

1 Thursday, 9 June 2022
 2 (10.00 am)
 3 **SIR BRIAN LANGSTAFF:** Welcome, Mr Fenwick.
 4 **THE WITNESS:** Thank you.
 5 **SIR BRIAN LANGSTAFF:** Let me explain the set-up. You're
 6 talking to a select audience here at Aldwych House.
 7 They are participants in front of you and the public.
 8 There may be representatives of the press at the back,
 9 and the lawyers are to your left.
 10 Mr Hill will ask you questions in a moment once
 11 you've been sworn. But you're talking, beyond this
 12 room, to something in the region of 100 or so people who
 13 are watching online, live streamed and YouTube, as we go
 14 along.
 15 **THE WITNESS:** That's very clear.
 16 **SIR BRIAN LANGSTAFF:** Rose, will you administer the oath,
 17 please.
 18 **JUSTIN FENWICK QC (sworn)**
 19 **Questioned by MR HILL**
 20 **SIR BRIAN LANGSTAFF:** Mr Hill?
 21 **MR HILL:** Mr Fenwick, is it right that you're a barrister
 22 and a Queen's Counsel?
 23 **A.** It is.
 24 **Q.** You came to the bar after a career in the army in the
 25 Grenadier Guards and you were called to the bar in

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1 **A.** Yes, a blank one, which you kindly provided.
 2 **Q.** Thank you. I'm going to start by asking you a few
 3 questions about your career before the HIV Litigation.
 4 You were instructed in the pertussis vaccine litigation,
 5 according to your witness statement at paragraph 2.1; is
 6 that correct?
 7 **A.** That is correct. One of the individuals involved in the
 8 pertussis vaccine research, Professor Miller, was
 9 a person with some involvement and, as a result of that,
 10 I was instructed and came to understand a little bit
 11 about the pertussis vaccine issues.
 12 **Q.** Were you then subsequently instructed by the Licensing
 13 Authority and the Committee on Safety of Medicines in
 14 the Opren litigation?
 15 **A.** Yes, I was.
 16 **Q.** That litigation concerned the safety of
 17 an anti-arthritis drug and concerned questions on
 18 whether the Committee on Safety of Medicines and the
 19 Licensing Authority owed a duty of care; is that
 20 correct?
 21 **A.** That was one of the issues. There were also, of course,
 22 issues as to whether there was any breach of duty if
 23 there was a duty owed.
 24 **Q.** Is it right that the cases against the Committee on
 25 Safety of Medicines and the Licensing Authority weren't

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1 1980 --
 2 **A.** Yes.
 3 **Q.** -- completed pupillage in July 1982 and became a silk,
 4 a QC, in 1993; is that right?
 5 **A.** Correct.
 6 **Q.** You remain in full time practice as a barrister and is
 7 it right that you've also sat as a judge in the civil
 8 and in the criminal courts?
 9 **A.** Yes, until the statutory age of retirement three years
 10 ago.
 11 **Q.** You are able to give evidence today and indeed in your
 12 witness statement because your former clients have
 13 waived privilege. Is it right that you give evidence as
 14 an individual and not as a representative of your former
 15 clients?
 16 **A.** Yes, it is. I have clarified with the Department in
 17 writing that I come here not to speak for the Department
 18 or Government or any of my former clients but as
 19 an individual doing my best to recollect and recount
 20 what I remember of those days.
 21 **Q.** Aside from your memory, is there any impediment to you
 22 giving your evidence today, professional obligations or
 23 any other form of obligation?
 24 **A.** Not that I'm aware of.
 25 **Q.** You have a copy of your witness statement with you?

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1 ultimately pursued and the litigation proceeded against
 2 the manufacturer of the drug?
 3 **A.** No, the litigation proceeded against all. The
 4 manufacturers, Eli Lilly, at some stage entered in
 5 a global settlement with, I think, all those except
 6 those they considered to be statute-barred. There was
 7 then a limitation hearing at first instance where,
 8 I think, only one plaintiff was permitted to continue
 9 under section 33, and then there was a hearing in the
 10 Court of Appeal, whose outcome I cannot now recollect,
 11 but in the end no allegations were, in effect, pursued
 12 against those authorities. So the issue was never
 13 resolved.
 14 **Q.** Is it right that neither the Committee on Safety of
 15 Medicines or the Licensing Authority contributed to the
 16 settlement that was put forward by the manufacturer?
 17 **A.** Correct. Absolutely nothing, nor did central
 18 Government.
 19 **Q.** You were also instructed, according to your witness
 20 statement, in the benzodiazepine group litigation --
 21 **A.** Yes.
 22 **Q.** -- on behalf of, again, the Committee on Safety of
 23 Medicines and the Licensing Authority?
 24 **A.** Yes, I don't think the Department was involved in that,
 25 I recollect those two.

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1 Q. That overlapped in time with the HIV Litigation but
 2 continued afterwards.
 3 A. Yes.
 4 Q. In your statement you say that the claims were later
 5 abandoned after substantial costs were incurred. First
 6 of all, is that right and, secondly, was that a result
 7 of the Legal Aid Board withdrawing funding?
 8 A. I believe so and, from recollection, there was something
 9 astronomical like -- I think it might even have been
 10 £30 million, it was certainly £15 million or more, was
 11 spent by the legal aid fund, and they didn't even get to
 12 the stage, I think, of there being a defence served
 13 before it was recognised that the merits were not such
 14 that the Legal Aid Board continued to fund it.
 15 Q. When you say there was that money spent on it, in
 16 effect, that money would have gone to the lawyers rather
 17 than the plaintiffs in the case?
 18 A. I regret to say it would, and there was of course money
 19 spent out of the resources of the Department of Health
 20 Licensing Authority on defending the case.
 21 Q. I'm going to turn now to the HIV Litigation, the bulk of
 22 my questions today are going to be about that.
 23 A. Yes.
 24 Q. May I begin by asking how much you're able to recall of
 25 your role in the litigation independently?

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1 at the time.
 2 It is difficult and I'll do my best.
 3 Q. Thank you. It appears from the documents we provided
 4 you with, and you mention this at paragraph 5.1 of your
 5 statement, that you were instructed in about mid-1988 at
 6 about the time when the writs in the litigation were
 7 served. You were instructed by the Department of
 8 Health, the Licensing Authority and the Committee on
 9 Safety of Medicines, and we'll explore the different
 10 interests those groups had in due course.
 11 A. Yes, probably initially by the Treasury Solicitor.
 12 There was a change around that period. Until about then
 13 all litigation was conducted of this kind of level by
 14 the Treasury Solicitor, with input from departmental
 15 lawyers. I think, over this period, there came a shift
 16 and the departmental lawyers became the instructing --
 17 the solicitors formally, whilst the Treasury Solicitor
 18 was in the background. But I can't recollect the exact
 19 legal structure of it. In those days, of course,
 20 barristers didn't have contracts, so it was where they
 21 came from. But, in essence, the instructions were on
 22 behalf of all three of those bodies.
 23 Q. Were there any concerns, either then or later, that
 24 there was any conflict of interest between those three
 25 bodies?

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1 A. It's always a difficult question when you have materials
 2 supplied to you. When I first was asked if I would give
 3 evidence, and before I looked at the two fat volumes of
 4 documents which were provided to me, I had certain
 5 overriding recollections of it, in terms of its general
 6 structure, the plight of the individuals, because I then
 7 went on, as you will cover, to human growth hormone and
 8 BSE and CJD so that was also very striking.

I also had a very clear idea of the view we formed
 of the legal merits, and I have a strong overriding
 recollection of my view throughout that, although we
 would win the litigation, the effect, in terms of the
 public perception of the suffering which had been
 endured by the haemophiliacs would lead, in any event,
 to a massive outcry for a public inquiry.

So that's my recollection before I read the
 papers. I've now read the papers you provided to me.
 I've read nothing else, apart from reminding myself of
 the variant CJD scheme, because it was relevant to one
 of your questions. And quite a lot has come back but
 the extent to which it is reconstruction from the
 documents, and recollection, is difficult to
 disentangle. I have tried in my statement, and I will
 try today, to make that distinction between what
 I remember and what I believe I would have done or said

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1 A. There was -- there were no concerns. I and the other
 2 barristers, and I think all the lawyers, were aware that
 3 there could come a time when there was a conflict. For
 4 example, if the Department wanted to take one view in
 5 order to resolve the matter of not taking a particular
 6 point, which was important to the, in those days,
 7 I think, about 25 or 30 individuals on the Committee on
 8 Safety of Medicines, all eminent doctors. There never
 9 came such a time, but we were always -- as in all
 10 litigation, where you have multiple clients, aware of
 11 the possibility.

12 Q. I'd like to just quickly run through the names of those
 13 who were on your legal team because they will be
 14 cropping up during the evidence today. You were the
 15 only junior who was instructed throughout; is that
 16 right?

17 A. I was the only junior who was instructed throughout. As
 18 I read the papers, including some papers very recently
 19 sent to me, there were, in addition, I think,
 20 Michael Spencer was already a QC when he joined us. He
 21 became a silk at about that time. Fiona Sinclair was,
 22 I think, my pupil, and turned up at one court hearing.
 23 Helen Rogers was involved at some stage. She sadly died
 24 of acute asthma, a few years later. But, in effect,
 25 I was the only junior.

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1 Q. Was it unusual that you'd be the only junior on such
2 a large case?
3 A. Not in those days. The large legal teams you see today
4 were not popular, certainly in Government circles in
5 those days. I mean, in Opren, the manufacturers had
6 several counsel; the plaintiffs, as they were then
7 called, had several counsel. I mean, you have to
8 recollect back to a period when almost all Government
9 litigation was conducted by the Treasury Devil, when
10 I started Simon Brown who went to the House of Lords,
11 then John Laws, and it was delegated down to the panel.
12 But I think it was quite usual for there to be
13 a very small legal team and quite normal for juniors
14 only to be instructed. The Treasury Devil never became
15 a QC, by tradition, so the introduction of QCs into
16 defence teams, in those days, was unusual.
17 Q. Did the size or the team during the HIV Litigation cause
18 you any problems, in terms of being able to keep across
19 the issues of the documents?
20 A. I don't recollect it. I was a lot younger then and
21 probably had a bit more energy. I don't remember --
22 I mean, I had another caseload -- various types of
23 litigation. I don't remember ever thinking: I need more
24 resource.

