

## vCJD – NO – FAULT COMPENSATION SCHEME

**Briefing Note as at 8<sup>th</sup> May 2001**

### Overview

1. The discussions between lawyers on behalf of the Department of Health and those acting for the families of victims of vCJD has led to the development of a Discussion Document which both sides' lawyers consider represents a reasonable basis for a No-fault Compensation Scheme.
2. The Discussion Document provides a basis for compensation out of a Trust Fund on lines broadly similar to common law damages, but with a significant discount overall from the level of damages which would be payable at common law.
3. The cost of meeting the commitment proposed in the Discussion Document will depend critically on the number of victims with dependent partners and young children and on their earnings before the onset of symptoms. A reasonably cautious estimate of the likely cost of funding the Scheme for 250 victims and their families is in the order of £55m.
4. The Discussion Document has been 'road tested' by the families' lawyers with a very high proportion of the families. The response has

been broadly supportive from the vast majority of those consulted, subject to one caveat.

5. This caveat is in respect of the payment for the victim's pain and suffering and loss of amenity, described in the Discussion Document as 'the patient's experience'. The Discussion Document proposes a figure of £70,000 for each victim (£75,000 in the case of those diagnosed prior to the announcement of the Scheme in Parliament in October 2000) but the families are pressing for a further £50,000 for each victim (they originally had in mind a figure of £250,000 per head). Their lawyers recognise that this cannot be justified by reference to a discounted common law basis of assessment but simply ask that the families' wishes be put before ministers. The families have apparently asked for an opportunity to make representations directly to the Secretary of State on this issue.
6. The figure proposed by the families reflects their desire for so-called 'punitive damages'. It would be difficult to justify making such a payment as compensation for pain and suffering and loss of amenity without creating a highly unfortunate precedent and suggesting that the level of damages awarded by the courts and the Criminal Injuries Compensation Board are substantially too low.
7. Any decision to make such an additional payment has significant implications. It is unlikely that a decision not to make such a payment

would wreck the families' support for the Scheme, although there must be a significant risk that they would seek to attract publicity on this point. In the event that a decision is made to make an additional payment (which if paid in full would amount to £12.5m for the first 250 victims), one way of doing so without having excessive repercussions on normal levels of damages would be to place that amount as an additional sum in the Discretionary Fund set up under the Trust and to broaden the discretion to make payments out of that fund.

8. An Interim Trust was set up shortly before Easter and has already made payments of £25,000 to a majority of the families. Further payments are planned and awaiting either the grant of probate/Letters of Administration or identification of suitable recipients of the Interim Payment.

9. If the Scheme receives ministerial approval, the process of finalising the Trust Deed and selecting suitable initial Trustees can proceed. Unfortunately, the selection of Trustees using Nolan procedures is likely to take some time and therefore an early start to the process is desirable to maintain momentum and the support of families.

## The Negotiations

10. The negotiations were informal and proceeded on the basis of a 'significant but not excessive discount on common law damages'. The families' lawyers had no formal instructions from their clients to negotiate and were therefore reluctant to put forward firm proposals.

11. The current Discussion Document reflects a prolonged period of discussion and has undergone significant modification from the first draft.

12. Although the current version has not formally been proposed by the families, it enjoys the support of their representatives and has been widely welcomed, subject to the caveat referred to in the Overview.

13. The draft as discussed by the claimants' lawyers with the families is at Appendix 1. A final version in publishable form is at Appendix 2.

## Details of the Scheme

14. The Scheme will consist of the following four elements:-

- i) The experience of vCJD for the patient.

The sum of £70,00 will be paid in all cases, together with a further £5,000 in those cases where vCJD was diagnosed before the publication of the Phillips Report.

*(This compares with a bracket of £65,000 – £80,000 at common law, depending on length of illness, plus interest at 2% from date of death. The majority of cases would fall into the upper end of the bracket).*

ii) The experience of vCJD for the patient's immediate family and/or carers

Each family would receive a minimum of £5,000 plus a further £5,000 where members of the family have cared for the victim during his/her final illness, to be split between the carers and immediate family. In the case of those diagnosed before publication of the Phillips Report, a further £5,000 would be payable.

Where a member of the patient's immediate family has suffered psychiatric injury as a result of the patient having suffered vCJD, a further payment of £5,000 will be made. The Trustees have a discretion to award further sums in cases where the psychiatric condition gives rise to particular hardship.

*(This payment is larger than the Bereavement Award at common law, and also payable in more cases. The payment for psychiatric injury will be significantly lower than a common law award, but there are problems of recoverability at common law)*

iii) Costs incurred by the patient and family as a direct result of the patient's suffering from vCJD.

Payments will be made to cover funeral expenses and capital expenditure reasonably incurred. Where care was provided either commercially or gratuitously before the implementation of the Care Package announced in Parliament in October 2000, a sum will be payable in respect of that care.

Where the patient and/or their carers have suffered loss of earnings and this has caused particular hardship, the Trustees will have a discretion to make a further payment out of the Discretionary Fund.

*(This represents a significant discount from common law damages since in most cases loss of earnings will not be paid and costs of care will not be claimable after the implementation of the Care Package).*

iv) Future Losses caused to the patient's dependents as a result of his/her death from vCJD.

