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*From the Secretary of
State for Health*

25 October 1990

Dear Sir,

COMPENSATION FOR MEDICAL INJURY BILL

Ms Harriet Harman proposes to present to the House on Thursday
25 October a Bill under the long heading:

"COMPENSATION FOR MEDICAL INJURY: Bill to provide that persons injured as a result of mishap during treatment by the National Health Service may be awarded compensation without having to prove negligence on the part of the National Health Service; to define eligibility for compensation; to establish a Medical Injury Compensation Board and to make other provisions for the assessment of eligibility and payment of compensation; and for connected purposes."

The purpose of the Bill appears to be the provision of 'no fault' compensation for victims of medical accidents in the National Health Service as an alternative to the present system whereby compensation for such victims would be dependent upon proof of negligence in a Court of Law.

The question of a possible 'no fault' compensation scheme for personal injuries resulting from medical accidents was reviewed by the Royal Commission on Civil Liability and Personal Injury in 1978 (the Pearson Report). The Commission found that a major difficulty in administering such a scheme would be distinguishing medical accidents from the natural progression of a disease or injury or from a foreseeable side-effect of treatment. It concluded that such a compensation scheme should not be introduced in this country at present and recommended that negligence should continue to be the

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basis of liability for most medical injuries. The recommendation has remained the justification of the Government's line that negligence should continue to be the criterion for compensating medical injuries.

In spite of the Pearson recommendation the question of 'no fault' compensation continues to be a topic which attracts some support from both sides of both Houses. I enclose at Annex A a list of some of the significant recent occasions on which the matter has been brought before Parliament.

We are well aware of and sympathetic to the case which is made out by the supporters of 'no fault' compensation. The principal argument in favour of a 'no fault' scheme is that reasonably standard compensation, probably on a continuing basis could be provided more promptly and at lower administrative cost than the present fault-based system. Advocates of 'no fault' compensation also see this as a means of reducing adversarial conflict between doctors and their patients and of overcoming delays allegedly inherent in the tort system.

In my opinion the arguments against 'no fault' remain overwhelming and I am unaware of any new arguments which have been brought forward since Pearson. In practice a 'no fault' scheme is likely to prove more expensive as, compared with negligence claimants, the potential pool of claimants will be very much enlarged. Assuming that it would be necessary to cap total expenditure the resultant levels of compensation will be very much less than are currently available through the Courts and may prove in some cases to be inadequate. Ms Harman's Bill would certainly be of no value to people such as the haemophiliacs with AIDS who could expect to receive, under a national 'no fault' scheme, much less than the average £28,000 already offered. Further, it would introduce new unfair differentiation between different categories of sufferer, so that, for instance, those injured in medical accidents in NHS hospitals need not prove fault, whereas other victims receiving private care treatment would have to so prove. There will also be inequities in dealing with other sufferers whose needs may be compensated through proof of fault eg a traffic accident victim who would receive some and those born with a congenital handicap or suffering from a deterioration in illness who might have similar needs but who would receive none. To help overcome some of the perceived criticisms of the tort system, initiatives have already been introduced which will ease the passage of action for compensation through the courts, and will provide a greater openness on the part of health authorities, hospitals and medical staff about errors in treatment through allowing greater access to medical records and improving the procedures to be followed when complaints are made.



It is clear from the annex to this letter and recent media comment that the concept of 'no fault' compensation enjoys wide support within and without Parliament and from our own supporters as well as those from the opposition. It is likely that Harriet Harman will attract some if not all of this to her cause. She will also be supported by significant elements of the medical and nursing professions and by various consumer organisations.

There is no time in the remainder of the session for the Bill to come up for Second Reading. But there is every likelihood that it will be raised again at the next session - possibly in consequence of the ballot for private members' Bills. I therefore think it is imperative that we settle now our approach which I recommend should be that we maintain our line that the basis for seeking compensation for injuries alleged to have been suffered as a result of medical intervention should be by negligence actions through the courts. I also recommend that should a similar Bill be introduced in the new session that arrangements should be made to block it at an early stage.

I am copying this also to the members of L Committee, to the L Committee Secretariat, to Sir Robin Butler and to First Parliamentary Counsel.

GRO-C

KENNETH CLARKE

SOME RECENT OCCASIONS WHEN COMPENSATION FOR
MEDICAL INJURY ISSUES HAVE BEEN BROUGHT BEFORE PARLIAMENT

Sir Michael McNair-Wilson	EDM	March 1987
Lord Allen of Abbydale	PQ	May 1987
Lord Allen of Abbydale	PQ	July 1987
Sir Michael McNair-Wilson	(PM)PQ	July 1987
Sir Michael McNair-Wilson	EDM	October 1987
Viscount Hanworth	PQ	November 1987
Sir Michael McNair-Wilson	Adjournment Debate	December 1987
House of Lords	Debate on NHS	March 1988
Jack Ashley	PQ (NFC-Drug Damages)	March 1988
Jack Ashley	Compensation Advisory Board Bill	March 1988
Lord Scarman	Citizen Action Compensation Campaign	May 1988
Neil Kinnock	(PM))PQ	July 1988
Elliot Morley	Adjournment Debate	December 1988
Lawrence Cunliffe	Citizens Compensation Bill	March 1989
James Cran	PQ	July 1989
Harriet Harman	Standing Committee E re NHSCC Bill	February 1990
Sir Michael McNair-Wilson	EDM	October 1990