IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. CL 2002/C-123

BETWEEN	DOTHLYN HOLNESS (Administrator ad litem in the Estate of Roan Chin Hing Deceased)	CLAIMANT
AND	UNIVERSITY COLLEGE HOSPITAL BOARD OF MANAGEMENT	1ST DEFENDANT
AND	SOUTH EAST REGIONAL HEALTH AUTHORITY	2ND DEFENDANT
AND	MINISTER OF HEALTH	3RD DEFENDANT
AND	THE ATTORNEY GENERAL	4TH DEFENDANT

Alexander Williams for Claimant.

Stephen Shelton and Maliaca Wong instructed by Myers Fletcher and Gordon for 1st Defendant

Amina Maknoon and Thalia Francis instructed by Director of State Proceedings for the 2nd, 3rd, and 4th Defendants

HEARING DATES: March 26, 27, 28, and June 29, 2007

JUDGMENT

JONES J:

BACKGROUND

[1] Roan Chin Hing's life was relatively short, yet filled with tragedy. He was diagnosed with haemophilia at age nine months; he required periodic blood transfusions for the rest of his life; he was diagnosed with Hepatitis C and HIV on April 8, 2001; his mother Dothlyn Holness (Administrator ad litem) cannot say the exact date he was infected, but believed it was during a blood transfusion on March 23, 2001; he died on September 23, 2003, at age sixteen years. The

doctors at the University Hospital of the West Indies ("UHWI") who did the transfusions say that although blood is routinely tested for agents that are known to be transmitted in it, such as HIV and Hepatitis C, a "window period" remains when donors are infectious but blood tests will not detect the viral agents.

[2] Dothlyn Holness ("Claimant") filed an action in this court against the Defendants claiming damages in negligence for the death of her son, Roan Chin Hing. She alleges that in March of 2001, at the University Hospital of the West Indies (UHWI), Mona, St Andrew, the servants and/or agents of the hospital negligently administered blood that was negligently supplied by the Southeast Regional Health Authority and/or the Ministry of Health ("MH") through the National Blood Transfusion Service ("NBTS"). She claimed that the blood administered to her son was contaminated with both HIV and Hepatitis C viruses, which caused him to sustain injuries, loss and damages, eventually causing his death.

[3] Dothlyn Holness also claims that the Defendants owed a duty of care to the public including her son to have a proper blood testing and screening system. She says that the Defendants have breached their duty to her son by:

a) allowing an imprudent standard practice of testing blood,

b) failing to adequately test blood products, and

c) failing to store, screen, and administer blood and blood products.

[4] She says that as a result of this breach of duty, her son who was a haemophiliac experienced pain, suffering, discomfort, depression and eventually died as a result of complications from contracting the HIV and Hepatitis C viruses during his March 2001 blood transfusion.

[5] From the evidence, Haemophilia is a condition that causes uncontrolled bleeding. Individuals born with Haemophilia (like the deceased) are missing or have a low level of a protein (called the clotting factor) needed for normal blood clotting or blood coagulation.

[6] The UHWI denies any negligence. They admit that the blood administered to Roan Chin Hing (deceased) was received from the National Blood Transfusion Service (NBTS) and its collection centre located at the hospital. The UHWI says that the same process for the collection, screening and storage of the blood is used at all collection centres of the NBTS which complied with the then existing internationally accepted standards in the region.

[7] The Attorney General of Jamaica was joined as a Defendant by virtue of the Crown Proceedings Act. The Attorney General denies negligence and says that the NBTS tests all samples of blood to be administered to patients and that the testing, storage, screening and administrative procedures used by the NBTS accords with the standards of a responsible body of medical opinion.

[8] The claim by Dothlyn Holness is in negligence, and more specifically, medical negligence. Claims in medical negligence differ from other negligence claims, as the Claimant must rely on expert medical evidence to establish all the major elements of liability. It has not escaped the attention of the court that the Claimant called no expert witnesses in this case.

ISSUES

[9] There are four issues to be determined here:

a) As a matter of causation, whether or not the deceased Roan Chin Hing contracted HIV and Hepatitis C from the blood that he was transfused with at the UHWI in March of 2001;

b) Whether the methods for screening donors, collecting blood, testing for contaminants and storage of the blood collected at the NBTS's collection centre at the UHWI and at the Central Unit of the NBTS were reasonable in all the circumstances and whether those methods were properly performed;

c) Whether the UHWI was negligent in administering the blood products to Roan Chin Hing (deceased) given the risk associated with receiving blood contaminated with HIV and Hepatitis C;

d) Whether the deceased, through the Claimant consented to the risks involved in receiving blood transfusions.

