

**LPP WAIVED FOR PURPOSES OF DISCLOSURE TO THE GIP**

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T: Code A

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Our Ref Code A

Your Ref

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Dear Elaine

**Liabilities for Actions at Gosport War Memorial Hospital ("GWMH")**

I write with reference to the above matter and apologise sincerely for the delay in returning to you. As mentioned to you over the telephone, the matter is complex and it has taken some time to decipher and work through the various Transfer Orders and even then, there remains doubt as to who has responsibility for the actions of nursing and medical staff at GWMH for the period 1996 to 2000.

Whilst I enclose with this letter a detailed note our analysis, I have attempted below to provide an edited version. The upshot is that we consider that any liability attaching to the actions of Dr Barton may remain with the Secretary of State and consequently, before a substantive response is sent to Blake Laphorn, we think it would be sensible to alert the Department of Health/Strategic Health Authority to this.

**Summary of Analysis:**

*Who was originally liable?*

1. For the purposes of our analysis we have assumed that any liability arises from events which occurred on Dryad and/or Daedalus Wards over the relevant period (1996 – 2000) and that allegations of liability will focus on the activities of the staff on those Wards, and on Dr Barton in particular.
2. We have provisionally concluded it was Portsmouth Health Care NHS Trust who had legal responsibility for GWMH for the period 196 – 2000. Whilst we know what happened from 1 April 2002 onwards in terms of the devolution of liability, it would be prudent to establish beyond question:
  - 2.1. who had legal responsibility at all points between 1996 and 2002; and
  - 2.2. whether the responsibility rested, as we believe, in Portsmouth Health Care NHS Trust as at 1 April 2002.
3. Until these have been finally resolved, Hampshire PCT should formally reserve its position on the point.

*Who did the liability pass to in 2002?*

4. Assuming responsibility for events at GWMH over the period 1996 to 2000 was vested in Portsmouth Health Care NHS Trust on the 1 April 2002 when it was dissolved and its staff, property, assets and liabilities transferred elsewhere:
  - 4.1. All rights and liabilities relating to GWMH at that date [i.e. its staff, property and premises – which must generally be sufficient to cover all claims arising out of its previous operations, save for those relating to premises/properties/staff specifically excluded or which otherwise failed to transfer] transferred to Fareham and Gosport PCT on 1 April 2002.
  - 4.2. The only liabilities which did not transfer would be those:
    - 4.2.1. relating to excluded properties/staff [i.e. those specifically stated in the 2002 Transfer Order to be transferring to other named NHS bodies] mentioned; or
    - 4.2.2. which the 2002 Transfer Order may have been intended to transfer but which it may, on a proper reading of the Order, have failed to cover [e.g. claims relating to the activities of *former* staff members who did not transfer] and liability for which may now arguably remain with the Secretary of State [see paragraph 4.6.3 above].
    - 4.2.3. If this is correct and any of the former Portsmouth Health Care NHS Trust staff involved in the alleged negligence did not transfer [1] under the Order or [2] arguably, if they transferred by other means and not pursuant to the Order, then Hampshire PCT should properly decline liability in that the 2002 Order failed to transfer that liability to anyone and it must accordingly rest with the Secretary of State.
  - 4.3. We need therefore, to try to establish as soon as possible:
    - 4.3.1. whether any of the Portsmouth Health Care NHS Trust staff previously employed to work on Dryad and Daedalus Wards over the relevant period, and believed possibly to be implicated in the delivery of care of which complaint is/may be made, left the employment of Portsmouth Health Care NHS Trust prior to the 1 April 2002; or
    - 4.3.2. perhaps more easily done, establish what staff on those Wards actually transferred to Fareham & Gosport PCT on that date.
  - 4.4. Subject to the answer to the questions posed above, it may be no liability transferred to Fareham & Gosport or indeed to any other body. However, if the staff (or any equipment or property implicated in any allegations) transferred to one or other body then, for the reasons given in the body of our detailed analysis, it would seem likely that those staff transferred to Fareham & Gosport PCT together with “all rights and liabilities relating to them”.

