

Transcript of Procedural Hearing

of

Penrose Inquiry

Held at

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Grassmarket, Edinburgh.

on

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VERBATIM *reporters*

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LORD PENROSE: Good morning ladies and gentlemen. I hope that most, if not all of you, know that this Hearing has been arranged to receive parties' submissions on an application to reopen the oral hearings to hear evidence or further evidence from five individuals, and those individuals are Professor Goldberg, Dr Hay, Dr McClelland, Dr Gillon and Dr Soldan. I am aware that this morning there has been media publicity which suggests that I am going to hear representations from Solicitors representing many of the victims to hear a lot more patients, witnesses and things of that kind (this perhaps at the moment is not untypical of BBC whose reputation I think is not as good perhaps as it once was for investigating and getting things right). I don't imagine that this is your work Mr Di Rollo?

MR DI ROLLO: Certainly not, no.

LORD PENROSE: So, we'll proceed then on the narrow basis of what we are here to deal with please, and I shall tell you as best I can at the moment what I would like to hear, but I am not going to give you a ... Can everybody hear? If anybody can't, then let me know because there's no point in suffering in silence.

Well, the first thing I want to say Mr Di Rollo is that I have received written comments and observations

not only from Thompsons for the parties you represent but also from Government, so I am going to leave it to those attending here to decide for themselves to what extent they think it appropriate or necessary to repeat what is said in those documents. I have to say that the more you go into them the more you tempt me to respond to them, and we have to take that on board, but I would also remind everybody here that this is an investigation on specific issues that have been remitted to me in Terms of Reference that were specified by the Scottish Government. It is not a party on party dispute; it is not adversarial in character. It is not for the parties to choose issues, and either to constrain my investigation at one end of the spectrum or to compel it in a direction of their choice at the other. It is not a free-for-all ladies and gentlemen, I have to operate within the constraints imposed upon me.

Now, it seems to me Mr Di Rollo that the witnesses are not all of the same kind as it were. Dr Soldan stands on her own for reasons I will come to. Dr Hay clearly represents a particular interest but to some extent the other three are in a group. I don't know if that's helpful. It seems to me that that will emerge and I've got specific issues relating to these groupings that will emerge as we go on. But what I would like you to ensure you do at the outset is to address the question of what it is in the Terms of Reference, and in particular Term of Reference 4 that requires me to carry out the exercise that is

proposed. You can deal with other things of course as you wish, but I want a particular answer to that and I want your submissions on that, not anyone else's thoughts. So, if you bear that in mind with respect please.

MR DI ROLLO: Sir, if you wish me to address that particular question at the outset, and I think that you have indicated that that is what you would like me to do, I think the first thing to do is to say what Term of Reference 4 actually says. The Term of Reference 4 states that "The Inquiry is to investigate systems for recording and monitoring the numbers of NHS patients in Scotland treated with blood or blood products with particular reference to the numbers exposed to risk of infection with the Hepatitis C virus and HIV, and the numbers contracting either or both such infections as a consequence of such treatment". Now, when introducing the topic of Public Hearings...

LORD PENROSE: I'm not interested in that, and I should make particularly clear this is the sort of particular approach which happened to suit me for other reasons, but when I said at the beginning I want your submissions I mean Mr Di Rollo I want your submissions and an attempt to slough off responsibility on to Laura as you have done in your second written submission is not acceptable. I want your submissions please.

MR DI ROLLO: Well, it is my submission that the Inquiry is required to investigate the number of people who have been infected.

LORD PENROSE: Not the systems for recording numbers but the actual numbers?

MR DI ROLLO: Well, you cannot as a matter of logic work out whether the system is effective unless you have some understanding of what the actual numbers may or may not be.

LORD PENROSE: Well Mr Di Rollo, I don't know how much study of traditional formal logic you ever did, or how much study of modern logic you have done, but I have always understood that one could approach a generality of this kind by looking to see whether there are any negative characteristics that could prevent the system from being effective without ever trying to work out whether the system is effective. And with reference to logic it is really quite dangerous, unless you are prepared to tell me what, if any, Cartesian or other logical systems, point to the validity of the submission you are making. Sorry to be narrow but I really do want to know what the basis of this is.

MR DI ROLLO: It is my respectful submission, Sir, that you do require to work out what the numbers infected are, and as accurately as possible, and that

unless you do that you will not be fulfilling the Term of Reference number 4.

LORD PENROSE: And that is on the basis of the straightforward reading of the Term of Reference as you see it?

MR DI ROLLO: It is on the basis of a straightforward reading of the Term of Reference as I see it. It is also, if I may say so, in my understanding which I have had throughout my involvement in this Inquiry. As to what the Inquiry requires, one of the aspects of the Inquiry, it has always been my understanding that it was the intention of the Inquiry to carry out this exercise. If you are now saying that it is not the intention of the Inquiry to carry out this exercise then I have been labouring under a misapprehension not of my own making I may say, but one which I have been led into thinking was taking place. Not only have I been led into thinking it was taking place but those that I represent understand – justifiably on the information that they've had – that that is what the Inquiry was, one of the things that the Inquiry was about. Can I just say before I finish, I haven't quite finished. In advance of today's Hearing I was not given any notice that there would be any discussion about what the Terms of Reference were and whether there was any issue about the Terms of Reference. I have been proceeding on the basis that this exercise was within the Terms of Reference. Now, if it is not within the Terms of

Reference, and we are to have an argument about that, a legal argument about that, then we'll have to have another discussion about it.