THE APPLICABLE LAW

[10] There is no disagreement as to the principles of law that apply to this case. They are conveniently and concisely set out in the well researched and presented written submissions of counsel for the Claimant and Defendants. The two leading cases for standard of care and breach of duty in medical negligence claims are the **Bolam** and **Bolitho** cases. In **Bolam v Friern Hospital Management Committee,**[1] the plaintiff who was suffering from mental illness was advised by a consultant at the Defendant's hospital to undergo electroconvulsive therapy. He was not warned of the small risk of fracture. He was also not given relaxant drugs nor was he restrained. The plaintiff sustained a fractured hip during treatment. At the time, medical opinion on the desirability of warning patients of the risk of fracture and the use of relaxant drugs and physical restraint varied.

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[1] [1957] WLR 582

[11] McNair J in addressing the jury on the issue of liability in negligence said:

> "But where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art...I myself would prefer to put it this way, that (a doctor) is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. I do not think there is much difference in sense. It is just a different way of expressing the same thought. Putting it the other way around, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view. At the same time, that does not mean that a medical man can obstinately and pig-headedly carry on with some old technique if it has been proved to be contrary to what is really substantially the whole of informed medical opinion. Otherwise you might get men today saying: 'I do not believe in anaesthetics. I do not believe in antiseptics. I am going to continue to do my surgery in the way it was done in the eighteenth century.' That clearly would be wrong."[2]

[12] What is clear is that the **Bolam Test** treats medical negligence differently from other cases of negligence. Medical persons by virtue of the services they offer and supply, consider themselves as having more than average abilities. As a result, this test determines the standards against which to measure the legal quality of the services actually delivered by those who claim to be among the best in their fields of expertise. The **Bolam test** has been applied in some cases but criticised in others. This criticism has lead to its modification in later years.

[13] The modification took place in **Bolitho v. City and Hackney Health.**[3] In that case a two year old boy had severe brain damage after admission into hospital for respiratory problems. He subsequently died. The paediatrician had failed to intubate him. Intubation was the only procedure that would have prevented respiratory failure, but was not without risk. The expert witness on each

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[2] At page 586-587
[3] [1997] 4 All ER 771

side gave diametrically opposed views about whether the failure to intubate was reasonable. Lord Brown-Wilkinson in giving the judgment of the court commented on the circumstances in which a court would decide that there was negligence despite expert evidence agreeing with the Defendant's course of action. The following passage is taken from his judgment:

> "...in my view, the court is not bound to hold that a Defendant doctor escapes liability for negligent treatment or diagnosis just because he leads evidence from a number of medical experts who are genuinely of opinion that the Defendant's treatment or diagnosis accorded with sound medical practice. In Bolam's case McNair J stated that the Defendant had to have acted in accordance with the practice accepted as proper by a 'responsible body of medical men' (my emphasis). Later he referred to 'a standard of practice recognised as proper by a competent reasonable body of opinion.' Again, in the passage which I have cited from Maynard's case, Lord Scarman refers to a 'respectable' body of professional opinion. The use of these adjectives-responsible, reasonable and respectable-all show that the court has to be satisfied that the exponents of the body of opinion relied on can demonstrate that such opinion has a logical basis. In particular, in cases involving, as they so often do, the weighing of risks against benefits, the judge before accepting a body of opinion as being responsible, reasonable or respectable, will need to be satisfied that, in forming their views, the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter...In the vast majority of cases the fact that distinguished experts in the field are of a particular opinion will demonstrate the reasonableness of that opinion. In particular, where there are questions of assessment of the relative risks and benefits of adopting a particular medical practice, a reasonable view necessarily presupposes that the relative risks and benefits have been weighed by the experts in forming their opinions. But if, in a rare case, it can be demonstrated that the professional opinion is not capable of withstanding logical analysis, the judge is entitled to hold that the body of opinion is not reasonable or responsible.
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> I emphasise that, in my view, it will very seldom be right for a judge to reach the conclusion that views genuinely held by a competent medical expert are unreasonable. The assessment of medical risks and benefits is a matter of clinical judgment which a judge would not normally be able to make without expert evidence. As the quotation from Lord Scarman makes clear, it would be wrong to allow such assessment to deteriorate into seeking to persuade the judge to prefer one of two views both of which are capable of being logically supported. It is only where a judge can be satisfied that the body of expert opinion cannot be logically

