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Our Ref: LW/CMCK

Your Ref: L69/3211/JMD

Date: 7th Sept 1990

Dear Sirs

Re: HIV Haemophiliac Litigation

1. Introduction.

On the 26th of June, 1990, Mr Justice Ognall made a statement in Chambers in which he invited the parties to this litigation to give "anxious consideration" to the prospects of a compromise of these proceedings.

We assume that you have conveyed his observations to your respective clients in accordance with his invitation so to do. A reasonable time has now elapsed in which to consider the prospects of compromise.

In acting for the Plaintiffs we are acutely conscious of their unique and tragic predicament. Deep public and parliamentary concern for them is regularly expressed. Accordingly we have no doubt that you and your clients will wish to examine all the factors that play a part in any compromise of these claims - legal, financial, moral and humane.

We now put our position on these matters.

2. Procedural Progress

2.1 Discovery. We will have completed inspection and copying of the Defendants' documents thus far disclosed by the end of September.

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2.2 The Immunity Claim. On 11th September the Court of Appeal is due to hear the appeal from the judgment of Mr Justice Rougier concerning the Government's claim for public interest immunity. Subject to any further appeal, the further discovery and inspection ordered can be completed by the end of September at the latest.

In taking your stance we presume that you have taken account of the advice given by Sir Donald Acheson to Mr. Kenneth Clarke referred to in the Sunday Times article of 5th August, 1990, page 1.7. "Haemophiliacs demand end to official secrecy." While disclosure of sensitive government documents may be embarrassing, nondisclosure could be too.

2.3 Lead Cases. The selection is underway as to appropriate categories and the identification of suitable cases. In cases involving AIDS it may be necessary to video the claimants' evidence so that it can be used at trial in the event of prior death.

2.4 Tests and Back testing. The nature and extent of this and related discovery can no doubt be agreed between the parties by the end of the month.

2.5 Expert reports. Subject to the completion of discovery a reasonable time for exchange is towards the end of the year.

2.6 Trial. The trial date has been fixed for March 4th, 1991, and we do not presently anticipate any procedural reason for adjournment.

3. Legal issues.

3.1 These are fully set out in the pleadings and were expanded in the oral and written skeleton arguments presented at the immunity hearing. It is not the purpose of this letter to rehearse the arguments on liability available to each party. We

refer you to the material in the Plaintiffs' skeleton arguments before Mr Justice Rougier and the Court of Appeal in the public interest immunity hearing.

3.2 Mr Justice Ognall referred to the "legal difficulties" attendant on the Plaintiffs' case as to duty and causation.

It cannot reasonably be argued that the Plaintiffs' claim must necessarily fail as a matter of law. Mr. Justice Rougier did not so find on the discovery Summons. It is highly unlikely that on the appeal on the immunity issue the Court of Appeal will seek to determine the duty question. Indeed there would almost certainly be a sense of public outrage if there were such a finding against the Plaintiffs without evidence at a trial.

We imagine that you have noted the conclusion of Mr Justice Rougier (at 22A of his judgment) that:

> "As to the facts, whilst stressing that I desire to express no opinion whatever on the ultimate outcome, the documents I have read which have already been disclosed to my mind are sufficient to show that the plaintiffs can raise a prima facie case if they can surmount the initial hurdle of showing that they are in a position to sue".

3.3 The duty issue is a mixed question of law and fact. It is inappropriate in litigation of this kind to seek to determine the issue on the pleadings and assumed facts. Any Court must be very cautious in determining questions of fact on assumed facts, and the risk of doing so unfairly to one side or the other is increased where, as here, the existence of any duty and the reasonableness of the Defendants' actions can only properly be determined on the oral and documentary evidence at a full trial, and will doubtless require that senior civil servants give evidence. In any event the duty issue is different as between the Plaintiffs and the Central Defendants and the Plaintiffs and the Health Authorities.

