

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

1990 R No 860
1989 H No 3689

ROYAL COURTS OF JUSTICE
 THE STRAND
 LONDON

Thursday 19th November 1992

Before

THE HON. MR JUSTICE FRENCH

ELIZABETH REAY

Suing on her own behalf and as
Mother and Administratrix of the
Estate of DOROTHY REAY (deceased)
and as Widow and Administratrix of the Estate
of GEORGE REAY (deceased) (Plaintiff)

v.

BRITISH NUCLEAR FUELS plc (Defendants)

AND

VIVIEN JANE HOPE (Plaintiff)

v.

BRITISH NUCLEAR FUELS plc (Defendants)

APPEARANCES:

For the Plaintiffs:

MR B A HYTNER QC
 MR B F J LANGSTAFF
 MR G S READ and MISS T GILL
 (Instructed by Messrs Leigh, Day &
 Co. Solicitors, London)

For the Defendants:

MR K S ROKISON QC
 MR M G SPENCER QC
 and MR C J BUTCHER
 (Instructed by Messrs Freshfields,
 Solicitors, London)

From the Notes of J L HARPHAM LIMITED
 Official Shorthand Writers
 55 Queen Street, Sheffield S1 2DX



TENTH DAY'S PROCEEDINGSTHURSDAY, 19th NOVEMBER 1992

A MR. JUSTICE FRENCH: Mr. Hytner, you can take it that I have read Messrs. Leigh, Day's letter.

B MR. HYTNER: My Lord, I think that, in a way, it is a pity your Lordship has. Mr. Rokison and I have been exchanging views and, my Lord, it seems as though there has been something of a misunderstanding between the solicitors. My Lord, can I tell your Lordship what the situation is as Counsel have discussed it. As I understand it now, the solicitors accept what Counsel have appreciated.

C My Lord, the first thing is that I understand from Mr. Rokison that he obviously cannot give undertakings that he is going to be an hour or any particular time with his oral submissions. My Lord, he has had an opportunity of looking very quickly through my submissions. My Lord, through an administrative blunder (on my side, I hasten to say, not on the Freshfields side), I have only so far seen the occupational dose submissions. The situation is this: looking at the occupational dose submissions of the Defendants

D MR. JUSTICE FRENCH: Which I have not seen at all.

E MR. HYTNER: My Lord, no. I would have thought ten minutes on my feet orally would do me. My Lord, I have not seen the environmental submissions and I cannot, therefore, give any indication but I doubt whether it will be all that long. Mr. Rokison's present estimate, which, of course, he cannot give with any firmness - my Lord, we all accept this, that these estimates must always depend so largely on what assistance the Court requires - and, my Lord, he has not had an opportunity either of going through them carefully but his present estimate is about two hours. My Lord, it would rather look as though three hours, that is Monday morning, would see the oral submissions through.

F
G However, it is not, in fact, crucial because Mr. Spencer and I have now considered the medical evidence. The first piece of good news is that Prof. Greaves can now make himself available for the whole of Tuesday, not just Tuesday morning. My Lord, Mr. Spencer and I have informally, over the telephone, which obviously can never be firm, run through the list of issues arising out of the medical evidence. My Lord, I have done the same exercise with my solicitor. My Lord, we really need to sit down and formally get a list out and, my Lord, that can be done and then given to your Lordship.

H MR. JUSTICE FRENCH: A list of what, Mr. Hytner?

PROCEDURAL MATTERS

MR. HYTNER: A list of the issues arising out of the medical evidence.

A MR. JUSTICE FRENCH: That is the little bit of medical evidence, or the whole of it?

B MR. HYTNER: Well, no, my Lord. What we are really concerned with is what arises out of the medical evidence as a whole. Now, my Lord, a number of those issues are uncontentious, and a number of the issues are contentious. The contentious issues relate both to epidemiology and genetics and, indeed, to aetiology. My Lord, we are both agreed that it would be of negative assistance to your Lordship if we were to attempt to deal with any of the contentious issues before the epidemiological evidence.

C MR. JUSTICE FRENCH: Well now, are we, for this purpose, lumping in diagnostics with the medical evidence?