> supported at all that such opinion will not provide the bench mark by reference to which the Defendant's conduct falls to be assessed."[4]

[14] The House of Lords set the standard higher than in **Bolam**. They decided that a doctor would not be absolved from responsibility in negligence simply because he puts forward evidence from a number of doctors that his treatment accorded with proper medical practice. It must be shown that the procedure was demonstrably reasonable and logical.

[15] In our own jurisdiction in the case of **Joyce Hind v Walter Craig MD and the University Hospital Board of Management**[5] the plaintiff, who suffered from hypertension, was admitted to the UHWI to have an Angiogram operation. The operation was performed by the first Defendant on the same day and the plaintiff recuperated and was discharged the following day. Three months later the plaintiff, on a trip to the United States developed symptoms including pain. She was admitted to surgery in the United States and hospitalized for 60 days. She claimed that the pre-surgical and post-operational treatment received in the USA differed from what she received at the UHWI.

[16] She sued the Defendants to recover damages for negligence claiming as against the first Defendant that the medical equipment was not sterilised, failure to use gloves and/or masks and failure to take or to advise her on post-operational precautions and as against the hospital that they engaged an unskilful doctor. Wolfe J. (as he then was) in dismissing the claim said obiter:

> "A medical man "is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art . . . merely because there was a body of opinion who would take a contrary view".[6]

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[4] At page 777-778
[5] [1982] 19 J.L.R 81 (SC)
[6] At page 87

[17] The same principle was applied, with the opposite result, in the recent case of **Howard Genas v Attorney General of Jamaica, The Black River Hospital Board of Management and Dr KD Mshana**[7]. In that case the Claimant fell from his motor cycle and injured his right leg. He was taken to the Black River Hospital with a suspected fracture of the tibia and circulatory compromise. He remained there for 8 days before being transferred the Orthopaedic Department of the Kingston Public Hospital. As a result of the delay and treatment given, the Claimant's leg was amputated. A consultant Orthopaedic Surgeon gave evidence for the Claimant and expressed the view that "the standard of care fell far short of what was required in this case". He said that the doctor should have removed the Claimant to a specialist facility as soon as possible "by any means, including transporting him by ambulance". Anderson J in the Supreme Court after referring to the **Bolam** and **Bolitho** test said:

> "I am satisfied that there has been a breach of the duty of care owed by the (doctor) to the Claimant. The liability also attaches to the (Black River Hospital Board of Management) as employer of the (doctor)..." [8]

[18] **Estate Walker v York Finch General Hospital**[9] dealt with breach of duty to screen blood donors and products. There was a failure to ask symptom-specific questions in order to eliminate high risk donors. In that case the plaintiffs contracted HIV from blood supplied by a blood agency; the Canadian Red Cross Society (CRCS). Those products were tainted with the HIV virus. Eventually the plaintiffs developed AIDS and died. Before they died, they sued the CRCS claiming, among other things, that the CRCS failed to implement appropriate blood donor screening procedures and that its failure resulted in the donation of blood which was HIV positive. They claimed that the tainted blood found its way into the products provided to each of them thereby

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[7] Suit No. CL G-105 of 1996, Unreported [Delivered October 6, 2006]
[8] At page 14
[9] [2001] 198 DLR (4th) 193

causing them to become infected with HIV and eventually developed AIDS. The tainted blood received by one of the plaintiffs was donated in 1983 at which time the donors were asked general questions about their health, but not about the specific symptoms of AIDS or high risk factors. In May 1984 the CRCS first published a pamphlet that requested that gay or bisexual males who had multiple partners should refrain from donating blood. The pamphlet said nothing about negative health indicators of HIV infection. In 1984 and 1985 the other two plaintiffs received tainted blood. It was not until November 1985 that the CRCS revised its May 1984 pamphlet to describe a typical member of the group of high-risk donors as a person who was "a male and [has] had sex with another male since 1977". Around the same time, it also began testing all blood donations for the presence of HIV antibodies using the ELISA (Enzyme Linked Immunosorbent Assay) test. In May 1986 the CRCS introduced the first brochure that asked symptom-specific questions about HIV. Two experts testified at the trial that the general questions about health were adequate and symptom specific questions were unnecessary. During the entire period the American blood agency advised all potential donors about the symptoms of AIDS and high risk factors. The trial judge found for the plaintiffs and the Court of Appeal upheld the finding on first instance accepting that the CRCS owed a duty of care to users and recipients of blood and blood products and this obligated them to take reasonable steps to protect the safety of the blood and products it supplied to the public. They also accepted that the steps taken by the CRCS to protect the safety of the blood supply should be measured against the professional standard of other voluntary blood banks. On further appeal to the Supreme Court of Canada, Major J said:

> "I agree with the Court of Appeal in upholding the trial judge's conclusions in the cases. The trial judge was not asked to assess complex scientific or highly technical matters. Simply, the issue was whether the general health question was sufficient to deter the infected donor from donating blood. The issue is not how an expert would respond to the donor screening questions in the questionnaire, but

how a lay person would respond. I agree with the reasoning of the Court of Appeal at p. 468:

> 'Nor is the factual issue at the heart of Justice Borins' conclusion that the screening procedures followed by the CRCS were inadequate, one that fell within the exclusive domain of medical experts. His finding that the pamphlet was inadequate did not turn on any disagreement with the experts on a medical issue, but rather on his evaluation of whether the message conveyed by the pamphlet was sufficient to deter those at high risk of having the HIV virus from donating blood. The finding that the pamphlet did not meet that purpose turned on his evaluation of how that pamphlet would be read and understood by possible donors and not on the application of any medical expertise'".[10]

[19] **Re: "E" v Australian Red Cross Society**[11] is an Australian case dealing also with the screening of blood donors and blood products. In that case a blood donor gave blood to the Australian Red Cross Society on October 3, 1984. Nine days later, on 12 October 1984, the appellant underwent an operation at the hospital. The surgical procedures were satisfactorily completed, but the appellant developed serious post-operative bleeding. The Society sent fresh frozen plasma to the hospital which was transfused into the appellant on October 14, 1984. That plasma included the donation given on October 3, 1984, which was later found to be HIV positive. In March 1985 new HIV tests became commercially available in the United States and they were introduced by the Society in May 1985. In October 1985 the appellant tested positive for the HIV virus.

[20] The appellant sued the respondents including the "Society" for negligence claiming that the procedures adopted by the Red Cross Society for the exclusion from the blood donor pool of persons within the known AIDS high risk categories were inadequate. He was critical of the form of the warning notice given to donors, the failure to provide "face-to-face" questioning and counselling of donors and the lack of any system permitting an embarrassed donor anonymously to request the

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[10] At page 33 para 82
[11] [1991] ALR 601

discarding of his or her donation of blood. In the Federal Court of Australia Lockhart J in dismissing the appeal of the appellant said:

> In my opinion, although the form in use on 3 October 1984 may have been deficient in some respects, it goes too far to say that any such shortcomings could constitute actionable negligence. Indeed, for my part I regard the form as basically clear and sensible.... his Honour was correct in concluding that, whatever may have been the shortcomings in the form of the notice signed on 3 October 1984 by (the donor), it was not possible on the evidence to make any finding of causal connection between the omission with respect to the form and the infection of the appellant. This branch of the argument must fail."[12]

[21] **Kitchen v McMullen**[13] deals with the issue of the doctors' duty to disclose risk to patients. In that case the plaintiff suffered delayed bleeding due to a tooth extraction. He was a haemophiliac and was given cryoprecipitate to stop the bleeding. He was also given another product which had a higher risk of transmitting hepatitis. He was not warned of the risk and he contracted hepatitis. The evidence was that the risk of contracting hepatitis from the other product was low and it was not the practice to disclose it. Stratton CJ said:

> "The medical evidence was that Mr. Kitchen required an infusion of blood factors to stop the delayed bleeding and that the risk of contracting hepatitis as a result thereof was exceedingly small. No other viable means of treatment was established. In weighing the risk inherent in the treatment against the potential consequences of leaving the condition untreated, I am persuaded on the evidence that a reasonable person in Mr. Kitchen's position who was informed of the 'unusual' risk of hepatitis would have consented to the infusion of cryoprecipitate and Hemofil to stop the bleeding in his mouth."[14]

[22] Rice J.A put it more clearly:

> In my view...a reasonable person in the appellant's position, knowing the extent of the risk of contracting hepatitis non-A, non-B, would have consented to the

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[12] At para No. 75 of Judgment
[13] [1989] 62 DLR 481
[14] At pages 15-16 of Stratton CJ's judgment

> treatment...the appellant had no reasonable alternative but to submit to the transfusion."[15]

[23] I will now deal with the four issues in the case.

