

cc Mr Slater  
Dr Lewis Mr Lilleywhite  
Mr McKeever Mr Barton  
Dr Harris Dr Ower  
Mr Cashman Dr Smithies  
Mrs Morgan Mrs Massiah  
Dr Pickles Mr Macdonald

5/11/02  
Copy - Mr. M. A. Harris ✓  
Copy  
Dr Moore  
Mr Chingue  
Mr Heppell

AIDS ISSUES

I was very interested to see the documents from the "Hastings Center" in New York which you enclosed with your minute to me of 4 February.

2. I note what you say concerning what you were told at that institution about the conclusions they had reached concerning the relative advantages of public health and personal rights in connection with anonymised screening but, this seems to be the direct opposite of the conclusions in the article in the Journal of American Medical Association from the Hastings Center, which you copied to me. The requirements they list for screening include those that individuals must be notified that screening will take place and that individuals who are screened have a right to be informed about the results. The arguments on which these conclusions are based seem to me to be most effectively deployed in the article.

3. I cannot, of course, express any opinion on what the legal position in New York, or elsewhere in the USA, might be (though I suspect it is unlikely to be no less concerned with individual rights than it is here) but I am in no doubt myself that it would take overwhelming evidence that the protection of public health required screening that denied a person the right to refuse to allow his blood to be used for this purpose as well as his right to be informed of the results, before an English court would accept this as justification for the breach of such rights - and even then this would only go to the question of the quantum of damages.

4. You ask for advice on the possible liability, if any, of the NHS for infection of haemophiliacs with HIV infection arising from contaminated blood or blood products supplied through the NHS. It is very difficult to cover possibilities in the abstract. I do not know for example the extent of involvement of the Department in control of the import of blood products from overseas which could result in some failure amounting to negligence on the part of the Department, but there would certainly be potential for some breach of a duty of care on the part of health authorities as bodies and of individual members of staff working for them.

5. Whether a body or person in the NHS could be held liable in negligence would depend on whether, in the then state of medical and technical knowledge, there had been a failure to take all proper steps to guard against infection

or - if it was known that there could be an unpreventable risk - to get the informed consent of the patient to undergoing treatment involving such risk. In deciding whether there had been a breach of a duty of care, the court, would have to consider all the circumstances and the state of informed medical opinion and scientific knowledge at the time.

6. On your final question about the way in which we could properly invite DHAs to consult either RHAs or DHSS before entering into negotiation or settlement, I was reminded of the "Dear Administrator" letter of 24 June 1975 and of the Health Circular HC(78)42, sent out in December 1978, which placed limits on the power delegated to health authorities to settle legal proceedings (currently a maximum of £100,000 plus costs) so that a settlement involving a higher sum is not a decision that can be taken by a health authority and they are required to seek authority from the Secretary of State to do so. I am however advised that over the years some health authorities have in practice been entering into agreements to settle for higher amounts and coming to the Department ex post facto to get the rubber stamp of approval. This, of course, is tied to questions of finance in relation to which the Secretary of State has specific powers of direction. I am doubtful whether the Secretary of State has got power to actually require DHAs to consult about particular cases where it is alleged they are liable for breach of a duty of care to a patient before entering into negotiation or settlement. Paragraph 15 of Schedule 5 to the NHS Act 1977 makes it clear that legal obligations are those of the authority itself. In settling those obligations I doubt if they could be said to be exercising any function as to which they could be given a direction. I am not entirely sure what topics you envisage consultation by a DHA in such circumstances would cover and who would need to be involved.

7. For your information I enclose a copy of the Dear Administrator letter of 1975 to which I referred. Possibly a suitable adapted (and less mandatory) letter along these lines to Regional and District General Managers, with copies to be given to legal advisers of authorities, could be the most effective way of ensuring a consistent approach to any claims in respect of this matter.

GRO-C

J St L BROCKMAN  
Solicitor  
Room B905  
AFH  
Ext GRO-C

6th February 1987