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Mr Alcock PS to S of S

From: J C Dobson EHF1

Date: 23 November 1990

cc: Mrs Baldock PS to PS(L)
Mr Heppell HSS
Mr Powell SOL
Mrs Firth FA

LITIGATION INVOLVING HIV-INFECTED HAEMOPHILIACS

I attach briefing material for Secretary of State's meeting next week, which has been cleared with Mr Heppell and with legal and finance colleagues. The briefing consists of:-

i A brief summary of key points to make

ii Detailed speaking notes. Although these are laid out in a logical sequence and could conceivably form the basis for an initial statement of Secretary of State's position, it is more likely that he will wish to use the material in piecemeal fashion.

iii Five supplementary notes giving additional facts and arguments. Notes A and B (but only these) have been sent to Treasury officials and could be openly tabled at the meeting.

iv The text of the plaintiffs' proposal and Mr Canavan's analysis.

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LITIGATION INVOLVING HIV-INFECTED HAEMOPHILIACS - MAIN POINTS

* We have a proposal from the plaintiffs' solicitors which may offer a way of ending the litigation.

* The total cost (about £50m) compares favourably with the cost of proceeding with the action, taking into account the risk of losing and going down for a far greater amount.

* A prolonged action, lasting into the Autumn of 1991, would be politically very damaging.

* We could present a settlement in a way that minimises the knock-on effects.

* We need to move quickly to avoid missing this opportunity. We will never again have the chance to settle for the sort of amount now on offer.

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LITIGATION INVOLVING HIV-INFECTED HAEMOPHILIACS - SPEAKING NOTES

Background

1 You are familiar with the general background. Our line so far has been

- We deny liability on the part either of the NHS or of central Government.

- We accept that there are arguments for giving special help to this tragically-affected group, but this needs to be weighed against the needs of other no less deserving groups. We believe that the £34m given through the Macfarlane Trust strikes a fair balance.

- We do not accept that the Government should pay no fault compensation.

2 I know that you have also discussed with Kenneth Clarke the earlier indications that the plaintiffs would be prepared to settle for a sum much lower than their public claim. His view was

- he would in principle be prepared to settle at a reasonable price on the ordinary basis of the possible risk of losing the action, but

- he could not see any way of negotiating such a price given the overwhelming public sympathy for the plaintiffs and the difficulty of getting agreement to this outcome from the very large number of individual plaintiffs.

3 The message was therefore conveyed through Counsel to the plaintiffs that the Government would not make an offer, but would be prepared to listen to proposals provided these were firmly supported by all the plaintiffs.

The Plaintiffs' New Proposals

4 The steering group representing the plaintiffs' solicitors have come forward with a new proposal which I believe we should take seriously. The main points are:

i They assume the Government would wish to give comparable amounts to those HIV-infected haemophiliacs who have not so far joined the action (about 350).

ii They propose a total sum of £42m, and a method of allocating this to various categories of plaintiff.

iii All amounts given should (as with awards from the present Macfarlane Trust) be disregarded for social security purposes.

iv There should be a separate settlement for the small number of clinical management (medical negligence) cases [see note A].

5 Allowing for

- the possibility of some previously unidentified cases coming forward

- the likely cost of settling the clinical management cases

- legal costs

we estimate the total cost of the proposals at around £50m [see note B].

6 In comparison,

- fighting on would incur costs of some £20m in legal fees (including the cost of legal aid for the plaintiffs)

- we would still be likely to incur the cost of the medical negligence cases

- even if we won on the majority of cases, there would be intense political pressure to make a further gesture - say a further payment of £10m to the Macfarlane Trust

- if we lost, in the worst case our damages could be of the order of £150m or even significantly more.

At best, therefore, we would face having to pay £35m or more [see note B].

DH View

7 I have consulted colleagues and our leading Counsel. I now incline to the view that, if we can secure the proposed package, we should aim to do so.

- It appears that the doves among the plaintiffs are now in the ascendant; once serious preparations for the trial begin, attitudes may harden.

- The cost of the proposals is only slightly greater than the cost of the alternative on the best of possible assumptions. If there is only a 10% risk of losing the main action - and given the likely sympathies of the trial judge, this must be more than likely - the proposals would represent the better "buy" [see note C - not yet shown to Treasury].

- There are enormous political risks in continuing with a trial in the run-up to an election. If collectively we were to lose our nerve during the trial, the cost of settling at that stage would be far greater.

- We should not underestimate the stress which the preparations for the trial will create, particularly for the doctors who are caring for haemophiliacs.

8 I therefore conclude that we should instruct Counsel to signal that

- we would be prepared to make an offer on the basis of the proposals, subject to negotiation on certain detailed aspects (eg the method of calculation of costs).

- This would be our final offer and there is no possibility whatsoever of negotiating upwards on the total cost.

- The offer would be available only if all the plaintiffs were to agree to drop their action. (We might at the end of the day be prepared to settle if say 99% of the plaintiffs were signed up, but this would be for the negotiation.) In addition, any non-litigant applying for payment would have to agree not to start proceedings later on.

- The agreement would have to be presented in the way we propose (see below).

[For use if pressed:

9 I have carefully considered the possibility of making a lower offer. Counsel advise that the plaintiffs might be prepared to settle for a figure of around £30m on the basis of the balance of risks [see note D - not yet shown to Treasury]. However

- there is a clear risk that the plaintiffs would try to negotiate for a higher figure, and that negotiations would become public knowledge. It would make the Government look mean to be bartering over "only a few" million pounds.

- Even if the majority of plaintiffs agreed to a lower figure, it would increase the risk that a significant minority would decide to fight on.

