

COURT OF SESSION, SCOTLAND

D E F E N C E S

for the First and
Second Defenders

in causa

ROBERT MACKIE (A.P.)

PURSUER

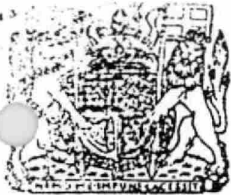
against

(FIRST) LOTHIAN HEALTH BOARD,
(SECOND) THE SCOTTISH NATIONAL
BLOOD TRANSFUSION SERVICE and
(THIRD) THE SECRETARY OF STATE
FOR SCOTLAND

DEFENDERS

1988

J I McCubbin Esq.,
Solicitor, Edinburgh.



Amended
GPM

Court of Session, Scotland.

S U M M O N S

in causa

ROBERT MACKIE, (Assisted Person) residing at
GRO-C

Pursuer

against

(FIRST) LOTHIAN HEALTH BOARD, 11 Drumsheugh Gardens, Edinburgh
(SECOND) THE SCOTTISH NATIONAL BLOOD TRANSFUSION SERVICE,
Ellenglens Road, Edinburgh and (THIRD) THE SECRETARY OF STATE
FOR SCOTLAND, New St. Andrew's House, Edinburgh.

Defender

*ELIZABETH II, by the Grace of God, of the United Kingdom of Great
Britain and Northern Ireland and of Her other Realms and Territories
Queen, Head of the Commonwealth, Defender of the Faith, To the said
Lothian Health Board, The Scottish National Blood
Transfusion Service, The Secretary of State for
Scotland.
Whereas by this Summons the pursuer craves the Lords of our Council
and Session to pronounce a decree against you in terms of the
conclusions appended hereto, We therefore charge you that, if you have
any good reason why such decree should not be pronounced, you cause
appearance to be entered on your behalf in the Office of the Court,
2 Parliament Square, Edinburgh, on the calling of the Summons
in Court, which calling will be not earlier than the
Twenty First day from the date of service upon you of this
Summons; and take warning that, if appearance is not so entered on
your behalf, the pursuer may proceed to obtain decree against you in
your absence.*

*This Summons is Warrant for arrestment and inhibition
on the dependence of the action.*

GRO-C

*Given under our Signet at Edinburgh, 2nd November 1988
1988 11 Atholl Crescent
Edinburgh*

Printed in Scotland by Alna Press Ltd., Broxburn and published by HER MAJESTY'S STATIONERY OFFICE
Price £1 per 25 net (exclusive of tax)

DJ 735516 CS00 2/82

ISBN 0 11 490408 1

DHSC0043352_156_0002

Conclusion.

1. For payment to the pursuer by the defenders jointly and severally or severally of the sum of TWO HUNDRED AND FIFTY THOUSAND POUNDS (£250,000), Sterling, with interest thereon at the rate of fifteen per centum per annum from the date of decree to follow hereon until payment.
2. For the expenses of the action.

C O N D E S C E N D E N C E

1. The pursuer resides at GRO-C The first defenders are the Lothian Health Board constituted under the National Health Service (Scotland) Act 1978 and having their principal office at 11 Drumsheugh Gardens, Edinburgh. They are responsible for the management and administration of the Royal Infirmary, Edinburgh. The second defenders are the Scottish National Blood Transfusion Service, having their principal offices at Ellen Glens Road, Edinburgh. The third defender is the Secretary of State for Scotland, having his office at New St. Andrews House, Edinburgh. He is responsible in terms of the National Health Service (Scotland) Act 1978 for the provision of health services in terms of said Act. Each of said defenders is domiciled in Scotland. In any event, the pursuer in the present action seeks

GRO-C

reparation for loss, injury and damage sustained by him through the defenders' fault and negligence and breach of statutory duty. The harmful event in consequence of which the pursuer suffered said loss, injury and damage occurred in Edinburgh. This Court accordingly has jurisdiction. To the knowledge of the pursuer no proceedings are pending before any other Court involving the present cause of action and between the parties hereto. To the knowledge of the pursuer no agreement exists between the parties prorogating jurisdiction over the subject matter of the present cause to another Court.

2. The pursuer was born on GRO-C 1950. He was diagnosed as a haemophiliac at the age of one year. Since then he has required treatment for haemophilia. His condition was originally treated by means of a transfusion of whole blood. Transfusions of whole blood required to be given to the pursuer while he was a hospital inpatient. In about the early 1970's this form of treatment was superseded by the use of a single donor blood product named cryoprecipitate. Cryoprecipitate was administered to the pursuer by means of a drip, but the pursuer still had to be admitted to hospital

GRO-C

for this treatment. In about 1979 or early 1980 the use of cryoprecipitate in the pursuer's treatment was superseded by the use of another blood product known as Factor Vlll. Unlike cryoprecipitate, Factor Vlll was a freeze dried concentrated blood product from several different donors. It could be administered by means of intravenous injection, which the pursuer was trained to administer to himself. This enabled him to receive treatment at home rather than as an inpatient in hospital.

