

IRISH HAEMOPHILIA SOCIETY

TRIBUNAL NEWSLETTER

ISSUE 21

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23rd February 2001

TRIBUNAL OF INQUIRY

(Into the Infection with HIV and Hepatitis C of Persons with Haemophilia and Related Matters)

PROCEEDINGS: Monday 18th December 2000 - Day 82

The Tribunal reconvened to hear an application by the Irish Haemophilia Society for an extension of time in which to allow the Society to adduce additional documentation relating to medical records.

Mr Martin Giblin S.C. made the application on behalf of the I.H.S. Mr Giblin outlined to the Tribunal efforts of the previous week to resolve the matter by way of correspondence and meetings between the Tribunal and the Irish Haemophilia Society's legal team. Mr Giblin said these efforts had been unsuccessful, but he extended the appreciation of the Irish Haemophilia Society to the Tribunal for the way in which it tried to meet the concerns of the Society.

Mr Giblin said a difficulty had arisen insofar as there were 210 cases involving the infection of people with haemophilia, and whereas it was common cause that there were in fact 210 infections, the Tribunal proposed to look at a total of 25 cases in respect of these infections. Mr Giblin said it was not possible to say that these 25 cases are representative of all 210 cases, unless the 210 cases were inspected. Mr Giblin said all 210 cases should be reviewed.

Mr Giblin further said that the Irish Haemophilia Society believed that the Tribunal itself should undertake this review of all the cases. Mr Giblin said that if the Tribunal was not willing to look at the 210 cases, the I.H.S. would undertake to do so and make its findings available to the Tribunal. In either event, extra time would be needed to review the cases.

Mr Giblin pointed out that over the weekend Mr Raymond Bradley, solicitor for the I.H.S. had reviewed 22 cases at St. James' Hospital. Of the 22 cases reviewed he had come across facts in the medical records which appeared to suggest that in at least two of these cases further investigations should be carried out. Mr Giblin said that in the circumstances, the concern felt by the Irish Haemophilia Society on this issue prior to the review of any additional cases, had now grown to alarm. Mr Giblin said that in view of the extensive nature of the task of reviewing all 210 records, he would be asking the Tribunal to delay its hearings of the next stage of the investigation until the first week of February. Alternatively, Mr Giblin suggested that the Tribunal could take the evidence of Prof. Temperley in two phases. The Tribunal could commence its business as planned on 11th January and any matters arising from the investigation of the medical records could be put to Prof. Temperley at the conclusion of his evidence. Mr Giblin further suggested that Prof. Temperley could be afforded a further adjournment to consider any new documentation arising from the investigation of the medical records.

On the issue of consent to the use of medical records Mr Giblin asked the Tribunal to indicate that it would only be in circumstances of considerable exception that persons concerned would be required to give evidence. He also said that the persons concerned should be given an opportunity to make representations to the Tribunal should any party make application to the Tribunal to have such person called to give evidence.

The Chairperson indicated that as the interests of Prof. Temperley were most affected by this application, he should be given the first opportunity to reply.

Mr Brian McGovern S.C. for Professor Temperley replied to the application. He said he was amazed at the content of the application, as it entirely impinged upon the Tribunal's area of investigation. Mr McGovern said the Irish Haemophilia Society had been facilitated on a number of occasions in the past, particularly with respect to the introduction of personal testimony which allowed patients to give evidence, and while he had no objection to this course, he said the I.H.S. was now asking for further facility whereupon they would produce documents and trawl through them. Mr McGovern said this would inevitably mean further delay in the business of the Tribunal, and further delay to Prof. Temperley in his evidence.

Mr McGovern said Prof. Temperley was anxious to give his evidence and had waited a long time to vindicate his rights, and faced hostile comments in the media, and it was his position that he did not wish to endure further delay. Mr McGovern said that such delay was wholly oppressive of Prof. Temperley, and on the basis of fairness and natural justice he should be permitted to give his evidence as scheduled.

Mr McGovern added that it was not for the Irish Haemophilia Society to conduct any investigation. Mr McGovern said this was the province of the Tribunal. Mr McGovern said that it was impertinent for any other party to suggest to the Tribunal how the evidence should be presented. Mr McGovern said that Prof. Temperley had been prepared to commence his evidence last week but due to the volume of documents submitted, principally by the Irish Haemophilia Society, he was unable to commence his evidence. Mr McGovern said Prof. Temperley wanted to give his evidence without further delay. He said any further delay would be oppressive and unfair to Prof. Temperley and he strongly opposed the application of the I.H.S.

Mr Mel Crystal S.C. for the Children's Hospital, also opposed the application. Mr Crystal said the compilation of medical records takes an inordinate amount of time and further required the authority of the patient. Mr Crystal said by way of example, that the records of 10 patients would take approximately four weeks to compile. Mr Crystal said he agreed with Mr McGovern that it was for the Tribunal to decide which files were relevant. Mr Crystal added that the application of the I.H.S. was basically a display of mistrust or lack of confidence in the Tribunal team.

Ms Deirdre Murphy for St. James' Hospital asked the Tribunal to clarify the position as regards consent and discovery of medical records.

Mr Michael McGrath for the B.T.S.B. said the Tribunal was acting within the Terms of Reference and as such the B.T.S.B. supported the Tribunal's position.

Mr Ian Brennan for the Department of Health said he supported the Tribunal in any decision it may come to on this matter.

Mr John Finlay S.C. in reply to the application on behalf of the Tribunal, said that the Tribunal has already examined a considerable volume of documentation relating to the circumstances by which all persons who became infected with either HIV or Hepatitis C came to be so infected.

Mr Finlay said that what was at issue in this application were the individual medical records of patients as opposed to general records. Mr Finlay said that the relevant circumstances and the relevant issues relating to the circumstances of the infection with HIV and Hepatitis C of people with haemophilia have already been examined to some extent by the Tribunal. Mr Finlay said that the Tribunal would explore in a very full and comprehensive detail the circumstances of infection in the next phase of its work. Mr Finlay said that the right to privacy with respect to individual medical records had guided the Tribunal's policy, and in this respect general orders for discovery had exempted individual medical records from the general run of discovery made by the hospitals. This exemption had been applied because the Tribunal

took the view that it would not be appropriate to make any order for discovery without reference to the individual concerned.

Mr Finlay said that in its application, the Irish Haemophilia Society sought an opportunity to propose to the Tribunal that it should look at individual medical records which have particular significance for the work of the Tribunal. Such records would be adduced in circumstances where the Irish Haemophilia Society has consent of the relevant persons for the records to be made available to the Tribunal and used by the Tribunal in the course of its work. Mr Finlay said that if the Irish Haemophilia Society had such records, they should have been made available to the Tribunal a very long time ago. Mr Finlay said this should have occurred in October or November of 1999 when the Memorandum of Procedures was published.

Mr Finlay then opened a booklet of correspondence between the Irish Haemophilia Society's solicitor and the solicitor for the Tribunal, wherein discussions on the issue of medical records are set forth.

In June 2000 the Tribunal requested medical records held by Malcomson Law being made available to the Tribunal. The solicitor for the I.H.S. supplied the records to the Tribunal in September 2000, in the form of 30 lever arch folders. With respect to Prof. Temperley's evidence the Tribunal provided a booklet of extracts from medical records on 6th December 2000, requesting that additional documents be provided to the Tribunal before lunch time on 8th December 2000. Malcomson Law accordingly provided a list of 62 names to the Tribunal. The Irish Haemophilia Society suggested this list contained cases which would be of particular interest to the Tribunal concerning the circumstances of infection. Of these 62 names, 19 had already been addressed by the Tribunal in the 25 cases selected for analysis by it.

Mr Finlay said that from the exchange of correspondence some fundamental matters arose. Mr Finlay said it was neither necessary nor appropriate for the Tribunal to examine publicly the individual medical records of every individual person who had been infected with HIV or Hepatitis C in order for the Tribunal to discharge the obligation imposed upon it of investigating the Terms of Reference as laid down by the Oireachtas.

Mr Finlay said it was incumbent upon the Tribunal to answer various questions posed in the Terms of Reference, including insofar as it is possible to do so, questions as to what caused the infection with either HIV or Hepatitis C. Mr Finlay said that this process was not necessarily assisted by an examination of the individual medical records of every single individual concerned.