D MR. HYTNER: Yes, my Lord. Diagnosis is not likely to be contentious at all, and, my Lord, what we feel is this. It may be of assistance to your Lordship, and this entirely depends upon your Lordship - I personally am of the view that it would be - to have general evidence given, which is descriptive of the cell lineages and the blood system, so that your Lordship has a background knowledge of the general system that we are talking about, together with a description of what leukaemia is, what lymphoma is, and how the various sub-sets of leukaemia and lymphoma inter-relate.

E MR. JUSTICE FRENCH: I will have that, when?

MR. HYTNER: My Lord, Monday/Tuesday, so that you have it before the epidemiology. Tuesday.

MR. JUSTICE FRENCH: Yes, I have read Prof. Greaves with some care.

F MR. HYTNER: My Lord, this is, of course, Mr. Spencer's quarter, and he may well be right and I may well be wrong. If your Lordship has absorbed and understood the background to leukaemia and the general cellular system in Prof. Greaves' report, my Lord, it is not necessary that we give evidence on that at all.

G MR. JUSTICE FRENCH: Yes. As with other witnesses, it is useful to have them there to dot "i"s and cross "t"s.

H MR. HYTNER: My Lord, in that case, if your Lordship would like to do that before the epidemiology starts, that can be done on Tuesday and will be very short, because that is not contentious. My Lord, the diagnosis is unlikely to be contentious, but, if it is, it is only at the very margins.

PROCEDURAL MATTERS

A MR. JUSTICE FRENCH: Can you give me some indication of the area to which the diagnostic aspect relates?

MR. HYTNER: My Lord, there are the various lineages of the cellular system and, my Lord, certainly my evidence will be that diagnosis as to which lineage is involved and which cell is involved will very often depend on whether the pathologist gets there first or the haematologist gets there first.

B MR. JUSTICE FRENCH: That appears from Prof. Greaves.

C MR. HYTNER: Yes, my Lord. So, my Lord, if there are any doubts about the diagnosis, it is likely to be that one doctor thinks he can specify the cell lineage of the leukaemia of Dorothy, and similarly with the lymphoma of Vivien.

MR. JUSTICE FRENCH: In the absence of immuno-phenotypes?

MR. HYTNER: Yes, my Lord.

D MR. JUSTICE FRENCH: Well, that is one of the main difficulties about the diagnosis.

MR. HYTNER: Yes, my Lord, there are various tests at the moment being carried out on some tissues from Vivien Hope.

MR. JUSTICE FRENCH: What, of the Epstein Barr?

E MR. HYTNER: Yes. My Lord, can I just explain about the Epstein Barr?

MR. JUSTICE FRENCH: Yes, of course.

F MR. HYTNER: My Lord, there is no doubt whatever that Vivien has the Epstein Barr virus, as, apparently, 80% of us do. My Lord, the question has arisen, and the Defendants have raised this, as to whether there are clonal signs of Epstein Barr in the tumour, in the lymphoma. My Lord, if there are not, then this issue will probably disappear altogether. If there are, then there may be issues arising out of that which the experts will have to address.

G MR. JUSTICE FRENCH: Can I just follow this? Is it conceived, on behalf of the Plaintiffs, to be in their interests to show that there were signs of EBV in the lymphoma?

H MR. HYTNER: No, my Lord, if the Defendants conceive it to be, as I understand it, it would be in their interests. If I can put it very crudely, if the EVB has invaded the tumour. My Lord, there is no doubt,

PROCEDURAL MATTERS

A as I say, that the EBV is there. It is a question of whether it has invaded the lymphoma and whether there are clonal signs within the tumour. My Lord, as I understand it, they conceive it of assistance to them. My Lord, that is something which our experts are addressing at the moment. We would not necessarily accept that.

MR. JUSTICE FRENCH: Yes. Well, where does all this take you?