LORD PENROSE: We won't be having another discussion. Could you tell me this, if contrary to what I have suggested, you are right and it is the obligation of this Inquiry to calculate, to estimate, use whatever expression you like, the numbers infected, what time and resources do those making the proposals, invoking them - I include the press - and I include the Scottish Government (costs) in this figure. To take such a submission, what time and resources would be required to complete the exercise?

MR DI ROLLO: Well, again I'm not in a position to answer that question and the situation...

LORD PENROSE: Why?

MR DI ROLLO: Well, all I was asked, if I understand it, is to indicate what witnesses we thought the Inquiry might like to consider hearing from at an oral hearing in order to complete the exercise that was begun on the 15th of March 2011. The Inquiry heard from Professor Goldberg, asked him specific questions, he was not in a position to answer those questions.

LORD PENROSE: What was the reason for that? Those behind you can't hear you Mr Di Rollo. I can't solve that problem and I'd really like to. Ladies and

gentlemen, I think you will just have to bear with us. It is not easy for Mr Di Rollo to speak to me and be heard by you without shouting too much.

MR DI ROLLO: I will try and keep my voice at a certain level so that others in the back of the room can hear what I have to say. Sir, I have to say that before today my understanding was that we were required to justify in terms of an exercise that had been begun by the Inquiry, we were required to justify the reasons for calling back certain witnesses and calling a particular witness for the first time. Now, it is in my respectful submission that the exercise that the Inquiry had been engaged in is with a view to calculating, amongst other things, with a view to calculating, the number of people that have been infected as a result of treatment with blood and blood products.

LORD PENROSE: That is pie in the sky Mr Di Rollo. I may, on the information I've got, and I anticipate that if there were more information I might be slightly better placed, but I may on the information I've got be able to come up with a range of figures, but you have indicated your view that I am required to reach a figure. Now, I have great difficulty in understanding that having regard to the evidence. I have great difficulty in understanding by having regard to all the literature that has been made available that makes it clear that because there were no stats available over a

substantial part of the critical period it is not possible to reach a figure. You can have some sort of projection, you can have some sort of calculation, but you cannot reach a figure.

MR DI ROLLO: Well, whether you can reach a figure or you can't is not the issue with respect.

LORD PENROSE: Well, with respect it is because if I cannot reach a figure I cannot justify taking time and expending money on the exercise, and that is why I asked whether you have thought about the financial and time implications of doing it. I don't think you would have, to be honest, or those instructing you.

MR DI ROLLO: Well, I'm sorry but that kind of remark about whether what I have thought about or not thought about or those instructing me have thought about is inappropriate and unacceptable.

LORD PENROSE: Well, have you thought about it?

MR DI ROLLO: I have done what I have been asked to do which was in specific terms: I was given instructions to answer certain questions in two letters and we have prepared our response which was designed to answer the questions that we were asked, and that is what we have done. If you want me to go away and think about how much it's going to cost then no doubt that exercise could be done. If somebody from the Inquiry Team - if the position of the Inquiry

is that it is not prepared to carry out the exercise because it would be too expensive to do so then perhaps the Inquiry could indicate what the expense is going to be and give the reasons as to why the exercise should not be carried out for reasons of expense.

LORD PENROSE: Time is as important as expense. I have to complete this Inquiry, I have to and I cannot without very good reason indulge in an extension of the exercise for another year, 18 months or whatever. I cannot do it and I will not do it.

MR DI ROLLO: Can I just come back to a question you asked me about calculating the numbers because I think it is important to understand that we recognise that the exercise that the Inquiry has begun has certain difficulties given the nature of the information which is before it, and it looks rather more likely than not that the Inquiry have only been able to come up with a range of figures in the four categories that we see.

That, of course, is not the whole issue because anyone reading the evidence and the transcript and the other material that is made available would be in a position to decide for themselves perhaps where in the range of figures that the Inquiry comes up with where the answer is more likely to be, is it at the lower end of the range or at the higher end of the range? That requires in my respectful submission that the

complete picture of the material that is already available should be rehearsed publicly.

LORD PENROSE: And that is for the Reports to do.

MR DI ROLLO: Well, you say that but the Report is the conclusion of the process, but the process which this Inquiry is engaged in involved a very important component which was the Public Hearings. Now, the Public Hearings began with Professor Goldberg giving certain evidence on this issue, Professor Goldberg giving certain information which was incomplete. He then went away and carried out a number of, he did pieces of work which were the subject matter of discussion between him and two persons from SNBTS who input information into the work that he was compiling. There were discussions between the Inquiry and Professor Goldberg and there was a - he comes up with a certain range of figures at the end of the day. Those figures are different from the figures that Dr Kate Soldan produced some time ago.