With respect to the possibility of a person who consented to medical records being used being called to give evidence, Mr Finlay said such a person would not normally be required to give evidence. This would only occur where the person became the focus of the Tribunal's enquiry. Mr Finlay said that this circumstance may arise where an individual instructed contradictory evidence with respect to a witness under investigation. Mr Finlay said a witness may also be called to give evidence in unforeseen circumstances, but there existed a strong policy of objection by the Tribunal to calling such a witness against his or her will. Mr Finlay said strong cogent reasons would have to be offered for doing so, however the Tribunal could offer no absolute guarantee that persons consenting to the use of medical records would not be called to give evidence.

With respect to the bulk of haemophilia A infections which occurred in the early 1980's, Mr Finlay said the policy issues relating to these infections would be looked at, but not the individual cases. Mr Finlay said with the bulk of the haemophilia A infections which occurred in the early 1980's, significant issues arose and they would be explored in full. He said, however, it was not necessary to look at each case. He added that it would not be the case that the Tribunal was overlooking the tragedy of each case in not examining each individual record.

Mr Finlay said the Tribunal had real concern for the privacy of persons, and in this sense when the medical record was put into evidence it must be realised that fundamental questions of fairness arose. Where such records were put into evidence the Tribunal and parties concerned must have access to all the medical records. Any relevant parties should have notice in advance of any document, including medical records, sought to be introduced.

Mr Finlay said the course of action proposed by the I.H.S. whereby Prof. Temperley would start his evidence and the medical records would then be opened, was fundamentally unfair to Prof. Temperley. With respect to consenting to the use of medical records, Mr Finlay said this was a delicate matter, but anyone giving such consent must understand there is a risk they will be called to give evidence. He said that this would not happen as a matter of course. Anyone seeking to call such a witness would have to offer a reasoned application.

Mr Finlay said that the I.H.S. request that the Tribunal look at 210 medical records was an extraordinary increase from the additional 53 originally suggested on 8th December. Mr Finlay said it was not relevant for the Tribunal to look at an additional 190 sets of medical records. Mr Finlay said that further medical records could only be added if there was consent to their use.

Given the reservations of the Tribunal, Mr Finlay said that where solicitors for the Irish Haemophilia Society could show that additional relevant medical records should be put in evidence, the Tribunal would consider such documentation. If the Chairperson was disposed to allow additional evidence to be adduced at this stage it should be done so within a limited time period. Mr Finlay said that were truly unforeseen circumstances to arise it would still be open to adduce additional evidence.

Mr Martin Giblin S.C. replied on behalf of the Irish Haemophilia Society.

The Chairperson gave her ruling. The Chairperson said this was an application to extend time within which to adduce additional documentation derived from individual medical records. The Tribunal Chairperson said that no explanation had been offered as to why the medical records in question had not been mentioned before. The Chairperson said that the first time the Tribunal got an indication that more medical records, other than those selected, would be required by the I.H.S. was on 8th December. The Chairperson said that a list of 62 names was submitted on this date. In his application of today the Chairperson said that Mr Giblin now mentioned 210 cases. She said no explanation for this disparity was offered.

The Chairperson said she would allow further opportunity to the Irish Haemophilia Society to suggest new and additional medical records to the Tribunal, and to furnish copies of those records to it. The I.H.S. should indicate in what way those medical records disclosed new or additional information in regard to an issue relevant to Phase Three of the Inquiry. Such time being extended to Monday 8th January at 5.00 p.m. The Chairperson said no further extensions would be allowed unless a very good reason was given.

With respect to an individual whose circumstances were not covered by the Tribunal, the Chairperson said she had made it clear at all stages that the Tribunal was to be an all-encompassing one. To this end she invited and reiterated that any person who wishes to come forward and make contact with solicitors for the Tribunal, and to give additional or new or relevant information as that person may have, was invited to do so. The Chairperson said that such person or persons may still make contact with the Tribunal.

The Chairperson said that as a direct consequence of the extension of time allowed, the Tribunal would not now sit on 11th January 2001, but would sit on 18th January, 2001. Prof. Temperley is the first witness scheduled before the Tribunal on this date.

PROCEEDINGS: Tuesday 30th January 2001 - Day 83

At a special sitting of the Tribunal, Counsel for the Irish Haemophilia Society Mr Martin Giblin S.C., made an application on the issue of discovery and privilege on behalf of the Society. The applicant's substantive application challenged the Tribunal's acceptance of claims of privilege made to it by various departments of State and State agencies, and the employees of State agencies. The Society's challenge to the Tribunal's attitude with regards claims of privilege was based upon a reading of the Terms of Reference, in particular Term of Reference Section (V), which states:

“All persons employed in the Departments of State and State agencies concerned shall give their full co-operation to the Tribunal and those Departments of State and State agencies shall themselves fully co-operate with the Tribunal by providing it with all documents and information requested of them that are in their possession or power”.

The Society's case was that, given the mandatory nature of the Term of Reference, it was inappropriate for the legal representatives of those employed in Departments of State and State agencies concerned to raise privilege over documentation and information requested of them by the Tribunal. In making this case Mr Giblin noted that the Tribunal must make its various orders by reference to its statutory powers and within its Terms of Reference. He said that with respect to Term of Reference (V), the Tribunal cannot allow State agencies or the employees of State agencies to claim privilege over any discoverable documentation which may assist the Tribunal in its inquiry.

Mr Giblin said that the Tribunal, while exercising its powers, which are on a par with those of the High Court, must also be guided by its Terms of Reference. In this respect, the Society made the case that the Tribunal should read Term of Reference V as a waiver of privilege by the State over State documents.

The I.H.S. made the case that the State in this instance was manifested in the office of the Minister for Health. Mr Giblin said that in the first instance the Tribunal should ask witnesses concerned to waive any claims of privilege over the documents. Failing such voluntary waiver, the Tribunal should rule in accordance with its Terms of Reference Section (V) in that it could not accept claims of privilege from State witnesses where the State had waived privilege over the documents concerned. Mr Giblin said this issue was of particular relevance to establishing if the State was aware of its liabilities when it entered into the HIV Compensation Scheme in 1991. Mr Giblin said that this was of crucial importance with regard to the Factor IX HIV infections in 1985 and 1986.

In addition to the issue of whether or not the State's documents were privileged, the I.H.S. also made an application to the Tribunal on the basis that many of the claims of privilege in the Affidavits of Discovery made by various parties to the Tribunal, did not adequately list, identify and enumerate the documents over which privilege was claimed.

The I.H.S. made the case that, where documentation is not adequately described, privilege could not be maintained. However, the I.H.S. substantive application was on the issue of waiver of privilege by the State over its documents, and in these circumstances the Society said the Tribunal could not accept claims of privilege. Mr Giblin, on behalf of the Society, put detailed legal argument to the Tribunal. The Society's case was also put in a written submission which was received by the Tribunal and other parties at the hearing. Mr Giblin said it was clear from the Term of Reference and the Dail debate that ensued upon the resolution adopting the Terms of Reference, that the Minister intended that there would be full disclosure.

Mr Giblin also pointed out that the Irish Haemophilia Society was directly involved in negotiating, drafting and agreeing the Terms of Reference with the Department of Health and were of the understanding that the Minister for Health at the time in good faith, having given an undertaking to the Irish Haemophilia Society, went into the Dail and Seanad and secured from the Oireachtas a commitment in legal form to a Tribunal of Inquiry which would look comprehensively at all the matters contained in the Terms of Reference. Mr Giblin said it was clear from the submission to the Dail, that the Oireachtas wanted full disclosure and did not want its civil servants behaving like Chinese mandarins, playing games with mirrors, trying to suppress documents which the Oireachtas had directed should be disclosed to the Tribunal. Mr Giblin said no form of suppression of these documents was acceptable, whether on the basis of legal professional privilege or any other form of privilege.

Mr Giblin said in his submission the Oireachtas had made it very clear that it wants full, comprehensive inquiry into these matters, notwithstanding that blushes may be caused to certain persons, or notwithstanding that the grip of those persons on the documents concerned may be very tight indeed and that they may want to maintain a tight grip upon the documents, and they may wish to use legal professional privilege to maintain that grip.