B MR. HYTNER: My Lord, where this takes us is that the desire that we had to deal with the submissions tomorrow has disappeared. In any event, I understand that that would have been inconvenient to the Defendants, for very good reasons, and, my Lord, it does not now, it seems to me, put us in any difficulty. We were concerned, obviously, when the belief was that it was going to take a day simply to do one side's oral submissions, because at that stage we thought it was necessary to call medical evidence at some length. My C Lord, for two reasons now the difficulty has disappeared. First of all, that the oral submissions will not take all that long and, secondly, the medical evidence will be very short, if your Lordship accepts the joint view of Mr. Spencer and myself.

D MR. JUSTICE FRENCH: Yes. Well, a thought that has been in my head for some time, and perhaps you can dispel it, is that there might be good sense in your submissions being heard tomorrow, and those of Mr. Rokison on Monday.

E MR. HYTNER: My Lord, the first thing that I wish to say about that is this: that now we have put in our submissions very fully in writing, it now really is for Mr. Rokison to go first. My Lord, I do not make too much of this....

MR. JUSTICE FRENCH: That is agreed, is it?

MR. HYTNER: Yes. My Lord, there it is.

F MR. JUSTICE FRENCH: Sorry, I thought it was datum that you would go first, as you had called no evidence.

MR. HYTNER: My Lord, it is one of those issues which always seems to have more form than substance. My Lord, if it is felt that I should go first, I will go first.

G MR. JUSTICE FRENCH: Mr. Rokison wants to go first. does he?

MR. ROKISON: Not particularly, my Lord. If your Lordship is inviting my comments at this stage, may I deal with matters other than medical, because my learned friend, Mr. Spencer, will deal with the medical issues?

H MR. JUSTICE FRENCH: Yes.

PROCEDURAL MATTERS

A MR. ROKISON: May I just make it clear, that I have never suggested that my oral submissions on dosimetry would take a day. I have never even suggested they would take half a day, although I have indicated that they might. My position has always been that we would set out our submissions as clearly and concisely as we could in a written document, and that we would obviously expect questions from your Lordship, if your Lordship required any further clarification.

B The oral submission would essentially depend on those submissions which my learned friend put in his written document, which, of course, we did not get, and it was the agreed timetable that these would be exchanged by midday today, and I, in fact, glanced through it at twenty-past-12.

C Now, my first blush reaction to that, and it is very much a first blush reaction, because it is 38 pages, and one cannot assimilate that in such a short time, is that I will probably be, say, two to three hours, but certainly nowhere near a day.

D Now, my Lord, I will not be ready to do that tomorrow, I do not think, and quite apart from that, as I explained to my learned friend, we have a rather important witness who we want to see tomorrow who, on the basis of the timetable that we were going to have our submissions on Monday, is stopping off on his way between France and Canada this afternoon, and is going to be available to see us this afternoon and tomorrow. My Lord, it would very, very inconvenient if we could not see him then, because otherwise it would mean that one or more of us would have to go to Canada in order to do that.

E MR. JUSTICE FRENCH: So you confidently expect that it will take more than an afternoon to interview him?

F MR. ROKISON: Absolutely. There is no doubt about that.

G So, my Lord, the position is that I agree with my learned friend that we can comfortably be confident that we will finish our oral submissions on Monday, subject, of course, to your Lordship's questioning. One can never guarantee, but I am confident that that will be the case and, as I understand it, it is now agreed that the medical evidence, such as it is at this stage, can proceed on Tuesday, when all relevant witnesses and those who want to be there to hold Counsel's hands will be available.

H MR. JUSTICE FRENCH: Yes. So you are both confident that the minor medical issue, the diagnostic issue, can be dealt with on Tuesday?

PROCEDURAL MATTERS

MR. ROKISON: May I ask Mr. Spencer to address your Lordship on that?

MR. JUSTICE FRENCH: Yes.

MR. SPENCER: My Lord, yes. The answer to your Lordship's question is yes. Indeed, my Lord, the position is this. Prof. Greaves is now available the whole of Tuesday. There has always been a problem on our side, and that is that Prof. Catovsky is only available Tuesday afternoon. I do not know if your Lordship has had an opportunity to look at his report?

MR. JUSTICE FRENCH: I am about half-way through, I should think.

