Briefing for the Public Petitions Committee

Petition Number: PE1253
Main Petitioner: James McNeill
Subject: Calls on the Parliament to compel the Scottish Government to establish a discretionary compensation scheme to provide redress to persons who suffered injury due to negligent medical treatment prior to the establishment of the NHS.

Introduction

This petition raises several issues including: the 3-year limitation period for personal injury damages actions, vicarious liability, the duty and standard of care in medical negligence and no-fault compensation mechanisms.

Limitation

Under the Prescription and Limitation (Scotland) Act 1973 (c.52), damages actions for personal injury must be commenced within three years of the injury. The petitioner's claim would be time-barred, although there is scope for judicial discretion in the application of the 1973 Act.

Vicarious liability

Ordinarily NHS Trusts bear the legal liability for the acts and omissions of staff in their employ. In terms of the petition, however, prior to the establishment of the NHS, the work done would be analogous to the liability of private practitioners or hospitals. There would appear to be no vicarious liability for a doctor carrying out private work within a National Health Service hospital. This is because the contracts in place “do not give rise to an employment relationship”, which is a necessary element for vicarious liability to arise.

Negligence

Discussion of medical negligence draws on principles of negligence generally and professional negligence in particular. Medical negligence falls within the law of delict and the delict of negligence as applicable to the medical professional in the clinical context.

In the classic judgment of Hunter v Hanley, Lord President Clyde found that the test is whether the doctor was, “guilty of such failure as no doctor of ordinary skill would be guilty of if acting with ordinary care.” Where a deviation from ordinary practice has been alleged, it must be established that

1 as substituted by the Prescription and Limitation (Scotland) Act 1984 (c 45)
(i) there is a usual and normal practice, (ii) it was not followed and (iii) that the course the doctor adopted is one which no professional man of ordinary skill would have taken if he had been acting with ordinary care. If the breach of the standard of care is established, the pursuer must prove that the breach caused the injury suffered.

**Gross negligence**

There are no longer any degrees of negligence. Although the petition considers the use of the term ‘gross negligence’, a medical practitioner making an assessment of ‘gross negligence’ on 26 August 1942 (when the petitioner underwent his operation) would not have had the same applicability as such an assessment made by a judge, or one made after the judgement in *Hunter v Hanley*, which rejected ‘gross negligence’ as the basis of liability in medical negligence claims.

**Historical Hurdles**

There may be a conceptual problem in the terms of the petition: judging a set of facts from 1942, based on a test for medical negligence judicially developed in 1955, particularly as courts must assess the reasonableness of the doctor’s acts, and the state of his medical knowledge, as at the time they were committed and not at the time of the court action. However, in Scotland the law on medical negligence was originally a branch of the doctrine of *culpa* or fault, that comes from Roman law. For example Justinian’s *Institutes* states, “Lack of skill also counts as fault, as where a doctor kills your slave by operating on him badly or by giving him the wrong medicine”.

In *Dickson v Hygienic Institute* [1910] it was held that where a person professes to have a high skill as a dentist, then in carrying out dental treatment, he must display at least the same standard of skill as other members of the dental profession. In other words, it is academic that the benchmark test post-dates the petitioner’s case.

All of the above on limitation and negligence is relevant to the petitioner’s argument that discretionary redress be provided to victims of negligence. But in effect the petitioner seeks a discretionary form of compensation in which the element of fault (*culpa*) does not require to be proven.

**Strict Liability and No Fault Compensation**

It is important first to distinguish no-fault compensation from strict liability. Strict liability refers to a set of criteria the fulfilment of which will lead to a successful claim under the terms of the statute. The most relevant example is the Consumer Protection Act 1987 for damage caused by ‘products’. It requires proof that the product was ‘defective’. In the English courts this was held to apply to blood products, in *A v National Blood Authority*, in which those infected with hepatitis C from blood transfusions received compensation.

---

5 Justinian *Institutes* 4,3,7, 8 (trans P Birks and G MacLeod, cited in Earle, M & Whitty, NR, “Medical Law” in *Stair Memorial Encyclopaedia* para 164. 2006).
6 *Dickson v Hygienic Institute* 1910 SC 352, 1910 1 SLT 111.
7 *A v National Blood Authority* [2001] 3 All ER 289, 60 BMLR 1.
from the Blood Authority. The Scottish Executive moved to settle analogous claims out of court.

No-Fault systems apply to issues which would ordinarily be dealt with under the law of negligence, but which, under the statute or scheme, do not require proof of fault. There are several examples of such mechanisms:

The Vaccine Damage Payments Act 1979 (c.17) provides for lump sum payments where a person has suffered death or severe disablement from a prescribed vaccine on the statutory list. There is no need to prove fault or negligence, but causation must be established. An initial decision on claims is made by the Secretary of State (Department for Work and Pensions); if refused, there is a right to review by the vaccine damage tribunals; decisions of the tribunals are conclusive, but subject to judicial review.

Scottish Parliament Action

The Health and Community Care Committee considered that exclusion of some Hepatitis C patients from the Consumer Protection Act 1987 was unfair. They were excluded because the 1987 Act came into force in 1988 and its terms are not retrospective, and because claims under the Act are time limited to within ten years from the date of treatment. The Committee recommended that ex gratia financial and other practical support should be made available from public funds. However, the Scottish Executive considered that this recommendation deviated from the principle that the NHS does not pay when it has no legal liability for the harm suffered. Following the Health Committee’s Report on Hepatitis C Compensation, an Expert Group was set up under the convenorship of Lord Ross, to consider compensation mechanisms and the issue of contracting Hepatitis C from contaminated blood transfusions administered by the NHS, and to do so in context of no-fault compensation.

Under the Smoking, Health and Social Care (Scotland) Act 2005 (asp 13) Scottish Ministers may make a scheme for the making of payments in respect of two categories of persons. The first is those who before 1 September 1991 received blood or blood products in the NHS and as a result became infected with Hepatitis C and did not die before 29 August 2003. The second is those who were infected through contact with someone who before 1 September 1991 was treated in the UK using blood or blood products in the NHS and as a result became infected with Hepatitis C. The claimant must at the time of transmission have been in one of the relationships mentioned in the 2005 Act (spouse, cohabitee, etc.); and not have died before 29 August 2003.

Recent Scottish Government Action

On 12 January 2009 it was announced that there would be a full judicial public inquiry on the issue of Hepatitis C and HIV infection from blood products, chaired by Lord Penrose.

In addition, the Scottish Government conducted a Patients’ Rights consultation, which ran until 16 January 2009. Among other issues, the Consultation paper acknowledged that a no-fault compensation scheme could be simpler than existing processes and indicated that it would explore whether

---

a no-fault compensation scheme may be the way forward. However, the Report of the Expert Group on Financial and Other Support,\(^9\) while recognising that such a system may have advantages, including speed and reduction in legal costs and stress on complainants and health professionals, also emphasised that there are major difficulties with no fault compensation as it ignores the important issues of accountability and quality of care.

12 May 2009
Murray Earle
Senior Research Specialist

---