Scottish Office and SHHD Decision-Making: Addendum Note

Undertakings in the HIV Haemophilia Litigation and Blood Transfusion Scheme

I. INTRODUCTION

1. This note is an addendum to the presentation note on Scottish Office and Scottish Home and Health Department ("SHHD"), which was the subject of an oral presentation on 21 September 2022.

2. Its main purpose is to provide further detail on a feature common to the HIV haemophilia litigation settlement and the blood transfusion and tissue transfer scheme: the requirement to provide an undertaking not to bring certain claims in the future in order to receive a payment. It focuses on the following issues in particular:

    a. Whether the Scottish undertaking in the HIV haemophilia litigation required individuals to waive the right to bring future claims related to HIV and hepatitis infection, or only HIV.
    b. The development of an equivalent undertaking in England and Wales, and how any difference in scope between the two jurisdictions came about.
    c. The mechanisms by which the HIV litigation undertakings in Scotland and in England and Wales worked.
    d. The scope and nature of the undertaking in the Scottish blood transfusion and tissue transfer scheme.

II. THE HIV HAEMOPHILIA LITIGATION

3. This section describes the development of the undertakings for Scotland and England and Wales in the HIV haemophilia litigation. It does so chronologically across the two jurisdictions and, while it focuses on Scotland, it also sets out material of more direct relevance to England and Wales. That is in order to compare the structure and substance of the undertakings in the two jurisdictions, and because developments in England and Wales were closely linked to those in Scotland.

4. This chronological narrative should be read alongside the appendix to this note, which sets out relevant provisions from the HIV settlement terms in England and Wales, from the equivalent terms in Scotland and from the Macfarlane Trust (Special Payments) (No.2) deed ("the MFT No.2 deed"). The appendix does not set out relevant provisions from every iteration of those documents; instead, it is intended to assist with understanding how they changed over time.

Initial drafting of the MFT No.2 deed and settlement terms

5. By December 1990, Department of Health ("DoH") officials had begun circulating draft detailed settlement terms for England and Wales. These included an undertaking to discontinue existing claims and not to bring certain claims in the future. An 18 December 1990 draft, copied to Mr Panton at the SHHD, divided the undertaking across two groups: plaintiffs and non-plaintiffs [DHSC0003655_022]. The provision for each was drafted broadly, with an exception for claims alleging clinical negligence. §5 provided that "*[t]he Plaintiffs will discontinue their actions against all Defendants and will undertake not to bring fresh proceedings, save that that those Plaintiffs who have already made allegations as to clinical management...*". §7 stated that "*[a]ny qualifying non-plaintiff shall be entitled to receive benefits from the MacFarlane Trust corresponding to their circumstances upon signing an undertaking not to bring proceedings against any Defendant or against any other Government body*".

6. By January 1991, Scottish Office officials and lawyers were discussing the preparation of equivalent settlement terms for Scotland. Mr Henderson wrote to Mr Tucker on 11 January 1991 to send a "*revised draft*" of the proposed Scottish terms, explaining that, although he had considered using the English draft and "*simply add[ing] an appendix or schedule or adaptation provision to apply them to Scotland*", he had decided instead 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*" [SCGV0000231_037].

7. The revised draft provided by Mr Henderson to Mr Tucker would appear to be draft 3 of the settlement terms [SCGV0000501_114].

a. The first recital to this document recorded that it was "*the Government's intention that HIV/Haemophiliacs in Scotland to whom the English Settlement would otherwise apply should be treated in the same way as they would have been had that settlement applied. Consequently the Government's intention is that the proposals set out in the English Settlement should with appropriate modification apply to Scotland.*"

b. §7 described the undertaking to be signed by those wishing to receive a payment under the settlement. It stated that "*[a]ny person entitled to benefit in terms of para 2(3) or (4) above shall be entitled to receive benefits from the MacFarlane Trust corresponding to their circumstances only upon signing an undertaking not to bring relevant proceedings against any Defender in particular the Secretary of State, or against any other Government body any Health Board or any medical practitioner*".[1]

c. "Relevant proceedings" (as well as "relevant action") were defined as "*any action or proceedings before the Scottish courts by any person comprised in any of the categories listed in paragraph 2(1), against the Secretary of State, [any Health Board or any medical practitioner] alleging injury arising from treatment of that person or any other person with Factor VIII, Factor IX or cryoprecipitate.*"

8. Around this time, the Scottish Office was also corresponding with the solicitors acting for patients and their families in Scotland. On 11 February 1991, Mr Henderson wrote to Balfour and Manson, the firm acting on behalf of the Scottish HIV litigation steering group, attaching "*a redraft of the draft proposals for settlement*" [SCGV0000232_108].

9. On 22 February 1991, Mr Henderson provided Mr Tucker and Balfour and Manson with draft 7 of the proposed terms [SCGV0000232_022, SCGV0000232_091 and SCGV0000232_092[2]].

[1] This provision remained the same in draft 4 [SCGV0000231_044].
[2] This version is marked as draft 7.3 but would appear to the draft referred to in Mr Henderson's cover notes (rather than another draft, marked as 7 [SCGV0000232_045]).

a. §2.5 described the requirement to provide an undertaking as follows: "*It is a condition of entitlement to receive payment as specified above that persons to whom payment is to be made shall give an undertaking to the Secretary of State in the form set out Schedule* [blank] *hereto, not to bring or continue relevant proceedings, except proceedings related to medical negligence as specified in para 7 below against the Secretary of State or any Health Service body.*"

b. Relevant proceedings were defined as "*any action or proceedings before the Scottish courts by any person comprised in any of the categories listed in paragraph 2(1), against the Secretary of State, or any Health Service body alleging injury arising from treatment of that person or any other person with Factor VIII, Factor IX or cryoprecipitate*".

10. In his cover letter to Balfour and Manson, Mr Henderson described §2.5 as "*a new provision. This deals with the grant of undertaking and discharges. The draft had not previously dealt properly with undertakings to be required from haemophiliacs and others who might claim payments from the Macfarlane Trust except such persons as were pursuing relevant proceedings at present under 7.3 of the old draft 6 or such persons who developed and* [sic] *entitlement in terms of paragraph 3. The latter was dealt with in 3.4 of draft 6. 2.5 therefore provides a blanket provision requiring an undertaking as a condition of entitlement to receive payment*" [SCGV0000232_091].

