

Witness Name: Benjamin Hartley

Statement No.: WITN3525001

Exhibits:

WITN3525002-WITN3525005

Dated: 3 July 2019

## **INFECTED BLOOD INQUIRY**

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### **WRITTEN STATEMENT OF BENJAMIN HARTLEY**

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I provide this statement in response to a request under Rule 9 of the Inquiry Rules 2006 dated 24 June 2019.

I, Benjamin Hartley, of the General Medical Council, 3 Hardman Street, Manchester M3 3AW will say as follows: -

#### **Section 1: Introduction**

1. My full name is Benjamin Hartley and my date of birth is GRO-C1974. I qualified as a solicitor of the Senior Courts of England and Wales in 2001. I gained Higher Rights of Audience (All Proceedings) in 2008. I have a current practising certificate from the Solicitors Regulation Authority.
2. Since 2014, I have been a Principal Legal Adviser in the in-house legal team at the General Medical Council. This means I lead a team of Senior Legal Advisers, Legal Managers, Solicitors and Paralegals whose main work is investigating fitness to practise cases and preparing cases for hearings before tribunals of the Medical Practitioners Tribunal Service. One of my responsibilities is to oversee the legal support which the legal team gives to the GMC in assisting and responding to external inquiries and investigations. Depending on the legal support required and volume of work, this may involve legal advisers and paralegals from the team.

3. In 2005, I started work as a Legal Adviser at the GMC and from 2010 to 2014, I was a Senior Legal Adviser. To the best of my recollection, I was not involved in the investigations on the fitness to practise cases the GMC have identified so far as being relevant to the inquiry's terms of reference. This statement is therefore based on my reading of relevant case files and documents and not from any direct involvement at the time, or alternatively if I have relied on other sources of information for this statement, I have stated those sources.

## **Section 2: Response to Criticism of Alice Mackie**

### *Relevant legislation*

4. The GMC's legal framework is set out at Exhibit WITN3365004 (referred to as CM/3 in Charlie Massey's witness statement dated 28 June 2019 (WITN3365001)). Prior to 1 November 2004, the exercise of the GMC's fitness to practise powers in relation to convictions and allegations of misconduct under the Medical Act 1983 was governed by the General Medical Council Preliminary Proceedings Committee and Professional Conduct Committee (Procedure) Rules Order of Council 1988 (the '1988 Rules').
5. On 1 November 2004, the 1988 Rules were replaced by the General Medical Council (Fitness to Practise Rules) Order of Council 2004 (the 'FTP Rules'). A link to the FTP Rules can be found at Exhibit WITN3365005 (referred to as CM/4 in WITN3365001). A summary of the changes that occurred to our fitness to practise investigation processes appears at Exhibit WITN3365008 (referred to as CM/7 in WITN3365001). Transitional provisions about how cases which were already ongoing as at 1 November 2004 should be dealt with are set out in Exhibit WITN3365010 (referred to as CM/9 in WITN3365001) ('Transitional Provisions').
6. Rule 6 of the 1988 Rules is of particular relevance to the stage of investigation reached in Mr Mackie's complaint. There were a number of amendments to the 1988 Rules and we have been unable to obtain a full copy of the 1988 Rules that were in force between receipt of Mr Mackie's complaint in November 2003 and the introduction of the FTP Rules in November 2004 to exhibit to this statement. However, a copy of rule 6 in force at that time is attached to this statement as **Exhibit BH/1**. We can make further efforts to seek a fully copy of the 1988 Rules in force at the relevant time if the inquiry would be assisted by this.

