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From: Mr R M Henderson
Solicitor's Office
18 April 1991

Mr Panton
Management Executive
Room 158
St Andrew's House

HIV/WHOLE BLOOD TRANSFUSION

I refer to Mr Bayne's fax of 17 April and my telephone conversation with you this morning. This matter relates to correspondence from Messrs J & A Hastie addressed to Mr Burrage at Department of Health and Mrs Bottomley, Minister for Health. The matter relates to alleged contraction of HIV from whole blood transfusion. The letter to Mr Burrage sets out certain detail in relation to a number of cases in which Messrs J & A Hastie are representing HIV patients. This Office has already received intimations of formal claims from Messrs J & A Hastie in relation to 3 of the 4 cases referred in the letter to Mr Burrage. So far as we can identify them those are the cases of the 26 year old man, the lady in her thirties and the 5 year old boy.

So far as I am aware Ministerial responsibility in relation to matters concerning blood transfusion in Scotland rests with the Secretary of State for Scotland. Equally departmental responsibility in relation to those matters and the activities of the Scottish National Blood Transfusion Service lie with the Scottish Office Home and Health Department.

To my mind it is wrong for the Department of Health to be corresponding in relation to matters falling within the responsibility of the Secretary of State for Scotland. Although the letter to Mr Burrage does not call for comment in relation to particular cases it would be even less acceptable if Department of Health were to comment in relation to the particular circumstances of cases in which claims had specifically been made and addressed to the Secretary of State for Scotland.

I would therefore suggest that you consult with Ministers as to whether they would wish this matter to continue to be dealt with through the Department of Health.

So far as the matters raised in the letter to Mr Burrage are concerned and in respect of which a draft reply was attached with the fax I do not consider that that draft reply can properly be sent.

The Department of Health seeks to differentiate between whole blood HIV and Factor VIII etc HIV cases upon 2 bases. The first basis is to the effect that somehow haemophiliacs have a stronger claim to compensation to the extent that they because of their underlying condition were not in a position to insure or build up savings in order to provide for their dependents. This is in no way a legal argument nor I suspect is it meant to be. However I would not have thought that a moralising position relating to what people perhaps ought to have done is likely to secure a sympathetic hearing from those acting on behalf of these particular claimants.

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Of more importance from my position however is the argument in relation to causation. I do not consider that this argument is well founded.

So far as causation is concerned my understanding is that blood used in any transfusion and in particular blood used by SNBTS in that regard is traceable to the donor even in circumstances where that blood may have been imported from abroad. That being the case it would be a relatively simple matter to determine whether the donor was at the time of donation HIV positive, and it ought also to be possible to determine whether that donor subsequently was found to be HIV positive, came from a high risk group or was in some other way to be linked to a possibility that the blood was contaminated. Establishing the chain of causation is a theoretical possibility. It may be difficult for a pursuer to establish that chain to the extent that release of records tending to show the identity of a particular donor may be thwarted by Government claims for public interest immunity as happened in the case of AB in 1989. The difficulty in establishing causation is a difficulty for the pursuer. It is not so far as I am aware likely to be a difficulty so far as the Crown is concerned.

If we assume for one moment that the pursuer was in a position to establish the possibility that the blood used in a transfusion came from a contaminated source then it would not be for that pursuer to have to show that there was no other source of contamination from which he or she effectively became infected. To my mind the burden would lie on the Secretary of State to show that some other source of causation was the true source of infection on the balance of probabilities.

In the case of whole blood HIV patients who are unable to identify the source of the donation because of a claim for public interest immunity on the part of the Secretary of State in relation to that information, there is effectively no chance of them being able to win in a competition unless there is a concession on the part of the Secretary of State that the blood with which the particular individual was treated was contaminated. If you were going to make that concession then the only defence for the Secretary of State would be that he had taken all reasonable precautions at the time of treatment to ensure that blood used in the transfusion was not contaminated in any way. Effectively you would be put into the position of arguing the cases as deployed in the HIV cases.

However it is highly unlikely that you would make the concession in the first place and realistically there can be little prospect unless the Court can be persuaded to intervene to assist recovery of information, that the pursuers in these particular cases will ever get anywhere with their actions.

Finally, so far as the way in which the argument is projected in the draft letter to suggest to the solicitors acting on behalf of the pursuers that there would be difficulties in establishing causation might be taken to mean that they would have difficulty in establishing that HIV was contracted from blood source as opposed to any other source. That is tantamount to suggesting that the particular claimants fall into one of the high risk groups. I am sure that you would not wish to suggest to

them that they were intravenous drug abusers, prostitutes or members of any other similar high risk group.

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