

POLICY RESTRICTED

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From: Briony Enser HSD2

Date: 2 July 2001

~~YVETTE~~ - BRIEFING AS REQUESTED ON
HAEMOPHILIACS - ADDITIONAL

BRIEFING IS AVAILABLE FROM OFFICIALS

cc: See attached

- ARE YOU CONTENT WITH PQ'S + CORRESPONDENCE
ATTACHED. MONTY 2/7

HAEMOPHILIACS INFECTED WITH HEPATITIS C BY BLOOD PRODUCTS

Purpose

1. As requested, to provide a position paper on the above, in the light of the recent High Court judgement which awards damages to people infected with hepatitis C through NHS blood transfusion and to outline the options for action.

Summary

- until the mid 1980s, when heat treatment of blood products became possible, most haemophiliacs were infected with HIV or hepatitis C, sometimes both, through contaminated blood products supplied by the NHS;
- in the late 80s, those haemophiliacs with HIV were awarded ex-gratia payments and the Macfarlane Trust was set up to provide continued support;
- for the past 10 years haemophiliacs with hepatitis C have campaigned for compensation on the same basis as those with HIV. Ministers argued that the payments to haemophiliacs with HIV were exceptional, as in the late 80s everyone with HIV was expected to die (victims of hepatitis C were not);
- since Ministers last reviewed their position, the High Court has awarded no fault compensation under the Consumer Protection Act 1987 (CPA) to a group of people infected with hepatitis C by blood transfusion (a hepatitis C screening test was not introduced in the UK until 1991). No haemophiliacs were in the group action because most, if not all, were infected before the CPA came into force;
- Although this judgement only places a legal obligation on Government to make payments to those awarded damages by the Courts, it introduces further questions of inequity and increases the moral pressure to do so.

Timing

2. ~~Urgent~~. There is considerable parliamentary concern on this issue. Lord Morris the President of the Haemophilia Society and a number of backbench MPs regularly raise questions in both Houses.

3. In addition, Susan Deacon plans to announce an out of court settlement for Scottish litigants on 6 July on the basis of the English High Court judgement. This statement will make it clear that payments will be made only to people who qualify under the CPA (ie. not haemophiliacs or others infected before the CPA was in force).

4. The Haemophilia Society are maintaining a high profile campaign and calling again for a Public Inquiry. Ministers have undertaken to give the Judgement careful consideration. Lord Hunt replied to the most recent letter from Chris Hodgeson, Chairman, of the Haemophilia Society in May to this effect. He also advised that Ministers would need time after the Election to review the accumulated information about haemophiliacs with hepatitis C and would then consider meeting the haemophiliac community again.

Background

Infected Haemophiliacs

5. Around 4000 haemophiliacs were infected with hepatitis C through blood products before heat treatments to inactivate the virus were introduced. In 80% of infected cases no serious illness ensues. However, the other 20% develop serious disease that can cause cirrhosis and cancer. Some 120 have already died. The Haemophilia Society is seeking a Public Inquiry, ex gratia payments and a hardship fund for the victims. Since awards were made to the haemophiliac victims of HIV/AIDS, they have sought parity for the victims of hepatitis C.

6. Officials last met with the Haemophilia Society on 27 June when the Society indicated that they were drawing up more detailed proposals for a hardship fund to support infected haemophiliacs. This is the first movement in their position to date and indicates that a more modest settlement might end the campaign than had previously been thought.

High Court Judgement

7. Mr Justice Burton gave the judgement in the High Court on 26 March in favour of 117 plaintiffs in a group action against the National Blood Authority (NBA). The plaintiffs alleged that blood that they were given in transfusion was a defective product under the Consumer Protection Act 1987 (CPA) because it infected them with the hepatitis C virus.

8. The Judge held that the NBA is liable to all the 117 claimants. Preliminary damages are estimated at £7.5m. (comprising "no fault" compensation awards, out-of-court settlements and claimants' costs). Additional damages will arise when any claimant's condition deteriorates in future as a result of the infection.