Mr Giblin said it was the belief of the Irish Haemophilia Society that they had secured an undertaking and were consulted by the Minister, which consultation was recorded in the Dail debates, concerning the adoption of the resolutions upon which the Tribunal was established.

The I.H.S. application was opposed by counsel for the BtSB, the Irish Medicines Board, the Department of Health, the Southern Health Board, the Western Health Board, St. James' Hospital, Prof. Temperley and the representatives of Church & General Insurance.

The substance of the objections to the I.H.S. application was that it amounted to saying the adoption of the Terms of Reference by resolution of the Oireachtas, was tantamount to amending the legislation under which a Tribunal of Inquiry is established. In adopting the submissions of Mr Frank Clarke S.C. on behalf of the BtSB, the opposing submissions said that an individual's right to privilege could not be removed by way of a Dail resolution. Mr Clarke said if the I.H.S. wished to amend the legislation concerning a person's right to privilege as contained in the Tribunals of Inquiries Act 1921 – 1998 as amended, they would have to lobby for a change of legislation, and even if they were successful in changing the legislation to this effect, said Mr Clarke, it would most likely be an unconstitutional amendment to the legislation and would not survive a challenge.

Mr Clarke made the case that privilege was a fundamental right and could not be waived on behalf of an individual or on behalf of an organisation such as the BtSB by actions of the Minister for Health. Mr Clarke said a board such as the BtSB stands alone by virtue of its statutory nature, and he could not see how a resolution of the Oireachtas could impose an obligation on the BtSB to waive its legal right to privilege.

Mr Ian Brennan for the Department of Health adopted the submissions of the BtSB. Mr Brennan said legal professional privilege is a right. Mr Brennan described Section (V) as an exhortation to those identified in the section to co-operate with the Tribunal.

All the parties to the Tribunal in varying degrees resisted the application.

PROCEEDINGS: Wednesday 31st January 2001 - Day 84

Mr John Finlay S.C. for the Tribunal of Inquiry, replied to the application of the Irish Haemophilia Society concerning the issue of discovery and privilege.

Mr Finlay said that in interpreting Section (V) of the Terms of Reference, in accordance with the Tribunal's powers under the Tribunal of Inquiries (Evidence) Act as adopted, that Section (V) of the resolution had to be interpreted such as to avoid constitutional impropriety. In so doing, the only interpretation that could be put on Section (V) which fulfilled this requirement, was that it was included in the Terms of Reference so as to encourage persons to co-operate with the Tribunal.

Mr Finlay said that Section (V) of the Terms of Reference could not be interpreted so as to abolish the rights of persons. Mr Finlay said that the resolution of the Dail was not legislation, could not purport to amend legislation and had to be interpreted in accordance with the Constitution. Mr Finlay said that having regard to the construction of the clause and the need to avoid any constitutional impropriety, Clause (V) should be construed as requiring persons employed by the Departments of State and State agencies, to co-operate with the Tribunal and to provide it with all documents and information requested of them.

With respect to the point that the section amounted to a waiver of privilege, Mr Finlay said while this may be argued in respect of the Department of Health and perhaps in regard to the BTSB and the Irish Medicines Board, it could not refer to individual institutions or individual witnesses. Mr Finlay also said that a resolution of the Dail and Seanad could not infringe upon the entitlement of a person to claim privilege. Mr Finlay said that the privilege attaches to the person claiming it, not to the Oireachtas.

With regards to the inadequacy of some of the Affidavits of Discovery before the Tribunal, Mr Finlay said that this could be rectified by way of an Affidavit in the correct form being supplied.

Ms Maureen Clarke, Senior Counsel for the Attorney General and the public interest, addressed the Tribunal. Ms Clarke said the case she came to address was contained in a letter of 18th January addressed to the Tribunal on behalf of the Irish Haemophilia Society. The letter stated, "It is our position that the Terms of Reference precludes the parties identified from claiming privilege over documents over which legal professional privilege could normally be established in judicial proceedings". Ms Clarke said she understood this to mean that the Irish Haemophilia Society was claiming that the resolution of the Dail establishing the Tribunal, could and did amend legislation. Ms Clarke also said she construed the statement in the letter of the 18th January that described the Chairperson as having "acquiesced" in terms of legal professional privilege, as being a direct criticism of the Chairperson.

Ms Clarke then noted that the Counsel for the Irish Haemophilia Society had not argued any point which stated that a resolution of the Dail had the effect of amending legislation, and in fact seemed to implicitly accept in the letter written that such a fundamental right did exist. Ms Clarke said that what the I.H.S. appeared to argue was that the Minister has on behalf of a number of parties, by section (V) of the Terms of Reference, waived expressly or impliedly the right of persons employed by Departments of State and State agencies and such departments themselves to rely on the right to professional privilege.

Mr Clarke said that this was a matter of fact to be determined by the Tribunal. Ms Clarke said she disagreed with the proposition that the Tribunal should ask witnesses concerned to waive privilege. She also disagreed with the proposition that documents were being withheld by way of privilege. Ms Clarke set out her understanding of the law of privilege for the benefit of the Tribunal, particularly for journalists who, she said, did not appear to fully understand the concept which was so ably defined and outlined by

various Counsel on the previous day. Ms Clarke said that when a person consults his lawyer in confidence, he must be absolutely sure that what he tells his lawyer in confidence will never be revealed, and on this basis legal professional privilege should not be set aside.

Mr Giblin, in reply for the Irish Haemophilia Society, said that 60 per cent to 70 per cent of the submissions made by counsel in response to his submission were irrelevant to the submission that he had made. Mr Giblin said he did not say legal professional privilege should be challenged. The I.H.S. submission was that the Minister had waived his legal professional privilege by agreeing to insert Section (V) in the Terms of Reference.

Mr Giblin said it was nowhere suggested by him on behalf of the I.H.S. that section (V) of the Terms of Reference had the effect of amending the Tribunal of Inquiries Act 1921, or any other enactment of the Oireachtas.

Mr Giblin said he agreed with Counsel for the Attorney General and the public interest in one respect, and that was on the question as to whether or not the Minister had waived privilege, being a question of fact for the Tribunal to determine. Mr Giblin said he wholeheartedly agreed with that proposition.

Mr Giblin said with respect to the approach taken by counsel for the Minister on the previous day, it was his submission that the Tribunal cannot determine this question of fact until the Minister is required to state a position on his understanding of the meaning and effect of Section V of the Terms of Reference.

Mr Giblin informed the Tribunal that it was a fact that the Irish Haemophilia Society had negotiated, drafted and agreed the Terms of Reference, and particularly Term of Reference section (V) with the Minister and his officials prior to the establishment of the Tribunal. Mr Giblin said that this was acknowledged in the record of the Dail debate which had been opened to the Tribunal in his submission. Mr Giblin said there could be no doubt but that the State was clearly of the understanding that the 1991 HIV Compensation Settlement would be examined by the Tribunal.

At this point Mr Giblin was interrupted in his reply by Mr John Finlay S.C. for the Tribunal. Mr Finlay said that the argument being adduced by Mr Giblin was in fact a new argument. Mr Finlay said that he understood that what had been argued to date, was that the clause in the resolution adopted by both houses of the Oireachtas, had the effect of waiving an entitlement to privilege. Mr Giblin, he said, now seemed to be making a case that the Minister in some way waives his entitlement to rely on privilege.

The Chairperson said her understanding of the I.H.S. submission was that paragraph (V) of the order setting up the Tribunal, said that Departments of State and State agencies were precluded from claiming privilege. The Chairperson said that she did not hear Mr Giblin at any stage in his submission, say that the Minister effected a waiver of privilege.

Mr Giblin asked the Chairperson, was he to take it that he could not address the issue as to whether the Minister waived in the first instance his own privilege, and in the second instance the privilege of any other representatives of the State in any guise. The Chairperson said this argument was not made by Mr Giblin yesterday, and had not been addressed by the parties, and in those circumstances she was ruling against him.

A review of the previous day's evidence will reveal counsel for the B.T.S.B. submitted that the Minister does not have authority to waive a private privilege or a separate statutory board's privilege. Counsel for the NDAB identified the issue raised by the I.H.S. as amounting to the question did the Terms of Reference effect to a waiver by the State? Counsel for the Department of Health, in rebutting the

applicant's submission, identified the Minister as the alleged source of waiver of privilege claimed by the applicant.

