ABIGAIL HOLT

FOLLOWING THE SCIENCE?

ACCOUNTABILITY IN THE TIME OF COVID

1. Yesterday in "the Times"[1], in relation to the government's consultation on Judicial Review, as it happens, there was a letter to the editor which included the phrase "*Conscience and the law have taught us the rule that no wrong should be without remedy*". With that idea in mind:
   - Has the COVID pandemic generated legal wrongs?
   - And if so, what about legal remedies?

2. The rationale for our Garden Court series on Accountability in the time of COVID is to examine whether, when, and to what extent, events of the pandemic demanded legal accountability; and who, or which institutions, have failed to fulfil their legal obligations; to consider possible remedies; and importantly, to see what lessons relating to legal regulation need to be learnt for the next pandemic which will surely come; and to prepare for the practicalities of living with climate change, which, amongst other things, is likely to generate more zoonotic diseases - diseases where viruses jump species from the animal world into humans.

3. We've previously discussed the limits of Coroner's Inquests.
   - That Covid-death Inquests are not Article 2 Inquests, where the Coroner looks at more wide-ranging systemic failures; and

[1] 25.05.21

- The limitation that there is rarely funding for legal representation for bereaved families

4. In relation to the recently-promised Statutory Inquiry, the limits to that include that:
   - the Government controls the timing, scope and Judge or panel; and
   - the timing of a statutory/public Inquiry has, I believe, been kicked into the "long grass", to some vague period in the future, at the whim of politics.

5. And so to accountability. To ask the obvious question, if the oldest and simplest justification for government is as a protector, why then, has a country like the UK, wealthy in resources including education, suffered such a high death rate and contagion? This begs the questions:
   - Was the pandemic just a natural phenomenon in an era when we are loathed to confront our own morality?
   - Or is there evidence which point to wrongs that demand legal remedies?

6. I suggest that there are many issues which point in favour of justifiable criticism of the failure to plan for a pandemic, and criticism of the response to the COVID pandemic by those leading some public institutions and government ministries, over the last 18 months-or-so.

7. The starting point is to acknowledge that Pandemics are a fact of life; that pandemics have always been part of human experience. Nonetheless, as *phenomenon*, the COVID-19 pandemic was entirely predictable. The possibility of a global pandemic was hardly

a surprise before March 2020. "Unprecedented" is often used in relation to our experience of coronavirus, and in a sense, it was. However, the appearance of new viruses seems to have been increasing over recent years. As the editorial in The Lancet on 28 March 2020[2] pointed out, thinking that COVID was "unprecedented" "*belies the damage wrought by*" and ignores the recent learning from:

- SARS[3] – severe acute respiratory syndrome
- Middle Eastern Respiratory Syndrome - MERS[4]
- Ebola virus[5]
- Zika virus[6] (spread by mosquitoes, not generally harmful but can cause birth defect encephalitis in unborn babies)
- 2009 H1N1 influenza virus

I'd also add,

- Learning from the evolution of AIDS/HIV.

8. Thinking about foreseeability and planning, did the UK learn lessons from knowledge of other recent pandemics? Arguably no! Countries that were badly affected by recent pre-COVID pandemics of emerging infections, such as Hong Kong and South Korea, were able to better cope with COVID, for example, by effective, fast scaling-up of testing and contact tracing and, I believe, isolating and supporting infected individuals.

[2] COVID-19: learning from experience - The Lancet

[3] SARS (severe acute respiratory syndrome) - NHS (www.nhs.uk) – 8,098 infections 774 deaths (killed about 1 in 10 of those infected) (another coronavirus which originated in China in 2002, which mutated from small mammals enabling it to infect humans)

[4] Middle East respiratory syndrome (MERS) - NHS (www.nhs.uk)

[5] Ebola virus disease - NHS (www.nhs.uk)

[6] Zika virus - NHS (www.nhs.uk)

9. Further unassailable evidence that pandemic preparedness was on the official radar is demonstrated that in 2016 the UK government ran a dry run type of "war game" to investigate levels of pandemic preparedness. But were the lessons learnt from that exercise followed through?

10. Over three days in October 2016, UK public health officials (including Public Health England), conducted a cross-governmental exercise called "Operation Cygnus"[7]. It was a "war game" to look at how the UK and its institutions would cope with an influenza pandemic[8], and where, to quote Gov.UK website, "*the aim was to test systems to the extreme, to identify strengths and weaknesses in the UK's response plans, which would then inform improvements in our resilience.*" Of course, the COVID pandemic was different, but there are significant areas, it seems, where planning for an influenza pandemic overlaps with identical plans for a coronavirus pandemic, and bearing in mind that SARS was also a coronavirus of which scientists and public health officials were very aware.