3. During the period from at least 1979 the pursuer received treatment for his haemophilia at the Haematology Department of the Royal Infirmary of Edinburgh. The pursuer's treatment was under the management and care of the first defenders' Consultant Haematologist, Dr. C.A. Ludlam. Dr. Ludlam was responsible for the treatment of the pursuer's condition using Factor Vlll. The pursuer received regular supplies of Factor Vlll from the Haematology Department of the Royal Infirmary of Edinburgh. These supplies of Factor Vlll were manufactured by the second defenders. During the period from 2 March to 8 May 1984, the pursuer received about twenty two doses from a batch of

GRO-C

Factor VIII concentrate from the first defenders for the treatment of his haemophilia. Said batch was numbered 023110090. Said batch of Factor VIII concentrate was manufactured by the second defenders. Said batch of Factor VIII concentrate was contaminated by a virus now known as HIV1. Infection with the virus HIV1 may cause a person to develop acquired immune deficiency syndrome (hereinafter referred to as "AIDS"). The pursuer has been infected with the HIV1 virus as a consequence of having used the said batch of Factor VIII for treatment of his haemophilia.

4. AIDS was first described in homosexual males in the USA in 1981 and in USA haemophiliacs in 1982. Cases of AIDS have been appearing in United Kingdom haemophiliacs since 1983. Since 1983 a number of groups have been recognised as being at high risk of acquired AIDS. The groups at high risk are (a) male homosexuals, (b) intravenous drug abusers, (c) travellers to countries where the virus is endemic and who have had sexual relations with the local population, (d) recipients of multiple blood transfusions and (e) haemophiliacs. The virus that causes AIDS, now known as HIV1, was not discovered until mid-1984. However, it was known as early as

GRO-C

1983 that the then unidentified agent which caused AIDS was carried by blood and blood products. it was also recognised in 1983 that concentrated blood products such as Factor VIII probably carried a greater risk of containing the suspected infectious agent than blood or single donation blood products such as cryoprecipitate. In 1983 steps were taken in the United Kingdom in an attempt to reduce the risks to recipients of blood and blood products, of being infected with the agent that causes AIDS. In particular, blood donors who were in the aforementioned high risk groups were requested to stop donating their blood.

5. The first defenders' said servant Dr. Ludlam knew or ought to have known by the beginning of 1984 that treatment with a concentrated blood product such as Factor VIII carried the risk of infection by means of the then unidentified virus that causes AIDS. He knew or ought to have known that if a person was infected with said virus, then there would be considerable risk that he would develop AIDS. He knew or ought to have known that if a person developed AIDS he would almost certainly suffer severe disability and then death. He knew or ought to have known that in the case of

GRO-C

haemophiliacs there were alternative means of treatment involving the use of blood, plasma or cryoprecipitate. He knew or ought to have known that there was a materially reduced risk of a haemophiliac suffering infection by the virus now known as HIV1 from treatment with blood or plasma or cryoprecipitate than from treatment with a concentrated blood product from multiple sources such as Factor VIII.

6. It was Dr. Ludlam's duty when treating the pursuer to exercise the standard of care reasonably to be expected of a haematologist of ordinary competence. Dr. Ludlam failed to exercise such care in the treatment of the pursuer between March and May 1984. A haematologist of ordinary competence exercising reasonable care would not have continued to treat the pursuer by means of Factor VIII. A haematologist of ordinary competence between 3 March and 8 May 1984 would not have allowed the pursuer to receive any Factor VIII, but would have substituted for this treatment, treatment by means of blood or cryoprecipitate. In the exercise of such care Dr. Ludlam failed and by his failure materially increased the risk of the pursuer suffering the loss, injury and damage hereinafter

GRO-C

condescended on. His breach of said duty occurred when he was acting in the course of his employment with the first defenders and the first defenders are vicariously liable for their servants' breach of duty. If Dr. Ludlam had fulfilled said duties incumbent on him as he ought to have done, the pursuer would not have been infected by the virus known as HIV1.