MR. SPENCER: I am grateful. It is right to say, I think, and it is common ground, that the fullest treatment of the different types of leukaemia and their origins in the blood system is to be found in his report and, therefore, I would anticipate that, in terms of providing your Lordship with this background evidence about the types of leukaemias and lymphomas, he is going to be an important witness. I do not intend in any way to denigrate Prof. Greaves on this, but Prof. Catovsky, I think, is one of the country's foremost experts in this area.

Now, my Lord, I am in agreement with my learned friend that it would not help your Lordship to be going into the contentious areas in relation to the medical aspects of this case at this stage. All your Lordship, I think, will find useful at this stage, will be, as my friend has said, evidence as to the types of lymphoma and leukaemia, how and where they arise, what parts of the lymph and the blood systems that they arise, the types of cells that give rise to them, and then the question of the diagnosis in the two Plaintiff claims before your Lordship.

My Lord, as to the diagnosis point, it is not contentious. If I can summarise it, I think, in this way. As to Vivien Hope, there appears to be no disparity between the parties as to her lymphoma. As to Dorothy Reay, Prof. Greaves says that he is satisfied that she had an acute leukaemia, and that the balance is tipped in favour of being an acute lymphoblastic leukaemia. Prof. Catovsky agrees that far, but goes further. He says that he thinks, from all the evidence, that it was probably an early B-cell acute lymphoblastic leukaemia. So, he goes a bit farther than Prof. Greaves, but I would anticipate that Prof. Greaves would probably not dissent from Prof. Catovsky's conclusion on that.

So, my Lord, that, I think, is likely to be, as it were, the nearest one gets on Tuesday to a contentious issue and is unlikely, I think, to be contentious, and my

PROCEDURAL MATTERS

A learned friend, when we speak tomorrow, as we intend to do, may well be able to help me a little bit further about that. My Lord, just to set the record straight, he and I, when we spoke on the 'phone today, did not, in fact, go through a list of the contentious issues, but we agreed that we should, and we shall do, so that we can be satisfied ourselves that everything can be dealt with on Tuesday.

B The point I am really coming on to is simply this. I personally think that this part of the medical evidence would only take Tuesday afternoon and, as Prof. Greaves can be available Tuesday afternoon, it makes sense for your Lordship to hear it Tuesday afternoon.

MR. JUSTICE FRENCH: Why not Tuesday morning?

C MR. SPENCER: Because Prof. Catovsky cannot be here on Tuesday morning.

D MR. HYTNER: My Lord, I could call Prof. Greaves on Tuesday morning. My Lord, he would still be here over the adjournment and obviously, if he finished early, we could break off; my friend could then discuss with him anything contentious that he wanted to put to him in the afternoon and then there is really no danger of dribbling over.

MR. JUSTICE FRENCH: I am very reluctant, I am bound to say, to abandon Tuesday morning as working time.

E MR. SPENCER: My Lord, I could certainly do that, and there is one other, I think, witness, Dr. Ray Powles, who also considers diagnosis, and he can be here Tuesday morning as well and, if it is necessary, we could call him and, I think, get him out of the way Tuesday morning.

F MR. JUSTICE FRENCH: Yes. Then as far as you and Mr. Rokison are concerned on the one hand, and as far as Mr. Hytner and his team are concerned on the other hand, there are strong arguments for not embarking upon submissions tomorrow, perhaps very largely because of your desire to interview Prof. Catovsky?

MR. ROKISON: No, it is not Prof. Catovsky, it is our Canadian witness, my Lord.

MR. JUSTICE FRENCH: Your Canadian witness?

G MR. ROKISON: Yes, who is coming in this afternoon from Lyon. But, my Lord, it is not just that. It is also the fact that I do not think it would be, with respect, very efficient, simply because I have just received, literally, as I said, almost exactly an hour ago - that is not a complaint, that was in accordance with the agreed timetable - my learned friend's written submission.

H

PROCEDURAL MATTERS

A MR. JUSTICE FRENCH: I understand you have got to read it and digest it.

MR. ROKISON: And if I am going to make sensible and economic comments....

MR. JUSTICE FRENCH: No, I follow that perfectly well. However, that could have been coped with, had it otherwise been desirable, by you doing so over the weekend.