7. Based on my reading of this case file and information we have provided to other historic inquiries, it appears that our investigation process went beyond the legal requirements of rule 6 in terms of what was provided to the complainant. Once the GMC received a complaint or referral and assessed it as being a matter within its remit, the GMC sought the complainant's consent to disclose the complaint to the doctor. At the same time, the GMC requested any further information which would support the complaint and which it appeared might be in the complainant's possession.
8. Once consent to disclose the complaint to the doctor had been received, the GMC invited the doctor's comments and also sought any other relevant information that may be required to establish whether there was a case to answer.
9. The doctor's comments would then be disclosed to the complainant and the complainant had an opportunity to reply.
10. As soon as it appeared that there was sufficient information on which to decide whether there was evidence of serious professional misconduct, the case was referred to a medical screener for a decision whether to close the case or refer it to the Preliminary Proceedings Committee ('PPC').
11. If the medical screener was satisfied that from the material available that it was properly arguable that the practitioner's conduct constituted serious professional misconduct, the medical screener was obliged to refer the case to the PPC. An allegation of misconduct would not be referred to the PPC if at the time the complaint was made, more than five years had elapsed since the events giving rise to that allegation. However, the medical screener could direct that such a case still be referred to the PPC if the public interest required this in the exceptional circumstances of that case (the 'Five Year Rule'). Where a medical screener referred a case to the PPC, the GMC was required to notify the practitioner of the receipt of the complaint or referral and state the matters which appear to raise a question as to whether the conduct of the practitioner constituted serious professional misconduct. There is no provision in the 1988 Rules requiring disclosure of any of the information to the complainant unless the medical screener decided not to refer a case to the PPC. In

those circumstances, the complainant must be informed of that decision but will have no right of access to any document relating to the case submitted by another person.<sup>1</sup>

12. The 1988 Rules then provided that, after considering the case, the PPC could then refer a case on to the Professional Conduct Committee for a hearing<sup>2</sup>. However, in Professor Ludlam's case, Mr Mackie's complaint was ultimately not considered by the PPC and the matter was dealt with under the new provisions of the Fitness to Practise Rules that came into effect on 1 November 2004.
13. The FTP Rules state that the Registrar must write to the practitioner informing them of the allegation against them and provide copies of any documents in support of the allegation. The Registrar shall invite written representations from the practitioner and also notify them that any representation made will be disclosed, where appropriate, to the maker of the allegation for comment. The practitioner's comments on the allegations may, where appropriate, be disclosed by the GMC to the complainant.<sup>3</sup> Once all comments are received, the case is passed to the case examiners (senior GMC decision makers) for a decision as to how the case should proceed. A number of options are available to the case examiners including closure and referral to a Fitness to Practise Panel (now Medical Practitioners Tribunal).

#### *Chronology of Mr Mackie's case*

14. The correspondence and documents in this section of my statement can be found on case file 2003/2726 which has been disclosed to the inquiry.
15. On 18 November 2003, Robert Mackie made a complaint about Professor Ludlam to the GMC. Mr Mackie's complaint was acknowledged on 21 November 2003, noting that the GMC was considering whether the complaint could be considered given the Five Year Rule. The letter stated that the GMC would contact Mr Mackie again once a decision had been made on whether the GMC would be taking any action on the complaint.
16. On 21 November 2003 Mr Mackie sent a further letter to the GMC, noting that he wished to add a number of questions to his initial complaint. This letter was

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<sup>1</sup> Rules 6(1), (3), (6), (7) and (8) 1988 Rules

<sup>2</sup> Rule 11, 1988 Rules

<sup>3</sup> Rule 7 FTP Rules

acknowledged by the GMC on 26 November 2003. This letter informed Mr Mackie that the GMC had decided to consider his complaint and requested numerous things from Mr Mackie, including his consent (which was received on 2 December 2003), any further documentation he thought was relevant, copies of all medical records and correspondence with Professor Ludlam.

