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

HIV/WHOLE BLOOD TRANSFUSION

I refer to my conversation with you yesterday 22 April. We left the matter then that you were preparing a draft PS minute to Secretary of State and Mr Forsyth indicating the state of current correspondence and that they might wish to consider whether it was more appropriate for them to reply to the correspondence than for Department of Health to deal with that. You asked if I could consider the terms of the draft reply which could be suggested for them.

Matters have changed to some extent since I wrote to Mr Panton on 18 April to the extent that The Observer newspaper had an article and a leader in its edition of 21 April dealing specifically with the situation of whole blood transfusion HIV victims. Ministers might be interested especially in the leader comment to the effect that the Department of Health claim that there is a distinction between the cases of the haemophiliacs and those infected through normal surgical procedures is "such patent nonsense as it is extraordinary that it should have been seriously put forward."

However for the time being the position of HM Government is that compensation in respect of whole blood transfusion HIV victims is resisted.

Obviously the terms of any letter in reply to J & A Hastie will differ according to whether the Scottish Office or the Department of Health replies.

The issue is really as to the basis upon which HM Government seeks to differentiate between haemophiliac sufferers and whole blood transfusion victims.

Grounds of Alleged Liability

In the case of haemophiliacs the original line for HM Government was to dispute liability. The particular actions against the Secretary of State proceeded on the proposition that the Secretary of State owed a duty to secure effective treatment for haemophiliacs which did not involve the risk of HIV which Factor VIII did. The defence as pled was effectively that at the time the Secretary of State did all that he reasonably could. It was a state of the art defence.

In the case of whole blood transfusion infection a case has not yet been deployed but it will be substantially the same; that is to say it will be to the effect that the Secretary of State owed a duty to secure effective treatment in relation to a pursuer's particular condition involving if necessary blood transfusion treatment without attendant risk of contracting HIV from contaminated blood. The defence on the part of the Secretary of State will probably be to the effect again that all reasonable steps were taken. Again as in the haemophiliac cases the defence will require the pursuer to prove a connection between HIV infection and treatment by blood transfusion.

We made no admission of that connection in the Factor VIII cases and we would make no admission in the whole blood cases generally.

Proving the Link

So far as whole blood cases are concerned the pursuer may be in a more difficult position in so far as they would require to show that the blood transfusion came from a particular batch which was infected. Yet they would not, standing AB v Secretary of State, be able to identify the particular donor and they might then not be able to inquire into the probability that the donor was infected at the time of donation. If the donor could be identified then the pursuer would look to such factors as lifestyle to determine whether there was a likelihood that at the relevant time the donor was infected.

While in Factor VIII cases the Crown was sitting waiting for haemophiliacs to prove their cases, in the whole blood cases the Crown is effectively putting a block in the way of the pursuers which is insurmountable unless the Court allows recovery of records showing the identity of donors. I would expect J & A Hastie to make that point in due course that the whole blood transfusion victims are being blocked from pursuing actions.

There is an argument so far as HM Government is concerned, and I think this is an argument directed at the introduction of a scheme, that so far as whole blood transfusion victims are concerned there is a problem in being able to confirm that infection derived from whole blood transfusion and not from some other source. Looked at in the generality it would be for each pursuer to show a causal connection between the transfusion and HIV. If the pursuer cannot recover records as to the identity of the donor effectively the pursuer will be at the mercy of the defender to concede that the blood used in transfusion was infected. Evidence of an infected donor or a concession that the blood was infected would set up a clear presumption that infection derived from that source. But it would then be for the Secretary of State to show that some other source of infection was more likely.

Looking at the cases that we have I note in any event that the case of GRO-A is one in which the pursuer already has evidence, by concession I suspect, that the blood donation used to transfuse the pursuer was donated by an individual who is now known to be an HIV positive homosexual. Clearly I suppose if this case were to be fought all the way it might be necessary for the pursuer to show that at the time of donation the person was known to be an HIV positive homosexual, or at least without a lifestyle putting him or her in a high risk group. Even in GRO-A case while there is little doubt that the action could get off the ground, she would still run into the problem of not being able to prove that the donor ought to have been identified as a high risk at the time of donation because she cannot get records specifically identifying that donor.