11. On 20 March 1991, Mr Powell (a DoH official) wrote to Mr Henderson [SCGV0000502_099], enclosing the latest drafts of the English terms of settlement [SCGV0000502_103] and of the new Macfarlane Trust deed [SCGV0000502_100], as well as several schedules to the draft deed. The English settlement terms continued to distinguish between plaintiffs and non-plaintiffs, with an exception for claims alleging clinical negligence. §5 stated that the "*Plaintiffs will discontinue their actions against all Defendants and will undertake not to bring fresh proceedings against any Defendant or against any other Government Department, Health Authority or treating doctor, save that those Plaintiffs…*". §8 provided that "*[a]ny qualifying non-plaintiff shall be entitled to receive benefits from the MacFarlane Trust corresponding to their circumstances upon signing an undertaking not to bring proceedings against any Defendant or against any other Government body*".

12. The schedules to the draft deed provided by Mr Powell included schedule 1, applicable to England and Wales and entitled "*Undertaking to be given by an individual not under a disability in accordance with clause 7 or clause 10*" [SCGV0000502_101].[3] This draft undertaking did not cover hepatitis: it provided that the individual in question would "*not at any time hereafter bring any proceedings against any person or body involving any allegations concerning the spread of the human immuno-deficiency virus through Factor VIII or Factor IX (whether cryoprecipitate or concentrate*)." An equivalent draft undertaking for personal representatives, acting on behalf of the estate or dependants of deceased patients, was also enclosed as schedule 2 [SCGV0000502_102].

13. The reasoning behind the use of the expression "*allegations concerning the spread of the human-immunodeficiency virus…*" in these schedules is unclear from the available documents. It may suggest an intention to cover a wide range of potential claims: for example, those by patients infected directly through their treatment; those by partners and other family members infected by patients; and those by partners or family members at risk of infection from infection patients. At this stage, the parallel provisions in the settlement terms were drafted very broadly: §8 simply referred to signing an undertaking "*not to bring proceedings against any Defendant or against any other Government body*". However, as set out below, these settlement terms became more tightly drawn during the period that followed.

14. On 21 March 1991, Mr Henderson provided Mr Tucker with comments on the draft trust deed and proposed settlement terms he had received from Mr Powell, with brief reference to the provisions related to undertakings [DHSC0003660_035].

15. On 22 March 1991, Mr Henderson responded to Mr Powell regarding the draft trust deed and settlement terms [DHSC0003635_101]. In relation to schedule 1, he wrote: "*We will need separate forms of undertaking for Scotland and I am preparing drafts to let you have I hope on Monday* ".

[3] Other enclosures to the letter included schedule 8 (defining allegations as to clinical management) [SCGV0000502_104].

16. That same day, Mr Henderson wrote to Mr Tucker again [SCGV0000233_103]. He enclosed a copy of his letter to Mr Powell [DHSC0003635_101], as well as "*2 draft undertakings which I think will have to be the basis for the undertakings which Scotland will require; one for the haemophiliac or the other person principally entitled to receive payment, the second for the case where the executors grant the undertaking with a corresponding undertaking to distribute in terms of the arrangement in Schedule 7 or whatever will be our equivalent to Schedule 7*".[4]

17. In a 27 March 1991 letter to Balfour and Manson, Mr Henderson stated that he was enclosing a number of documents, including draft settlement terms in the English litigation dated 22 March[5], a draft deed of trust dated 20 March, and draft 8 of the proposed settlement for Scotland [SCGV0000502_076].

18. Mr Henderson commented that the draft deed of trust "*clearly requires considerable adaptation to extend to Scotland. As we can see it is an English Trust and we do not need a specifically Scottish Trust simply because some of the Trust purposes involve payments in Scotland*". He noted that there were "*clear places in which we will require to have some adaptation and we are making suggestions to the Department of Health on this*", such as the definitions of a Category G plaintiff and of children, as well as the mechanism of payment. He also attached "*copies of draft undertakings which would be appended to the draft Deeds of Trust and which would be the undertakings to be completed both by litigants and non litigants in Scotland as the condition for access MacFarlane Trust funds*".

19. The provisions describing undertakings in the 22 March 1991 draft of the English settlement terms, referred to in Mr Henderson's letter, continued to distinguish between plaintiffs and non-plaintiffs [DHSC0041209_076]. §5, addressing the undertaking applicable to plaintiffs, had become more specific about the proceedings it was intended to cover than previous versions. It stated that the "*Plaintiffs will discontinue their actions against all Defendants and will undertake not to bring fresh proceedings against any Defendant or any other Government Department, Health*

[4] A manuscript note on the letter suggests that the undertakings may not have been enclosed with Mr Henderson's minute.
[5] This would appear to be the document at [DHSC0041209_076].

Authority or treating doctor in respect of the administering of cryoprecipitate, Factor VIII or Factor IX, save that..." §8, for non-plaintiffs, remained as in previous drafts.

20. Draft 8 of the proposed Scottish terms continued to refer to the requirement to give an undertaking at §2.5 in the same terms as previously [SCGV0000233_105].

21. A draft of the trust deed circulated within the DoH and to the SHHD on 22 March 1991 included an undertaking for England and Wales with the same scope as that dated 20 March 1991: namely, not to bring proceedings against various bodies "*involving allegations concerning the spread of the human immuno deficiency virus through Factor VIII or Factor IX*" [SCGV0000233_102 p.20].[6]

April 1991 changes

22. The provisions in the draft settlement terms for England and Wales continued to develop during April 1991. A draft, unsigned 3 April 1991 letter from Mr Powell to Justin Fenwick (junior counsel to the DoH) suggested that the undertaking at §5 of the terms was "*too wide*" and asked: "*Can the undertaking be limited to the administering of Factor VIII before a certain time? Should it be limited to certain types of infections?*"

23. Negotiations also continued over the Scottish terms in April 1991. For example, in a 12 April 1991 letter to Balfour and Manson, Mr Henderson noted that he would be providing "*a fresh draft of the terms of settlement together with the fresh draft of the Trust Deed*" [SCGV0000502_052]. In a minute to Scottish Office ministers, also on 12 April, Mr Tucker recorded that it was anticipated that the settlement of the English litigation would be finalised soon after a 1 May 1991 hearing, and that the detailed terms of settlement for Scotland were "*at an advanced stage*" [SCGV0000233_080].

