

Anita James

From: Marilynne Morgan, LSPG

Date: 7 March 2000

Via E-Mail

HEPATITIS C

Thank you for your draft. I've amended it a bit and would be grateful for your views. In particular -

- are we happy to name names here (ie. the wretched PES?) rather than leave it impersonal? Should we not perhaps say that the papers seem to have been destroyed?
- are we happy with the recommendation? I'm not sure that I've made it clear enough as to why we think an investigation is necessary. Would it reveal anything about the content of the papers? (The labyrinthine mind of Dr Metters may be sparked into action.) Can we say what the consequences if not having an inquiry are? Or what alternatives there are? I've added one thought in square brackets in the final para.
- Paragraphs 2-4: are these in the right order? What is the difference between the files in para 2 and the files in para 4? Coming to all this cold these paras are not entirely clear.
- Who should this be copied to - depending on whether names are named, and what marking should it have?

system
of keeping
papers

Timing - urgent

Those on hot
Pat Troop

(Signed)

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GRO-C

para 2 are those put together
by A Rejman

para 4 are the A C V S B
papers.

copy SMS letter in reply

DRAFT

Chris Kelly

From: Marilynne Morgan, LSPG

Date: 7 March 2000

Via E-Mail

Copy: Anita James
Charles Lister

HEPATITIS C LITIGATION

Issue: A potential problem in relation to the disclosure of documents in the Hepatitis C litigation.

Recommendation: Leading Counsel has suggested that the Department sets up a small internal investigation to determine what happened in this case and to make representations to prevent such a thing happening again.

Timing: ?

Background

1. There are two types of Hepatitis C claims:

- claims from those haemophiliacs who received blood products. Heat treatment destroyed Hepatitis C and the claims against the Department relate to a period prior to 1985 when they were given untreated blood products. Unfortunately, quite a few haemophiliacs were infected with HIV. They were paid out under a scheme organised by the Department. At the same time they undertook not to sue in relation to Hepatitis C. The Department has on its books nine cases outside the scheme which are presently stayed;
- patients who received blood transfusions of individual donations of blood who were also infected with Hepatitis C. A reliable test for HIV came onto the market in 1983 but the first tests for Hepatitis C were not developed until 1989. Blood transfusions continued between 1989 and 1991 when the existence of Hepatitis C was known but the tests in the UK had not been introduced. The Department is not a party to this litigation; the parties are those

who received blood transfusions, represented by Deas Mallen Souter, (DMS) and the National Blood Authority. Through a process known as "non party discovery" the Department consented to hand over the papers which it had.

The litigation to which this minute relates is in respect of the second category, but may have implications for the first.

The disclosure process

2. At a time in the mid-1990s when the Department thought it was going to be a major party in the litigation, leading counsel, Justin Fenwick QC, advised us to be prepared. Dr Rejman ^{*the medical adviser to brands dealing*} [who was?] who was experienced in other discovery exercises, extracted relevant documents from the files. The files were kept in the Department of Health until February 2000 when they were disclosed to DMS. At this point, and picked up, I am afraid to say, by DMS, it became apparent that the documents were incomplete.

3. Anita James, who took over conduct of the case in June 1999, was aware of another source of documents. To that end, she had telephoned Dr Metters' former Secretary (he having retired) Mrs de Sampayo to ask for Dr Metters' papers which she had seen when she was previously in Sol Litigation. Dr Metters had been chairman of the committee which had looked into the adequacy of the tests and given final advice on their introduction in 1991. It transpired that Mrs de Sampayo had had a clearout when Dr Metters retired and that the copy papers no longer existed.

4. When DMS came back to the Department about the gaps in disclosure, Charles Lister, sought to retrieve the registered files for the period covered by the disclosure (1988-1991). He has been informed by those at remote storage that the files relating to the Advisory Committee on the Virological Safety of Blood have been destroyed. They were apparently marked for destruction at an early stage.

Counsel's advice

5. After discussion with me about the situation, Anita James and Charles Lister consulted Justin Fenwick QC on 3rd March 2000. Counsel questioned both Anita and Charles as to how they knew the documents had been destroyed. I gather he was rather incredulous about the matter. So far as immediate action was concerned he agreed with our view that we write to DMS; a copy of the letter is attached. Obviously, what has happened is a potential source of embarrassment. It may well be that DMS will accept the situation, but, if DMS do cause difficulty, more money than might otherwise be spent will have to be spent on the settlement.

6. However, the real problem is in relation to the stayed litigation (the first category mentioned in paragraph 1). There, the Department has a duty to the Court not to destroy documents. The claimants are represented by J Keith Parke and Graham Ross – the latter a frequent correspondent with the Department. They are not known for their reasonableness and we are all of the view that if they get wind of what has happened, there will be adverse publicity for the Department. Mr Ross uses the newspapers as a means to an end. Counsel's advice in relation to the stayed litigation for which these two firms act is that if necessary the Department will have to settle their claims. In relation to the blood transfusion cases we are negotiating a settlement that the Department is to fund with Davis Arnold Cooper and the National Blood Authority; Counsel advised that the Department should advise Ministers about what has happened [and how are we doing that?] and making sure Davis Arnold Cooper who act for the National Blood Authority do not make a fuss (and in this regard he proposed it be done on a counsel to counsel basis). [Anita: I have probably confused this: I can't work out who DAC are. Should para 1 be expanded?]

L DAC = NBA

7. In addition Counsel was of the view that there should be a small, and probably in-house, investigation into the destruction of the documents. The investigator should interview Dr Metters, Mrs de Sampayo, the person at DH who signed the destruction authorisation (whom we know to be still at DH) and Dr Rejman. This should not be a witch hunt but the investigator should report

and make recommendations about such matters in the future. Counsel was of the view that as part of the investigation Heywood Stores should be visited. In this way, the Department would have audited what has happened. It occurs to me that this is a function which could properly be carried out by internal audit.

Recommendation

8. This does appear to be a one off case. Sol Litigation has handled three other major writ actions of this kind and will undoubtedly handle others. They have no experience of this kind of thing happening before. But equally we cannot be complacent. More importantly in this case we have a duty to the court which I believe we can satisfy only by undertaking a formal audit of what happened. [My own recollection is that the only time such a thing has happened before – an issue involving the Lister Institute (no relation) in which vital papers were inadvertently sent to a land reclamation site - an internal investigation was held.] My advice, therefore, is that such an investigation is held [and that Ministers are informed].

(Signed)

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