Of course, the resources of the Department and

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1 Department in those days.
2 Q. And also you mentioned earlier Michael Spencer, who
3 became a silk at or around this time. You say in your
4 statement that his speciality was medical negligence and
5 pharmaceutical litigation and he was brought in to add
6 that expertise?
7 A. Yes. I mean, he came from outside the tradition of the
8 Treasury Panel. He had been involved for the
9 manufacturers in Opren, and therefore had developed,
10 with me, an understanding, an awareness and familiarity
11 with group action and group action litigation. And he
12 had very substantial medical pharmaceutical knowledge,
13 so he was an obvious add-on when we wanted to have some
14 more strength, rather than adding a junior from
15 the Panel who might not have the experience of medical
16 matters.
17 Q. Your solicitors, and you've mentioned the distinction
18 between the Treasury Solicitor and the Departmental
19 solicitor, it was Jayant Desai for the Treasury
20 Solicitors and Ron Powell for the Department of Health?
21 A. I think that they probably were the lead people. When
22 I was writing my statement I had quite a lot of
23 difficulty remembering it. Jayant Desai I think was
24 involved with the Treasury Solicitor quite a lot during
25 that period. He was probably the lead solicitor. I've

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1 those helping the Licensing Authority and the CSM were
2 stretched, but I found -- I don't recollect there being
3 any sense that "We can't do it because we haven't got
4 enough men on the team". If we had, I would have said
5 so, and I think by that stage I had sufficient influence
6 within the Department if I said, "I need more help",
7 then we would have got it.
8 Q. And of course you mentioned that Fiona Sinclair and
9 Helen Rogers -- their names appear in some of the papers
10 so they would have assisted at some point?
11 A. Yes. I don't think they had much involvement. They may
12 have helped me at certain stages but that's in the mists
13 of time I'm afraid.
14 Q. You were led by Andrew Collins QC, who was a senior
15 member of the Common Law Panel of the Treasury Solicitor
16 at that time?
17 A. Yes, I think technically, just -- your earlier question
18 jogging my memory. I think, technically, as soon as he
19 took silk, he ceased to be a member of the panel. But
20 because he'd been on the panel for 20 years or
21 something, he was one of the silks they called upon.
22 I think he took silk when John Laws was made the
23 Treasury Devil because the two were in line with each
24 other for the job. But he was very much regarded as
25 a senior member of the Panel instructed by the

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1 seen documents from him. Ron Powell I recollect. There
2 were others but quite what part they played, I can't
3 remember.
4 Q. When you say there were others, are those other
5 solicitors or were you receiving instructions from civil
6 servants as well?
7 A. I was always receiving instructions from solicitors but
8 there would be civil servants present at the time. And,
9 I mean, if one goes back to those days, 35 years ago,
10 when barristers held conferences and consultations in
11 their chambers, in their rooms, with six or eight or ten
12 or 12 uncomfortable chairs, with people sitting there
13 taking notes on their knee, it wasn't always possible to
14 work out who the juniors were and which ones were
15 lawyers and which ones were officials. So I may have
16 been asked or told something by an official, but it was
17 effectively channelled through the Treasury Solicitor
18 and the Departmental solicitors.
19 Q. Was there any individual or individuals that stuck in
20 your mind as being particularly important as to the way
21 the case was argued and the instructions you were given?
22 A. Not from memory. I mean, I can see one or two people
23 writing notes with firm views, as I reviewed the papers.
24 I mean, I think Andrzej Rejman was involved and had
25 pretty strong medical views. There were one or two

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1 officials who had views about precedents and so on, but,
 2 really, which one it was I simply don't recollect.
 3 **Q.** You mention Dr Rejman and strong views. Did they have
 4 a particular influence on the way that you ran the case?
 5 **A.** No. I mean, he was a source of information because
 6 certainly I am not an expert on either haemophilia
 7 or HIV, although I got involved to a certain extent with
 8 Professor Miller when I was doing pertussis.
 9 He was, if you like, the person we asked when we
 10 wanted to know the answer to a technical medical
 11 question, I think, and he would write papers, as far as
 12 I recollect. But he is the only one of the doctors who
 13 remains in memory.
 14 **Q.** Was there anything unusual about the way in which you
 15 were instructed and the instructions that you received
 16 in the HIV Litigation?
 17 **A.** I don't think so. I mean, we were going through
 18 a period when the traditional A2 instructions tied with
 19 a piece of white string -- because it was Government
 20 work -- were being replaced by much more informal
 21 instructions. We of course had nothing like emails in
 22 those days. So quite a lot was verbal. There was
 23 a certain amount of instructions in writing. And it was
 24 a big and complex case. And although Opren was a big
 25 case in the sense that there were 3,000 claimants,

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1 individuals but certainly on Government authorities and
 2 entities set up under statutory powers, including this
 3 Inquiry. Those who act under those statutes owe duties,
 4 obviously of care, to conduct whatever they're doing in
 5 a proper way, but that duty is generally owed to the
 6 public at large, to Government, rather than to
 7 individual specific plaintiffs.
 8 There are areas in which a statutory duty may give
 9 rise to a claim actionable by individuals, and --
 10 I mean, one of the early cases was about, I think it was
 11 the Yorkshire Ripper Inquiry, whether the police owed
 12 a duty to the victims individually or simply a statutory
 13 duty to the public at large to perform their duty in the
 14 correct way. And the general rule in this kind of case,
 15 where there are wide duties owed for the protection of
 16 the public, is that there will not be a duty owed to
 17 specific individuals unless there's something in the
 18 statute which says there should be.
 19 And I can give you an example which may sort of
 20 have some resonance from a different area, which is
 21 another case I did involving the Fire Brigade. The Fire
 22 Brigade is there -- they have a public function, they're
 23 there set up by public statute to save lives and protect
 24 property. Generally they will not be actionable, they
 25 will not have a duty to an individual in carrying out

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1 the vast majority of cases were of mild symptoms, of
 2 brittle nails and so on. There were only the very
 3 rarest of cases of more serious things, I think there
 4 were two cases of renal failure. So it was a very
 5 different kind of case.
 6 So I think we talked about this case a lot more
 7 because it was important and, as you know and will come
 8 on to, it clearly attracted the attention of ministers,
 9 much more so than Opren ever did.
 10 **Q.** I'm going to move on to some of the papers and some of
 11 those issues, but before I do, and to assist those who
 12 are following the evidence today, can I just ask for
 13 some fairly, if possible, straightforward explanations
 14 of some of the legal concepts involved in the case.
 15 It's always dangerous asking a lawyer for an explanation
 16 of legal concepts, but one of the issues that was raised
 17 was breach of statutory duty.
 18 **A.** Yes.
 19 **Q.** Could you explain to those listening and watching what
 20 that concept meant.
 21 **A.** Yes. I mean, I haven't dealt with breach of statutory
 22 duty for about 25 years, I don't think. So my
 23 recollection is recollection rather than, so to speak,
 24 a quasi-expert talking about what I'm doing in 2022.
 25 Certain obligations are imposed on sometimes

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1 those duties. In the case with which I was concerned,
 2 it was decided -- I was acting for another party -- that
 3 because the chief fireman on the day decided that he
 4 would switch off the sprinklers, the sprinkler system,
 5 then his breach of statutory duty was, if you like -- it
 6 was also a common law duty, and that was held to be
 7 actionable. It went all the way up to the Court of
 8 Appeal on the allegation, no duty of care owed, purely
 9 to the public at large, and failed.
 10 That's why, in this case, there was always a scope
 11 for the Department, the Health Authorities, not just
 12 clinicians, to step beyond their role in performing
 13 their public functions and carry out an action which the
 14 courts would regard as having a direct impact on an
 15 individual, and therefore being arguably actionable.
 16 So in general, a statutory duty was unlikely to
 17 give rise to a duty of care owed to individuals, the
 18 duty was to perform for the public interest. And again,
 19 equally, in order to show that there was a breach of
 20 a statutory duty, you would have to show that the
 21 individual entity or minister or official acted in a way
 22 which is said to be unreasonable as opposed to merely
 23 negligent. The concept of *Wednesbury* unreasonableness,
 24 which is used in planning terms a lot, was there. And
 25 the Court of Appeal, you will know, and you may have

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1 covered, concluded that there was unlikely to be a case
 2 of statutory duty here but there might be, for precisely
 3 the reasons I've tried to identify rather clumsily.
 4 **Q.** And Wednesbury unreasonableness is the concept that no
 5 individual, or no minister, properly informed could
 6 possibly have taken that decision, reasonably?
 7 **A.** Yes, which is several stages beyond "He made a mistake
 8 and that mistake was negligent in that there was
 9 a failing of his duty of care". So you have to go that
 10 stage further.
 11 **Q.** In terms of the duty of care and, as you've described,
 12 there, a distinction which was drawn in some of the
 13 papers as between an operational duty --
 14 **A.** Yes.
 15 **Q.** -- and the policy duty, am I right in understanding that
 16 the policy duty was the one that would have to be proved
 17 to Wednesbury unreasonableness standards, as allocation
 18 of resources, decisions on major issues such as which
 19 project to pursue, but the operational policy, how
 20 a policy was implemented, would be actionable on the
 21 lower standard of negligence?
 22 **A.** Assuming that it fell within the scope of duty because
 23 it was that side of the line, then it would be
 24 actionable on proof of negligence, yes.
 25 **Q.** And that is a line which is easy to describe here but

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1 there may be risks involved -- and denying those
 2 medicines on the basis that they weren't sufficiently
 3 proven.
 4 And as we've seen with things to do with Covid
 5 over the last two years, where the process has moved
 6 incredibly rapidly, there is always a balance between
 7 something which is so important in terms of its
 8 therapeutic benefits that it should, if possible, be
 9 permitted to be marketed, with appropriate warnings if
 10 necessary. But, where there are signs of significant
 11 side effects which effectively change that balance from
 12 a balance in favour of making it available, subject to
 13 safeguards, to not making it available at all or
 14 withdrawing it, withdrawing its licence, that requires
 15 an exercise of judgment by all of those individuals.
 16 They all give up their time, and they're doing it and
 17 they're looking, as they have to, not at each individual
 18 who might be infected but at the balance between the
 19 benefit to the many of -- and this Inquiry will know of
 20 the experimental drugs to deal with HIV, which have been
 21 so successful they changed our perception of HIV.
 22 And you have to have trials, clinical trials,
 23 animal trials, testing. There was a very clear system
 24 for the recording of adverse reactions and providing
 25 them to the Committee.

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1 very difficult to identify in terms of individual parts
 2 of the claim; is that fair?
 3 **A.** Very difficult to identify, needs very considerable
 4 thought in anybody who is going to argue either side of
 5 the line, and, you know, is a sort of thing the judges
 6 will agonise over in working out. It's not easy.
 7 **Q.** You've described there the general concepts of the duty
 8 of care and breach of statutory duty. I'd like to ask
 9 you specifically about the importance of this issue to
 10 the Committee on Safety of Medicines and the Licensing
 11 Authority. This is something that you address at
 12 paragraph 11.2 of your statement, but can I ask you just
 13 plainly why it was so important to the CSM and the
 14 Licensing Authority that a duty of care was not
 15 established in law against them?
 16 **A.** Yes. I mean, the Committee on Safety of Medicines, and
 17 I don't know how much has already come out in the
 18 Inquiry about this, was an assembly of 20 to 30 very
 19 eminent medical people of all sorts of disciplines. And
 20 they voluntarily sat on the Committee and gave up their
 21 time to consider whether new pharmaceutical products
 22 should be licensed, whether any licence condition should
 23 be imposed, whether they should be withdrawn. And in
 24 doing so, they were balancing the interests of making
 25 medicines available -- sometimes at the frontier, where

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1 Now, in making those decisions, those individuals
 2 believed that they were acting for the public at large,
 3 assisting the Department and the Licensing Authority.
 4 But when I first addressed the Committee on Safety of
 5 Medicines in about 1985 or '86, when they were first
 6 brought into the Open litigation, the concept that
 7 those individuals could be sued, even with a Government
 8 indemnity, for their decision-making process, was
 9 a matter of real concern, because, as opposed to trying
 10 to make a judgment for the overall benefit, reflecting
 11 the interests of each person who might be given that
 12 product, but also reflecting the risk to those who would
 13 be deprived of it, that was something which they needed
 14 to make without the feeling that they could be sued if
 15 they made the wrong decision.

