IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. C.L. F057/ 2002

IN THE CIVIL DIVISION

BETWEEN	*Richard Stanford Facey (Minor by Next Friend and Mother Nicole Facey)*	*Claimant*
And	*Dr. Campbell*	*1st Defendant*
And	*Dr. J. Williams*	*2nd Defendant*
And	*The Board of Management Bustamante Hospital for Children*	*3rd Defendant*
And	*The Attorney General for Jamaica*	*4th Defendant*
And	*South East Regional Health Authority*	*5th Defendant*
And	*The Board of Management National Blood Transfusion Service*	*6th Defendant*
And	*The Ministry of Health*	*7th Defendant*

Mrs. Antoinette Haughton-Cardenas instructed by Haughton and Associates for Claimant.

Mrs. Simone Mayhew and Miss Nicola Brown instructed by the Director of State Proceedings for the 4th, 5th and 6th Defendants.

Heard: *5th December, 2005;*
10th February, 2006;
October 12, 2007

Marsh J.

Background

The facts of this case are of very tragic proportions. Richard Stanford Facey was only four months old, when it became necessary for his parents to take him to the Bustamante Hospital for Children. He kept bleeding for three days. Tests done on him there revealed that he was a hemophiliac ' a bleeder' and that not only would he have to live with this condition for the rest of his life, but also that he would always require 'blood fusions to stabilize his condition.' Thereafter followed regular admissions to hospital, approximately three times per month and on each occasion he would receive blood transfusions. He was referred for further treatment to a Specialist Clinic at the University Hospital of the West Indies.

In 1977, large lumps under his arms and at his throat appeared on young Richard Facey. He was taken back to the Bustamante Hospital, admitted and received blood transfusions. In about January 1997, Richard Facey was diagnosed as having contracted HIV. It is not disputed that this was as a result of one of the many transfusions of blood received by him in the treatment of his haemophiliac status. The blood with which Richard Facey was transfused came from stock provided by the National Blood Transfusion Service.

Nicole Facey, mother of Richard Facey, filed suit against Dr. Campbell, Dr. J. Williams, the Board of Management of the Bustamante Hospital for Children, The South East Regional Health Authority, The Board of Management of the National Blood Transfusion Service, the Ministry of Health and the Attorney General of Jamaica – the latter joined as Defendant by virtue of the Crown Proceedings Act.

The Negligence alleged against the Defendants is that during the period when Richard Facey was being given blood transfusions he was infected with the HIV virus because -

(a) they failed to exercise due care and diligence in ensuring that the blood given to him in and around December 1997 was uninfected.

(b) they failed to test at all or to properly test for the HIV virus the blood that was transfused to him.

(c) failing to have a proper system in the testing of blood

(d) failing to store blood, so tested as to prevent HIV infected blood from being transfused to him

(e) failing to have sufficient checks and balances so as to prevent HIV infected blood from being transfused to him.

Alternatively, the Claimant pleads res ipsa loquitur.

The Defendants expressly denied the particulars of negligence and say that Drs. Campbell and Williams, the 1st and 2nd Defendants are not specialists in the testing of blood and it was not their responsibility to test blood for HIV virus or other infectious diseases.

The National Blood Transfusions Service tests all samples of blood to be administered to patients in hospitals and other health facilities for HIV and other infectious diseases. This testing and storage procedure used by the National Blood Transfusion Service accords with the standards of a responsible body of medical opinion in the testing of blood.

The Defendants further deny that it was their negligence or the negligence of the servants or agents of the Bustamante Hospital for Children and/or the National Blood Transfusion Service that caused loss, injury or damage to the Claimant as alleged or at all.

The sole witness called by the Claimant is Nicole Facey mother of the minor Richard Facey. Her evidence related essentially to Richard Facey's history and to what symptoms he manifested and the types of medication that his condition obliged her to purchase.

