

Our Ref: 78/273/205

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AIDS/HAEMOPHILIAC ACTIONS

I was obliged by our meeting on Monday 5 September and very grateful to attend the conference on Tuesday 6 September. I look forward to receiving the minutes in due course.

Clearly a number of issues have been thrown up by our own meeting and more particularly by the conference which will require to be resolved.

It appears that all defenders are of the view that the actions should be resisted. The real difficulty it seems to me is to determine where liability should rest.

You agreed to prepare a detailed chronology showing the extent of the Department's contact and knowledge of the problem throughout. You also agreed to look out various leaflets and documents as well as copies of minutes of relevant meetings involving the Department which would help us all see more clearly what the progress of this matter was.

I still adhere to the view that the main focus of attention will ultimately be that period within which the possible contamination of factor 8 was within knowledge and yet that factor 8 was still supplied. It seems from what Professor Cash had to say that there were various crucial discussions and decisions taken about this and hopefully these are also matters of record. The whole development of policy in this area, however, as Dr Ludlam pointed out may be relevant to the case.

On the question of where liability rests. I consider that in the event that there was a policy in place and to whatever extent that policy was not followed there may be liability on the person who did not follow it. This of course assumes that the departure from policy was inappropriate or in other words, negligent. That may be a matter of concern both for the clinician involved and for the health board. There seems to be general agreement that that would be a difficult case to prove. Otherwise one must look to where liability in respect of policy formulation on the provision of blood or blood products lay. That is not clearly identified by any of the pursuers. I look generally at the legislation though not completely at this stage and I would value the views of Mrs Howieson who may be able to shed considerably greater light on the subject than I have.

The main thrust of the Secretary of State's duty is contained in section 1 of the 1978 Act. He is there obliged to promote a comprehensive and integrated health service and to that end to provide or secure effective provision of services. The 1978 Act does not make specific reference so far as I can

trace to the Secretary of State's duties with respect to obtaining and distributing blood. Section 44 read along with section 54 does however recognise that supplies of blood may be acquired by the Secretary of State.

Section 10 of the 1978 Act, however, constitutes the Common Services Agency for the Scottish Health Service. By sub-section 3 the Secretary of State is entitled to delegate by order such of his functions under the Act as he considers appropriate. In terms of sub-section 7 the Agency is to act subject to and in accordance with such directions as may be given by the Secretary of State. By sub-section 8 the Agency so far as it exercises those functions on behalf of the Secretary of State incurs its own liability in respect of them.

After brief research I have been able to trace that in the National Health Service (Functions of Common Services Agency) (Scotland) Order 1974 (No. 467) by Article 3(e) the Common Services Agency had delegated to it the duty in respect of the provision of supplies of human blood for the purposes of carrying out blood transfusions and related services, including the production of blood fractions. It appears that that Order has remained in force notwithstanding at least one further order which has modified its terms. I would be grateful if Mrs Howieson would confirm that this is the present position and that indeed that delegation in respect of supplies of human blood etc remains in force. If that Order does remain in force and that power rests with CSA and the exercise of that power is subject to sub-section 8 of section 10 of the 1978 Act then it seems to me that CSA remains liable in respect of such matters. How the Scottish National Blood Transfusion Services comes into the picture is still unclear to me, however. As I understand it the Service is an administrative feature of CSA. I am unaware whether it has any statutory or legal personality, however. If it did I would have doubted whether there could be any lawful sub-delegation of duties in respect of blood supplies to it. I assume therefore that the pursuers have simply got the name of the second defender wrong. I stand open to correction, however.

I think it would still be fruitful to pursue the question of how SNBTS works. How is it constituted and who are its members? How is funded? I gather that its resources may come from the individual health boards.

In more general terms and perhaps for later consideration is how the process of producing factor 8 proceeds. It would be helpful to know more about the process so that concrete arguments can be better understood as to why it would be so difficult to revert from factor 8 to any of the other forms of blood product or whole blood transfusion for haemophiliacs.

Otherwise the areas for investigation meantime continue to be those matters which go to show how far the Department involved itself in policy making in respect of supplies of blood and in particular from the time from when aids was becoming recognised as a disease which effected among others haemophiliacs and presumably later which could be known to be transmittable by factor 8. It seems to me that the argument which will develop from SNBTS at least is that he who holds the purse strings develops the policy. I am not sure if that argument should be allowed to wash. Aside from the statutory provision it appears clear from what Professor Cash had to say that it was in the absence of any direction from the Secretary of State that SNBTS resolved upon a policy that it would become self-sufficient insofar as a factor 8

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for Scotland. As Dr McIntyre has pointed out, however, it appears that that policy or policy intention was supported financially by Central Government.

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