

QNE/057/004/GCN

ARTHUR McEWAN v REV JOSEPH HENDRON & ORS

File Note – 9 December 2004

Lindsay Anderson and Gillian Nelson meeting with clients, Rachel Edgar and Shirley Laing, ED: LACY:1.

Noting that the Minister for Education had given instructions to continue to defend the cases, but he did not want to take any 'purely technical' legal arguments against the Pursuer, which would make it more difficult for the Pursuer to bring his case.

Discussing the approach. Agreeing that we should insist in the time-bar defence in this case. This was partly due to the stage the case had reached (it would be impractical to delete all the averments regarding time-bar at this stage), but also due to the fact that even if we were to remove our time-bar defence, that would have little practical effect on the outcome of the case, as the judge would still require to address the time bar points made by the other Defenders.

Further, clients felt it was significant that in this case, the Pursuer had not been candid about the date on which his repressed memories had surfaced, and it was important to make that point.

Agreeing that in future cases, we would not automatically take the time-bar argument. Each case should be looked at on its own merits.

Discussing the proposed Note of Argument. Agreeing that the Note did not appear to suggest that the Pursuer should not be allowed at this stage to plead a systems case at all. The Note was merely correcting a misrepresentation made by the Pursuer's Senior Counsel and pointing out the procedural difficulties which would arise were the Pursuer to be allowed to bring this argument in orally, and then to amend. Its purpose was also to ensure that the Lord Advocate had the opportunity to respond to this new argument, made in closing submissions.

Clients advised that on this basis, the Minister was unlikely to have any objection to it. GCN advising that she would check the position with Senior Counsel.

Discussing with Gerry Moynihan at court. He confirmed that the purpose of the Note had not been to say that the Pursuer could not bring a systems case at this stage in the debate per se; it was merely to say that the scope and nature of that duty had to be properly set out, and to bring the procedural <sup>difficulties</sup> to the court's attention. Advising that on that basis, we had instructions to proceed with the Note of Argument. Gerry Moynihan would speak to the Pursuer's Senior, Colin McEachran, and make our position on the Note clear.

GCN

**Nelson G (Gillian)**

**From:** Nelson G (Gillian)  
**Sent:** 08 December 2004 15:33  
**To:** Edgar, Rachel  
**Cc:** Anderson L (Lindsay); Laing SG (Shirley); Donnelly LM (Louise)  
**Subject:** Public Petition PE 535 - McEwan v Hendron



McEwan.Supplemen  
 tary Note.doc ...

Rachel

I refer to my email of last Thursday night (2 December) regarding possible political embarrassment arising from the Ministers' position in the Lists D schools court cases, in the light of the position taken in the parliamentary debate. I have now skimmed the Official Report from last Wednesday's debate, and have also discussed with Lindsay Anderson.

Generally, we are not concerned about the Ministers' position in the legal debate on time-bar or on disclosure of records. The position being taken by Ministers on these issues in the legal debate would not appear to conflict with what was said in Parliament.

We still require your instructions on whether Counsel is to insist in the Note of Argument. The Note states that the Pursuer should not be allowed to bring an argument (that SED had a general duty to take reasonable care to provide an adequate system to ensure that no child was exposed to risk of injury) at this late stage in debate, without giving prior notice. I attach a copy of the Note of Argument, which has been intimated to other parties, but not yet brought before the court.

I would anticipate that if the Minister remains of the view that the legal cases are to be defended, irrespective of what happens in the political process, he will be content for us to continue with this line of argument. However I would be grateful if you would confirm.

Please let us have instructions by close on Thursday 9 December. If that is not going to be possible, please let me know.

If you would like to discuss I will be in the office until around 4pm today, and will then have to leave for a meeting. Lindsay will be available after 4, and we will both be around tomorrow.

Gillian

---

Gillian Nelson  
 Solicitor  
 Office of the Solicitor to the Scottish Executive  
 Victoria Quay  
 Edinburgh EH6 6QQ

Tel: [REDACTED]  
 Fax: [REDACTED]