16 So it was really important to have that voluntary,
 17 effectively unpaid, I think they might have got
 18 expenses, system successful, that there should be no
 19 duty of care owed to individuals.

20 The Licensing Authority were effectively --
 21 I mean, the Licensing Authority was the minister, with
 22 about two civil servants attached for those purposes,
 23 and they would effectively follow the advice of the
 24 Committee on Safety of Medicines. And any departure
 25 from that would have raised enquiries and would have had

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1 to be very carefully justified. And that was the way in
2 which the ministers delegated that difficult
3 discretionary power to decide at what point a product
4 should be licensed, cautioned against, side effects
5 warned against, or withdrawn. That was their job. And
6 the Licensing Authority had the formal job of approving
7 or withdrawing the licence as a result.

8 And when licences were withdrawn, you know, on the
9 one hand manufacturers would scream and on the other
10 hand those who were enjoying the benefits of the product
11 in alleviating suffering would object. When Opren was
12 withdrawn, a number of people who found it very
13 beneficial for their arthritis were very upset. So
14 that's probably the long explanation of why it was
15 considered very important that they should be able to
16 continue to give that advice, operate in that way,
17 without fear of individual actions being brought against
18 them.

19 Q. Can I just pick up on a couple of points from there.
20 You said that the individual members of the Committee on
21 Safety of Medicines would be sued. Is that correct,
22 that it would be those individuals rather than the body
23 itself that would face the action?

24 A. The -- I'm searching back in my memory as to their
25 precise legal status, but they were a collection of

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1 to do it.

2 And that was certainly a view echoed by those in
3 the Department who were responsible for recruiting the
4 next specialists, you know. These were the most eminent
5 people in their fields, virology, pharmacology -- and
6 I can't remember the disciplines any more. But, yes, it
7 was a real concern that we wouldn't have what has been
8 recognised as an incredibly thorough and effective
9 system in terms of their input. Obviously, the extent
10 to which adverse reactions are reported is variable and
11 depends on people further down the chain, but it was --
12 I think it was a world class system for licensing.

13 Q. You mention in your statement that, at this time, there
14 was a group of plaintiff personal injury lawyers who
15 were, as it were, pushing the boundaries of the law in
16 this area with the litigation, which you've mentioned.
17 Was there any reason, so far as you could tell, why it
18 was that in the mid to late '80s, this became such
19 an issue?

20 A. Yes, let's just -- I need to try and get back into that
21 moment. I think, from my perception, and I've had some
22 fairly strong views about this, that there came across
23 the Atlantic, in the early 1980s, the concept,
24 originating in the class action, which became the group
25 action. In Opren, there was a \$6 million award given in

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1 individuals who were appointed to be on the Committee on
2 Safety of Medicines. They were sued as such. But, if
3 you like, there was no company that could be struck off.
4 So they were effectively, those who made up the
5 Committee on Safety of Medicines from time to time, who
6 would have been sued. And there was a very real concern
7 that they would be named.

8 I think at one stage, it was Abraham Goldberg, who
9 was the chairman of the CSM in Opren, and I'm not sure
10 that at one stage some of the writs weren't addressed to
11 Sir Abraham Goldberg and the members of the CSM. There
12 was no self-way of insulating them from the risk.

13 Q. Was there then a genuine sense that if the duty of care
14 point was not successfully defended, then the system may
15 struggle and indeed collapse because people would not
16 volunteer to do this?

17 A. Yes. I mean, always dangerous to have that kind of sort
18 of threat, either perceived or given, but I do know,
19 because I had, in Opren particularly, four or five
20 meetings, round rooms with 22 people, each with their
21 rather old-fashioned microphones, talking into them when
22 they pressed a button. And there was a very real sense
23 that, if we are going to be sued for this, we're just
24 not going to be able to get people to replace us. We
25 might see out our turns but it's going to be very hard

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1 one case by a jury in Texas, I think. The Opren
2 plaintiffs tried to sue, I think, in the United States
3 first, and were told they couldn't, and Opren became the
4 first group action where there were multiple plaintiffs.

5 In pertussis vaccine by contrast, it was
6 an individual-by-individual approach, and that was
7 a disaster. There were two cases which were tried, the
8 case of Kinnear, which was Johnnie Kinnear, which all
9 the evidence that had been given as to whether pertussis
10 vaccine can cause brain damage, you know, terrible
11 consequences to the individual and, unfortunately, there
12 was one spare afternoon where the judge said, "Well,
13 let's hear from Johnnie Kinnear's mother", and when she
14 gave her evidence it was plain that, whatever else
15 happened in that case, she could not succeed because of
16 another condition, I don't remember the details. So the
17 case collapsed and they had another case,
18 *Loveday v Renton*. So that's not a very efficient way of
19 dealing with this kind of problem.

20 The group of plaintiff lawyers who the opportunity
21 to bring the American form of class action, where you
22 get lots of plaintiffs together and the lawyers
23 therefore can charge very large fees which no individual
24 could possibly afford, as a way of increasing the size
25 of their practices and, bluntly, making money.

24

1 It had a dual function. Of course, they were
2 there to try and represent the interests and promote the
3 benefit of those who had suffered, but this was also
4 a way in which they could succeed now.

5 Claims against pharmaceutical companies are
6 heavily defended. I think the concept was: if we sue
7 the Government, they may be a softer target. And there
8 was, therefore, this tendency to bring the American
9 blame culture across and have massive claims with
10 multiple plaintiffs against the CSM and the Licensing
11 Authority, which, if successful, would have been very
12 damaging. And, of course, that went on into the other
13 class actions.

14 This was all legal aid funded, and benzodiazepine
15 was a classic example where there were I can't remember
16 how many thousands of plaintiffs. But it came from
17 America, and a number of firms grew very large and
18 successful on the back of it.

19 Q. One point I've been asked to put to you by some of the
20 Core Participants is that if the claim for a duty of
21 care against the Committee on Safety of Medicines is
22 successful resisted, is there not what lawyers would
23 call a lacuna, in terms of the legal responsibilities of
24 the CSM? How is that scare circle -- how is that circle
25 squared? Is there a problem there, in the fact that

25

1 the Bolam standard -- I'm sorry, it's back into law
2 again -- is that it's got to be a decision, not that no
3 reasonable minister -- that's the Wednesbury test -- but
4 that no reasonably competent professional in that
5 profession would do or no opinion they would hold.

6 When you've got 20 or 25 or 30 eminent people and
7 they all collectively decide to do something then the
8 legal standard for "no reasonably competent practitioner
9 would do it" could only be met in the most extreme
10 circumstances. They all went out to dinner and got
11 drunk and had a licensing day the next day and passed
12 the papers through without reading it. There would
13 probably be a cause of action then because that would be
14 an operational action. But when they all get together
15 and they think and read the papers and they debate and
16 they decide, then it must follow, in my view, that you
17 cannot say that no reasonably competent person would
18 have done it. So even if there was a duty of care, then
19 you would fail on negligence on that test because
20 they've considered it.

21 Again, you have to have the position, if there's
22 something they haven't considered, a piece of
23 information which has been missed, then that's probably
24 something which the Department failed to provide to
25 them, and that would be an operational duty of the

27

1 there is no legal oversight, as it were, of the CSM?

2 A. I understand the concern, and I think the reason that
3 there is no duty of care owed is because the function
4 being carried out is one being carried out for the
5 public at large and, therefore, is not one which gives
6 rise to a claim. I mean, we have moved in the last
7 50 years from negligence cases being comparatively
8 difficult, to the sort of "where there's blame there's
9 a claim" mentality.

10 It was not at all unusual at that stage that
11 genuine suffering would not give rise to a claim. If
12 there's been negligence somewhere down the line, then it
13 does. And, of course, there are two aspects to that.
14 First of all, if the clinician doesn't give the
15 appropriate warnings or doesn't consider the warnings
16 when deciding whether to treat their patient in
17 a particular way, they will be at fault and there will
18 be a claim.

19 But there are certain things. If the Fire Brigade
20 comes and arrives too late, they have no duty of care:
21 it burns down, there is no recourse. If there was
22 a position where 22 men -- 25 men made a mistake, then
23 the question is "Well, why shouldn't they be sued? Why
24 shouldn't we have damages for that?" But, of course,
25 the concept of duty of care in professionals, following

26

1 Department, for which there would be a cause of action
2 in negligence.

3 So there isn't, I don't think, a lacuna of real
4 significance. Where there are situations where the law
5 does not give a remedy, and the law is, I'm afraid,
6 a pretty rough way of trying to do justice, because it
7 has to be, it can't cater for everything, and judges, as
8 well as lawyers, are human, then there is that gap, and
9 that is where Government action, if appropriate, is
10 needed to intervene. And that's an area you may discuss
11 later, which I have some pretty strong views on.

12 Q. We will come on to that shortly.

13 What I'd like to do now is take you to an advice
14 that was written by Andrew Collins in October 1989. Can
15 we have on screen, please, Paul, DHSC0006484_012.

16 If we could have the second page of that. That's
17 just the fact summary. We can see it is entitled
18 "Liability of the Department of Health and of the CSM in
19 Respect of Personal Injury caused by Licensed Medicinal
20 Products. Advice". Paragraph 1 says:

21 "The need for this advice arises from two actions
22 which are currently being pursued against the Crown.
23 The first is the so-called HIV Haemophiliacs Litigation,
24 in which a Master Statement of Claim has been served
25 alleging breaches of duty and negligence against the

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1 Department, both as Licensing Authority and as having
2 responsibility for the provision of medical services
3 under the National Health Scheme, the CSM and the
4 Regional and other Health Authorities. The allegations
5 against the Department as Licensing Authority and the
6 CSM are based on failures to vary or revoke licences
7 because of the known risk of Hepatitis, the granting of
8 licences to non-heat-treated Factor VIII concentrates
9 and a failure to appreciate in time the AIDS risk.
10 Similar allegations are made against the CSM in that it
11 failed to give the necessary advice which would have led
12 to the removal of the offending product from the
13 market."

