

!HOT ISSUE BRIX NOTE

HEPATITIS C IN BLOOD – COMPENSATION

EMBARGO	NONE
Issue	SE policy on compensating patients infected with Hep C
Accusation	Why isn't SE doing more to compensate patients infected with Hep C by blood or blood products provided by Scottish National Blood Transfusion Service?
Fact(s)	<ul style="list-style-type: none"> English High Court found National Blood Authority liable in Consumer Protection Act (CPA) case brought by patients who contracted Hep C through transfused blood. On 29 August solicitors acting for NHSScotland contacted the legal representatives of patients who have legally valid actions that are directly affected by the judgement - with a view to settling. Only actions raised under CPA will be settled. Actions alleging infection before CPA came into effect (1/3/88) not covered by CPA and won't be settled – this includes those raised by haemophiliacs. 19 September – HCCC reveals that their report will advocate that all patients who contracted Hep C from blood receive compensation, even though no legal obligation to do this. It will suggest McFarlane Trust set up to compensate HIV victims should be model for providing compensation.
Line(s) to take	<ul style="list-style-type: none"> SE Ministers and NHS have huge sympathy for everyone who has been infected. Inevitably, something occasionally goes wrong which is not the fault of the NHS. SE upholds the policy of previous administrations that the NHS should not pay compensation where there is no legal basis for it being held at fault. Cannot comment on HCCC report until the detail is known but currently no intention to compensate anyone other than those whose cases are directly analogous to English High Court case. Compensation for HIV sufferers was a special case
Lead Minister	Susan Deacon, Minister for Health and Community Care
Contact	Bob Stock
Next Update	Updated 19 September 2001 HP&Q ☎ 46913



is an Executive wide briefing system being developed under the Knowledge Network Project (Ext: 42050 for info).



The Scottish
Parliament

October 2, 2001

**HEALTH COMMITTEE REPORT CALLS FOR
FINANCIAL SUPPORT FOR ALL 'HEP. C'
BLOOD TRANSFUSION SUFFERERS**

Financial and practical support should be provided for all NHS patients who contracted Hepatitis C through blood transfusion services, regardless of whether negligence can be proven, says a parliamentary report published today.

And the Scottish Parliament's influential Health Committee is calling upon the Scottish Executive to put in place mechanisms to provide such support within twelve months.

Committee convener Margaret Smith said:

"Having considered the issues raised in two petitions to Parliament, our committee is persuaded by the 'moral' case for providing financial and practical assistance to those individuals infected with hepatitis C through blood transfusion services.

"It is important to stress, however, that we are not advocating the principle that all injury caused through NHS treatment should be compensated. Nor are we asking the Executive to establish any new, wide-ranging precedent on the management of risk in clinical decision-making. We realise that all medical treatment carries risk, and we agree with the Health Minister that a risk-averse NHS is in no-one's interests.

"Instead, we are simply seeking to correct an inconsistency in the operation of an existing, narrow precedent, namely the precedent created when the UK government set up the MacFarlane Trust in 1988. The MacFarlane Trust provides financial assistance to all individuals infected with HIV through medical treatment, regardless of whether there was any medical negligence involved. Today, we are calling upon the Executive to provide similar assistance for Hepatitis C sufferers who received contaminated blood or blood products from NHS agencies.

"On compensation for medical injuries generally, this committee believes that the current system is badly in need of re-appraisal. There is too much onus on aggrieved patients having to prove their case in the law courts. Justice is often simply deferred for years as cases proceed expensively through the legal system.

"There must be a better way of resolving disputes between the NHS and patients, and it is perhaps time to begin questioning old certainties about the way in which such disputes are handled. We welcome the Health Minister's announcement (on

August 29) that she already intends to re-examine the effectiveness of the NHS complaints system as a first step in that process of re-appraisal."