11. However, the Cygnus report findings (or at least the elements of the report which have been made public) revealed problems and deficits in planning and preparation for a pandemic where the illness was spread from the respiratory tract of infected individuals. Basic shortcomings identified apparently included that:

    - there was no overarching oversight of management of such, during this type of pandemic practiced for, between government departments;
    - Social care was of particular concern: *"Participants discovered it was extremely difficult to locate capacity in the care homes sector, partly because care homes*

[7] Annex A: about Exercise Cygnus - GOV.UK (www.gov.uk)
[8] What was Exercise Cygnus and what did it find? | Health policy | The Guardian

are almost entirely privately run, making it difficult to clear hospital beds by moving patients into care homes".

- Interestingly, a "key learning" from the Cygnus exercise was that "*..., the UK's preparedness and response, in terms of its plans, policies and capability, is currently not sufficient to cope with the extreme demands of a severe pandemic that will have a nation-wide impact across all sectors*".[9]

  A reminder, Cygnus was in 2016.

12. However, the Cygnus Report has never been published in full, and so it is impossible to know if learning from the report and recommendations were implemented. The Guardian[10] reported that "*In a response to a freedom of information request, the Department of Health claimed that the report needed to be kept secret so as to inform policy development*".

13. Even before Dominic Cummings made his startling assertions before the Parliamentary Committee[11], justifiable criticism of the spring 2020 response in the UK emanated from what NERVTAG was saying long before 2020. NERVTAG is an acronym that we have become uncomfortably familiar with of late. (It stands for "New and Emerging Respiratory Virus Threats Advisory Group" and is an expert committee of the Department of Health and Social Care which advises the Chief Medical Officer and other government departments. NERVTAG provides scientific risk assessment and

[9] Annex B: Exercise Cygnus Report (accessible) - GOV.UK (www.gov.uk)
[10] 7 May 2020 What was Exercise Cygnus and what did it find? | Health policy | The Guardian
[11] 26 May 2021

mitigation advice on the threat posed by new and emerging respiratory viruses and the options for their management).

14. The minutes of the UK's NERVTAG meeting of 14 June 2017 are revealing, particularly insofar as the minutes summarise some of the findings from the 2016 "Operation Cygnus"[12] mentioned above. Topics relevant to COVID preparedness in the NERVTAG June 2017 minutes include that:

    - Improved coordination between "the complex network of partners" was required for a pandemic influenza response;
    - "*Action 5.7* (an official) *JVT to write to DH (?Dept Health?) to -re-express concerns that NERVTAG has made new recommendations regarding the composition of pandemic stockpiles of antivirals, antibiotics and PPE, but the current clinical management guidance has not been updated to reflect this*";
    - NERVTAG gave Advice on the stockpiling of eye protection, influenza facemasks and respirators, and suggested that the NERVTAG sub-committee on facemasks and respirators should be convened, but that a response was needed quickly to comply with the "procurement window".

    I comment that it would be interesting to see whether, and to what extent, the recommendations were followed through, and what happened, given the UK scandals (according to press reports) surrounding procurement of PPE in a chaotic fashion, with allegations of waste due to incorrect specifications being obtained and opaque supply arrangements.

    The NERVTAG minutes from June 2017 also highlighted the:

[12] NERVTAG Minutes_14June17.pdf | Powered by Box

- Need to strengthen surge capability and capacity in operational resources

15. Because of the lack of disclosure of the full report on Operation Cygnus, its contents are unknown. However, it is worth noting the comments of the Liberal Democrat MP and former Conservative Minister, Dr Philip Lee who was in government at the time of the Cygnus operation. He is quoted as saying – (see Guardian article from 19.04.20):

    "The question I would very much like to ask the health secretary, Matt Hancock, and Michael Gove, who have responsibility in the Cabinet Office, is when did they read the Cygnus report that has not been published and, having read that report, why did they conclude not to increase testing, PPE and ventilator capacity in January?" (I.e. January 2020).

16. Another key, albeit pretty complex, issue in understanding the unfolding of the pandemic is the failure to understand the significance of symptomless transmission of COVID. Symptomless transmission, obviously, makes it far harder to detect and respond to Coronavirus. Nonetheless, it seems that the issue of asymptomatic transmission of Coronavirus, (and/or pre-symptomatic transmission), was a known issue in the scientific community before it was communicated to the public! In fact, even now, the official mantra still seems to be "hands, face, space". With "space" being the last concern.