The Counsel for St James' Hospital, in rebuttal of the applicant's submission, identified the Minister as the alleged source of waiver of privilege claimed by the applicant.

Counsel for the Attorney General in her submission, recognised that the applicant at no stage submitted that a resolution of the Dail, by which the Terms of Reference were adopted, purported to amend legislation under which the Tribunal of Inquiry was established. She identified in the applicant's argument, that the Minister had by virtue of section (V) of the Terms of Reference, waived privilege on behalf of the Departments of State and Stage agencies, and the employees of such agencies.

In the event, the Chairperson ruled that the I.H.S. could not make such an argument in reply as, said the Chairperson, the I.H.S. had not made this argument in its submission.

Mr Giblin, in continuing his reply, said that the Irish Haemophilia Society had no interest whatsoever in the law of legal professional privilege. The Society had negotiated the Terms of Reference and thought it had got, and did get, a Tribunal which was to discover the truth of what happened to its members. Mr Giblin said that this was a very simple truth.

Mr Giblin said the Irish Haemophilia Society came away from the process of negotiation and the process of the passing of the resolution by the houses of the Oireachtas, thinking it had a tribunal which would look at the truth of what happened, including the litigation which was compromised in 1991, and would do so in the terms set out in Section (V), that all persons employed in the Departments of State and Stage agencies concerned, shall give their full co-operation to the Tribunal and those Departments of State and agencies shall themselves fully co-operate with the Tribunal by providing it with all the documents and information requested of them that are in their possession or power. Mr Giblin said that the word "shall" was a mandatory word, and the word "all" meant what it says on its face, ie. "all" means all, and "shall" implies that something must be done. Legal professional privilege was not mentioned at any time, nor was it mentioned in the Terms of Reference. Mr Giblin said it would now appear, subject to the ruling of the Chairperson, that the I.H.S. may not have got such a far-reaching inquiry as it had thought it had got at the time.

In all, Mr Giblin was interrupted on 13 occasions in the course of his submission in reply. The Chairperson indicated she would give her ruling on the following day.

PROCEEDINGS: Thursday 1st February 2001 - Day 85

The Chairperson gave her ruling on the Irish Haemophilia Society's application on discovery and privilege.

In replying to the application the Chairperson first of all said that her powers under the Tribunals of Inquiries Act and under common law, where it has been found that the powers of a tribunal are no greater or no less than those of the High Court. The Chairperson said in this case, a person coming before the Tribunal can claim privilege over certain documents and that the same immunities and privileges apply to witnesses before a tribunal as to witnesses before the High Court. The Chairperson said that the resolution passed by the Oireachtas is not legislation, nor can purport to amend legislation. The Chairperson said that orders for discovery had been made against parties before the Tribunal, and some of these furnished as early as October 1999. She said, as is acceptable practice, these Affidavits have a category described as privilege, being documents prepared in preparation for litigation of the Tribunal, and advice given thereto.

The Chairperson said that the Tribunal's attitude to privilege had been challenged by the Irish Haemophilia Society, on the grounds that the Tribunal had acquiesced in the matter of claims for privilege, and that the Tribunal was precluded from accepting such claims of privilege from the State, State agencies or the employees of such agencies by virtue of Terms of Reference (V).

The Chairperson said she had examined Term of Reference (V) and from the normal reading and interpreting and understanding it, this term was inserted so that all persons employed by State or State agencies would co-operate with the tribunal.

The Chairperson said that at this stage, all persons who had been asked to provide documents, had co-operated with the Tribunal. The Chairperson stated that the Irish Haemophilia Society maintained that the Term of Reference precludes the State from claiming legal privilege over documents which were prepared in or about the preparation of litigation, or in or about the preparation for this Tribunal (the Irish Haemophilia Society by way of reply, expressly stated, did not ask the Tribunal to rule that the Minister had waived privilege in relation to any documents brought into being for the purpose of this Tribunal).

The Chairperson said she concluded as follows. A resolution of the Dail cannot change statute. Legal privilege, said the Chairperson, is a legal right, an absolute right, and it is not in the power or control of a resolution of Dail to interfere or amend, or purport to take away that right. It is not up to the Dail or resolution of the Dail to decide when it can be dispensed with. It is a right pertaining to the individual party. The Chairperson said that legal professional privilege was a legal right attaching to the person or party claiming the privilege. She said a resolution of the Dail cannot take away such privilege. If the Dail wished to remove such privilege it would have to do so by legislation, and the Chairperson said she for one would doubt that legislation's ultimate constitutional validity.

The Chairperson said the second ground on which the I.H.S. brought its application was that Section (V) amounted to an implied or expressed waiver of the right to privilege. The Chairperson said this argument was fundamentally flawed as the State cannot waive a person's right to legal privilege. The Chairperson said such waiver could only be effected by the client in a case, or a witness before a tribunal. There could only be disclosure if the person concerned waives the right to privilege. The Chairperson said that the right was a personal right to the person or party. The Chairperson said that she interpreted the section as a matter of law, and could not rule that Section (V) of the Terms of Reference amounted to an implied waiver. Her reasons for coming to this conclusion were that:

- 1) It was not within the power of the resolution to do so, and,
- 2) That legal privilege is a right to a personal party and is a fundamental right to that person or party. It is a right between the client and the lawyer.

The Chairperson said it was questionable as to whether the section concerned could apply to other bodies such as the BTSB, the NDAB, the Health Board or the hospitals. The Chairperson said that these bodies had shown their independent status, albeit that they were linked to the State in some form or other. The Chairperson said these bodies were independent from the State and could not be affected by any waiver that the State may choose to adopt. The Chairperson said that any construction put on the section must observe constitutional propriety. The Chairperson said that legal professional privilege was a fundamental right upon which the practice and procedure of courts and tribunals was based. She said it could not therefore be described as a suppression of documents.

For all these reasons, the Chairperson said she did not accept the arguments made by Mr Giblin on behalf of the Irish Haemophilia Society. The Chairperson said that Term of Reference No. (V) did not act as a waiver of the right to legal professional privilege of Departments of State and State agencies and the employees of such agencies. She said she did not think this argument was a viable, legal or a proper interpretation of the section.

With respect to the defect in the form of the Affidavits sworn by parties before the Tribunal, the Chairperson ordered those parties to deliver amended Affidavits containing claims for privilege set out in the correct manner.

Following representations by the Irish Haemophilia Society and a meeting with the Minister for Health, the Minister agreed to waive privilege over all documentation relevant to the Tribunal's inquiries held by his Department, including documentation over which legal professional privilege had previously been claimed. The Minister made this agreement on 7th February 2001.

PROCEEDINGS: Tuesday 13th February 2001 - Day 86

Mr Martin Giblin S.C. for the Irish Haemophilia Society, made an application to be heard by the Tribunal in relation to the issue of discovery and privilege. The Chairperson indicated she would hear Mr Giblin's application at 10.00 am the following day.

Mr John Finlay S.C. then set out an opening statement relating to the forthcoming phase of the Tribunal's investigation. Mr Finlay said that in this division the Tribunal will examine Terms of Reference 3, 5, 6 and 7 with reference to all relevant parties other than the Blood Transfusion Service Board, its servants, agents or employees. The Tribunal would also examine Terms of Reference 8, 13 and 14. Mr Finlay said that in this phase of the Tribunal's investigation, it is proposed to focus on the role played by the following persons and bodies, in the following order:

1. The National Haemophilia Treatment Centre, regional haemophilia treatment centres and other relevant hospitals and doctors who provided treatment to persons with haemophilia and other blood clotting disorders.
2. The National Drugs Advisory Board
3. The Minister for Health and Children

Mr Finlay said, as had already been indicated while Mr Brian O'Mahony was giving evidence in Division 1, the Tribunal will also examine the role played by the Irish Haemophilia Society in respect of matters relevant to Division 3.

