

Mr J Canavan
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Rm X505 EH

From: Ronald Powell Sol C3
Date: 13 September 1989

cc: • Dr Rejman
Mrs Armstrong

HIV HAEMOPHILIAC LITIGATION: DISCOVERY OF DOCUMENTS

1. I have already sent you a copy of Pannone Napier's letter to Treasury Solicitor of 11 August, concerning discovery. Treasury Solicitor has replied to the letter saying that we are not prepared to make voluntary discovery of documents and that an order must be obtained.
2. The question now arises as to the extent to which we should agree to an order being made.
3. Normally the process of disclosing relevant documents takes place at a much later stage in the proceedings - after the completion of the formal exchange of documents such as the Statement of Claim, Defence and so on. Discovery will be sought at an earlier stage in these proceedings however, for the reasons given in Pannone Napier's letter of 11 August.
4. Whenever discovery takes place, the parties concerned must first of all list all documents they have. You must disclose every document you have in your possession, whether you are bound subsequently to produce it or not.
5. We shall end up with a list of documents identifying what they are, their date, and the parties involved but not of course listing the contents.
6. All those documents can then be inspected by the other parties and copies taken (for which they must pay) unless the documents are subject to some form of privilege. The main relevant heads of privilege so far as this action is concerned, will be legal professional privilege, and public interest immunity.
7. The Department will not be bound to produce copies of documents passing between administrators and legal advisers nor will it be bound to produce copies of documents which were put together with a view to or for the purposes of the litigation, even though they do not involve legal advisers.
8. As regards "Crown privilege" (public interest immunity) any document may be withheld (or indeed an answer to any question in court may be refused) on the ground that the disclosure of the document or the answering of the question would be injurious to the public interest. A claim to public interest immunity is usually made by a Minister in the form of a certificate.

9. The decision whether to allow or reject a claim to public interest immunity, and if so to what extent, is however the decision of the court and the view of the Minister that the production or disclosure of documents or information whether because of their actual contents or because of the class of documents to which they belong, is not conclusive. The court is entitled to see the documents before deciding whether to order production or not.

10. The court will more readily uphold an objection on the ground of the particular contents of the document and if such a privilege is claimed, then the certificate need not go into detail as to the contents of the document.

11. But where the Minister raises the objection to production on the ground that the documents belong to a class the production of which would be injurious to the public interest, the certificate must describe in some detail the nature of the class and the reasons why the documents should not be disclosed. In deciding this issue, the proper test to be applied is whether the withholding of a document because it belongs to a particular class is really necessary for the proper functioning of the public service, and the term "public service" in this context is not to be construed narrowly.

12. The public interest immunity claim will not be allowed simply because documents are state documents or official documents or marked "Confidential", nor will it be allowed just because the consequences of production of the documents might result in Parliamentary discussion or public criticism or expose inefficiency or lead to claims for compensation. The documents will only be withheld where for example the practice of keeping a class of documents secret is necessary for the proper functioning of the public services. Documents which ought not to be disclosed for this purpose whatever their contents are for example Cabinet minutes and the like (at least until such time as they are only of historical interest) documents which concern the inner workings of the Government machine or the policy making within Departments and possibly also deliberations about a particular case.

13. Referring now to Pannone Napier's letter of 11 August, of the documents identified in heads (a) to (j) it seems to me that those in (e), (f) and part of those in (g) are not for us but are for Medicines Division to decide about.

14. Of the remainder it seems to me that those in paragraphs (a), (b), (c), (d), (h) and (j) are not privileged and should properly be disclosed.

15. It seems to me however, and Treasury Solicitor agrees, that those in (i) would be subject to public interest immunity and should not therefore be disclosed.

16. If this is agreed, then the process of the plaintiffs obtaining an order will be much curtailed and time saved thereby. It would be quite possible that an order for discovery in these terms could be made on 23 October.

17. I ought to mention, that it does seem to me both from the type of documents referred to in Pannone Napier's letter, and also from the text of their letter itself (in paragraph 6 they say why they want early discovery) that this will not be the end of the discovery process. Here they are only asking for particular types of documents to enable them to give further consideration of the nature of the allegations that they are making against the various defendants. Under an order for discovery in these terms there would be no general discovery of Departmental minutes for example, that did not lead to Ministerial briefing. I imagine it is their intention later on in the litigation - at the normal stage at which discovery takes place - that they would expect disclosure of all other documents in the Department's possession.

18. Given that the Department does not wish to be seen to be deliberately slowing down the pace of the litigation there are advantages obviously in agreeing to an order for discovery as requested at this stage. It is likely that such an order would be conditional upon the plaintiffs giving undertakings (a) to (h) as on the attached order in the case of Hamilton.

19. I would be grateful if you could let me know in due course whether or not the Department is prepared to agree to an order as requested.

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