24. On 16 April 1991, solicitors representing litigants in England and Wales provided the DoH with suggested amendments to the draft settlement terms [DHSC0003661_021 and DHSC0003661_022]. These including adding the following to §5:

[6] Another draft, circulated on 19 March 1991, was also in the same terms [SCGV0000233_112 p.19].

"*(2) Nothing herein shall prevent a Plaintiff from bringing proceedings in respect of the administering prior to 13th December 1990 of Cryoprecipitate, Factor VIII or Factor IX where:*

(i) that has caused damage to such Plaintiff which not been diagnosed by 13th December 1990; and/or

(ii) the damage alleged does not include infection or the risk of infection by HIV and/or the hepatitis viruses."

25. They also proposed adding the following to §8 of the draft terms:

"*, save that nothing herein shall prevent a qualifying non-Plaintiff from bringing proceedings in respect of the administering prior to 13th December 1990 of Cryoprecipitate, Factor VIII or Factor IX where:*

(i) that has caused damage to such Plaintiff which had not been diagnosed by 13th December 1990; and/or

(ii) the damage alleged does not include infection of the risk of infection by HIV and/or the hepatitis viruses".

26. On 17 April 1991, Mr Henderson wrote to Mr Powell and informed him of a number of amendments to the draft Scottish terms, attaching draft 9 of the document [SCGV0000502_042 and SCGV0000502_043].

a. For the first time, §2.5 cross-referred to a specified schedule (schedule 1), providing that it was "*a condition of entitlement to receive payment as specified above that persons to whom payment is to be made shall give an undertaking to the Secretary of State in the form set out at Schedule 1 hereto, not to bring or continue relevant proceedings…*".

b. Mr Henderson also described a number of proposed changes to the draft deed, which were "*regardless of the effect of the Trust Deed in Scotland*".

c. He added that, *[s]o far as specifically Scottish points are concerned, there are amendments to Schedule 3 (Undertaking) to spell out the scope of the proviso in relation to medical negligence. There are also a number of amendments to Schedule 4 which sets out the specific modifications of the application of the provisions of the Trust Deed in Scotland*".[7]

27. Also on 17 April 1991, Mr Henderson wrote to Balfour and Manson to provide a copy of draft 9 of the detailed terms of settlement and to outline changes made since the previous draft [SCGV0000502_151].

28. The following day, Mr Henderson wrote to Balfour and Manson again, attaching "*a revised Schedule 3 to the Trust Deed and revised Schedule 4 to the Trust Deed*", as well as noting: *"Schedule 3 you will already have as Schedule 1 to the terms of settlement. Schedule 4 deals with the Scottish adaptations to the Trust deed*" [SCGV0000233_056].

    a. The first enclosure to Mr Henderson's letter was headed "*Schedule 4*" and was entitled "*Modification of the application of the provisions of the trust deed in Scotland*" [SCGV0000233_056 pp.2-5].
    b. The second enclosure was headed "*Schedule 1*" and was entitled "*Undertaking to be given by a qualifying person to receive payment from the Macfarlane Trust*" [SCGV0000233_056 pp.6-7].[8]
    c. This draft undertaking was longer and in a different form to the undertakings proposed for England and Wales and did not refer to hepatitis.
    d. Its first recital recorded that the Secretary of State for Scotland had "*set out proposals for payment of certain sums to or in respect of haemophiliacs infected with human immuno deficiency virus and to or in respect of other persons who may have become infected as a consequence of their relationship to such a haemophiliac*".
    e. Following a second recital, it set out a discharge and undertaking across three paragraphs. The first two discharged the Secretary of State for Scotland and other government departments, as well as bodies including Health Boards, the CSA and the SNBTS "*from any liability they may have in respect of the infection of* [blank] *with human immuno deficiency virus, allegedly arising out of treatment with Factor VIII or Factor IX (whether cryoprecipitate or concentrate)*". §4 was an undertaking "*not to bring any proceedings against the Crown or any health service body now or at any time in the future in*

[7] Neither of these schedules appear to have been enclosed with the letter.
[8] Another version of this document is available at [SCGV0000502_038].

respect of the said infection of [blank] *by human immuno deficiency virus*", with an exception for certain negligence claims.

29. On 22 April 1991, Mr Burrage (a DoH official) provided Mr Tucker with a copy of the latest draft of the settlement terms for England and Wales by fax, commenting: "*Please note, this is not the final version (but I understand it is close to a final version*) [SCGV0000233_040].

    a. §5 of this document, addressing the undertaking applicable to plaintiffs, was in a different form to the version circulated by the DoH on 20 March 1991. It appears to have incorporated amendments proposed by solicitors for the plaintiffs on 16 April 1991. As well as specifying a cut-off date for the treatment covered by the undertaking (13 December 1990), §5(2) described claims that did not come within it: "*nothing herein shall prevent the Plaintiff from bringing proceedings in respect of the administering prior to 13th December 1990 of cryoprecipitate, Factor VIII or Factor IX where:- (i) that has caused damage to such Plaintiff which had not been diagnosed prior to 13th December 1990; and/or (ii) the damage alleged does not include infection or the risk of infection by HIV and/or the hepatitis viruses*."
    b. §8, addressing non-plaintiffs, also specified 13 December 1990 as the cut-off date for treatment covered by the undertaking, as well as preserving claims "*in respect of the administering prior to 13th December 1990 of cryoprecipitate Factor VIII or Factor IX where:- (1) that has caused to such Plaintiff which had not been diagnosed by 13th December 1990; and (d) the damage alleged does not include infection or the risk of infection by HIV and/or the hepatitis viruses*" (emphasis in original).
    c. While seemingly intended to describe claims which would be preserved notwithstanding the undertaking, both of these amended terms suggested that future claims for hepatitis, as well as HIV, could come within its scope, and so that the right to bring them would be waived.