Now, that is the extent of the - that is the state of play on the evidence that we have and we can see that there is an attempt in our response to, or in the information that we have produced which I should indicate is document number 14 in the bundle [[PEN.019.1248](#)] which is our response to the letter dated 27th September 2012 [[PEN.019.1246](#)] on behalf of

the patient interest core participants. Appended to that document is intended to be a view of the state of the evidence dealing with the numbers infected with HIV and Hepatitis C as a result of blood transfusions, and as a result of blood products - the four different categories which we have divided, or which the Inquiry has, in fact, also divided up the questions into. So, the state of play then is that there is a range of figures which...

LORD PENROSE: A series of figures.

MR DI ROLLO: A series of figures, and the category was, perhaps we can agree about this, the category which has caused perhaps the most difficulty, or the most difficulty arises from, is the category which is the numbers infected in Scotland with Hepatitis C from blood transfusions,. And we can see there that Dr Soldan's figures, as a result of the work, that she carried out some time ago, produces significantly higher figures than those as a result of the analysis from Professor David Goldberg.

LORD PENROSE: Is Dr Soldan available as a witness?

MR DI ROLLO: Well, we had understood from the information that we had available to us that she was indeed available as a witness. Now, if the Inquiry knows that she is not available or she's unwilling or unable to take part or do anything then obviously that is an end to the matter.

LORD PENROSE: Well, I've got a letter from Dr Harris in response to the Inquiry's attempt to engage Dr Soldan. Now, it makes it clear that there is a limited amount of work that could be in principle be done, but that having spoken to Dr Soldan it is unlikely that we will have updating of her modelling work published in 2002. I think that coming from a Civil Servant with their usual capacity for understatement we can take that as a refusal, but there are other problems about Dr Soldan you know. Her report was done and sent in, in 2002, long before the look-back was concluded. The look-back report was reported by Mr Andrew Kerr, and the look-back report makes it clear that the preliminary data based on early testimony, and compared with the ultimate position found, indicates that the infectivity rate estimated at the early stage was ten times that which was subsequently found. Dr Soldan did her work in the very early days and what you are effectively asking, if we are asking her to come, is that a completely new model is done on the basis of further information. I don't know that there is any basis on which I could ask Dr Soldan to do the work. It is not a case of asking her to come and speak to us. I couldn't ask her to do the work, and can't compel her to do the work, and really she has been asked. The Inquiry did not fail to try to engage her expertise.

MR DI ROLLO: Well, she has never given public evidence on her 2002 Paper and there were certain

questions that were asked of the Inquiry of Professor Goldberg about his understanding of what she had said in that Paper which Professor Goldberg was unable naturally enough to answer because it's not his work. It's her work and it does at the very least, even if we don't get to the point of her carrying out more work, doing her remodelling exercise as you say, at the very least her explaining the basis upon which she reached her figures at the time that she did the work is of benefit in terms...

LORD PENROSE: Is this with respect the only basis? Her peer reviewed work was fully written up. One can follow the path, the critical path from the nearly 9,000 samples that she had from look-back. You can follow successive statements and you can work out how much the percentages you know. We know from the Public Hearings that the net result was that something like 5% of the number she eventually reported was based on real data and 95% of the number she reported was based on logical extrapolation.

Now, we know that when she came to Scotland that she applied the same methodology and that methodology resulted in 3% of the numbers in Scotland being based on her data and 97% being based on extrapolation of a number of assumptions each of which is set out. Now, her methodology was said by Professor Goldberg to be a reasonable approach, and I don't see that asking any questions about her

methodology, or indeed his, would improve my understanding of the report. What we cannot do is substitute for the assumptions made any better substitute, any better assumption. Let me take, for example, the critical assumption which she made which was that the prevalence of infection was the same in the first place from 1981 to 1991 based on the four months of testing following introduction of screening at the end of 1991.

Now, she applies her figure retrospectively over the whole period, a period during which not just from Professor Goldberg's work, but generally we know was a period during which there was a very rapid increase in the prevalence of infection of Hepatitis C in Scotland in particular. Now, one might question Professor Goldberg's actual figures on how he extrapolated backwards, but I wouldn't have thought that it would be really open to question that there was a problem about assuming an infectivity rate over what became a 20 year period from the very early 1970's when Hepatitis C prevalence was very low through to the narrow period in 1991 when it had become significantly higher. Now, I don't need Dr Soldan to come and give evidence about that, and I don't think that how one should have read what I might say about it can be of any relevance to what I think about it.

MR DI ROLLO: Well, it seems with respect to me that Dr Soldan may be in a position to answer for

herself and give her indication of what she thinks about these matters.

LORD PENROSE: She's done that, that's what writing her peer reviewed paper is all about Mr Di Rollo.

MR DI ROLLO: Well, Professor Goldberg's of course is not peer reviewed.

LORD PENROSE: Not yet, and I'm not prepared to wait until they all are. We know a great deal about Dr Soldan but the main thing that we really ought to take on board is that she has been asked. It is unlikely, in the Civil Servant expression, that she will do fresh work. She is no longer in the department. It's not her area any more and I know of no basis on which I could reasonably attempt to re-engage Dr Soldan.

MR DI ROLLO: Well, just to be clear, it is my understanding that Dr Soldan has never actually been specifically asked to carry out any work for the Inquiry as I understand it, but what we would want to happen is that Dr Soldan is invited to an oral hearing to give evidence about the work that she has carried out and to indicate for herself what is valid about it, what may be invalid now, and what work would be required in order to establish from the way in which she has approached the matter what the appropriate figures are for the category that she is dealing with.

