

69

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HIV/HAEMOPHILIA CLAIMS IN SCOTLAND

I refer to my note to you of 9 January in which I promised that I would write to you with comments on the draft Proposed Details of Settlement for Scotland. I am attaching with this note a revised draft and the comments which I make in this note relate to that draft.

The first issue which I approach was whether or not we could use the terms of the English detailed terms of settlement and simply add an appendix or schedule or adaptation provision to apply them in Scotland. However it seemed that those Detailed Terms of Settlement (which I refer to as the English Settlement) are so closely bound into the English litigation that I thought it best to start again and provide a complete set of Detailed Terms of Settlement for Scotland alone, relying where possible on the wording of the English settlement, and indeed not changing it unless I thought it necessary.

In going through the detailed terms of settlement the paragraph numbers that I use refer to the paragraph numbers of the draft attached.

1(1) This is simply an introduction.

1(2) What I have done here is to take the definitions which are included in the proposed trust deed and to use them rather than the definitions as they appear in paragraph 1(3) of the English Settlement draft of 7 January. My view is that the substance of the definitions is the same but the layout makes it clearer. Thus the definitions of infant, single adult, married but childless, and intimate are as they appear in the trust deed with the exception that in relation to "married but childless" I have not referred to "stable relationship" but have rather referred to "not married to the person with whom he is living together as husband and wife". There is no statutory definition of stable relationship anywhere but what I have done is to go to the Social Security legislation to get an idea of what I think is meant in the English Settlement draft. I should say as well that you will see at the end of 1(2) in the Scottish draft that I have restricted references to husband and wife so that they refer only to heterosexual relationships so that there is no possibility of any homosexual relationship qualifying in the "married but childless" category. It may be that you think this is provocative and might be taken to imply some prevalence of homosexual relationships which might otherwise be a source of HIV infection. I do not think there would be any great loss if that part of the definition were to be deleted but it is in at present for the sake of completeness.

"Children" is the subject of a definition within the definitions section and it is defined in terms of minor or pupil child. We cannot refer either to adult children but I think it is quite proper to refer to persons over the age of 18 in full time education to bring you within the same category.

So far as "intimate" is concerned the definition in the English Settlement draft of 7 January is heavily dependant on the terms of the English

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litigation as is the definition of "category G". I went to the trust deed and also to the English litigation papers to get the definition of intimate and category G. I have not come up with a better term than "category G" although it is patently meaningless for Scotland other than as a code. I am not sure whether we have anybody in any event who would come within the category G class.

There is no definition for the MacFarlane Trust yet.

1(3) This is derived from 1(1) of the English Settlement. I have used the reference to "infant" which may well be a term of art in English Law but has no significance for Scots Law. However I think it is probably appropriate to use the same terms since we are dealing with a UK settlement.

2(1) This is derived from 1(2) of the English Settlement draft. The main change is to set out that the trust purposes include paying not only to individuals but also in respect of them since the definitions of the individuals include those individuals deceased. For that reason I have left out the first sentence of 1(5) of the English Settlement draft since our definitions of the various classes of infant, single adult etc include reference to those individuals whether alive or deceased and in the latter case obviously the payment would be made to the executors.

2(2) This takes in the second sentence of what was 2(5) of the English Settlement draft.

2(3) Because 2(6) of the English Settlement draft applies I think to require the Government to top up the MacFarlane Trust if the numbers of persons qualifying in any category exceed the numbers in 1(3) of the Scottish draft I thought it best to put the provisions of 2(6) of the English draft at the end of paragraph 2. Accordingly 2(3) of the Scottish draft is effectively 1(7) of the English Settlement draft with changes.

2(4) This is derived from 1(8) of the English Settlement draft. There are words in that paragraph that are frankly very difficult to understand. For example the first paragraph in 1(8) of the English draft refers to application of MacFarlane Trust provisions to certain persons who have not "as yet" been informed of something.

As to the classes of spouses etc in 1(8)(2) of the English Settlement draft I have taken the listing within Schedule 4 or Schedule 10 to include in particular persons in stable relationships again. I have avoided using that term but a question does arise as to whether or not there is some time limitation so that the stable relationship must have been one which subsisted as at 13 December.

So far as categories 3 and 4 in 1(8) of the English settlement draft are concerned I have restricted those so that the haemophiliac in question is comprised within any of the categories listed in paragraph 2(1) of the Scottish draft. I do not think that it is any haemophiliac whose child may benefit in terms of these proposals but only an HIV haemophiliac and then again only one who has had Factor VIII, Factor IX or cryoprecipitate treatment.

2(5) I have taken the proviso of 1(8) of the English Settlement draft and put it into a separate paragraph and I have also broken down the constituent elements.

2(6) This is a reworking of 1(6) of the English Settlement draft.

3. This reflects with some modifications the terms of paragraph 2 of the English Settlement draft.

4. I have not looked at the mechanics by which the sums received from the MacFarlane Trust will be ignored in assessing entitlement to Social Security benefits. If I am correct in thinking that regulations govern the assessment of entitlement to Social Security benefits then in order to secure that certain sums are ignored provision will have to exist already in Social Security regulations to allow sums generically akin to MacFarlane Trust payments to be ignored, or alternatively specific provision will require to be made. If specific provision requires to be made then that will be by way of regulations and all that Government can do is lay those before Parliament. It would not be possible or at least would be singularly unwise to make provision that such sums will be ignored.

I should say also in relation to paragraph 4 that I have taken what I take to be the first option and use that rather than set out at length the various options set out in 3(1) (2) (3) and (4) of the English Settlement draft.

5. This is a reworking of paragraph 4 of the English draft.

6. This is a reworking of paragraph 5 of the English draft. I am not sure whether we need the bit in square brackets ie the final sentence. We will need some definition of what is meant by a medical negligence claim. I have made a stab at this in a revised 6(2).

7. This is an amalgam of all the undertaking provisions in the English Settlement draft which appeared in paragraph 8 of the English Settlement draft.

8. This is derived from paragraph 6 of the English Settlement draft.

9. I think that this one will have to be struck out completely. It is derived from paragraph 7 of the English Settlement draft but is in my view wholly unacceptable to the extent that it would involve the Secretary of State in statutory duties of the Legal Aid Board.

10. I think we will have to discuss with you at some length the expenses provisions which are to be included in the draft.

11. This is a lift from 9 of the English Settlement draft.

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