and where they are balancing competing public interests because such decisions are not suitable for investigation in civil proceedings and should be regarded as "non-justiciable".

**Discovery in the litigation.**

The Department of Health and the Licensing Authority and the Committee on the Safety of Medicines have already disclosed a very large number of documents. In July 1990 the Ministry of Health supplied to the plaintiffs' advisors the list of documents for which public interest immunity was claimed. The claim to immunity was put forward by a certificate supplied by the Permanent Under Secretary of State and not by a Minister because the relevant documents extend over a period of time covered by more than one Administration. The certificate refers to approximately 600 documents bearing dates between 1972 and September 1986. The certificate divides the documents into categories based on the nature of the document and also by reference to the matters dealt with in the documents. It is necessary to set these out in detail because Rougier J. ordered the production of some but not all within the different categories.

The categories of documents are described in paragraphs 3 and 4 of the certificate and the grounds of immunity in paragraph 5, as follows. References to Category 5, in respect of which no order was made save to give liberty to apply, are omitted.

> "The categories of documents
>
> 3. The documents which number approximately 600 fall into the following categories:
>
> [1]. Documents revealing the process by which policy decisions were arrived at, comprising:
>
> (i) submissions to Ministers and exchanges with Ministers, directly or through their Private Secretaries, relating to the formulation of policy and the making of decisions which can be characterised as "policy" rather than

"operational" or as "non-justiciable" rather than "justiciable";

(ii) exchanges between senior officials specifically forming part of the process by which submissions, draft submissions and policy documents were brought into being;

[2]. Position papers and similar documents which were prepared by civil servants and directed towards the formulation of future policy and plans, but which were not themselves designed to be placed before Ministers or to form the direct basis for a submission to Ministers;

[3]. Briefings to Ministers directly relating to parliamentary questions or debates, and particularly draft parliamentary answers and notes in respect of possible "supplementary" questions;

[4]. Briefing notes and draft replies to letters, consisting of

(i) briefing notes to Ministers prior to meetings at which they were expected to make a statement or to declare their views;

(ii) draft answers to be sent by Ministers in response to letters received by them.

**4. The subject matter of the documents**

The subject matter of the various documents in each category can be summarised as follows:

Category 1. These fall into two principal groups:

(a) Documents relating to decisions which are major matters of policy; and

(b) Documents relating to other decisions involving elements of policy.

The documents in each group cannot easily be sub-divided precisely into subject headings, since many overlap and deal with more than one issue, but the various matters covered by these documents are as follows:

1(a) Documents relating to decisions which are major matters of policy:

(i) Whether to adopt a policy of self sufficiency in blood products;

(ii) What resources to allocate to the implementation of such a policy;

(iii) Future planning for the role of the Blood Products Laboratory;

(iv) What priority to give and what resources to allocate to the redevelopment and/or refurbishment of the B.P.L.;

(v) Whether and how to re-organise the National Blood Transfusion Service or other parts of the N.H.S.

1(b) Documents relating to other decisions involving elements of policy:

(i) What approach to take towards the widespread introduction of vaccination against hepatitis in the light of the AIDS problem;

(ii) What warnings to issue to blood donors in order to discourage those at risk from giving blood, whilst maintaining adequate supplies of blood for the N.B.T.S.;

(iii) How best to implement a procedure for the screening of blood donations;

(iv) Whether, when and how to introduce the use of heat treated blood products;

(v) What steps to take to minimise the risk of hepatitis infection to haemophiliacs and others.

Category 2. This group of documents relates principally to the papers prepared in the mid-1970s to consider the ways of expanding the N.B.T.S. in order to implement the declared aim of self sufficiency in blood products. The majority of these papers involved matters on which a decision by Ministers would be needed in due course if they were to be pursued.

Category 3. The briefings and draft Parliamentary answers cover a whole range of topics, as can be discerned from looking at the questions raised and answers given in Parliament. Briefings and drafts will have been prepared for most of these questions. Not all drafts have yet been unearthed.

Category 4(1). This category consists of documents which were prepared for the guidance of Ministers before important meetings, including meetings with A.S.T.M.S., the staff of B.P.L. and representatives of manufacturers. In most cases, minutes of the meeting or other records of what the Minister actually said on the relevant occasion are available and are not privileged.

Category 4(2). This category of documents consists of a variety of draft replies on policy and operational matters, where the Minister's response has been prepared by way of a draft with comments by the appropriate officials.

## 5. The Public Interest which is at Stake

It is in my opinion necessary for the proper functioning of the the public service that these documents

should, except in the most exceptional circumstances, be withheld from production on the grounds of public interest. The reasons for this opinion are principally as follows:

Category 1

(i) The documents falling into group A, namely documents relating to decisions which are major matters of policy, all fall within within the class of policy making documents in which (1) there is a need for effective candid and uninhibited advice to Ministers and discussions between Ministers and their senior advisors and (2) there is a public interest in protecting from possible critics the inner workings of Government in the formulation of important Government policy. The documents in question cannot properly be described as routine documents and many of them go to important questions of major economic significance, in particular the allocation of scarce resources.

(ii) The documents included within group B, namely documents relating to other decisions involving elements of policy, as a matter of principle fall within the same class, but although they contain a significant "policy" element, it is fair to say that they are in reality more closely concerned with operational matters. However, it is in the interests of good government to allow Ministers and civil servants to communicate freely with each other on all aspects of the decision making process, without the risks that such communications might subsequently come under scrutiny in the context of litigation brought by private individuals.

Category 2

This category requires protection in that the working papers are preparatory steps in the formulation of future policies and strategies which in due course will be developed into submissions and briefings to Ministers.

Category 3

(Omitted: no appeal is advanced with reference to this category.)

Category 4

These documents represent direct exchanges between Ministers and their senior advisors and it is important to the efficient working of Government that such exchanges should be candid and full, without fear that they will be subject to critical analysis in future litigation.

## The Nature of public interest immunity

This case must cause great public interest and concern. The plaintiffs, who are haemophiliacs, first suffered

the grave misfortune of that hereditary disorder. Then, through use of the treatment which had been devised by medical science to alleviate the consequence of that disorder, and which was provided by the National Health Service, they have been infected by a virus which, as medical science now stands, is likely to have fatal consequences. If that second grievous misfortune is not shown to have been caused by an illegal fault of any person or authority the plaintiffs must bear their misfortunes with no more financial aid than private or public generosity may provide. A previous example of payments of public money without proof of a right to damages in law may be seen in the Vaccine Damage Payments Act 1979. These proceedings are not concerned with the entitlement of the plaintiffs to sympathy or to voluntary support because of the gravity of their sufferings but solely with such rights as they can prove in law.

The Department of Health has raised the matter of public interest immunity so as to prevent the disclosure of the documents listed above. The Department does not do that in order to put difficulty in the way of the plaintiffs, or to withhold from the court documents which might help the plaintiffs. The Department raises the matter because it is the duty of the Department in law to do so in support of the public interest in the proper functioning of the public service, that is the executive arm of the government: see per Lord Denning *Air Canada v. S. of S. for Trade* [1983] 2 AC 394 at 411H. It is not for the Department but for the court to determine whether the documents should be produced. The plaintiffs acknowledge the validity of the claim to public interest

immunity but ask the court to order production notwithstanding the existence of the valid claim to immunity. It is essential that that aspect of these proceedings should be clearly understood.

The valid claim to immunity is to be over-ridden by the order of the court if the law requires that it should be over-ridden. The task of the court is properly to balance the public interest in preserving the immunity on the one hand, and the public interest in the fair trial of the proceedings on the other. It has been said that the test is intended to be fairly strict. In the ***Air Canada*** case Lord Fraser said at page 436A:

> "It ought to be so in any case where a valid claim for public interest immunity has been made. Public interest immunity is not a privilege which may be waived by the Crown or by any party. In ***Reg. v. Lewis Justices, Ex Parte Secretary of State for the Home Department*** [1973] AC 388, 400 Lord Reid said:
>
> 'There is no question of any privilege in the ordinary sense of the word. The real question is whether the public interest requires that the letter shall not be produced and whether that public interest is so strong as to over-ride the ordinary right and interest of the litigant that he shall be able to lay before a court of justice all relevant evidence.'"