Five witnesses were called on behalf of the Defendants and much assistance was afforded the Court by the Expert Reports of Doctor Patricia Hewitt and Doctor Celia Christie respectively.

The issues identified in this case may be categorized as follows:-

1. Whether the Defendants had tested all the blood that was transfused to the Claimant.

2. Whether the Defendants were negligent in that the procedures adopted in testing the procedures adopted in testing blood that was transfused to the Claimant and not accord with the standards of a responsible body of medical opinion.

3. Whether it was the negligence of Defendants, their servants or their agents that resulting in the Claimant contracting HIV.

4. Whether the principle of res ipsa loquitur applies in the instant case.

5. If the Claimant succeeds in his claim, is he entitled to Compensatory damages and what is the quantum of damages.

SUBMISSIONS:

The Attorneys for the Claimant and the Defendants respectively, have made written and oral submissions of considerable length and thoroughness and accompanied by the authorities on which they rely.

The afforded assistance is greatly appreciated.

The Claimant submitted that there are six donor records missing from the National Blood Transfusion Service (NBTS). These records contain information concerning donors of blood with which the Claimant were transfused.

The system of storage for donor information during the relevant period 1995 – 1997 was flawed and insufficient. There was admittedly a manual systems employed at the time to enter information relevant to donors on cards and worksheets.

It was mandatory for blood transfusion services, such as that operated by the 6th Defendant to have retained records of blood donors and of the tests of their donations of blood. The Defendant (NTBS) failed

to keep proper and accurate records of donors and donated blood in a safe place.

The system of ascertaining whether an individual is suitable to become a donor of blood is itself flawed – there being no empirical way of confirming the truth of the information that prospective donors provide.

The Defendants cannot escape liability for negligence because the testing and storage procedure for blood transfused to the Claimant accords with sound medical practice. The Defendants had the duty and responsibility to ensure to the public that there is a safe, efficient and thorough system of testing donated blood for the HIV infection.

See Bolitho v. City and Hackney Health Authority (1997) 4 All E.R. 771.

The requirement of the doctrine of res ipsa loquitur have been met in the circumstances. These principles are laid down in ***Scott v. London and St. Catherine Docks Co. (1865) 159 ER 665.***

The Claimant has proven and the Defendants have (the 6th Defendant) in particular agreed that they have control and management over the tested blood given to the Claimant. In the ordinary course of things the accident would not have happened without negligence.

The Claimant is entitled to Exemplary damages as there has been oppressive conduct by government's servants or agents.

In response to the above mentioned submissions by the Claimant, the Defendants contended that all the blood transfused to the Claimant, then a patient at the Bustamante Hospital for Children, at the material time, was tested for HIV and found to be negative.

It was conceded that a duty of care is owed by a doctor/hospital to patients and that any breach of that duty resulting in damage will successfully ground on action in negligence. However the standard of care required by the law for the discharge of that duty is not the standard of the average man.

The Court is not bound to hold that a Defendant doctor escapes liability for negligence just because he leads evidence from a number of medical experts who genuinely are of the opinion that the Defendants' treatment or diagnosis accorded with sound medical practice. Any supporting expert evidence as to the approach to treatment must be subjected to logical analysis by the Court for the Court to be so persuaded. The Court should not, with the benefits of hindsight, judge doctors who act at the time to the Claimant's complaint, in accordance with prevailing standards of professional knowledge.

Current state of knowledge and standard practice in other countries at that time may not be relevant to the standard of care applicable to doctors in Jamaica. However the standard of the profession should not be negligent.

The Claimant, Defendants contend, has not proven a case of negligence against the Defendants. The Defendants have proven by the evidence produced by them that the procedures of the Blood Bank relating to blood donation, testing and transfusion at the Bustamante Hospital for Children accorded, at the relevant time, 1995 – 1997 with a responsible body of medical opinion. It was consequently not as a result of any negligence on the part of the Defendants that the Claimant contracted the HIV virus.