14 I won't go on to read the rest of that paragraph
15 but if we could move on to the second paragraph, on
16 page 3 of the electronic document:

17 "The second group of actions (although only one
18 has so far materialised) is a claim by a Plaintiff who
19 alleges that he has been injured by becoming addicted to
20 Valium (benzodiazepine). It is said that the Department
21 and the CSM ought to have warned of the danger of
22 dependency."

23 So this advice is being given in respect of both
24 of those actions.

25 If we, Paul, could go briefly to the page 14 of
29

1 against the public purse, through the CSM, every time
2 a medicinal product proved to have unexpected side
3 effects and unexpected consequences.

4 And that was regarded as very serious and needed
5 to be looked at, I think, together, so there was
6 a consistent view taken between the two.

7 And in a sense, as I put elsewhere, I think, in my
8 advice, the combination of CSM and Licensing Authority
9 with the Department, raised the difficulty. The
10 combination of claims for benzodiazepines being brought,
11 I don't think necessarily by exactly the same group of
12 lawyers, but there was some overlap at same time as
13 this, meant that the consequences of any decision taken
14 as to the way in which cases were to be handled, and the
15 consequences of the imposition of duty of care in
16 either, was much wider than just limited to the
17 haemophilic case.

18 So it was unnecessary and, in retrospect,
19 unsatisfactory aspect, that the importance of preserving
20 the position of the CSM and the Licensing Authority,
21 separately from the Department, was all the stronger
22 because of this perceived risk of benzodiazepine and
23 further claims down the line being brought.
24 Benzodiazepine being a relatively mild condition, such
25 as Opren, being brought in the same basket as these
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1 the document. There is a redaction over the initials,
2 but they are "AC", and we know from those initials and
3 from the address of the chambers that that is
4 Mr Collins, as he then was, 18 October 1989.

5 So we have some context, we heard from
6 David Mellor last week (*sic*) that, at around this time,
7 he was questioning whether or not the duty of care point
8 should be taken, at least by the Department of Health,
9 and the CSM and Licensing Authority were also giving
10 their views on that.

11 The first question arising from this: why was it
12 that this advice was given about both of the actions
13 rather than just the HIV Litigation?

14 A. I don't know why it was. I can reconstruct at that
15 stage, because the attack on the CSM and the Licensing
16 Authority and the Opren litigation had raised these real
17 concerns which we discussed, but had been successfully,
18 I think, by this stage, fought off, and it arose in two
19 contexts: one small group of plaintiffs, haemophiliacs,
20 very, very serious consequences; the other very large
21 group of plaintiffs, usually much more mild
22 consequences, addiction to Valium -- raised the
23 possibility that this was the next wave of the onslaught
24 of trying to impose a duty on the Licensing Authority
25 and the CSM, which would enable a claim to be brought
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1 much, much more serious matters, with all the terrible
2 consequences which you've heard so much about.

3 Q. I'm not going to go through all this advice. The
4 general tenor of it is that a duty of care point should
5 be taken for the Department of Health and the Licensing
6 Authority and CSM.

7 A. A duty of care point?

8 Q. A duty, sorry, yes: a duty of care point. The case for
9 the latter, the Licensing Authority and the CSM, was
10 particularly strong.

11 A. Yes.

12 Q. I am just going to take you to electronic page 13 and
13 paragraph 9. This is towards the end of the advice and
14 this from Mr Collins. I emphasise that you weren't
15 a signature to this advice:

16 "I should add that, from the information I have
17 seen, I think that there are reasonable defences to all
18 claims on the merits. But I am sure that the existence
19 and, if it exists, the extent of any duty of care must
20 be settled and these cases are the vehicles to enable
21 that to be done. Once the decision has been made to
22 leave it to the courts, it must be dealt with properly,
23 taking all properly arguable points."

24 Am I right to read that as a fairly strong steer
25 to ministers from Mr Collins that you should be left to
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1 run the duty of care points that you thought were
 2 properly arguable?
 3 **A.** I'm sorry, can you repeat that?
 4 **Q.** Am I right in reading this as being a fairly strong
 5 steer to ministers from Mr Collins that the lawyers
 6 should be left to run the duty of care points that they
 7 considered to be properly arguable?
 8 **A.** I don't think I'd put it quite like that. I mean,
 9 Andrew was always robust, and he came from a family
 10 tradition of robustness. His father was the dean of
 11 St Paul's and a leading member of the CND, and Andrew
 12 followed in his trenchant views. I think what was being
 13 said here is that, despite the fact that it was
 14 a reasonable defence on the merits, irrespective of the
 15 legal duty, it was necessary, with claims being made,
 16 particularly against the CSM and Licensing Authority,
 17 that the existence of those -- of such a claim and its
 18 nature, if it existed, needed to be determined for the
 19 future because, otherwise, if you say no duty, nobody is
 20 just going to go away. The lawyers were keen to run the
 21 point, and if it were conceded, then there would be
 22 serious consequences.
 23 So since it was clear that you couldn't just say
 24 "Well, let's put it to one side", you had to take the
 25 point, once you decide to take the point, the Government

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1 one of the surrounding circumstances."
 2 First of all, did you agree with that paragraph
 3 and the sentiments expressed in it?
 4 **A.** I can't remember whether I put it in my statement.
 5 I never would have quite used the trenchant language of
 6 Andrew, who was pretty senior, and I was pretty junior
 7 and still fresh from the Army, where we did what we were
 8 told, as opposed to saying what people should do.
 9 I entirely agreed with the concept and, throughout
 10 my involvement in this, this is one of my strong
 11 recollections, it is really important that part of the
 12 Government's function is to look with care and love at
 13 all those in its constituency, and where there is
 14 a legal claim, there is a legal claim, and you deal
 15 with it under the law. Where there is not, you then
 16 have to consider the human and the resource and the
 17 policy case. You cannot compensate everybody who is the
 18 victim of misfortune. That is impossible in a society
 19 with limited resources.
 20 Therefore, if you have a really serious
 21 misfortune -- and there are many medical misfortunes, as
 22 mistakes have been made and knowledge is learned, things
 23 you could have done 20 years ago, if somebody had
 24 realised it, and then it was discovered. But Government
 25 should be there to make political decisions where there

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1 lawyers -- and that is everybody from the Attorney
 2 General and Solicitor General had to be consulted down
 3 through the departmental lawyers and the counsel team --
 4 should be instructed to take the point. And if you take
 5 the point, you have to take it seriously. You don't
 6 take it halfheartedly. If you are going to take it
 7 halfheartedly, then you should waive it.

8 **Q.** I'm going to take you to one more piece of this advice
 9 as well. Electronic page 9, paragraph 7.3.

10 Paragraph 7.2 concerns the legal arguments about
 11 whether or not there is a duty of care owed by the CSM
 12 and there has been similar discussion about duty of care
 13 owed by the Department. In 7.3 Mr Collins wrote this:

14 "If this is right [his legal analysis], there is
 15 no alternative Defendant in the Haemophilic cases and
 16 they will not be compensated through the courts. I note
 17 that a decision had been taken not to compensate them in
 18 other ways, for example a scheme such as applied by the
 19 Vaccine Damage Act. There is, I think, much to be said
 20 for some such scheme to compensate those who fall
 21 victim, through no fault of their own, to a medical
 22 disaster. But that is a political and not a legal
 23 problem, although a sympathetic judge may be persuaded
 24 to take asked of the absence of alternative compensation
 25 in deciding whether there is a duty of care, that being

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1 is an absolutely massive case for some form of
 2 compensation of an extra legal sort. And I mean that
 3 certainly informed my view throughout, and we see it
 4 happening. You know, whether it is aid to Ukraine or
 5 whether it is aid to victims of disasters at Aberfan or
 6 anywhere else, that is a function of Government to fill
 7 in the gap between what the law will do and what it is
 8 proper to do. But the question of what it is proper to
 9 do is a political decision, not a legal decision.

10 And that's why I was always careful not to push my
 11 views down the throat of those instructing me, in the
 12 way that Andrew probably felt able to do so, but to make
 13 clear whenever asked my view and, you know, you'll come
 14 on to it, but my absolute overriding view was that, in
 15 this case, the plaintiffs would all fail. They would
 16 all go through the agony of a trial and they would lose,
 17 and get no compensation.

18 But such is the terrible nature of the
 19 consequences on this already much afflicted group of
 20 people, that at the end of it, the public outcry for
 21 compensation would have been all the louder and the
 22 Government would have ended up paying lots of money to
 23 lawyers, which is not a thing I'm very keen on, and then
 24 having to spend more money on compensation because of
 25 the outcry. And my view is that I'd rather have all the

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1 money go to compensation and dispense with the lawyers.
 2 **Q.** I'm going to finish on the duty of care point by just
 3 briefly going to a further document which is
 4 DHSC0041034_007. It's dated 24 October 1989, so a few
 5 days after what we were just looking at, and it is
 6 a submission from Sue Armstrong, a solicitor to
 7 Mr Wilson in the Department of Health, and it is about
 8 the duty of care and how it should be run in the
 9 litigation.

10 If we look at the second paragraph, we see:

11 "Counsel advises that it would be very difficult
 12 to take the point in Valium and not in HIV. Questions
 13 would inevitably be asked as to why we were doing so,
 14 when the issues vis-a-vis the [Licensing Authority] and
 15 the CSM are identical. This could in itself cause bad
 16 publicity about the Department's attitude to sufferers
 17 from tranquilliser dependency."

18 Then we have a paragraph talking about a potential
 19 variation. Then we have this:

20 "Counsel has suggested the following approach:

21 "1) We take the point on behalf of the [Licensing
 22 Authority] and the [Committee on Safety of Medicines] in
 23 both.

24 "2) So far as the Department goes, in HIV we
 25 raised the issue of allegations that go to questions of

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1 the actual policy decision is outside the remit of the
 2 court.

3 **Q.** The constitutional principle behind that is that the
 4 democratically elected Government is responsible to
 5 Parliament for those political decisions?

6 **A.** Yes.

7 **Q.** To the best of your knowledge, is this the approach that
 8 was then taken for the rest of the litigation on behalf
 9 of the Defendants?

10 **A.** Yes, I believe so. I've seen nothing -- I mean it
 11 sounds right. I've seen nothing in what you sent me to
 12 suggest that we changed.

13 **Q.** Just to conclude on this, at paragraph 17.2 of your
 14 statement, you state that there was a decision by
 15 Mr Justice Ognall not to try these matters as
 16 preliminary issues on 5 December 1989. Now, that is
 17 something that both the plaintiffs and the central
 18 defendants had wanted but other defendants had not
 19 wanted. Mr Justice Ognall said, "We're not going to
 20 have a trial about that now, we will try everything
 21 together in due course"; is that a fair summary?

22 **A.** Yes.

23 **Q.** I'm going to move on, then, to a conference that you had
 24 with the Department of Health and those representing the
 25 Department of Health and the Committee on Safety of

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1 policy, and attempt to strike them out as
 2 non-justiciable, leaving the other aspects of the
 3 Department's involvement, ie its
 4 administrative/operational function, intact.