- Any settlement involving minors has to be agreed as fair by the Courts.]

Presentation

10 In presenting a settlement, we would have to minimise the risk of any knock-on effects. The agreement would have to make clear that

- the Government does not accept negligence, or the existence of any general duty of care to individual patients

- nor is the settlement to be regarded as a form of no fault compensation

- it is simply the action which any litigant might take, however good his case, if there is a possible chance of losing the action.

Timing

11 I believe that we need to respond quickly to the plaintiffs' proposal, which we received on Friday 9 November, because

- the doves may not continue to hold the upper hand without some encouragement from us.

- Very soon, both sides will have to start making serious preparations for the trial and the costs will mount rapidly.

Funding

12 I see no prospect whatever of funding any settlement out of money already allocated to the NHS. You have already reached agreement with Kenneth Clarke on what is a politically defensible settlement for the NHS for 1991-92. If we are seen to be trimming off £50m to settle this litigation, the Government would again appear to be mean and would lose any political credit for settling the litigation. [See also note E - not shown to Treasury]

NOTE A

LITIGATION INVOLVING HIV-INFECTED HAEMOPHILIACS - BASIC FACTS

Number of haemophiliacs involved

* About 5-6,000 haemophiliacs in UK, many only mildly affected (therefore infrequent users of Factor 8)

* 1,200 haemophiliacs known to be infected with HIV (the AIDS virus). Could be a few more (? up to 100) yet to come forward.

* 770 haemophiliacs and 190 others (spouses etc) have joined in the litigation.

Main points of claim

Against central defendants:

(A) Government should have pursued more vigorously 1976 policy of self-sufficiency in blood products. If it had, many fewer haemophiliacs would have been infected (since NHS blood less contaminated than imported).

(B) As knowledge of AIDS epidemic grew, Government should have taken earlier action to reduce risks, eg earlier introduction of screening for blood donors; heat treatment for Factor 8; advice to clinicians.

Against health authorities:

(C) In certain individual cases (the "medical negligence cases") clinicians failed to take reasonable precautions or gave unnecessary treatment given knowledge of risks involved.

Note that (A) applies to virtually all the claims, (B) only to those where infection occurred at a relatively late stage in the epidemic, and (C) only to a subset (about 20-30) of these.

Legal advice

* If law strictly applied very good chance of winning great majority of claims. Slightly more vulnerable on claims in category (B) (but still better than 50:50).

* But Courts may be swayed by sympathy for defendants.

* Health Authorities are definitely at risk of losing the clinical negligence cases (category C).

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NOTE B

ESTIMATED COSTS TO EXCHEQUER

Plaintiffs' proposal	£m
Basic amount	42
Unidentified cases	0-2
Medical negligence cases	3-5
Costs	2
	47-51

Continuing with action	'Best' case	'Worst' case	
Legal costs of all parties (including legal aid)	20	20	
Medical negligence cases	5	-	
Further grant to Macfarlane Trust	10-15	-	
Damages		150	(100-300)
	35-40	170	(120-320)

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NOTE C

COMPARISON OF THE TWO OPTIONS

1 Continuing with the action is cheaper only if we are virtually certain of winning. If there is even a 10% chance of losing in the generality of cases, the statistical expectation of the cost becomes

$$0.9 \times 37 + 0.1 \times 170$$

$$= £50m$$

ie comparable to the cost of a settlement. When account is taken of the cases infected at a late stage in the epidemic, for which the risk of losing is substantially higher (see note A), the expected cost becomes even higher.

2 Strictly speaking the costs of continuing with the action should be discounted to allow for the fact that damages awarded will reduce entitlement to social security benefits for some claimants. We have not yet been able to quantify this. In any case, this correction is likely to be small in relation to the margin of error on the estimate of damages.

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NOTE D

A 'MINIMUM COST' SETTLEMENT?

Counsel suggests that a settlement of £27m is the least that the Courts would be likely to accept as fair (the Courts will necessarily be involved on behalf of minors). Taken together with the existing payment of £24m through the Macfarlane Trust this would give a total of some £50m or about one-third the estimated full-cost of £150m. Given Counsel's assessment of the plaintiffs' chances of winning, this seems to him a reasonable level of discount.

This would make the overall minimum:

	£m
Main action	27
Medical negligence cases	3-5
Unidentified cases	0-2
Costs	2
Total	32-36

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NOTE E

[Not for Treasury eyes]

FINANCING A SETTLEMENT

Treasury may well press for a DH contribution to the costs of a settlement. There are two arguments for not making one:

(a) on principle - the settlement is primarily in the interests of Government collectively, not of the NHS;

(b) on practice:

* In 1990-91 the chances of our finding cash are negligible. Health authorities are in great difficulties (Secretary of State will recall Ms Masters' presentation at the meeting with Chairmen on 21 November) and it will be a hard struggle to stay within the Cash Limit. In addition there is very little money spare within the amounts top-sliced centrally for services: perhaps £3-4 million and there are other urgent uses for that.

* for 1991-92, although the PES settlement for the NHS looks generous it has to do a lot of things. That settlement was 5% in real terms; when account is taken of possible pay and price increases that could reduce to 1.7%. And from that there will need to be additional top-slicing eg for hospices, NHS Review implementation, junior doctors' hours. We need every fmillion that is there.

* CFS is a small budget and is already over committed for 1990-91. For 1991-92 the provisional allocation includes £2 million for payments to affected haemophiliacs who may come forward under the arrangements agreed with the Macfarlane Trust in 1989. No further provision would be possible in 1991-92 because of the overall pressure on the CFS budget.