The Claimant's claim will fail where the Defendant's evidence satisfies the Court that proper care was taken even though the outcome itself cannot be explained in the current state of medical knowledge. In complex medical cases, such as this one, as opposed to simpler medical cases, for the Claimant to rely upon the doctrine of res ipsa loquitur, the Claimant would have to call expert evidence that there was want of care.

The Defendants further submitted that to succeed in this action the Claimant would have to establish that the Defendants deviated from the normal standard of care and that this resulted in the Claimant's contracting the HIV virus.

The Law:

The duty of case owed to a patient by a doctor in hospital is well established. Where a breach of that duty occurs and there is resulting damage to the patient then this breach and resulting damage will give rise

to an action in negligence. The standard of care and breach of duty in medical cases are treated differently where the person in breach of that duty is an "average man."

The requisite standard is admirably defined by McNair J in ***Bolam v Friern Management Committee (1957) 1 WLR 582*** -

> ***"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 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."***

There was a time when a claim for medical negligence could be successfully defended by the calling of an expert witness or witnesses to say that he or they would have acted in the same manner as the Defendant did. However, in ***Bolitho v. City and Hackney Health Authority (1997) 4 All E.R. 771,*** a decision of the House of Lords, it was held that –

> ***"a doctor could be liable for negligence in respect of diagnosis or treatment despite a body of professional opinion sanctioning his conduct where it had not been demonstrated to the judge's satisfaction that the body of opinion relied on was reasonable or responsible. In the vast majority of cases the fact that***

> ***distinguished experts in the field were of a particular opinion would demonstrate the reasonableness of that opinion. However, in a rare case, if it could be demonstrated that the professional opinion was not capable of withstanding logical analysis, the judge would be entitled to hold that the body of opinion was not reasonable or responsible.***

It was urged by the noble and learned Law Lords that before such evidence could be considered persuasive, there was need for the Court to hear supporting expert evidence by subjecting it to logical analysis.

Despite the urging of this approach on the trial judge, Lord Browne-Wilkinson was quick to emphasize that in his own view, "it will very seldom be right for judge to reach the conclusion that views genuinely held by a competent expert are unreasonable. The assessments of medical risks and benefits is a matter of clinical judgment which a judge would not normally be able to make without expert evidence." Lord Browne-Wilkinson referred to a Privy Council decision from Hong Kong. ***Edward Wong Finance Co. Ltd. v. Johnson Stokes and Masters (a firm) (1984) AC 296 .***

In this case, solicitors in Hong Kong, had conducted the completion of a mortgage transaction in "Hong Kong style" rather than the old fashioned English style. This practice facilitated a dishonest solicitor appearing for the borrower, to abscond with the loan without providing security documents for the loan.

The Privy Council held that even though completion in the Hong Kong style was almost universally adopted in Hong Kong and was in accordance with a body of professional opinion there, the Claimant succeeded in negligence against the Defendants' solicitors. This was an obvious risk which could have been guarded against.

Medical science is constantly advancing, is hardly ever static and in deciding whether a Defendant exercised reasonable care and skill, the state of the science at the time of the alleged act or omission is a relevant consideration. As Lord Denning opined in ***Roe v. Ministry of Health (1954) 2 All E.R. 131***, at page 137 -

> ***"We must not look at the 1947 accident with 1954 spectacles."***

In the Canadian case of ***ter Neuten v. Korn (1995)127 D.L.R. 4th) 577, Sopinka J*** delivering the judgment of the Supreme Court of Canada stated the point in the following manner.

> "..... courts must not with the benefit of hindsight, judge too harshly doctors who act in accordance with prevailing standards of professional knowledge."

Locally, Wolfe J (as he then was) in ***Hurd v. Walter Craig MD and the University Hospital the Board of Management (1982) 19 JLR. 81,*** stated 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."***

The Evidence

The sole witness called by the Claimant is the mother of Richard Stanford Facey who was transferred with the donated blood at the Bustamante Hospital for Children. The Defendants called witnesses to prove that there are procedures at the Blood Bank relevant to how donors are arrived at, how blood is taken and tested, how it is stored and how the tested blood is dispatched to institutions such as the Bustamante Hospital for Children, when needed to transfuse a patient.