EVALUATION OF THE ISSUES

As to (a): On the matter of causation, whether or not the deceased Roan Chin Hing contracted HIV and Hepatitis C from the blood that he was transfused with at the UHWI in March of 2001,

[24] The matter of causation raised in the first issue is central to the outcome in this case. If the answer to this first question is in the negative, the Claimant's case must fail. The Claimant contends that Rohan Chin Hing (deceased) died from HIV and Hepatitis C and that this was as a result of the blood transfusion in March of 2001. This was pleaded in the claim by Dothlyn Holness. The burden of proving causation is on the Claimant. If it cannot be established on a balance of probabilities that the blood transfusion in March of 2001 caused Rohan Chin Hing (deceased) to acquire the viruses, the claim cannot be sustained. This court has been asked to determine on a balance of probabilities whether Roan Chin Hing (deceased) contracted HIV and Hepatitis C from the March 2001 blood transfusion. Consequently, the evidence of the date or dates of the relevant blood transfusion is central to resolving this issue.

[25] It is not in dispute that in February 2001, Dothlyn Holness received a request from Dr. Urquahart that her son Roan Chin Hing (deceased) should go to the UHWI to receive cryoprecipitate for his haemophilia. In March of 2001 she brought her son to the chemo-therapy unit at the UHWI where he received three (3) units of cryoprecipitate. For three days following the transfusion Roan continued to experience side effects such as red eyes, itching, red and sore lips, and bumps on his stomach, back and chest. On April 8, 2001, Dothlyn Holness brought Roan to

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[15] At page 9-10 of Rice J's judgment

the hospital were he received a blood test for HIV and Hepatitis C viruses by Dr. Capilio. On April 21 2001, Roan was released from the hospital following his blood tests.

[26] Lockhart J. in **Re: "E" v Australian Red Cross Society** made it clear that the date at which the particular applicants received the blood or blood product is an important matter: The only March 2001 date which was submitted by the Defendants and not contested by Dothlyn Holness was March 23, 2001. Equally important is the date of the blood donation. Lockhart J made it clear that it was not possible to evaluate cases in this type of negligence case without paying careful attention to the date or dates of the relevant donation or donations. Since the person whom the blood was received from cannot be determined nor the date of donation, the only date the court can use to determine this issue is the March 23, 2001, date.

[27] The court heard expert evidence from Dr. Gillian Wharfe. She is a doctor in medicine and a Consultant Haemotologist at the UHWI. She has been employed there since 1984. Her evidence on the issue of causation was balanced, compelling and thorough. She said that it is highly unlikely that the deceased was infected with the HIV and Hepatitis C viruses as result of the blood transfusion on March 23, 2001. She said that the time frame for persons to develop HIV antibodies is three (3) weeks or twenty one (21) days. In her expert opinion, Dr. Wharfe explained that due to the date of the transfusion (March 23, 2001) and the date of the HIV test (April 8, 2001) it was highly unlikely that the deceased received HIV and Hepatitis C viruses from the March 23, 2001, transfusion. This conclusion was drawn because only sixteen (16) days passed between date of the transfusion and the date of testing, meaning that the "window period" for detecting the HIV virus did not pass. Given the expert medical evidence from Dr Wharfe, the question is whether or not Dothlyn Holness has shown that there is a greater than 50% chance that her son contracted HIV

and Hepatitis C from the March 23, 2001, blood transfusion. The answer is simple. She has not done so.

[28] Although the Claimant did not call any expert witnesses to contradict the testimony of Dr. Wharfe, she contends that the probabilities are in her favour. On the other hand, the Defendants during the course of trial implied that the deceased could have been involved in a high risk lifestyle. An assertion of this significance cannot be established by a side wind. It was a mere assertion, not supported by facts or witness testimony.

