

HAEMOPHILIA / HIV

It is rare that I take an initiative of this kind in civil litigation before me. But the circumstances of these actions are such that I have no hesitation in doing so, and in much more specific terms than might normally be expected or considered appropriate.

Now that the issues have been clarified by the pleadings, I wish to invite the parties to give anxious consideration to the prospects of any compromise of these proceedings. If consideration is already being given, I would like to think that these observations will lend impetus to it.

So far as the plaintiffs are concerned they, no doubt, recognise the legal difficulties attending the argument as to the nature and extent of the alleged duty of care and its breach. Likewise, with regard to the issue as to whether any proven breach of duty is capable of giving rise to any individual cause of action by an injured party. The plaintiffs' advisors have no doubt also taken account of the issue as to causation in each individual case.

The ~~must~~ also be, I suppose, unusually large areas of uncertainty attendant upon assessment of quantum.

But when all those factors are taken into account, it seems to me that for a number of reasons, it is not an abuse of language to describe these activities as unique in their surrounding circumstances. I hope that I will be allowed to identify some of those circumstances.

A government which takes upon itself the role of public provider of medical advice and clinical services is in a very different position to any commercial organisation. It is clearly arguable that their duty to innocent citizens who suffer injury under the aegis of such treatment has a moral dimension to it which should distinguish their assessment of their position from the criteria to be adopted by other defendants of a corporate character. Government owes a duty under law to its shareholders or citizens. It should also mean that the public may be entitled to expect from government an appraisal of their position which is not confined solely to legal principles to be found in the law of negligence, or problems of proof.

Compromise does not necessarily
 betoken any admission of
 blame or wrongdoings. In any event, it
 might be argued that any perception
 by the public of fault on the
 defendant's may well be significantly
 less than the opprobrium attached to
 any apparent unwillingness to temper
 the rigors of the law with the
 promptings of compassion.

The plight of the plaintiffs
 - or many of them - is a special one.
 (a) Mr. A. Thomas suffers from a liver
 in the shadow of a fatal condition
 for which there is presently no known
 cure. I am told that the evidence
 will suggest that "incubation" may
 be as long as 15 years. He continues,
 I suppose, not believing that soon
 or late they will succumb.

(b) Many have already died, and
 in the nature of things many more
 will die without knowing the
 outcome of this litigation. It seems
 to me, at least, that the matter
 should be treated as cardinal
 important. It also sets it apart from
 any other action in my own experience.
 At best, the plaintiffs will die uncertain
 as to the outcome. At worst, they
 will die deprived of money to comfort

(for those with dependants) that they
are buying a measure of financial
security

(c) With the best will in the world it
may be the end of 1991 before the
legal process affecting the main
cause of action has been exhausted.
That is two and a half years since
the proceedings began - or more. It
may then be necessary - if the court
the plaintiffs succeed - to set bench
marks for quantum, again no doubt
on appeals.

(d) It is common ground that all plaintiffs
are entirely blameless.

The allocation of court resources
involves heavy cost and long term
planning. This is a minor factor compared
with those I have mentioned, but it
deserves at least to be identified.

It is in these circumstances
that I have thought it proper that the
advisors to all parties should be
invited to convey to their respective clients
these observations. It might be said that
I have raised considerations of a political
rather than a purely legal character. I
acknowledge that. But I believe that the

best to see that the legal system
does not become a scapegoat in
the eyes of the public for what a
few may be perceived as the unjust
and inhumane denial of any significant
measure of compensation to the plaintiffs.
"The law must take its course" is not
an attractive principle in the context
of this case.

No doubt any consideration
of compromise will raise formidable
problems in working out its terms.
I am quite prepared to do anything
which the parties believe calls
for my intervention in furtherance of
that process. I have in mind, for
example, determining questions in any
category of case that the parties
find themselves unable to resolve.
There may be other areas. I do not
know. But overall I do not believe
that such problems would provide
insuperable obstacles to the resolution
of a particularly sensitive, and
messy, notorious issue.

Harry O'Neil

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