30. On 24 April 1991, Mr Canavan faxed a further update of the English settlement terms to Mr Tucker, alongside a memo from Mr Fenwick [SCGV0000233_038].

a. The draft terms included amended wording in §5(2), which stated: "*nothing herein shall prevent a Plaintiff from bringing proceedings in respect of the administering prior to 13th December 1990 of cryoprecipitate, Factor VIII or Factor IX where the damage alleged does not include infection of the risk of infection by HIV and/or the hepatitis virus*".

b. In his memo, Mr Fenwick recorded that he had changed "*the Plaintiff*" to "*a Plaintiff*" and had "*deleted sub-paragraph (i). As indicated, this was intended to protect us from claims which the Plaintiffs already knew about, but on the whole I accept that the* [sic] *importance of excluding a double claim for infection by HIV or hepatitis*".

c. As for §8, which remained the same as the previous draft, Mr Fenwick commented:

> "*in paragraph 8, this is not necessary because there is a double trigger. Damage from risk of infection by HIV or hepatitis is excluded and the claim must relate to damage which had not been diagnosed by 13th December 1990. In other words, the claims which are preserved are claims for latent injuries and expressly exclude HIV and hepatitis. In those circumstances, it does not seem to me that one can reasonably exclude the Plaintiffs from bringing proceedings relating to an injury which is both now unknown to him and totally different from the subject-matter of this litigation*".

31. Also on 24 April 1991, the DoH provided Mr Tucker with a copy of the latest draft of the trust deed [SCGV0000233_039].

a. Schedule 1, for England and Wales, was different to the version circulated by the DoH on 20 March 1991. As well as including the 13 December 1990 cut-off date, it referred to both hepatitis and HIV. It stated [SCGV0000233_039 p.19]: "*...I undertake with the Secretary of State for Health that I will not at any time hereafter bring any proceedings against the Department of Health, Welsh Office the Licensing Authority under the Medicines Act 1968, the Committee on Safety of Medicines, any district or regional health authority or*

any other Government body involving any allegations concerning the spread of the human immuno-deficiency virus or the hepatitis viruses through Factor VIII or Factor IX (whether cryoprecipitate or concentrate) administered before 13th December 1990)."

b. This schedule was entitled "*Undertaking to be given by an individual not under a disability in accordance with clauses 10, 13 or 15*". Each of those clauses referred to payments to different categories of non-litigant (i.e. individuals who were not plaintiffs in the litigation). The draft deed does not appear to have included a schedule with an undertaking for litigants in England and Wales

c. Schedule 2 was entitled "*Undertaking to be given by personal representatives in accordance with clauses 8, 12 or 16*" [SCGV0000233_039 pp.20-27]. The substance and scope of this undertaking were very similar to schedule 1. Clauses 12 and 16 also referred to categories of non-litigant. The reference to clause 8 may have been a typographical error: it referred to payments to litigants in Scotland and Northern Ireland.

d. Schedule 3, the discharge and undertaking to be given in Scotland to receive a payment from the MFT No.2, remained similar to the version circulated on 18 April 1991 [SCGV0000233_039 pp.21-22]. It was headed "*Undertaking to be given by a qualifying person to receive payment from the Macfarlane Trust*". It continued to cover HIV but not hepatitis, and to be divided across four paragraphs. §§1 and 2 discharged government and health bodies from "*any liability they may have in respect of the infection of* [blank] *with human-immuno deficiency virus, allegedly arising out of treatment with Factor VIII or Factor IX (whether cryoprecipitate or concentrate*)." §4 was an undertaking, subject to an exception for certain negligence claims, "*not to bring any proceedings against the Crown or any health service body now or at any time in the future in respect of the said infection of* [blank] *by human-immuno deficiency virus*".

32. On 25 April 1991, Mr Henderson wrote to Mr Powell [SCGV0000233_027] and Balfour and Manson [SCGV0000503_086] regarding the Scottish settlement terms. In both letters, he discussed draft 10 of the settlement [SCGV0000503_087]. The

requirement to give an undertaking as a condition of being entitled to a payment from the MFT, which had previously been contained in §2.5, was moved to §3.4 in this version. Its substance, however, did not change.

33. In his letter to Mr Powell, Mr Henderson commented that the "*form of undertaking to be given by a qualifying person to receive payment from the MacFarlane Trust in Schedule 3 should be amended and I attach a revised draft. There is also attached a schedule 1 to the settlement terms. The main change is to specify the derogations from the proviso allowing medical negligence actions to proceed*" [SCGV0000233_027]. The document he attached had two headings – "*Schedule 3 to Trust Deed*" and "*Schedule 1 to Terms of Settlement*" – and the title "*Undertaking to be given by a qualifying person to receive payment from the Macfarlane Trust*" [SCGV0000503_089]. As with previous drafts, it addressed HIV but not hepatitis.

34. Mr Powell responded to Mr Henderson on 26 April 1991, enclosing a further draft of the trust deed [SCGV0000503_067 and SCGV0000503_068]. The schedules to the deed were in a different order to previous versions, and the discharge and undertaking for Scotland contained an important difference to earlier drafts: it referred to both hepatitis and HIV. It sought to discharge government and NHS bodies "*from any liability they may have in respect of the infection of* [blank] *with human immuno-deficiency virus or hepatitis viruses, allegedly arising out of treatment with Factor VIII or Factor IX (whether cryoprecipitate or concentrate)*" [SCGV0000503_068 p.25]. It also included an undertaking "*not to bring any proceedings against the Crown or any health service body now or at any time in the future in respect of the said infection of* [blank] *by human-immuno deficiency virus or hepatitis viruses*" (as before, with an exception for negligence claims).

