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RESTRICTED – POLICY

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From: **Marilynne Morgan, LSPG**

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HEPATITIS C LITIGATION

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

Recommendation: 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: Urgent: such an investigation needs to be carried out as soon as possible.

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. There are 113 claims against the National Blood Authority (who are represented by the NHS Litigation Authority who have instructed Davis Arnold Cooper). The 113 claimants who received blood transfusions are represented by Deas Mallen Souter (DMS). The Department is not a party to this litigation, but through a process known as "non party discovery" the Department consented to hand over the papers which it had. The trial for these claims is set for October, but the present position is that the National Blood

Authority are hoping to negotiate a settlement with the claimants, subject to Ministerial approval.

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 the branch which dealt with policy on blood, and who was experienced in other discovery exercises, extracted relevant documents from his branch's files. Those extracted documents 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. I understand that nothing remains on the files from which the documents were extracted.

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) to ask for Dr Metters' personal papers on the subject which she had seen when she was previously in Sol Litigation. Dr Metters had been chairman of the Advisory Committee on the Virological Safety of Blood which had looked into the adequacy of the tests and given final advice on their introduction in 1991. It transpired that his former secretary had had a clearout when Dr Metters retired and that the copy papers no longer existed.

4. Charles Lister sought to retrieve the registered files relating to the Advisory Committee of which Dr Metters had been chairman, which should have contained a full record for the period covered by the disclosure (1988-1991). He has been informed by those at remote storage that those files 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; copies of our letter and their reply are attached. Obviously, what has happened is a potential source of embarrassment. DMS's response is very reasonable but they are of course concerned. They ask for a further understanding of the Department's position by next Tuesday, in the form of an annotated list of documents. Anita will complete this by Friday. Counsel proposed to talk on a counsel to counsel basis to the National Blood Authority's lawyers to smooth things there. Ministers will need to be informed of the position in due course.

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 two firms, J Keith Parke and Graham Ross – the latter a frequent correspondent with the Department. Neither firmare 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 is that if necessary the Department will have to settle the claims (£15-30k per case), but this could easily be represented as "lost the papers and paid us off".

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 and his secretary, 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. I am also concerned that nothing like this happens in any other litigation we have or may have, in particular of course in the context of BSE. 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 conducted as a matter of urgency.

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