CD-3SEPT

Mr Powell SOLB3
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From: J Canavan
EHF1A
Date: 3 September 1990

Copies: Mr Heppell PO
Mr Dobson EHF

HAEMOPHILIA/HIV LITIGATION

I enclose for comment two draft letters on litigation issues based largely on drafts provided by Counsel.

The first letter (Annex A) conveys the Secretary of State's decision on an out of court settlement and sets out the reasons for refusing to compromise the litigation. As some of you will know Counsel has suggested that the letter should be addressed to Treasury Solicitors as our instructing solicitors and signed by the Permanent Secretary. It would then be passed to the Judge through Counsel and copied in confidence to the Plaintiffs' Counsel.

The second letter (Annex B) is intended to underline the possible cost consequences for the Plaintiffs if we have to defend against the whole range of their allegations. Counsel would like to try and get the plaintiffs to remove hopeless allegations from their Statement of Claim which otherwise seem likely to delay the trial and extend the time it will take when it is heard.

Once we have comments on the drafts we will need to obtain the views of the Law Officers Secretariat and then put a handling submission to the Secretary of State. The timetable is quite tight as we need to let Mr Justice Ognall know the Secretary of State's views on the out of court settlement before the end of September.

I would therefore be grateful for good comments on the draft letters by noon **Wednesday 5 September.**

GRO-C

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ANNEX B

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DRAFT LETTER TO MESSRS PANNONE NAPIER

WITHOUT PREJUDICE SAVE AS TO COSTS

Dear Sirs

RE: HIV LITIGATION

We have been giving further consideration with Counsel to the scope of this litigation and to the multifarious issues which it raises.

In its present re-amended form the Statement of Claim makes many far-reaching allegations against the Central Defendants covering many of their activities over a ten-year period. A great number of these relate to matters which arose long before the existence of AIDS was known or suspected.

We believe that there are many areas of the Statement of Claim where on any view there can be little or no prospect of your clients' claims succeeding either as a matter of law or on the facts. However, those same issues will require many hours of investigation and preparation and will add very considerably to the length and expense of the trial. At the end of the day, even if your clients were to succeed on some issues it seems to us almost certain that they will fail on many others. Thus the effort and costs expended on exploring those issues will have been wasted and the resolution of the claims delayed for no purpose. [illegible]

~~In those circumstances, the Court would inevitably have to consider who should bear the costs of those issues in which the Plaintiffs have failed to prove their case. This is not the kind of~~ case in which ~~it can be said that all the costs incurred are bound up together and no~~ split order ~~for costs can~~ could be made.

We fully appreciate that you may have wished to plead your claim widely in the first instance and until you had had the opportunity of seeing the way the defendants put their case and of considering the material made available on Discovery. However, we believe that the time has now come when the scope of this litigation should be reconsidered and thought given to which parts of the claim should be proceeded with. This is particularly so in the light of the recent judgement of Mr Justice Rougier.

As you will appreciate, the Central Defendants do not in any way wish to stifle or discourage any proper claim that your clients may wish to make. Indeed, we co-operated with you over seeking preliminary issues on some of the more difficult questions where an early decision would have assisted your clients in saving unnecessary costs without abandoning arguments which had any reasonable chance of success. We have also awaited the completion of discovery before raising with you the question of the possibility of honing down your pleading.

However we believe that if the more speculative and unpromising of your clients' claims were to be abandoned now, the present trial date would become more realistic and the trial could be far shorter, without in any way prejudicing your clients' overall prospects.

Because we appreciate the reasons why your claim may have been framed widely, I am instructed that the Central Defendants will not seek an order in respect of the costs of any allegations which is discontinued say within one month of this letter and indeed will accept that all costs incurred to date on such issues should be treated as costs in the cause. However, should your clients choose not to take advantage of this opportunity, it is the present intention of the Central Defendants to seek a split order for costs if appropriate and to resist any application for the payment of your client's costs on any issue on which they fail. I cannot rule out the possibility that in certain circumstances I may be instructed to seek an order for the payment of the Central Defendant's costs of some issues by the plaintiffs in appropriate cases.

I appreciate that you may require some time to consider this letter and that you may in any event wish to await the outcome of the forthcoming Court of Appeal hearing before making any final decision, but I would invite you to begin your consideration of these matters as soon as possible.

Yours faithfully

ANNEX A

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DRAFT LETTER TO TREASURY SOLICITOR

Thank you very much for providing me with a copy of the note handed down by Mr Justice Ognall on 26th June 1990.

The Secretary of State has carefully considered the points put forward by the Judge, together with the advice given previously by Counsel in the light of the overall situation concerning the tragic effect on haemophiliacs of the use of Factor VIII containing the HIV virus.

The Government has recognised that the plight of haemophiliacs and the fact that the treatment which led to their infection was intended to help them to lead as near a normal life as possible, makes their case wholly exceptional. Accordingly, and in recognition of their unique position, the Macfarlane Trust was set up following an announcement by the Minister of Health in November 1987 and was provided with £10 million, to make payments on an ex-gratia basis to affected individuals and their families throughout the United Kingdom. Since then, many payments have been made out of the fund, on the basis of financial need, and this continues.

