Hepatitis C as medical misadventure

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Editorial

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On Mar. 27 Health Minister Allan Rock announced, with appropriate media fanfare, a $1.1 billion compensation package for "victims" of hepatitis C. The package included compensation for lost income, medical expenses not covered under provincial health insurance schemes, and pain and suffering. The offer was limited to those who contracted the disease through transfusion of infected blood or blood products between January 1986 and July 1990, a period when the Red Cross was not screening donor blood for hepatitis C even though surrogate tests were in use in the US. Although the health ministers may feel proud of their efforts we must not forget that the Red Cross and the federal government were mainly responsible for the fiasco. Paying compensation now may prevent future lawsuits.

Now there is the problem of the estimated 20 000 Canadians whom the blood supply managed to infect before 1986 (when there was no screening test) or after July 1, 1990 (when screening was implemented). These cases were not preventable, and Rock does not want to use general tax dollars to pay compensation. These "victims" are disappointed and outraged. The provinces are breaking rank and, at the time of writing, Quebec, Ontario and BC had voiced their determination to push for a new deal for all the victims of hepatitis C. The deficit is gone; Ottawa has deep pockets. So why not pay up?

Why not? Because to offer compensation for a medical treatment gone wrong — a misadventure — would open the federal treasury and taxpayers' pockets to a whole range of other legitimate cases. The treatment of illness is heavy with risk. When personal injury results from the competent treatment of a disease, we call this medical misadventure. If compensation is to be offered to hepatitis C victims, then in fairness it should be offered to all Canadians who suffer a medical misadventure. To do this we would have to set up a medical misadventure compensation fund, as New Zealand did in 1974.

In New Zealand a medical misadventure might be said to occur if a child given antibiotics for a serious illness has an anaphylactic reaction and suffers brain damage. Such an outcome would not be the result of the disease (for which there would be no compensation) but an unintended and unpredictable consequence of a necessary medical treatment. As in Canada, such patients would receive "free" medical care, but in New Zealand they would also be compensated for lost income and expenses not covered under the health insurance plan. In Canada a medical misadventure is just bad luck, and not the responsibility of society at large.

Few countries have adopted the New Zealand plan. Observers have been wary of its financial cost to society and of the lack of incentive that no-fault schemes may give to employers, manufacturers and, for that matter, health care professionals to concern themselves with safety standards. There are also definitional problems. Deciding what constitutes an "accident" can be tricky and may lead to judgements about individual cases that seem unfair. There is also the problem of agreeing on what outcomes are sufficiently severe to warrant compensation, as well as which are sufficiently rare: the adverse event cannot be a foreseeable side-effect of therapy, nor can it be so rare that there is substantial doubt of it having been caused by the treatment in the first place. *British Medical Journal* Editor Richard Smith concluded in the early 1980s that, aside from the knotty definitional problems that are bound to arise, most of these pitfalls are more hypothetical than real and that the system appears to be working — mostly without the help of lawyers.[1–3] His brief series of articles still provides a cogent introduction to the

scheme, and interested readers can also investigate the Web site of the New Zealand's Acccident Rehabilitation and Compensation Insurance Corporation (**www.acc.org.nz**).

In Canada we also have compensation plans, some of which are paid for by taxpayers (Table 1). Thus if you are injured in a car accident, at work or as a result of vaccination, you can receive compensation by applying to the appropriate insurer or government agency. However, medical misadventure can be eligible for compensation if the event resulted from malpractice and the patient is rich enough (or poor enough) to seek redress through the courts. As for other medical misadventure, Canadian governments have limited their involvement to compensating people who have severe adverse reactions to vaccination. In this case, the rationale is the need for "herd immunity." Protection from disease by vaccination is achieved only when almost everyone in a population is vaccinated. Vaccination is required as part of one's dues to society (some provinces require it before school entry), and so it follows that the very few unlucky individuals who suffer adverse effects should be compensated from general tax revenues.

In drafting the New Zealand compensation legislation, care was taken to exclude the effects of an illness itself; thus, infectious diseases and their consequences, any normal consequence of a disease or condition, and deterioration caused by the general effects of aging are covered by the health care system but are not compensated. Accidental injury is included, however, as are what we might call the accidents of being a patient — that is, the untoward events that may occur in the course of necessary treatment. A rock climber who hits her noggin in a fall but survives in a coma would be compensated, as would an elderly woman who experiences intracerebral bleeding after being given heparin during hemodialysis. But the elderly woman in the next bed who has spontaneously suffered a stroke will not. To some, this exclusion of illness and disease from the realm of the accidental may seem arbitrary.

It is worth noting that the amounts awarded under the New Zealand plan are relatively modest. If Canada were to adopt such a system, compensation for medical misadventure could easily mimic the amounts usually awarded in our no-fault accident plans and in workers' compensation programs. These amounts are reasonable and allow people to live comfortably with their disabilities and illnesses.

Now to apply the New Zealand model to the victims of hepatitis C. If you had a bleeding ulcer and received blood contaminated with hepatitis C you would, under the New Zealand plan, presumably be compensated for any subsequent illness. Your misfortune would meet the criteria of rarity, unforeseeability and severity. But Canada does not have a medical misadventure insurance plan, still less an established and sustainable fund from which to draw compensation payments. Had we heeded Justice Horace Krever's recommendation to institute a no-fault insurance plan and compensation for all present and future victims of "tainted blood," the anguished debate surrounding the government's responsibilities toward the victims of hepatitis C could have been avoided. Given the constraints of our present system, the health ministers' decision to reject special compensation for all victims is responsible and rational. But such a conclusion is cold comfort to those who were not merely unlucky, but unlucky at the wrong time. Surely one way out of this impasse is to enact legislation for an insurance compensation scheme for medical misadventure.

References

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2. Smith R. Problems with a no-fault system of accident compensation. *BMJ* 1982;284:1323-5.
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Table 1: Compensation plans in Canada

Type	Prerequisite for compensation	Source of funding
Motor vehicle accident	No-fault: no proof of negligence needed	Vehicle owners' insurance premiums
Workers' compensation	Injury or illness is related to employment	Employers; general government revenues*
Vaccination adverse event	Serious illness is the result of a required vaccination	Provincial government
Medical malpractice	Injury or harm is the result of negligence by physician or the health care system	Malpractice insurance premiums; general government revenues*
Medical misadventure†	Injury or harm is the result of the competent treatment of illness	Federal government

*Because insurance premiums are a tax-deductible expense of doing business, the resulting tax savings to employers and physicians can be seen as a contribution of government toward the cost of the insured programs.
†Hypothetical.