

## **HIV INFECTION RESULTING FROM NHS BLOOD/TISSUE TRANSFERS**

### **BRIEFING FOR SOFS MEETING WITH SIR MICHAEL MCNAIR WILSON AND GAVIN STRANG**

#### **1. GENERAL BACKGROUND**

The awards to haemophiliacs, in 1987 and 1990, have been followed by campaigns to give similar financial help to those who have contracted HIV as a result of blood transfusions. The present campaign sparked off last year when the £42 million settlement for haemophilacs was announced includes an Early Day Motion which has been signed by 235 MPs, including 40 Government supporters (Flag A), and media coverage, particularly in the Observer.

#### **2. MPs INTEREST IN THE CURRENT CAMPAIGN**

Sir Michael McNair-Wilson has a personal interest in this issue as a recipient of a blood transfusion during a renal operation. He has written to Ministers on two recent occasions, and raised the issue at the Debate on the Motion for the Christmas Adjournment (Flag B).

Gavin Strang is known to have a special interest in the whole question of HIV and AIDS. He sponsored the AIDS (Control) Act 1987 which enables the Government and health authorities to monitor the progress and effectiveness of their prevention and treatment efforts in the area of AIDS and the use of earmarked money. During the Adjournment Debate on 20 December 1991 Gavin Strang brought to the attention of the House the case of one of his own constituents who became infected following a blood transfusion in the course of the birth of her first child in 1984, and has subsequently tabled an Oral Question (Flag C). Both Members are supporters of the Early Day Motion

## 2. GOVERNMENT'S GENERAL LINE

### Background

Ministers have been taking the line in public that while they have the greatest sympathy for those who have been infected with HIV as a result of blood transfusion/tissue transfer, the Government do not accept the case for no fault compensation for medical accidents, and are not convinced that the blood transfusion recipients are a special case. The Government's view that a general no fault scheme for medical accidents would be unworkable and unfair was accepted by the House in a free vote when the Rosie Barnes Bill was debated in February last year. The Pearson Commission recommended against introduction of a general no fault scheme for medical accidents when it reported in 1978. Since then, the Department has been keeping a watching brief on schemes abroad, but has yet to see a scheme that works and would be relevant in this country.

### Line to Take

The Government does not accept the case for no fault compensation for medical accidents. We recognised the arguments forcefully put to us that the haemophiliacs are a very special case and we have acted accordingly. Always difficult to draw lines and always likely to be someone who feels unjustly excluded. [The Government is not just offering sympathy, but meaningful help to all those unfortunate enough to have suffered from HIV or AIDS]

### Concluding Line

We have not been convinced that it would be right to extend the special financial provision which we have made for HIV infected haemophiliacs to the blood and tissue transfer cases, but we will of course reflect on what has been said today.

## SPECIFIC ISSUES

### 3. HAEMOPHILIACS A SPECIAL CASE

The special provision for haemophiliacs has been justified on the grounds that they are a very special case. We have argued that they were doubly disadvantaged; the problem of HIV was superimposed on the health, social and financial disadvantages they already suffered as a result of their lifelong, hereditary haemophilia. We have also argued that this combination of circumstances would not generally apply to blood transfusion cases. However, it is very difficult to get this argument across to the public who have considerable sympathy for the blood transfusion cases. Those campaigning on their behalf stress the similarities with the haemophiliacs; both groups were infected through treatment and those infected can pass the HIV to their families. Those suffering from hereditary thalassaemia or sickle cell anaemia who require blood transfusions may claim to be doubly disadvantaged but there are thought to be few with HIV. Leukemia, although not hereditary, is a also difficult example to argue against, particularly where children are concerned as their condition may have been lifelong.

#### Line to take

The health, social and financial problems caused by the haemophiliacs' lifelong condition were exacerbated by the onset of HIV. This combination of circumstances does not generally apply in the case of the blood transfusion and tissue transfer recipients.



#### 4. NUMBERS AND COSTS

##### Numbers

The total number of reported cases at 31 Dec 91 - 190, of which:-

- transfused in UK = 73
- transfused abroad = 100
- place of transfusion unknown = 17

The figures for those transfused in the UK are:-

HIV reports in England, Wales and Northern Ireland - 62

HIV reports in Scotland - 11

Of 62 reports in England, Wales and Northern Ireland 29 are reported with AIDS, of whom 23 are known to have died. We also know that 9 of the reported HIV cases have died. We do not know whether those who have died did so from an HIV/AIDS related condition or from some other cause. These figures show an increase of 11 UK cases over earlier figures which had remained relatively stable for some time. The increase may well underline concerns that numbers and therefore the cost of any settlement could be greater.

The reports in England include one case of HIV infection due to tissue transfer.

(The reports are collected for England, Wales and Northern Ireland by the Communicable Diseases Surveillance Centre at Colindale, and for Scotland by the the Scottish Communicable Diseases Surveillance Unit.)

## Potential Costs

Gavin Strang has estimated a cost of £4 million but it is not clear on what basis; it may not take into account infected partners and children, nor make allowance for some of those cases where the place of transfusion, at present unknown, may be found to have been In UK. Payments to the HIV infected haemophiliacs in the last settlement varied with circumstances. We do not know the composition of the HIV infected blood transfusion recipients as a group, but the estimated cost of extending the recent settlement for haemophiliacs to those transfused in UK could be around £5 million (this assumes half of the cases where place of transfusion is unknown were transfused in the UK). Inclusion of infected partners or children (as was done in the recent haemophiliac settlement) could increase the cost to around £10 million. The cost of extending the £20,000 payments given to haemophiliacs in 1990 could add a further £2 million.

Giving them access to Macfarlane Trust for "needs" payments would also bring forward the day when that Trust would need topping up.