Among the issues the Tribunal will examine in this phase of its investigation, said Mr Finlay, was the relevant choice of product for treating doctors and institutions between the years 1974 and approximately the end of 1982. Mr Finlay said the choice at the disposal of treating doctors was cryoprecipitate and factor IX produced by the BTSB from plasma donated by voluntary Irish donors on the one hand, and commercially produced factor VIII and factor IX made from plasma obtained from remunerated donors. Mr Finlay said all these products at this time gave rise to a risk of non-A, non-B hepatitis. Mr Finlay said the Tribunal would examine whether the decision by treating doctors to use commercial concentrates during this period was justified.

It could be argued, said Mr Finlay, that apart from the question of whether it was appropriate to use commercial concentrates at all, the treating doctors should have had a policy of avoiding the use of commercial concentrates in the case of persons who required only very infrequent treatment. The Tribunal will examine whether the treating doctors had such a policy and whether it was implemented.

Mr Finlay said the date at which treating doctors became aware or ought to have become aware that product used for the treatment of persons with haemophilia was causing HIV infection, appeared to fall somewhere between the latter part of 1982 and the middle of 1983. Mr Finlay said by then it appeared to be the case that there was a general realisation that the products carried a risk of infection with the virus later described as HIV. It also appeared to be generally realised that this risk was much higher in the case of commercial concentrates than in the case of cryoprecipitate or BTSB factor IX. Mr Finlay said the Tribunal would examine the decisions taken by doctors in light of the risk, with due regard to medical and scientific knowledge, opinion and practice at the time. Mr Finlay said it appeared to be the case that four options were available to treating doctors at this time.

1. Abandon the use of commercial concentrate altogether.

2. Modify the policy in deciding between the use of commercial concentrates and BTSB products and to take account of the risk of HIV infection.
3. Seek commercial concentrate in which the risk of HIV infection had been removed or significantly reduced by an appropriate form of viral inactivation.
4. Replace commercial factor VIII concentrate with high purity product fractionated from the plasma of voluntary donors.

Mr Finlay said it would appear that Prof. Temperley, as the Director of the NHTC, adopted option two. Mr Finlay said the Tribunal would examine whether or not the policy adopted was timely, and whether it was in fact followed in practice. The actions of other treating doctors and institutions will be submitted to similar scrutiny, said Mr Finlay. In December 1984 Prof. Temperley and Dr Cotter essentially adopted the third option in that they took a decision that only heat-treated factor concentrate would be used from January 1985.

Mr Finlay said that the evidence heard to date clearly establishes that treating doctors continued to use BSB factor IX and BSB cryoprecipitate, neither of which had been heat-treated, after January 1985. Seven persons with haemophilia B using BSB factor IX at this time were infected with HIV. Five of this group of seven people have since died, said Mr Finlay.

Mr Finlay said the Tribunal will seek to establish when exactly the first reports of HIV tests in persons of haemophilia B were received by treating doctors. In so doing, the Tribunal will seek to establish if the treating doctors should have, upon learning of HIV infections among people with haemophilia B, made efforts to discover if such infections were caused by BSB factor IX or commercial concentrate. The Tribunal would also look at the issue of using BSB factor IX after the 1st January 1985, and whether heat-treated factor IX should have been introduced earlier than October of 1985.

The Tribunal will look at the intervention of Dr Helena Daly in this issue. It will also look at the issue of co-ordination between the National Haemophilia Treatment Centre and regional centres, and at the operation of the NHTC itself.

The Tribunal will examine policies surrounding the choice of product and the continued use of cryoprecipitate after 1st January 1985, and whether it was appropriate to continue with such treatment.

The Tribunal will examine the issue of Armour product A28306, which caused HIV infection to a person with haemophilia A after being treated with this batch of commercial factor VIII on 21st February 1986. The person concerned tested positive for HIV in December 1986. Mr Finlay said there were no further HIV infections after January 1987. The focus of the Tribunal's investigation after this date would switch to the risk of hepatitis C infection. With respect to hepatitis C, Mr Finlay said that the Tribunal would examine yet again the letter of Prof. Temperley to the Board of the BSB on 14th June 1988. This letter will be examined from the perspective of whether or not the BSB should have sought a more effective form of viral inactivation of factor VIII custom fractionated for it by Armour.

Mr Finlay said the Tribunal would examine whether treating doctors took appropriate steps to protect previously untreated patients from hepatitis C infection in the period after 1985, when a special regime appeared to have been put in place to protect previously untreated haemophilia A patients. No corresponding scheme appeared to be in place for previously untreated patients with haemophilia B. The Tribunal will seek to establish if any special policy was put in place for the treatment of patients with haemophilia B.

Mr Finlay said that the Tribunal would look at the infections of four haemophilia B children with hepatitis, and also at the case of the person who gave evidence under the pseudonym of “Luke”.

Mr Finlay said the Tribunal would examine the delay in informing people who were tested in December and January of 1984/1985, of their test results. Mr Finlay noted that a significant number of those tested were not informed of the results until November of 1985. The Tribunal would inquire as to why such a long delay ensued. Mr Finlay said the way in which such information was conveyed by medical staff would also be investigated.

Mr Finlay said that allegations concerning the issue of HIV testing and results had been made by many of those who had already given evidence. Specific allegations concerning failures on the part of treating institutions and doctors in respect of testing and failing to make appropriate contact to offer testing, and failure to communicate the results of tests, and failure to convey the results in an appropriate manner were among the matters to be addressed in this division of the Tribunal’s investigations. The relevant institutions and doctors will be afforded a full opportunity to deal with these allegations in their evidence, said Mr Finlay.

Mr Finlay said that the final matter to be examined in respect of treating hospitals and doctors, will be the adequacy and timeliness of their response when they became aware of the fact that there were infected persons. This element of the Tribunal’s investigation is set out at Terms of Reference No. 8.

Having set out the manner in which the Tribunal will investigate the issues arising in Phase 3, Mr Finlay commenced his examination of Prof. Temperley. Mr Finlay briefly outlined Prof. Temperley’s career. Prof. Temperley was appointed to Trinity in 1958. He was appointed Consultant Haematologist at the Federated Dublin Voluntary Hospitals in 1968. In 1971 he was appointed Medical Director of the National Haemophilia Treatment Centre, and retained this position until his retirement in 1995. He was appointed Associate Professor at Trinity College in 1969 and Professor in 1985. He served as a board member with the BHSB from 1987 until 1999, and was Dean of the Faculty of Health Sciences at TCD from 1987 until 1993. Prof. Temperley was also a founder member of the Irish Haemophilia Society.

Mr Finlay discussed with Prof. Temperley the early days of haemophilia treatment and the introduction of cryoprecipitate in and around 1967. Prof. Temperley said that prior to the introduction of cryoprecipitate, persons with haemophilia had to be treated with plasma. He said there was a limit to the amount of treatment that could be administered using plasma.

Prof. Temperley said that prior to 1971 the average life span for a person with haemophilia was 15 years. Of 110 registered severe haemophilia patients in 1971, only 11 were over the age of 30 years. In the early 1970’s the BHSB started producing factor IX. In 1974 Hemofil became available and home treatment became a possibility. Following various debates between the NDAB, the BHSB, Prof. Temperley and the Department of Health, Hemofil was eventually introduced to Ireland. In August of 1975 the product was withdrawn following an outbreak of hepatitis B.

Prof. Temperley expressed concerns that the introduction of Hemofil, if not centralised through the National Haemophilia Treatment Centre and the BHSB, would lead to a fall-off in attendance at Centres. In overseeing the introduction of Hemofil, Prof. Temperley said that the product appeared to be acceptable in Britain, he was following vague guidelines as to its use from doctors in other parts of the world.

Following the withdrawal of Hemofil in August 1975, Prof. Temperley wrote to Dr O’Riordan asking that Hemofil be returned. Prof. Temperley said it was recognised that commercial products were associated

with outbreaks of hepatitis B. Mr Finlay asked Prof. Temperley, did the risk of hepatitis B give any cause for concern at this time? Prof. Temperley said he would complain bitterly to the company concerned, but at the end of the day the product was of such extreme importance to the management of patients with haemophilia that it was better to continue with its use. Prof. Temperley agreed that, while using the hepatitis B surface antigen test decreased the risk of hepatitis B transmission through the use of concentrates, it did not entirely eliminate risk. Prof. Temperley agreed that this was because a test carried out on a donor in a window period could return a negative result for a positive donor.

