POLICY IN CONFIDENCE

To: Mrs Baxter PS (PS(H))

From: J Canavan EHF1A

Date: 13 August 1991

cc: Mr Heppell DS
Mr Dobson EHF1 OR
Dr Rejman MedISP
Mrs James Sol B4
Mr Merrett EA2B

HIV INFECTED BLOOD TRANSFUSION CASES

Introduction

1. PS(H) may recall that Graham Ross of J Keith Park & Co has written to Ministers on several occasions pressing for compensation for the blood transfusion recipients infected with HIV. With Ministers agreement, officials have taken over the correspondence. Graham Ross expressed some concern at this but has been assured that Ministers will be told of any new arguments. This submission considers a point of particular concern to Mr Ross that preserving the anonymity of blood donors could make it difficult for the blood transfusion recipients to seek redress through the courts.

2. In the submission we are also reporting the RHAs' willingness to take the lead in negotiating a deal to settle the blood transfusion issue, should Ministers wish to seek such a settlement.

Recommendation

3. We do not consider that these developments in themselves warrant a change in the Governments position. However, should Ministers be minded to seek a way of settling the blood transfusion issue the J Keith Park and RHA developments may be helpful in reducing the risk of wider repercussions.

J Keith Park & Co - Donor Anonymity

4. In litigation the Department must claim immunity from disclosure of information which it considers should be withheld in the public interest. The disclosure of names of blood donors could jeopardise our system of voluntary donors as people would be reluctant to give blood if there was a risk of becoming involved in litigation. J Keith Park accept the need to avoid undermining the system in the public interest but are concerned about the impact on litigation by the blood transfusion cases since:

i) donors cannot be called to give evidence on whether the blood collection centre correctly operated screening procedures on the day HIV infected donation was collected;

ii) without the name, it would be impossible to sue a donor even if there was a basis for such action.

Extracts from their recent letters covering these points are annexed.

5. In a Scottish case in 1989 an HIV infected blood transfusion recipient sought disclosure of a blood donor's name with a view to suing for damages. The Secretary of State for Scotland successfully resisted on grounds of public interest. J Keith Park cite this in support of their case for special compensation for the blood transfusion cases. They also refer to the remarks made by the Judge in the Scottish case that if plaintiffs are to be deprived of the ability to claim damages from those who caused injury through negligence because of public interest, 'it would be reasonable for public policy to provide also some alternative means of compensation.'

6. J Keith Park accept that preserving the anonymity of donors would not of itself prevent allegations of negligence being made against the Department or Health Authorities for the general adequacy or otherwise of the blood screening systems. It also seems unlikely that plaintiffs could be significantly inhibited from alleging a specific breakdown of the screening systems on a particular day. In making such an allegation it seems unlikely that the plaintiffs would rely on a witness accurately recalling events which may have happened six or more years before. However if the plaintiffs solicitors thought it important they could seek to persuade the courts that the public interest in a fair trial should over-ride the public interest in preserving donor anonymity. J Keith Park know from the haemophilia litigation that the Department's claim for public interest immunity can be overridden.

7. There is also the difficulty in identifying the donor who caused the HIV infection. Many patients may have had more than one unit of blood and so several donors might have been implicated. These donors may or may not have had an HIV test performed on a subsequent occasion. It is difficult to be certain whether J Keith Park is seriously suggesting that any of the possibly implicated donors who were identified should have an HIV test at this late stage.

8. Moreover unless a blood transfusion recipient had a valid claim for negligence against the donor (or HA for failing to operate adequate screening procedures) he or she could not be said to be adversely affected by the need to preserve donor anonymity. Therefore even if J Keith Park's argument were to be accepted it would support the case for special compensation only in certain cases. Some kind of arbitration mechanism would be required to look at the evidence in individual cases and advise on those cases where negligence would probably have been established but for the preservation of donor anonymity.