35. The undertaking in the final, 26 April 1991 settlement terms for England and Wales remained the same as the version provided to Mr Tucker on 24 April 1991 [HSOC0023174].

    a. §5 required plaintiffs to discontinue their actions and "*undertake not to bring fresh proceedings*" against various bodies "*in respect of the administering prior to 13th December 1990 of cryoprecipitate, Factor VIII or Factor IX*",

with exceptions for certain negligence claims, as well as an exception for proceedings "*in respect of the administering prior to 13th December 1990 or cryoprecipitate, Factor VIII or Factor IX where the damage alleged does not include infection or the risk of infection by HIV and/or the hepatitis viruses*".

b. §8 provided that qualifying non-plaintiffs would be entitled to receive benefits from the MFT corresponding to their circumstances *"upon signing an undertaking not to bring proceedings*" against various bodies "*in respect of the administering of cryoprecipitate, Factor VIII or Factor IX before 13th December 1990*", while preserving the right of a qualifying non-plaintiff to bring proceedings "*in respect of the administering prior to 13th December 1990 of cryoprecipitate Factor VIII or Factor IX where:- (1) that has caused damage to such Plaintiff which had not been diagnosed by 13th December 1990; and (2) the damage alleged does not include infection or the risk of infection by HIV and/or the hepatitis viruses*" (emphasis in original).

36. In a 1 May 1991 fax to Mr Henderson, Mr Powell enclosed "*a copy of the current working draft of the Macfarlane Trust deed*", noting that he had made "*numerous small amendments in the light of comments from the Macfarlane Trustees and their solicitors*" [SCGV0000503_062 and SCGV0000503_063]. The working draft seems to have based on the version provided by Mr Powell on 26 April 1991, with amendments in manuscript. These included re-ordering the schedules, so that the undertakings for England and Wales became schedules 1 and 2 and the undertaking for Scotland became schedule 4. The amended Scottish undertaking addressed both hepatitis and HIV, with dates inserted into the paragraphs discharging government and NHS bodies from liability for treatment [SCGV0000503_063 pp.27-28].

Execution of the MFT No.2 deed

37. As recorded in the presentation note on Scottish Office and SHHD decision-making, the deed of trust for the MFT No.2 was executed on 3 May 1991 [MACF0000083_004]. The undertaking in schedule 1, applicable to England and Wales, was entitled "*Undertaking to be given by an individual not under a disability in accordance with clauses 12, 15, 17, 18 or 20*". Each of these clauses referred to a category of non-litigant. The undertaking itself stated:

"1. In expectation of receiving from the Macfarlane (Special Payments) (No.2) Trust the sum of [£ [blank]*] I undertake with the Secretary of State for Health that I will not at any time hereafter bring any proceedings against the Department of Health, the Welsh Office [in Northern Ireland – the Department for Health and Social Services Northern Ireland] the Licensing Authority under the Medicines Act 1968, the Committee on Safety of Medicines, any district or regional health authority [in Northern Ireland – any health and Social Services Board] or any other Government body involving any allegations concerning the spread of the human immune-deficiency virus or hepatitis viruses through Factor VIII or Factor IX (whether cryoprecipitate or concentrate) administered before 13th December 1990."*

38. Schedule 2, also applying to England and Wales, was entitled "*Undertaking to be given by personal representatives in accordance with clause 14 or 22*". Its substance and scope remained very similar to schedule 1. As with the cross-references in schedule 1, clauses 14 and 22 referred to categories of non-litigant.

39. Schedule 4 was entitled "*Undertaking to be given by a qualifying person in Scotland to receive payment from the Macfarlane Trust (Special Payments) (No.2) Trust)*".

    a. Following a number of recitals, §1 stated: "*I hereby discharge the said Secretary of State and all other Ministers of the Crown and Government Departments or bodies or any of their respective agents, servants or employees whomsoever (hereinafter referred to as "the Crown"), from any liability they may have in respect of the infection of* [blank] *with human-immuno deficiency virus or hepatitis viruses, allegedly arising out of treatment before 13th December 1990 with Factor VIII or Factor IX (whether cryoprecipitate or concentrate)*".
    b. §2 directed the same discharge of liability to various health bodies.
    c. §4 stated: "*I undertake not to bring any proceedings against the Crown or any health service body now or at any time in the future of respect of the said infection of* [blank] *by human-immuno deficiency virus or hepatitis viruses*", with an exception for certain negligence claims.

Continued Scottish negotiations

40. Meanwhile, the Scottish Office continued to negotiate the settlement terms applicable to Scotland.

41. In a 23 May 1991 letter to Balfour and Manson, Mr Henderson explained that the settlement procedure in Scotland would involve "*an application by each litigant to the Macfarlane Trust and that the Trust will look to the Secretary of State to confirm the details of such applications. Litigants so applying would be required in terms of the settlement and the Trust deed to complete a form of undertaking and discharge to be delivered to the Secretary of State*" [SCGV0000503_058]. He then suggested that the relevant undertaking was that in the schedule to the draft settlement terms in Scotland:

> "*We think that the best way may be for litigants to channel applications through us. We would then dispatch those in batch form to the Trust. The form of undertaking and discharge provided in the schedule to the draft terms of settlement makes clear that the undertaking could be forwarded to us in advance of payment being received from the Trust. The undertaking is conditional upon such payment being received.*"

42. On 3 June 1991, Mr Henderson wrote to Balfour and Manson to provide a "*redraft of draft 11*" of the settlement terms, following a recent meeting with the firm and amendments suggested by Brian Gill, the QC instructed by Balfour and Manson, [SCGV0000503_055 and SCGV0000503_056]. Mr Henderson noted that *"Schedule 1 to the terms of settlement sets out the draft undertaking. The only change beyond the revisals which Brian Gill suggested are in relation to the proviso to paragraph 4 where the references to Factor VIII etc are brought into line with each other*". He added that the Scottish Office was "*in touch with the MacFarlane Trust in relation to the variation of the Trust Deed necessary to allow payments in Scotland. We will be letting them have a copy of the new schedule 4 and the form of undertaking schedule 3*". The provision in the draft settlement terms referring to the undertaking remained at §3.4 and stated:

"*It is a condition of entitlement to receive payment as specified above that persons to whom payment is to be made shall give an undertaking to the Secretary of State in the form set out Schedule 1 hereto, not to bring or continue relevant proceedings, except proceedings related to medical negligence as specified in para 8 below, against the Secretary of State or any Health Service body*."