5 "In this way perhaps, the Government would not be
 6 seen as eroding its responsibilities, but merely
 7 directing them towards the right quarter. It would also
 8 reduce the complexity and cost of the litigation, thus
 9 assisting the Plaintiffs to some extent."

10 Do we take from this that advice then is that, to
 11 run the duty of care point in full for the Committee on
 12 Safety of Medicines and the Licensing Authorities, but
 13 to draw that distinction which you were talking about
 14 earlier between the operational and the policy
 15 distinctions for the Department of Health.

16 **A.** Yes, and I mean, just to illustrate that, a policy
 17 decision as to whether you go for earlier
 18 self-sufficiency in blood products and Factor VIII, and
 19 the resources you put to it is a policy non-justiciable,
 20 when you have decided what you are going to do, the way
 21 in which the Department goes about it and at the speed
 22 it does so, and any failure to make progress or look at
 23 avenues, can go into the operational side.

24 So there is a remedy for the failure to do what
 25 policy decides competently and in a timely manner, but

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1 Medicines and the Licensing Authority on
 2 19 October 1989, so at the same time as this discussion
 3 was taking place.

4 We have, first of all -- I won't ask for it to be
 5 brought up, but there is a reference which is not in
 6 your statement, so I give it for the transcript:
 7 DHSC0019630. Which is, in effect, an agenda for the
 8 conference which was sent by letter, by Mr Powell, sent
 9 to Mr Desai but also to you, and he said that he wanted
 10 to consider three issues: levels of compensation if the
 11 case is lost; advice on the likelihood of the success on
 12 the preliminary issues before going on to consider
 13 settlement; and, thirdly, the Sunday Times campaign for
 14 compensation that was running at the same time. It's
 15 that issue that I'd like to pick up on in particular.

16 **A.** Yes.

17 **Q.** If we could have on screen, please, DHSC0041034_015.

18 This is a note that was made of the conference by
 19 somebody who attended. It's not signed.

20 You say in your statement at paragraphs 14.12 that
 21 "this was a rather sketchy note", and you express some
 22 concern about relying on this rather than on the written
 23 advices that you gave during the hearings, and that is
 24 something, of course, that we will keep in mind. But if
 25 we could just go down to the bottom of that page, the

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1 final paragraph, what is recorded in the note is this:
 2 "Regarding the articles appearing in the
 3 Sunday Times, Counsel said that these were tiresome and
 4 showed that the plaintiffs know what is going on but the
 5 article[s] do not amount to concept. The articles might
 6 be an attempt to influence the trial Judge. All the
 7 articles boil down to saying, is that the Government
 8 should provide compensation. Counsel has told the other
 9 side that they should be careful what they say in the
 10 Sunday Times. In answer to a question from
 11 Mrs S Armstrong [solicitor], Counsel said that press
 12 publicity in Opren litigation was distinguishable from
 13 the present press publicity because in Opren, the Court
 14 had a supervisory role and the object of the press
 15 cuttings was to influence the Court. Counsel said that
 16 there might be contempt of Court if there is a repeated
 17 and persistent campaign but contempt of Court had not
 18 yet been committed. Counsel advised that the DHSS get
 19 the previous Judgment of Mr Justice Hirst and pass the
 20 press cuttings to the trial judge, Mr Justice Ognall."

21 Are you able to recall now what that issue with
 22 Opren litigation was in respect of the press?
 23 A. No, I can't recall specifically. In the Opren
 24 litigation, to my recollection, and because this became
 25 a frequent approach of plaintiff lawyers in this kind of

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1 I suspect the manufacturers took a point in Opren. It
 2 would be more their style than the government's, to take
 3 a point and say, "You shouldn't be doing it".

4 So I think the Department, as many, many
 5 defendants, particularly those -- public servants, are
 6 uncomfortable with publicity, hence raising this
 7 question.

8 Q. Did you feel either then or at any time during the
 9 litigation that the Department was taking inappropriate
 10 attitude towards press coverage?

11 A. No, because it didn't do anything about it. I mean,
 12 it's human nature not to like it. It doesn't actually
 13 help the decision-making process, whether within the
 14 Department -- it, you know, puts potential witnesses off
 15 track. It's diversionary. You're doing litigation, you
 16 are trying to get the best evidence in order to present
 17 the law and the facts to the court, and it's
 18 a distraction.

19 So they didn't like it. Is it inappropriate of
 20 them to say, "Can we do anything to stop it?" I think
 21 defendants do that all the time. Did we take any steps
 22 to do anything -- it looks as though we may have made
 23 sure that Mr Justice Ognall was aware of what was being
 24 said in the press, if he didn't read it over his
 25 Rice Krispies in the morning. Is that inappropriate?

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1 litigation, there was an attempt to run a press campaign
 2 in parallel with the legal proceedings in order to seek
 3 to influence a court of public opinion, and those who
 4 were decision makers. And, you know, it happens all the
 5 time. And people do it in a -- plaintiffs will often
 6 try to engage the press, try to get them there, try
 7 to -- it's the sort of stuff I do now, about
 8 big commercial cases -- try to get public sympathy for,
 9 you know, the conduct of the defendant or whatever it
 10 may be.

11 In this case, by running it in parallel with the
 12 litigation, and effectively suggesting that this was
 13 the only correct outcome, there was no doubt that there
 14 was a hope that this would influence both the judge and
 15 the defendants and government into taking an approach
 16 which was not strictly legal. And, you know, it's
 17 perfectly justifiable, I've seen it happen, I've seen
 18 opening days -- the opening day of the human growth
 19 hormone trial, there were about 60 press people there.
 20 Nobody left until the end.

21 So press campaigns are used as a vehicle in
 22 litigation. I deplore the habit. I understand why
 23 people do it.

24 I don't recollect what it was that made, by the
 25 look of it, Mr Justice Hirst say something about --

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1 In my view, no. Had we tried to muzzle it? No.
 2 Written to the court and asked them to restrain it, try
 3 to put pressure on it? I don't know what, if anything,
 4 happened between Andrew Neil, I think was the editor in
 5 question, and any influential people within Government,
 6 but I am not aware of anything which crosses a line
 7 between disliking publicity and enduring it.

8 Q. Moving on to a separate part of the note then, if we
 9 stay on the same page, please, electronic page 2 of that
 10 document, four paragraphs down, there is a discussion of
 11 the -- slightly gnomic comments on the merits of the
 12 case and the issue about preliminary issues being tried.
 13 But then right at the bottom, just the final two
 14 sentences:

15 "Counsel feels that the plaintiffs will lose the
 16 case. Ministers, he felt, should consider
 17 compensation."

18 This not your note, but doing the best you can,
 19 looking back on it, that second sentence "Ministers, he
 20 felt, should consider compensation", what do you think
 21 you were saying --

22 A. I think I was almost certainly saying what I've said
 23 already I think today, which is that from what I knew
 24 about or believed to be the case about legal duties,
 25 which we've covered, the extent of duty of care, what

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1 I had seen of the documentation and the difficulty of
 2 proving an actual breach of duty, if there was a duty at
 3 all, and the problems of causation, I was -- "confident"
 4 is a wrong word, but I was strongly of the view that the
 5 claims would fail as a matter of law, and the judge
 6 would have to dismiss the claims on the law, but
 7 because -- I mean, the simple fact of haemophiliacs
 8 suffering from HIV is poignant and tragic enough in
 9 itself; if you have a trial where victims and their
 10 family are recounting the consequences, you will get an
 11 outcry for compensation. And the reason you get an
 12 outcry for compensation is not a sort of bad thing we
 13 want to try to avoid, it's because there is a really
 14 strong case for compensation, and therefore -- it's not
 15 my job as a lawyer to say, "As a matter of policy you
 16 should compensate". It is my job as a lawyer to say,
 17 "There is a huge compassionate case here, and my best
 18 judgment is that the consequences of a trial would be an
 19 even greater outcry and one which ministers would find
 20 it very hard to resist". Particularly because it
 21 spanned two administrations and so it was not going to
 22 be a party and party issue, it was a cross-party issue.
 23 And it's exactly -- I mean, you don't simply get
 24 closure because the case is lost and everybody goes
 25 home, because the haemophiliacs and their family are

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1 paying". It's like saying to an insurer, as an advisor,
 2 "This insurance policy does not cover this claim but
 3 they're nice people and they've had a disaster, so you
 4 should pay". You have to say what the law is and they,
 5 insurers and Government ministers and departments, will
 6 on the whole expect you to hold the line of legal
 7 liability until or unless someone decides to do
 8 something different.
 9 So these were comments deliberately not based on,
 10 "I think you as a minister or as a department should
 11 pay", it's "I think that these will be the consequences,
 12 so I as a lawyer can legitimately tell you that this
 13 case is so strong compassionately that if we win it, you
 14 will still lose in the sense that you'll have to
 15 compensate them."
 16 **Q.** You've described today and in your statement your
 17 personal sympathy for the plaintiffs and what they had
 18 been through. Did you get a sense that that sympathy
 19 was shared by those who were instructing you, the civil
 20 servants and the solicitors?
 21 **A.** Yes. I mean, I have to distinguish in my memory between
 22 this, human growth hormone and variant CJD, because
 23 after 20 and 30 years they do tend to merge together.
 24 I think everybody was acutely aware of the unique
 25 situation of the haemophiliacs. It's desperately

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1 still there. So that is the kind of thinking which
 2 I had throughout, and which informed my view of
 3 subsequent litigation.

4 And I was probably saying that in probably less
 5 sophisticated terms because I was 30 years younger.

6 **Q.** I note for the transcript that you also deal with this
 7 point at paragraph 14.6 of your witness statement, to
 8 which people can refer later.

9 Do you recall what response you got from the civil
 10 servants and the instructing lawyers when you made these
 11 kind of points? Was there any pushback that you
 12 shouldn't be going there, you should just be giving the
 13 legal advice?

14 **A.** No, I don't think so. I mean, there is a distinction
 15 between that which they recognised and took on board,
 16 and there was a theme, which comes through the papers
 17 you sent me, that we need to be very careful before we
 18 go down the route of ignoring whether or not we have
 19 a legal liability, because you get the floodgates
 20 argument. So there's always a balance between trying to
 21 do the right thing for a particular group, and creating
 22 a precedent.

23 And then there's the question of, when you advise
 24 ministers, what do ministers do about it? You don't
 25 advise ministers, "We have no liability, you should be

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1 difficult condition, the hereditary nature of it and
 2 this blow of what is not only an appalling condition,
 3 where we all believed that everybody that became HIV
 4 positive would die in a very short period but, in
 5 addition, the social stigma attached to HIV because of
 6 its origins put them in a special case. And I think
 7 everybody recognised that.

8 There is a distinction because the Department, of
 9 course, had to deal with lots and lots of cases of
 10 medical problems and things that go wrong, whether it's
 11 complaints about shortage of supplies in hospitals and
 12 people dying because they are waiting for treatment.