Hemofil continued to be the factor VIII concentrate in circulation. In November 1978 a dispute between Prof. Temperley and Dr O’Riordan ensued over the price of Hemofil, resulting in a decrease in the price per unit of the product. In June 1979 Prof. Temperley wrote to Dr O’Riordan concerning a visit to him by Immuno Ltd offering European derived factor VIII and US concentrate, the European product being at a slightly higher price. Prof. Temperley wrote to Dr O’Riordan suggesting he might consider a change-over to Immuno, as it was a reputable firm. Further, Prof. Temperley also conducted a trial of the Immuno product, which was satisfactory from the point of view of the product’s efficacy.

In and around this time the NHSCC was established. The NHSCC’s first meeting being on 19th January 1979. In its October meeting of 1979, the NHSCC asked Prof. Temperley to put together a policy document on the use of high purity factor VIII products. The NHSCC then set out its position regarding the use of high purity factor VIII products. Prof. Temperley’s policy prepared for the NHSCC, identified those type of patients for whom “high purity” products should be used, they were divided into the following categories:

- a) Home therapy
- b) To supplement cryoprecipitate for operation
- c) Patients with inhibitors

Prof. Temperley said these categories were a broad guideline of the position. However, Mr Finlay pointed out that on its face the statement itself was unqualified. Prof. Temperley said, while the statement was written in that way, it was not necessarily followed in relation to the management of patients.

Prof. Temperley said that when it came to a choice between concentrates and cryo, he was in favour of increasing the use of concentrates. Prof. Temperley said it was almost a miracle type treatment. It was the product of choice and it was the product that was easier to administer. While recognising the risk of contracting hepatitis, all the advantages of concentrate outweighed the disadvantage presented by hepatitis.

With respect to a study done by Dr Daly in 1979 concerning hepatitis and the use of concentrate, Dr Daly pointed out that, while concentrate results in a vast improvement in the quality of life for people with haemophilia, if it brings with it a definite risk of liver disease then the risk may exceed the benefit. Prof. Temperley said that the risk of hepatitis was not taken seriously compared to the advantages of factor concentrates. People with haemophilia were given concentrates despite the risks of hepatitis. Prof. Temperley said that concentrate was administered to both severely and mildly affected patients. He said it was the treatment of choice. It was given in small quantities to produce a high rise. You could measure the amount that was given. This was recognised by medical staff at the haemophilia centre, and at the National Children’s Hospital, and in St. James’.

Mr Finlay asked Prof. Temperley if at this time in 1979, when a patient may have contemplated moving from cryo to home treatment, would they have been given any advice that that might involve an increased exposure to the risk of hepatitis? Prof. Temperley said he couldn’t answer that question. Prof. Temperley said he did not know what the nurse preparing home therapy may have said or not have said to the

patients. Mr Finlay put it to Prof. Temperley would this matter not have been dealt with by the doctor? Prof. Temperley said not necessarily; the nurse may well have dealt with advising patients.

Mr Finlay then asked Prof. Temperley to consider the case of Mr John Berry. Mr Berry, of Athy, Co. Kildare, gave evidence to the Tribunal in May 2000 and died in September last.

Mr Berry was admitted to hospital in January 1979 with a nose bleed. In 1976 he had been assessed with mild haemophilia and was assayed as having a 50per cent factor VIII level. Prof. Temperley said that Mr Berry had had four assays which showed that he had a average factor VIII level of around 30-35 per cent. By the time he was admitted to hospital his nose bleed had stopped. In January 1979 Mr Berry had never been treated with any blood product for his haemophilia. Prof. Temperley agreed that a 50% factor VIII level put Mr Berry within the normal range of factor VIII. Mr Berry's recollection was that he had never had any previous treatment. Mr Berry's medical records show that, should his nose bleed recur, it was to be treated under cover of cryo. At 6.45am on the day following his admission to Saint James's Hospital Mr Berry's nose bleed resumed and it was noted on his medical record that insufficient water for reconstitution of a dose of cryoprecipitate meant that he could not be treated with cryo. A Dr Lawlor instructed two bottles of Hemofil to be administered slowly as cover. Mr Finlay put it to Prof. Temperley that the treatment with Hemofil infected Mr Berry with hepatitis C. Prof. Temperley agreed that this was the case. Mr Finlay asked Prof. Temperley, would it be the case that sterile water was something that would be found in a hospital ward? Prof. Temperley said this was not necessarily so particularly at such an early hour of the day. Mr Finlay asked Prof. Temperley would it not have been policy to avoid the use of concentrate for patients who had not been previously exposed to blood products at this time with respect to hepatitis? Prof. Temperley said he did not think there was a policy formulated with regards to hepatitis at this particular time.

PROCEEDINGS: Wednesday 14th February 2001 - Day 87

Counsel for the Irish Haemophilia Society, Mr Martin Giblin S.C., made an application to the Tribunal on behalf of the Society. Mr Giblin said that the Society's application was premised on the belief that the Tribunal had acted in excess of its jurisdiction when dealing with the matter of legal professional privilege, which was the subject of a previous application by the I.H.S.

Mr Giblin said that the Society made the application having come to the conclusion that, whenever it seeks to encourage the Tribunal to look at a new issue or examine an old issue, bearing in mind new evidence which might or might not come to light, the Tribunal has expressed something of a reluctance to take up that suggestion. Mr Giblin said that, while the I.H.S. had no wish to behave in a triumphalist manner, and it wished the Tribunal well in its endeavours. Nevertheless the Society felt on a number of issues raised it the Tribunal was reluctant to act while the Society's views were subsequently vindicated. Mr Giblin said in respect of his application of legal professional privilege, he was interrupted on no fewer than 13 occasions in his submissions in reply. He further said that the Chairperson had given a ruling on an application he had not made, and had failed to give a ruling on the application that he did in fact make.

Mr Giblin listed a number of issues where the I.H.S. and the Tribunal have engaged in dispute, he noted that such disputes were usually settled in favour of the I.H.S. However, Mr Giblin said a perception had built up that a reluctance was present on the part of the Tribunal to take on board issues which the I.H.S. wanted investigated.

Mr John Finlay S.C. for the Tribunal said he was astonished at the submission, and said the interruptions of Mr Giblin in his application on discovery and privilege were made because he attempted to introduce new material in reply to comments on his submission. Mr Finlay said he would regret if the I.H.S., or any other party coming before the Tribunal, felt unhappy or dissatisfied with the way the Tribunal was doing its work. Mr Finlay said the Tribunal was in touch with all parties who were represented before it, and was grateful for information and assistance which becomes available to it from any of the parties.

The Chairperson said she noted with regret the contents of what Mr Giblin had to say. She said that the Tribunal would continue to do its business in the manner in which it had set out in the Memorandum on Procedures.

Mr Finlay for the Tribunal, then continued his examination of Prof. Temperley. Mr Finlay referred Prof. Temperley to the period in and around October 1979 and the establishment of the National Haemophilia Services Co-ordinating Committee. Prof. Temperley agreed that the committee was established to act in an advisory capacity to the Department, but he said the Department of Health was negative in its attitude to the committee and would not fund it. The first meeting of the NHSCC took place in January 1979. In October 1979 the Terms of Reference for the committee were agreed. Mr Finlay directed Prof. Temperley to the establishment of regional centres, sub centres of the National Haemophilia Treatment Centre. However, he noted that regional centres, such as Drogheda, did not have a resident haematologist and provided only general treatment. For specialist advice reference was made back to Prof. Temperley. Prof. Temperley said the regional status of each centre would vary depending on the hospital concerned. Prof. Temperley said as time advanced the centres became more autonomous.

With respect to the NHTC, Prof. Temperley agreed with Mr Finlay that there was uncertainty and variation and difference in the way patients related to the National Haemophilia Treatment Centre, depending on where they happened to live, and under which centre their treatment was administered.

With regard to the relationship between the National Haemophilia Treatment Centre and the regional centres, Mr Finlay referred Prof. Temperley to the Minutes of the NHSCC and to a document outlining the role and function of the regional centres in relation to the National Haemophilia Centre. Prof. Temperley said the plan for the regional directors and the National Director to get together sometimes worked and sometimes did not work. Prof. Temperley said that if someone was appointed consultant haematologist in a particular hospital they may not take too kindly to someone from the National Centre telling them what they should be doing. Prof. Temperley agreed that with respect to Prof. Egan in Galway, no regular meetings took place with him in his role as regional director. Meetings of the medical directors seemed to consist of meetings between Prof. Temperley and Dr Cotter.