Conclusions

9. In the view of officials, the arguments about donor anonymity do not warrant a concession to the blood transfusion recipients infected with HIV. However if Ministers were minded to seek a way of settling the issue then the arguments might be used to present the settlement as a necessary measure to protect our voluntary blood donor system. However any such argument would have to be used with caution as any erosion of public interest immunity principle could have serious implications for all Government Departments and for other public bodies. There would need to be consultation with these other interests.

Regional Health Authorities Offer

10. At a recent meeting with officials Mr Bruce Martin, Chairman of Mersey RHA and lead chairman for the haemophilia litigation, told us that the RHAs would be willing to take the lead in seeking a settlement of the HIV blood transfusion cases. The question of funding would be for discussion with the Department but the RHAs would be willing to present the initiative as their own so that Ministers could distance themselves from it. This might help prevent repercussions with other groups seeking Government compensation.

11. The RHAs were not suggesting that there should be a settlement (the number of writs against HAs and the Department is small so far) but they thought the parliamentary recess provided the opportunity to settle the matter quietly, should Ministers wish to do so.

12. It seems likely that the Department's role in any offer by the RHAs would become known. Particularly as it is almost certain that the RHAs would look for funding to the Department. However the HAs did play a useful role in initiating discussions with the plaintiffs in the haemophilia litigation and could do so again in the blood transfusion cases, if Ministers wished to seek a settlement. However the RHAs offer does not itself change the arguments for not making a concession.

Decisions Required

13. We are asking PS(H) whether:

i) he is content that officials should inform J Keith Park that the Government's position on compensation for the blood transfusion cases is unchanged by the arguments about donor anonymity?

ii) he wishes any further action taken at this stage to pursue the RHAs offer?

GRO-C

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2 Letter dated 24 July 1991 from J. Keith Park + Co

point that this suggested that the reason the Government made the payment to the Haemophiliacs was as a result of fear that they might be held liable in law in the then forthcoming Court trial. You accepted however there were also claims against particular Health Authorities and that these, in individual cases, may have greater strength.

7. You did not understand how a successful implementation of the public policy to prevent solicitors having access to the identity of the donor would significantly reduce the prospects that their clients had of succeeding in the litigation. I explained how indeed there was such a significantly adverse effect. Whilst it would be possible, without identity of the donor, to investigate the particular screening policy adopted at the particular time, it would be impossible to investigate whether that policy, good or bad, was in fact imposed on the day in question against the particular donor. Failure to carry out a policy resulting directly in the failure to screen out an infected donor can amount to negligence. Further, it will not be possible to investigate, without identity of the donor, whether the donor, whether out of embarrassment or for any other reason, failed to honestly respond to questions about his background which may have put him in one or other risk group. By way of a simple example, if a donor presents himself to the Transfusion Centre and incorrectly tells the staff that he had never been an intravenous drug abuser than that would give a strong claim in law against the donor. By way of another example, if a donor was a practising homosexual but was not told that, as such, he ought not to be giving blood and indeed he was not asked any questions to the answers of which would declare his inclusion in that group, and that such took place at a time when the Department's recommendations to the Blood Transfusion Centres were to specifically exclude practising homosexuals from giving blood, than that would amount to a strong claim of negligence against the Health Authority. In neither of these circumstances could the Plaintiff succeed until such time as he has been able to identify the donor and establish as a fact, for example, that person's membership of a risk group.

You agree that you would give further consideration to this point and will also discuss this with your Legal Advisors to see whether or not you can now agree with my point that this policy would severely prejudice the claims in law of the Plaintiffs. iF If you agree you would refer the matter back to Mrs Bottomley with further advice, which I took, by implication, to mean that you would put this forward as further grounds to reconsider the rejection of the claim for compensation.

You did accept that, in general terms, if the effect of such a public policy was to take away significantly the opportunities for an individual to litigate then that is an argument in support of helping those people in another manner.