*What happened to the liabilities in 2006?*

5. On the dissolution of Fareham and Gosport PCT in 2006, all of its liabilities passed to Hampshire PCT pursuant to Article 6 of the 2006 Transfer Order, unless they were liabilities of a kind covered by Articles 3 and 4 of that Order.
6. If they were so covered, they transferred instead either to Portsmouth Teaching PCT (certain Jubilee House staff) or Portsmouth Hospitals NHS Trust (certain staff at Dolphin Day Hospital, Dryad Ward and Dedalus Ward).

7. Insofar as staff at Jubilee House are not presently thought to be the likely subject of any allegations, we shall disregard Article 3 for the moment.
8. Article 4 liabilities [i.e. the transfer of staff to Portsmouth Hospitals NHS Trust together with liabilities “under or in connection with” the contracts of employment] only transferred if:
  - 8.1. the staff were based at Dolphin Day Hospital, Dryad Ward or Daedalus Ward on or immediately before 1 October 2006;.
  - 8.2. the conditions under Article 4(1)(c) were all met; and
  - 8.3. the liability was “under or in connection with” the contracts of employment of those staff who transferred pursuant to the Order.
9. If the first two of the above conditions were met and the claims of Blake Laphorn’s clients relate to activities on those wards by the employees who were transferred as at that date, then Hampshire PCT may be able to argue that the third condition was also met and that the liability therefore transferred to Portsmouth Hospitals NHS Trust on the basis that the claims arise in “under or in connection with” the contracts of employment of the transferring staff from Dryad and Daedalus Wards.
10. However, if any of the above conditions were not met [e.g. the staff had left prior to the 1 October and therefore never transferred; or it could not now be proven that notice of transfer was given by the due date; or as a matter of law it was decided that third party claims in negligence do not fall within the expression ‘a liability .. under or in connection with .. a contract’ of employment which transferred] we consider a Court would conclude that any liability of Portsmouth Health Care NHS Trust which existed as at 2002 and which had successfully passed to Fareham & Gosport PCT at that point, subsequently passed, as described above, to Hampshire PCT.
11. The above analysis is based purely on a detailed reading of the various Orders. In reality, events on the ground may well have been at odds with all or any of this and this could have a material bearing on the question of liability. Until we can establish the facts, any explanation we give should, we consider, be given on a qualified basis.
12. Subject to this, we assume that until 2002 both nursing and medical care on Dryad and Daedalus Wards [‘the Wards’] was provided by staff solely in the employ of Portsmouth Health Care NHS Trust.
13. The wording of the 2002 Order transferred all staff from the Wards, and all liabilities relating to those staff, to Fareham & Gosport PCT. However, we now have good reason to believe that at or about this time different arrangements applied, with the nursing staff having transferred to Fareham & Gosport PCT and the medical staff who previously serviced the Wards, having transferred to East Hampshire PCT.
14. This seems to us to be at odds with the wording of the 2002 Order, but what we do not know is exactly when these arrangements were implemented and whether the disparity between them and the Order was known about and taken into account in some way. It is possible that an error was made in the drafting of the order or changes were made after the Order was prepared. Whatever the reason, we need to know more about this episode.
15. Subject to what is revealed about why nursing staff transferred to Fareham & Gosport PCT and medical staff did not and the fact that this happened may well have a bearing on how

liability devolved. If our reading of the 2002 Order is correct, liabilities only transferred to the extent the staff who incurred them transferred under the Order.