43. As indicated in his letter to Balfour and Manson, on 4 June 1991 Mr Henderson wrote to Mr Williams of the Macfarlane Trust [SCGV0000234_104], enclosing copies of "*a new schedule 3 – form of undertaking – and a new form of schedule 4 – Scottish adaptations – for the MacFarlane Special Payments No.2 Trust*". He noted that he had sent these documents to Mr Powell and that it would be necessary for the trust deed to be varied in light of them.

44. Mr Henderson's letter to Mr Powell, enclosing schedules 3 and 4, explained that the Scottish Office had almost reached agreement on settlement but that it would be necessary to replace the schedules applying to Scotland in the MFT No.2 deed [SCGV0000234_105, SCGV0000234_102 and SCGV0000234_103]. His letter suggested that the wrong schedules had been included in the 3 May 1991 deed, though he did not explain which particular changes were required and why:

"*The final form of the trust deed which you let me have on 10 May did not unfortunately contain the form of undertaking and schedule 4 which I think are necessary for Scotland. We have been in touch with the MacFarlane Trust and advised them that we will let them have the revised form of undertaking in due course. I am writing to them today with that revised form of undertaking. My main purpose in writing to you however is in relation to the terms of the trust deed and in that connect I attach the revised form of schedule 3 and the revised form of schedule 4 which is the schedule of Scottish adaptations*."

45. The schedule 3 enclosure to Mr Henderson's letter had two headings – "*Schedule 3 to Trust Deed*" and "*Schedule 1 to Terms of Settlement*" – and was entitled "*Undertaking to be given by a qualifying person to receive payment from the Macfarlane Trust*"

[SCGV0000234_102]. It did not cover hepatitis and used wording from earlier drafts. For example, the discharge applicable to government and NHS bodies was "*from any liability they may have in respect of the infection of* [blank] *with human immuno deficiency virus allegedly arising out of treatment with Factor VIII or Factor IX (whether cryoprecipitate or concentrate)*". For future claims, the undertaking was "*not to bring any proceedings against the Crown or any health service body now or at any time in the future in respect of the said infection of* [blank] *by human immuno deficiency virus*" (as before, with an exception for certain negligence claims).

46. On 21 June 1991, Mr Henderson wrote to Balfour and Manson, noting that the formal Scottish offer was being issued, with the terms at Annex C [SCGV0000504_107]. He also notified Mr Tucker of this correspondence in a minute on 21 June 1991, recording that he was advising Mr Powell that it would "*now be appropriate to vary the terms of the Deed of Trust to substitute Schedule 3 and 4 (Form of Undertaking and Scottish modifications*)" [SCGV0000234_048]. Mr Henderson additionally wrote to Mr Powell to inform him of the offer, advising that it would now be appropriate to vary the terms of the Trust Deed "*to facilitate payment in terms of that offer*" [SCGV0000504_105].

47. The Scottish terms of settlement were offered formally to Balfour and Manson on 24 June 1991 [DHSC0003635_065; BNOR0000329]. In his cover letter, Mr Henderson confirmed that arrangements were being made to vary the terms of the MFT No.2 deed to facilitate payments in accordance with the terms of settlement. He noted that "*this will entail substitution of Schedule 4 and also Schedule 3 (Form of Undertaking). The appropriate Form of Undertaking is set out in Schedule 1 to the terms of settlement"* [DHSC0003635_065].[9] As with drafts previously shared by Mr Henderson, the undertaking was headed "*Schedule 3 to Trust Deed*" and "*Schedule 1 to Terms of Settlement*", and covered HIV but not hepatitis. The key paragraphs were as follows [BNOR0000329]:

[9] In an (unsigned) 24 June 1991 letter to Ranald Macdonald of the Scottish Health Service Central Legal Office, Mr Henderson also noted the need to substitute new schedules 3 and 4 for those in the existing 3 May 1991 Trust Deed [SCGV0000504_101].

"*1. I hereby discharge the said Secretary of State and all other Ministers of the Crown and Government Departments or bodies or any of their respective agents, servants or employees whomsoever (hereinafter referred to as "the Crown"), from any liability they may have in respect of the infection of* [blank] *with human immuno deficiency virus, allegedly arising out of treatment with Factor VIII or Factor IX (whether cryoprecipitate or concentrate)*

2. I hereby discharge any Health Board, the Common Services Agency, the Scottish National Blood Transfusion Service or any other body established under the National Health Service (Scotland) Act 19[blank] *or any of their respective agents, servants or employees whomsoever (hereinafter referred to as a "health service body") from any liability they may have in respect of the infection of* [blank] *with human immuno deficiency virus allegedly arising out of treatment with Factor VIII or Factor IX (whether cryoprecipitate or concentrate)*

...

4. I undertake not to bring any proceedings against the Crown or any health service body now or at any time in the future in respect of the said infection of [blank] *by human immuno deficiency virus.*

Provided that this discharge and undertaking shall be without prejudice to any claim competent to me against any health service body in respect of any alleged medical negligence in connection with the infection of [blank] *with human immune deficiency virus allegedly arising out of treatment with Factor VIII or Factor IX (whether cryoprecipitate or concentrate), and for the purpose of this undertaking the expression "medical negligence" shall include only specific allegations as to negligence in the application of treatment including treatment with Factor VIII or Factor IX (whether cryoprecipitate or concentrate) and shall not extend to averments as to the policy for such treatment of the selection or screening of any blood products or other material in such treatment, and by way of example:-*

a. *that self-sufficiency in blood products should have been achieved at any date prior to…* "

Variation of the MFT No.2 deed

48. The MFT No.2 was subsequently varied by deed on 19 September 1991 [MACF0000083_003]. The variation involved substituting new schedules 3 and 4. Schedule 4 was entitled *"Undertaking to be given by a qualifying person to receive payment from the Macfarlane (Special Payments) (No.2) Trust*". Save for minor differences – such as referring to the "*National Health Service (Scotland) Act 1978*" – its contents were materially the same as those in the offer formally made on 24 June 1991: in particular, it covered HIV but not hepatitis.

1993 review of Scottish HIV litigation undertaking

49. In 1993, SHHD officials became aware that the Scottish undertaking in the HIV haemophilia litigation covered HIV but not hepatitis, unlike the equivalent in England and Wales, and sought to understand why.