With respect to the risk of AIDS in and around 1983, Prof. Temperley agreed that there was concern about products with respect to AIDS, but he thought it was a US problem. Prof. Temperley said that at this removal it was very difficult to distinguish between what he could remember and what he had read, however he agreed with Mr Finlay that he had learned of the AIDS problem sometime in 1983. Prof. Temperley said he would have been aware as early as February 1983 that there was some cause for concern regarding the infection of people with haemophilia with AIDS. Prof. Temperley said that, while it was considered in the first instance to be a problem for the United States, that realisation changed gradually over the course of 1983. Prof. Temperley said that he was very guided by the UK Haemophilia Centre Directors on the question of AIDS and HIV.

Mr Finlay pointed Prof. Temperley to the first reported case of AIDS in a person with haemophilia, on 16th July 1982 in the MMWR. Prof. Temperley said he did not know the MMWR existed at this time. Prof. Temperley said that in 1983 he was in receipt of information from the UK Haemophilia Centre Directors. He would get their minutes and had been invited to some of their meetings. However, Prof. Temperley said he was not in receipt of any recommendations from MASAC of the National Haemophilia Foundation in the United States. Prof. Temperley said the Irish Haemophilia Society may have been in receipt of these documents but he was not.

Mr Finlay referred Prof. Temperley to a cutting from the evening press of December 11th 1982. The purpose of the reference to this article was to illustrate that the issue of AIDS in haemophilia and blood transfusion were in the public domain at this time.

Mr Finlay referred Prof. Temperley to a meeting of the National Haemophilia Services Co-ordinating Committee of 12th May 1983, where a discussion on AIDS took place. Prof. Temperley said he could not remember the content of the discussion and agreed with Mr Finlay that, at that time haemophilia was treated with commercial concentrate, freeze-dried cryo, BSB factor IX and commercial factor IX. Mr Finlay asked Prof. Temperley that, given that the link between the treatment of haemophilia and AIDS was firmly established by May 1983, did the treaters in the NHTC apply their minds to changing the treatment available to patients in the light of the risk now associated with commercial concentrates? Prof. Temperley said he obtained advice from Prof. Bloom and Dr Rizza in Oxford. Prof. Bloom and Dr Rizza wrote on the 24th June 1983 from the Oxford Haemophilia Centre, and advised Prof. Temperley that, at a meeting of the Reference Centre Directors, the following general recommendations were agreed.

1. For mildly affected patients with haemophilia A or von Willebrand's disease or minor lesions, treatment with DDAVP should be considered. This course was considered necessary because of the increased risk of transmitting hepatitis by means of large pool concentrates in such patients, and was in any case the usual advice pertaining to such patients.

2. For the treatment of children and mildly affected patients, or patients unexposed to commercial concentrates, many directors already reserved supplies of NHS concentrates, cryoprecipitate or freeze-dried, and it would be circumspect to continue this policy.

Mr Finlay asked Prof. Temperley had he observed these guidelines? Prof. Temperley said he presumed he had since the document was contained in his Discovery to the Tribunal. Mr Finlay pointed out to Prof. Temperley that it appeared that these guidelines were not put into operation, and it was not until November and December of 1983 that Prof. Temperley produced guidelines for use in the NHTC. Prof. Temperley said he could not explain why such a long delay occurred.

Mr Finlay then referred Prof. Temperley to a letter from Mr Shay Farrelly of the Irish Haemophilia Society of 31st May 1983. Mr Farrelly wrote to Prof. Temperley on the subject of AIDS and said that the Society was particularly concerned with the use of U.S. blood products, especially with regard to the high incidence of AIDS in the United States and the nature of the blood donor system in that country. The letter wished to know what steps were being taken to supply the home market with home therapy requirements of Irish origin. Prof. Temperley said he recalled receiving the letter. Prof. Temperley said he replied to the letter sometime in August. Prof. Temperley replied and included a suggested contribution to the Society's Newsletter.

Prof. Temperley said he was at all times following the policy of the UK Centre Directors. However, his letter to Mr Farrelly did not reflect the advice of the UK Directors. Prof. Temperley said it contained a brief summary of what he thought was the case. He had not at any time set out to mislead the Irish Haemophilia Society. Prof. Temperley's observations were contained in an article called *AIDS – A Menace to Haemophiliacs*.

Mr Finlay then referred Prof. Temperley to various guidelines that he drew up in late 1983 concerning the management of treatment for people with haemophilia. Prof. Temperley said he expected these guidelines to be observed. He said his word was law, but it was not always observed.

Mr Finlay referred Prof. Temperley to a meeting he had with the Irish Haemophilia Society on 1st December 1983. The meeting between Prof. Temperley and the I.H.S. concerned the issue of funding a research project. The I.H.S. agreed to fund the project which was to research into immunological dysfunction, lymphocyte and T4/T8 suppressor ratios and other matters of that kind, said Prof. Temperley. A paper was produced containing the research.

Mr Finlay then referred Prof. Temperley to the case of "Rory". Rory had haemophilia A and died in 1995 from AIDS. The Tribunal has previously heard evidence from his mother, who gave evidence under the pseudonym "Jackie". She described how her son had been treated with locally made cryoprecipitate until August 1983, when Prof. Temperley persuaded her to switch to a commercial concentrate. Jackie explained in her evidence to the Tribunal, that she had a fear of needles, but overcame the fear in order to administer home treatment to her son. Jackie said she had been persuaded to administer home treatment by Prof. Temperley and had never been told of the risks attached to the use of commercial concentrates. If she had been told, she said, she would never have used the product. Jackie said she had only been looking for an excuse not to switch from cryo to concentrate.

Mr Finlay asked Prof. Temperley did he not feel that Jackie was entitled to such information concerning the dangers of concentrates as against the use of cryo. Prof. Temperley said he was not of this opinion, however Prof. Temperley stressed that the decision to switch from cryo to concentrate was not a question of being thoughtless, it was a clinical decision based on the perceived risk at the time and what he considered to be the best option for Rory.

Prof. Temperley said he thought at the time it was fairly essential that Rory switch from concentrate to cryo, as his condition was deteriorating and he thought that home therapy would improve Rory's overall condition. However, with respect to the policy guidelines drawn up by Prof. Temperley in 1983, it stated that for day-to-day hospital therapy patients should only be given cryo and that this plan should only be disregarded in a serious emergency.

Prof. Temperley's guidelines were not finalised until December 1983. The issues involved were under consideration at the time of the decision to switch Rory from cryo to concentrate.

Mr Finlay asked Prof. Temperley would his treatment of Rory have been consistent with the policy contained in the advices he had received from the UK treatment directors? Professor Temperley agreed that his treatment of Rory would not be consistent with the policy of the UK directors from which he had earlier said he took his standards.

PROCEEDINGS: Thursday 15th February 2001 - Day 88

Mr John Finlay S.C. continued his examination of Prof. Temperley. Mr Finlay referred Prof. Temperley to the case of "Declan". Declan was the husband of "Deirdre" who gave evidence to the Tribunal as a personal testimony witness. Declan was a person with mild haemophilia A and was admitted to hospital for the treatment of an in-grown hair at the base of his back. Prior to his admission to hospital in April 1984 he had never received any factor concentrates or blood products.

An examination of Declan's medical record reveals he underwent a minor surgical procedure for the removal of the in-grown hair on 30th April 1984. Prior to his operation it had been decided that he would have the operation under the cover of cryo. On 1st May 1984 it was recorded that Declan was in receipt of cryoprecipitate. On 2nd May 1984 it was noted that a 90 per cent rise was effected on cryo. On 3rd May 1984 it was noted in the medical record that cryo had stopped and factor VIII concentrate was now in use.

Prof. Temperley said he did not know why the cryo was stopped. He agreed with Mr Finlay that the administration of concentrate was a departure from his treatment guidelines. Professor Temperley agreed that treatment with concentrate was a failure on the part of the junior doctor treating Declan to observe the guidelines. Prof. Temperley agreed with Mr Finlay that concentrate was not prescribed for Declan on his authority. No reference to Prof. Temperley is recorded in the notes, and there is no record of Prof. Temperley being consulted.

