

HIV/HAEMOPHILIA LITIGATION

CURRENT POLICY

Litigation

A commercial manufacturer (Amour) has now been joined in the action, in an individual claim, but others may be joined later.

1. Following previous discussions with Ministers, the Department and the other 'central defendants' in this action (Committee on Safety of Medicines; Licensing Authority; Welsh Office) are presently acting on the policy that the Plaintiff's claims should be put to the Courts, and that all allegations of negligence should be contested. Officials know from a meeting with representatives of the other defendants (Health Authorities) that they are assuming the same stance. Facts are still being collected for Counsel, but officials believe all the Plaintiff's allegations can be successfully countered. It is also known that the Haemophilia Society sought legal advice some time ago on whether actions for negligence might succeed; they were advised against pursuing such actions.

2. Our Counsel has advised that the "no duty of care" argument should be deployed as a preliminary point to seek to remove the central defendants (alternatively CSM and LA) from the action altogether. [Mr C Wilson's submission of 18 10 89 refers].

3. Counsel also wishes to take other preliminary points eg whether action to protect against hepatitis is relevant to HIV litigation. The upshot might be that so much of the Plaintiff's case would be removed as to undermine the whole case. The Legal Aid Board might reach the view that the Plaintiffs chances of

started as a possible preliminary issue by the Hk's Counsel.

This has now been

The judge is to hear application on preliminary issues on 5th December 1989
and will try them over 2-3 weeks commencing 11th June 1990

success were so slim that the case should not be funded. ↓

If the preliminary points did not succeed, the defence would contest allegations of negligence at the main hearing [probably November 1990]. We believe that we could present a robust defence, given; - Early 1991

- i. the uncertainties in scientific knowledge of the AIDS virus and its routes of transmission in the early 1980s,
- ii. the very considerable efforts made, once the nature of the threat became clear, to protect against it (eg screening of blood donors).

There might however be ~~several~~ individual claims against individual doctors which might succeed?

Current situation on Macfarlane Trust

From the outset Ministers have intended that the £10 million given to the Macfarlane Trust should be used to meet need and that it was not intended as a compensation payment. The Trust's allocation policy is set out in Annex B. Recently, they have extended help into the mortgage field and their policy is to share costs with the haemophiliac to the extent necessary to support the mortgage in return for an equity share. Outlays for the fund are now running at some £2m pa.

6. In allocating funds the Trustees do interpret 'need' in a broad way and officials have supported them in this view. MS(H) knows of the proposed exchange of letters between Mr Heppell and the Trust. Ours would confirm that "the Trustees would not make more limited offers of help than they would otherwise consider

reasonable simply to conserve funds". They all also advised that the right time to approach Ministers for additional funding would be when funds were sufficient to meet commitments for only another two or three years. The proposed reply from the Trust warmly welcomes these reassurances. [The letters can now be "officially" exchanged and published so that the current situation is on the record.]

Future Options

7. If Ministers are minded to review our current stance, the main options for dealing with this litigation and/or for increasing the financial help presently on offer to haemophiliacs are as follows.

Option "A": Out of Court Settlement

8. The Haemophilia Society, ^{MPS} ~~MPS~~, the Press and a substantial body of opinion within the NHS favours an "out-of-court" settlement, ^{it is claimed} so that those suffering the effects of HIV infection can quickly be assured of financial security.

^{- but with a note of individual doctors}
- Within the NHS this view is at least in part so as to save the time & ^{money} ~~cost~~ of ^{possibly} ~~cost~~ ^{at meetings} ~~at meetings~~. This view has been stated ^{at meetings} ~~at meetings~~.
to have to defend themselves, and for the HAAS to save time + money.

9. Moreover, a settlement out-of-court on the HIV litigation is likely to provoke claims by other groups seeking compensation from the MCA by this route. [An immediate example might be the benzodiazepines (valium) litigation where the Department is not presently co-joined (with the manufacturers and doctors) as

It is also suspected that in a few individual cases a claim might succeed against an individual doctor, which may be a consideration in the minds of ^{individual} ~~individual~~ ^{organisations} ~~organisations~~, including the ^{defence} ~~defence~~.

defendants. Circa 40,000 Plaintiffs are involved].

10. Another consideration would be the effect upon the licensing system itself. Experts would be hesitant/reluctant to endorse a product as worthy of licensing if they may be sued and face costs without proof of negligence, and realizing that DfI and the government are not prepared to make any effort to defend ~~outside experts~~ these experts.