The following Conclusions and Recommendations are included in the *Health and Community Care Committee's Report on Hepatitis C*:

Conclusions include:

- We are not persuaded of the case for a further, independent inquiry into all the concerns raised by the Haemophilia Society and others, if that were to focus mainly on exploring questions of alleged fault. On the basis of the information we considered, we could find no evidence of negligence on the part of the Scottish National Blood Transfusion Service.
- We have come to the view that financial and other practical assistance, awarded on a no-fault basis, is the clearest solution to the issues raised in these petitions. We believe as a matter of fairness that these individuals who have suffered serious, long-term harm as a result of receiving hepatitis C – contaminated blood or blood products through NHS treatment should receive some practical assistance.
- ...we also believe that this solution is required for reasons of consistency, in recognition of the fact that HIV sufferers already receive assistance, under clearly analogous circumstances, via the MacFarlane Trust.
- Should the Executive accept the principle of our recommendation, we are content to leave it to the Executive to decide the best mechanism by which to make financial and practical assistance available.

Recommendations include:

- We recommend that the Executive set up a mechanism for providing financial and other appropriate practical support to all hepatitis C sufferers who have contracted the virus as a result of blood transfusions provided by the NHS in Scotland, or which involved blood or blood products produced by the Scottish National Blood Transfusion Service.
- We recommend that this mechanism for providing financial and other support comes into operation within a period of twelve months.
- The level of financial assistance awarded to any claimant should be determined on the basis of need, having regard to the physical or psychological loss individually suffered, and should include redress for practical difficulties such as the inability to obtain an affordable mortgage or life assurance.

The full report is available on the Parliament's website or for purchase from outlets of the Stationery Office.

For further information, the media contact is:

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For general enquiries, contact: 0845 278 1999 (local call rate)

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Falconer S (Sandra)

From: Stock RG (Bob)
Sent: 03 October 2001 14:49
To: 'Dudgeon, Jeff'
Cc: Falconer S (Sandra)
Subject: RE: Hepatitis C compensation

Sensitivity: Confidential



press release.doc

Jeff

I'll attach the press release again but, since I know other people have sometimes had difficulty downloading this document, I'll also paste the text into this message.

I think it quite likely that it will be discussed at the JMC - if only because DH(E) will be concerned that we don't do something (in response to the H&CC report) that will queer their pitch.

We are rigorously applying the 10 year bar in our consideration of actions. It means in effect that any claim arising now cannot be converted into a legally valid action (unless it relates to infection caused by a failure in the screening process). To do anything else means you are operating outwith the parameters of the law ie being conciliatory, and once you do that people will say 'well why can't you operate outside the law in some other respect' and it becomes a slippery slope. The 3 year bar is different because a court could set it aside - so if we choose to ignore that in particular cases then we can justify it in terms of it being an action which reflects an option that could exist within the law.

BOB

29 August 2001

EXECUTIVE MOVES TO SETTLE WITH SOME PATIENTS INFECTED WITH HEP C

- Deacon outlines plans to settle more

NHS disputes outside the courts -

NHSScotland lawyers have today been instructed by Scottish Health Minister Susan Deacon to begin talks aimed at settling outstanding legal actions that are directly analogous to those considered in a recent ruling by Mr Justice Burton in the English High Court.

These were actions raised under the Consumer Protection Act 1988 (CPA) whereby certain individuals alleged that blood they received by transfusion was a defective 'product' as it carried Hepatitis C.

The Minister's decision follows careful consideration of the English judgement and its likely implications for similar Scottish cases. While the High Court decision is not binding on Scottish courts, a Scottish court would be likely to have regard to a relevant judgement reached elsewhere. For this reason, the Minister is keen to avoid individuals in similar circumstances facing the cost and distress of fighting their cases through the Scottish courts.

She also announced that the Executive was exploring ways of achieving faster, fairer resolution of disputes between patients and the NHS. This 'middle way' will seek to resolve more disputes

outside the courts through:

- a comprehensive new NHS complaints system in Scotland, to be implemented in 2002, which will include the use of conciliation to settle NHS disputes;
- and consideration of new work by the independent Royal Society of Edinburgh on the scope for using mediation to resolve disputes in NHS Scotland.

The Executive will also continue to consider the most effective and sensitive way of dealing with cases of clinical negligence and will monitor carefully any parallel developments in England.

Ms Deacon said:

"The issues involved here are both sensitive and complex. Our aim is to adopt an approach which is sensitive to the concerns of individuals while recognising the wider implications of any decision for future patient care. We have sought also to be responsive to the developing legal position in this complex area.