Any announcement could provoke more claims from people who currently have no reason to suppose they are infected through blood/tissue. The costs could therefore be much greater. The potential costs of compensating other groups who might be encouraged to claim would be very much greater.

Line to take

The cost of extending the most recent settlement for the haemophiliacs, which included provision for infected partners and children, would not be insignificant, and could exceed £10m. (This equates, for example to the cost of 1,000 kidney transplants or 500 heart transplants or 300 bone marrow transplants.) If other groups sought similar payments the cost could be considerably greater.

#### 4. PROBLEM OF RING FENCING

The extension of financial help to HIV infected blood and tissue recipients may encourage claims from a number of other groups injured by medical treatment. These groups include the following who are already taking or considering legal action:-

- some 2,000 children who received human growth hormone and who may develop Creutzfeldt Jakob Disease (the human condition analogous to "mad cow disease"). Only a minority may develop the disease but in the absence of a test for CJD during life, all recipients of human growth hormone may press for compensation;
- several thousand haemophiliacs infected with hepatitis. This is less serious than HIV and few haemophiliacs will die as a result of hepatitis. However we know that several firms of solicitors are in the early stages of legal action;
- those harmed by adverse drug reactions. There are already a considerable number of people dependent on the benzodiazepene drugs seeking compensation from the manufacturers. They might also seek Government compensation on the basis that the Licensing Authority licensed the products.

The ring fence around the haemophiliacs is difficult to maintain.

Finding another place to re-establish it is also difficult. It may be possible to create a credible ring fence round all those infected with HIV through medical treatment. HIV is the emotive issue and the public are unlikely to be convinced that it is reasonable to compensate those who were infected by one form of treatment but not another. However, a concession would send the wrong signals to other groups already lining up to press their own case for compensation.

#### Line to take

It is always difficult to draw distinctions, and wherever a line is drawn, there will always be others who will argue that they have been unjustly excluded.



## 5. NHS NEGLIGENT

We know that two writs have been issued against the Department. The two writs also cite the health authority concerned; we do not know how many writs have been issued which cite only the health authorities. In Scotland 6 intimations of claim have been addressed to the Secretary of State. Two writs have been served in Scotland so far. One writ cites Scottish National Blood Transfusion Service and the Health Board, the other SNBTS only. Neither writ cites the Scottish Office.

Cases alleging medical negligence against the doctors and the hospital where the treatment took place would be for the Health Authorities to defend.

### Line to take

I am advised that as soon as the nature of the AIDS epidemic became apparent, the Government took all reasonable steps to protect the blood supply. If allegations of negligence are made, we will defend them.

If the NHS were to be proved negligent in a court, of course it would accept its liability to pay damages.

## 6. PRESERVATION OF DONOR ANONYMITY

An issue which has been raised by solicitors representing the HIV infected blood transfusion recipients is that preserving the anonymity of donors could hamper court action in individual cases. They considered that to be justification for special help from Government. In a Scottish case in 1989 an HIV infected blood transfusion recipient sought disclosure of a blood donor's name with a view to suing for damages. The Secretary of State for Scotland successfully resisted on the grounds of public interest.

### Line to take

If blood transfusion recipients were to seek details of donors as a material part of their legal action, any claim to withhold that information in the public interest could be challenged in the courts. The courts would decide whether the public interest lay in disclosing further details.

## **7. OTHER COUNTRIES**

Although some countries have decided to make provision which includes infected blood transfusion recipients, other countries have made no state provision at all for any of those infected with HIV as a result of medical treatment. The available information is shown at Annex D.

### **New Zealand**

New Zealand's no fault compensation scheme has been the subject of criticism on the grounds that it is inequitable and costly to operate. Expenditure on medical treatment for those experiencing accidents of all types (not just medical accidents) amounted in 1989/90 to 4% of total health service expenditure (0.3% of GNP). The equivalent percentage of health expenditure in England and Wales in 1991 would be about £1.4 Billion. The total cost of the scheme is 1.4% of New Zealand's GNP, or 35p per person per day. Non earners are excluded from higher rates, and the scheme removes the right to sue through the courts. We understand the scheme is being revised because it is so costly.

We must be careful in drawing comparisons because the NZ scheme covers accidents of all types and not just medical.

### **France**

Recently, there have been numerous allegations about improper conduct in the French blood transfusion service at the time that HIV testing was first being introduced. Press reports relate to allegations about activities of officials between February and

October 1985, when screening was first introduced and legal proceedings have been started against some. The French have a much bigger problem in that 5,000 people including 1,200 haemophiliacs are thought to have been infected through blood or blood products. The French Government recently announced that help would be made available to this group as well as haemophiliacs. We understand that most of the cost (which could be as much as FF12 billion) will be met by the Government but insurance companies will make a contribution.

Line to take

Not all countries have made State provision for those infected with HIV as a result of medical treatment. Circumstances vary between countries and countries differ in their approach to social benefits, health care and other matters. Governments make their own decisions in these matters in the light of the circumstances of their cases and are accountable to their own parliaments. [The decision by the French Government reflects the circumstances in that country.]



## VACCINE DAMAGE PAYMENTS

### NO FAULT COMPENSATION FOR ROAD ACCIDENTS

Neither the Vaccine Damage Payment scheme nor the proposals for no fault compensation for no fault compensation for road accidents can justifiably be cited as precedents for payments to HIV infected blood/tissue recipients.

#### Line to take

The vaccine damage payment scheme does not provide a precedent. Recipients of blood transfusion are given this treatment for their own benefit. Vaccines are given to the healthy for the general good, and therefore it is right that they should be compensated.

The proposals in relation to minor road traffic accidents bear no relation to the issue of medical accidents, and if implemented create no relevant precedent. The scheme would be paid for by motorists through increased insurance premiums.