Earlier in his speech at page 435, after referring to the impossibility of stating a test in a form which could be applied in all cases, Lord Fraser said:

> "The most that can usefully be said is that, in order to persuade the court even to inspect the documents for which public interest immunity is claimed, the party seeking disclosure ought at least to satisfy the court that the documents are very likely to contain material which would give substantial support to his contention on an issue which arises in the case, and that without them he might be "deprived of the means of ... proper presentation" of his case."

**The issues before the judge**

The Department maintained the validity of the claim to immunity but in addition raised fundamental questions as to whether the plaintiffs had any cause of action. There was no application to strike out under Order 18 rule 19 on the grounds that the pleading disclosed no reasonable cause of action.

In November 1989 application had been made to Ognall J., the judge assigned to conduct the trial of this litigation, for directions which included directions for the formulation and trial of preliminary issues to be heard on 15th January 1990. This court was told that it was the intention of the plaintiffs and of the Central Defendants that the issues of law as to the validity of the plaintiffs causes of action should be determined by trial of preliminary issues. That course was opposed by some defendants and Ognall J. on 5th December 1989 refused to make the order sought. No appeal was taken against that decision and, of course, it has been acknowledged that there were good grounds for the learned judge to exercise his discretion in that way. The present proceedings for discovery were commenced in July 1990.

Rougier J. expressed his reluctance in proceedings for discovery to enter upon consideration of the question whether the plaintiffs' pleaded case disclosed valid causes of action. The plaintiffs did not dispute the right of the Department of Health to raise the point in support of their opposition to the plaintiffs' application. The judge approached the issues on the basis that, in dealing with the

validity of the causes of action as a collateral question in discovery proceedings, he should only refuse to order production on that ground alone if he was wholly satisfied that the plaintiffs, as a matter of law, had no arguable case against the Central Defendants.

Rougier J. first considered the allegation of beach of statutory duty. The relevant duties are contained in section 1 and section 3(1) of the National Health Service Act 1977 and they are set out below. To the question whether, upon the proper construction of the Act as a whole, it was shown that Parliament intended there to be a cause of action for any member of the public affected by breach of the duties, he held that it was plain that Parliament did not so intend and that, therefore, the plaintiffs had no claim for breach of statutory duty.

Rougier J. then considered what he described at the alternative "coterminous claim in negligence on precisely the same facts" advanced by Mr Jackson for the plaintiffs and concluded that it was not sustainable in law. His reasoning was that, if the statute does not confer a cause of action on the private individual for its breach, he is not able to bypass the bar thereby created by alleging precisely the same facts as negligence, because that would be to stultify the effect of the general rule and the intention of Parliament as manifested by the words of the statute. It is clear that the phrase "cause of action for its breach" was there intended by the judge to refer only to a failure to perform the duties imposed by the statute.

As to the plaintiffs' claims in negligence as a whole, Rougier J. rejected the third, fourth and fifth of the main contentions advanced for the Department, as set out above, namely that the plaintiffs could have no claim in negligence because there was no sufficient proximity between individual plaintiffs and the Department; or because it was not just and reasonable to impose such liability; or because the claims should be held to be "non-justiciable". I refer to these for brevity as the policy contentions.

Finally, Rougier J. ruled that, although for the reasons stated the plaintiffs had no cause of action in negligence based on the ground only of the alleged failure of the Department to perform the duties imposed by the statute, nevertheless the plaintiffs could have a good cause of action in negligence if the Department of Health is shown to have carried out their duties in a negligent manner so as to cause damages to the plaintiffs: he referred to that as "performance related negligence". Upon examination of the allegations of breach of duty made against the Department, Rougier J. held that although most of those allegations appeared to be no more than allegations of failure to perform duties he was not satisfied that there were no elements of "performance related negligence" set out in the statement of claim. He therefore rejected the Department's contention that there was no reasonable cause of action put forward by the plaintiffs in aid of which discovery could be ordered.

Rougier J. then considered what, if any, documents should be ordered to be produced. Having stated the

principles, by reference to which he was required to decide whether the plaintiffs had proved that any of the documents should be produced, and noting that he would omit from his consideration the issues relating to breach of statutory duty or to negligence coterminous with such breach, he considered the "second dichotomy", namely that between matter of policy, which are not thought to found any cause of action, and matters of operation. It was, however, possible to attack a policy decision if it was shown that the public body was acting ultra vires as the plaintiffs alleged. Further, in reliance upon ***Vicar of Writtle v. Essex C.C.*** [1979] 77 LGR 656, the plaintiffs argued that the fact that a negligent decision was made upon matters of policy would afford no defence if it is shown that the decision maker was so badly briefed as to the relevant facts as to be incapable of exercising a proper discretion.

<u>The order of Rougier J.</u>

Rougier J. decided that, as to some of the documents described in the certificate, production to himself for inspection must be ordered. His general approach was, he said, that "other things being equal this case is of such gravity that the need to do justice outweighs the need to confidentiality in decision making".

As to category 1, he ordered production, subject to one important limitation, of all documents within both category 1(i) (submissions to Ministers etc., relating to the formulation of policy) and category 1(ii) (exchanges between

senior officials etc.) which fell within some only of the groups described in paragraph 4 of the certificate, namely:

1(a)(ii) What resources to allocate to the implementation of a policy of self sufficiency in blood products;

1(a)(iii) Future planning for the role of the Blood Products Laboratory;

1(a)(v) How (not whether) to re-organise the National Blood Transfusion Service (not other parts of the N.H.S.);

1(b)(ii) What warnings to issue to blood donors in order to discourage those at risk from giving blood, whilst maintaining adequate supplies of blood for the N.B.T.S.;

1(b)(iii) How best to implement a procedure for the screening of blood donations;

1(b)(iv) (Not whether) when and how to introduce the use of heat treated blood products;

1(b)(v) What steps to take to minimise the risk of hepatitis infection to haemophiliacs and others.

Thus, within category 1, the learned judge refused to order production of documents within category 1(a)(i) on the ground that documents relating to whether to adopt a policy of self sufficiency in blood products could not be relevant to "performance" as opposed to "breach" related negligence.

The judge did not order production of documents within category 1(a)(iv) relating to what priority to give and what resources to allocate to the redevelopment and/or

refurbishment of the Blood Products Laboratory because it appeared to him that anything likely to assist the plaintiffs case would be produced under 1(a)(iii), future planning for the role of the Blood Products Laboratory.

As to category 1(a)(v) the judge omitted documents related to "whether" to re-organise the N.B.T.S. on the ground that that question was entirely a "breach related matter". For the same reason documents relating to "whether" to re-organise the N.B.T.S. under category 1(a)(v) and documents relating to "whether" to introduce heat treated blood products under 1(b)(iv) were excluded.

As to category 1(b)(i), no issue was raised before the judge by the plaintiffs as to documents relating to the introduction of vaccination against hepatitis in the light of the AIDS problem, because it was acknowledged that the plaintiffs had no case concerning vaccination against hepatitis.

The Judge's decision to include documents in both category 1(i) and 1(ii) was based upon acceptance of the plaintiffs' contention of their need to show that the Minister may not have been properly briefed in coming to his decisions.

Finally, as to categories 2, 3 and 4, Rougier J. refused to order production of any documents. As to category 2, he held that the dangers of an unfairly distorted picture being presented, plus the need for free discussion of such matters as lead to the ultimate formation of policy, outweighed

any legitimate help that the plaintiffs were likely to derive from such documents.

As to categories 3 and 4 Rougier J. pointed out that it was the Minister's ultimate decisions and the briefings leading up to them that are the target of the plaintiffs' attacks. Things which may have been said on the way, collateral to those decisions, had very little relevance, although, he added, in point of fact, they were available in any event. Insofar as briefings might offer some pointers as to where and how the Minister was being led astray, Rougier J. took the view that such material on that head as was likely to assist the plaintiffs' case would be adequately produced under category 1(i).