LORD PENROSE: Can we just pause on that, ... you are going to ask her about, after she (has) left what work would be required thereafter to work out figures of prevalence. Are we not now getting to the root of my concern about time? These exercises take a huge amount of time. The Scottish Government may want in due course to engage Statisticians, Epidemiologists, a whole range of skills to inform their policy, to inform their budget for whatever, as to what the incidence might be - for you to ask this Inquiry to enter upon that is a big ask. It is going to hold up completion of this report if you are right very, very considerably and I rather think Mr Di Rollo that there are many, many people outside this room who want to see an outcome to this Inquiry, who want to see the report, who will not be happy to see me sit for another 18 months, two years doing statistical studies which are – with the greatest of respect – at the edge of the exercise. They want to know about people and what the impact has been on individuals and there are an awful lot of them.

MR DI ROLLO: Well, the situation is if we could perhaps leave Dr Kate Soldan to one side for the moment...

LORD PENROSE: Well, can we because she's absolutely central to the position you have adopted. What is your final position on it?

MR DI ROLLO: Well, my final position is that the Inquiry should hear any oral evidence from her.

LORD PENROSE: So that she can be asked destructive questions of the kind that were...

MR DI ROLLO: When you say destructive questions I don't understand.

LORD PENROSE: The question was aimed at undermining the approach adopted...

MR DI ROLLO: Questions were asked by?

LORD PENROSE: By everybody, including me, and testing as it is called, but they are destructive. Nobody asked for a positive figure.

MR DI ROLLO: Well, I think I would quite like to have a positive figure, given the opportunity. As you know this was a topic which was allocated to my learned junior and I didn't ask any specific questions in relation to this particular topic, but if Dr Kate Soldan was to give evidence I would certainly like to ask her what her views of the figures are, and as I understand her position she stands by what she has said as to being the correct figures.

LORD PENROSE: How do you understand that?

MR DI ROLLO: Well, my understanding is from a conversation with her reported to us by Professor

Goldberg, as I understand it. Unless you invite the witness to give evidence you don't know what she's going to say in advance, so I suggest that she is someone who has given figures. Those figures are of course in the public domain. They are significantly different from the figures that we have from Professor Goldberg and it would, in my submission, be necessary to compare and contrast her approach with that of Professor Goldberg. Now, that is something that you Sir have - obviously it is an exercise that you have been engaged in for yourself. Now, I have no problem with that and, indeed, that it seems to me is entirely appropriate but all we are saying is that Dr Soldan should come to the Inquiry and give evidence on the topic so that she can rehearse those matters in public.

Now, when it comes to Professor Goldberg's position he started to give evidence in public but he didn't complete his evidence. In fact, he hadn't at that stage carried out the work which the Inquiry had asked him to carry out. Now, that was in March 2011 and it was only in July of 2012, months after the Hearings, the evidential Hearings, had come to an end and submissions had been made on all the other topics that the core participants that I represent were given the information which allowed them to make a submission on the topic of statistics and that submission was put forward after - it was put forward to the Inquiry at the end of August 2012. So within a month of being asked to do it it was done and in the

course of that we suggested that the Inquiry might like to hear from Professor Goldberg, to speak to the work that he had carried out, the significant work that he had carried out in the intervening period. And what we would like to do is compare what Professor Goldberg's figures are with those of Dr Kate Soldan so you hear from them both in a balanced way, and we would also like to hear from Dr McClelland and Dr Gillon who provided Professor Goldberg essentially with much of the raw material which allowed him to make the assumptions.

LORD PENROSE: There are two points really, not much, there are two aspects. The first is the number of components that were yielded by a blood donation because they're 10% fewer than the calculation of the exposure to risk, and the other was the effectiveness of policy changes in 1984 that might have persuaded people not to come and give blood. Your learned junior might like to pluck the figures from the first list prepared by Dr Soldan, by Professor Goldberg and by Dr McClelland and see what the rough guide through them would be. You might find it very interesting that you had to do a tremendous amount of change to get a significant difference in the volume of figures underneath the graph but that's just by the way.

I've been looking at this. I've tried to understand this in great detail and that is on the document, but all of this is predicated you see on the view that I am required

to reach a figure. If my function is to test systems then the fact that one gets very widely differing results from the different applications, that maybe underlines the fact that the hard data is insufficient to enable a figure to be reached and the purely negative aspect of it is as important to me as applying the figure.

Now, if that is a valid approach then it doesn't actually matter whether one can reconcile Dr Soldan and Professor Goldberg. The fact that they both have to acknowledge that their exercises are pretty fundamentally dependent on assumptions and not hard data means that they prove a very important matter. This is the point that one reaches. They prove a very important fact that the systems for reporting were incapable of producing the sort of answer that we want and that is important in itself Mr Di Rollo. This is not a pointless exercise, nor was the investigation ever pointless, but the assumption that it must end up with a positive is what is fundamental.

