

DRAFT MINUTE TO THE PERMANENT SECRETARY FROM MAM

RE: HEPATITIS C

1. I am writing to let you know of a potential problem in relation to the disclosure of documents relating to Hepatitis C.

Background

2. There are two types of Hepatitis C claims. Firstly, there were 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.

Secondly, there are 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 no reliable test for Hepatitis C was available until 1991 although the original tests for Hepatitis C were developed in 1989. Blood transfusions continued between 1989 and 1991 when the existence of Hepatitis C was known but the tests had not been introduced. The Department is not a party to this litigation. The parties are those who received blood transfusions and the National Blood Authority. However, through a process known as non party discovery the Department consented to hand over the papers which it had.

The Disclosure process

3. At a time in the mid nineteen nineties when the Department thought it was going to be a major party in litigation, counsel, Justin Fenwick QC advised us to be prepared. Dr Rejman 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 Deas Mallen Souter (DMS) who act for the claimants. At this point and picked up, I am afraid to say, by DMS it became apparent that the documents were incomplete.
4. 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' papers which she had seen when she was previously in Sol Litigation. Ms de Sampayo had had a clearout when Dr Metters retired. 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.
5. 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 have been destroyed. They were apparently marked for destruction at an early stage.
6. Mrs James could see no alternative but to tell DMS what had happened. I said I would be happy for her to write to DMS provided Counsel approved. She therefore went to see Justin Fenwick QC with Charles Lister on 3rd March 2000.

Counsel's advice

7. Counsel questioned Mrs James and Mr Lister as to how they knew the documents had been destroyed. I gather he was rather incredulous about the

matter. He advised that the Department should deal with problem by advising Ministers about what had happened 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). He also agreed that DMS and the Court be kept informed. The latter can be done in the formal discovery document which Anita James will sign in due course with a covering letter. The former was accomplished by the letter to DMS. Anita James sent them the letter by post and fax on 6th March. It was drafted on Counsel's advice and I attach a copy at Annex A.

8. Obviously, what has happened is a potential source of embarrassment. It may well be that DMS will accept the situation. However, the real problem in relation to the stayed litigation. There, the Department has a duty to the Court not to destroy documents. Also, the claimants are represented by J Keith Parke and Graham Ross - 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. It may be that if DMS do cause difficulty more money than might otherwise be spent will have to be spent on the settlement.
9. Counsel was also of the view that there should be a (small) investigation into the destruction of the documents. He thought it should be done in house and should not by any means take on the characteristics of a public inquiry. The investigator should interview Dr Metters, Ms de Sampayo, the person at DH who signed the destruction authorisation (whom we know to be still at DH) and Dr Rejman. The investigator should then report on that 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. I suggest we do this and I suggest we appoint XXX to carry out the investigation.

He is

10. May I reassure you that this appears 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 happening. Indeed, Mrs James does not recall it happening in any other case.