There is evidence also from Dr. Patricia Hewitt and Dr. Celia Christie provided in their respective expert reports. It must be stated here that the evidence of the Defendants stand uncontroverted. They called several witnesses to prove that, during the period 1995 – 1997 the relevant period, the procedure at the Blood Bank with regards to collecting, testing, storage and the dispatching of blood requested for transfusion was such that it accorded with a responsible body of medical opinion.

Daphne Davis, former Supervisory Medical Technologist at the Blood Bank testified as to the procedures at the Blood Bank between 1995 – 1997 for the donating, gathering, testing, and storage of blood.

Prospective donors are interviewed to eliminate from donating blood, persons who were considered risky.

The procedure used to test blood during the relevant period 1995 – 1997 in Jamaica was Enzyme Linked Immunosorbent Assay (ELISA) test – an automated testing for HIV1 and HIV2 amongst other things. She indicated that test results were transferred to the daily work sheets and blood record cards, after being cross checked by two medical technologists. In cross examination, she said that blood tested after the 28 days window period could be made safer but that haemophiliacs, such as the Claimant was, are required to have fresh blood between one to five days old. This was one reason she Hewitt, why the post window period testing of blood was impractical.

Dr. Evadne Williams, current director of the National Public Health Laboratory gave evidence that the Immunology Laboratory is located in her department. She gave evidence of the testing procedures for testing blood for HIV, including confirmatory tests done by the said Immunology Laboratory. The confirmatory tests done there, were not only validated by Jamaica since it had to be population specific, but was based on information published by the World Health Organization. The P24 Antigen Test was not used in Jamaica between 1995 – 1997, she testified, as this was not a World Health Organization standard and it was still then being used as a 'research tool.'

In relation to the Genomic Acid Testing (GAT) also known as the Nucleic Acid Testing (NAT), she explained that there were not available in Jamaica or anywhere else on the world during the relevant period 1995 – 1997 (not during the 1990's). Cross examined by counsel for Claimant about retesting donors after the 28 days window period had passed, Dr. Williams was quite firm in her response. She said that would be impractical as one would have had to have vast amounts of blood to do this; besides this would not protect the unit of blood already taken. Some components of the blood taken must be used within 24 hours of the blood being taken.

It was also an internationally accepted standard not to retest the negatives. She further stated when asked why positive blood is tested twice, that positive blood was not tested in relation to transfusion but rather for clinical diagnosis.

Dr. Patricia Hewitt, a qualified doctor in medicine, a Fellow of the Royal College of Physicians (London, UK) and also of the Royal College of Pathologists is a consultant specializing in blood transfusion since 1984. She was, up to 9th July 2004 when she made her Expert Report, Lead Consultant in Transfusion Microbiology for the National Blood Authority (England). She has "particular experience in the area of transfusion microbiology, including, transfusion transmitted infections, the testing of

blood donations, and risk assessment for transfusion transmitted infections." She was asked to report and reported on the following:

(i) the accepted procedures used for screening for HIV between 1995 and 1997, especially as it related to the screening of donor blood.

(ii) an explanation of the "window period" for HIV and whether there was any method of screening available between 1995 and 1997 that was able to detect antibodies to HIV during this period.

In preparing the report, she had read the Amended Statement of Claim and the witness statements of Defendants' witnesses, Doreen Claire Brady-West, Evadne Williams and Daphne Davis respectively.

Her report was eminently thorough and displayed a keen knowledge of and experience in the area of which she made her report.

Verbal questioning of donors in order to assess their suitability to donate blood is part of the routine assessment of individuals who attend to give blood. This was introduced when Aids was first recognized to be transferable by blood. This was in 1982 – 1983 and the HIV agent was yet to be identified and there was then no available tests to directly detect evidence of infection.