MR DI ROLLO: Well, if what you are saying is that we are suggesting to the Inquiry that it must come up with a specific figure in each of the categories then that is not something - if that number can't be achieved then that's the world in which we live and nobody can argue with that, but what I am suggesting is that the Inquiry should try to do its best to come up with as accurate a figure as it can. If it can't come

up with an accurate figure it should explain why it has been impossible to do so, and it should also explain what the systems were for recording the numbers and how those systems may or may not be improved in the future in order to ensure that accurate recording of infections from whatever the source might be. So that one could ask, for example, Dr Kate Soldan or Professor Goldberg – or Dr McClelland or Dr Gillon for that matter – what information actually would you need in order to be able to reach an accurate figure. In what way is the information inadequate in order to reach a specific figure? How is it that we have not got specific figures for all these matters?

Now, some work has been done in relation to that. Dr Gillon in his evidence in March did indicate the limits of what he could do, given the information that he had and the way in which things worked, but Epidemiologists such as Professor Goldberg and Dr Kate Soldan will be in a much better position to tell us how information could be recorded and what information would be necessary in order to actually calculate the figures in a way which is more accurate than we are, in fact, able to do.

Can I just come back to the assumptions that you indicated that - it was only two assumptions - namely the deferral and the blood donation – the number of units generated from one blood donation. In fact, Professor

Goldberg's assumption in relation to the proportion of units transfused is based on assumption. Those assumptions are based on limited local data and expert opinion, and I rather assume that that is Dr McClelland and Dr Gillon.

LORD PENROSE: That is rather different, the SNBTS national statistics, which I thought you might have looked at, although they vary in precisely how they present data, trace the numbers of donations, the numbers of components, and the numbers sent to hospitals and the numbers returned from hospitals.

MR DI ROLLO: And what about assumption number (viii) which is the age at transfusion of a contaminated unit? Again, according to Professor Goldberg, this assumption was based on limited local data and expert opinion. Well, whose expert opinion is that? Presumably Dr McClelland and Dr Gillon.

LORD PENROSE: Possibly.

MR DI ROLLO: I rather think that when Professor Goldberg is talking about expert opinion he is actually referring to Dr McClelland or Dr Gillon. So, all I'm saying is that when one looks at the assumptions upon which Professor Goldberg reaches his conclusions, such as they are, and with the limits with which one can have attached to those conclusions, he is basing that on expert opinion. The document that I have referred to sets out in detail the basis upon which...

LORD PENROSE: Which one is that?

MR DI ROLLO: That is item number 14 in the tab [[PEN.019.1248](#)] which is the response to the letter dated 27th September 2012 on behalf of the patient interest core participants. It sets out in detail the basis upon which we seek the five witnesses which we have identified, why we say they should be asked to come back to the Inquiry to give evidence to the Inquiry. We wouldn't anticipate that their evidence would take a... certainly more than two or three days.

LORD PENROSE: How can you possibly say that?

MR DI ROLLO: Because that is the basis upon which evidence on this topic has been approached throughout the Public Hearings. Essentially the way in which matters have proceeded have been that the Inquiry Team has obtained information from the various witnesses - it's put that - made that available to the core participants. The Inquiry Team has then indicated in broad terms the way in which it is going to approach matters and we have been given an opportunity to suggest lines of questioning to the Inquiry Team and those questions are then asked generally speaking by the Inquiry Team, and the matter if I may say so, during the Public Hearings has proceeded expeditiously throughout and...

LORD PENROSE: It has indeed because of quite extraordinary efforts by Ms Dunlop and her team, quite extraordinary, but this is your initiative.

MR DI ROLLO: You say it is my initiative, all we are saying is that - we are not suggesting that these questions necessarily have to be asked by us. What we are saying is that there are important questions that the witnesses should answer publicly in the way that other witnesses have answered matters publicly and, in fact, those witnesses have already given evidence publicly, but if you take...

LORD PENROSE: Dr McClelland has been here so often that we almost all became firm friends.

MR DI ROLLO: Indeed Sir.

LORD PENROSE: Indeed acquaintances of course, but that doesn't mean that that should continue to be the case.

MR DI ROLLO: Well, I hope we'll remain friends. Dr McClelland's evidence, for instance, in relation to the deferral is interesting in that he gives evidence in relation to - he gave evidence in relation to the B2 topic in relation to the effect or effectiveness of, on B1 - I should say - the effectiveness of the leaflets that were available at that time. We didn't hear at that stage of the particular statistic of a 66% deferral. Where that actual figure comes from and how it is

arrived at is something, I appreciate and it has been pointed out to me and I understand that that, in fact, leads to perhaps a higher or a different - it doesn't necessarily maximise the figures. It may reduce the figures if one takes the 66%, but the point is that we don't for our part understand where that figure comes from or how reliable it is. Now, that is not a criticism of anyone, it is just a fact on the state of the evidence as it is and the way in which the matter has been approached in relation to this.

Now, it seems to me that if the Inquiry had, in an ideal world, if I can put it like that, if this information had been available at an earlier stage that material that would have been gone into publicly. Because it's become available subsequently, as we were dealing with other things, other important issues that the Inquiry raises in its 11 other Terms of Reference, we haven't had an opportunity of going into that material.

LORD PENROSE: Can you help me with this, and I really mean help, as I understand it the effect of the 66% reduction was more or less instantaneous, right?

