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PS/SoS
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RH

From: Ronald Powell SOLB3

Date: 23 October 1990

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HIV HAEMOPHILIAC LITIGATION : PUBLIC STATEMENTS

1. I thought it might be useful if I set out in one place what Ministers can or ought not to say in public. I have discussed the matter generally with Counsel, Justin Fenwick.

2. Care needs to be taken over public statements because Ministers need to avoid:-

a. committing a contempt of Court;

b. stating facts which though believed to be accurate at the time, we may later find to be inaccurate; and

c. prejudicing our standing with the Judge.

3. Counsel's advice in general terms is that it is open to Ministers to state in public what the Government's case is but that they should not go into the facts any further.

CONTEMPT OF COURT

4. It is a contempt of Court to publish a statement which creates a substantial risk that the cause of justice in proceedings that are active will be seriously impeded or prejudiced (Contempt of Court Act 1981 s.2(2)). Proceedings are "active" from the time when arrangements for the hearing are made. The hearing date has been set for these proceedings so there can be no doubt that they are "active" for these purposes.

5. Prejudice may be by influencing the tribunal (in this case the Judge) or by putting pressure on parties. An example of the latter is inciting public opinion against a party so as to affect his conduct of the case or the assertion of his rights.

6. I think there is little likelihood of any public statement creating a substantial risk of seriously impeding or prejudicing these proceedings by influencing the Judge. Rather, it seems to me that the risk is that public statements which go into the factual basis upon which we assert that the defendants were not negligent, will be seen as trying to influence the plaintiffs in the conduct of their case by trying to persuade them to withdraw. However there has to be a substantial risk of serious prejudice. Plainly statements about the case can therefore be made, provided the risk they create is not substantial or the possible prejudice serious. It may well be (and there is some authority for this) that what will be important is the way the statement is made, not merely its content. The risk of committing a contempt can be lessened if statements are,in the words of the leading case on the subject, fair and temperate. References to the plaintiffs taking or continuing Court proceedings should for example, be qualified with comments that the proceedings are ones that of course the plaintiffs are perfectly entitled to take. There is a plain risk however that raising factual issues may provoke an emotional and ill-considered response from those whose sympathies lie with the plaintiffs. Being drawn into a debate of such a tone must be avoided.

7. Generally the consent of the Attorney-General is needed to the institution of proceedings for contempt of Court in these circumstances. In any such proceedings it is a defence to show that the statement was made as or as part of a discussion in good faith of public affairs or other matters of general public interest and if the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion.

8. If the Court is satisfied that on the face of it a particular statement is a contempt, it will be easier to justify the defence of discussion in good faith and merely incidental risk, if the statement was restrained.

POSSIBLY INACCURATE FACTS

9. Apart from the question of contempt the main practical risk involved in mentioning facts, is that something may be said now in good faith, that subsequent research indicates to be inaccurate. Parties to Court proceedings frequently try to take advantage of apparent inconsistencies in the other party's case and we must fully expect that to happen here. We can avoid that problem by saying little about the facts until the hearing itself when they will all have been properly researched.

PREJUDICING OUR STANDING WITH THE JUDGE

10. This is not an unimportant consideration. Counsel has from the very outset of the case advised that we should do everything we could to keep ourselves in the Judge's good books. Too deep and public a discussion of the issues he may have to decide, may not please him.

PARLIAMENTARY PRIVILEGE

11. As regards proceedings in Parliament (and this covers both debates and oral and written questions) they are covered by Parliamentary privilege and nothing said can form the basis of a contempt of Court. However, there is no reason why facts stated in Parliamentary proceedings should not later be relied on to show inconsistencies in our case. There are some restrictions on the extent to which the record of Parliamentary proceedings can be used in Court proceedings but those restrictions do not in my view apply here.

MORAL ISSUES

12. What I have said above of course applies only to statements which are about the legal issues involved in the Court proceedings. The moral obligations are outside the Court proceedings completely and it seems to me that a discussion of these could not amount to a contempt of Court or in any other way prejudice our position.

GRO-C

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