AS TO THE ADMISSIBILITY OF

Application No. 28641/95
by Patricia A. TAYLOR
against the United Kingdom

The European Commission of Human Rights (First Chamber) sitting in private on 9 April 1997, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
L. LOUCAIDES
B. MARXER
B. CONFORTI
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
M. VILA AMIGÓ
Mrs. M. HION
Mr. R. NICOLINI

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 10 May 1995 by Patricia A. TAYLOR against the United Kingdom and registered on 21 September 1995 under file No. 28641/95;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a British national born in 1941. She is a housewife and resides in Trollhättan, Sweden. She claims to be suffering from a form of arachnoiditis, a disease causing severe pain in the back and legs, as a result of myelograms she underwent in which Myodil, a spinal dye, was used.

The facts of the case, as submitted by the applicant, may be summarised as follows.

A. The Myodil litigation in general

When the potential link between Myodil and arachnoiditis was realised, civil proceedings for negligence were instituted against Glaxo Laboratories Ltd (hereinafter Glaxo), the manufacturers of Myodil, and the Health Authorities of England and Wales.

On 19 December 1991 the High Court of Justice gave permission to the plaintiffs in the action against the Health Authorities to discontinue the proceedings before 15 January 1992. The court decided that it would not make any order as to costs for plaintiffs who discontinued before

that date. It also ordered the Health Authorities to continue to supply copies of their medical records to the plaintiffs or potential plaintiffs in the proceedings against Glaxo.

The proceedings against Glaxo were organised as follows. There was the generic claim concerning the liability of Glaxo for damages caused through arachnoiditis being brought about by Myodil myelography. All the plaintiffs were parties to this claim which was conducted as a group action by a Steering Committee designated by the Group of Solicitors involved in Myodil litigation. In addition to the generic claim, there was a series of individual claims as to whether each plaintiff was suffering from Myodil induced arachnoiditis. These were handled by each plaintiff's solicitors.

The statement of claim in the generic action and Glaxo's defence thereto were served before the end of June 1992. By the same time, the consultants of the Steering Committee of the Myodil Solicitors Group had met with the consultants of Glaxo and had agreed on "the essential diagnostic criteria for Myodil-induced symptomatic arachnoiditis" (hereinafter "the essential criteria").

It appears that the High Court judge appointed to hear the litigation issued an order approving the essential criteria. Only the persons who satisfied the essential criteria were admitted to the litigation and were allowed to lodge individual claims. As agreed between the Steering Committee and Glaxo, each potential plaintiff would be examined by a neurologist who would provide a clinician's report. Where appropriate the neurologist would refer the potential plaintiff to a radiologist or neuro-radiologist to undergo a Magnetic Resonance Imaging (hereinafter MRI) scan.

The essential criteria were clinical and radiological criteria. The patient should have been injected with Myodil. There should be radiological evidence of arachnoiditis not just at the site of the initial pathology or surgery, but also at other levels. There should have been no other exclusive cause for arachnoiditis. Finally, the symptoms and clinical findings should match the anatomical distribution of the arachnoiditis which had been demonstrated radiologically.

A number of potential litigants who had been granted legal aid limited to all steps up to but excluding the issue of proceedings and who were found not to satisfy the essential criteria agreed to have their legal aid certificates "discharged". According to the rules governing the granting of legal aid by the Legal Aid Board, persons who have their legal aid certificate "discharged", are covered by legal aid up to the date of the notice of "discharge". A "discharge" of a legal aid certificate is to be distinguished from its "revocation". If a legal aid certificate is "revoked", it is as if the person concerned never had legal aid. As a result, the person concerned has to bear the full cost of the work done under the "revoked" certificate.

On 23 November 1992 a directions hearing took place at the High Court. The judge instructed that all individual claims had to be notified to Glaxo by 1 February 1993 and that the court proceedings had to be served by 1 March 1994. The general claim was to be heard in October 1994.

The deadline for serving the individual claims was subsequently extended to 1 September 1994 and the hearing of the generic action was adjourned until 26 April 1995. On 21 December 1994 the court ordered a further adjournment until October 1995 in the generic action. In January 1995 the court authorised the belated serving of additional individual claims. The Steering Committee promised that it would seek no further extension in respect of individual cases.

In March 1995 Glaxo and the Steering Committee exchanged expert evidence. On 5 July 1995 Glaxo made an offer to settle the action which

the Steering Committee advised the plaintiffs to accept. On 31 July 1995 the judge approved the settlement terms.

It is not clear whether a second action was ever brought by persons who were found not to fulfil the essential criteria.