"Over the years, significant advances in science and medicine have taken place. Blood and blood products are now considerably safer than in the past. Sadly, many people, were unknowingly infected by hepatitis C during the 1980's before the virus itself was identified and isolated, and before the procedures existed to eliminate it.

"As I have said repeatedly, Executive Ministers and the wider NHS have the greatest sympathy for those who have been infected with the hepatitis C virus as a result of blood transfusions and other procedures carried out in the NHS.

"I realise too that for many that human cost has also translated into financial costs. For some it is also a question of recompense for the pain and suffering endured. I understand the strength of feeling that exists.

"The NHS is a caring organisation staffed by competent well-trained professionals. But sometimes, somewhere, something will go wrong. In cases of negligence, clear arrangements already exist to provide compensation where an error or injury occurs.

"However, prior to Mr Justice Burton's judgement, the NHS has held to the general principle that individuals are not compensated in cases of non-negligent harm. This approach has been adopted by successive UK Governments and is in line with the practice in almost every other major developed country.

"The reason for this approach is sound. Every drug, treatment, therapy and medical procedure carries a degree of risk. Every day medical professionals must reach judgements about how best to treat an individual patient. A life saving operation or blood transfusion can, on occasion, have adverse consequences.

"The issue here is how we manage that risk. It would not be in the interests of the NHS or, more importantly patients, to create a climate whereby doctors and other health professionals were more likely to opt not to administer a treatment because of the consequences it might have. A 'risk averse' NHS is one which may not be able to deliver the best outcomes for patients.

"Similarly, widespread compensation for every adverse consequence of non-negligent harm would divert substantial amounts of vital NHS resources away from frontline patient care and could ultimately harm significantly more people than it benefits.

"However, I believe we must be sensitive to changes in public expectations. Individuals should, as far as possible, be made aware of the risks involved in their treatment, where these are known.

Better information and greater dialogue with patients must be central to a modern patient-centred NHS.

"The law is also evolving in this area. The recent English High Court judgement was significant in that it ruled that, under the terms of the CPA, certain patients infected by Hepatitis C through blood transfusions should be compensated as the blood was deemed to be a defective 'product'.

"The ruling applies to limited number of people in very specific circumstances and within a limited time period. However, I have no wish to see individuals in a similar position here in Scotland be dragged through the courts. That is why I have decided to move towards a settlement in such cases.

"We have now begun that process with the small number of Scottish patients in a similar position to those affected by the English ruling. Solicitors acting for NHSScotland have today contacted the legal representatives of those patients involved. Discussions and investigations on individual settlements will begin almost immediately. This will necessarily involve checking that the actions are legally competent and the relevant facts can be proved.

"Our decision will not please everybody. There are many others who have been similarly affected by this debilitating disease but who fall outside the scope of the recent English court ruling. No doubt some will choose to raise actions through the Courts. Others – including individual patients, patients' groups and politicians - will ask us to go further. But the question is how far?

"This is a legitimate area for public debate. The fact is that the law, policy and practice is continually evolving and developing and I welcome open and constructive debate around this issue. Much has been made, not least in the Parliamentary Health Committee, around the debate on 'where to draw the line' on compensation in the NHS. No consensus exists and I believe, as politicians, we must be careful not to reach judgements which might seem 'fair' to some but manifestly 'unfair' to many. We must also avoid taking short-term decisions without thinking through the long term implications. Today's announcement seeks to strike a balance. I believe it is the right one."

The Minister also announced plans to improve the way that patients can seek redress when they are dissatisfied with their treatment or care in the NHS.

"At present we have a complaints system that too many find too cumbersome to use. Apart from that, patients have recourse to the law, which can be just as cumbersome, much more expensive in terms of legal fees, and far more stressful.

"I want to explore new ways of making the system faster and fairer where the people affected have a legitimate legal claim, for example where there has been negligence by NHSScotland or a breach of the legal duties imposed by the Consumer Protection Act. A middle way where we look at conciliation and mediation as serious alternatives to the courts.