13 So there has to be a slightly harder edge, but
 14 I have no doubt the haemophiliacs were particularly
 15 recognised by the Department as requiring sympathy,
 16 whatever the legal consequences turned out to be. And
 17 it was a tension between the need to preserve (a) assets
 18 and resources for the right thing, (b) the legal
 19 precedent, and (c) do what one can, and you see that.
 20 You missed out a paragraph, I think, somewhere earlier,
 21 about an accretion to the Macfarlane Trust.

22 **Q.** Yes.

23 **A.** So the Government was doing something outside
 24 litigation. And that was, I think, a recognition of the
 25 sympathy the Department and everybody else and ministers

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1 had of this situation. So -- that's probably rather
2 a long answer but that's my recollection.
3 **MR HILL:** Just so that we have it in context, the
4 Macfarlane Trust had been set up the previous year and,
5 shortly after this conference -- this is in
6 October 1989 -- in November 1989, a further payment was
7 made to the Macfarlane Trust.

8 Sir, I note the time and I'm about to move on to
9 a different topic.

10 **SIR BRIAN LANGSTAFF:** Yes, well, we will take a break now
11 until 11.45.

12 You know what I'm going to say now: you're giving
13 evidence. You must not discuss the subject of your
14 evidence with anyone, whoever that person is. You can
15 talk about anything else you like. That, of course,
16 applies to all breaks.
17 11.45.

18 (11.18 am)

19 (A short break)

20 (11.45 pm)

21 **SIR BRIAN LANGSTAFF:** Yes.

22 **MR HILL:** Mr Fenwick, I'd like to turn now to the issue of
23 public interest immunity in the HIV Litigation. Just so
24 that those following understand in broad terms what this
25 means, would you agree that this is an exception to the
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1 with Andrew Collins and then later discussed it with the
2 Treasury Devil.

3 **Q.** That's John Laws?

4 **A.** John Laws, yes.

5 **Q.** Is it a fair assumption both of those had vast
6 experience in PII matters?

7 **A.** Vast experience, yes.

8 **Q.** You say in your statement at paragraph 18.2 that you
9 recall a telephone conversation with John Laws
10 specifically on PII matters and that you took some
11 reassurance in the fact that he agreed with the approach
12 that you had taken?

13 **A.** Yes, what I recollect is discussing with Andrew Collins
14 in advance, doing my work, discussing it with the
15 Department, rechecking it, and then John Laws having
16 access to what I'd done and then saying he'd like to
17 have a conversation with me. You know, in the odd way
18 that memory helps you, I remember exactly where I was
19 sitting when I had that conversation. I knew John but
20 this was the first time that I'd spoken to him and, so
21 to speak, his subordinate doing an exercise of real
22 importance to get it right.

23 **Q.** His view was that you had got it right?

24 **A.** As far as I can recollect, yes.

25 **Q.** You address at paragraph 18 of your statement -- or
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1 usual rules of disclosure, which means that a Government
2 department, in this instance, doesn't have to produce
3 material to the other side in litigation because there
4 is an overriding public interest in maintaining the
5 confidentiality of that material?

6 **A.** Almost. My understanding was and is that where
7 a document falls into that class, it's not the
8 Department doesn't have to, but the Government must not.
9 The only person who can decide that the document should
10 be handed over, despite that public interest, is the
11 judge.

12 **Q.** We'll look at that position in more detail as of 1990
13 but the point you make there about it being a duty and
14 not a discretion -- the Government must not allow this
15 material to be disclosed -- is an important one.

16 When you were asked to advise on public interest
17 immunity during the HIV Litigation in 1989 and 1990, how
18 much experience did you have in PII matters?

19 **A.** Relatively little. I think, from reviewing some of the
20 documents you provided me with, that there was some
21 involvement in relation to Open. It is possible that
22 I had looked at it in relation to one or two other bits
23 of litigation I've handled for the Treasury Solicitor.
24 But relatively little, which is why, as I think
25 I recorded in my advice, I had discussed it in detail
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1 section 18 of your statement -- a conference that took
2 place on 18 May 1990, of which we have a rough note.
3 The Inquiry has looked at that before. It's the note
4 that refers to "We must stop destruction on the date
5 that litigation comes on". I'm not going to take you to
6 that because you've dealt with the issues in your
7 statement, and I'm merely draw people's attention to
8 those. What I would like to take you to, though, is the
9 written advice you gave on PII, which is 4 July 1990.
10 If we could have on screen, please, DHSC0004360_072.

11 Building on the discussion that we had earlier, am
12 I right to conclude that your view is that this is
13 a better evidence about the approach that was taken to
14 PII than the rough note of that conference on 18 May.

15 **A.** Yes.

16 **Q.** This advice, I won't take you to the page, but it is
17 signed by you alone, dated 4 July 1990, and it is
18 entitled "Re: HIV Litigation Claim to Public Interest
19 Immunity". If we just look at the first paragraph
20 there, what you write is this:

21 "The Classes of Documents Involved

22 "1. The documents which I have been instructed to
23 consider fall into 6 different categories for each of
24 which a possible claim to Public Interest Immunity may
25 be made out ..."

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1 I'm not going to take you through every word of
 2 this document but if we just look at the different
 3 categories you identify, the first is there:
 4 "Documents revealing the process by which policy
 5 decisions were arrived at, comprising:
 6 "(1) Submissions to Ministers and exchanges with
 7 Ministers ...
 8 "(2) Exchanges between senior officials
 9 specifically forming part of the process by which
 10 submissions, draft submissions and policy documents were
 11 brought into being."
 12 If we go over to the next page, please -- sorry,
 13 the bottom of that page still. The second category of
 14 documents to which PII may be attached were:
 15 "Position papers and similar documents which were
 16 prepared by civil servants and directed towards the
 17 formulation of future policy and plans ..."
 18 Next page, please.
 19 **A.** There is that important caveat at the bottom.
 20 **Q.** Sorry, if we go back then, please. We'll read the whole
 21 of that:
 22 "Position papers and similar documents which were
 23 prepared by civil servants and directed towards the
 24 formulation of future policy and plans, but which were
 25 not designed to be placed before Ministers or to form

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1 confidentiality between governments. "
 2 I'll just pause there for a moment. The last two
 3 categories, 5 and 6, don't appear to have been argued
 4 over in the litigation that followed. Do you know if
 5 PII was ever claimed over such documents?
 6 **A.** I'm sure it was. I mean, 5 is a well-known thing, which
 7 I'm sure you're practising here. What happened with the
 8 CSM and the Licensing Authority is adverse reactions
 9 were reported on what were called yellow cards, which
 10 would include personal detail of the patients as well as
 11 the adverse reaction.
 12 So what we're dealing with here is the original
 13 unexpurgated versions, so there will have been disclosed
 14 a redacted version which hadn't got identifying marks.
 15 And that was, I think, not controversial.
 16 Then this question about documents, if there were
 17 any between governments, in order to pass on
 18 information, but with an expectation of confidentiality,
 19 and the views are being expressed by a foreign
 20 government. Again, I don't think that was challenged.
 21 **Q.** I certainly haven't seen any documents to suggest that
 22 it was.
 23 If we turn back to the documents in that first
 24 section, you've set out six different categories of
 25 documents. If we turn then, please, to electronic

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1 the direct basis for a submission to Ministers ..."
 2 **A.** Yes.
 3 **Q.** But if we go over to the next category:
 4 "Briefings to Ministers directly relating to
 5 Parliamentary questions or debates, and particularly
 6 draft Parliamentary Answers and notes in respect of
 7 possible 'Supplementary' Questions ..."
 8 The next category is:
 9 "Briefing notes and draft replies to letters,
 10 consisting of:
 11 "(1) Briefing notes to Ministers prior to other
 12 meetings at which they were expected to make a statement
 13 or declare their views;
 14 "(2) Draft answers to be sent by ministers in
 15 response to letters received by them."
 16 5, the fifth category:
 17 "The original unexpurgated versions of documents
 18 in or by which doctors and others supplied details of
 19 patients' illnesses and/or adverse reactions in
 20 confidence to or for the CSM and/or Licensing Authority.
 21 "6. Documents forming part of an exchange of
 22 information between the UK Government or foreign
 23 governments or government agencies, containing
 24 information or views expressed by such foreign
 25 government on the basis of express or implied

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1 page 3.
 2 You, in this section, set out the subject matter
 3 of the documents that you have classified into those
 4 six different categories. I am not going to go through
 5 that, but we can give just an example of one. If we
 6 look at the subparagraph 1 there, this is category 1, so
 7 the documents that had been in the process by which
 8 policy decisions were arrived at.
 9 Then you subdivide that category into (a),
 10 "Documents relating to decisions which are clearly major
 11 matters of policy". And you give as an example whether
 12 or not to adopt a policy of self-sufficiency in blood
 13 products. And you give some other examples as well.
 14 Then the second subcategory, at (b), is "Documents
 15 relating to decisions which contain some elements of
 16 policy but which are subordinate to major policy
 17 decisions of the kind set out above".
 18 And you give as an example what approach to take
 19 towards a widespread introduction of vaccination against
 20 hepatitis in the light of the AIDS problem.
 21 Again, you give other examples as well. I'm just
 22 trying to give here a flavour of the approach that you
 23 took to that advice.
 24 If we could then turn, please, to page 5, and
 25 electronic page 5 of the document. After having gone

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1 through each of the categories and set out the subject
 2 matter of the documents contained therein, you turn to
 3 the public interest which is at stake. And that is you
 4 identifying the basis, as I understand it, for which PII
 5 might be claimed on these documents. Is that right?
 6 **A.** Yes.
 7 **Q.** And again, I will give just one example. If we look
 8 at -- yes. Paragraph 3 there. And I quote:
 9 "In my view, and having discussed the position in
 10 some detail with Andrew Collins QC, the public interest
 11 which is at stake in respect of each category and the
 12 mischief which a claim for PII would be designed to
 13 prevent can be summarised as follows:
 14 "1(1) and 1(2) The documents referred to in
 15 Paragraph 2.1(a) above fall within the class of
 16 policy-making documents in which (1) there is a need for
 17 effective, candid and uninhibited advice to Ministers
 18 and discussions between Ministers and their senior
 19 advisers and (2) there is a public interest in
 20 protecting from possible critics the inner workings of
 21 government in the formulation of important government
 22 policy."
 23 You then go on to discuss some further aspects of
 24 that in relation to some of the documents that you've
 25 identified.