16. On that basis, any liabilities attaching to *nursing* staff who previously worked on the Wards would have transferred to Fareham & Gosport PCT under the 2002 Order, if they transferred as the Order envisaged.
17. However, if the *medical* staff somehow transferred to East Hampshire PCT and not to Fareham & Gosport PCT, then one needs to consider what effect that had on the liabilities relating to them. The argument would be that as those staff did not transfer under the Order then either:
  - 17.1. the liabilities also transferred to East Hampshire PCT in some way associated with the basis on which their contracts of employment transferred (which is unknown to us at the moment); or
  - 17.2. they failed to transfer to anyone and therefore the liabilities remain with the Secretary of State; or
  - 17.3. despite the apparent illogicality, the liabilities nonetheless transferred to Fareham & Gosport PCT despite the fact the medical staff who incurred them were transferred elsewhere.
18. It would not necessarily be illogical if the staff had first transferred to Fareham & Gosport PCT and then some time afterwards transferred again to East Hampshire PCT, unfortunately perhaps leaving behind in Fareham & Gosport PCT any liabilities which did not transfer when they moved on to East Hampshire PCT. It is for this reason we need to know more about the precise order of events at this time and the reasoning behind them.
19. Getting to the bottom of those factual matters referred to above is vital as it has a direct bearing on liability. If the liability devolved on the Secretary of State, Hampshire PCT will have no legal liability.
20. If it fell on either Fareham & Gosport PCT or East Hampshire PCT, Hampshire PCT might be liable, depending on the impact of the 2006 Order.
21. If we assume that the effect of the 2002 Order was to transfer liability to Fareham & Gosport PCT for claims relating to the nursing **and** medical staff on the Wards who transferred somehow in April 2002 [and still bearing in mind what we said above about staff who did not transfer in 2002 because the conditions were not met] then the effect of the 2006 Order was to transfer liability for them to Hampshire PCT as it picked up **all** Fareham & Gosport's liabilities, unless they were specifically excluded.
22. Those 'excluded liabilities' included liabilities 'under or in connection with' the contracts of employment of Fareham & Gosport staff who worked on Dryad and Daedalus Wards immediately before 1 October 2006 in relation to whom certain conditions were met.
23. If they were met, those staff, and the specified liabilities, transferred to Portsmouth Hospitals NHS Trust. However, if the staff were not employed by Fareham & Gosport [for example because they were employed by East Hampshire PCT] and/or did not transfer for any reason and/or the conditions were not met and/or the liability [i.e. the claim] could not be said to be one 'under or in connection with' their contract of employment then the liability did not transfer to Portsmouth but went to Hampshire PCT.

24. On the other hand, if the liabilities relating to medical staff on the Wards had transferred to East Hampshire in 2002 and not to Fareham & Gosport PCT or the Secretary of State, the effect of the 2006 Order dissolving East Hampshire PCT was also to transfer all of its liabilities to Hampshire PCT unless:
- 24.1. they were mentioned in the Transfer Schedule to that Order, which does not appear to be the case but this should be checked as/ when the claims are eventually specified by Blake Laphorn; or
  - 24.2. are liabilities 'under or in connection with' the contracts of employment of employees of East Hampshire PCT who were employed to work on the Wards as at 1 October 2006 and in relation to whom certain conditions were met.
25. If all of the above were satisfied, the staff in question transferred to Portsmouth Hospitals NHS Trust. We would however stress that the only liabilities transferring were those which arose 'under or in connection with' the contracts of employment of the staff concerned. Any other liability passed to Hampshire PCT.

### **Conclusion**

Once you have had a chance to digest this advice I suggest we meet to discuss the matter and where we go from here. It would be most helpful to be able to discuss the above (in particular the queries raised) with those who were in post at the time (e.g. Richard and anyone else who he thinks may be able to assist). At the moment there are too many imponderables and unknowns which have a direct bearing on liability issues.

In the meantime, I will send a holding letter to Blake Laphorn with an explanation of why a substantive response remains outstanding. By the time that such a response can be provided, I hope that we will have spoken and that a discussion will also have taken place with the SHA/DOH about the possibility that the Secretary of State may have some residuary obligations.

Given the discursive nature of the note, I would suggest that this letter and the enclosure should not be shared with anyone outside Hampshire PCT. Should it become necessary to write to them, we will draft a variation to go to the SHA/DOH.

I will be away from the office from 15 – 30 December inclusive. However, if you need to discuss any aspect of this matter, then can I suggest you contact Trevor Blythe on [Code A] [Code A] as he has undertaken most of the analysis and if up to speed with the issues that are raised above. Wishing you the very best for the Festive Season.

Yours sincerely

**Kiran Bhogal**  
**Partner**  
**For and on behalf of Weightmans LLP**