3.4 Issues of foreseeability, and causation are necessarily questions of fact.

3.5 It follows that if there is no compromise then there will be a trial at which, inter alia, the following issues will arise for investigation by the Court with consequent debate by the public and the media:

1. The existence and extent of a duty by the Central Defendants, and in particular the Department of Health and Welsh Office, towards an identifiable group treated within the National Health Service who were foreseeably at risk of personal injury because of the acts and omissions of the Central Defendants.
2. As to the self sufficiency issue, an exhaustive examination of Government documents and evidence of relevant civil servants (whether called or on subpoena), and perhaps past and present ministers, to see why there was a failure to follow the World Health Organisation's recommendations and the Government's stated policy.
3. The speed of the Defendants response to the AIDS crisis. For instance, the delay by the Government in introducing HIV testing of blood donors from January 1985 to October 1985.
4. The legal relationship between the Central Defendants and Health Authorities and doctors in terms of the duty owed to National Health Service patients when the Government's acts or omissions substantially determine the scope of treatment and advice which such authorities and doctors can give to patients.
5. As to duty and breach the relevant dates of knowledge of the Defendants arising on the pleaded issues.
6. Whether the Bolam test can be relied on when the doctors are advising and treating patients on the basis of non-medical considerations of economics and resources rather than medical considerations.

Whatever be the results of the trial on this and the other issues in the case public debate and concern will no doubt persist for long after because of the unique features of this litigation. This no doubt influenced Mr Justice Ognall to comment on the "moral" dimension to this case which he said should mean that

> "...the public may be entitled to expect from government an appraisal of their position which is not confined solely to legal principles to be found in the law of negligence on problems of proof. Compromise does not betoken any admission of blameworthiness. In any event it might be argued that any perception by the public of fault in the Defendants may well be significantly less than the opprobrium attached to any apparent unwillingness to temper the rigours of the law with the promptings of compassion."

We therefore turn to the humane and financial factors that invite compromise.

4. The nature and extent of the Claims.

4.1 The total number or claimants is about 970. The Steering Committee for the Plaintiffs represent a consortium of about 70 firms of solicitors representing the individual Plaintiffs. The Plaintiffs in this litigation represent a majority of those haemophiliacs infected with HIV.

4.2 The claims against each Regional Health Authority can be separated as follows. The first figure represents the total number of claimants against the Authority, the latter represents the number of cases where the Authority is the only Health Authority Defendant. The figures are not entirely complete; they are based on a study of 896 cases.

East Anglia 32, 15; Mersey 60, 49; Northern 85, 73; North Western 76, 66; Oxford 91, 59; South Western 47, 24; Thames North East 88, 51; Thames North West 25, 6; Thames South East 111, 67;

Thames South West 13, 5; Trent 68, 45; Wales 81, 52; Wessex 94, 67; Yorkshire 69, 52; Hammersmith and Queen Charlotte's Special Health Authority 26, 20; Great Ormond Street Special Health Authority 23, 11; others 5.

4.3 Of the 896 (of about 970) cases studied, 721 are brought by haemophiliacs, of whom 75 have died already, 48 have clinical AIDS including six minors, and 325 have AIDS related complex including 59 minors. (We have no information on 34 of the haemophiliacs). Of 175 intimates who are suing, one has AIDS, 12 have AIDS related complex, and a further 12 are infected with HIV. There are 133 "category g Plaintiffs", that is intimates who have not been infected with HIV, most of whom are suffering from psychiatric illnesses, including 78 wives and 40 parents.

4.4 It would seem that several Plaintiffs die every month, and several dozen will die before the anticipated conclusion of the trial. Their dependants and their estates will continue their claims after they have died. It is believed that all the Plaintiffs will die of AIDS eventually, and it may well be that most do so in the next few years.

There will never have been a trial in this country taking place with Plaintiffs in such dire circumstances. This factor of impending death was described by Mr Justice Ognall as being "cardinally important". We agree.

5. Timing and Costs

Timing

5.1 A trial of four to six months from March 4th 1991, followed by a reserved judgment indicates a decision in about October 1991 at the earliest.

5.2 An appeal to the Court of Appeal would be unlikely to be heard before early 1992, and could take four to six weeks.

5.3 Any appeal to the Appeal Committee of the House of Lords would follow in the Spring, and if leave were granted to pursue the appeal a hearing in the Spring or early Summer of 1992 would be likely.

