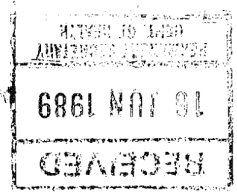

1. Mr Heppell PS
2. Mrs Kirk PS to PS(H)

From: J C Dobson HS1

Date: 15 June 1989

cc:

Mr Davey	PS to MS(H)
Miss Gwynn	PS to Perm Sec
Dr McInnes	PS to CMO
Dr E Harris	MED
Miss Pease	HS1
Mr Wilson	MD
Dr Walford	MED IMCD
Dr Metters	MED SEB
Dr Pickles	MED SEB
Mr Barton	Aids Unit
Dr Rejman	MED SEB
Mr Powell	SOL C3
Mrs Armstrong	SOL C5
Mr Green	FA2
Mr Canavan	HS1

AIDS LITIGATION

The purpose of this submission is

i. to inform ministers of the legal action being taken on behalf of a number of haemophiliacs who have been infected with the AIDS virus through blood products, and a smaller number of people infected by blood transfusion

ii. to seek ministers' views on the case for resisting the plaintiffs' attempt to proceed by way of a group action

iii. to seek ministers' views on other options for handling the litigation and the controversy which it is likely to engender.

An early response on (ii) (preferably by Tuesday 20 June) would be helpful; we are due to meet Treasury solicitor the following day in preparation for a court hearing on 29 June.

Background

2. The dangers of transmitting the AIDS virus (HIV) via blood or blood products became gradually clearer from July 1982 onwards; but it was not until September 1984 that a means of destroying the virus by heat treatment was demonstrated, and not until March 1985 that a test for screening blood donors became available. This test was simultaneously introduced in transfusion centres and STD clinics in the UK in October 1985, following expert advice to CMO not to introduce screening for blood donors until the HIV test could be made generally available (to avoid giving high-risk groups a positive incentive to give blood in order to be tested for HIV). Up till early 1985, therefore, the only means of giving haemophiliacs partial protection from the risk of infection with AIDS were

i. to revert to the use of less concentrated products (eg "cryo-precipitate") instead of the highly-concentrated Factor VIII,

ii. to use blood products from UK sources rather than commercial products from the US, where the spread of AIDS was much faster (but even NHS non-commercial product has been shown to be the source of infection of some patients).

3. By now, some 1,200 haemophiliacs have become infected with the AIDS virus as the result of receiving HIV infected blood products and an increasing number are pursuing claims for compensation through the Courts. A few people non-haemophiliacs who have become infected as the result of a blood transfusion in NHS hospitals are also seeking compensation in the Courts. We know that so far 5 writs have been served on Health Authorities, 6 others issued but not served and there have been 79 applications for disclosure of medical records. In some, but not all, the Secretary of State for Health has been listed among the defendents both in his own right and as a member of the Licensing Authority. The latest development is a summons, to be heard on 29 June, to join several claims in a Class Action.

4. The government has already responded to the plight of haemophiliacs with HIV by setting up a £10m fund, administered by the independent MacFarlane Trust, to make grants in individual cases of hardship. However the sums which litigants in these court actions are likely to be seeking are very much higher - one summons in Scotland suggests the figure of £250,000, instead of the £8,000 per head represented by the MacFarlane Trust. We believe that the government has a fair chance of successfully defending its role and that of HAs in the court actions, given that at every stage it has acted as swiftly as possible to minimise the risk of infecting haemophiliacs with AIDS in the light of the best expert opinion available at the time.

Issues: i. Group Action vs individual actions

5. The advantages to the plaintiffs of seeking a Class Action are obvious. From the government's point of view, a major argument for resisting a group action in the case of haemophiliacs is that individual cases differ widely in such respects as

i. the date at which the plaintiff is likely to have been infected (and therefore the state of medical knowledge at the time, particularly on the means of preventinig transmission of HIV in blood and blood products)

ii. the clinical practice of the doctor responsible for providing care (some haematologists use up to twice as much Factor VIII as others for conditions of similar severity)

iii. whether blood products from one or a number of commercial sources could have been involved.

A class action could confuse these differences and increase the risk of losing cases which could otherwise have been successfully defended.

6. For the (relatively small) number of infected blood transfusion recipients the potential variation is much less - for instance in many cases no alternative treatment would have been possible - so there would be more advantage to the government in encouraging the plaintiffs to bring forward either a test case or a class action.

7. There is however a wider political dimension. Ministers might feel that the government should not be vulnerable to the charge of dragging out the legal process by insisting on trying to fight each case separately. On this argument, it might be better to propose a small number (say 3 or 4) of test cases - involving particular combinations of the factors listed in paragraph 5 - seek an early decision on these, and then propose an out-of-court settlement for the remainder. The objective would be to demonstrate that the government, while not at this stage admitting any liability, was nevertheless seeking a just outcome as quickly as possible.

8. In the light of these arguments, would ministers wish to

i. attempt to resist the class action and try to fight each case individually, or

ii. accept in principle the value of a class action but suggest a subdivision so that 3 or 4 cases typifying different aspects could be examined first?

And would they wish

iii. officials to seek to bring forward one of the blood transfusion cases as a test case?

(It should be noted that the Committee for Safety of Medicines is being sued separately in at least one action and may conceivably have a different perception of the balance of advantage.)

Issues: (ii) other possible action

9. **No fault compensation.** We understand that the West German authorities have developed a scheme under which haemophiliacs who have been infected with the AIDS virus are offered a relatively modest sum - believed to be about £30k - in return for an undertaking not to sue for damages. Such a scheme if introduced here would be more expensive than the existing MacFarlane Trust could but would reduce the risk of a much more expensive court settlement; it could also be portrayed as showing ministers' concern for haemophiliacs with AIDS without admitting liability. But many infected haemophiliacs (perhaps a quarter) might not accept compensation even if a much larger amount were on offer than in West Germany. And allowing no-fault compensation in this case would create a precedent which would un-doubtedly be exploited on behalf of other groups of

patients (eg leukaemia sufferers near nuclear installations). Treasury permission even for a limited scheme could not be taken for granted. Do ministers wish us to examine this option further?

10. **Publicity**. There is a danger that the government will appear to be on the defensive over this issue if it merely waits for the court actions to proceed. (See the attached cuttings from the Daily Express of 30 May as an example of the likely press reaction). There might be a case for deliberately seeking some publicity to convey the message that the government

i. has already acted to help Haemophiliacs by setting up the MacFarlane Trust

ii. believes that it has consistently taken all possible steps to protect haemophiliacs in the light of current expert advice, but

iii. welcomes the opportunity to test this belief in the courts.

Do ministers wish to see more detailed proposals for such publicity?

Conclusion

11. Ministers are asked to indicate

- which of the options for handling claims from haemophiliacs they prefer (paragraphs 8(i) and (ii))

- whether they wish to encourage a test case for blood transfusion recipients (paragraph 8(iii))

- whether they wish to see any work done on a possible no fault compensation scheme (paragraph 9)

- whether they would like to see proposals for positive publicity for the government's position (paragraph 10).

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