7. The second defenders knew or ought to have known by the beginning of 1984 at the latest that there was a material risk that the Factor VIII which they manufactured would carry the unidentified agent which caused AIDS. Despite this, the second defenders continued to manufacture and supply Factor VIII. The second defenders did not take any steps at this time to treat Factor VIII which they had manufactured in order to destroy or attempt to destroy the agent which caused AIDS. The heat treatment of Factor VIII, which destroys the virus HIV1, was instituted by the second defenders at about the end of 1984. The second defenders did not issue warnings that there was a material risk of the Factor VIII which they supplied at the beginning of 1984 being contaminated with the agent which caused AIDS. The second defenders knew or

GRO-C

ought to have known that the Factor VIII which they supplied at the beginning of 1984 would be used by persons such as the pursuer in the treatment of haemophilia. They knew or ought to have known that there would be a material risk to a person such as the pursuer developing AIDS as a consequence of the use of said Factor VIII.

8. The second defenders owed a duty of reasonable care to the pursuer. It was their duty to take reasonable care for the health and safety of persons such as the pursuer who used the blood products which they manufactured and supplied. It was their duty not to supply Factor VIII when they knew or at least reasonably ought to have known that there was a material risk of such a product being contaminated with the agent which caused AIDS. In any event, it was their duty to warn that the use of Factor VIII which they supplied carried the material risk of infection with the Agent which caused AIDS. Had the pursuer received reasonable warning of such a risk then he would have had the reasonable opportunity of undergoing alternative treatment for his haemophilia, such as the use of a blood or cryoprecipitate. In each and all of said duties incumbent on them the second defenders

GRO-C

failed and by their failure materially increased the risk that the pursuer would suffer the loss, injury and damage hereinafter condescended on.

9. Further and in any event the pursuer's loss, injury and damage was caused by fault on the part of the third defender. It was the third defender's duty to promote in Scotland, a health service to secure prevention, diagnosis and treatment of illness. It was the third defender's duty to provide or secure the effective provision of health services in accordance with the National Health Service (Scotland) Act 1978. In these circumstances the third defender owed to the pursuer a duty of care. It was the duty of the third defender to secure that by the beginning of 1984 steps were taken to prevent the infection of haemophiliacs with the agent that caused AIDS. It was his duty to secure the effective provision of treatment for haemophiliacs which did not carry the material risk of infection by the agent that causes AIDS. It was his duty by the beginning of 1984 to stop the treatment of haemophiliacs with Factor VIII. In the fulfilment of each and all of said duties incumbent on him the third defender failed and by his failure materially increased the risk of the

GRO-C

pursuer suffering loss and damage hereinafter condescended on.

10. As a result of the fault of the defenders as condescended on the pursuer has suffered serious loss, injury and damage. As a consequence of his treatment with said batch of Factor Vlll between 2 March and 8 May 1984 he was infected with the virus HIV1. He was found to be seropositive on 29 May 1984. In about January 1987, he was told that as a result of treatment with said batch of Factor VIII he is now infected by an HIV1 virus. The discovery that he is infected with this virus has caused the pursuer considerable anxiety and distress. He is married and has one child. The risk of his developing AIDS is now substantial. In the event that he develops AIDS his life expectancy will be severely diminished. He will suffer pain and suffering until his premature death. He will require an increasing degree of care and assistance in the course of his every day life which will be provided by his wife. He will be unable to provide the services to his wife and family which he presently provides. Reference is made to Sections 8 and 9 of the Administration of Justice Act 1982. He will suffer patrimonial loss as a consequence of

GRO-C

having developed said condition. In the circumstances the sum sued for is a reasonable estimate of the pursuer's said loss, injury and damage.

11. The pursuer has called on the defenders to make reparation to him for his said loss, injury and damage, but they refuse or delay to do so. This action is accordingly necessary.

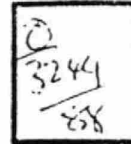
P L E A S - I N - L A W

1. The pursuer having suffered loss, injury and damage as a result of the fault and negligence of the defenders as condescended on is entitled to reparation therefor from them.
2. The sum sued for being a reasonable estimate of the pursuer's said loss, injury and damage, decree therefor should be pronounced as concluded for.

IN RESPECT WHEREOF

GRO-C

Solicitor for Pursuer
11 Arnot Crescent
Edinburgh.



Court of Session, Scotland.

SUMMONS

in causa

ROBERT MACKIE, (Assisted Person)
residing at GRO-C
GRO-C Pursuer

against
(FIRST) LOTHIAN HEALTH BOARD, 11
Drumsheugh Gardens, Edinburgh (SECOND)
THE SCOTTISH NATIONAL BLOOD
TRANSFUSION SERVICE, Ellenglens Road
Edinburgh (THIRD) THE SECRETARY OF
STATE FOR SCOTLAND. Defender

Action of REPARATION

1988

Lindsays W.S.,
11 Atholl Crescent
Edinburgh

Solicitor for Pursuer