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Rt Hon Andrew Smith MP
Chief Secretary
HM Treasury
Parliament Street
London SW1P 3AG

5 April 2001

Dear Chief Secretary,

HEPATITIS C LITIGATION

Last year, claims for compensation against the National Blood Authority were brought under the Consumer Protection Act 1987 on behalf of 114 people infected with Hepatitis C through blood prior to the introduction of a screening test in September 1991.

The Judgement was handed down last week. All 114 claimants were awarded damages, which I understand will be met by the NHS Litigation Authority from existing resources. The judge's main finding was that the public is entitled to expect that the blood they receive will be 100% safe. The Judgement creates a very strict liability regime that would apply to anything that falls within the definition of a product within the Consumer Protection Act. It leaves the National Blood Authority and the wider NHS with liability for "defective products" where the risk is known but regardless of the ability to eliminate that risk. At the worst case, this could include not only blood and blood products, but human tissues (eg bone marrow, stem cells, skin grafts), organs for transplantation, and possibly some medicines and medical devices.

We have taken the advice of lawyers on whether the Judgement should be appealed (an appeal would have to be lodged at the Court by tomorrow morning). Their advice is that it should not. They believe that an appeal stands only a 30% chance of success. And if the Judgement is upheld in the court of Appeal and the European Court of Justice (to which the Court of Appeal are likely to refer the case) then it will be far less open to challenge in future. Tactically, lawyers suggest we do not appeal now and leave open the option of appealing the Judgement in any future case where the chance of success may be better.

Reluctantly I am inclined to agree with the advice not to appeal. You will appreciate that the Judgement has potentially major financial implications for the NHS. There is already a case involving transmission of Hepatitis C via a heart due to be heard later this year, which may be settled out of court.

As you know, there is no provision in my current SR settlement to meet any future claims - my resources are already committed to delivering the NHS Plan and meeting other pressures such as clinical negligence. Since a decision not to appeal is likely to open up further claims, these can only be funded by a claim on the Reserve.

I am copying this letter to the Lord Chancellor, Stephen Byers and Sir Richard Wilson.

Yours sincerely,

GRO-C

pp ALAN MILBURN

*(approved by the Secretary of
State and signed in his absence)*