HIV and blood transfusions

David Hirsch, Sydney

David Hirsch

The discovery in late July that a Melbourne school girl was infected with HIV from a blood transfusion caught the country by surprise. The risk was said to be "one in a million".

Most would have thought it impossible that such a thing could occur after the implementation of the rigorous blood-screening procedures in Australia in the mid-1980s.

But the child's father, who is a medical practitioner, obviously recognised the inherent risks of anonymously-donated blood. He requested that a family member be allowed to make a "directed donation" for his daughter's operation. The request was refused by those responsible at the Royal Children's Hospital citing a policy against such donations.

The child received blood donated by an anonymous but regular blood donor. The donor presumably denied any risk behaviours in the mandatory questionnaire answered by all prospective donors. The blood was screened before being cleared for transfusion. The donation was contaminated but the screening process then used was unable to detect the virus.

The donor's own recent HIV infection was discovered soon after the donation was made and this was followed by an alert by the donor to the Red Cross. The blood donation was followed up but, regrettably, too late to stop the transfusion to the girl.

The girl's father told the media that he did not blame the donor or the Red Cross for what had happened. He was understandably (and in my view rightly) concerned at the prospect of people losing faith in the integrity of the blood donation system. But the father questioned the policy against directed blood donations.

The rationale against directed blood donations generally is sound and supported by medical evidence: directed donations are no guarantee against infection with blood-borne diseases and may even be more dangerous than anonymously donated blood. A major concern with directed donations is that persons may feel obligated to assist due to their relationship with the patient (as a family member or friend) and there would be some pressure on that person not to disclose risk behaviours which would otherwise disqualify them from making a donation.

Rivkin's new career – financing litigants

Andrew Burrell and Chris Merritt

Flamboyant Sydney stockbroker and businessman Mr Rene Rivkin has entered into his first contract to finance a major court case in return for a percentage of any winnings, in a move that could revolutionise Australia's legal system.

After a year spent examining hundreds of potential test cases, Mr Rivkin's latest money-making venture, Justice Corporation Pty Ltd, has signed an agreement with a Queensland entrepreneur who is suing law firm Clayton Utz for negligence.

The agreement paves the way for a possible test case in the Federal Court within weeks on whether private financiers can fund court cases in return for a percentage of any damages.

Mr Rivkin must prove to the court that his controversial business plan is legal. He has hired one of Australia's most senior barristers, Mr Tom Hughes QC, to run the case.

Justice Corporation – which has received more than 2,000 applications from potential clients in the past year – wants to fund civil litigation from start to finish, brief specialist lawyers and pay all the costs if they lose in court.

The plan is closely related to US-style contingency fees. Its detractors, including many leaders of the Australian legal profession, fear it will lead to a litigation explosion.

If Justice Corporation is successful in its test case, it believes it can fill part of the big hole left by cuts to legal aid.

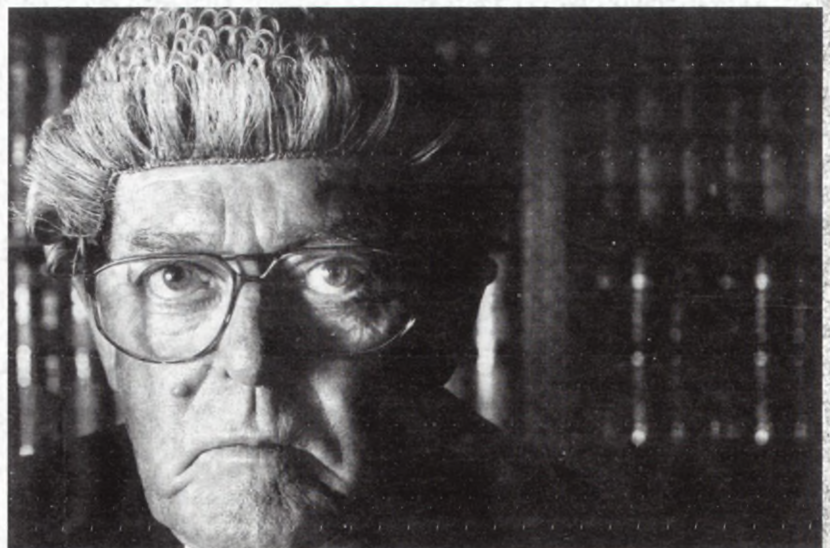
It would also allow other financiers to enter the market and could swing the balance of power in civil litigation toward small litigants, who would gain access to much more legal firepower.

But in a strange twist, the test case could be thwarted if Clayton Utz decides not to challenge Justice Corporation's involvement in the matter, thereby denying the financier a ruling from the court.

"If they don't challenge it, then perhaps Clayton Utz, despite their extensive commercial client base, are saying that they are happy to see us in business," said Justice Corporation's managing director, Mr Andrew Rayment.

