

Jonathan Stopes-Roe

02/05/2006 12:30

To: Brian Bradley/HP-SL/DOH/GB **GRO-C**

cc: Edward Goff/HP-SL/DOH/GB **GRO-C**

bcc:

Subject: FW: Legal costs of vCJD compensation scheme

Brian

Ted has been doing some work on this. The position is (I think) as follows:

- Irwin Mitchell say that the Trust ought to pay various legal costs (probate, trusts, etc). David Body wrote to me about this on 16 January and 1 February.
- So far, I have given him only a very vague reply on the matter (23 January).
- Rosemary McKenna MP wrote to PS(PH) on 10 April on the same matter - PO90551 is presumably still outstanding.
- Richard Vallance wrote to Ted about the MP's letter on 26 April - the Trust considers that it has no power to pay these costs.
- We now have SOL advice (below) that we should resist this demand.
- I think we are now in a position to draft replies to both the MP, and to IM.

Can you take this forward, please?

Jonathan Stopes-Roe  
Head of Strategy & Legislation  
Health Protection Division  
Department of Health  
Wellington House  
**GRO-C**

----- Forwarded by Jonathan Stopes-Roe/HP-SL/DOH/GB on 02/05/2006 12:18 -----



Gidden Mark LSPG Sol  
LIT

<Mark.Gidden **GRO-C**

**GRO-C**

28/04/2006 16:44

To: Jonathan Stopes-Roe/HP-SL/DOH/GB **GRO-C**

cc:

bcc:

Subject: FW: Legal costs of vCJD compensation scheme

Jonathan,

This advice is subject to legal professional privilege - both legal advice privilege and litigation privilege.

I have attempted to exhumate my files from yesteryear but they are many and in what I think is a proportionate amount of time to be spent on the task I have arrived at the following conclusions without necessarily examining

every paper filed over the relevant period.

1. The cost of obtaining a grant of probate (where a victim has died leaving a will) or letters of administration (upon intestacy) was not, as I am able to recall, the subject of specific agreement or indeed detailed discussion at the time DH advisors were 'negotiating' with Irwin Mitchell and counsel for 'the families' (as we then referred to their clients).

2. These discussions culminated in a Discussion Document recording the basic outline of an agreed scheme by which compensation might be paid by Govt to The Families. It included under the heading 'Costs' - 'An appropriate mechanism will be established for securing that benefits paid under the scheme are not reduced by legal costs reasonably incurred in investigating and putting forward a claim in respect of any patient/family'. Nothing specific was said about probate fees. This document was, as I recall, settled by our counsel and IM then had the chance to agree or disagree with it but in the event did neither. Instead they simply 'road-tested' with clients who it was reported were generally in favour of what was proposed.

3. Subsequently this document was amongst the instructions made available to Chancery counsel who settled the final Trust Deed which the families lawyers most certainly did crawl all over before a final agreed version was ready for execution. This Deed, as well we know, contained the provisions now carefully examined in the letter from Richard Vallance of 26 April.

4. The view has clearly been taken that clause 7.1 does not permit the Trustees to pay probate and trust fees. IM it seems have, in their representations to the Trust, placed greater reliance upon clause 11.1 - but again to no avail. The Trustees have concluded that such costs cannot be said to have arisen to meet a requirement of the Trust - rather, for the protection of individual beneficiaries. What this means in practice is that the person to whom compensation is paid under the vCJD Trust is the person with appropriate legal authority to receive it. Otherwise payment might be made to X or Y who lacking suitable authority to receive it then find that receipt challenged by others. In a worse case scenario what has then been paid as compensation ends up being dissipated in legal fees litigating such disputes. It is worth bearing in mind that in settling some very substantial human growth hormone cases of vCJD IM have not pressed for payment of probate or administration of estates fees and nor would we entertain paying such.

5. In most cases the cost of obtaining a grant should be modest. It is also an exercise that the overwhelming majority of personal representatives will have to undertake in order to deal with the administration of the deceased's estate in any event. Somewhat exceptionally it seems that in Scotland the cost of obtaining the equivalent Confirmation may be greater although we have not seen any detailed breakdown of costs - some of these may relate to the administration of the estate and not just to the obtaining of a grant or it's equivalent.

6. Where this leaves us seems to me to be that in the absence of specific earlier agreement, of specific provision in the Trust Deed, and in the absence of any willingness on the part of Trustees to exercise a discretion to pay, the position is that probate fees will not be met out of the vCJD Settlement. This is no doubt very difficult for IM who now find that they have client expectations that they cannot meet and of course with the benefit of hindsight how much better it might have been to have ensured that this issue was specifically catered for. It was not. The response, predictably enough, is to try and construct an expectation on their part that at the material time agreement was reached by saying, 'It was assumed that the legal costs associated with bringing a claim against the Trust would be met by the Trust'. In this instance one man's assumption is frankly another man's oversight.