This category broadly reflects the common law approach but with the following important variations:-

- a) Subject to a residuary discretion on the part of the Trustees, there will be no payment in respect of anticipated higher earning capacity in the future;
- b) However, a minimum earning capacity of a net £7,500 per annum will be attributed to all victims, even those not working or earning less than that amount at the time of the onset of their illness. This is to reflect their future earnings potential;

c) Compensation in respect of pension loss will not be payable except to those aged 45 or over, for whom a discounted sum in respect of pension loss will be payable;

d) All figures are reduced by an overriding discount of 10%.

*(This category is likely to lead to a very substantial discount on common law damages, in particular in cases where there are significant prospects of increased future earnings).*

#### Overall Cost of the Scheme

15. The overall cost of the Scheme is difficult to predict and will depend critically on the number of patients who have dependent partners and young children. A series of spreadsheets have been prepared, including sensitivity analyses. On the basis of 80 single persons without dependants, 70 with partners but no dependent children and 100 with partners and dependent children, with a variety of different earnings, partner's earnings and children's ages, a reasonable estimate of the cost of the Principal Fund will be £50m.

16. Alternative scenarios with a larger or smaller number of patients with dependents and with higher or lower current earnings, would give a probable bracket of £45m - £55m for the Principal Fund, but the bracket could be as wide as £40m-£60m.

17. When the current nearly 100 victims' circumstances have analysed, it should be possible to provide more robust figures.

18. For present purposes, it is considered that funding of £50m for the principal fund will be adequate. This can be drawn down by the Trustees in tranches.
19. It is suggested that a reasonable figure for the smaller Discretionary Fund would be £5m.
20. The purpose of dividing the compensation into two funds is that the monies needed for the payments as of right under the Principal Fund cannot be determined in advance and there is likely to be either a surplus or deficit. It is considered more appropriate that the Trustees' Discretionary Fund should be of a limited sum which they will need to divide between deserving cases, rather than from an unlimited fund where they may be tempted to make more generous payments if the fund is in surplus or to make payments in the expectation that the fund can be topped-up as needed.

#### Overall comparison with common law damages

21. As shown above, there will be some discount from common law damages in the first and third categories but the payment under the second category will probably be higher than under common law in most cases. The principal discount will be under the fourth category of future loss of earnings.
22. On the currently predicated split of single/married and married with dependents, leading to the figure of £50m referred to above, the expected discount from common law damages will be in the region of 35%. If more victims are single and without dependents, the gross cost will be significantly

less but the discount from common law damages could fall to as low as 15-20%. By contrast, if a greater than expected number of victims are married with dependents and have a high future earnings capacity, the overall cost will be higher but the discount could be as great as 45-50%.

23. Overall, it is reasonable to predict that the discount from common law damages will be approximately 25% or better which was my initial aim.

#### Examples

24. Three typical examples are given by way of illustration.

#### Example A

A single person aged 22 cared for at home by their parents before October 2000. In such a case the following amounts will be paid:-

- i) Victim's experience - £75,000
  - ii) Family's experience and care - £15,000
  - iii) Expenses – depending upon amount of care provided and costs of any capital equipment, between £5-£15,000
- Total – approximately £105,000

#### Example B

Married man with no children aged 25 earning £10,000 per annum net with spouse earning £5,000 net, diagnosed after October 2000:-

- i) Patient's experience - £70,000

|      |                              |          |
|------|------------------------------|----------|
| ii)  | Care and family's experience | £10,000  |
| iii) | Funeral expenses -           | £1,500   |
| iv)  | Loss of future earnings      | £100,000 |
|      | Total                        | £181,500 |

#### Example C

Victim aged 35 at death. Married with two children aged 9 and 5. Earning £20,000 net per annum with wife earning £5,000 per annum:-

|      |                                    |          |
|------|------------------------------------|----------|
| i)   | Victim's experience -              | £70,000  |
| ii)  | The family's experience and care - | £10,000  |
| iii) | Funeral expenses                   | £1,500   |
| iv)  | Loss of future earnings            | £217,000 |
|      | Total                              | £303,500 |

#### Appointment of Trustees and Finalisation of Trust Deed

25. The families' representatives have suggested that the Chairman of the Trustees should be a high court judge. They have put forward Mr Justice Robert Owen, who represented the claimants in the Human Growth Hormone litigation. He is a former Chairman of the Bar with wide experience of personal injury cases and very sensible.

26. Discussions are continuing as to the qualifications of other Trustees and what say the family will have in their appointment. However, an early decision in principle including a decision to appoint a high court judge as Chairman, would enable the Chairman to be selected and to have some input into the selection process for other Trustees and the final wording of the Trust Deed.

Conclusion

27. The compensation scheme package is now in a state where it is sufficiently finalised for ministers to consider approving it, with reasonable confidence that if adopted it will enjoy the support of the families subject to the caveat in relation to the additional £50,000 referred to above.

28. Once a decision to proceed is taken in principle, the Scheme can be further developed in the next four to five week with a view to seeking nominations for the position of Trustees some time in June.

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