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NOTE ON MEETING ABOUT HAEMOPHILIA HIV AND LITIGATION, ROYAL FREE HOSPITAL, 16 JUNE 1989

Please see appended agenda.

1. Dr Rizza commented about the results of a questionnaire sent out to Haemophilia Centre Directors. 110 were sent out and 86 replies were received. At that time 214 patients were involved in some form of legal action. 42 centres were affected. 34 writs had been issued against health authorities, 4 against a Director, 3 against the SNBTS, 6 against the Secretary of State for England, 3 against the DH, 2 against CSM, 1 against a drug company, 1 against the Licensing Authority. The solicitors involved include Panone Napier in 63 cases, Keith Parkin 30, Robertson in 8 and others in 4 or less actions. There appeared to be coordination in the letters that had been written to the various authorities. The questionnaire results we obviously now out of date.

2. Dr Ludlam briefly highlighted a few points from his historical summary of AIDS in haemophiliacs 1981-1985. (See appended) He also referred to some additional documents which were not originally circulated (A, B and D).

3. Dr Hill in a brief talk mentioned the problems of litigation involving children. He said that the only family that had discussed the problems with him had not proceeded with litigation. However those families which were proceeding with litigation were becoming increasingly difficult to handle. The parents seem to be accusing particularly the junior staff and nurses of changing their attitude, although he himself thought that it was a change in attitude of the patients and their parents. There was also the problem of how to deal with adolescent children who needed to start AZT but whose parents were not prepared for them to be told that they had HIV infection. He also focused on inadequate staff and resources to cope with these problems as well as the potential problem in junior staff being discouraged from going into the haemophilia speciality.

4. Dr Katherine Allsopp from the MDU reiterated her advice of a year ago to a meeting of the Haemophilia Centre Directors. The main claim of patients was on the grounds of negligence, ie. a breech of duty of care to a patient leading to damage to that

patient. She felt that the Crown indemnity scheme which was due to come in fairly soon was not going to change the situation much, as this was not going to be a no fault compensation scheme. She then summarised the usual procedure of a complaint being made to a doctor either verbally or by a letter to him or by a solicitor's letter. She advised that doctors should not attempt to deal with the problem themselves but should involve their defence organisation. She emphasised the importance of passing all the records to the plaintiff's solicitor and not to try to hide anything. She stressed that expert witnesses for the plaintiffs would have to be other Centre Directors, and it was preferable that good and prompt advice be supplied by specialists rather than the Haemophilia Centre Directors refusing to cooperate. If this were to happen then worse advice would be obtained from non-specialists. An expert witness had to be prepared to stand up in court and read out his criticism, if such there were, of a colleague face to face. The defence organisations would advise on this. The main defence was likely to be a state of the art defence. The question would be whether actions were taken in accordance with what could reasonably be expected to be the knowledge of a specialist in the field at that time.

5. The Scottish position was outlined by Mr John Griffiths. He stressed that in Scotland there was a difference from England and Wales in that the legal office covers all the regions in Scotland as well as the SNBTS. So far there had been 12 litigations of which 2 were patients who had AIDS (1 already dead) and 10 had HIV infection. Eleven claims were pre-litigations. The 12 litigations had all been sisted. This was mainly because the plaintiffs were applying for Legal Aid (2 were granted, 2 refused and the rest are waiting). The main expert witness in all these cases was Dr Jones from Newcastle. However in one case Legal Aid had been granted to obtain an expert witness from the US - a Dr Devine. Again there appeared to be lot of coordination between plaintiffs and one firm of solicitors was dealing with nine of the cases. The Secretary of State for Scotland was also a defendant, but he came under a different legal office. Claims were for £250,000 each and in each case the Health Board was claimed against, being vicariously liable. The Secretary of State for Scotland had apparently only provided a very basic skeleton defence so far. Mr Griffiths' office on the other hand had had considerable help from Dr Ludlam and had prepared one very detailed defence, which might represent a guide for action. He then went into a specific case and the claims that were made in it. We have a copy of that particular summons. It centres on whether the doctor should have used Factor VIII or an alternative produce, and whether he should have warned the patient of the risk; and what the magnitude of the risk was perceived at that time. (See Sideaway, House of Lords). The timing of heat treatment and its efficacy also had to be considered as well as, for instance, in one case patient ~~who was~~ abnormal~~ly~~ sensitiv~~e~~ity to cryoprecipitate. Mr Griffiths' view was that there was very little chance of the litigation succeeding.

6. There followed a detailed panel discussion.

1. it was felt that social records might form part of the medical records asked for by solicitors, particularly if these contained comments about telling the patient that he was HIV positive and counselling. Other information had been asked for included nursing Kardex, or correspondence and operating notes. There was apparently a standard letter of request for notes.

2. The reason why no case had been brought against producers of Factor VIII was that apparently no litigation in the US had been successful against the Factor VIII companies. None of these carried insurance and so would prefer to go bankrupt rather than to pay the costs involved. Also in most instances several manufacturers' material had been used. It was therefore easier to bring the case against the Health Authority.

3. If a patient attends several different centres, there was no problem in Scotland because there was one legal office that ~~were to~~ would deal with the ~~latter~~ case. In England and Wales it would be a greater problem to decide who was liable.