Even then it had been recognized that certain persons by their behaviour were at risk of contracting AIDS and efforts were made in blood transfusion services to inform potential blood donors about AIDS and to

encourage those who recognized themselves to be at risk of developing AIDS to exclude themselves from blood donation.

Verbal questioning of donors of blood must be relevant to the population in question. Each country must ask appropriate questions of donors having assessed the risk in its own population

In late 1983, the Human Immunodeficiency Virus (HIV) was identified and its infection recognized to be the cause of AIDS. In the following years, blood tests to detect evidence of HIV infection first became available. A body infected with the virus responds by producing certain antibodies and these co-exist with the infection in the infected person. The antibodies persist throughout the course of the infection.

Initially the first test – the HIV^{1} antibody test was introduced in the U.S.A. and the U.K. in 1985, about the same time as it was introduced to the developed world. Upon the discovery of the HIV^{2} virus, commercially available tests were adapted to include testing for antibodies to HIV^{2}. The combined test for antibodies to HIV^{1} and HIV^{2} was introduced in the U.K. in 1990. Later refinements to detect other subtypes of HIV infection were introduced into the U.K. in 1996.

If a test is 100% sensitive, it will detect every HIV infected person but, in practice achieving 100% sensitivity is impossible.

The "window period" is the time between infection and the first detection of antibodies to HIV. This period, using sensitive Anti- HIV^{1}

and 2 tests is in the order of twenty one (21) days. It will never be possible to have an antibody test which is 100% sensitive for detection of all spheres of detection.Various methods to reduce the window period for HIV have been proposed – some introduced in some countries.

The P24 Antigen test cannot be used in place of the HIV antibody test. If it is to be used at all, it must be in addition to that test. This test (the P24 antigen Test) was first available in 1994 and introduced into the U.S.A. in 1996. It was introduced also in Thailand where there was large numbers of new HIV infections in that population.

Europe, on the other hand, had no evidence of large numbers of new HIV cases within the blood donor population – who would not be detected by routine questioning and encouragement of self-exclusion. But for Germany, Western European Countries did not adopt HIV P24 antigen testing. The most sensitive method for avoiding or minimizing the window period for HIV infection is to perform a test to directly detect the viral genomic material. These tests are known as Genomic Acid Testing (GAT) or Nucleic Acid Testing (NAT). These tests will reduce the window period significantly so that the risk of an infected unit escaping detection is reduced to an absolute minimum. These systems however were available on a research basis in the 1990's but only became available for routine testing of blood in 2000. "They were therefore not an option during the period in question"

The Expert Report of Dr. Hewitt dated 9th July 2004, was amplified by answers to questions posed to her in writing pursuant to Rule 32.8 of the Civil Procedure Rules by Claimant's Attorney at Law.

It was mandatory for blood transfusion services to retain records of blood donors and of tests done on their blood donations. Prior to legislation enacted in the U.K. records were genuinely kept for a minimum of 11 years. Legislation of 2005 now demands that such records be kept for a minimum of thirty years.

Blood already tested negative using an antibody test could be further tested by different tests but this would not be done in the context of blood donation screening. Initial screening is done using a sensitive antibody test. Only samples which show a reaction in the screening test would be further tested by confirmatory testing. Such testing would never be applied to blood already tested and found to be negative. It was impossible to provide an exact cost for the introduction of additional HIV testing since such costs will depend upon the number of samples to be tested. A viral load test is not used for blood donation screening.

Dr. Celia Christie, Professor and Chair in Paediatrics and Consultant in Paediatrics infections diseases, Epidemiology and Public Health at UWI/UHWI, Mona provided an Expert report on the subject Claimant whose case she continued to oversee since she was first consulted on July

19, 2002. Her detailed report related exclusively to her clinical findings while Claimant was being overseen by her.