Rougier J. acknowledged that the nature of his decision would make it necessary for a further selective process to be carried out in order to ensure that the documents produced as a result of the order complied with the reasons for making the order. He noted that the parties had expressed optimism that, between them, they would be able to carry out the selective process in which case it would not be necessary for him to examine the documents.

<u>The Appeal and the Cross-Appeal</u>

Both sides complain of the order made by the judge. The plaintiffs ask this court to vary the judge's order so as to include all documents within category 1(i) and 1(ii) and the documents in category 2 and 4(i). No claim is now made for production of category 3 (briefings and draft Parliamentary

answers) or for category 4(ii) (draft replies on policy and operational matters). The Department, on the other hand, has submitted that the plaintiffs have not shown that any of the documents should be produced.

The main issue raised concerns the validity of the plaintiffs' causes of action. It is argued for the plaintiffs that their allegations of breach of statutory duty are good in law and that their claims in negligence are not in law limited to "performance related matters". There was, therefore, no reason for distinguishing between documents or groups of documents on that ground. As to the documents in category 1(a)(iv) the judge was wrong, it was said, to refuse production of them for the reason given by him because, on the evidence, those documents were not likely to have been produced under category 1(a)(iii).

The cross appeal which, as I have said, contends that there should be no order requiring production of any of the documents, is based on grounds directed only to the absence of any valid cause of action and to the judge's failure to have regard to the alleged weakness of the plaintiffs' case in law, if any and, in the alternative, to the judge's failure properly to apply the principle that the plaintiffs' case was limited to "performance related" negligence. No complaint is made in the notice of cross appeal as to the judge's statement or application of the principles by which the court is required to decide whether the plaintiffs have shown that documents, covered by public interest immunity but relevant to a valid cause of action, should be produced. Nevertheless, as Mr

Collins submitted, this court should not order production of any documents unless it has been made clear that the test laid down in ***Air Canada*** is satisfied.

The "good cause of action" point

These are not proceedings to strike out. They are proceedings between the plaintiffs and the Central Defendants only although counsel for all the defendants appeared before Rougier J. It has not been argued, rightly in my view, that the Department is not entitled to raise the issue as a ground upon which the court should refuse to order discovery. Therefore, this court must consider the issue and decide it at least so far as may be necessary for the proper determination of these proceedings.

If it is sufficiently clear on the material available for the court to decide that any cause of action put forward by the plaintiffs is bad in law then, in my judgment, we should say so even though the effect of such a decision upon the future conduct of these proceedings between all parties may be unclear. If, however, there are good reasons for not making any decision with reference to the validity of the causes of action, the court should abstain from any such decision if, without making it, the appeal can be properly and fairly decided.

There are, in my judgment, good reasons for not making any such decisions. Both with reference to breach of statutory duty and to negligence, this case raises questions of public importance which are, in my judgment, to be regarded as

novel. It is usually undesirable, unless the case is very clear, for such questions to be decided as upon an application to strike out, on pleadings as contrasted with findings of fact upon evidence: see ***Lonrho plc v. Fayed*** [1989] 2 AER 65, Dillon LJ. 70A-D. The nature of the decisions in law, both with reference to statutory duty and to negligence, seem to me to be such that the court will be better able to make those decisions after trial.

I have, for the reasons which follow, reached the conclusion that the plaintiffs' case on breach of statutory duty is at best of uncertain validity in law primarily for the main reason given by Rougier J. in his judgment, namely the terms in which the duties are described and imposed. I have also reached the conclusion that the plaintiffs appear, on their allegations of fact, to have at least a good arguable claim in law based upon common law negligence. It is not in issue that the plaintiffs have pleaded with sufficient particulars a prima facie case on the facts. Decisions to the effect and extent described are sufficient for the proper disposal of this appeal.

I will deal at this point with one of the grounds of the cross appeal, namely the relevance of the alleged weakness of the plaintiffs' case in law if any valid cause of action exists. It is not necessary to decide whether the weakness in law of a plaintiff's cause of action, which despite its weakness should not be struck out, could ever be relevant to the making of the court's decision and to the exercise of the court's discretion in proceedings for discovery of

documents within public interest immunity. In most cases, I would expect that the problem could be solved by the trial of preliminary issues but, if it could not be so solved, it is not easy to see on what grounds a case, weak in law but arguable and therefore required in justice to be tried, should be sent for trial without documents which would be required to be produced (for disposing fairly of the cause) if the case was stronger in law. In my judgment, in this case, the apparent strength of the plaintiffs' case in law on negligence is such that there is no weakness in it which could properly affect the court's decision upon production of the documents. The difference in apparent strength in law between the claim on breach of statutory duty and the claim based on negligence is of no relevance in this appeal. It has not been argued that any of the documents could be shown to be required to be produced as to statutory duty but not as to negligence.

Breach of statutory duty

The plaintiffs rely upon section 1 and section 3(1) of the National Health Service Act 1977. By section 1(1):

> "It is the Secretary of State's duty to continue the promotion in England and Wales of a comprehensive Health Service designed to secure improvement (a) in the physical and mental health of the people of those countries and (b) in the prevention, diagnosis and treatment of illness, and for that purpose to provide or secure the effective provision of services in accordance with this Act."

By section 3(1):

> "It is the Secretary of State's duty to provide throughout England and Wales, to such extent as he considers necessary to meet all reasonable requirements -
>
> (a) hospital accommodation; (b) other accommodation for the purpose of any service provided under this Act; (c) medical, dental, nursing and ambulance services; (d) such other facilities for the care of expectant and nursing mothers and

young children as he considers are appropriate as part of the Health Service; (e) such facilities for the prevention of illness, the care of persons suffering from illness and the after care of persons who have suffered from illness as he considers are appropriate as part of the National Health Service; (f) such other services as are required for the diagnosis and treatment of illness."

Reference was also made to section 5(2) by which:

"The Secretary of State may ... (c) provide a micro-biological service, which may include the provision of laboratories, for the control of the spread of infectious diseases and carry on such other activities as in his opinion can conveniently be carried on in conjunction with that service; (d) conduct, or assist by grants or otherwise ... any person to conduct research into any matters relating to the causation, prevention, diagnosis or treatment of illness, and into any such other matters connected with any service provided under this Act as he considers appropriate."

Next, by section 13, the Secretary of State may direct certain Health Authorities to exercise on his behalf such of his functions relating to the Health Service as are specified in the direction and (subject to section 14) it then becomes the duty of the body in question to comply with the directions.

The Minister has by statutory instrument delegated many of his functions including that under section 3(1)(e) of the 1977 Act with respect to the provision of facilities for the prevention of illness, the care of persons suffering from illness and the after care of persons who have suffered from illness. It is common ground that the definition of illness under the Act of 1977 includes the condition haemophilia. The Minister has also delegated his function under section 5(2)(d) of the 1977 Act.

By paragraph 15 of schedule 5 of the 1977 Act:

"(1) An authority shall, notwithstanding that it is exercising and function on behalf of the Secretary of State or

another authority, be entitled to enforce any rights acquired in the exercise of that function, and be liable in respect of any liabilities incurred (including liabilities in tort) in the exercise of that function, in all respects as if it were acting as a principal. Proceedings for the enforcement of such rights and liabilities shall be brought, and brought only, by or, as the case may be, against the authority in question in its own name.

(2) An authority shall not be entitled to claim in any proceedings any privilege of the Crown in respect of the discovery or production of documents. This sub paragraph shall not prejudice any right of the Crown to withhold or procure the withholding from production of any document on the ground that its disclosure would be contrary to the public interest."