Mr Finlay put it to Prof. Temperley that by this stage in 1984, the increased risk in terms of hepatitis and in terms of HIV from concentrate over cryoprecipitate, was clearly established and particularly with regard to someone who had never had any treatment before. Prof. Temperley said he would dispute that in the sense that the HIV test wasn't available until much later in the year. However, Prof. Temperley agreed that the treatment of Declan was a departure from his guidelines.

The Tribunal also examined the case of "Adam", who the Tribunal was told was treated with concentrate in February 1983. Adam was 3 years old when he was treated with concentrate. In March 1983 he was put on home therapy. Adam was put on concentrate despite being a young child and being in contravention of the guidelines then in existence, which indicated that young children were not to be put on concentrate. By November 1983 he was well established on home therapy and continued to be treated with it.

The Tribunal also heard of the case of "Bernard" who as a young child, was in February 1983 diagnosed as having haemophilia A. At that time he was treated with cryo. In April 1983 he was treated with concentrate. Prof. Temperley said it was a choice between concentrate or cryo at this time. He said it was one or the other and it was easier to administer concentrate to a small child.

The Tribunal then heard of the case of "Aidan". Aidan has severe haemophilia A and avoided HIV infection. He was infected with hepatitis C. Mr Finlay asked Prof. Temperley was it the case that Aidan had received only cryo. Prof. Temperley said that he may have received concentrate in 1982 or 1983, but there was no written evidence of this.

Mr Finlay then referred Prof. Temperley to a study conducted by Dr Eagleton, the research of which was financed by a grant from the Irish Haemophilia Society. Mr Finlay referred Prof. Temperley to documents which indicated that in December 1983 patients were being examined for signs of AIDS and AIDS-related conditions. It was noted that no change of treatment was recommended when the signs were positive. Mr Finlay asked Prof. Temperley when a number of patients presented with signs of AIDS, was there no revision of the 1983 guidelines? Prof. Temperley said they took it on board but there

was no policy change. Prof. Temperley said they were hoping there was no problem, and were being optimistic as to the difficulties they faced.

Mr Finlay asked Prof. Temperley did other treaters behave in the same manner, and Prof. Temperley said it hadn't been discussed. With regard to the treatment guidelines, Mr Finlay asked Prof. Temperley had he ever checked that the treatment policy was being implemented. Prof. Temperley said he was sure that Ms McKeever, his secretary, made sure the policy was followed.

Prof. Temperley agreed that various heat treated products became available in early 1984. Prof. Temperley said a trial with Armour heat-treated was agreed between himself and the NDAB, however the clinical trial fell apart before it was implemented in Ireland. Prof. Temperley said hepatitis B infections occurred in England among those using the product. The Irish trial was then deferred.

Prof. Temperley said in October 1984 the usage of heat treated product was under consideration. He approached his colleagues. Prof. Temperley wrote to the NDAB informing them that there was no person with haemophilia in Ireland with an AIDS related condition. On the first confirmed case of AIDS arising from haemophilia treatment, Prof. Temperley informed the NDAB that the previous policy would have to be changed.

Mr Finlay then discussed the issue of HIV testing in November 1984 with Prof. Temperley. Prof. Temperley told the Tribunal that the tests were carried out for St. James' Hospital in Britain by Dr Tedder at Middlesex Hospital. Prof. Temperley issued instructions that all haemophilia A and haemophilia B patients were to be screened as soon as possible. Prof. Temperley said a special effort was made to get everyone to the hospital for testing, however he did not issue instructions as to whether or not patients were to be told they were being tested for HIV. Prof. Temperley said he did not know whether or not patients were told.

PROCEEDINGS: Friday 16th February 2001 - Day 89

Mr John Finlay S.C. continued his examination of Prof. Temperley.

Mr Finlay referred Prof. Temperley to 1985, in which Prof. Temperley took a sabbatical leave from May to November of that year. Prof. Temperley said at that time he had been in TDC for 24 years and had been involved in the establishment of the main haematology lab. In 1984 Prof. Temperley said the haematology lab was a major undertaking, with 35 people working there. It was involved in research and bone marrow transplant. Prof. Temperley said he was also instrumental in establishing the leukaemia unit at the National Children's Hospital, and in the bone marrow transplant unit at St. James'.

Prof. Temperley said he was involved in the fund raising of the first bone marrow transplant unit. He said that 1984 was a year of change and assessment for him, and by that time most of his work was with bone marrow transplant. Prof. Temperley said that in and around 1982 he fell ill. He said the stress of his various occupations contributed to his illness. He was treated then and was still being treated now for the effects of this condition.

Prof. Temperley said the situation which led to a crisis for him in 1984, was that he was the only consultant in the National Children's Hospital through 1970 to 1984. The culmination of the various demands on Prof. Temperley increased the level of stress he was experiencing and he became ill. Prof. Temperley said the sabbatical arrangements were put in place.

Among those agreeing to provide locum cover for Prof. Temperley's sabbatical was Dr Helena Daly. Her locum period ran from 1st July 1985 to 30th September 1985. Mr Finlay asked Prof. Temperley, in the face of the serious crisis facing haemophilia patients, would he not have considered postponing his sabbatical? Prof. Temperley agreed that there was a serious crisis, but he said he had to get away as he could not function.

With respect to postponing his sabbatical, he said if he had postponed it he would never have got it back. He also said it was a pity that Dr Daly could not come sooner as she would have had a lot of experience in haemophilia and AIDS. Prof. Temperley said he returned in November and resumed his workload. He said he relinquished the lab in 1984, otherwise he continued as before. Prof. Temperley said that in late 1984/early 1985, up to 150 persons were tested for HIV. Prof. Temperley said at this stage they were not sure of the accuracy of the test.

Mr Finlay referred Prof. Temperley to a letter from the social work department in St. James' Hospital from a Ms Kennedy, which noted that 80 per cent infection with HTLV-III among the haemophilia population was possible. She suggested that a system for informing people of their infection be set up. The statistics concerning HIV had been imparted to her by Prof. Temperley before he left on his sabbatical.

Mr Finlay referred Prof. Temperley to the cases of "Charles", "Ronald", "Alexander", "Bernard" and John Kelly. With respect to the case of John Kelly, it was noted that he was tested on 23rd January 1985. Dr Daly was informed of the test result on 13th August 1985. Among the medical records is a note from Dr Daly that on 14th August 1985, John Kelly's father was informed of his HTLV-III positive condition, and counselled accordingly. Among the documents in the medical records is an earlier letter from a Dr Worsley, in which Dr Worsley, who is a GP and was treating John Kelly, was informed that the boy was HTLV-III positive. Mr Finlay asked Prof. Temperley how it was that Dr Worsley, the GP, had been informed but not John Kelly's parents? Prof. Temperley said he didn't know why John's parents had not been informed.

The Tribunal also looked at the cases of “John”. On 12th June 1985 John tested HIV positive. A report from the Virus Reference Laboratory to this effect was available on 8th August 1985. The medical record indicates that John’s family was informed of his HIV positive status on 13th November 1985. When asked to comment on the delay, Prof. Temperley said sometimes it was the case that parents didn’t come up, or they may be reluctant to find out. Prof. Temperley said delay occurred in being asked to attend and actually coming to the clinic.

The Tribunal also looked at the case of “Stephen”. Evidence was given to the Tribunal on behalf of Stephen by his father, under the pseudonym of “Martin”.

A HIV test was conducted on Stephen in 1984. Martin called the pathology department for a result on several occasions and was told that if he heard nothing he was to assume that all was well. In October of 1986 the family attended St. James’ for the regular haemophilia clinic, where Prof. Temperley noted that he could see they got on well at the counselling. The family inquired as to what counselling. Prof. Temperley said he assumed the family had been told, but he could tell from their reaction that something was amiss, and they had not been properly counselled at the time. Prof. Temperley then said the test would be repeated, however the medical record shows that on 21st December 1984, a HTLV-III positive test was recorded for Stephen. It would appear from the record that between 1984 and 1986 Stephen was being monitored for his HIV positive status, but his parents were not told.

The Tribunal also looked at the cases of “Vincent” and “Rory”.