5.4 Between now and the Summer of 1992 scores of haemophiliacs will die. Public and media interest will be unrelenting.

Costs

5.5 There are over 700 legally aided Plaintiffs of the total of about 970 claimants.

5.6 The Plaintiffs costs are already very large and will be larger. They consist of:

1. The costs of the Steering Committee in conducting the main proceedings. This includes considering tens of thousands of documents and consulting very many expert scientists and doctors.
2. The costs of a lengthy trial and possible appeals to the Court of Appeal and House of Lords.
3. The additional costs of preparing nearly a thousand High Court actions.

5.7 We assume that similar costs have been and will be incurred by the Central Defendants and, particularly, the Health Authorities.

5.8 Whatever the result of the litigation, the costs will be massive, and nearly all will be met by the public as taxpayer.

5.9 The conclusion is surely compelling. Such monies should be expended as part of compensation to these innocent victims rather than in legal costs.

5.10 In the event of uncertainty, a ministerial reference to Parliament would certainly confirm that the view we express represent decent and humane opinion that transcends party lines.

6. The Value of the Claims:

6.1 The principal heads of damage common to these claims are:

(a) pain, suffering and loss of amenity;

(b) past and future financial loss, in particular value of care and loss of earnings or earning capacity.

6.2 General damages for pain, suffering and loss of amenity include:

(a) severe mental injury caused by the fact of, or fear of H.I.V. infection, the occurrence, of AIDS, and its effect on the Plaintiff haemophiliacs and their families,

(b) the physical pain and suffering associated with AIDS,

(c) reduced life expectancy and the full perception of this of those infected with HIV (see Section 1(b) of the Adminstration of Justice Act 1982).

(d) loss of amenity, including social isolation.

Valuation of this head of damage is so unusual that it may well merit trial by jury

The knowledge and fear of death - in particular the horrible death of an AIDS victim - must produce the most profound suffering. We value this head of claim in a broad, but not exclusive range, of £40-60,000. (Cf For a minimum starting point the loss by early death from cancer due to industrial disease dealt with in Jefferson v Cape Industries kemp Vol.2 7-021. The updated value of that award of £19,500 is about £30,000).

6.3 The individual claims have not yet been the subject of final advice on quantum from counsel. A very broad estimate of the range of value of the claims on the basis of full recovery is about £50-100,000. Some will be greater, but few less. This

preliminary assessment suggests a total value of these claims as being £80M to £90M.

6.4 In October 1989 the Government made an ex gratia payment of £20,000 to affected haemophiliacs. The MacFarlane Trust set up in 1987 administers a fund which was initially £10M. Its objects are to relieve those persons suffering from haemophilia who as a result of receiving infected blood products in the United Kingdom are suffering from AIDS or are infected with HIV and are in need of assistance, or the needy dependents of such persons.

Up until the end of March 1990, just over £3M had been spent, of which half has been in regular payments of £20 per week (increased to £25 in September 1989), and the remainder in specific grants, for instance for heating and clothing in the winter.

6.5 No one within Parliament or without has ever suggested that such funds represent adequate compensation to these Plaintiffs; indeed, they have not been provided as compensation.

7. Funding a Settlement

7.1 The Government is invited to consider funding any settlement by reference to:

1. The prospects of losing and the costs of compensation and legal costs incurred as a result.
2. The saving in legal costs of all parties, which will mostly be borne by the taxpayer, if there is an early compromise and no trial and appeals.
3. The financial strain on the budgets of Health Authorities in terms of costs and damages should the Plaintiffs succeed; and should they lose, irrecoverable costs. We presume that the Health Authorities have informed you of the financial strain on their budgets; a settlement would also release any funding put to reserve on account of these claims.

4. The contingency fund maintained by the Government in each budgetary year of some £3 billion.

5. The £15.867M spent by the Department of Health in the year 1989-1990 on advertising, and the £19M spent by the Ministry of Agriculture, Food and Fisheries on the salmonella and eggs crisis.