On this point, I did refer you to the comments of Lord Morison in AB v Scottish National Blood Transfusion Service and Secretary of State for Scotland. I pointed out that it was the Judge's view that the policy itself supported the claim for Government compensation. You did not recall these comments but I would refer you to the remarks commencing at the foot of Page 5 of the Judgment as follows:-

"However I entirely agree that it is offensive to any notion of Justice that persons should be deprived of the ability to claim damages from those by whose negligence they have been injured. If public policy requires this, it seems to me that it would be reasonable for public policy to provide also some alternative means of compensation".

I think those comments are quite clear.

Incidentally, on a number of occasions during the telephone conversation you appeared to be saying that, whilst you accepted that the prevention of access to the donor's identity might have some damaging effect on the Plaintiffs ability to successfully sue in law, you did not think that the effect was "significant". I have already explained why indeed it is significant. However, it occurred to me, after putting down the telephone, that you were assessing "significant" in the context of the prospects of the overall success in the litigation. In other words, it may be that what you were considering was that, as it was the Department's view that there was little prospect of success in the litigation in any event, then no amount of difficulties placed in the way of the Plaintiffs could "significantly" reduce their prospects of a successful conclusion. If that indeed was your line of thinking, then I must object most strongly. All that needs to be considered is whether the policy effectively puts up a large hurdle in front of the Plaintiffs to prevent them fully being able to investigate the case. It would be wrong to pre-judge the issue by suggesting that the hurdle is not in reality as great as it may seem because, even if it was successfully overcome, there would be no successful outcome. That cannot be the correct way to look at this matter.

There is one other matter that I would ask you to bear in mind. It has been suggested by Mr. Stephen Dorrell that if the Government were to make these ex gratia payments it would take funds out of the system otherwise available for other patients. The fact remains however that money is going to be taken out of the system in any event. The Legal Aid Board have granted Certificates for victims and therefore public monies are going to be spent in the prosecution of these claims. Because of the small number of Plaintiffs compared to those in the Haemophiliac case the spread amongst them of the shared costs would mean that the the burden on the Legal Aid fund per case could be around £40,000 each. In the case of children and unmarried adults this is all we are seeking for them by way of ex gratia payments. In addition to that of course, the Department of Health and various Health Authorities have to pay for the defence costs. There does

Letter from J. Keith Park & Co
dated 27 June 1991

screening out of at risk donors, and delay in the introduction of an Aids test on donors. You will be aware that both of these matters have in past years been the subject of public debate in the media.

You make the observation that you do not believe that the "Scottish precedent" would prevent a claim of negligence against a Health Authority. You do not however put forward any argument in support of this contention. The simple fact is that it is clearly going to be far more difficult for a solicitor to establish that a Health Authority failed to take sufficient steps to adequately screen out a donor, who was subsequently found to be HIV positive, without knowing who that donor was and without therefore, being able to ascertain whether there were factors surrounding that donor that ought to have led the Regional Blood Transfusion Staff to have refused his blood. Further, without identifying the donor it would not be possible to know whether he misled in anyway the Transfusion Centre Staff, in which case he might be liable for himself. It is simply not enough to investigate the particular techniques that the records show were employed in a particular Centre at a particular date. We simply have to know the full facts and be able to assess as much as possible what was the situation when that donor presented himself to the Centre.

Could you please therefore re-consider this point and let me have your confirmation that you now accept that the failure of our being able to identify the donor will significantly reduce the legal remedy available to our clients.

With regard to item (i) on page 2, can you please indicate the number of meetings between Mr Freeman and other Ministers specifically relating to the claims by the blood transfusion victims, as opposed to "related issues".

With regard to item (ii) on page 2, what are the specific circumstances referred to that, presumably, do not apply in Canada and Australia.

With regard to item (iii) on page 2, what was the date on which the payment was actually made to the Trust?

Yours sincerely,

GRO-C

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