[29] What is not disputed, though, is that between January and March of 2001, the deceased received over forty (40) units of blood. Therefore, the possibility that the deceased acquired the viruses from the several blood transfusions that occurred during the course of the year is very possible. This would especially be true if the deceased received a blood transfusion anytime in March prior to the 17th of that month. As there was no other blood transfusion date in March, 2001, the court on balance must decide whether the Roan Chin Hing (deceased) contracted the viruses from the March 23, 2001, transfusion.

[30] It has been established by expert evidence that the opinion of reasonable medical bodies across the world is that there is a "window period" that prevents HIV antibodies from appearing on tests. This window exists because HIV antibodies do not develop outside of the body and take several weeks to show up in blood tests. Given the March 23, 2001, transfusion date, which was given in evidence at the trial and the expert evidence of Dr. Wharfe, this court, is driven to conclude that the deceased did not receive the viruses from that transfusion.

[31] Dr Wharfe evidence suggests that the terminal events of Roan Chin Hing's life were not related to HIV or Hepatitis C. She said that his docket showed that he was transferred from May Pen

Hospital where he was admitted in an unconscious state. He was admitted to the UHWI with intercranial bleeding, which would explain his fever and unconsciousness. She said that his terminal events were, bleeding from his skin, gastrointestinal tract and other places in the body. These were all, she said, a result of Haemophilia and not HIV.

[32] In the event that I am wrong on the issue of causation, and for completeness, I will go on to deal with the other issues in the case, the next of which is the screening of donors.

As to (b): Whether the methods for screening donors, collecting blood, testing for contaminants and storage of the blood collected at the NBTS's collection centre at the UHWI and at the Central Unit of the NBTS were reasonable in all the circumstances and whether those methods were properly performed

[33] Screening prospective donors is a vital aspect of supplying a country with the safest blood supply possible. Legal precedent across the Caribbean, as well as countries such as the United Kingdom, Canada, and the United States, indicates that any collector of blood has a duty to exercise reasonable care when screening potential blood donors for their blood supply. Dothlyn Holness contends that the Defendants breached their duty by negligently screening the blood given to her son. There is no evidence given by either party from donors of the screening process for donating blood.

[34] Counsel for Dothlyn Holness relied on **Ter Neuzen v Korn**[16] on this point. In that case the Claimant was infected with HIV through artificial insemination in Canada in January 1985. The evidence was that the risk of infection was not generally known in British Columbia until the mid 1985 period although it was in Australia since 1982. The Supreme Court of Canada held that it was not open to the jury to find the doctors negligent as their conduct had to be measured by reference to the Canadian Standards at the time of the infection. It was also held that the

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[16] 127 DLR (4th) 577

Defendant could be held liable for negligence in screening and following up donors if they ought to have foreseen that a failure to screen and follow up donors could result in an infection for a STD. The court also pointed out that a jury could find that there was no standard practice or that the standard practice was negligent without reliance on expert evidence.

[35] The fact is, though, that in this case there was expert evidence called by the Defendants. Documents and forms were submitted into evidence which provided the court with guidance as to the standard practice in screening potential donors of blood. This has to be evaluated like all other evidence in the case.

[36] Mirth Treston, another expert witness for the defence gave evidence of the screening process of potential donors. She says that the process consists of an available collection of literature on blood donation which is available for each prospective donor to read once entering a donation centre. Each donor is registered and their personal information is taken. After the information is recorded the donor is given a registration number and then given various documents to read (if the donor is unable to read, it is read to them). After reading, the donor then has his/her haemoglobin checked and their blood group established. Following the completion of the later step the donor is sent to a doctor/nurse so they can be interviewed and their medical history taken. This is the process for screening potential donors for all nine (9) blood bank collection sites. According to Dr. Gilian Wharfe, the screening process for potential donors at the UHWI is the same procedure used at all the blood collection sites across Jamaica.

[37] In order to prove that the Defendants breached their duty to provide a proper screening and testing procedure, Dothlyn Holness must provide evidence that contradicts the expert medical evidence provided by the Defendants. She was not able to provide any physical evidence or any

witnesses to attest to the negligent screening of donors at the UHWI. She could have called previous blood donors and/or experts witnesses to testify that the screening practice used by UHWI was not adequate. She has not done so.

[38] It is common ground between the parties that there was a duty of care owed to the Claimant by the Defendants in relation to the blood transfusions. Thus, the only question is whether any of Defendants breached that duty.