In ***Cutler v. Wandsworth Stadium Ltd.*** [1949] AC 398, Lord Simonds, on the question whether a statute is to be held to provide a cause of action for a breach of duty imposed by it, said at page 407:

> "I do not propose to try to formulate any rules by reference to which such a question can infallibly be answered. The only rule which in all circumstances is valid is that the answer must depend on a consideration of the whole Act and the circumstances, including pre-existing law, in which it was enacted. But that there are indications which point with more or less force to the one answer or the other is clear from authorities which ... will have great weight with the House. For instance, if a statutory duty is prescribed but no remedy by way of penalty or otherwise for its breach is imposed, it can be assumed that a right of civil action accrues to the person who is demnified by the breach. For, if it were not so, the statute would be but a pious aspiration."

Under the 1977 Act no remedy by way of penalty or otherwise is prescribed for breach of the duties imposed upon the Secretary of State. Neither side has placed reliance on any aspect of the previously existing law or upon the terms of the statutes which preceded the 1977 Act.

Mr Jackson submitted that because the 1977 Act imposes a duty but provides no remedy for its breach, there is a presumption that Parliament intended that there be such a

remedy, and he submitted that no reason is to be found in the provisions of the statute as a whole to justify a different conclusion. He acknowledged that the duties imposed upon the Secretary of State by the Act are of a general nature, and involve the exercise by him of discretion, but Mr Jackson contended that that was no sufficient reason to deny a cause of action for breach of them. Claims for such breach would be rare both because of the difficulty of proving breach of such duties and because the Secretary of State has delegated the performance of most of his functions to Health Authorities. Further, Mr Jackson submitted that paragraph 15 of schedule 5 supported his argument. That paragraph provides that, upon delegation of a particular function to a Health Authority, it is the Health Authority and not the Secretary of State who is to be sued. The proper inference is, it was said, that, with reference to a particular function which has not been delegated, if it is performed negligently, or if it is negligently not performed, the proper defendant is the Department of Health.

Mr Jackson relied upon the decision of Forbes J. in ***Booth and Co. v. N.E.B.*** [1978] 3AER 624 upon the provisions of the Industry Act 1975. A claim for breach of duty imposed by that Act, passed for the benefit of the United Kingdom economy, was held to be arguably good in law. The 1977 Act was passed to protect and to promote the health of the individual citizens of this country and breach of the duties imposed by it should be held to be actionable.

Mr Jackson acknowledged that no duty is imposed by the Act in absolute terms such as are found in statutes such as the Factories Act or in the Road Traffic Acts with reference to insurance. He further acknowledged that, if a claim for negligence is held to be available against the Central Defendants for breach of the common law duty of care in the performance of the functions performed by them under the 1977 Act, it is not possible to think of a claim which could succeed for breach of statutory duty which would fail if put forward as negligence. That concession was, as I understood the argument, not intended to be made if the court should hold the cause of action to be limited as Rougier J. held it to be. Mr Jackson argued, however, that the existence of a cause of action in negligence was irrelevant to the process of the court's determination of the intention of Parliament by construction of the statute as a whole.

In answer to these submissions, Mr Collins relied upon the reasons for his decision given by Rougier J. He also relied upon the unreported decision of Wien J. in January 1979 in ***Regina v. Secretary of State for Social Services and West Midlands R.H.A., ex parte Hincks***, in which at page 29 of the transcript he held that the 1977 Act does not give rise to a right to damages for a breach. The applicants appealed to the Court of Appeal on 18th March 1980 where the decisions and reasons of Wien J. were approved. The question of a right of action for damages for breach of statutory duty was not considered in the Court of Appeal. As Mr Jackson submitted the decision of the question by Wien J. was obiter.

For my part, I share the judge's view of the apparent nature of the duties imposed by the 1977 Act. They do not clearly demonstrate the intention of Parliament to impose a duty which is to be enforced by individual civil action. Furthermore, for reasons which follow, I consider that the plaintiffs have at least a strongly arguable case in law that a claim for negligence can lie against the Central Defendants for negligent acts or omissions in the performance of functions under the 1977 Act. If that is held to be right it would, in my judgment, be relevant to the question whether Parliament, in legislating by reference to the general law (see schedule 5, paragraph 15), is to be taken to have intended to confer also a civil remedy for breach of statutory duty upon all persons entitled to receive the intended benefits of the National Health Service, and would support the construction that Parliament did not so intend.

The submission based upon schedule 5, paragraph 15 does not appear to me to be of great force. The purpose of the provision is, in my judgment, and as Mr Collins submitted, to provide that the Secretary of State should not be vicariously liable in respect of the exercise of a function by an authority on behalf of the Secretary of State. I accept that if, in respect of any delegated function, it could be shown that the Secretary of State was independently in breach of the relevant duty, the wording of paragraph 15 does not provide any protection. In other words, as Mr Jackson submitted, if there is a duty upon the Secretary of State for breach of which there is a civil remedy, the fact of delegation of the exercise of the function would not by itself provide a defence it it could

be shown that, notwithstanding delegation, the duty was breached. Nevertheless, the language of paragraph 15 does not, in my judgment, significantly assist the submission that Parliament intended there to be a civil remedy for breach of the duties imposed by the Act.

The European Convention on Human Rights

Mr Jackson relied upon the provisions of the Convention as providing support for his submission that the Act gives a civil remedy for breach of the duties imposed by it. Having regard to the view which I have formed of the apparent strength of the plaintiffs' case in law on negligence, I do not find it necessary to reach a decision on the validity of this submission. The point, in summary, was as follows. It was not, as I understand it, relied upon before the judge.

This country became party to the Convention, as we were told, in 1951 and, therefore, before the enactment of the 1977 Act. By article 1 this country undertook to secure to everyone within its jurisdiction the rights and freedoms defined in section 1 of the Convention. By article 2, part of section 1:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court ..."

Upon the true construction of article 2, by the first sentence thereof, this country is required to take appropriate steps to safeguard life: reliance was placed upon the decision of the Commission no. 7154/75, a claim against this country with reference to adverse reactions suffered from vaccination and

upon decision no. 10044/82, a claim against this country arising out of the accidental death of a child caused by a plastic bullet fired by the army in Northern Ireland.

It was submitted by Mr Jackson that articles 1 and 2 together require this country to take appropriate steps to safeguard life and not negligently to fail to take such steps. The provision of a Health Service is to be seen as a particular formulation of the general duty "to take appropriate steps to safeguards the lives of the inhabitants". A duty to provide a Health Service must be a duty to provide an adequate Health Service. In the context of these cases, that duty became a duty to safeguard haemophiliacs against potentially fatal viral infection from coagulation factor concentrates. Failure to do so was a failure to take appropriate steps to safeguard the lives of a number of people of this country.

Next, the Convention by article 13 requires that:

> "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by person acting in an official capacity."

It was acknowledged that those obligations under the Convention do not create direct statutory authorities enforceable under the domestic law of England and Wales and that article 13 is itself not capable of providing an enforceable remedy in our courts. If, however, there is ambiguity in the construction of the 1977 Act, as to whether it does or does not provide a civil remedy for breach of the duties thereby imposed, this court should apply the presumption that Parliament intended to legislate so as to secure that this country will be in

compliance with its obligations under the Convention. Reference was made to ***R. v. Miah*** [1974] 1WLR 683 and to ***Reg. v. S. of S. for Home Affairs, ex parte Bhajan Singh*** [1976] QB 198.

There is, I think, no doubt as to the principle of construction to be applied by this court. In ***R. v. S. of S., ex parte Brind*** [1990] 2WLR 787 CA, Lord Donaldson MR at page 798C said:

> "It follows ... that in most cases the English courts will be wholly unconcerned with the terms of the Convention. The sole exception is when the terms of primary legislation are fairly capable of bearing two or more meanings and the court, in pursuance of its duty to apply domestic law, is concerned to divine and define its true and only meaning. In that situation various prima facie rules of construction have to be applied, such as that, in the absence of very clear words indicating the contrary, legislation is not retrospective or penal in effect. To these can be added, in appropriate cases, a presumption that Parliament has legislated in a manner consistent, rather than inconsistent, with the United Kingdom's treaty obligations."

