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CHIEF SECRETARY

1. Mr. [Signature]
2. Mr. [Signature]
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FROM : A J C EDWARDS
28 September 1990
Ext GRO-C

cc Mr Monck
Mr Saunders

HAEMOPHILIACS AND HIV

Mr Clarke has asked to discuss this subject with you on Monday at 6.30 pm. The immediate issue is whether or not DH should signal to representatives of HIV-infected haemophiliacs a readiness to explore an out-of-court settlement.

Background

2. You may like to have a brief reminder of the background:
 - At least 1200 haemophiliacs caught the HIV virus (which causes AIDS) as a result of injections of Factor VIII made from contaminated blood between 1981 and 1985.
 - The Government has never accepted legal liability for this great tragedy. The Government's position has been that AIDS and its transmission were not understood at the time and there was therefore no fault and no liability. The virus which causes AIDS was not finally identified and isolated until 1983. Heat treatment to make blood products safe was not discovered until 1984 and was not introduced to the UK until the middle of 1985. (Now all blood is routinely tested before being used for medical purposes.)
 - In response to public pressure and requests from the Haemophilia Society, the Government set up the Macfarlane Trust in 1987 with an initial endowment of £10 million to be paid to haemophiliac AIDS sufferers on a discretionary basis.
 - Last year, the Government agreed, after discussions between you, the Prime Minister and Mr Clarke, to provide a further £24 million to enable non-discretionary payments of £20,000 to each of the 1200 then known sufferers. (It is now thought

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there could be up to 1400.) These payments were likewise administered by the Macfarlane Trust, though for technical reasons they were channelled through a separate Trust. It was hoped that this further contribution would head off litigation.

- Contrary to the Government's hopes, representatives of the sufferers have brought proceedings against the Government - in the persons of the Secretary of State, as the licensing authority for medicines, the Department of Health, the Committee on Safety of Medicines, the Central Blood Laboratories Authority (responsible for the Central Blood Products Laboratory, manufacturers of Factor VIII) and regional health authorities. The case is now due to come to the High Court in March of next year. There are likely to be around 30 plaintiffs, chosen to cover between them all types of case. The Haemophilia Society, though previously advised that the sufferers had only a poor chance of success, have backed them in bringing the case.
- In the meantime, the haemophiliacs' representatives have petitioned (and appealed) for access to Government papers. The Appeal Court has directed that papers be made available to the trial judge, Mr Justice Ognall, so that he can decide what should be passed on to the plaintiffs. Mr Justice Ognall also issued in June, most unusually, a statement which implicitly recognised that the plaintiffs would have difficulty in establishing that the Government had been at fault but urged that the Government should not take a narrowly legalistic view and should explore the possibility of settling out of court.
- The advice of the Solicitor General and Counsel, as reported to us, is that for the most part the Government is not vulnerable to charges of negligence or other fault and is therefore likely to win the court cases so far as most of the plaintiffs are concerned. They see the legal arguments as being on the Government's side but warn that judges are likely to be as sympathetic as possible to the plaintiffs,

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especially in the 30 or so cases where infection is likely to have occurred towards the end of the period, when the plaintiffs will argue that the Government was slow in telling high-risk groups not to give blood and in introducing screening tests for blood donors. In those cases our legal advisers put the chances at about 60/40 in the Government's favour.

- Other countries have had similar tragedies. DH say that the UK is presently at the top end of the league for generosity to haemophiliac AIDS sufferers, at least where Government payments are concerned.

Mr Clarke's dilemma

3. DH say that the haemophiliacs' representatives, possibly sensing that their strength lies in the political rather than the legal case, have indicated in response to the Judge Ognall's statement that they would be willing to discuss an out-of-court settlement. We understand that Mr Clarke is instinctively disinclined to proceed down this road, while being aware that the Government is likely to encounter severe criticism whatever it does. He has not, however, made up his mind and would like to discuss the position with you, especially given the large potential financial implications.

Financial implications

4. If all 1200-1400 sufferers were to be awarded compensation, or receive ex gratia payments, the expenditure involved could be extremely substantial. Some illustrative numbers are shown below.

<u>Payment per head</u>	<u>Total cost</u>
£	£m
30,000	40
40,000	50
55,000	70
80,000	100
130,000	170
180,000	230

In addition to the above, DH think that a court case would be likely to cost well over £10 million.

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5. The above sums would not, of course, be likely to be the end of the story. The precedent set by large payments to AIDS-infected haemophiliacs could, if the worst came to the worst, lead to large additional amounts of expenditure in other areas. It would be hard to resist extension to the 120 known cases of people who have contracted the AIDS virus after receiving blood transfusions. The big risk, however, is that the Government could be faced with unimaginable bills if either a court judgment moved the system in the direction of no-fault compensation (or compensation because of deficiencies in Government policy as against negligence in its implementation) or the Government itself set a precedent of making large payments on an ex gratia basis in no-fault cases. It is easy to see how the bills could mount if such compensation (or ex gratia payments) were extended to areas such as drugs, vaccines, surgery and delays in treatment. The United States' experience is relevant in this connection.