50. A 27 September 1993 handwritten note from Sandra Falconer to Mr Panton recorded that she had "*checked the files to see if there was any explanation of why Hepatitis appears in English* [sic] *settlement but not Scottish*" [SCGV0000236_090]. Having described the settlement and trust deed documents in which reference to hepatitis appeared, she wrote: "*There doesn't appear to be anything on file which highlights that Hepatitis was added in docs 46B + 48 nor is there anything from Mr Henderson to say why it was omitted. It may be the case that it has been overlooked*".

51. On 6 October 1993, following "*a discussion about the differences between in the English and Scottish schemes of payment*", Mr Panton wrote the following in a minute to Mr Henderson [SCGV0000236_089]:

> "*A thorough review of our files has revealed no reason why the English scheme includes a clause to ensure no claims can be raised for hepatitis*

infection following receipt of payment for HIV and the Scottish scheme doesn't.

The English draft Trust Deed dated 22 March 1991 did not mention Hepatitis but the next draft received on 24 April did. The amendment was not highlighted. Similarly, the English draft Terms of Settlement dated 28 March 1991 did not include Hepatitis but their next draft received on 24 April 1991 does. Again, this amendment was not highlighted.

It would appear that the insertion of the clause may have been overlooked and should have been included in the Scottish scheme.

It would be grateful to receive your comments and advice. You may be aware of a particular reason why the clause was not included in the Scottish scheme."

52. The Inquiry has been unable to find a response from Mr Henderson.

Summary and analysis

53. The documents described above would appear to suggest the following:

a. The undertakings required of those wishing to benefit from the MFT No.2 appear to have been materially different in Scotland and England and Wales. The former required those receiving payments to sign an undertaking in respect of only HIV, while the latter required undertakings covering both HIV and hepatitis viruses.
b. The form of the undertakings in the two jurisdictions, both as described in the settlement terms and in the schedules to the trust deed, also differed.
c. In England and Wales, the settlement terms describing the undertakings were divided into those required of plaintiffs and of non-plaintiffs, and were structured differently to the equivalent provision in the Scottish settlement.

d. The undertaking in schedules 1 and 2 to the MFT No.2 deed applied to non-litigants in England and Wales. None of the schedules to the deed appears to have been intended for plaintiffs in the English litigation. It is unclear from the available documents why this approach was taken. It is possible that the plaintiffs in the litigation were considered to be sufficiently bound by the settlement terms, which were accepted on their behalf, so that signing an undertaking which was part of the settlement agreement would have been unnecessary.

e. This analysis may be supported by the wording of the relevant provisions in the settlement: signing an undertaking, rather than providing one, was only described as a requirement for non-litigants. §5 stated: "*The Plaintiffs will discontinue their actions against all Defendants and will undertake not to bring fresh proceedings…*" (emphasis added) [HSOC0023174 p.20]. §8 stated: "*Any qualifying non-plaintiff shall be entitled to receive benefits from the new Macfarlane Trust… upon signing an undertaking not to bring proceedings…*" (emphasis added).

f. The undertakings in schedules 1 and 2 also used different wording to the settlement terms in England and Wales. The former referred to "*allegations concerning the spread of*" HIV and hepatitis through factor concentrates and cryoprecipitate, while the latter referred to proceedings "*in respect of the administering*" of factor concentrates and cryoprecipitate. It is unclear from the documents why these different expressions were used. It may be that the language in the schedules, which came before the expression used in the final settlement terms, was intended to be sufficiently broad as to capture a wide range of potential claims, but it is unclear why the final versions of the settlement and the deed used different expressions.

g. The relationship between the settlement terms and the undertaking in Scotland would appear to be more straightforward. The terms did not seek to describe the contents of the undertaking. Instead, they simply cross-referred to it as a schedule.

h. While the evidence suggests that the Scottish undertaking ultimately covered HIV and not hepatitis, the reason for the difference in scope with the equivalent in England and Wales is unclear. The initial drafts of the settlement

terms and trust deed for England and Wales referred only to HIV. This appears to have changed in mid-April 1991, possibly in light of discussions with and correspondence from the lawyers acting for the plaintiffs in England and Wales. Reference to hepatitis had been added to the drafts of the English and Welsh settlement and the trust deed provided to the Scottish Office on 22 and 24 April 1991, but the change in scope in the undertaking does not appear to have been highlighted by the DoH.

i. It is unclear whether the Scottish Office – and in particular Mr Henderson in the legal office – was aware of this particular divergence between the undertakings in the two jurisdictions. While Mr Tucker received the 22 April 1991 memo from Mr Fenwick to the DoH, which referred specifically to excluding a double claim for HIV and hepatitis in the English and Welsh settlement, it is unclear from the available documents whether this was passed to Mr Henderson. In any event, no evidence has been identified to suggest that the issue was discussed amongst Scottish Office officials and lawyers in late April and early May 1991, before the MFT No.2 deed was executed on 3 May 1991.

j. By early June 1991, Mr Henderson had become aware that the incorrect undertaking for Scotland had been included as a schedule to the MFT No.2 deed. This, as well as the need to substitute another schedule, led to the September 1991 variation of the deed. What remains unclear is whether the undertaking in schedule 4 to the 3 May 1991 MFT No.2 deed was considered to be incorrect because of its reference to hepatitis as well as HIV, or for other reasons.

III. THE BLOOD TRANSFUSION AND TISSUE TRANSFER SCHEME

54. The background to the creation of the scheme for payments to patients infected with HIV by blood and tissue transfer in Scotland was described in the presentation note on Scottish Office decision-making. This section focuses on the undertaking required of those seeking a payment from the scheme.

55. In a 21 February 1992 minute to Mr Panton and Dr McIntyre, Mr Tucker described a recent meeting with DoH officials on the preparation of the scheme for England, Wales and Northern Ireland [SCGV0000509_050]. He recorded that Mr Henderson, who had also attended the meeting, would be "*drawing up a 'Scottish' scheme*".