The Commission's view of the first sentence of article 2 was that it required the State to take "adequate and appropriate steps to protect life" and breach of that obligation is not shown merely because the decision was made to follow a particular course of action with knowledge that it exposed some individuals to risk of injury from it: the test, in short, appears to be one of reasonableness in the known circumstances having regard to the nature and size of the known risk. If the plaintiffs have, on proof of the facts, a valid claim in law based on negligence, as in my view the plaintiffs have a good arguable case for demonstrating, article 13 would not, in my judgment, require them to have in addition a cause of action for breach of statutory duty, at least unless there is some right set forth in the Convention which could only be

protected by such a cause of action. It would be surprising, in my view, if the limits upon the rights of a plaintiff imposed by the substantive law of negligence in this country, e.g. by the definition of what amounts to reasonable care upon the part of experts in medical science, could be held to constitute the denial of an effective remedy before the courts of this country. If, on the other hand, it should appear that, without reference to the presumption, it is not clear whether Parliament intended there to be a cause of action for breach of statutory duty under the 1977 Act and that there is no remedy in law against the Central Defendants negligence upon proof of the facts alleged, the point based upon the Convention would then appear to me to be both relevant and of substantial force.

The Claim in Negligence

The main points advanced by Mr Jackson were:

(i) There is no authority to support the proposition that a decision upon the construction of a statute, to the effect that there is no civil remedy available for breach of any duty imposed by it, necessarily means that there can be no claim in negligence in respect of the discharge or carrying out of those duties insofar as any breach of duty consists of a failure to act. Reference was made to ***Bux v. Slough Metals Ltd.*** [1973] 1WLR 1358, 1369-1370; and to ***Dorset Yacht Co. v. Home Office*** [1970] AC 1004.

(ii) If, as the judge found, the plaintiffs have sufficiently demonstrated an arguable case on the policy contentions as to proximity, etc., then it was wrong to draw the distinction

between "breach related" and "performance related" matters as excluding or limiting the duty of care. The distinction between acts and omissions is relevant to the question whether breach of the duty has been shown.

(iii) The distinction between acts and omissions is of significance in cases against public authorities, where the decision within the authority's discretion and policy making function may be impossible to attack as negligent. But the fact that the decision attacked is made as a matter of discretion or policy making does not make the decision immune in law. If it is ultra vires or wholly unreasonable the authority will be liable in negligence if the decision is shown to be negligent by reference to proximity and foreseeability. Reference was made to the ***Dorset Yacht*** case at pages 1031A-1032A per Lord Reid, 1036F-1037G per Lord Morris, and 1067F-1068C per Lord Diplock; and to ***Mead v. Haringey*** [1979] 1WLR 637 at 647 per Lord Denning MR.

For the Department, Mr Collins did not support the proposition that rejection of the claim for breach of statutory duty must of itself negative any "coterminous" claim in negligence, but submitted that the same result is achieved by reference to similar aspects of this case by proper application of the requirement that it be just and reasonable to impose the duty of care. The nature of the relationship between the plaintiffs and the Central Defendants, based upon the 1977 Act, is such that it is not just or reasonable to impose a duty of care directly enforceable by any member of the public. His protection should be by an action for negligence, if there is

breach of duty, against those who directly provide care and treatment to him; and the remedy for imperfections in the performance of the duties imposed by the 1977 Act should be within Parliament or through the ballot box. All the alleged duties upon which the plaintiffs rely contain the elements of discretion.

Further, as part of the concept of "just and reasonable" Mr Collins argued that the nature of the discretion, and of the matters relevant to the decisions made in discharge of the duties imposed by the 1977 Act, is such that a decision upon alleged negligence in the exercise of those functions should be held to be non-justiciable as unsuitable for judicial decision: reference was made to ***Rowling v. Takaro Properties Ltd.*** [1988] AC 473, 501D-503H. Also it would be against public policy to impose liability in respect of those functions: see ***Hill v. Chief Constable*** [1989] 1AC 53.

For my part, as to those policy contentions I agree with Rougier J. that the plaintiffs have made out at least an arguable case. It is obvious that it would be rare for a case on negligence to be proved having regard to the nature of the duties under the 1977 Act, and to the fact that, in the law of negligence, it is difficult to prove a negligent breach of duty when the party charged with negligence is required to exercise discretion and to form judgments upon the allocation of public resources. That, however, is not sufficient, in my judgment, to make it clear for the purposes of these proceedings, that there can in law be no claim in negligence. Nor, on the allegations of fact, can it be said that the plaintiffs have

not alleged a case which could be upheld if in law the claim is viable.

I have reached that conclusion on grounds which include the following. In ***Murphy v. Brentwood D.C.*** [1990] 3WLR 414, HL, Lord Keith at page 421, commenting on the two stage test described by Lord Wilberforce in ***Anns***, [1978] AC 728, 751-752, said at page 422F:

> "In ***Shire of Sutherland v. Heyman*** [1985] 157 CLR 424 ... Brennan J. expressed his disagreement with Lord Wilberforce's approach, saying at page 481:
>
> > "It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable "considerations which ought to negative, or to reduce or to limit the scope of the duty of the class of person to whom it is owed ..."
>
> Finally, in ***Yuen Kun Yeu*** at page 193, and in ***Hill v. Chief Constable*** [1989] AC 53,63, I expressed the opinion, concurred in by the other members of the House ..., that the second stage of the test only came into play where some particular consideration of public policy excluded any duty of care. As regards the ingredients necessary to establish such duty in novel situations, I consider that an incremental approach on the lines indicated by Brennan J. in the ***Shire of Sutherland*** case is to be preferred to the two stage test."

Mr Collins accepted that the issue of negligence in this case is to be regarded as novel for the purposes of that approach. In ***Rowling v. Takaro Properties*** at page 501E the question whether, having regard to all the relevant considerations, it is appropriate that a duty of care should be imposed is a question of

> "an intensely pragmatic character, well suited for gradual development but requiring most careful analysis ..."

In ***Murphy's*** case the claim was for economic loss. These plaintiffs have suffered personal injury. It is

possible, in my judgment, that the court, after full consideration, may in this case be driven to hold that in the circumstances of these claims, and notwithstanding the difficulties of proof of negligence for the reasons stated above, yet a duty of care is imposed by the law upon the Central Defendants in the discharge of their functions under the 1977 Act. Those difficulties of proof will, of course, include the matter of exercise of discretion, policy making, allocation of resources and the distinction between failing to confer a benefit as contrasted with the infliction of harm.

Further, if the court declines to find applicable the ordinary duty of care in negligence, the definition of which itself requires consideration to be given to the difficulties of proof of breach mentioned above; or if, upon the evidence, it should appear that the only prima facie breaches of duty proved are in the realm of discretion or policy as contrasted with the carrying out of a defined policy; there is no reason apparent to me, subject to the decision of the issues raised by the policy contentions, why the principle as stated in ***Dorset Yacht*** by Lord Diplock should not be applicable, page 1067G:

> "... over the past century the public law concept of ultra vires has replaced the civil law concept of negligence as the test of the legality, and consequently of the actionability, of acts or omissions of Government departments or public authorities done in the exercise of a discretion conferred upon them by Parliament as to the means by which they are to achieve a particular public purpose. According to this concept Parliament has entrusted to the department or authority charged with the administration of the statute the exclusive right to determine the particular means within the limits laid down by the statute by which its purpose can best be fulfilled. It is not the function of the court, for which it would be ill suited, to substitute its own view of the appropriate means for that of the department or authority by granting a remedy by way of a civil action at law to a private citizen adversely affected by the way in which the discretion

> has been exercised. Its function is confined in the first instance to deciding whether the act or omission complained of fell within the statutory limits imposed upon the department's or authority's discretion. Only if it did not would the court have jurisdiction to determine whether or not the act or omission, not being justified by the statute, constituted an actionable infringement of the plaintiff's rights in civil law."