MR DI ROLLO: That's what is said, yes.

LORD PENROSE: And persisted throughout?

MR DI ROLLO: Throughout.

LORD PENROSE: It couldn't affect anything before?

MR DI ROLLO: No.

LORD PENROSE: That is why we get a very strange curve, it is almost exponential up to 1983, all fairly high/low, and then in a much more gentle curve up to 1991. It is very instructive to do a graph to see precisely what it is. Now, let's assume that instead of being 66% it was 50%, what does one do then?

MR DI ROLLO: Well, I appreciate the point, and the point has been made to me in discussion about this particular matter that the effect of a 50% figure, as you say, would produce - might produce a different number of people with infections. We're not, the question is not one of what one would do - the important issue not to lose sight of is where does that 66% - how hard a figure is that 66% - how reliable a figure is that?

LORD PENROSE: Well, that actually influences me less than knowing what would happen because Professor Goldberg points out in his paper that the one thing he can't do is simply carry out an arithmetical exercise. He points out that the prevalence results that he uses were not the arithmetical mean of the figures that went before but were the result of rerunning part of his model programme. That is to test the model of the range of values, and necessarily in modelling a

judgment as to which line one takes to represent most clearly, as one can, the likely result of examining possibilities.

So, I think that I am entitled to say to you - let's say you get a new figure? What then? Because I can't see anything short of another full statistical model following Mr Di Rollo. And again, if I can't do that, then what you are asking me to do if it comes to the bit, is not only examine these various figures, not only find out that they're variable, and that other factors might actually emerge. But then, well, I have to try to reach a result and that result necessarily in the circumstances would involve a major statistical and epidemiological study. Now, that is what you are asking me to do and that is why I am seriously concerned about this whole approach. You take things so far as to point to the questions you would like to ask but there is no indication of where the exercise would take us.

MR DI ROLLO: Well, I appreciate the difficulty, but perhaps it is difficult and may involve further work. The problem we have at the current stage of the evidence is that we don't know how acceptable or reliable the assumptions upon which that work currently is based are and is that not something that perhaps we are entitled to raise questions about? We have not really had that opportunity.

LORD PENROSE: Well, I don't know what you think you are entitled to do. I rather think that the

regulations lead to me to decide what you are permitted to do and to talk about entitlement is blurring the edges of our roles but...

MR DI ROLLO: Well, let's take the word "entitlement" out.

LORD PENROSE: What would you like to do?

MR DI ROLLO: Well, I'm just simply looking for a consistency of procedure here.

LORD PENROSE: Well, we can't get that consistency in procedure. The specific topics were discussed between all parties with Ms Dunlop who identified some areas that were going to be investigated, but there are vast ranges of information here that were never subjected to oral hearing, so consistency *per se* is not something that can be taken into account, but my big concern here is that it is a step too far. You really don't know Mr Di Rollo, if I may respectfully say so, this is a term I don't like being thrown about, especially in some documents being used to characterise our own documents, but with such respect as I can offer you you can't say where this exercise will take us to.

MR DI ROLLO: I appreciate that completely, and I appreciate that I don't know what the outcome of the exercise would be. There is another issue with which I should say, I don't think I have said, in relation to the

input in relation to the raw material that Professor Goldberg has used to do his work - that is that clearly one of the core participants SNBTS has provided Professor Goldberg with that material, and whether that information is correct or not correct - or subject to or can be looked at in - whether that material is reliable or not or how reliable it is in terms of certain of the assumptions that are made is not something that we have had an opportunity of analysing.

LORD PENROSE: I'm not quite sure what you are talking about, this is the latest...

MR DI ROLLO: Well, I'm talking about the assumptions that we have actually already been talking about already, but also the latest document was produced in July of 2012, the document, sorry, in August 2012. The point I am making is that the SNBTS have had a significant input into Professor Goldberg's figures and there has been no, as I see it, public justification for this assumption having been given and it seems to me that those assumptions do require to be looked at, considered and either accepted or rejected and if, of course, they are rejected the Inquiry would then have to decide where it goes from here in relation to calculating the figures.

LORD PENROSE: But, you know, that is going into the dark. Let's say if I grant these four or five days as described to me conservatively, fixed up quite soon and Dr McClelland comes along, willingly or unwillingly, and says

“Well, I’ve got about 1.25 from a variety of sources and I think that one of them might be looked at because I know that the ratio of contact is two and I say that I’ve also got the SNBTS national statistics for every year from 1980 to 1991 consistently and fairly reliable, and I know that the experts in my team have done all the calculations and value ranges between 1.02 and 1.04”, what do we do then?

The whole exercise merely shows that Professor Goldberg was even more wrong than he would be on another approach, but I cannot take even the 1.02 to 1.04 and substitute it in a nice little equation that varies the outcome any more than I can take the 50% and substitute it for 66% in an isolated format. They all lead on to something quite different, much more major, much more unpredictable and impossible to resolve the issue for one factor, Mr Di Rollo - 1 and that is that until the virus was isolated, until there could be a test there was no hard data and it is all calculation, extrapolation, estimation, speculation. You can't get to the truth, and yet that is really what you are asking me to do – step into the dark with no port of call, setting out to a very stormy sea with no port of destination in sight. I’ll modify that a bit to make it sound better...