17. Within this letter, the GMC also specifically addressed the queries raised by Mr Mackie in his letter of 21 November 2003, noting *'...you have asked a number of questions and you have said that you would like answers to those questions. We cannot provide the answers you seek, or compel Professor Ludlam to answer those questions, but your correspondence will be made available when a decision is taken on whether your complaint raises any issues of 'serious professional misconduct' on the part of Professor Ludlam'*.
18. Mr Mackie's complaint was disclosed to Professor Ludlam on 9 December 2003. On the same date the GMC wrote to Mr Mackie to inform him that his complaint had been disclosed to Professor Ludlam with the following note:

*'...I should explain that, at this stage, Professor Ludlam is under no obligation to comment, but should he choose to do so, I will provide you with a copy of his comments. At that stage you will have an opportunity to provide further comments if you wish.*

*If you do make further comments we will forward them to the Professor Ludlam who can make a further response within two weeks. That is the end of our disclosure procedure for the initial stages of the complaint with both you and Professor Ludlam having two opportunities to comment.'*

19. Professor's Ludlam's comments were sent in response on 23 December 2003. These comments raised an issue with the decision to waive the Five Year Rule. These comments were then sent to Mr Mackie on 12 January 2004. It was noted to Mr Mackie that it was open for him to comment if he wished but that any response would be forwarded to the Professor Ludlam and the Medical Defence Union ('MDU') to allow him a further chance to reply. Mr Mackie provided further comments by way of letter dated 18 January 2004.

20. Mr Mackie's comments were then sent to Professor Ludlam/the MDU on 21 January 2004. In addition, on 21 January 2004 the GMC wrote to Mr Mackie to acknowledge his response dated 18 January 2004. In this letter it stated that Mr Mackie's letter had been sent to Professor Ludlam and the MDU and that Professor Ludlam had a further two weeks to provide final comments on the complaint. It then stated *'I will write to you again when I have any further information on the progress of your complaint, but hope you will appreciate that this may not be for several weeks.'* Further comments were not invited from Mr Mackie. Professor Ludlam provided further comments to the GMC on 30 January 2004.
21. Mr Mackie wrote a further letter to the GMC, dated 28 April 2004. In this letter Mr Mackie provided further comments in relation to Professor Ludlam and enclosed a copy of a letter from Bob Stock on behalf of the Minister for Health and Community Care. On 30 April 2004 the GMC acknowledged this letter stating that his comments were noted and added to the file for future reference. It also stated *'Your complaint has been the subject of unavoidable delay, and we have not yet been able to make a decision on it. I can confirm, however, that we are nearing the end of our investigation into the issues you have raised.'*
22. On 18 May 2004 the GMC provided a further update to Mr Mackie to confirm that his case had been referred to a medical screener. Professor Ludlam was updated of the same.
23. On 1 June 2004, the medical screener considered that it was in the wider public interest to waive the Five Year Rule, noting that *"Mr Mackie is a patient with haemophilia who contracted HIV and hepatitis C from replacement blood products"* and that the allegations, if proven, would represent Serious Professional Misconduct and must be referred to a Preliminary Proceedings Committee *"...as most of the other cases being brought by patients with haemophilia in this series are being"*.
24. On 23 February 2005 Mr Mackie emailed the GMC requesting an update. Mr Mackie sent a chaser to this email on 3 March 2005.
25. In light of the introduction of the new FTP Rules in November 2004, the investigation into Professor Ludlam's fitness to practise then came to be considered under those rules as provided for in the Transitional Provisions.

26. On 9 March 2005, the GMC sent a letter to Professor Ludlam to inform him that the case was being prepared for consideration by case examiners. It also noted that as it was some time since the GMC had originally disclosed the complaint to him, Professor Ludlam had a further opportunity to provide comments. The GMC requested these comments by 30 March 2005.
27. On 18 March 2005 Professor Ludlam sent a letter to the GMC noting that they had agreed that he would provide comments by 10 April 2005. Professor Ludlam provided these additional comments by way of letter dated 6 April 2005.
28. Mr Mackie and Professor Ludlam were informed of the case examiners' decision to close the case on 20 April 2005. On 19 August 2005, Mr Mackie asked the GMC to provide the procedure for appealing against the Case Examiners' decision. Mr Mackie sent a chaser for this information on 26 August 2005. The GMC responded to Mr Mackie on 31 August 2005 noting that it was not generally possible to overturn the Case Examiners' decision but that Mr Mackie could challenge it by way of judicial review.