17. Very arguably, in early 2020, evidence of asymptomatic transmission was not accorded the proper focus. Bushproof Infection Control Engineer, Dr Sarah House has, for

example, drawn my attention to reports of the work of Dr Camilla Rothe, working in Munich who, on 27 January 2020 discovered and reported the first German Coronavirus patient with a positive COVID result *but no symptoms*. The following day three contacts of this patient with *no or very mild symptoms* also tested positive. She and colleagues in Munich submitted a report to the New England Journal of Medicine and it was online by 30 January 2020[13]. Unfortunately, there was significant pushback from this article within the scientific community summarised in the New York Times article "*How the World Missed COVID 19's Silent Spread"* from 27 June 2020 (updated 2 February 2021). However, this serious report of asymptomatic transmission from respected doctors in Munich was "out there" in the epidemiological community and public domain by the end of January 2020.

18. Further evidence on asymptomatic transmission that I am aware of included:

    i. On 1 April the US Department of Health and Human Services/Centers for Disease Control and Prevention published a report online by Wei et al "*Presymptomatic Transmission of SARS-CoV-2 – Singapore, January 23 – March 16, 2020*"[14]. (That was subsequently published in the Morbidity and Mortality Weekly Report on 10 April 2020). The paper asserted that:

        - "*To account for the possibility of presymptomatic transmission, officials developing contact tracing protocols should strongly consider including a period before symptom onset*";

[13] Transmission of 2019-nCoV Infection from an Asymptomatic Contact in Germany | NEJM
[14] https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6914e1-H.pdf

- The article identified infection from respiratory droplets or possibly indirect transmission (e.g. singing/choirs);
- The evidence suggested that transmission could be via virus "shedding" in the absence of symptoms and before symptom onset, and therefore that *"… to control the pandemic it might not be enough for only persons with symptoms to limit their contact with others, because persons without symptoms might transmit infection".*

ii. On 3 April 2020, Kimball and others published a study with the snappy title: "*Asymptomatic and pre-symptomatic SARS-CoV-2 infections in a Long term care home nursing facility in King County, Washington.*" (Reported in the Morbidity and Mortality Weekly Report, for 3 April 2020)[15].

This article highlighted, inter alia, that:

- older adults were susceptible to severe disease;
- the risk of rapid spread amongst residents in care homes;
- 57% of residents who tested positive were asymptomatic; and
- Therefore, long term care homes should take steps to prevent introduction of SARS-CoV-2 infections.

iii. On 28 May 2020, the New England Journal of Medicine Vol 382 No 22 published article "*Pre-symptomatic SARS-CoV-2 Infections and Transmission in a Skilled Nursing Facility*"[16]. Conclusions included that:

[15] https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6913e1-H.pdf

[16] Presymptomatic SARS-CoV-2 Infections and Transmission in a Skilled Nursing Facility (nejm.org)

- More than half of residents with positive test results were asymptomatic at the time of testing;
- Positive residents most likely contributed to transmission;
- Infection-control strategies focused solely on symptomatic residents were not sufficient to prevent transmission after SARS-CoV-2 introduction into this facility.

iv. On 28 May 2020, the Editorial of the New England Journal of Medicine published "*Asymptomatic Transmission, the Achilles' Heel of Current Strategies to Control Covid-19*"[17]. This article highlighted:

- the differences between SARS and COVID and threw light on the different ways that the virus spread itself around;
- that half of a cohort of residents tested were asymptomatic;
- that patients with cognitive impairment were implicated in the inadvertent spreading;
- The conclusion was that "asymptomatic" people were playing a major part in spreading the virus.

19. So when did UK's SAGE[18] and NERVTAG committees start talking about care homes? Bushproof Sanitation Engineering experts, Dr Sarah House and Eric Fewster, have logged the evolution of the pandemic in Care Homes. Their findings include that:

[17] Asymptomatic Transmission, the Achilles' Heel of Current Strategies to Control Covid-19 (nejm.org)

[18] The Scientific Advisory Group for Emergencies

- Care Homes were not mentioned until meeting #12 on 3 March 2020 and that the issue of Care Homes only became a dedicated action point on 23 April 2020, (although nosocomial transmission from Hospitals to Care Homes was noted on 31 March);
- NERVTAG minutes suggest that data from Care Homes was only discussed from 9 April 2020, by which time there were 844 acute respiratory outbreaks in Care Homes, of which 412 had tested positive for COVID;
- SAGE, PHE[19] and NERVTAG discussed asymptomatic transmission from mid-January 2020, but did not act on the information;
- Asymptomatic transmission was only discussed openly from May 2020, and only then did the committees start to incorporate consideration of asymptomatic transmission into strategy;
- It is noted that the care home situation in the UK is complex and that there was a lack of clarity over who was responsible for guidance to the sector.
    - There was a “soup” of guidance, scattered across different documents but with some gaps, inconsistencies and factual errors;
    - In particular, staff working in care homes did not have easy access to relevant guidance, and so were not aware of issues relating to asymptomatic transmission and so were probably “unwitting spreaders”
- House and Fewster are also critical that learning, regarding basic infection control methods used with success controlling, e.g. Ebola in West Africa, were not applied in UK care home settings.