It is not necessary for these purposes to consider the extent of any difference between the description of the principle there given and that stated by Lord Reid at page 1031A-B.

Varying the Judge's Order

I turn, therefore, to the question whether, in the light of the conclusions expressed above on the validity of the plaintiffs' cause of action, there is any ground for making a change in the judge's order. Insofar as the cross appeal was based upon the judge's rejection of the defendants' contention that the plaintiffs have advanced no reasonable cause of action in law the cross appeal fails.

On the plaintiffs' appeal, although I have much doubt as to the existence of any cause of action for breach of statutory duty, I would not treat that part of the plaintiffs' claim as fit to be struck out and, therefore, to that extent, I differ from Rougier J. That difference in approach, however, can have no substantial effect because there are no groups or categories of documents which could be regarded as necessary to be produced for the claim in breach of statutory duty but not for the claim in negligence.

The plaintiffs' success at this stage on the "cause of action" point cannot by itself justify varying the judge's order in favour of the plaintiffs, or even upholding the order made, unless it is clear that, on the material before him, it was properly open to the judge to hold that the plaintiffs had shown that "the documents are very likely to contain material which would give substantial support to his contention on an issue which arises in the case and that, without them, he might "be deprived of the means of ... proper presentation of his case": per Lord Fraser, *Air Canada* page 435 cited above. The test must, of course, be understood and applied with regard to the fact that the party seeking disclosure, and the court, know only the class of the documents as described and do not know what is in them.

The documents in category 1, group (a) relate to self sufficiency, allocation of resources, the role and development of the Blood Products Laboratory and the re-organisation of the National Blood Transfusion Service. It is not in dispute that some at least of the plaintiffs have been infected by HIV by Factor VIII concentrate obtained by the N.H.S. from the U.S.A. and supplied to those plaintiffs. The plaintiffs have set out, in my judgment, a prima facie case to the effect that the Department knew or should have known of the risk to the plaintiffs from the use of concentrate obtained from suppliers in the United States; that practicable steps could have been taken by the Department to eliminate or to reduce that risk; and that if those steps had been taken the injury suffered by all or some of the plaintiffs would not have been caused to them. By "prima facie case" I mean no more than

that the plaintiffs have alleged facts, which, if proved, could justify those conclusions. The plaintiffs have supported their allegations, and in particular the allegation that the Central Defendants knew or ought to have known of the nature and gravity of the risk to which the plaintiffs were exposed by the use of infected blood products and of the steps which could be taken to eliminate or reduce that risk, by reference to publications and proceedings which appear to give substance to the allegations. It must be emphasised that these are allegations to which the Department has not yet had occasion to present any detailed answer. The allegations may turn out to be unsustainable when all the evidence is before the court. It is, however, on the plaintiffs' pleaded case that the court must test the claim to production of the documents.

No one could doubt the sincerity of the efforts of those in the Department to protect and to assist the plaintiffs as patients in the National Health Service, but on the pleaded case grave errors of judgment were made. Even if there was no grave error of judgment it appears to be not in dispute that there was in fact a failure to protect the plaintiffs from the danger of using blood products, whether imported or supplied in this country, which were infected. If the publications and proceedings relied upon by the plaintiffs for proof of the information available to the Department, after examination in the light of expert evidence, support the conclusions which the plaintiffs say are to be derived from them, and in particular as to the knowledge which the Department had or should have had at the dates alleged of the nature and gravity of the risk to the plaintiffs, then, in my judgment, it is not likely that the

error of failing to act upon that knowledge was the result of careless inattention to a known risk on the part of the senior officials or of the professional advisers to the Department. It seems to me to be more likely that such an error, namely failing to act appropriately upon available information, was the result of failure at some level within the Department to pass that available information to those who were required to make the decisions. If that is not in fact the explanation, but it is proved that the information as to the nature and gravity of the risk, and of the steps available to eliminate or reduce it, was supplied to those who were required to make the decisions, then, in my judgment, the plaintiffs would have a prima facie case for asserting that the decisions were such that no reasonable or responsible person could properly make them.

I must again emphasise that this structure may collapse entirely at the stage of proof. It may appear that, at the dates alleged, the nature and gravity of the risks to the plaintiffs were not as alleged or was not known to be such; and that the alleged steps for eliminating the risk were not available, or were reasonably judged to be of inadequate utility. Judging the case upon the material before the court, however, as we must, it is clear to me that it must be held to be very likely that the documents in category 1 group (a) will contain material which would give substantial support to the plaintiffs' contentions and that without them the plaintiffs might be deprived of the means of proper presentation of their case. I say that because it is shown that the failure to protect the plaintiffs happened in fact; on the plaintiffs'

case that failure was caused by failing to have due regard to a known risk; and the documents are likely to explain why that failure occurred. The plaintiffs need the documents for the proper presentation of their case in order for them to obtain the necessary expert evidence directed to the explanations for that failure which the documents will reveal. It seems to me to be necessary for the fair and proper disposal of the case that there should be known to both sides the actual grounds for the various decisions which led to the continued use of imported and other blood products capable of infecting a patient with HIV.

I would hold that the plaintiffs have, for substantially the same reasons, similarly made out a sufficient case for production of the documents in category 1(b) namely those relating to warnings to blood donors, screening of donors, heat treatment and steps to minimise the risk of hepatitis infection, but not including vaccination against hepatitis. Next, since the plaintiffs have, in my judgment, made out an arguable case on negligence without the limitation which the judge felt obliged to attach, based upon the claim being valid as to "performance related" matters only, I would uphold the judge's order as to category 1(a) and (b) but I would delete the consequential limitation which excluded documents which concerned "breach related" matters.

Further, and for the same reason, I would include within the order for production the documents in category 1(a)(i) concerned with "whether" to adopt a policy of self sufficiency in blood products; and those in category 1(a)(v)

relating to "whether" as well as to how to re-organise the N.B.T.S.

In the judge's order the final words of 1(a)(v), namely "or other parts of the N.H.S." were omitted. In my judgment those words should stand part of the order for production. It is not clear what the "other parts of the N.H.S." are but the documents would not be listed in the certificate if they were not relevant to the issues in the action. It seems to me to be likely that one topic covered in these documents is the possibility of using the Scottish facilities to enlarge the production of blood products in the United Kingdom and thereby to reduce or eliminate reliance on imported products. They should be produced for the same reasons which govern production of the other documents.

Lastly, so far as concerns category 1(a) the judge refused to order production of the documents in 1(a)(iv), "what priority to give and what resources to allocate to the redevelopment and/or refurbishment of the B.P.L.", on the ground that what was likely to assist the plaintiffs' case would have been produced under category 1(a)(iii), "future planning for the role of the Blood Products Laboratory". I accept Mr Jackson's submission that on the material before the court it is not possible to be confident that that reason is valid. It is clear that there may well be overlapping between the two categories but, in my judgment, the reasons for ordering production of documents in category 1(a)(iii) also require and justify production of the documents in category 1(a)(vi).

As to category 1(b), which deals with the issues raised by the plaintiffs' case on warnings to and screening of blood donors, the heat treatment of blood products and the taking of other steps to minimise the risk to haemophiliacs, as summarised above, I would include within the order for production those in category 1(b)(iv) as to "whether" to introduce the use of heat treated blood products, thereby ordering production of all documents in category 1(b)(ii) to (v). I reach that conclusion for substantially the same reasons as those explained above with reference to category 1(a).

As to category 2, the subject matter of the documents is, according to the description of the class in the certificate, substantially the same as in category 1(a). I am unable to accept the validity of the judge's reasons for refusing to order production of these documents. I see no reason why production of these documents should create any greater risk of an unfairly distorted picture being presented than would production of those in category 1. I acknowledge the force of the point as to the need for free discussion, for that lies at the basis of the valid claim to immunity with reference to all these documents, but the public importance and the gravity of the case for each plaintiff must, in my judgment, in this case overcome that objection. Finally, the legitimate help which the plaintiffs are likely to derive from these documents in category 2 seems to me to be not significantly different from that which they are likely to get from the documents in category 1.