*Request for review*

29. The correspondence referred to in this section of my statement which we have located, can be found in case file 2005/1881 Vol 2 disclosed to the inquiry. On 3 December 2006, Mr Mackie wrote to the GMC's then President Sir Graeme Catto, requesting his original case to be reconsidered. Mr Mackie stated that he felt that since the Freedom of Information (Scotland) 2002 Act came into force, he had received information which would have helped his case.
30. On 28 February 2007, the President of the GMC, Sir Graeme Catto wrote to Professor Ludlam and Mr Mackie to say that the GMC had decided to undertake a review of the decision to close the case against Professor Ludlam under rule 12 of the FTP Rules. The President considered that the GMC had erred in its administrative handling of the case and was satisfied that it was in the public interest to review the case because:
  - a. The Case Examiners had not addressed all of Mr Mackie's allegations in their decision; and

- b. Mr Mackie's letter dated 3 December 2006 mentioned new information that would have helped his case since the decision by the Case Examiners.
31. On 19 February 2007, the Archer Inquiry was announced. On 13 April 2007, the GMC wrote to Mr Mackie and informed him that we would not be conducting a review of the decision on his case under rule 12 whilst the Archer Inquiry was ongoing. We confirmed to Mr Mackie that we would revisit the matter at the conclusion of the Archer Inquiry.
32. Mrs Mackie has referenced some subsequent exchanges and correspondence with the GMC which we have been unable to locate within our files. These are the following:
- A letter from Mr and Mrs Mackie to the GMC in response to the 13 April 2007 letter objecting to the decision not to conduct a parallel investigation to the Archer Inquiry
  - August 2007 – letter from the GMC to Mr and Mrs Mackie informing them that the President had decided it was appropriate to lift the stay of the Rule 12 review
33. On 15 January 2008, the GMC wrote to Mr Mackie notifying him that the GMC had concluded its review under rule 12 and decided that the original decision not to refer the allegations to a Fitness to Practise Panel should stand. A copy of this letter is attached at **Exhibit BH/2**.
34. We have continued to search for relevant documents and have located one further document relating to Mr Mackie's complaint not previously disclosed. This is a letter dated 6 November 2007 to Mr David Lundell MP providing an update that the GMC's rule 12 review remained ongoing. A copy of this letter is also attached at **Exhibit BH/2**.

*Freedom of Information Act and Data Protection Act request*

35. I have relied upon information provided to me by the Information Access Team at the GMC for this section of my statement. The Freedom of Information Act 2000 provides public access to information held by public authorities. The Data Protection Act 2018<sup>4</sup> and General Data Protection Regulation (GDPR) set out the legal responsibilities for

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<sup>4</sup> The Data Protection Act 2018 replaced the Data Protection Act 1998 in May 2018.



organisations that process personal data which includes subject access rights to personal data held by data controllers. In 2003 the GMC established a centralised team to respond to data subject access requests under the Data Protection Act 1998 and to prepare for the introduction of the Freedom of Information Act 2000 (FOIA) on 1 January 2005.