B MR. ROKISON: But I could not then have made my submission tomorrow, my Lord.

MR. JUSTICE FRENCH: No, I was thinking of Mr. Hytner's submissions.

C MR. ROKISON: Oh I see. Oh, I quite agree. If Mr. Hytner were to go first, if he were in no difficulty, although it is true to say he has not yet, because it has not been passed on to him by his instructing solicitor, seen what we say in our written submission in relation to the environmental dosimetry, but if he feels he could deal with it tomorrow, so be it. I mean, I would actually rather hear what he says, and if we are confident we can get through it on Monday, in circumstances where unless I see our Canadian witness tomorrow I may very well have to fly off to Canada in order to see him, which seems really rather pointless in circumstances where he is going to be in London.

D I would respectfully suggest that - after all that date, when we last were before your Lordship, I think it was agreed by everybody that we should make our submissions in relation to dosimetry on Monday, having exchanged our written submissions at lunchtime today. The only reason why anybody suggested that that might be brought forward to tomorrow, was because of the hiatus which had arisen in relation to the medical experts, who it seemed could not all be here at the same time. Since that has now been resolved, I would respectfully suggest that there really is no point in causing inconvenience by our having our submissions tomorrow rather than Monday.

E MR. JUSTICE FRENCH: Yes. What was in my mind was largely the assurance as to the brevity of the submission.

F MR. ROKISON: Yes, I see that. I appreciate your Lordship's point. I see that, but I am pretty confident that that will not be a problem.

G MR. JUSTICE FRENCH: Well, I hope it will not be either.

H MR. ROKISON: I cannot give your Lordship an undertaking.

PROCEDURAL MATTERS

MR. JUSTICE FRENCH: Of course you cannot.

A MR. ROKISON: Well, I am glad your Lordship adopts that attitude, because I cannot know, because I do not know what your Lordship may put to me.

MR. JUSTICE FRENCH: No, but the more you say that, the more I am inclined to say we will hear Mr. Hytner tomorrow.

B MR. ROKISON: Well, I wonder whether we might compromise? Obviously we want to be as co-operative as possible to your Lordship and to my learned friend. I mean, if it would be of assistance, if my learned friend were to make his oral submissions tomorrow afternoon, so that I would at least have the morning with my Canadian witness, and then I could make my submissions on Monday morning, I would agree to that - it is not my position to agree, your Lordship can direct anything - but all I am saying is that it would be very, very inconvenient if your Lordship were to say, "You have got to be in Court tomorrow morning", because we made our arrangements on the basis that we were going to be making our submissions on Monday.

D MR. JUSTICE FRENCH: Yes. Well, thank you, Mr. Rokison. Do you want to add anything?

E MR. HYTNER: Well, my Lord, all I can say is this. This case is going to last several months. Sensible parties always realize that the difficulties of the other party may be replicated on their own side in due course. There may well be times when we need to see witnesses from abroad, and will be coming to ask for mercy. Therefore, there is no way in which I am going to put Mr. Rokison into difficulties tomorrow. My Lord, I am content to make my oral submissions tomorrow afternoon.

F MR. JUSTICE FRENCH: Yes. Thank you. Well, I think as both your sets of submissions are going to be in writing, and taking the gloomiest possible view, and having regard to the evidence before the Court, I do not see how it can possibly be a very lengthy exercise. My inclination is to leave matters as they are, and I will hear submissions on Monday.

G However, I think one thing ought to be made quite clear, having regard to the terms of Messrs. Leigh, Day's letter, and I do not say this by way of criticism at all, that it must be clearly understood that any alteration of a timetable must be the subject matter of a formal application - though letters which alert the Court to the nature of the matter, of course, are most helpful, because then one knows what the subject matter is. But it must not be thought to be implicit in the writing of the letter that it is any substitute for a formal application. I hope that will be clearly understood.

H

PROCEDURAL MATTERS

Well, I am grateful to you all for your help. We can now see where we are hoping to go. The only alteration I propose to make, is to say that we will sit at 10 o'clock on Monday, and not at 10.30. Thank you.

(Court adjourned until 23rd November, 1992)

A

B

C

D

E

F

G

H