

Annex A

L89/3211/JNDHAEMOPHILIA / HIV LITIGATION

It is rare that I take an initiative of this kind in civil litigation before me. But the circumstances of these actions are such that I have no hesitation in doing so, and in much more specific terms than might normally be expected or considered appropriate.

Now that the issues have been clarified by the pleadings, I wish to invite the parties to give anxious consideration to the prospects of any compromise of these proceedings. If consideration is already being given, I would like to think that these observations will lend impetus to it.

So far as the Plaintiffs are concerned they, no doubt, recognise the legal difficulties attending the argument as to the nature and extent of the alleged duty of care and its breach. Likewise, with regard to the issue as to whether any proven breach of duty is capable of giving rise to any individual cause of action by an injured party. The Plaintiffs advisors have no doubt also taken account of the issue as to causation in each individual case.

There must also be, I suppose, unusually large areas of uncertainty attendant upon assessment of quantum.

But when all those factors are taken into account, it seems to me that for a number of reasons, it is not an abuse of language to describe these actions as unique in their surrounding circumstances. I hope that I will be allowed to identify some of those circumstances.

A government which takes upon itself the role of public provider of medical advice and clinical services is in a very different position to any commercial organisation. It is clearly arguable that their duty to innocent citizens who suffer injury under the aegis of such treatment has a moral dimension to it which should distinguish their assessment of their position from that criteria to be adopted by other defendants of a corporate character. Government owes a duty under this to its shareholders or insurers. It should also mean that the public may be entitled to expect from government an appraisal of their position which is not confined solely to legal principles to be found in the law of negligence, or problems of proof.

- 2 -

Compromise does not necessarily betoken any admission of blameworthiness. In any event, it might be argued that any perception by the public of fault in the defendants may well be significantly less than the opprobrium attached to any apparent unwillingness to temper the rigours of the law with the promptings of compassion.

The plight of the plaintiffs - or many of them - is a special one:

- (a) All of them suffer from or live in the shadow of a fatal condition for which there is presently no known cure. I am told that the evidence will suggest that "incubation" may be as long as 15 years. Meantime, I suppose, most believe that sooner or later they will succumb.
- (b) Many have already died, and in the nature of things many more will die without knowing the outcome of this litigation. It seems to me, at least, that this factor should be treated as cardinally important. It also sets it apart from any other action in my own experience. At best, these plaintiffs will die uncertain as to the outcome. At worst they will die deprived of money to comfort their last days, or with the knowledge (for those with dependants) that they will bring a measure of financial security.
- (c) With the best will in the world it may be the end of 1991 before the legal process affecting the main cause of action has been exhausted. That is two and a half years since the proceedings began - or more. It may then be necessary - in the event the plaintiffs succeed - to set 'bench marks' for quantum, again no doubt with appeals.
- (d) It is common ground that all plaintiffs are entirely blameless.

The allocation of court resources involves heavy cost and long term planning. This is a minor factor compared with those I have mentioned, but it deserves at least to be identified.

- 3 -

It is in these circumstances that I have thought it proper that the advisors to all parties should be invited to convey to their respective clients these observations. It might be said that I have raised considerations of a political rather than a purely legal character. I acknowledge that. But I believe that the legal profession has a duty to do its best to see that the legal system does not become a scapegoat in the eyes of the public for what I fear may be perceived as the unjust and inhumane denial of any significant measure of compensation to the plaintiffs. "The law must take its course" is not an attractive principle in the context of this case.

No doubt any consideration of compromise will raise formidable problems in working out its terms. I am quite prepared to do anything which the parties believe calls for my intervention in furtherance of that process. I have in mind, for example, determining quantum in any category of case that the parties find themselves unable to resolve. There may be other areas. I do not know. But overall I do not believe that such problems would provide insuperable obstacles in the resolution of a particularly sensitive, and increasingly notorious issue.

Harry Ognall

26.6.1990