Mr Tucker
SHHD Management Executive 3
Room 161A
St Andrew's House

SCOTTISH HAEMOPHILIAC/HIV LITIGATION GROUP

I refer to my telephone conversation with you this afternoon.

Linda Towers and I met Fred Tyler of Balfour and Manson together with his assistant Anne Moynihan this morning. We showed them the latest draft of the proposed detailed terms of settlement and there was a discussion of its terms. I did not give them a copy to retain and I indicated that the document was simply the latest draft and did not represent the concluded terms of the offer. I indicated that English Counsel intended to have the final draft of the detailed terms of settlement available by the end of this week, and that Department of Health hopes to be in a position to issue individual offers to separate plaintiffs in mid January. I understood that there would be contact between the Department and the English Steering Group between now and mid January with a view to finalising the detailed terms of settlement.

I indicated that there were still inconsistencies within the draft as for example in the question of the discretion to be afforded to the MacFarlane Trust set out in 1(2) as against the apparent entitlement of any qualifying non plaintiff set out in paragraph 7.

So far as the Scottish cases are concerned Balfour and Manson are acting on behalf of some 41 haemophiliac claimants not all of whom have commenced legal action. Three pursuers have legal aid at present and another 10 or so are to be the subject of a grant of legal aid according to information available to Balfour and Manson on the 10 December. They do not expect the legal aid certificate to be available until middle to end January. However they will take steps to expedite the certificate.

So far as Balfour and Manson are concerned and so far as the Steering Group are concerned they were interested primarily in the position of their clients rather than in the position of non litigants. While going through the general conditions in paragraph 1 they remarked that it was surprising that there was no separate claim apparently available for a child infected from birth for example. While an infant infected by treatment with Factor 8 would be the subject of a separate award and while infected intimates were the subject of separate awards a child infected from birth would not be.

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They were also concerned as to the position of parents. As you are aware we have 2 parents suing at present. As you are also aware there were some dubiety between Department of Health and ourselves as to the position of parents and in particular whether they came into category G plaintiff status. I think in fact that they do not if one looks at the terms of category G in the main statement of claims. The Steering Group here would be anxious to know what the position of parents is to be.

They were also concerned as to the method of certification of whether an individual was in fact an HIV haemophiliac sufferer and whether they fell into a particular category in 1(3). I indicated that the MacFarlane Trust

were taking the view that they did not want discretion in these sorts of matters and therefore we will be looking to provide a certificate to the MacFarlane Trust in relation to any particular individual. At this stage they should proceed upon the basis that we would probably need medical certificates in relation to any particular pursuer certifying the HIV haemophiliacs status and that the individual had been treated with cryo precipitate, factor VIII or factor VIV. I think, although I did not say so to Mr Tyler, that we could look for such information from Health Boards ourselves.

The most important point arising this morning however related to the question of funding of the further investigation. From paragraph 12 it is clear that the Government accepts a liability in the case of agreements to settle to meet the costs of conveying the proposed terms of settlement to plaintiffs together with the reasonable costs of giving advice as to the proposed settlement and the costs of concluding the approval of the settlement. The most important part in that is the cost of reasonable expenses of giving advice in connection with the settlement.

So far as the Scottish actions are concerned their stage of development is significantly behind that in England and Wales. This is partly due to the fact that legal aid has not been available and therefore no worthwhile preparation could possibly have taken place. In relation to the private client cases preparation has not taken place because of the expense. Obviously the closer an action became to a hearing then the greater the need would be for speculative type investigation to be carried out. Certainly however as far as the legal aid cases are concerned there can be no criticism of the stage of development so far. In order for proper advice to be given as to the acceptability of the settlement, and arguably in order to avoid a charge of negligence, the solicitors involved who now have the benefit of legal aid would require to carry out a full scale assessment of the prospects before they could advise on the suitability of the settlement. Solicitors estimate that about 6 months would be taken up with the process of investigation to the stage at which advice on whether the settlement should be accepted could be tendered.

So far as the non legal aid cases is concerned the difficulty for the solicitors is that they will not be able to carry out the investigation because of lack of funds and accordingly while they might be able to recover such expenses as they had incurred in giving advice in those cases, that would only apply in the case of settlement. Thus in the case where investigation took place at the solicitors own expense and the client rejected the settlement then the solicitors would be looking to the client for reimbursement.

There are then 2 issues which arise.

The first issue is one which I think you have no difficulty in rejecting. That is the suggestion by the solicitors that some form of indemnity be available in relation to their non legally assisted clients to allow them to carry out some minimal investigation to allow advice to be given. My own view and I suspect your view is that this is unacceptable and that what has been offered is simply reimbursement for expenses incurred rather than the granting of a facility to incur expense regardless of the outcome.

The second issue however is more important. That is the issue of how long it is going to be until the solicitors can give proper advice to the

clients. The scenario I see is as follows. The offer will be put to the individual pursuers through their solicitors probably in middle to end January. The HIV haemophiliacs and others concerned will then seek advice. They will be told that before giving advice it will be necessary for some investigation to be carried out into the nature and extent of their individual claims. If there is a strict time limit on the offer the solicitors will advise whether or not it is possible for them to carry out such investigation before the expiry of that time limit. If it is not then they will advise their clients that it is not possible and that accordingly they are not in a position to give any advice as to whether or not the settlement should be accepted. That will almost certainly lead you into a politic problem in that you will then be seen to be attempting to steamroller a settlement through deliberately without giving an opportunity for proper investigation of the efficacy of the offer. It would be suggested that you were imposing that deadline and time limit simply to sabotage any proper assessment of the offer and to place undue pressure onto an already vulnerable group namely the HIV haemophiliac sufferers. You would be called on to justify the time limit in the first place. You would not be able to provide any reasonable basis for the time limit which has been indicated of April 1991. You would accordingly come under severe pressure to extend that time limit and you would not be able to resist that pressure. In those circumstances you might wish to take up with the Department of Health at this early stage the likelihood that if the terms of settlement contain a time limit of less than 6 months after the date of issue of the offer then it is highly likely that a proposed amendment will be put to that by the Scottish Steering Group.

In the meantime I should say that Linda Towers and I are looking at the terms of the latest draft with a view to making some sense of it for Scotland.

RICHARD M HENDERSON
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Solicitor's Office
Room 2/46
NSAH
Ext: GRO-C