Questions were posed to her in writing pursuant to Part 32.8 of the Civil Procedure Rules by Defendants' Attorney at law. She explains that Claimant's behavioural changes and neurological symptoms were as a result of his HIV status. Fronto-parietal masses in the brain, as in Claimant's case do present with behavioural and neurological problems. Asked to estimated Claimant's life expectancy, Dr. Christie described that task as challenging and said it was difficult to predict and virtually left such prognostification in the lap of the gods.

Dr. Doreen Clare Brady-West is a consultant Haematologist at the University Hospital of the West Indies. She has also acted as Director of the National Blood Transfusion Service. She testified as to the procedures employed at the Blood Bank during her tenure there.

If, as she was informed donor cards had gone missing, information concerning the relevant donors, in particular their HIV status, could be found in such sources as the worksheet, or laboratory records. If the donor's blood had tested positive or indeterminate, then the immunology unit at the National Public Health Laboratory would also be another source of obtaining this information. Where someone was transfused with infected blood collected by the Blood Bank, one would therefore be able to trace the donor who originally gave it.

Her reason for indicating that confirmatory testing is not done on blood tested negative originally, is that this would be futile. For the duration of the 'window period' the donor would have to be restricted from all risky behaviour. If the donor engages in sexual activity or any other risky behaviour, the second test would also be in the window period.

She disagrees with the opinion expressed by Dr. Celia Christie as to the fact that she would not expect neurological symptoms in a patient at a time when other symptoms of AIDS are not present – it was highly unlikely she testified that they would appear in isolation just before this person became infected.

Dr. Lundie Richards, at the time he gave evidence was the Director of National Blood Transfusion Service and a Consultant Haematologist.

His evidence is essentially about investigations he had carried out. He had carried out these investigations and concluded from the checks he had made that the blood dispatched to the Bustamante Hospital for Children had tested negative for the HIV virus. He was unable to find the permanent records for six donors, but was able to ascertain donors' serological status by checking at the National Public Health Laboratory and with the Epidemiology Unit of the Ministry of Health. He stated that 'not found' on the list which was attached to his witness statement referred to the permanent donor cards for the six persons and did not mean that the serological status of those donors had not been ascertained.

His evidence as regards the unreliability of the P24 Antigen test for blood banking purposes were in terms similar to the opinion expressed by Dr. Patricia Hewitt, the maker of the Expert Report.

Dr. Joy Williams at the material time, was a Consultant Paediatrician at the Bustamante Hospital for Children She has responsibility as one of the consultants who was charged with Claimant's management and care where he was a patient in the said Bustmante Hospital for Children.

She outlined the procedure employed in relation to transfusions and gave an outline of Claimant's condition up to the time of his discharge from the hospital. She indicated that the Claimant was a haemophiliac, possessed of a congenital bleeding disorder caused by the absence in the blood of a factor necessary for clotting of blood. Bleeding with relatively mild trauma results.

Checks of hospital records revealed that the Claimant was the recipient of in excess of 200 pooled blood transfusions. There is a risk with each transfusion, she admitted. The Blood Bank was contacted when in 1997 it was discovered that the Claimant had tested positive for HIV so that investigations could be done.

Under her supervision, a review of the Claimant's docket was done and a list of the unit numbers of the blood products transfused to him was compiled.

The evidence provided by the Defendants has not been contraverted by the Claimant. Suggestions made to the witnesses have remained suggestions. The Defendants' contention is that the process used to obtain blood for donors, testing that blood and storing it for possible use in transfusions is a standard process.

All the blood that was transfused to the Claimant at the Bustamante Hospital for Children was tested for HIV was found to be negative. The Claimant however has submitted that Dr. Lundie Richards assumption that all the blood transfused to the Claimant was tested was made on faulty premises. Hence his conclusions must be necessity be faulty.