7.2 In the light of such considerations the settlement of these claims can be achieved at relatively modest cost.

8. Terms and Structure of Settlement:

Terms

8.1 The unique position of these Plaintiffs makes it mandatory for their legal advisors to consider a reasonable compromise of their claims.

8.2 In the event of a reasonable compromise being offered which their legal advisors consider acceptable, the Plaintiffs will be so advised.

8.3 The Legal Aid Authorities would then receive an opinion from Counsel advising acceptance of the settlement. This would lead to the withdrawal of Legal Aid from any claimant who refused the offer. Those not on Legal Aid who considered refusal would face an immediate and overwhelming costs burden if they wished to pursue their claims.

8.4 Any compromise would be based on the full and final settlement of all claims by the Plaintiffs against the Defendants Special consideration will have to be given to cases where clinical mismanagement is a live issue.

8.5 Any offer would have to be accompanied by an agreement to pay the Plaintiffs costs, which will avoid any burden on the Plaintiffs because of the legal aid charge on monies recovered. We consider that it will be appropriate for costs to be on an

indemnity basis - both in principle and to achieve a fair and expeditious disposal of these proceedings; the Plaintiffs would then receive the full sum of the settlement offered to them.

Structure of Settlement:

8.6 The alternatives appear to be:

(a) payment of each claim on the basis of what that plaintiff would be entitled to recover in a civil Court. If necessary, as Mr. Justice Ognall hinted, lead cases could be determined as to quantum so giving guideline for the settlement of the other claims with substantial savings as to costs; or

(b) A similar approach but based on a system of lead cases decided at a private arbitration (as in the claims arising form the capsize of the "Herald of Free Enterprise" at Zeebrugge); or

(c) A lump sum payment to each claimant; or

(d) A scheme based on a scale of disability related to different heads of compensation (similar to the Eraldin claims scheme operated by ICI in the 1970's).

But any of the options must be based on a strict timetable for ultimate payment with adequate provision for interim payments.

9. Conclusion:

In our view, Mr. Justice Ognall was right to take the initiative that he did. We are responding to it with the objective of reaching a reasonable compromise if that is possible. After consultation between Counsel and the Steering Committee, Leading Counsel has advised that this letter be sent in its present form.

We therefore request that this letter is passed on by you to those for whom you act so that we may have a prompt response from you and your clients.

Whatever the legal view of the Defendants as to the proceedings we presume that any legal advice given will not be

based on a rigid interpretation of the law, and that those receiving such advice will feel free to take decisions on the basis of what best reflects a just solution having regard to the position of the Plaintiffs and the public interest. As Mr Justice Ognall said:

> "It is in these circumstances that I have thought it proper that the advisers to all parties should be invited to convey to their respective clients these observations. It might be said that I have raised considerations of a political rather than a purely legal character. I acknowledge that. But I believe that the legal profession has duty to do its best to see that the legal system does not become a scapegoat in the eyes of the public for what I fear may be perceived as the unjust and inhuman denial of any significant measure of compensation to the Plaintiffs. "The law must take its course" is not an attractive principle in the context of this case."

We are confident that your clients will respond to our approach with magnanimity rather than intransigence. if that confidence is borne out a reasonable compromise of these proceedings can only redound to the credit of these Defendants in the public domain.

We treat this letter as open correspondence and whatever the response it is our duty fully to inform all the claimants and their Solicitors of whatever transpires between the parties arising from this letter. We shall do this by supplying them with copies of Mr Justice Ognall's statement, this letter and such other correspondence arising from it as occurs between the parties. Further it is likely that Counsel will attend meetings of the Plaintiffs in different parts of the country to advise them on the progress of their claims.

Before we take such steps we consider that 14 days is a reasonable period in which to call for a reply, over ten weeks having passed since the last hearing before Mr Justice Ognall. We would be grateful if you would pass this letter on to your lay

clients immediately, and confirm that you have done so by no later than 4 pm on Friday 14th September 1990.

Yours faithfully

GRO-C: Pannone Napier