MR DI ROLLO: Whether you can get to the truth or not in terms of the numbers of those which were infected as I say is not the point. The point in my respectful

submission is that an explanation has to be given by those that have provided the information for the basis upon which, of the basis upon which that information has been provided. If someone reading Professor Goldberg's report wants to know how reliable, or let's just stick with reliable - how reliable the assumptions are then there needs to be an explanation of those assumptions. Now, there is no explanation of those assumptions.

LORD PENROSE: It's a standard formulation that you find in the epidemiological papers and in the literature. The expression is not novel in this context, I found it in others. It's the standard way of saying "I've gone round the houses and got the best information I can find".

MR DI ROLLO: Well, fine, but the point is should there not be some examination of the assumptions?

LORD PENROSE: There may be a question and an answer but examination is totally different. On what basis, let's say I ask you to answer that question "Did you go round the houses and get the best information you could, and who did you speak to? Brian McClelland and..."

MR DI ROLLO: Well, he has told us that already.

LORD PENROSE: "And what did he tell you?" and he says "Well, you know, we really did our very best to make an estimate." And what does one do with that?

It's a sterile environment of examination, that's the way it will go because it cannot in itself lead anywhere. It cannot, and we've got no, I'm pretty sure this is so, we have got no independent source of data that will answer all the questions. There are bits of data that may or may not be taken into account like a full analysis of the SNBTS annual national statistics, but looking at it with the best will in the world Mr Di Rollo, just looking at it does not take one one step towards a future that provides the better answer.

MR DI ROLLO: But I'm not, my position does not, depend on asking for something which is impossible to achieve. I'm not asking for the Inquiry to necessarily to come up with the definitive answer if that is impossible to achieve. What the Inquiry has to do is to say "It is impossible to achieve a definitive answer and here's why", and it can produce a range of figures and these are they and here's why, and the assumptions upon which they are based are these, and some of these assumptions may or may not be more reliable than others. Now, that is what needs to happen. When you come to the latter category you can't do that unless you've examined what the assumptions are and you've explored it with the person involved. Now, that is all I'm asking for.

LORD PENROSE: Yes, yes, the Argonauts wanted the Golden Fleece.

MR DI ROLLO: No, it's nothing of that kind, it's fairly standard. What I'm seeking is...

LORD PENROSE: Fairly standard, what does that mean? Do we have another Inquiry of this kind that you want to rely on to tell me that it is fairly standard?

MR DI ROLLO: It is just a case of giving a - having a consistent procedure for a matter which the Inquiry - it appeared to me at least, regarded as something which should be the subject of Public Hearings and that the exercise which is being engaged in essentially postdates the Hearings that we have already had, and it is essentially completing the process which the Inquiry started in March but hasn't finished. So that you have the public rehearsal of the matters rather than which have been on paper behind the scenes as it were.

LORD PENROSE: I think there are rather more people here today than when we heard the statistical evidence.

MR DI ROLLO: That may be true. The reason for having today is so that we have a Public Hearing so that people can hear what is going on and there is a transcript available and people can look at it. I'm just asking for exactly the same with these particular controversial matters that have arisen.

LORD PENROSE: Well, they're not controversial, with the greatest of respect you can't describe

them as controversial. They may lack clarity, they may not be well defined but to call them controversial implies that there is an opposing view that can be put into the balance and a decision taken. Now, really that is one of the problems here, if you perceive this to be controversial as to take on uncertainty there is a huge issue over what you are now asking us to do. I would expect you to be telling me if it is controversial to provide an alternative. It wouldn't be for me to speculate that 66 might go down to 50. It would be for you to calculate the controversy by telling me what the figures are that you are arguing about and specificity is something that will...

MR DI ROLLO: You know exactly what the situation is as far as the limits of our resources Sir, you have access - the only information I've got is the information which the Inquiry provides to us and we have no expert assistance, we have no input from anyone - I can't suggest different figures or anything of that kind. All I can do is raise questions as to, in relation to the material that we have been provided with and we have raised those questions, and in advance of this no doubt you Sir have considered the matter and no doubt have come to a certain view and...

LORD PENROSE: Well, no, I'm sorry, I have come to lots of individual views, I have not come to an overall view.

MR DI ROLLO: Well, I had rather thought...

LORD PENROSE: There is another possibility which I have simply not mentioned and that is that I should simply write to Dr McClelland and Dr Gillon and ask them what their contribution was. Is that the information you are after? We can send you a copy of the letter.

MR DI ROLLO: Well, such further work is - we have raised - as I say - we have raised these matters. They're actually very clearly I hope set out in our response, and hopefully we have explained that the difficulties that we are under in relation to the topic and have expressed ourselves in such a way that the Inquiry is in a position to consider the application, if that is what it is, and to make a ruling on it, and I'm not sure if there is anything further that I can add to that.

LORD PENROSE: I have deaved you enough....

MR DI ROLLO: I beg your pardon Sir?