9. Prior to this judgement, Ministers in the current and previous administrations have taken the view, over some 10 years, that in the absence of negligence, compensation was not payable. The Judgement states that if a product (in this case blood and blood products) is deemed to be defective then the producer is liable, whether or not there has been negligence.

10. These findings have the potential to be far reaching across the NHS. However, Ministers accepted the NHSLA's advice not to take the case to appeal, as the chances

of success were slim, the costs would escalate and this would have become a high profile appeal. Further consideration of the wider impact on the NHS will be the subject of a separate submission.

11. Haemophilia pressure groups have been quick to seize on the Judgement and use it to exert further pressure on the UK government and Devolved Administrations. The haemophiliac Society has claimed that a "moral precedent" has been set and we can anticipate that sympathetic MPs will reflect this in their lobbying/PQs etc.

Discussion

No fault compensation

12. Ministers' established view is that *as a general rule* the NHS should not pay "no fault" compensation, that is, compensation for non-negligent harm, to patients caused by NHS treatment. Nevertheless, the Judgement imposes a strict product liability regime for injuries caused by NHS products after the introduction of the CPA. This being so, compliance with the Judgement means paying compensation for non-negligent harm, which will be seen as conflicting with previous government policy. This inevitably raises the general principle of such payments.

13. Exceptions to the general rule already exist, e.g. in the payment schemes for HIV/AIDS and vCJD. However, these schemes for non negligent harm were agreed only in exceptional circumstances. While any further instances of payment for non negligent harm in the NHS will not necessarily erode the general rule, it will be important to re-emphasise the Government's own parameters for such payments to contain any impact on the NHS.

Inequitable outcomes

14. The CPA Judgement is not designed to deal equitably with all the patients infected with Hep C by blood or blood products, nor to align with the Government's position. The circumstances of the claimants are in no way exceptional. Rather, the CPA Judgement provides a limited time period for potential claimants. The claimants in the Judgement were given an easily identified blood transfusion in the narrow qualifying period. Other potential claimants, may be unable to ground a claim. Infected haemophiliacs in particular were probably infected with Hep C before the CPA came into effect on 1 March 1988.

15. The narrow window that the Judgement provides for claims means that:

- some infected people (who may not be ill) *will* qualify;
- some infected people (who may be terminally ill) *will not* qualify;
- it will not end the campaign on behalf of infected haemophiliacs;
- it will intensify the campaigning on behalf of others infected.

16. These are foreseeable and undesirable outcomes. Meeting the claims of those who do qualify under the Judgement will involve the Government in significant financial outlay, as above, but this will not resolve the long-standing problem of other patients, like haemophiliacs, infected with Hep C by blood. Any action will need to be taken in the light of the needs of those others infected.

Options

17. There are five main options for action:

- i. Do nothing (This, like all the options, entails compliance with the letter of the CPA Judgement and the legal precedents that it sets)
- ii. Public Inquiry, lump sum and hardship fund for all haemophiliacs infected with Hep C by blood
- iii. Lump sum and hardship fund for all haemophiliacs infected with Hep C by blood and low key Inquiry,
- iv. Lump sum and hardship fund for all or some haemophiliacs infected with Hep C by blood
- v. Hardship fund for haemophiliacs infected with Hep C by blood and who have severe liver disease

These options are set out in full in the attached options paper.

18. If Ministers wish to consider making payments to haemophiliacs with hepatitis C, Option v is recommended because it:

- a. re-establishes the Government's stance on no fault compensation (i.e. singular, exceptional cases only);
- b. provides an equitable outcome for haemophiliacs in a way that the Judgement does not;
- c. effectively defuses the campaign on behalf of all haemophiliacs by targeting only those as sick as the victims of HIV/AIDS;
- d. entails relatively modest costs.

19. Any decision will impact on the Devolved Administrations and will need to be made in conjunction with them. Ministers are asked for a decision before the recess.

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