Discussion

6. The three main options as DH see them are:

- i. to indicate willingness to negotiate an out-of-court settlement;
- ii. to decline such a negotiation and let the court case take its course; and
- iii. to make a payment into the court.

We have not had the opportunity to examine all the papers or discuss these issues with our own legal advisers. Subject to those important qualifications, we would see the pros and cons as follows.

7. It seems to us that indicating willingness to settle out-of-court (option i.) would be likely to be very expensive as well as very dangerous. The main considerations are:

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- i. The media would almost certainly join the plaintiffs in bringing maximum pressure on the Government during such negotiations and would be unlikely to settle except for very high sums.
- ii. Individual sufferers could well pursue court cases subsequently even after an out-of-court settlement.
- iii. If the Government continued to insist that it was in no way at fault, the precedent of paying large ex gratia sums in no-fault cases would be potentially damaging and extremely expensive.
- iv. Any attempt to guard against this danger by accepting liability (which would clearly be extremely difficult given the Government's stance to date) would evidently be less attractive than letting the court case proceed.

On all these grounds, opening negotiations on an out-of-court settlement looks to us to be prima facie unattractive - unless conceivably the plaintiffs were to make a very moderate offer and agree not to pursue further litigation. The Government might in principle consider encouraging them to make a suggestion without compromising its own position. But the reality is that it would be extremely difficult to avoid being drawn into a negotiation, with the disadvantages noted above. [See postscript at end.]

8. The alternative of allowing the court case to continue (option ii.) would clearly have considerable disadvantages as well:

- i. There must clearly be some risk, albeit a small one, of an adverse judgment which would nudge the system closer to no-fault compensation. We are not clear whether any steps (such as new legislation) could realistically be taken to limit such damage if it were to occur.

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- ii. The Government would be publicly on the defensive about this issue for a significant period while the case and appeals continued.
- iii. In the event of victory, the Government would probably feel that it was politically important to be generous.

Prima facie this looks a better buy than the first option provided that the risks of serious defeat in the court case are slim (as we believe them to be). In public relations terms, the Government would doubtless be concerned to draw a clear distinction between willingness to help on the one hand and admission of fault on the other.

9. The third option of letting the case proceed but paying a sum into the court would seem to be the worst of all worlds.

Line to take

10. We suggest you should:

- listen sympathetically to what Mr Clarke has to say;
- if he argues against indicating willingness to settle out of court, say that your strong instinct is to support him in that judgment;
- if he argues for indicating such willingness, counsel caution and urge that further consideration be given to the proposal with Treasury colleagues and legal advisers before any such signal is given; and
- ask in any case that Mr Clarke's officials should keep in close touch with yours over this difficult and potentially very expensive dossier.

Modalities

11. Mr Clarke is willing to see you either a-deux or with one official in support (probably his Deputy Secretary, Mr Heppell). You may feel that it will on balance be helpful to have one official present on each side, if only because that will help us

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in advising you subsequently. If so, perhaps Mr Heywood could convey to Mr Clarke's office that you would welcome the presence of one official on each side?

12. Mr Clarke is understandably anxious to minimise the amount of paper written on this subject and to restrict circulation of any such paper. That is why I am not copying this minute widely.

GRO-C

A J C EDWARDS

Postscript

In their maddening way, DH have only now sent us, at 5.30pm on Friday, the key documents we requested earlier in the week, including some which we did not even know existed.

I attach:

- i. Mr Justice Ognall's 26 June statement (Annex A) and
- ii. the Haemophiliacs' solicitors' response to it (Annex B).

There is no absolute need for you to read these documents. But you will wish to know that the Haemophiliacs' solicitors' letter appears to say, on page 8, that the plaintiffs would settle for claims as follows:

General suffering	£40-60,000
Individual claims	£50-100,000

on top of the money which the Government has already provided. The above figures seem to be additive though that is not totally clear. If they are additive, however, the implication is that the average payment to each sufferer, including amounts already made available by the Government, would be of the order of £150,000.

It is also stated on page 10 of the letter that any agreement would be based on full and final settlement of all claims by the plaintiffs.

Instinctively one cannot but sympathise with Mr Justice Ognall's thesis that an issue such as this would better be settled by negotiation than by litigation. Our immediate impression, however, is that the haemophiliacs' proposal is very far from being the sort of deal which the Government could accept:

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- First, the sums suggested (if correctly interpreted) would establish a very high floor level for other hardship cases in the future.
- Second, it would be very difficult to defend giving so much money to this particular group of people, tragic as their condition is, when there are so many other groups of people with comparable suffering.

There would of course be all manner of other legal and practical issues to consider.

If the Government were to indicate willingness to negotiate a settlement on these broad lines, it seems clear that there would have to be a long negotiation, with much attention in the media and all the attendant disadvantages noted in paragraph 7 of this minute.