11. Even if in principle Ministers were inclined towards an out-of-court settlement there are some difficult questions of detail to be resolved, some of which might prove contentious. An award to all HIV Plaintiff's or to all haemophiliacs? A standard amount or a tailored award? Would the Haemophilia Society (or the Macfarlane Trust) be involved in assessments, etc.

Byrd
Exp
Kew

(one of them have had to pay £7000 already in court litigation) who are HIV positive.
individual
Would haemophiliacs have to prove they could not have become HIV infected as a result of non individual haemophilic being transfused or drug addict? Would the date of presumed infection be relevant?

Option B: Explicitly increase funding to the Macfarlane Trust

12. The Macfarlane Trust could be given additional funds, again on an ex-gratia basis. Realistically the Trust Deed would need to be amended to place minimal emphasis on "means testing" and perhaps to allow substantial help with loans for housing etc. The settlement amount could be substantial, perhaps moving towards the likely range of costs for an out-of-court settlement. It is difficult to assess whether increasing the Trust Fund financially will meet the Plaintiff's other motivation(s) for the Court action, viz to establish official recognition of their HIV positive status via blood products. Some might proceed with litigation in any event. Moreover, there are signs that the haemophiliacs are looking for a lump sum without having to submit

what they might see as preventing any public criticism of them

*These figures show an average of the litigation has already
had to pay £7000 towards the costs.*

to any 'needs' test however generously it is affected. Channelling more money through the Macfarlane Trust might not therefore dissuade many Plaintiff's from the Court action.

Option C: Ex-gratia Payment

13. An amount could be allocated on a "no-fault compensation" basis that would provide an ex-gratia payment to haemophiliacs without either admitting ^{liability} or involving the Macfarlane Trust. Costs would be similar to those for Option A. Ministers have opposed "no-fault compensation" schemes since the Pearson Commission reported in []; also the option might suffer the same objections from Plaintiffs as Option B. *In addition it is unlikely that the press and public would consider this as anything other than an admission of liability.*

Option D: Panel of Inquiry

14. An option mooted by an NHS Haemophilia Centre Director (attached to the Haemophilia Society) was that a Commission of Enquiry might be established. This could either assess the government's record ^{over} ~~of~~ the relevant period, or consider the case for an ex-gratia payment or both. Officials believe this would need to be linked to an immediate ex-gratia award (perhaps to the Macfarlane Trust) to overcome the recurrent argument by the Plaintiffs that however the issue is resolved it should be with all speed.

Option E

15. As a matter of general policy the Department has maintained a

low profile in the face of critical Press and public "rehearsals" of the HIV litigation.

16. The allegations and misinformation contained in the Sunday Times campaign and elsewhere could be responded to forthrightly. The most blatant examples (eg that NHS heat-treated Factor VIII appeared one year after [USA] product) could be the subject of an approach to Lord Justice Ognall on contempt. If a response would not itself be held in contempt, a parallel history of the facts could form the basis of a Departmental Press Release. ~~The~~ Annex A to this submission addresses the main points mentioned in the Sunday Times campaign.

The judge refused to do himself and being funded with material relating to the case and Mr Justice Hirst's response to the judge is deciding whether some Court order would be appropriate.

17. The Plaintiffs are following normal procedure in litigation of this kind in singling-out only one of the defendants for attack. In this case it is the Department of Health, since we are seen as being the direct or indirect debtor in the event of a successful action by the Plaintiffs.

Also they see the Department as being anonymous and they stress that individual doctors are not being named - this is the Hemophilia Society's case. However, if the case goes to County Courts, individual doctors would have to defend their actions, as the last page of the claim is about clinical management for which individual doctors have

Summary

and it is encouraging plaintiffs towards this view

sole responsibility. Many haemophiliacs would not wish to have to stand up in Court to face their own doctor, the concept of all for anonymity is linked with this concept.

18. Our advice remains that the Department should continue to defend the Court action, but put a little more money into the Macfarlane Trust and make this known publicly. Attempts could also be made on the publicity front to consider the critical reporting so far.

Ministers may however wish to consider:-

i. whether they would wish any of the alternative options to be worked up in more detail;

ii. whether they would wish us to begin soundings with Treasury on the possibility of increasing by whatever means the funding available to HIV - infected haemophiliacs.