To that extent, I would allow the plaintiffs appeal. As to category 4(i), documents prepared for the guidance of Minister before important meetings, Mr Jackson acknowledged that the plaintiffs' case on this heading is weaker. It is stated in the certificate that

> "in most cases, minutes of the meeting or other records of what the Minister actually said on the relevant occasion are available and are not privileged."

Mr Collins has informed the court that the Department will supply to the plaintiffs information as to the date of each meeting referred to. Having regard to the documents which, in my judgment, ought to be produced under categories 1 and 2, and to the fact that what the Minister said at these meetings will be disclosed, or can be proved, I am not satisfied that there is any ground for disturbing the judge's order on this part of the case.

<u>The need for inspection by the court and the test to be applied</u>

At a late stage of the hearing before us the question arose as to whether inspection of any documents ordered to be produced should be carried out by Rougier J. or by Ognall J. to whom the conduct and trial of the the litigation have been assigned. As was pointed out by Bingham LJ, Ognall J, having extensive knowledge of the case, is likely to be more readily fitted to decide which documents should be disclosed, and to make the inspection and decision swiftly, than any other judge. The avoidance of any delay in this case is of the utmost importance. It was further pointed out by Sir John Megaw in the course of argument that, if the inspection is carried out by Ognall J., the decision need not be made finally

upon the first inspection by reference to the apparent force and relevance of the document but could, if the decision is finely balanced, be postponed with liberty to renew the application, if necessary on the judge's suggestion, during the trial. The apparent force and relevance of a document may be very different at a later stage in the trial from that which the document has at or before the commencement of the trial. Subject to his availability, neither side submitted that there would be any difficulty in or objection to the inspection being carried out by Ognall J.

Mr Jackson then submitted that this court could and should in the circumstances of this case direct immediate production of documents to the plaintiffs without the requirement of intervening inspection by this court or by any judge. Again, the main ground of that submission was the importance of avoiding delay by expediting the submission of disclosed documents to expert witnesses; but Mr Jackson also submitted that, since any documents ordered to be produced must satisfy the first test of being "very likely to support the plaintiffs' case", it was probable to the point of sufficient certainty that they would satisfy the second test at the stage of inspection which, he said, is relevance, i.e. the test which in ***Air Canada*** Bingham J. thought should be applied to the first test also: see ***Air Canada*** at page 410H. This submission raised questions as to what the appropriate test is at inspection by the judge and whether and in what circumstances that inspection can be dispensed with by the court. When the point was raised Mr Collins was no longer available. Mr Fenwick, for the Department, was, I think, at first minded to concede that it

might be possible in certain circumstances for the court to direct disclosure without inspection but he opposed the taking of that course in this case.

It seems to me that these are new points. In ***Air Canada*** the appellants, who were seeking production, submitted that the two tests were different but the other way round: see [1983] 2AC at page 433H and that (page 434A):

> "When the judge, having inspected the documents, came to the later question of whether to order them to be produced, the question was different and it then became relevant to consider whether disclosure would assist the party seeking it."

Lord Fraser, with whose speech Lord Edmund Davies agreed and from whom on this Lord Wilberforce did not, I think, differ said at page 434D:

> "It follows, in my opinion, that a party who seeks to compel his opponent, or any independent person, to disclose information must show that the information is likely to help his own case. It would be illogical to apply a different rule at the stage of inspection from that which applies at the stage of production."

Their Lordships were not asked to consider the possibility of the tests being different as now submitted by Mr Jackson. The impression which I get from their speeches is that their Lordships thought that the test should be the same although they were not in agreement as to what the test was. Further, their Lordships were not asked to consider whether inspection by the court is in every case necessary but, again, it seems to me that their Lordships regarded inspection as a part of the ordinary practice to be followed.

For my part, I can see force in the submission that, once the first test is satisfied, the judge on inspection

should only be required to consider whether the documents are necessary for fairly disposing of the case and that they are to be regarded as necessary for that purpose if they give substantial assistance to the court in determining the facts upon which the decision in the case will depend. I do not, however, think it right to decide that point in this case. The point was not fully argued and, more importantly, decision of the point is not, in my judgment, necessary in the interests of justice for the proper disposal of this appeal. It would be clear to the judge who is required to inspect that, if I am right so far, this court will have determined that, for the reasons given, documents in the classes ordered to be produced are "very likely to contain material which would give substantial support to (the plaintiffs') contention on an issue which arises in the case and that without them (they) might be "deprived of the means of ... proper presentation" of their case". The question whether, upon inspection, the documents satisfy that test must at that stage be decided by reference to the allegations in the pleadings and to the undisputed gravity and importance of the case. The test propounded in *Air Canada* should, in my judgment, be applied, bearing in mind that the substantial support likely to be obtained by the plaintiffs from the documents includes the statement of the grounds and reasons for decisions, and the statement of the information and principles and considerations taken into account in making decisions, to which the plaintiffs intend to direct their expert evidence upon which their pleaded case as to the means of knowledge of the risk, and of the ways of eliminating that risk, is based. I would add that I can see no objection to the

Department assisting the judge in the process of inspection by indicating which of the documents in any class are regarded by the Department as not being in their contents significantly different in character of contents from that which the court has held those documents to be likely to possess. That is a different process from waiver of immunity which the Department has no power to make. The process of inspection may, with that assistance, be much shortened. It seems that there are 162 documents in category 1(i), 264 in category 1(ii) and 38 in category 2.

One other point must be mentioned. Accepting for the purpose of this case that the test at the stage of inspection is the same as that applied by the court when ordering production for inspection, i.e. very likely to assist the case of the party seeking production, the judge inspecting must, in my judgment, also ensure that any documents to be disclosed do not, having regard to all the documents ordered to be produced for inspection, present an unfair or distorted picture. That can be explained by an example. Suppose the first document in a class clearly supports the claimants' contentions and is therefore ordered to be disclosed; but the second document negatives or goes far to reduce the support which the claimant could derive from the first. It seems impossible to me that the law could require or permit the disclosure of the first without the second. The proper course, in my judgment, in such circumstances is to order the disclosure of both and, assuming there to be one or more which satisfy the test of providing support, as many of the documents in the class as are necessary to ensure that a fair picture of

the effect of the documents as a class is presented. The effect of such an order would, as I understand it, be as described by Lord Templeman in the ***Air Canada*** case: page 449E:

> "If the judge decides in all the circumstances that the claim for public interest immunity is not strong enough to prevail over the public interest in justice, the judge will allow the plaintiff to inspect the documents. In that case either party is free to use the documents for the purposes of the proceedings but is not bound to do so. If both parties in their discretion for the same or different reasons decide not to rely on the documents, the documents will not be revealed to the public. The plaintiff who will only have inspected the documents in order to determine whether or not to make use of them in the proceedings will not be allowed to make use of the documents for any other purpose."

I would therefore propose that this court direct that there be an order for production for inspection by the court of the documents listed in the certificate in categories 1(a) and 1(b) as stated above and in category 2 but of no other documents there listed. As to the question as to which court and by which judge the inspection should be carried out I would wish to hear counsel. Relevant to the final order to be made will be the availability of Ognall J. and Rougier J. If necessary, and if it should seem after submissions, given the need for expedition, to be the only convenient course, this court could inspect the documents, and make such order for immediate disclosure as may then seem right; and, if thought right and useful, give liberty to the plaintiffs to apply to the trial judge with reference to any documents of which immediate disclosure is not ordered.