7. Whether this is now a difficult question for DH depends upon the extent to which there is a groundswell of indignation amongst the families to cause an amendment to the strict terms of the settlement. Weight may be added to such a call if the Trustees add their considered clause 34 voices to any such clamour but this we do not yet know. Historically, and politically, the SofS of the day was most anxious to avoid paying out a lot of money and then being damned for it.

8. As to a reply I would be inclined to say that the Trust Deed does not facilitate the payment of probate fees since this was not a specific part of the agreement reached with those representing the families before the settlement was finalised 4 years ago (had it been part of that agreement then it would have been specifically included in the terms of the Trust). It is none the less a generous and sophisticated scheme of compensation by which the Department and those representing the families did their very best to cater for as many facets of tragic circumstance as possible. The great majority of probate fees should be relatively modest, certainly in relation to

the overall compensation being paid in individual cases. Whilst it may be tempting to continue expanding the categories of expense for which the scheme might cater there is ultimately a need to make sure that sufficient funds remain with the Trust to meet the contingency of future claims - surely a sentiment that everyone touched by the tragedy of vCJD would want to share.

Mark

-----Original Message-----

From: jonathan.stopes-roe [GRO-C] [mailto:jonathan.stopes-roe [GRO-C]]

Sent: 28 April 2006 12:27

To: Edward.Goff [GRO-C]

Cc: Brian.Bradley [GRO-C] Mark.Gidden [GRO-C]

Subject: RE: PO00000090551 Request for Contribution - Contribution due: 19/04/2006 - Legal costs of vCJD compensation scheme

All

This is useful raw material for a reply not only on this case, but also to Irwin Mitchell, to whom I do still owe a reply on this matter.

Mark - can you please verify Sir RO's assertion that it was always the avowed intention not to cover probate and trust costs, in negotiating the Trust Deed?

Beyond re-asserting that policy intention, I think our general line has to be that the coverage of such costs is a matter of Trust powers that requires to be reviewed annually by the Trustees, under Clause 34.1. If they consider that this is a lacuna in provision which significantly harms the interests of families in an unfair way, contrary to the objectives of the scheme, then no doubt they will make the necessary recommendations to SoFS.

Jonathan Stopes-Roe  
Head of Strategy & Legislation  
Health Protection Division  
Department of Health  
Wellington House  
[GRO-C]

Edward Goff

27/04/2006 08:18

To: Mark.Gidden [GRO-C]

cc: Jonathan Stopes-Roe/HP-SL/DOH/GB [GRO-C] Brian Bradley/HP-SL/DOH/GB [GRO-C]

Subject: RE: PO00000090551 Request for Contribution - Contribution due: 19/04/2006 - Legal costs of vCJD compensation scheme

Mark

You wanted to see Richard's response to this PO? I look forward to receiving your views

Regards

Ted Goff  
Strategy & Legislation Branch



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----- Forwarded by Edward Goff/HP-SL/DOH/GB on 27/04/2006 08:15 -----

"Richard Vallance"<Richard.Vallance@**GRO-C**

To: Edward Goff/HP-SL/DOH/GB@**GRO-C**

26/04/2006 17:24

Subject: RE: PO00000090551 Request for Contribution - Contribution due: 19/04/2006 - Legal costs of vCJD compensation scheme

Dear Ted

I attach a letter which contains suggestions on what you might include in a reply to the letter of Rosemary McKenna MP.

It is correct that this is an old case in that claims were dealt with in June 2003 and there is nothing outstanding since then. There has been no correspondence on this particular file concerning payment of legal fees.

The Trustees again considered representations which had been made to them in another case concerning payment of probate and trust fees, at their meeting on 7 April 2006. The attached letter is therefore based on the response which was subsequently sent out explaining their decision. I hope that this will suffice to help you prepare your own reply.

If it is the view of your Department that these costs should indeed be paid, the problem could of course be resolved by an amendment of the Trust Deed to give the Trustees the necessary power to do so. If it had been the intention that probate and/or trust fees should be paid out of the Trust, this could of course have been negotiated by the parties to the Trust Deed.

Regards

Richard

Richard Vallance

Partner - Head of Clinical Negligence and Personal Injury  
for and on behalf of Charles Russell LLP

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(See attached file:

NFL1-#1796625-v1-CJD\_Thomas\_Kerr\_-\_Letter\_-\_Ted\_Goff\_DoH.DOC)