[39] From the expert evidence given in this case it is accepted that there are weaknesses in the screening process of potential donors. These weaknesses can sometimes, but not always lead to negligence. In **Re: "E" v Australian Red Cross Society** the notice given to potential donors was in the following form:

> "AN IMPORTANT NOTICE TO ALL BLOOD DONORS REGARDING: AIDS (Acquired Immune Deficiency Syndrome) IN THE LIGHT OF PRESENT KNOWLEDGE OF AIDS (ACQUIRED IMMUNE DEFICIENCY SYNDROME) WE HAVE NO OPTION BUT TO ASK THE KNOWN 'AT RISK' PEOPLE TO REFRAIN FROM GIVING BLOOD, THESE PEOPLE ARE:
>
> (1) HOMOSEXUAL OR BISEXUAL MALES
>
> (2) INTRAVENOUS DRUG USERS (PRESENT OR PAST)
>
> (3) SEXUAL PARTNERS OF THE ABOVE
>
> IF ANY OF THIS APPLIES TO YOU PLEASE DO NOT GIVE BLOOD. IF YOU HAVE ANY DOUBT OR WOULD LIKE FURTHER INFORMATION OR ADVICE, PLEASE ASK TO SEE MEDICAL OFFICER".

[40] Lockhart J agreed that the "imperfections, such as they were, [did not] amount to actionable negligence." From the evidence in this case, the screening procedures were far more thorough than in the **Re: "E" v Australian Red Cross Society case**. Critical information is given to the donors; they are then interviewed and medical history taken, and from the evidence in this case these procedures for screening were utilized consistently at the various blood collection centres. I

find as a fact that the screening process for donors by the NBTS was reasonable and in the circumstances adequate to reduce or eliminate the risk of HIV or Hepatitis infection from contaminated blood. Accordingly, the Claimant has not proved on a balance of probabilities that the Defendants have breached their duty of supplying safe blood to patients, in general, and to Roan Chin Hing (deceased) in particular.

As to (c): Whether the UHWI was negligent in administering the blood products to Roan Chin Hing (deceased) given the risk associated with receiving blood contaminated with HIV and Hepatitis C.

[41] In order to succeed in an action against the UHWI for negligently transfusing tainted blood to Roan Chin Hing, Dothlyn Holness must prove:

a) That Roan Chin Hing (deceased) is owed a duty of care by the doctor transfusing him (and the UHWI vicariously);

b) That the UHWI breached that duty by failing to exercise reasonable care in providing safe transfusion blood products;

c) That the breach of care in providing safe blood products caused the injuries and loss of life to Roan Chin Hing (deceased).

[42] The existence of a duty of care within the doctor patient relationship is usually taken for granted, as it is a well recognized duty situation.

[43] The next step is to determine whether the UHWI breached its duty. In order to do this the court must decide whether the standard practice used by the NBTS (the agency charged with the testing of samples) for testing blood products for contaminants was reasonable. Although the societal need for blood products makes it difficult to remove it from the market, the tests used to screen the

blood must be adequate. As I have mentioned before in an action in negligence against the UHWI for using tainted blood products the test in **Bolam/Bolitho** is used to determine that the blood testing is consistent with measures that a reasonably prudent medical practitioner or hospital would take in similar circumstances.

[44] The UHWI used the ELISA (Enzyme Linked Immunosorbent Assay) test to screen all donated blood. Two expert witnesses were called to testify to this fact. The first witness Dr. Wharfe testified that the ELISA test was at the time and still is the internationally recognized standard test for screening blood. She went on to say that even when employing the ELISA test and other internationally recognized tests for screening blood it is impossible to eliminate the "window period".

[45] The second expert witness Mrs. Treston testified that the testing procedures used by the blood collection centres in Jamaica are adequate. She stated that between 1995 and 2001 the ELISA test (an automated test) was used to test for HIV (amongst other things). She said that an ELISA testing kit was provided, and the equipment was maintained and upgraded by Abbott Diagnostics. She also pointed out that there is a standard procedure for test results. All results are transferred to daily worksheets and blood record cards, after being cross-checked by at least two technologists.

[46] Dothlyn Holness contended that the standard practice in Jamaica (ELISA) for testing blood for HIV and/or Hepatitis C was at the time improper and in fact defective for the following reasons. First, there was no confirmatory testing of donors who had already given blood. Second, no one followed up donors after they gave blood, given the limitations of the test itself.

