IN THE HIGH COURT OF JUSTICE 1989 L No. 4370

QUEEN'S BENCH DIVISION

B E T W E E N:

LPN 57 Plaintiff

-and-

HAMPSTEAD HEALTH AUTHORITY First Defendant

-and-

NORTH EAST THAMES REGIONAL HEALTH AUTHORITY

-and- Second Defendant

THE DEPARTMENT OF HEALTH Third Defendant

-and-

THE ATTORNEY GENERAL
(on behalf of the Committee on Safety of Medicines)
Fourth Defendant

-and-

THE ATTORNEY GENERAL
(on behalf of the Licensing Authority under the Medicines Act 1968)
Fifth Defendant

-and-

NORTH WEST THAMES REGIONAL HEALTH AUTHORITY
Sixth Defendant

-and-

CENTRAL BLOOD LABORATORIES AUTHORITY
Seventh Defendant

-and-

PETER BERNARD ALLEN KERNOFF
Eighth Defendant

DEFENCE OF FIRST SECOND AND EIGHTH DEFENDANTS

[redacted]

1. Paragraph 1 of the Statement of Claim is admitted.

2. The Plaintiff's date of birth is admitted. It is admitted that he is in category a (i).

3. Paragraph 3 of the Statement of Claim is admitted.

4. It is admitted that the Plaintiff was treated with blood products as shown in Schedule I to the Statement of Claim, but it is not admitted that the said Schedule is a complete record of such treatment.

5. With regard to paragraphs 5 to 8 of the Statement of Claim, it is admitted that the first positive result of a test for HIV antibodies was from a sample of the Plaintiff's blood taken on 1st March 1982 and accordingly he seroconverted before the said date. Save as aforesaid, paragraphs 5 to 8 of the Statement of Claim are not admitted.

6. Paragraph 9 of the Statement of Claim is admitted.

7. As to paragraph 10 of the Statement of Claim, these Defendants adopt in their entirety Parts I and II of the Health Authorities' Defence to the Re-Amended Main

Statement of Claim. With regard to Part III ("Duties of Care and Breaches of Duty of Care"), they deny that they were negligent or have otherwise acted wrongfully or unreasonably as alleged in paragraphs 92 and 92A thereof, which are the only paragraphs in which allegations are made against them. With regard to the Particulars under paragraph 92, so far as adopted by this Plaintiff, these Defendants' Defence is as follows.

8. With regard to sub-paragraphs (a) to (af), i.e. the allegations under heads 1 to 6, these are mainly of a "generic" character, and these Defendants adopt the pleading to them in paragraphs 63 to 94 of the Health Authorities' Defence to the Re-Amended Main Statement of Claim. Insofar as some of the allegations pleaded in these sub-paragraphs are individual rather than generic in character, they appear all to be repeated in the sub-paragraphs under heads 7 and 8 and are pleaded to below.

9. With regard to sub-paragraphs (ag) and (ah), it is impossible to plead to these without proper particulars of what "other form of treatment might have been given" and when, and why it is said that it was negligent to

give Factor VIII concentrate in preference to that alternative. It is the Defendants' case that at all times during which the Plaintiff was being treated with Factor VIII concentrate it was the treatment of choice, or in any event a reasonable treatment for him, notwithstanding such risk as there may have been of infection with hepatitis, HIV or other viruses therefrom.

10. With regard to sub-paragraph (ai):

(i) it is admitted that the Plaintiff was treated with commercial Factor VIII concentrate on the occasions pleaded in Schedule I;

(ii) the Plaintiff is put to proof that even if he had been treated with home-produced Factor VIII concentrate he would not have been infected thereby and would not have seroconverted;

(iii) it is in any event denied that it was negligent to treat the Plaintiff with commercial Factor VIII concentrate, as opposed to home-produced concentrate, on the occasions that he was so treated; if

and insofar as it is established that at any material time there was a body of opinion to the effect that it was preferable for haemophiliacs to be treated with home-produced concentrate, it is nevertheless denied that the contrary view was unreasonable or in any event that it was negligent to treat haemophiliacs or the Plaintiff in particular, with commercial concentrate in preference to home-produced concentrate;

(iv) notwithstanding the foregoing, staff at the Royal Free Hospital Haemophilia Centre, including the Eighth Defendant, at all material times preferred to use home-produced Factor VIII when it was available but at the material times insufficient Factor VIII concentrate was being produced by the BPL to supply all the needs of the said Centre;

(v) it is in any event denied that the damage suffered by the Plaintiff, namely infection with the HIV virus, was foreseeable or was in any event of a kind which these Defendants or their

staff were under a duty to prevent.

11. With regard to sub-paragraph (aj):

(i) the Plaintiff was last treated with non-heat-treated concentrate on 3rd February 1985;

(ii) is denied that it was negligent not to give the Plaintiff heat-treated concentrate before 3rd February 1985; if and in so far as it is alleged that heat-treated concentrate should have been given against the risk of hepatitis or other viruses, these Defendants repeat the matters pleaded in paragraphs 34 and 70 (1) and (2) of the Health Authorities' Defence to the Re-Amended Main Statement of Claim; if and in so far as it is alleged that that heat-treated concentrate should have been given against the risk of infection with the HIV virus, there were no circumstances such as to require consideration of its use before the said date : no general recommendation, even of a qualified kind, of the use of heat-treated concentrates

was given by the National Haemophilia Foundation in the United States until 10th October 1984 or by the Haemophilia Reference Centre Directors in the United Kingdom until 14th December 1984 (as pleaded in paragraph 70(3) of the Health Authorities' said Defence);

(iii) further and in any event, even if (which is denied) the Plaintiff should have been treated with heat-treated concentrate at an earlier date:

(a) it is denied such earlier date would have been sufficiently early to have prevented him from seroconverting, which, as pleaded in paragraph 5 hereof, occurred before 1st March 1982;

(b) he is put to proof that earlier treatment with heat-treated concentrate would have prevented him from seroconverting: the earliest heat-treated concentrates were not wholly effective to prevent transmission of the HIV virus;

(c) he is put to proof that

heat-treated concentrate would then have been available.

12. With regard to sub-paragraph (ak) :

(i) it is impossible to plead fully to the said sub-paragraph without further particulars of what information it is alleged should have been given to the Plaintiff, and when;

(ii) it is not admitted that the Plaintiff was not given the information referred to in this sub-paragraph;

(iii) it is denied that the Plaintiff could and should have been given any further information at any earlier or material date;

(iv) further and in any event, even if the Plaintiff had been so informed :

(a) it is denied that he would have acted any differently;

(b) he is put to proof that such action as he would have taken would have

pre-dated his becoming infected.

13. Save as aforesaid, no admissions are made as to paragraph 11 of the Statement of Claim.

14. No admissions are made as to paragraph 12 of the Statement of Claim.

15. The Plaintiff's cause of action accrued, and he had the requisite knowledge under Section 11 (4) (b) of the Limitation Act 1980, more than three years before the issue of the Writ herein, and accordingly this claim is statute-barred.

JOHN GRACE

Served this 30th day of July 1990 by Beachcroft Stanleys of 20 Furnival Street, London EC4A 1BN.
Solicitors for the First Second and Eighth Defendants.