"We will shortly publish a major evaluation of the NHS complaints system, with a view to bringing in a new and more flexible system next year. One central strand of that new system will be enhanced conciliation services within the NHS complaints framework. The Executive is also supporting the current work of the Royal Society of Edinburgh to explore the scope for using mediation to resolve patient disputes."

NOTES FOR NEWS EDITORS

1. A fact sheet on this issue is available for the media by telephoning 0131-244 2968.
2. All those claimants who have raised an action under the CPA alleging that they received blood from the Scottish National Blood Transfusion Service (SNBTS) after 1 March 1988 that was

contaminated with Hep C will today be contacted through their solicitors.

3. An evaluation of the current NHS complaints system is being carried out on a UK basis and will be published shortly. As set out in the Scottish Health Plan, Our National Health, a reformed NHS complaints system will be introduced in Scotland in 2002. It will include, for the first time, conciliation measures to help resolve disputes.

4. The Royal Society of Edinburgh has drawn together a wide-ranging group to review the use of mediation in the NHS in Scotland. The group, which includes representation from NHSScotland, the BMA, the voluntary sector, and the legal community will report with recommendations by end January 2002.

-----Original Message-----

From: Dudgeon, Jeff [mailto:Jeff.Dudgeon@GRO-C]

Sent: 03 October 2001 14:30

To: 'Bob Stock'

Subject: Hepatitis C compensation

Sensitivity: Confidential

This email has been received from an external party and
has been swept for the presence of computer viruses.

Bob

Thanks for this. The press release of 24 August that you mentioned however was not present. Can you email to me please?

Do you think that the issue will get on the 22/10 agenda given that London will not have concluded their deliberations by then?

Is the ten year barrier being brought down absolutely to exclude such claimants in Scotland?

Jeff

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Falconer S (Sandra)

From: Falconer S (Sandra)
Sent: 22 October 2001 16:13
To: Macrae B (Barbara)
Subject: RE: HepC from blood transfusion

Barbara

Following consideration of the judgement issued in the High Court in London in the case of A & Others V National Blood Transfusion Service and others the Central Legal Office (CLO) has been instructed on behalf of NHSScotland to:

- identify analogous actions in which proceedings have been raised in Scotland in terms of the Consumer Protection Act 1987 in which alleged transmission of the Hepatitis C virus by blood product would appear to have occurred on or after the date the Act came into force on 1 March 1988.

Where claims meet all of these criteria CLO has been instructed to carry out substantive investigations with a view to establishing legal liability. These investigations would include consideration being given to the issue of prescription and limitation actions in terms of the Consumer Protection Act 1987.

The Executive is anxious that where people have been harmed by NHSScotland activity and have a legal claim, for example where there has been negligence or a breach of the legal duties imposed by the Consumer Protection Act, that they receive financial recompense with minimum delay and distress. However the Executive does not believe that the NHS should introduce a 'no-fault' type compensation scheme in situations where there is no legal basis for it being at fault. This policy is consistent with that of current and previous UK administrations.

I hope this is helpful.

Sandra

-----Original Message-----

From: Macrae B (Barbara)
Sent: 16 October 2001 17:18
To: Falconer S (Sandra)
Subject: FW: HepC from blood transfusion

Sandra

Received your Out of Office reply. Spoke to Dr Smellie and she will tell the enquirer that we will get back to her next week on your return from leave. Grateful for your advice asap after your return.

Thanks.

B

Sandra

Is this your area? If so, can you help.

Thanks.

Barbara
x42804

-----Original Message-----

From: Maida Smellie [mailto:SmellieM@GRO-C]
Sent: 16 October 2001 16:58
To: 'Barbara.Macrae@GRO-C'
Subject: HepC from blood transfusion

This email has been received from an external party and

has been swept for the presence of computer viruses.

Barbara,

Can you tell me how someone infected with hepC after blood transfusion
claims compensation? or has no decision been reached yet?

Maida

This email has been scanned for viruses by the MessageLabs SkyScan service.

For further details, please see http://www.gsi.gov.uk/main/gncnotices/gncinformationnotice5_2001.pdf.

In case of problems, please call your organisations IT helpdesk.