4. Those most likely to be expert witnesses were also those most likely to have the majority of suits against them. Responsible solicitors were unlikely to ask for more than 3 expert witnesses, and if these all agreed would probably accept their advice. There was nevertheless likely to be an element of conflict of interest, overwillingness to criticise a particular system of approach.

5. It was felt that if Crown indemnity took over the cases then the Department of Health would try to tell the Haemophilia Director what line he should take in the defence.

6. In England and Wales as well as in Scotland there was no need to name a specific doctor, since the Health Authority would arrange for the defence organisations to represent the doctor.

7. In England and Wales in some cases plaintiffs have been given reference numbers, whereas in Scotland they were named in each case.

8. The regional solicitor from Newcastle stated that the Lord Chief Justice had nominated Mr Justice Oglan to preside over a number of haemophilia and HIV cases. He was not sure whether the hearing would be at Reading, because he had heard that the Judge wanted the case heard elsewhere. Many Haemophilia Centre Directors were unaware of this departure. (DH knew of the proposal but were unaware whence it had originated)

9. It was questioned whether the reason for the US involvement in one case was because the NHS product was not licensed but produced under Crown immunity, whereas the other products were licensed products.

10. It was asked whether the Haemophiliacs might not prefer to have a few test cases and then decide whether the rest of them should also sue. Mr Griffiths said that the question of time barring might influence such a decision since usually a claim had to be started within three years of the date of the occurrence (although in children, this could be up to the age of 24). As a result the plaintiffs had to arrange for an expert witness to advise before legal aid could be granted.

11. Dr Peter Jones stated that the Haemophilia Society wanted to get money from the Government and preferred a no-fault compensation, such as in the case of pertussis ~~(?)~~. They did not wish to try to go against individual doctors. Haemophilia Society apparently had been given advice by leading counsel saying that there was no claim in law. As a result patients were given the names of solicitors interested in litigation on behalf of haemophiliacs, but the Haemophilia Society was not advising haemophiliacs to seek litigation.

12. The MDU advised all clinicians to get copies made of all their notes otherwise they would never have access to them again. They also advised that notes should be checked by regional solicitors to exclude any defamatory letters etc before passing on to plaintiff's solicitors.

13. The level of support doctors obtained from hospital services not only for photocopying but also for obtaining notes etc was criticised. In some hospitals the Health Authority was being compelled by Directors to do all this work.

14. Several people commented that they felt that doctors should be treating patients rather than spending their time in court defending themselves.

15. Advice was given that the patient's case was not undermined if he continued to be treated by a doctor while suing him. Both parties needed to know that this was happening.

16. Dr Jones apparently had 15 writs against him although he was the expert witness in almost all the Scottish cases.

17. Some doctors were anxious in case they were vilified by the local press during the court actions. Many felt that the whole exercise was a waste of time and resources.

18. Several doctors suggested that a no-fault compensation scheme should be available.

19. Several doctors suggested that the financial and manpower considerations should be put to the Government and that pressure should be brought to bear on the Government to sort out the problem. (Dr Jones and Dr Hill were particularly vociferous in this respect as well as the solicitor from Staffordshire and the one from Newcastle). Dr Barbara Bain said that it had been Government policy <u>not</u> to speed up production of factor VIII at Elstree to become self sufficient in the late 1970's. She said that she had been on a DHSS committee that had decided this.

20. Professor Bloom from Cardiff was the only Director who had anything helpful to say for the Government. He stated that it was not fair to blame the Government for a lack of hindsight when the Directors had a lack of hindsight themselves. Neither knew of the existence of HIV in the mid-1970's.

21. The solicitor from Staffordshire said that extra money would have to be obtained from the Government in the end anyway to pay the Regional Health Authorities for any ex-gratia payments or costs of legal services involved with the HIV litigation.

22. The testing of historical samples of patients involved in litigation was considered. In some cases where patients were aware that historical samples were available solicitors had asked for these to be tested. In other cases they just wished to know the dates and the sites of storage of these samples. (Mr Powell asked whether the GMC guidance on not testing for HIV without consent was relevant in this instance also. No comment was made).

23. The defence organisations said that they cooperated with each other in these cases. There was no formal coordination with Health Authorities. Several people suggested it was a waste having large numbers of solicitors involved. One regional solicitor mentioned that somebody from the Department of Health had tried to find out how many cases had been started.

24. The regional solicitor from Newcastle (who was very vociferous) several times said that he would like after this X meeting to meet up with the defence organisations and other regions about planning a joint defence. (There was no suggestion made of a joint defence with DH/Government).

25. It was stressed that solicitors working on behalf of the Haemophilia Centre Directors needed to be very well X informed. It was obvious that some of the plaintiff~~'~~s' solicitors were extremely well informed.

26. There appeared to be a steering committee of solicitors involving Keith Park, and Mallen and Walton. After the 29

June hearing it was probable that Napier might join the steering group.

27. As an aside it was mentioned that at least two transfusion cases had been brought, one in Yorkshire and one in Manchester.

28. The Haemophilia Centre Directors would probably form a sub-committee to try to plan a joint defence amongst themselves.