B. Circumstances particular to the applicant's case

The applicant had two myelograms in 1974. On 5 July 1991 the applicant had an MRI Scan. On 13 July 1992 she was examined by a specialist with a view to participating in the group action against Glaxo. Her solicitors considered that the specialist's report was one of the most clear-cut that they had seen, since the consultant had without reserve confirmed that the applicant was suffering from Myodil induced arachnoiditis. As a result, they issued a writ on her behalf.

The applicant's case was subsequently reviewed by counsel who expressed some concern that the site of arachnoiditis had not been clearly identified. On 20 May 1994 a second specialist advised the applicant's solicitors that her case needed further consideration. In October 1994 counsel advised that the applicant should have a second MRI scan. The applicant underwent such a scan on the basis of which the second expert considered that there was no evidence of arachnoiditis which would fall within the essential criteria. On 28 December 1994 a third specialist issued an opinion favourable to the applicant's case.

On 15 January 1995 counsel advised that the applicant did not fulfil the essential radiological criteria. On 18 January 1995 the applicant's solicitors advised her to withdraw from the litigation and proposed to reach on her behalf an arrangement with Glaxo concerning costs. According to the proposed arrangement, Glaxo would pay their own administrative costs and would not seek to enforce any generic costs order against the applicant. The applicant agreed.

On 28 April 1995 her solicitors asked her to pay them by way of costs and expenses £3,465.37 in instalments.

In a letter to the applicant dated 28 July 1995 Dr B, an arachnoiditis specialist from the United States, criticised the second United Kingdom expert's opinion in rather strong terms.

COMPLAINTS

The applicant complains that she was not allowed to take part in the Myodil litigation. She argues that the essential criteria were unduly restrictive. She does not invoke any provisions of the Convention.

THE LAW

The applicant complains that she was not allowed to take part in the Myodil litigation.

The Commission considers that the applicant's complaint should be examined under Article 6 para. 1 (Art. 6-1) of the Convention which provides that "in the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by a tribunal established by law." In accordance with the Court's case-law, this provision guarantees the right of access to a court, i.e. the right to have a claim relating to civil rights and obligations brought before a court or tribunal (Eur. Court HR, Golder v. United Kingdom judgment of 21 February 1975, Series A no. 18, p. 18, para. 36). Moreover, there can be no doubt that the applicant had a claim for compensation against Glaxo which was of a civil nature.

The Commission notes that the main thrust of the applicant's complaints is that the essential criteria were unduly restrictive and it recalls that these criteria were agreed by the Steering Committee of the Myodil Solicitors Group, which was conducting the group action, and the

defendants, Glaxo. However, it would appear that the essential criteria were also approved by a court order. As a result, the Commission is prepared to assume that the responsibility of the United Kingdom under the Convention could be engaged.

However, the Commission considers that Article 6 para. 1 (Art. 6-1) does not preclude the authorities from deciding various issues affecting participation in a group action on the basis of criteria established with the agreement of the defendant, provided that the criteria are reasonable and that potential litigants who do not fall within the criteria preserve the right to sue independently.

The applicant has not established that the criteria agreed between the Steering Committee and Glaxo were unreasonable. Moreover, the decision to withdraw from the group action was taken by the applicant herself after she had obtained expert medical and legal opinion on her prospects of success, always with reference to the essential criteria. It also clearly emerges from the applicant's submissions that persons who were excluded from the group action did not automatically lose the possibility of suing Glaxo independently.

The Commission is, of course, not unaware of the financial implications of such a course of action. Moreover, the applicant appears not to qualify for legal aid according to domestic law. However, the Commission recalls that, in accordance with its case-law, the unavailability of legal aid for the institution of civil proceedings does not always raise an issue under Article 6 para. 1 (Art. 6-1) of the Convention. The prospects of success of the intended proceedings need to be taken into consideration (No. 8158/78, Dec. 10.7.80, D.R. 21, p. 95; No. 10871/84, Dec. 10.7.86, D.R. 48, p. 154; No. 10594/83, Dec. 14.7.87, D.R. 52, p. 158). However, the applicant has not taken any steps towards the institution of such proceedings and, as a result, it is difficult, if not impossible, for the Commission to assess what the prospects of success of an independent action against Glaxo would have been. The Commission, therefore, considers that, in these circumstances, the applicant cannot claim that the inevitable consequence of exclusion from the group proceedings was inability to sue.

It follows that no appearance of a violation of the applicant's right of access to a court under Article 6 para. 1 (Art. 6-1) of the Convention is disclosed. The application, therefore, must be rejected as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO	J. LIDDY
Secretary	President
to the First Chamber	of the First Chamber