[19] Public Health England

20. Another area of potential legal scrutiny and criticism is supply chains and China. We recall from the beginning of the pandemic that there were massive shortages of Personal Protective Equipment ("PPE"); that healthcare professionals on the front line complained of rationed PPE and use of out-of-date PPE; but that the fundamental issue seems to be that stockpiles of PPE and equipment had been scaled back, and insofar that stockpiles had been purportedly replaced, they had in fact been replaced with "just in time" contracts with manufacturers in developing countries, particularly China. So, the obvious conclusion to draw is that there must have been no consideration that a global pandemic might include other countries; even developing ones… and include China.

21. The issue of the respect and prominence given to modellers is also a polemic that arises in considering actions to address the pandemic. The New York Times article of 20 July 2020, (updated 2 February 2021) "*Europe said it was pandemic ready. Pride was its downfall*" suggests that in the UK the government relied too heavily on epidemiological modelling in early spring 2020 in their decision to delay lockdown, despite seeing what was happening, for example, in Italy. In contrast to the modellers, traditional public health experts, with clinical experience and field observations, were said to be sceptical of modelling. Rather, they emphasised that modelling projections were only as good as their data and assumptions. And that, where modelling had been used for the control of the earlier foot and mouth outbreak and Swine Flu in 2009, modelling turned out to be inaccurate.

22. Some of the most glaring examples in areas of failure and where the official, public response to COVID arguably fell well below the standard that we would expect, that I

am aware of, have been highlighted above. There is a morass of evidence that demands scrutiny. Public scrutiny. With an eye to accountability and remedies.

Legal Remedies?

23. Going back to consider the assertion that "*Conscience and the law have taught us the rule that no wrong should be without remedy*", what are the legal remedies?

24. The bad news is that, currently, there are only hard answers which demand campaigning and reform.

    i. We seem to be grappling with a legal system that, despite our truly independent and confidence-inspiring Judiciary and Coroners, still incorporates elements of its Mediaeval structural roots, prioritising property and money over all else, functioning using complex and intimidating procedures and rituals, and above all, a shameful paucity of funding for access to Justice for the vast majority of citizens;

    ii. A situation made worse after years of austerity policies which did not protectively ring-fence the Justice system;

    iii. The Garden Court series previously discussed baked-in limits of Statutory Inquires and Inquests summarised above;

    iv. In relation to Judicial review - the remedy Marc Willers QC spoke of on 26 May 2021, where there is legal challenge to *governmental* decisions, currently the government is seen to be seeking to restrict scrutiny by the High Court, not least by asserting that the Judiciary too often become involved with political decisions.

25. This leaves tort-based civil litigation – suing for damages – a route which, over time, is known to indirectly push up safety standards, because those potentially at fault do not want to have to pay out compensation or higher insurance premiums. However, there are massive hurdles here too:

    i. Again, the theme is, that financial considerations trumps almost everything else;

    ii. Putting aside the abstract philosophical issues of reconciling death, grief and serious disability with money, the costs rules make it very difficult to pursue complicated cases with complex causation issues, but with low compensation value, typically worth less than £25,000.

    iii. The Civil Justice system puts the burden on Claimants (the seriously ill or bereaved) to provide the evidence to prove their case with zero legal funding (absent personal/domestic legal expenses insurance, trade union membership or crowd-funding). Whereas COVID-related civil litigation will require high-quality, detailed, systematic, rigorously independent scientific and medical opinions.

    iv. This is particularly so in potential COVID litigation where, for example,

        - Causation of COVID will raise difficult issues of causation; jurisprudence of material contribution and risk. (As in, did the nurse die of COVID because of her long shifts on a COVID ward, or did she catch COVID in the supermarket or from her children)?

        - And where say, the design of criticised PPE will be scrutinised in fine detail, as I believe, it was in Marc Willers QC case[20].

[20] Dr Viz and Dr Joshi represented by Jamie Potter of Bindmans LLP

v. Civil litigation also forces an adversarial approach with no mandatory "lesson-learning", when lesson-learning is what many touched by COVID really crave.

vi. And of course, brave litigants and their lawyers will run the risk of social disapproval as money-seeking or as "ambulance chasers" respectively. Why should those who have suffered most directly from the pandemic risk censure, when the remedial options open to them are so narrow, expensive, difficult and slow?

Conclusions

26. Particularly with our levels of education and wealth in the UK, we as citizens deserve better. We need to continue to organise to campaign for accountability on many fronts identified by our collective Coronavirus experience. We also desperately need a smarter legal system that provides appropriate remedies and which builds in learning and understanding for avoidance of similar problems. Not least for the sake of our future health security.

ABIGAIL HOLT

Garden Court Chambers

Lincoln's Inn

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