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1 **A.** Yes.
 2 **Q.** You say, in your statement at paragraph 18.1, that when
 3 you were advising on PII you tried to avoid taking
 4 a blanket approach. Is this an example of where you
 5 are avoiding such a blanket approach? I'm not saying
 6 all of these documents necessarily fall in.
 7 **A.** Yes. It's -- I mean, there's an awful lot of documents
 8 here which we had to consider, compared, I think, to
 9 some other cases and to classic PII cases which I've
 10 dealt with, for example, as a judge, when you're dealing
 11 with criminal matters. And I took the view, and I think
 12 Andrew Collins and others agreed with me, that we needed
 13 to be quite granular in looking at them. We didn't want
 14 to sweep classes away and claim blanket immunity, but
 15 really to assess them, particularly so that if there was
 16 a challenge, which we expected there would be, then the
 17 court had the best possible information of the kind of
 18 documents rather than a wide --
 19 Policy documents is not very helpful. Documents
 20 about the use of resources is not very helpful. So we
 21 tried to break it down, and I was trying to identify
 22 where, in my professional view, the line fell between
 23 the policy and the operational side and therefore
 24 whether the claim should or should not be made.
 25 **Q.** When you say that the court would have had that

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1 So this is you setting out the reason -- the basis
 2 for which PII would be claimed -- (overspeaking) --
 3 **A.** Yes.
 4 **Q.** If we just go down on page -- electronic page 6, please,
 5 to your comments about the public interest for category
 6 2, the position papers, you say this, and I quote:
 7 "This category requires protection in so far as
 8 the working papers are designed as preparatory steps in
 9 the formulation of possible policies and strategies
 10 which in due course will be developed into submissions
 11 and briefings to ministers. However, in so far as they
 12 represent merely papers concerned with how to implement
 13 existing policies, I do not consider that they should
 14 enjoy protection or that a claim for public interest
 15 immunity should be made for them."
 16 Now, firstly on that, do we see again that
 17 distinction between policy and operational matters that
 18 we have discussed earlier?
 19 **A.** Yes. When I say "I do not consider", it's not "I don't
 20 think", it is I don't believe they fall into the
 21 category which is to be protected. So it's not a --
 22 it's not a value judgment by me; it's a judgment as to
 23 whether or not they fall within the strict categories.
 24 **Q.** So this not a document for which a claim for PII can or
 25 should be made?

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1 information available to it, so that it could consider
 2 and, if necessary, challenge those distinctions that you
 3 have made, that's not just the judge, is it? It's also
 4 the plaintiffs would have had that information provided
 5 to them?
 6 **A.** Yes. Again, I can't remember the exact sequence, but
 7 I know that in due course a certificate was prepared
 8 which set out the categories with some detail, I don't
 9 remember how much detail. That will have been signed by
 10 the minister and that was the subject of debate between
 11 the parties with I think probably Rupert Jackson arguing
 12 it for the plaintiffs, and probably Andrew arguing it
 13 for the Department. And first of all,
 14 Mr Justice Ognall, and then the Court of Appeal,
 15 particularly Lord Justice Ralph Gibson, looking at those
 16 categories.
 17 They were not looking at that stage at the
 18 individual documents, the description and, therefore, it
 19 was important that the descriptions I gave were a fair
 20 description of the documents contained in that class,
 21 for which we were asserting the privilege.
 22 **Q.** It was also important, wasn't it, to provide a degree of
 23 detail --
 24 **A.** Yes.
 25 **Q.** -- so that they could analyse whether or not that was

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1 a proper claim for PII?

2 **A.** Yes.

3 **Q.** Just -- we will look in due course at the Court of

4 Appeal judgment, but we can see from that judgment that

5 the categories that you set out here did form the --

6 were used in the application that was made, and it was

7 ultimately signed by the Permanent Secretary rather than

8 the minister --

9 **A.** That was it, yes.

10 **Q.** -- because --

11 **A.** Oh, yes, because there were two administrations. So,

12 yes, Conservative and Labour. That was, I think, the

13 convention.

14 **Q.** If we could turn, please, to page 8. Having gone

15 through this process of identifying the categories for

16 types of material within them and the public interest

17 that may form the basis for the PII, you then go on to

18 discuss the various strengths and weaknesses of the

19 claims for PII. What you say in paragraph 4 is this,

20 and I quote:

21 "It is clear from the authorities that where

22 documents are protected by public interest immunity, the

23 department or person concerned has no discretion but is

24 under a duty to claim the privilege."

25 I pause there, "the authorities" there is

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1 the certificate or in the way in which we present it to

2 the court. And this was signalling that there was

3 nothing there that, in my view, having read them, was,

4 if you like, a document of significant benefit to the

5 plaintiffs, which they would be disadvantaged by not

6 having. They might not be able to have it because of

7 the immunity.

8 But I was seeking to be as fair -- because, again,

9 although the Department cannot waive it, if the judge is

10 aware and told "There are important documents in there

11 but this is the privilege", he has to balance, as I put

12 above, competing public interests in favour of

13 disclosure or otherwise.

14 **Q.** If there had been such a document then would you have

15 made explicit reference to it, both in this advice and

16 subsequently in the certificate, so that the judge was

17 particularly aware of that document?

18 **A.** If there'd been something in it, I would have made clear

19 that there were documents. Whether in this particular

20 document I would have identified them as opposed to

21 making provision for them to be identifiable, I suspect

22 that -- I don't know whether they would have gone into

23 the certificate because we never got that far but

24 I would have expected that, either by way of the

25 certificate or by way of the evidence and submissions

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1 a reference to the legal authorities, isn't it, the case

2 law? That is the point that you were making earlier,

3 that if PII applies, it can't be waived by the

4 Department, it must claim it?

5 I go back to the document, and I quote:

6 "It is then a matter for the court to decide

7 whether the balance of the competing public interests

8 lies in favour of or against disclosure. There is

9 nothing in the documents that I have seen which I would

10 expect to have any significant adverse effects on the

11 case to be put forward on behalf of the Central

12 Defendants in this litigation. Indeed, any of them may

13 be helpful in explaining the careful consideration which

14 was given to various matters at the time. However,

15 that is not the point."

16 By that are you saying that if PII applies, then

17 it applies as much to a helpful document as it does to

18 an unhelpful document?

19 **A.** Yes, it applies to everything. I mean, it is important

20 so you can't cherry-pick, clearly, but it's also

21 important to note, for those who haven't read the

22 documents in the way that I had, if there were any red

23 flag documents in there. Because if there's a red flag

24 document, which is clearly favourable to the plaintiffs,

25 then that may affect the way in which it is described in

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1 which we put forward when it went before the court, we

2 would have made clear that we do accept that there are

3 documents which may be of some relevance to this case,

4 as opposed to whatever we did do, which I'm afraid

5 I can't remember.

6 **Q.** Returning, then, to this advice. If we could just turn

7 to electronic page 12. As I say, you go through

8 category by category discussing the merits of the case

9 for PII. And if we turn to paragraph 11, this is

10 a reference to the fourth category, which is the

11 category for briefing notes and draft replies to the

12 letters. What you say in the advice is this, and

13 I quote:

14 "11. The fourth category is rather more

15 difficult. Ordinary briefings which do not relate to

16 policy-formulation are in my view matters which ought to

17 be disclosed, where their relevance and prima facie

18 likelihood of assisting the Plaintiffs' case are

19 established. However, if individual documents disclose

20 information about the policies currently under

21 consideration, there is a good case for considering

22 these documents as a subcategory of the first category

23 [which is policy formulation documents]. The same

24 applies to drafts of letters unless it is considered

25 appropriate to protect all direct communications between

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1 Ministers and their senior civil servants from
2 disclosure. It follows that this is a category for
3 which I consider that privilege should only be claimed
4 after careful thought. I see no objection to closing
5 these documents if that is considered appropriate."

6 Again, is that an example of not applying
7 a blanket approach, and instead considering it on the
8 document-by-document basis?

9 A. Yes.

10 Q. To the best of your recollection, is that what the
11 central defendants did? They take this advice and take
12 that approach?

13 A. To the best of my recollection, what happened was that,
14 following this, we put the ones which I thought did
15 attract privilege and therefore had to be withheld in
16 one, and those which fell outside it into another, and
17 therefore they didn't form part of the claim, those
18 documents. I certainly have no recollection of my
19 advice not being followed, and I think I probably would
20 have remembered if it hadn't been.

21 Q. Did you play any role in discussing with individual
22 civil servants the way that they should approach their
23 sift through the papers?

24 A. I really don't remember. I mean, I will almost
25 certainly have had some discussions about the kind of

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1 Q. If we could go, please, to electronic page 14 of the
2 document. This is still within the discussion section.
3 About the -- in paragraph 15, about halfway down,
4 there's a sentence starting "Where, as here", if we
5 could just highlight that.

6 What you write in the advices is this:

7 "Where, as here, the Plaintiffs raise adventurous
8 and novel arguments about the duty of care of ministers
9 and the justiciability of decisions relating to resource
10 allocation, I consider that it is quite considerable to
11 invite the Court to consider whether the Plaintiffs have
12 made out a case that this is a cause of action which
13 stands any real prospect of success in light of the
14 authorities. If the claim is hopeless in law, then the
15 importance of the evidence to the issue and the public
16 interest in doing justice to the Plaintiffs should not
17 be allowed to outweigh a legitimate public interest in
18 the confidentiality of the material of which production
19 is sought. In other words, although the matter is not
20 elevated to the status of a preliminary issue, the
21 Plaintiff may reasonably be asked to set out its case on
22 these adventurous issues for scrutiny by the Court. It
23 is only if the Court concludes that a prima facie case
24 has been made out in law that the Court should go on to
25 consider the competing public interests and other tests

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1 exercise and search they were carrying on. But I do
2 have a recollection, it's one of those sort of moments,
3 of sitting there with files of original documents, in
4 the sense of carbon copies or whatever they were, or
5 even originals with manuscript on them, and I think
6 that I would probably given an inclusive rather than
7 selected group. So anything which might fall within the
8 category provided to me as opposed to if somebody else
9 making the decision. But I don't recollect. And
10 I think that -- I do know that because there were
11 relatively few surviving documents, partly because in
12 those days we didn't have the computer, where we write
13 everything down and in emails, and partly because normal
14 losses over time. There weren't many documents. So we
15 were always talking about where else we might find some,
16 and where to go and search, and what -- you know, whose
17 old cupboard to look in and what storage unit to look
18 in.

19 So I think we will have discussed where to go to
20 finding the documents, but because they're within this
21 policy area, they're likely to be contained within
22 a fairly small number of people. You know, the civil
23 servants down the food chain won't be involved in this.
24 It's those very close to the ministers, Cabinet Office,
25 or whatever, would be more involved.

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1 advocated in Air Canada [which was one of the
2 authorities you cited in the report]."

3 Should we understand that, then, to be
4 a suggestion that the court needs to consider whether or
5 not there is actually a claim in law here as part of its
6 assessment of whether public interest lies in either
7 disclosing or keeping confidential these documents?

8 A. Yes, this is downstream of the selection of materials
9 for which claims to be made, and the decision of, in
10 this case, Permanent Secretary to sign the certificate.
11 And it's when it comes to the court considering it, in
12 balancing the public interest -- I mean, clearly if you
13 have what is a plainly viable claim in law and on facts,
14 then there is a significant public interest in wider
15 disclosure. If, on the other hand, it is a claim which
16 is speculative and weak, whether on the facts or on the
17 law, then the public interest may be in favour of
18 retaining it.