56. During March 1992, officials in the SHHD and DoH corresponded about the development of their respective schemes (see, for example, [DHSC0002656_006 and DHSC0002632_008]). During the course of this correspondence, emphasis was placed on the importance of the two schemes being compatible and following the same principles. This was prompted in part by a difference between early iterations of the proposals, whereby eligibility for the Scottish scheme was based on location of treatment and eligibility for the English and Welsh equivalent was based on residence. In a 13 March 1992 minute to DoH colleagues, following a letter from Mr Tucker highlighting this issue, Mr Scofield commented as follows [DHSC0002656_005]:

> "*We must aim to maintain the principle that as far as possible we are following on from the haemophiliac scheme and also that the two schemes should be as closed as possible unless there is a genuine point of law which demands different principles. What we cannot is that one should be more or less generous than the other, or should operate according to different principles*".

57. In a 26 March 1992 letter to Mr Tucker, Mr Scofield explained that "*we need to ensure that the two schemes do not differ in substance*", noting that he accepted that "*applications should be made under the scheme which covers the place of transfusion or tissue transfer*" [SCGV0000238_105]. As well as commenting on various differences between the proposed schemes, he enclosed a document with his comments on draft 3 of the Scottish scheme, which included the following [SCGV0000238_106]:

> *"Undertaking. There is no comment about hepatitis in the undertaking. Medical advice is that is quite possible that a transfusion recipient has been infected with both HIV and hepatitis, and so could sue the Secretary of State in respect of hepatitis transmission as well as HIV. This is particularly relates*

to NANB hepatitis. The undertaking by haemophiliacs included mention of hepatitis"

58. This suggests that Mr Scofield was unaware that the finalised undertaking in the Scottish HIV haemophilia litigation did not include reference to hepatitis. Moreover, as described below, by the time of Mr Scofield's letter, the draft undertaking in the proposed Scottish transfusion scheme had been amended to refer to hepatitis as well as HIV.

59. On 25 March 1992, Mr Henderson wrote to Balfour and Manson, attaching draft 4 of the scheme and explaining changes to a previous version [SCGV0000238_068 and SCGV0000238_071]. He noted that schedule 1 – containing a discharge and undertaking – had been "*changed slightly by the inclusion of a new paragraph 5 as an undertaking of confidentiality*". He did not comment further on the scope of the undertaking, but the draft itself referred to both hepatitis and HIV in relation to future claims [SCGV0000238_071 pp.16-18].

    a. The first two paragraphs of the schedule sought to discharge government and health bodies from "*any liability they may have in respect of the infection of* [blank] *with human immuno deficiency virus, allegedly arising out of medical treatment* [blank] *in blood transfusions, tissue transfer or treatment with fractionated blood products*".
    b. For future claims, §4 stated: "*I undertake not to bring any proceedings against the Crown or any health service body now or at any time in the future in respect of the said infection of* [blank] *by human immuno deficiency virus* ***or by hepatitis viruses***" (bold in original).

60. In a 31 March 1992 letter to J&A Hastie, a Scottish firm of solicitors, Mr Henderson recorded that he had received comments from Balfour and Manson on draft 4 and that, following a meeting with the DoH, a new draft was being prepared [SCGV0000238_053]. He also described a number of changes to draft 4, including: "*So far as the Schedules are concerned you will see that Schedule 1 which sets out the undertaking is changed slightly so far as the undertaking against disclosure is*

concerned". Mr Henderson did not refer to the inclusion or exclusion of hepatitis. The undertaking for future claims in draft 5, attached to his letter, continued to refer to both HIV and hepatitis [SCGV0000238_054 pp.19-20]. However, sometime between late March and 9 April 1992, the reference to hepatitis was removed.

61. As recorded in the main presentation note, on 9 April 1992 Mr Tucker sought the approval of the NHS Chief Executive in Scotland, Mr Cruickshank, for the finalised Scottish scheme [SCGV0000239_024]. He explained that, unlike in England and Wales, the undertaking required of applicants in Scotland did not cover hepatitis:[10]

> *"9. I should also draw your to your attention the terms of Annex 1 to the Scheme which sets out the form of undertaking to be given by the applicant. Our form does not require an undertaking discharging the Secretary of State in respect of liability for infection of the application with hepatitis virus. In that respect it differs from the English form of undertaking. However again we consider ourselves to be bound by the terms of the haemophilia settlement which did not limit an applicant's rights in connection with hepatitis infection. We have received strong representation against extending the undertaking into this area".*[11]

62. On 10 April 1992, Mr Henderson wrote to Balfour and Manson, enclosing a copy of the finalised scheme and noting that it had been approved by the Secretary of State [SCGV0000238_030]. He commented as follows on the undertaking:

> *"Perhaps I could draw your attention to the terms of the undertaking set out as Schedule 1 to the Scheme. You will see that reference to hepatitis virus has been deleted. Since the form of undertaking required of applicants under the Haemophiliac Scheme did not refer to hepatitis virus we have not thought it*

[10] Schedule 1 to the finalised scheme, containing the undertaking, is available at [SCGV0000239_016 pp.14-15].

[11] The Inquiry has been unable to locate these representations. Note also that the 13 April 1992 DoH submission, seeking the Secretary of State's approval for the scheme in England and Wales, stated that differences with the Scottish scheme did not include "*vital matters of eligibility or payments*" and that they were "*mainly of presentation*" [SCGV0000238_025]. The DoH submission did not refer to the differences in scope between the undertakings.

right to insist on an undertaking in respect of hepatitis infection from those who have become infected with HIV as a result of blood transfusion etc."

63. Also on 10 April 1992, Mr Henderson wrote a similar letter to J&A Hastie Solicitors, enclosing a copy of the finalised scheme and explaining that it was operational from that day [SCGV0000238_031]. He commented as follows with respect to the undertaking:

> "So *far as the terms of the Scheme itself are concerned I think the only significant change from the terms of draft 5 which I attached with my letter of 31 March arise in relation to the form of undertaking. You will see that the form no longer refers to hepatitis infection. We received representations from Balfour and Manson about this matter and we checked again as to the form of undertaking which we had required in the context of the haemophiliac settlement. I should also point out at this stage that the form of undertaking for Scotland will differ from the form of undertaking for England not only because of the differences in jurisdiction but also because so far as I am aware the form of discharge and undertaking for England and Wakes will include reference to the hepatitis virus since they take the that was covered in the haemophiliac settlement in England and Wales"*

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January 2023