Mr Brian Bartley, a solicitor with Corrs Chambers Westgarth, which represents Clayton Utz in the case, said no decision had been made on whether the application by Justice Corporation to fund the rest of the litigation would be opposed.

Mr Rivkin's company has signed a financing agreement with a young Queensland entrepreneur, Mr Paul Montague Williams, who literally lost a gold mine due to the negligence of Clayton Utz.



Mr Tom Hughes QC will take the first case for Mr Rene Rivkin's Justice Corporation.

Clayton Utz has already been found liable and the only question now is how much it has to pay.

But even though Mr Williams' corporate vehicle, Montague Mining Pty Ltd, had already won the main argument, the case was about to collapse due to lack of funds.

Although his solicitors, Cashman & Partners, had agreed to run the case on a "no-win, no-fee" basis, Mr Williams still had to find big amounts of money for the disbursements to other parties.

Mr Rivkin's company has now agreed to pay those disbursements and, in return, Justice Corporation wants 8 per cent of the verdict.

Clayton Utz was officially informed about Justice Corporation's involvement last month and the issue will now go to Justice Murray Wilcox for a directions hearing in the Federal Court on July 15.

A full hearing on damages has been set down for October 18.

The legal profession has not welcomed Mr Rivkin's venture into financing litigation, saying it is not needed and will lead to a US-style system of contingency fees.

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In cases involving children, however, that rationale seems a bit unrealistic. Where a parent wishes to make or arrange a directed donation for his or her child one would expect that under no circumstances would the parent allow this to proceed if there was a perceived "real risk". The fact that the child's father was a doctor can be taken as an implicit recognition of a risk with anonymous donations which he sought to reduce with a directed donation. In the end the policy prevailed and the directed donation was refused.

In the aftermath of this tragic case it was discovered that not all hospitals shared the same view about directed donations involving children. Some reasonable hospitals, therefore, considered that the risks of a directed blood donation were not so great as to warrant their prohibition. It was recently announced that the hospital in question will not permit directed donations for children.

This case raises interesting legal, practical and political issues.

All jurisdictions have passed "blood shield" legislation which protects blood banks, hospitals and doctors from civil suit where a blood donation is taken in accordance with the relevant regulations. This involves the provision of a pre-donation questionnaire which aims to identify "high risk" donations and the subsequent testing of donated blood. It would appear that in this case the regulations were followed and there would be statutory immunity from suit.

But this case is less about a contaminated donation falling through the net as it is about a policy which prevented a directed blood donation to a child. The fact that other hospitals would have permitted the donation to go ahead argues against the policy being "reasonable". And it would be easy enough to establish in retrospect that, had the intended directed donation been given in this case, the child would not have become infected.

It is certainly arguable that a doctor or hospital has a duty to advise a patient of the availability of other sources of transfused blood - directed or autologous donation. The failure to advise of this opportunity to reduce the risk of receiving contaminated blood might ground a claim in negligence in the event of a contaminated transfusion being given. But in this case the father was a doctor. He knew the existence of the risk and the options to reduce it. The situation may be different for the less well-informed.

"The rationale against directed blood donations generally is sound and supported by medical evidence: directed donations are no guarantee against infection with blood-borne diseases and may even be more dangerous than anonymously donated blood"

The upshot of this case and the public reaction to it is likely to be a politically-driven decision to implement even more sensitive blood screening which would reduce the "window" period during which a new HIV infection would not be detected by the screening system. This would be a costly exercise which might half the chances of this "one in a million" event from occurring again.

In a cash-strapped health care system one could well ask whether this precaution is worth the price. But faced with the prospect of a child becoming infected with HIV this economic rationalisation of risk is a politically unpalatable position to maintain.

When screening systems fail there is invariably a call for legal redress. These cases can be difficult to run even without obstacles like "blood shield" legislation. So far there is no indication that legal action will be taken and one has to ask whether, in the circumstances of this particular case, legal action would be advisable.

This unfortunate case is a sobering reminder that screening programs are not foolproof. Mammograms, pap smears and other screening measures are designed to reduce morbidity from non-iatrogenic illnesses. Still, there will be cases which fall through the net.

The law may not always be there to catch them. ■

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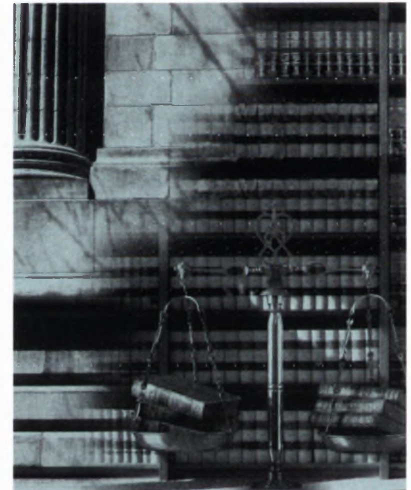

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