LORD PENROSE: I have deaved you enough to clarify your position on this issue. I am simply trying to make clear this is not simple. It is not just a case of having another wee Hearing and having a nice chat with Dr McClelland and Dr Gillon and Professor Goldberg. Anyway, I've tried to make that clear and I will deal with it as something that raises issues that go to the heart of my Terms of Reference,

but I will give you an answer on that and I will give you an answer on the application. I will also deal with the difference between obtaining information which might be partly in writing and partly following another Public Hearing. I must say the thought of another Public Hearing and arranging new premises, arranging all the back-up services that we had simply to end up with nothing is not a road I want to go down. Right, sorry Miss Turnbull, this affects you as well as anybody.

MISS TURNBULL: Good morning Sir. Perhaps I should make clear at the beginning that Mr Anderson is unable to attend today's Hearing due to a prior commitment. Perhaps I can be quite succinct in relation to our position which is in relation to Thompsons' application as to the recall of certain witnesses and indeed the additional witness Dr Kate Soldan. Our position is one of neutrality. If I can explain in relation to the three NHS witnesses, that is Professor Goldberg, Dr Gillon and Dr McClelland, having discussed matters with them in light of Thompsons' application - I think it is fair to say that the witnesses have responded as fully as they are able to do so on the issue of statistics.

LORD PENROSE: Well, I'm not sure about that. There is the point that has been made by Mr Di Rollo that we know that Dr McClelland, in fact it is pretty clear that Dr McClelland and Dr Gillon, must have tried to get together information from both sides of the country, have put it

together and come up with a figure, but we don't actually know at the moment how they did that.

MISS TURNBULL: Absolutely.

LORD PENROSE: So, it is a fair point to make that that part of the exercise has not been explored. So, it is not a case that they have done all that they could do. Much as I admire what they have done, and they have been fairly generous with their time but they have not done everything.

MISS TURNBULL: Perhaps the first stage is that they feel they have answered, perhaps without the greatest of explanation, all the questions posed of them, but what I would caveat that with is that all the witnesses that Thompsons seek to recall are more than happy, as they have always been, to provide any further assistance by way of explanation.

LORD PENROSE: Does that include Dr Soldan?

MISS TURNBULL: I can't speak for her, but there are three witnesses from the NHS called, Professor Goldberg and Drs Gillon and McClelland, because they appreciate putting forward further explanation and, indeed, having a discussion may assist Thompsons and indeed us all in understanding where their figures are derived from. Whether or not that is by way of Hearings or by way of a further

exchange of correspondence they will be happy to enter into Sir.

MR SHELDON: Sir, the Scottish Ministers' position is also one of neutrality. This is, of course, an Inquiry set up to be independent of Government and the Ministers are entirely content that this is a matter for you Sir to decide on the merits of the application having regard to the Terms of Reference, the likely utility of the evidence posed and, of course, questions of cost as you Sir yourself mentioned earlier today.

LORD PENROSE: Well, I'm obliged with regards to expense. It's not something casual...

MR SHELDON: Absolutely Sir, yes, quite so.

LORD PENROSE: Time is rather different, that is very personal and I make no secret of the fact that as I approach 75 having another year to two years on this does not appeal to me at all. If it is necessary, and I mean necessary, then I will have to knuckle under and accept it, but if it is not necessary I must bring this exercise to an end.

MR SHELDON: Indeed Sir and these are precisely considerations which are matters for you Sir as Chairman of the Inquiry.

LORD PENROSE: Mr Mackenzie, do you have anything to add to this?

MR MACKENZIE: I have nothing to add Sir, simply to explain the position of the Inquiry Counsel. I have no submission to make on the merits of the application for the simple reason Sir, of course, that that is a matter for you. I think that's been consistent with the previous approach of Inquiry Counsel to applications that their role is not to support or oppose an application, but if there are any particular matters we can offer assistance on then I am, of course, happy to do so Sir.

LORD PENROSE: On that point I think I should make it clear, as I've tried to make it clear in the past, that I take the view in this Inquiry that I would not try to direct Inquiry Counsel how to prepare, in the hope of getting as objective a presentation as I could, I have stood back from that. So, I have not taken part in negotiating what should be done or should not be done. The Inquiry Team have done that, quite consistent with that, I am now left to take that decision. I'm not going to give you a decision right away. I have done a great deal of work on this as I have done across most of the topics that were remitted for Inquiry and I had hoped that the Inquiry would now reach a point at which we could see a report in the reasonably near future. I've got to look very hard at the implications of what has been proposed here.

I am conscious that it has been proposed with the support of a number of core participants. I am also

conscious that we have representations and information that it would take from a very much larger constituency of people outside, they may not all have the same motivation of some of those present. So, I'm going to have to look at this very carefully and see what view I take, and included in my consideration, although it's not a matter of discussion here, will be a question of whether I can satisfactorily dispose of the matter by inviting the three Scottish experts to give written answers to some of the questions that have been posed.

Frankly I see no point in going back to Dr Hay. He has done astonishingly well and has produced data which must be as accurate as anyone could ever seek. The haemophilia patients have been extremely well looked after, Mr Di Rollo is right. The area that raises questions here is the area of the transfusion transmitted infection on people with Hepatitis C, and I will be considering very seriously whether further extensive investigation of that could justify the postponement and the completion of this exercise. That is really what it comes to, the very considerable delay in arriving at a final report. If it is necessary I will have to do it and I will give a written answer to submissions.

Adjourned.