

File

Ref: James289

RESTRICTED POLICY

Mrs A M James SOLB4

From: Dr A Rejman CA-OPU2

Date: 28 September 1995

Copy: Dr Metters DCMO
Mr Pudlo CA-OPU2
Miss K Phelan SOLB4

CONFERENCE WITH COUNSEL: HEPATITIS C

1. Thank you for your minute of 26 September.
2. I would agree with most of what you put in your note, other than your para 4. I am sorry if you were led to believe that I accepted Counsel's interpretation in respect of the EC Directive, Article 7 para (d) (para 11 of my minute of 3 August). I would rather say that I preferred not to pursue the argument with Counsel over this, partly in deference to his knowledge on legal matters and my lack of the same, but also because it was quite obvious that he had decided his view and would not be moved from it. If I were a producer, I would presume that my Counsel would use this particular paragraph as a defence, since it must be at least arguable whether a judge would indeed follow Mr Fleming's line of argument.
3. You will recall that during the discussion on this particular item, I pointed out that on the basis of 1 in 2000 blood donors being positive for hepatitis C, then every single pool of plasma used in blood products would have been infected in the past, and in practice have been shown to be so. In this case, the producer has two alternatives, one is not to produce the product, leading to considerable morbidity and even some mortality, or alternatively recipients of blood would have to sign away their rights. Mr Fleming's response was not satisfactory in that he just referred to what had happened in the States where the government had decided to exclude blood and blood products from legal liability because of this very difficulty.
4. I would like to now turn to your request for advice on taking the matter further.
5. My personal view is that we should not ask Counsel to do any further work for the time being. I would fully support Counsel's view that any request to go outside, to specialists such as Professor Ian Kennedy and others, poses a very major risk of our enquiries becoming public, which could well prejudice Ministers' freedom of action.

Currently we are not aware of any pressure from the haemophiliacs for payment. There may be several reasons for this.

7. At the meeting with Counsel we agreed that blood products were products under the Product Liability Law. He made no comment on the statements I made in my minute of 3 August where I stated that the haemophiliacs were unlikely to have a case, since they became infected before 1985/86, prior to the date of the EC Directive and our own Product Liability Law, and prior to the date of any test for hepatitis C.
8. It was interesting that during our discussion on para 7 (d), he referred to a possibility of defenses under para 7, subpara (e). He did suggest that the UK Product Liability Law did not seem to have encompassed all the detailed aspects of the EC Directive. I wonder whether it would be embarrassing if the Department or Health Authorities were to use aspects of the EC Directive in their defence, where these have not been translated into the UK Product Liability Law. Presumably the Directive carries greater weight than our own translation of the Directive into national legislation.
9. I accept that Parliament has been in recess recently, but I am not aware of any groundswell of letters from MPs regarding the haemophiliacs case. I wonder whether the MPs' true commitment to this cause is reflected more by the 6 MPs who turned up for the Adjournment Debate, rather than the 200 odd who were prepared to sign an Early Day Motion. Incidentally, at that Adjournment Debate, John Marshall gave a very poor presentation, which sounded as if he had just pulled out his speech from the HIV campaign. Of particular note was a reference to paid and unpaid donors, which in the context of hepatitis C infection is irrelevant. Throughout all the parliamentary debates, those supporting the haemophiliacs have been at pains to stress that there has never been a question of negligence, and they are just asking for payments for people who have suffered.
10. The Haemophilia Society and others must by now be aware of the Irish announcement, which I understand was covered fully in the Irish press. It is now 2 weeks and we have heard no comment from them. I think we also need to recall that this recent announcement is just the extension of the payment to the anti-D mothers who became infected with hepatitis C. At the time (June 1995) the haemophiliacs supporters did not raise this or ask for a comparable payment scheme. This may well be because having sat down and worked out the awards proposed, they realised that for many people they would be very small sums or zero. The only ones that would benefit would be those who had very serious illness related to hepatitis C or had actually died from it. Even in these cases, benefits they received from employers and the state would be deducted from any award.
11. During the campaign it has sometimes been difficult to work out exactly what the Haemophilia Society and others actually want in terms of payment. Sometimes it appears that they want parity with the HIV scheme with everyone who has ever been infected being paid the full sums, whereas on other occasions it would appear that they want payment to those who have actually suffered illness or death.

12. From the above, you will see that my understanding is that the only relevance of the consideration of product liability is in respect of recipients of blood and not haemophiliacs for the period between end 1989 when test kits for HCV became available and September 1991 when the UK introduced testing. In this respect the Product Liability Directive, para 7 (e) would be relevant. The NBA and others would presumably use the ACVSB and other scientific papers as evidence of the lack of scientific performance of the kits.
13. In summary, I would suggest no further action for the time being. I would defer to Dr Metters and administrative colleagues on a decision as to whether enough has come out of our consideration to justify a separate submission, or whether this should be relegated to a paragraph in the submission currently being prepared by Mr Pudlo on the Irish payment scheme.

GRO-C

Dr A Rejman
Room 420 Ext
EH

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