The system for storage of donor information, the Claimant contended, was flawed and inefficient. Basis for this conclusion was that Daphne Davis then supervisory medical technologist had testified that at that time there was a manual system of entering donor information on cards and worksheets. She agreed in cross examination that there was no computerized system o f recording donor information. The Claimant further submitted that Daphne Davis had stated that once this information goes missing, it was impossible to trace the donor as there are no records.

This is not what the witness had said. She said that if the donors' card went missing they would only have certain information on that donor. The information on the HIV status of the donor should be on the

worksheet. Dr. Patricia Hewitt's response to the question posited in writing to her, re the retention of records by blood transfusion agencies is that it is mandatory for these agencies to retain records of blood donors and of tests.

However she (Dr. Hewitt) emphasized that it was only in 2005 that legislation was enacted in the U.K. making it mandatory to keep such records for thirty (30 years) at minimum. Prior to that there was no slated minimum period although this was usually about 11 years.

Dr. Lundie Richards in his witness statement said he joined the service in 2003 and it is in that year that he because aware of a file relative to this case and began his investigations. He was unable to locate donor cards for six donors.

The exact date when these went missing is not substantiated by evidence. There is no evidence therefore that these cards were not retained but were lost or mislaid between the relevant period 1995 – 1997 and when Dr. Richards found them missing during his investigations which began in 2003. There is no evidence as the Claimant boldly contends that the 6th Defendant the National Blood Transfusion Service (the Board of Management) failed to keep proper and accurate records of donors and donated blood in a safe place.

The system of ascertaining the suitability of a prospective donor to give blood is itself flawed, the Claimant submitted. The brochures ask

very private and personal questions and in the type of society that Jamaica is, persons will not always tell the truth.

If this is the situation, and it may well be so, it would mean that in each case of a prospective blood donor, the answers given during an interview prior to his acceptance as a blood donor, should be checked and the truth or otherwise be ascertained. This would be impractical, unreasonable and self defeating.

Dr. Patricia Hewitt, in her Expert Report puts it this way:-

> "The verbal questioning of potential blood donors must be relevant to the population in question. Clearly questions asked in one country may not be applicable to individuals in another country."

I find as a fact that the process employed at the National Blood Transfusion Service for screening prospective blood donors in the instant case was more than adequate and reasonable in the circumstances to achieve the 'self exclusion" or self deferral" – the objective of these questions being administered to the prospective blood donor.

The Claimant contended that the procedures adopted by the National Blood Transfusion Service in testing the blood transfused to the Claimant did not accord with the standards of a responsible body of medical opinions.

It is well established law that a doctor/hospital owed a duty of care to its patients and where there was a breach of this duty and there is

resulting damage, this will give rise to an action in Negligence. The requisite standard of care required for the discharge of this duty is a standard which differs from that of the average man.

In the instant case, Dr. Evadne Williams, Dr. Doreen Hewitt Brady-West, Dr. Lundie Richards and Daphne Davis former Supervisory Medical Technologist at the Blood Bank have all testified concerning the methods used in the gathering, donating, testing and storage of blood. Those witnesses were proffered by the Defendants and their evidence remain unchallenged by any other evidence.

Dr. Patricia Hewitt, eminent Consultant in Transfusion Microbiology of the National Blood Authority in England also provided evidence in her expert Report. She had, in preparing her own Expert Report the Amended Statement of Claim and Witness Statements for Dr. Brady West, Dr. Evadne Williams and Daphne Davis.

Dr. Hewitt's Report was predicated on two bases:-

(a) the accepted procedures used for screening for HIV between 1995 and 1997 ..... as it relates to screening of donor blood.

(b) An explanation of "the window period" for HIV and whether there was any screening method available between 1995 and 1997 to detect antibodies to HIV during this period.

Her detailed and learned report gave a brief history of the testing of donated blood for HIV since AIDS was identified in 1983.

The burden of the report can best be summed up by repeating some lines of her report.

