LIE 10

CD-29JUN

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From: J C Dobson
EHF1
Date: 2 July 1990

cc: Mr Heppell PG
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HAEMOPHILIACS : AIDS LITIGATION

1. Some of you will already be aware of the suprising turn of events in the AIDS litigation, with the trial judge issuing a written statement inviting the parties to consider an out-of-court settlement. We are seeing Counsel on Wednesday to discuss more fully, but as we will need to get a submission up to Ministers very soon after that I have decided to attempt a first draft which is attached. (Perhaps I should say that I have written it in the expectation that Counsel will favour attempting an out-of-court settlement.) I would be grateful for any comments on the substance of the paper as soon as possible, and on the detailed drafting by close of play on Thursday (5 July). If the meeting with Council introduces some important new arguments, I will then circulate a further draft with the aim of getting the final version into Ministers' boxes on Friday.

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DRAFT

1. Mr Davey PS to MS(H)
2. Mrs Shirley-Quirk APS to SofS

From: J C Dobson
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Date: 2 July 1990

cc: Mrs Baldock PS to PS(L)
Dr McInnes PS to CMO
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HAEMOPHILIACS : AIDS LITIGATION

This submission invites Ministers to review the tactics in the legal action involving HIV-infected haemophiliacs in the light of:

(i) a statement from the judge, Mr Justice Ognall, inviting the parties to consider an out-of-court settlement (Flag A)

(ii) advice from Counsel (Flag B)

(iii) a submission from RMOs critical of the Government's present stance (Flag C).

Leading Counsel, Mr Andrew Collins, stands ready to advise Ministers further on the next steps.

The Judge's Statement

2. The statement from Mr Justice Ognall, the trial judge, starts with what appears to be a broad hint that the Plaintiffs will have great difficulty in winning their case. He then goes on to argue that the government, irrespective of any question of negligence, has a moral duty to take into account the particular circumstances of the plaintiffs - in particular the fact that they have suffered for no fault of their own "under the aegis" of NHS treatment, and that many will die before the litigation is resolved. He suggests that the law should not "be made a scapegoat" for what may be seen as a denial of plaintiffs' just rights. Finally, he invites all parties to consider a compromise and offers to help, for instance in determining the quantum of any compensation.

3. Our tactics so far are based on the calculation that:

i) the Government has a good chance of winning the case - partly on the grounds that the courts should not, as a matter of principle, attempt to "second-guess" Ministers' decisions on matters of policy such as resource allocations; and partly on the grounds that Government action at every stage was reasonable in the light of the state of medical knowledge at the time;

ii) if we settle too early it will raise expectations that Government will be prepared to give substantial compensation in any similar case in which NHS patients suffer as an unintended by-product of their treatment. In effect, we would be opening the gates to the principle of no-fault compensation without any rational debate of its merits.

The Government has therefore made clear that it denies liability and will fight the case on its merits.

4. The judge's statement gives unexpected confirmation of (i). Of course, the legal action is still at a fairly early stage - for instance, the judge has not yet seen submissions from the expert witnesses on either side - and the crucial passage in the statement is carefully worded. But it is clearly intended as a warning to the plaintiffs not to overestimate their chance of success.

5. However, the statement also emphasised the high costs, political as well as financial, if the current tactics fail. Mr Ognall has made it clear that his sympathies are with the plaintiffs and - if they manage to put a convincing case together - that must increase the likelihood that he will decide in their favour and that any award would be very expensive. Even at this stage, if the substance of the judge's comments are leaked (as is only too likely, since all the plaintiffs' solicitors now have them) that will increase the public pressure on the government to act.

Counsel's Advice

[6. To follow.]

The Submission From RMOs

7. Following a difficult meeting earlier this year CMO invited RMOs to put their concerns in writing and the result is at Flag C. RMOs argue that the HIV-infected haemophiliacs are indeed a special case and that, irrespective of the merits, fighting on uses up scarce resources of NHS senior management time. But their paper contains no convincing analysis of the possible knock-on effects of offering a concession now.

Discussion

8. Ministers may well conclude that neither Mr Ognall's statement nor RMOs' submission significantly changes the balance of the arguments between the current policy of fighting on and the alternative of seeking an out-of-court settlement. If the statement leaks and there is renewed pressure on the Government to take a more compassionate stance, we would stand by the argument that the Government has already shown it compassion by the £20,000 lump sum and by promising that the original McFarlane Trust will receive the funds it requires to meet genuine cases of financial need. In addition, we could point out that Mr Ognall's reasons for urging compassion are in fact very general and would (if accepted) justify introducing the principle of no-fault compensation for a wide variety of medical accidents. It would be wrong - so we might argue - for Government to overturn the conclusions of the Pearson Commission simply on the basis of one man's opinions in a particular case.

9. If, however, Ministers feel that the time has come to entertain the possibility of a settlement, we would need to consider how best:

(i) to limit the immediate costs;

(ii) to reduce the risk of knock-on effects.

On (i), a possible approach would be to indicate to the plaintiffs that Ministers were prepared to consider a settlement on a 'no fault' basis, but that we would expect the quantum to be similar to the amounts typically offered in countries that run no fault compensation schemes, rather than the amounts awarded in litigation cases. That might suggest an opening bid of say £30K per family (ie £10K more than the lump-sum already awarded) with a bottom line of £50K per family. If the plaintiffs are sufficiently dismayed at the judge's comments on the difficulty of their winning the case, such a settlement might now be attainable. On (ii) the best hope might be to agree a form of words with the plaintiffs and with the judge which emphasised the unique nature of the haemophiliacs' case and asserted that it should not taken as a precedent for other types of medical accident. (Whether such a statement would do much to lower expectations is doubtful.)

10. A more radical alternative would be to offer haemophiliacs a sum on account - say £10K extra per family - but to invite a small (say 3-man) commission to consider:

(i) whether the case for a general no-fault compensation scheme has altered since the time of the Pearson Commission;

(ii) if not, whether the haemophiliacs are a sufficiently special group to justify some form of compensation; and in either case

(iii) what might be the basis for settling the amount of compensation.

This approach would at least ensure that the problem of the haemophiliacs was seen in its wider context.

Conclusion

[11. Officials believe that to offer an out-of-court settlement to this particular group, without any effective way of avoiding creating a precedent for other groups, would be the worst of all worlds. We therefore advise that Ministers should continue with their present tactics and fight on. If, however, the political cost is judged too high we suggest as a serious alterative the setting up of a commission (para 10) coupled with payment of a sum on account. This could be presented as a principled attempt to solve a very difficult ethical problem while giving immediate relief to a group which has won great public sympathy.]

12. Ministers may wish to hear Counsel's advice at first hand before deciding.