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**NOTE.** This note is added to the judgment to ensure that the court does not make its final order under any misapprehension as to the submissions made for the plaintiffs. I have referred to varying the order so as to provide for production of all of the documents in categories 1(i) and 1(ii) and in category 2. That would appear to include the documents in 1(b)(i) which relate to "what approach to take towards the widespread introduction of vaccinations against hepatitis in the light of the AIDS problem"; but, as I understand the position the plaintiffs do not in fact seek inclusion of documents in category 1(b)(i) although the notice of appeal refers to all documents in category 1 and Mr Jackson used similar words in opening the appeal. In his judgment Rougier J. said at page 32E-F that the documents in 1(b)(i) were "not in point" and that statement was made, presumably, because of the concession recorded in paragraph 27 of the plaintiffs skeleton argument before Rougier J. the "the plaintiffs have no case against the Central Defendants concerning vaccination against hepatitis". It seems that the documents in category i(b)(i) have been treated as removed from the issues before the court. If I have misunderstood the position I would wish to hear counsel. If I have correctly understood the position, this note need form no part of the judgement and the order will not refer to category 1(b)(i).

HIV HAEMOPHILIAC LITIGATION

Bingham LJ

I have had the advantage of reading in draft the judgment of Ralph Gibson LJ, with which I am in complete agreement.

The main issue argued on this appeal was whether the plaintiffs' pleadings advance arguable claims against the Department of Health in statutory duty or negligence or both. I was at first somewhat concerned whether this issue could be appropriately raised by the Department on a summons by which the plaintiffs sought production of documents for which public interest immunity had been claimed by the Department in the absence of any order for trial of a preliminary issue or any application to strike out the plaintiffs' claim as disclosing no reasonable cause of action against the Department. I was inclined to think that the plaintiffs' pleading should be treated as disclosing a reasonable cause of action unless or until it was ruled not to do so on a fully-argued preliminary issue or was struck out.

The plaintiffs have, however, made no objection to the raising of this issue on this application and on reflection I am sure they are right not to do so. The unnecessary multiplication of expensive and time-absorbing interlocutory

applications should be avoided wherever possible. If the Department is able to satisfy the court that the plaintiffs have no reasonable cause of action against it, then it could not be a proper exercise of discretion to order the production of these documents for which (as is admitted) the Department's claim for public interest immunity is properly (and indeed necessarily) made. If (as in Burmah v Bank of England [1980] AC 1090) the effective claim for public interest immunity is made by a party who has not been sued, and so cannot seek trial of a preliminary issue or a striking out order, there is no alternative to raising the issue in the present manner. I am therefore satisfied, as both parties agree, that the present procedure is appropriate. It is, however, important to record the parties' further agreement, rightly made, that in considering whether the plaintiffs' pleading discloses a reasonable cause of action the court must at this stage assume all the plaintiffs' pleaded allegations to be true and capable of proof. It would also seem to me (although this was challenged by the Department) that if in any ordinary case the court concludes that the plaintiffs' pleadings do disclose a reasonable and adequately pleaded cause of action its decision on the plaintiffs' substantive application for production should not be influenced by any assessment of the plaintiffs' chances of success whether on the law or the facts.

Like the judge and Ralph Gibson LJ I have real doubt whether the National Health Service Act 1977 is to be construed as imposing on the Secretary of State any statutory duty enforceable by a member of the public in a private law action

for damages. I have nothing to add to the reasons of Ralph Gibson LJ on this point.

Mr Andrew Collins QC, for the Department, urged that just as the Secretary of State owed the plaintiffs no such duty under the statute so he owed the plaintiffs no duty of care at common law. He pointed out, relying on recent authority, that there is no close precedent for such a claim as the present, which differs in nature and scale from the negligence claims with which the courts customarily deal. Furthermore, he argued, the plaintiffs' complaints relate to matters within areas of political and administrative discretion which the courts are incompetent to evaluate ( save, where vires are in issue, on applications for judicial review). There were, he said, by analogy with Hill v Chief Constable of West Yorkshire [1989] AC 59, strong reasons of public policy (or justice and reasonableness) for not holding a minister and a department exercising public functions for the benefit of the community as a whole to owe a duty of care towards individual members of the public.

These are points properly and responsibly argued and they may ultimately prevail, but on the necessarily brief argument which we have heard at this stage I am not at present satisfied that they must do so. Since I agree with the reasons of Ralph Gibson LJ on this point also I shall indicate very briefly the matters which particularly weigh with me:

(1) While there may be no very close precedent for the present claim, there has not perhaps, at least in this country, been any comparable calamity. Of the plaintiffs still living, the great majority have throughout their lives suffered the grave affliction of haemophilia. To this there has now been added the even graver affliction of AIDS, now or in the future. The tragedy was avoidable in the sense that, had different measures been taken in the 1970s and early 1980s, it could, at least in large measure, have been prevented. The law cannot of course redress all ills, however grave, which afflict the human condition and the occurrence of a tragedy, however great, does not compel the conclusion that someone somewhere must be legally answerable. If, however, the plaintiffs can make good their factual allegations against the Department, as one must for present purposes assume in their favour, the law might arguably be thought defective if it did not afford redress.

(2) Although Dutton v Bognor Regis Urban District Council [1972] 1 QB 373 has now been overruled and the ratio of Anns v Merton London Borough Council [1978] AC 728 in part at least disapproved, I do not understand doubt to have been cast on Lord Reid's statement of general principle in Dorset Yacht Co v Home Office [1970] AC 1004 at 1026H - 1027D. Of course, as Lord Reid himself pointed out and as Lord Diplock at pages 1057H - 1060H of the same case even more explicitly emphasised, Lord Atkin's speech in Donoghue v Stevenson is not to be treated as a principle which is universally applicable or which can be mechanistically applied without very close attention to the relationship and circumstances of the case under

consideration. Nonetheless, where as here foreseeability by a defendant of severe personal injury to a person such as the plaintiff is shown and the existence of a proximate relationship between plaintiff and defendant is accepted, the plaintiff is well on his way to establishing the existence of a duty of care. He may still fail to do so if it is held that imposition of such a duty on the defendant would not in all the circumstances be just and reasonable, but it is by no means clear to me at this preliminary stage that the Department's submissions on that aspect must prevail.

(3) Mr Rupert Jackson QC for the plaintiffs argued that his complaints relate not to any policy decision taken by the Secretary of State but to the Department's failure to implement the policy decision taken, that is, to the implementation not the formulation of policy. I am not persuaded that that contention is wrong, although detailed examination of the facts may well show the line between the two to be blurred.

(4) While the court cannot review the merits of a decision taken by a public authority if it fell within the area of a discretion conferred by Parliament, it may do so even in a common law action for damages for negligence if satisfied that the decision in question for any of the recognised reasons fell outside the area of such discretion. Whether the plaintiffs can discharge that considerable burden on the facts here I cannot at present determine.

I am therefore of opinion that the Department's fundamental challenge to the plaintiffs' claim in negligence fails and, like Ralph Gibson LJ, I think it highly likely that these documents, if produced, will help the plaintiffs. That brings one to the balancing exercise.

The claim for public interest immunity being properly made, on a class basis, it is necessary to consider the grounds of the claim advanced in the Under Secretary's certificate. I understand these to be two-fold. The first is the need for effective, candid and uninhibited advice to ministers and discussions between ministers and their senior advisers. The weight of this consideration depends very much on the subject matter in question. It does not seem to me to have substantial weight in relation to the subject matter with which this case is concerned; indeed, apprehension that these documents might become public before expiry of the 30-year rule might even have prompted greater candour. The second ground relied on is the public interest in protecting from possible critics the inner workings of government in the formulation of important government policy. This ground, echoing the speech of Lord Reid in Conway v Rimmer [1968] AC 910 at 952, is always a factor of weight to be put into the balance, although again its weight depends on the nature of the policy in question. On the other side is the public interest in a fair trial of the claim made by this large body of grievously injured plaintiffs and, less important but still important, in public recognition that the claim has been fully and openly tried. Once the balancing

stage is reached I regard the balance as coming down decisively in favour of the plaintiffs.

I agree with what Ralph Gibson LJ has said about the classes of documents and I agree with the order he proposes. I would allow the plaintiffs' appeal to the extent he indicates and dismiss the Department's cross-appeal.

Sir John Megaw

I agree with both of the Judgments.