'Through out the period 1985 onwards test manufacturers continually improved the HIV antibody tests to make these tests more 'sensitive', and with a wider detection range of subtypes. That is to say, to attempt, as far as possible, to detect every HIV infected person with the test. If a test 100% sensitive, it will detect every HIV infected person. In practice, it is impossible to achieve 100% sensitivity for the reasons explained":

> "I accept that because of the 'window period' which she explained in great detail, tests may reduce the 'window period' significantly so that the risk of an infected unit escaping detection by screening tests is reduced "to an absolute minimum: 'Such tests the Genomic Acid Test or the Nucleic Acid Test was not available for routine testing of blood donations until the year 2000."

Dr. Hewitt's final sentence in her report dated 9 July 2004 stated quite categorically "They were not therefore an option during the period in question." Nothing that the eminent doctor has stated in her Expert report has been contradicted or contraverted in evidence, and I accept her report as being the exact situation during the relevant period 1995 – 1997.

Lord Denning's admonition in ***Roe v. Minister of Health (1954) 2 All E.R. P. 131*** at page 137, is timely in the instant case.

> ***"We must not look at the 1947 accident with 1954 spectacles."***

What was available for routine testing of donor blood in the period 2000 and after was not available in 1995-1997, the relevant period in this case.

The Claimant has suggested that the "window period" was an obvious risk which Defendants could have guarded against at the material time. However, the evidence in the case, tendered by the Defendants and the Expert Report of Dr. Patricia Hewitt has indicated otherwise. The P. 24 Antigen test was first available in 1994. It was introduced in 1996 in the United States of America, and in Thailand where there was, as Dr. Patricia Hewitt's Expert Report puts it "ample evidence of large numbers of new HIV infections in the population." There is no evidence to suggest that the Jamaican situation indicated any large numbers of new HIV infections.

It is in disputable that there existed a duty of care within the relationship between the Claimant and the Defendants. If this duty of care has been breached in the instant case, this must be determined by the Court. It must decide whether the procedure employed by the National Blood Transfusion Service (NBTS) for screening prospective donors of blood, for collecting samples of blood from donors and for testing samples

for any agents that would contaminate blood and for the storage of blood before issuing to hospitals for transfusion, were reasonable and responsible.

I am well aware that 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." Per Lord Justice Browne-Wilkinson in ***Bolitho v. City and Hackney HA (1997) 4 All ER 771*** at page 779.

The test laid down in ***Bolam v Friern Hospital Management (1957) 2 All ER 118 at page 122*** by McNair J., for the standard of care of a doctor runs this way "..... 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 ...." The evidence provided by the Defendants from the witnesses Daphne Davis, Dr. Evadne Williams, Dr. Doreen Clare Brady-West and to a lesser extent Dr. Lundy Richards coupled with that contained in the report of Dr. Patricia Hewitt, an expert in her field of Transfusion Microbiology, remain uncontroverted.

I am convinced on the evidence, despite the suggestions made to the witnesses by Claimant's counsel that the system was flawed from initial interview to how blood was tested and records kept, that the procedures

adopted by the National Blood Transfusion Services, accorded with standards of a responsible body of medical opinion, at the relevant time 1995 – 1997.

I am guided by the principles of guidance laid down by B***rowne Wilkinson LJ in Bolitho v. City and Hackney HA*** (Supra). The instant case is not one in which procedures and system outlined the evidence of Daphne Davis, Drs. Evadne Williams, Doreen Clare Brady-West, Lundy Richards and Dr. Patricia Hewitt's expert opinion can be considered unreasonable.

The opinions of the experts here outlined are logically supported.

The procedures of blood collecting and testing of blood at the National Blood Transfusion Service, during the relevant period 1995 – 1997 are consistent with a body of opinion which I consider reasonable and responsible.

Regrettably, for these reasons outlined above, the claim by Nicole Facey (next friend and mother of Richard Facey) is unsuccessful and therefore judgment is entered for the Defendants.

Question of costs in the matter is reserved for consideration after submissions by counsel for either side.