36. The GMC don't have any record of a Freedom of Information Act (FOIA) request being made by Mrs Alice Mackie. However we do have a record of an FOIA request being made by Mr Robert Mackie in 2005 and the chronology of this request is detailed below.
37. Mr Robert Mackie made a FOIA request on 21 April 2005 for a copy of all information held on his complaint file (reference: 2003/2726). I have attached as **Exhibit BH/3** to this statement a copy of our Information Access request file (Reference IAT/F142/CH). We acknowledged Mr Mackie's request on 26 April 2005 and explained that the case file contained his personal data. We therefore needed to consider his request under the Data Protection Act 1998 (DPA) in addition to the FOIA. We also requested a £10 fee to process his DPA request as was provided for under the 1998 Act.
38. We sent a FOIA response to Mr Mackie on 12 May 2005, providing some information from the case file which we could disclose to him under FOIA. We confirmed again that we would process his request for any personal data contained within case file 2003/2726 once we received the DPA fee of £10. We did not receive the fee so the request was treated as withdrawn and the file closed on 24 May 2005 - see note on the file at **Exhibit BH/3**. I've also attached as **Exhibit BH/4** extracts from a request database used at the time by the Information Access Team.
39. There is no correspondence or telephone notes within the Information Access file IAT/F142/CH at **Exhibit BH/3** stating that permission would need to be obtained by Mr Mackie from Professor Ludlam to disclose documents. Our process in relation to documents containing mixed personal data was at the time, and remains, to seek the views of any third party ourselves. There would not have been any requirement at all for Mr Mackie to make contact with Professor Ludlam in relation to this matter. At the time Mr Mackie's request was received, any objections received by a third party would have been considered in a 'balance of interests test' conducted by the Information Access Manager as per sections 7(4)-(6) of the DPA 1998. This test would have considered whether disclosure would breach any of the Data Protection Principles,

notably Principle 1 (disclosure needs to be 'fair and lawful') and whether a Schedule 2 condition (and Schedule 3 if sensitive personal data was involved) existed to legitimise the disclosure of the information in question. A similar provision exists today under Schedule 2, Part 3, paragraph 16(3) of the DPA 2018.

40. Mr Mackie is welcome to submit a request for a copy of the personal data we hold about him which we would now consider as a right of access request under Article 15 of the GDPR. Since 25 May 2018 when the GDPR came into force, there is no longer a £10 fee to be paid.

*Summary: Responses to questions 3 and 4*

41. Under rule 6 of the 1988 Rules which governed our fitness to practise investigation process at the time Mr Mackie's complaint was received, there was no obligation on the GMC to disclose a practitioner's comments on an allegation to the complainant or to tell the complainant that an allegation had been referred to the PPC. However, our practice in this case was that we disclosed Mr Mackie's complaint and further comments to Professor Ludlam so that he could comment on the allegations against him. We also disclosed Professor Ludlam's first response dated 23 December 2003 to Mr Mackie on 12 January 2004 and invited his comments. We did not provide Professor Ludlam's final response to the complaint dated 30 January 2004 to Mr Mackie.
42. Under the FTP Rules, a practitioner's comments on the allegations may, where appropriate, be provided to the maker of the allegation for comment. In other words, there is no obligation to provide the doctor's comments to the complainant in every case. Rather, the GMC has a discretion to do this where appropriate. As the doctor is the subject of our fitness to practise investigations, fairness in our processes means the doctor will usually be given the last word, before the case examiners make a decision on a case. We acknowledge that in this case we did not send Professor Ludlam's final comments before the case examiners' decision (dated 6 April 2005) to Mr Mackie for comment.

**Section 3: Other Issues**

43. The Information Access file IAT/F142/CH at **Exhibit BH/3** was not located in earlier searches for Dr Ludlam because Dr Ludlam's name was recorded on the database as "Dr Ludlum". The original request from Mr Mackie dated 21 April 2005 spelled Dr Ludlam's name as "Dr Ludlum".
44. The letter to David Mundell MP dated 6 November 2007 at **Exhibit BH/2** was not located during our original searches as we have prioritised our searches against the priority search terms provided to us by the inquiry and have not yet searched against the names of patients/complainants.
45. We will continue to search through our records for any further relevant documents and will disclose any further relevant information to the inquiry.

**Statement of Truth**

I believe that the facts stated in this witness statement are true.

Signed

GRO-C

Dated

03/07/19