So far as the other cases which we have at present are concerned there is no indication that evidence as to the source of the blood donation is in the hands of the pursuers.

What the GRO-A case suggests however is that there may well be evidence available by which the causal connection can clearly be shown between the infection and a transfusion. If that is the case it is verging

on the devious to suggest that proving the connection might be difficult and that other sources of infection might be involved.

In replying to J & A Hastie it would not be politic to depart wholly from the Department of Health line but I do not think that it would be wise to enlarge on or develop it in relation to cause or connection.

Whole Blood Victims Had Opportunities Not Available to Haemophiliacs

I have already said in my minute of 18 April that I would not regard the arguments in the third paragraph of the draft letter for Mrs Bottomley's signature as wise. The Government statement of 12 December 1990 referred to a recognition of the "very special and tragic circumstances of haemophiliacs and their families", as justified the settlement. It did not specify what those special circumstances were. The draft for Mrs Bottomley's signature might be thought to be trying to flesh out those special circumstances. In effect the argument is that because haemophiliacs are as a class in an economically vulnerable group then they should receive special treatment.

If you say that then it will be answered. The answer will be; look at the victims of whole blood transfusion now. It will be asserted that now those victims are equally economically disadvantaged as are haemophiliacs. It is a strange proposition to assert that because somebody starts off in a weaker position then they are to be given protection when they are injured, even though when another person who starts in a stronger position who suffers an injury becomes equally weak. As I said in my minute of 18 April pointing to the economically vulnerable position of haemophiliacs suggesting that that is the basis for special treatment when they are injured amounts to a moralising argument to the extent that it carries with it the necessary inference that those who are not in that economically weak position ought to have taken steps to cover the circumstances in which they now find themselves having been infected with HIV.

To open up why you think haemophiliacs are special will simply offer scope for that special status to be shown to be spurious.

Available Arguments

I would suggest that reasoned argument is difficult in this area because -

(a) so far as I can make out the arguments are predominantly against you, and

(b) arguments will not settle this issue.

I suggest that all you can properly do is to hold to the comparison of whole blood victims with other victims of NHS treatment and to move away from the contrasting of the whole blood victims with the haemophiliac victims. That is to say that the proposition that haemophiliacs were treated as a special case should be adhered to but the justification for not going further should be by reference to the position of other victims of NHS treatment rather than to analysing the position of haemophiliacs.

It goes without saying that you may expect to receive escalating criticism.

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I attach draft paragraphs for inclusion in a letter to issue from the Scottish Office.

GRO-C

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25 April 1991

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Draft Paragraphs

"The Government made provision for compensation in relation to haemophiliac/HIV victims as a special case. It is undoubtedly the case that other groups may have similar claims to special treatment. I can well recognise the strength of the arguments which you advance on behalf of your clients that they should be entitled to similar special treatment.

In your letter you suggest that the Government's position is to the effect that those sustaining injury as an unfortunate side effect of NHS treatment must prove medical negligence in order to become entitled to compensation. The suggestion on your part is that individuals should be entitled to compensation without having to establish medical negligence. Successive governments have never been persuaded that a general scheme of no fault compensation of such a kind would be fairer than present arrangements. Since the announcement of the settlement offer for haemophiliacs a general scheme of no fault compensation for the NHS has been considered in the House and decisively rejected. The Government's view remains that such a scheme would be unworkable and unfair.

[The Government does not set its face against treating any cases as special cases. However in order to be so treated those cases would require on their own to be differentiated from other groups of patients harmed as an unfortunate side effect of NHS treatment and who are not to be so treated].

You will understand that it would not be right for me to make any comment in the circumstances of the individual cases to which you refer since these could be the subject of claims brought before the courts. However I can say that in relation to individual cases in respect of which claims have been intimated, each such claim will be considered on its own merits."

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