

Mr J C Dobson

From : Paul Pudlo CA OPU2

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HEPATITIS C - COMPENSATION

1. Your E-mail of today to Ann Towner refers.
2. The reference in the briefing which you mention relates to evidence given by the SofS to the Health Committee (Public Expenditure Enquiry) on 19 July 1995. Asked by John Marshall about compensating those who suffer premature death through contaminated blood, SofS referred to his previous experience with the subject as a health minister and replied :-

"I believe it remains true now as I asserted then that there is a choice to be made about whether the Health Service uses its resources to compensate those who have suffered but through no fault of the Health Service where there has been a breakdown but without fault, whether that is a higher priority than the treatment of today's and tomorrow's patients. I said then and I still believe it very strongly to be true that any patient who undertakes a course of medicine must accept that there is a risk attached to modern medicine and in cases where a patient is damaged but without any fault, I do not believe that it is sensible use of NHS resources to provide compensation in those cases. Of course that is in no sense to undermine the quite proper obligation that rests when things go wrong through somebody's negligence. Where there is no fault, I am not in favour of compensation as a principle."

SofS said

Later in the hearing John Marshall returned to the subject asking :-

"Would you not agree that there is something illogical when those who have suffered early death through HIV are compensated but sometimes within the same family another haemophiliac suffered an early death through cirrhosis of the liver, through hepatitis C, and has received no compensation at all. Do you not think that it is worthy of re-examination, particularly as there are so few people involved?"

SofS replied :-

"I cannot deny that there is an illogicality there because the haemophiliac who contracted AIDS as a result of blood transfusion (sic) was provided with compensation in contravention of the principle I enunciated to the Committee. We can only give the grantee that there will be no illogicality if we extend the same form of compensation more generally than we have yet done and I am not in favour of doing that for the reason I gave to the Committee."

3. I am not sure that SofS's statement signals a new anxiety about the HIV precedent. He has consistently opposed any form of no-fault compensation but seems to be saying that it is preferable to live with what he regards as an anomaly than to remove it by making it the norm. Such a candid position may be difficult to defend publicly since it could be taken as a suggestion that the HIV infected patients are not deserving of the compensation they receive.
4. However this public evidence, so far, has not been used by proponents of compensation. There is a tacit recognition among both sides of the argument that, with the benefit of hindsight, the distinction made between the plight of HIV and HCV infected haemophiliacs is looking increasingly tenuous. It is now known that HIV is not as rapidly fatal as was thought at the time of the settlement but HCV is worse than predicted. This erosion of the clinical difference between the groups has weakened the proposition that HIV was a special case. This has been exploited by eg the Haemophilia Society who argue that there is now no moral basis for treating the two groups differently. They accept that there is no question of negligence in either case. Encouraged by Ministers responses to John Marshall they view the affordability of a settlement as the current pivotal issue.
5. Whilst your proposed alternative strategy is attractive for the reasons that you suggest, I am not sure either that it would be consistent with the HIV legal view at the time or how we could argue that the legal position vis a vis HCV was so much better both for haemophiliacs and blood transfusion cases. In any event I doubt that campaigners for compensation would be any more persuaded by a legal distinction than they are a clinical one. Additionally Ministers might be seen to be backtracking on a public position which has consistently held that the Department was not at all vulnerable on the issue of negligence and we might risk forcing those who have so far desisted to go down the litigation route turning the current dribble of writs into a flood. / by
6. Clearly this has implications that go wider than the blood-based infections but so far as HCV goes I am not, on balance, in favour of the legal argument. If others feel otherwise I would suggest that we need to carefully consider what was said publicly at the time of HIV settlement before proceeding to a submission.

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GRO-C