[47] The problem with this argument is that blood is a vital substance used for many different kinds of situations. Jamaica is one of many countries struggling to keep up the blood supply because of the lack of blood donors. The great need for blood and the limited amount that is supplied each year to our blood banks causes the turn around rate for blood use to be exceptionally fast.

[48] It is impractical to track down blood donors, and in addition, continuous testing of donated blood could make the difference between life and death for many Jamaicans, while not providing any additional safety benefits to the blood supply. From the expert evidence provided on the issue of continuous testing, it would in essence endanger more lives than it would save. Although Dothlyn Holness's arguments and suggestions are laudable, they are unworkable in Jamaica given the blood requirements in the medical system and unsupported by any medical evidence or responsible body of medical opinion.

[49] Furthermore, the court is guided by the expert evidence of Dr Patricia Hewitt. She is the National Blood Service (NBS) of the United Kingdom, Consultant Specialist in Transfusion Microbiology. In her expert report dated the September 15, 2005, she said that the antibodies test (ELISA) used to detect HIV and Hepatitis C between 1995 and 2001 in Jamaica first became available in 1984/1985. She was of the opinion that:

> "...the procedures used by the NBTS for laboratory screening of donor blood between 1995 and 2001 appear to accord with the standards of a responsible body of medical opinion in the blood transfusion community ".

[50] Dr Hewitt is of the view that although there may have been other tests used in other countries to test donor blood for the HIV virus, the internationally accepted test is the HIV antibody test or the ELISA test. This test has been the blood screening test for the HIV virus used by the NBTS since 1985. This test she says balances the need to allocate scarce medical resources, the cost

involved in testing donor blood together with the benefits received by recipients of donor blood. These views were not challenged by any expert evidence given by Dothlyn Holness.

[51] Dr. Hewitt also referred to other tests which have been introduced recently in some countries. Some of these tests detect viral genetic material and therefore is able to detect infection before the HIV antigen test. These tests reduce the window period, but do not eliminate it. These, however, have not been introduced as a screening test for donor blood.

[52] Applying the principles expressed in **Bolam/Bolitho**, in the "vast majority of cases" the fact that a renowned expert in the field of Transfusion Microbiology such as Dr Patricia Hewitt is of the opinion that the screening policy for donor blood in Jamaica is a reasonable one will be conclusive. "It will very seldom be right for a judge to reach the conclusion that views genuinely held by a competent medical expert are unreasonable" for the reason that any evaluation of medical risks and benefits is first and foremost a matter of medical judgment. It is only in an exceptional case when a judge can be convinced that the expert opinion cannot be logically supported that the expert opinion should be ignored. In my view, this is not such a case.

[53] In my judgment, the blood testing policies practiced by Jamaica's blood donation centres are consistent with measures that a reasonably prudent medical practitioner and blood collection agency would take in similar circumstances and does have a logical basis. The final issue raised is that of consent.

As to (d): Whether Roan Chin Hing (deceased), through his mother Dothlyn Holness consented to the risks inherent in receiving blood transfusions.

[54] Dothlyn Holness raised the issue of whether the Roan Chin Hing (deceased), consented to the risks involved in receiving blood transfusions. She says that she was not warned of the possibility that Roan might be transfused with blood tainted with the HIV and Hepatitis virus.

[55] **Rule 8.9 of the CPR 2002** provides that:

> The Claimant must include in the claim form or in the particulars of claim a statement of all the facts on which the Claimant relies.

[56] **Rule 8.9a of the CPR 2002** also provides that:

> The Claimant may not rely on any allegation or factual argument which is not set out in the particulars of claim, but which could have been set out there, unless the court gives permission.

[57] An issue of fact which is dependent on evidence cannot be decided by a court at trial unless it is set out in the statement of case: See **Sivanandan v Executive Committee for Hackney Action for Racial Equality [2002] EWCA Civ 111**. In this case, Dothlyn Holness did not apply to the court to amend the pleadings to raise the factual argument of not consenting to the risk inherent in receiving blood products, nor was any permission given. The CPR sections referred to above and the UK authority says that she cannot now at the end of the case raise this issue as a matter of right.

DISPOSITION

[58] For this, and the above reasons, the claim by Dothlyn Holness against the Defendants on behalf of Roan Chin Hing deceased must fail and there shall be judgment for the Defendants. The issue of costs is reserved pending submissions by counsel for the Claimant and Defendants.