When announcing the set up of the Macfarlane Trust, the Government made it clear that, while it considered the sum of £10 million to be appropriate at that time, it would nevertheless keep open to review the question of what funds were required. In consequence, on 23rd November 1989, the Secretary of State announced that further funds were being made available for haemophiliacs. The aim was firstly, to make individual payments of £20,000 to each haemophiliacs infected with the AIDS virus as a result of treatment with blood products in the United Kingdom or the family of such a person who has died; and secondly, to enable the Macfarlane Trust to continue on a more generous scale to help families in particular need.

Thus the Government has already made available a total of £34 million to mitigate the effects of this tragedy on all haemophiliacs with HIV and their families and not just the litigants in this action. Some £24 million of this total has been distributed to ~~each~~ individuals affected,

irrespective of means, whilst the remainder has been and continues to be made available on the basis of need. None of these payments is taken into account for the purposes of social security or indeed of legal aid.

The Government proposes to keep the sums available to the Macfarlane Trust and the needs of haemophiliacs under regular review.

All these sums are of course paid on an ex-gratia basis ~~and are not intended to be compensatory~~. ~~They are intended~~ Their purpose is to provide the resources to respond positively to the particular needs of affected haemophiliacs and their families. They are not however intended to be a substitute for the litigation of the issues currently before the Court.

Mr Justice Ognall has suggested that these are actions which should perhaps be settled on the basis of moral obligation rather than on a strict assessment of legal liability. The Secretary of State has already recognised the strong compassionate arguments in favour of providing assistance to haemophiliacs affected by HIV by setting up the Macfarlane Trust and providing resources for the assistance of such haemophiliacs. However, the question of any compromise of pending or threatened legal proceedings raises altogether more difficult issues.

As you know, the Re-Amended Statement of Claim makes allegations of negligence, breach of statutory duty and of the unreasonable exercise of a public function against the Central Defendants. So far as the Department of Health is concerned, these allegations span the existing administration and its predecessor. But allegations are also made against the Committee on Safety of Medicines, an independent body of ~~regularly changing~~ fluctuating membership which consists of eminent members of the medical profession selected for their skills and experience and who give service on a voluntary basis, and against the Licensing Authority which makes decisions with the benefit of advice given by the Committee on Safety of Medicines. These allegations are also of negligence, breach of statutory duty and unreasonableness.

The Secretary of State does not consider that it would be appropriate to compromise these ~~legal~~ proceedings without legal advice ~~that there is a substantial possibility that the Plaintiffs will succeed in establishing liability.~~ that it is proper to do so.

The Plaintiffs in these actions have sought to argue that the Secretary of State and the Licensing Authority and Committee on Safety of Medicines owe a duty to individual Plaintiffs in the exercise of their public functions. This matter has recently be considered by Justice Rougier in connection with the question of public interest immunity and ~~has been argued~~ before the Court of Appeal. On advice the Secretary of State has consistently maintained ~~the stance~~ that the Department, Licensing Authority and CSM do not owe a duty in such circumstances. That is the approach which has been taken in the Whooping Cough Vaccine cases, in the Opren litigation and in the Bensodiazepenes cases. The present actions are pleaded on a more extreme basis than previous actions, since they allege a duty of care in the taking of policy decisions.

The Secretary of State is firmly of the view that to compromise these actions, however, good motives for doing so may be, would provide strong and dangerous precedent which ~~is likely to~~ lead to yet more costly and resource-consuming claims against the Department, Licensing Authority and CSM in future. It is considered important to try to establish the principles that the duty of care is a general one and that policy making is not justiciable. Otherwise policy making including the difficult decisions on resource allocation would be distorted. The Courts have for this reason been very hesitant in the past to intervene in this difficult area. To compromise these ~~legal~~ proceedings with their serious ~~imputations~~ against eminent doctors would also add to the difficulties in persuading such experts to give up their time to serve on the advisory committees set up under the Medicines Act.

The Secretary of State is satisfied that the best and indeed the proper way of meeting the need adverted to by Mr Justice Ognall is through the machinery of the Macfarlane Trust or similar means. The Government remains committed to pursuing the course and will ensure that the needs of all affected haemophiliacs and their families are kept under review. That resolve will not be affected by the progress or outcome of the litigation.

It is recognised that it would be in the interests of everyone that the present litigation should be brought to a speedy conclusion. Apart from the anguish which it inevitably causes to plaintiffs and their families, it has placed a heavy burden on the resources of the Legal AID Fund and of the Department and Health Authorities. That inevitably involves the diversion of scarce resources from elsewhere. It must be a matter for individual Plaintiffs and their advisers as to whether they wish to continue to pursue their allegations against the Central Defendants in expectation or hope that they will be able to establish liability. However whilst the Secretary of State will continue to review the position from time to time, until or unless you advise that there is a ~~substantial~~ real possibility of the Plaintiffs or any of them succeeding in establishing liability, his view is that these actions should continue to be [illegible] defended ~~firmly~~. Meanwhile, I know that you and Counsel will do everything possible to adhere to the timetable set by the Court.

I would be grateful if you would express the Secretary of State's thanks to the Judge for his observations and make him aware of the matters set out in this letter. A copy of this letter may be provided to the Judge if you consider this appropriate.

Yours sincerely