R Jackson QC

HIV HAEMOPHILIAC LITIGATION

Submissions to be made at hearing on 10th June.

1. My function within the Plaintiffs' legal team has been to research, advise upon and when appropriate argue the legal issues affecting liability. My principal concern has been whether the Central Defendants owe a duty of care to the individual plaintiffs, if so what is its scope and to what extent can the plaintiffs recover damages for errors and omissions in the realm of "policy": see paragraphs 82 - 90 of the Re-amended Main Statement of Claim.

The Second and Third Central Defendants.

2. From an early stage, I took the view that our case against the Licensing Authority and the Committee on Safety of Medicines was weaker than our case against the Department of Health. The Licensing Authority is a regulatory body performing the functions entrusted to it under the Medicines Act 1968. It would have grounds for arguing that it owes no duty to members of the public who use the medicinal products which it licences: see Yuen Kun Yeu v Attorney-General of Hong Kong [1988] 1 AC 175. The Plaintiffs would, of course, seek to distinguish Yuen Kun Yeu, on the basis that that decision concerned economic loss. Assuming that hurdle was safely overcome, the next issue would be whether the Licensing Authority (weighing the interests of all haemophiliacs and at a time when there was insufficient factor

VIII available in this country) really ought to have revoked or restricted the product licences for imported concentrate. Whilst I do not suggest that the case against the Licensing Authority was hopeless, it did involve certain difficulties. The Committee on Safety of Medicines is the body which advises the Licensing Authority, and thus is one stage further removed from the Plaintiffs. Subject to that, broadly similar considerations apply to the claim against the Committee on Safety of Medicines as apply to the claim against the Licensing Authority.

The First Central Defendants.

3. The Department of Health (DH) has been the Plaintiffs' principal target. In essence, our case was that the DHSS (the predecessor of the DH) took inadequate steps in the 1970's to make this country self-sufficient in blood products. It allowed the Blood Products Laboratory at Elstree to decline. It failed to make use of facilities in Scotland to process English plasma. It devoted insufficient resources and effort to addressing this problem, with the result that many haemophiliacs had to be treated with imported factor VIII concentrate. We contended (although the DH denied) that throughout the 1970's haemophiliacs were exposed to a known increased risk of hepatitis from imported concentrate; and that from some time in 1982 onwards, haemophiliacs were exposed to a foreseeable risk of HIV infection from imported concentrate. Our case focussed heavily on the

hepatitis risk, because many of the Plaintiffs were infected with HIV before the AIDS risk was reasonably foreseeable.

4. Clearly the Plaintiffs had a strong moral claim against the DH for compensation. My concern was whether they had a good claim in law.

5. The first issue, strongly contested by the DH, was whether any relevant duty of care was owed by the Department to individual NHS patients. The DH rely upon the recent line of House of Lords decisions cutting down the ambit of the duty of care in tort, including Hill v Chief Constable of West Yorkshire [1989] AC 53, a claim involving personal injuries and death (rather than economic loss). On this issue I was reasonably confident of success. Dealing separately with the three elements involved: (i) foreseeability would be established, provided we succeeded on the expert issues. (ii) Proximity should not be a problem. Haemophiliacs are a relatively small and defined group, registered by name at the various haemophilia centres. (iii) As to the "just and reasonable" test, it would be a matter for the court whether it was just and reasonable that a duty of care should be owed by the DH to individual NHS patients. In my view, there are good grounds for arguing that this is just and reasonable, and I have so advised the Plaintiffs and the Legal Aid Board.

6. Assuming that we succeed on the first issue, and a duty of care is owed by the Department to individual haemophiliacs what

is the scope of the duty? In particular, does it embrace the matters referred to in paragraph 3 above? This raises questions of fundamental importance concerning the relationship between the courts and the Executive. If a government department negligently devotes insufficient resources to a problem or negligently misapplies available resources, can that department be held liable in damages? To take an extreme example, a decision to build a hospital at location A rather than location B, could not found a claim for damages by the residents in area B. The problem has been discussed by academic writers, but insufficiently explored by the courts.

7. One particular obstacle which lay in the Plaintiffs' path was the decision of the Privy Council in Rowling v Takaro Properties [1988] AC 473. This case involved a claim against the New Zealand Minister of Finance for alleged negligence in making a decision. At page 501 Lord Keith, delivering the judgment of the Privy Council, said this:

> "Their Lordships feel considerable sympathy with Quillam J's difficulty in solving the problem by simple reference to this distinction [viz the distinction between "policy" and "operational" matters]. They are well aware of the references in the literature to this distinction (which appears to have originated in the United States of America), and of the critical analysis to which it has been subjected. They incline to the opinion, expressed in the literature, that this distinction does not provide a touchstone of liability, but rather is expressive of the need to exclude

altogether those cases in which the decision under attack is of such a kind that a question whether it has been made negligently is unsuitable for judicial resolution, of which notable examples are discretionary decisions on the allocation of scarce resources or the distribution risks ... If this is right, classification of the relevant decision as a policy or planning decision in this sense may exclude liability; but a conclusion that it does not fall within that category does not, in their lordships' opinion, mean that a duty of care will necessarily exist."

8. I intended to attempt to overcome this obstacle by three lines of argument:

(i) That properly analysed, the acts and omissions of which we complain are not "policy" or "planning" matters. They relate to the implementation of a policy decision made by the Government in 1974, namely to achieve self-sufficiency in the near future.

(ii) In any event, even in respect of policy or planning decisions, a government department could be liable where its errors were "Wednesbury" unreasonable (as well as negligent) and personal injury or damage to property resulted: see Dorset Yacht Co v Home Office [1970] AC 1004 at 1031-2 (per Lord Reid), 1036-7 (per Lord Morris) and 1067-8 (per Lord Diplock).

(iii) The passage from Rowling v Takaro quoted above is obiter. It is clear that a full review of the academic literature was not undertaken in that case and the Privy

Council considered this a disadvantage (see page 500). In this case a full review would be undertaken, and the trial judge would be invited to take a broader view of the courts' role than that provisionally expressed by the Privy Council. The first of these arguments gave rise to certain problems, and I intended to concentrate primarily on arguments (ii) and (iii). Implicit in this was the need for the Plaintiffs to establish Wednesbury unreasonableness continuing over a period of years. This would be a formidable task, although we certainly had material on which to base such an argument. Our case would be based in part on expert evidence and in part on the documents disclosed by the DH. The strength of our factual case will be dealt with shortly by Mr Brennan.

9. The legal arguments referred to above were deployed, albeit rapidly, during the "battle" about discovery last summer. The Court of Appeal did not decide any of the issues, but considered that the Plaintiffs had an arguable case in law, and therefore were entitled to discovery of documents which would otherwise be protected by public interest immunity.

10. Conclusion. My overall opinion was that on the pleaded facts the Plaintiffs had a respectable and arguable case in law; but that we had some serious hurdles to overcome, without the benefit of any authority which directly supported our contentions.

Rupert Jackson QC