19 And all I was saying here is that some of these
20 arguments are difficult, and it's legitimate to say that
21 if you want the documents, you should explain to the
22 court why these claims have a significant prospect of
23 success.

24 From recollection, and you'll know better than me
25 because you'll have read it more recently, I think Mr --

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1 it must have been Mr Justice Rougier at first instance,
 2 concluded that the statutory duty claim would not
 3 succeed. Whether it made any difference to his choice
 4 or not, I don't remember. And the Court of Appeal said
 5 no, although weak, it was sufficiently arguable that any
 6 document which might be relevant to it could be placed
 7 in the balance with slightly more public interest in
 8 favour of its disclosure.

9 **Q.** We will come to the Court of Appeal judgment but that's
 10 an accurate summary of it. And the point being that
 11 this -- the point is taken in respect of public interest
 12 immunity -- were the court to find that a particular
 13 legal argument had no chance of success, then that would
 14 obviously influence the attitude of the plaintiffs and
 15 indeed to the litigation as a whole?

16 **A.** Yes.

17 **Q.** The final point from this document. Electronic page 15,
 18 please.

19 **A.** Yes, I just note when you're -- you're on 15, at the
 20 bottom of it? Are you coming to the conclusion?

21 **Q.** Yes. I am just briefly going to mention paragraph 16,
 22 just to cover the point off that we mentioned earlier:
 23 "Since the documents span administrations, it is
 24 more appropriate that the Certificate should be signed
 25 by the Permanent Secretary rather than by the

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1 important.

2 **Q.** In effect you were asking the most senior barrister
 3 instructed by the Government as to whether or not you'd
 4 approach was correct?

5 **A.** Yes.

6 **Q.** And to the best of your knowledge, he considered that it
 7 was?

8 **A.** Yes. He certainly said it was right. Whether he made
 9 some small adjustments, I cannot recollect.

10 **Q.** I'd like to go briefly to an additional advice that you
 11 provided. This is slightly out of sequence because this
 12 is given after the Court of Appeal judgment but I am not
 13 going to it for that reason. If we could go, please, to
 14 DHSC0046936_082. We can see that this is headed "Re:
 15 HIV Litigation, Additional PII Documents Advice".
 16 I won't take you to the page but it's signed by you on
 17 1 October 1990. If we just look at the first paragraph,
 18 it says:
 19 "I have looked at the additional documents
 20 provided to me and agree that, except as set out below,
 21 the documents are correctly included within the claim
 22 for public interest immunity and fall within the
 23 categories set out in the folders in which each document
 24 is contained."
 25 That would indicate that you have looked at those

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1 Minister ..."

2 And indeed that happened.

3 Then if we go down to the conclusions, at
 4 paragraph 18:
 5 "Subject to the approval of John Laws, I would
 6 advise that the following approach should be taken to
 7 the question of claiming public interest immunity ..."
 8 Then you go through the different categories.

9 **A.** That was particularly important because public interest
 10 immunity is a very powerful instrument affecting the
 11 disclosure of documents in this type of litigation. And
 12 it was, in my view, absolutely essential that there
 13 should be a consistent line taken. I mean, something
 14 went wrong when we came to the matters of the
 15 Scott Inquiry because -- I wasn't involved but the
 16 reported extent of the claim for PII privilege seemed to
 17 me to be just simply wrong, and I was very anxious to
 18 make sure that we were making a claim which was entirely
 19 orthodox, entirely conventional, and which was
 20 consistent with what the very experienced
 21 Treasury Devils through the generations, most of whom
 22 got to the House of Lords, had concluded was the correct
 23 advice to give, rather than me forming an independent
 24 view.

25 So his endorsement of it was, in my view, very

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1 individual documents --

2 **A.** Yes.

3 **Q.** -- in order to see whether or not they fall for PII?

4 **A.** Yes. In each case, I always looked at the individual
 5 documents, as opposed to giving the description and
 6 letting somebody else do the selection.

7 **Q.** We'll see from the Court of Appeal judgment shortly that
 8 there were about 600 documents for which PII was
 9 originally claimed, so would you have looked at each one
 10 of those 600 documents?

11 **A.** I'm afraid so.

12 **Q.** I won't go through the rest of that advice but, as is
 13 implied by the first paragraph, you've identified
 14 documents where a claim for PII should not be made --

15 **A.** Correct.

16 **Q.** -- as well as those for which it has been made.
 17 Let's turn, then, to the Court of Appeal judgment.
 18 It was handed down on 20 September 1990. If we could
 19 have RLIT0000657, please. We can see that the Court of
 20 Appeal was constituted of Lord Justice Ralph Gibson,
 21 Lord Justice Bingham and Sir John Megaw. The
 22 headnote -- and just for those not used to legal
 23 authorities, this is a report summarising the key
 24 findings of the judgment, which is then published in
 25 a law report.

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1 I won't take you all the way through it, we can
 2 see that just at the first sentence of it, that there
 3 are 962 applicants at that time, that number varies.
 4 A description of the case is given, and just towards the
 5 bottom of that paragraph we can see that:
 6 "Discovery was given by the Department of Health
 7 of a large number of documents, but public interest
 8 immunity was claimed for some 600 documents dating from
 9 1972 to 1986, mainly on the ground that they related to
 10 matters of policy."
 11 That's where I got the figure of 600 documents
 12 from.
 13 The headnote then goes on to describe that the
 14 Department of Health had raised the legal arguments that
 15 you had suggested in your advice, and it's summarises
 16 the ruling of Mr Justice Rougier in this way, it says:
 17 "The judge held, for the purposes of the discovery
 18 application ..."
 19 So this is about three-quarters of the way down,
 20 just before (a), (b), (c), I don't know if we can expand
 21 that. A little further down. There we go, thank you.
 22 "The judge held, for the purposes of the discovery
 23 application;
 24 "(a) that the plaintiffs had no claim for breach
 25 of statutory duty;

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1 through that:
 2 "Held:
 3 "(1) If it were sufficiently clear on the
 4 material available for the court to decide that any
 5 cause of action put forward by the plaintiffs was bad in
 6 law, then the court should say so, even though the
 7 effect of such a decision upon the future conduct of
 8 these proceedings between all parties might be unclear.
 9 "(2) On the other hand, if there were good
 10 reasons for not making any decision with reference to
 11 the validity of causes of action, the court could
 12 abstain from any such decision if, without making it,
 13 the appeal could be properly and fairly decided. There
 14 were good reasons for not making any such decisions.
 15 Both with reference to breach of statutory duty and to
 16 negligence, the case raised questions of public
 17 importance which were to be regarded as novel. It is
 18 usually undesirable, unless the case is very clear, for
 19 such questions to be decided upon pleadings as
 20 contrasted with findings of fact."
 21 "(3) It was not clear that Parliament intended to
 22 impose a duty under the 1977 Act [that's the NHS Act]
 23 which would be enforceable by individual civil action,
 24 but, although there was much doubt as to the existence
 25 of any cause of action for breach of statutory duty, the

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1 "(b) that they had no valid co-terminous claim in
 2 negligence based on the same facts as the alleged breach
 3 of statutory duty;
 4 "(c) that nevertheless certain respects a valid
 5 cause of action arose in respect of alleged negligence
 6 generally, both on policy and performance bases, and
 7 that, accordingly, discovery could be ordered."
 8 So you had some success, it seems, on the
 9 arguments on statutory duty and common law duty based on
 10 exactly the same facts but there was still a claim left
 11 over in respect of other parts of the pleaded case; is
 12 that a fair summary?
 13 A. Yes, no arguable case, and I can't remember what weight
 14 he gave it, but it was certainly not something which was
 15 so small a prospect as to make it reasonable on that
 16 ground alone to withhold production.
 17 Q. Of course, it's important to say that Mr Justice Rougier
 18 wasn't saying that that claim would succeed, meaning
 19 that it could be argued?
 20 A. Yes.
 21 Q. Both sides appealed to the Court of Appeal and if we
 22 could turn, please, to electronic page 2, the section
 23 under "Held" that this is a summary of what the Court of
 24 Appeal held, these aren't the judges' words directly,
 25 but these are the report of them. If I just read

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1 plaintiffs' claim should not be treated as fit to be
 2 struck out, and the judge's order would be varied
 3 accordingly.
 4 "(4) On the other hand, treating the plaintiffs'
 5 allegations for the purposes of appeal (by consent) as
 6 being true and capable of proof, the plaintiffs had
 7 a strongly arguable case in negligence in respect of the
 8 defendants' acts and omissions in the performance of
 9 their functions under the 1977 Act. If there were so,
 10 Article 13 of the European Convention on Human Rights
 11 would not require a separate cause of action for breach
 12 of statutory duty. *Aliter* if there were no remedy in
 13 law for negligence by the defendants upon proof of the
 14 facts alleged.
 15 "(5) The defendants' contention that negligence
 16 in the formulation and execution of policy should be
 17 non-justiciable failed. The plaintiffs had made out
 18 an arguable case, whatever difficulty in terms of proof
 19 might exist.
 20 "(6) The judge's order for inspection would be
 21 varied in certain respects, but the defendants would be
 22 ordered to disclose the documents for inspection by the
 23 judge, who would decide whether or not the plaintiffs
 24 would be deprived of the means of proper presentation of
 25 their case without disclosure to them of the documents."

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1 So looking at the way the decision went, and as
2 you described earlier, the Court of Appeal disagreed
3 with Justice Rougier about the breach of statutory
4 duty --

5 A. Yes.

6 Q. -- and held that there was potentially, arguably a case
7 in that respect.

8 How did the plaintiffs -- sorry, how did the
9 defendants, central defendants, view this judgment and
10 the words the judges used to express their views of the
11 strength or weaknesses of the plaintiffs' case?

12 A. It's very hard to put myself back into the position.

13 I didn't even remember this judgment until I read it.

14 So it is reconstruction. I don't think it -- it meant

15 that there was no immediate knockout blow, which is --

16 I think, justified the fact we never attempted

17 a strikeout, as opposed to preliminary issues. We

18 always expected courts to be sympathetic and, therefore,

19 to allow a hearing to proceed where there was

20 an arguable case, because of the severity of the

21 consequences to the plaintiffs and their families.

22 The wording of the judgment, which you may or may

23 not go through, certainly in my view, looking at it

24 again now, and trying to do my best as to what we

25 thought at the time, was that it supported our

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1 word, the way that you had described the documents that
2 fell within them, save for the fact that, as I mentioned
3 earlier, categories 5 and 6, concerning international
4 relations and the unexpurgated, unredacted versions of
5 the yellow card system were not part of this litigation?

6 A. Yes, and I noticed when I looked -- you were passing
7 through part of my advice, that it appeared there were
8 only two documents at most in the foreign Government
9 category.

10 Q. Yes.

11 A. So that may be why it fell out of consideration.

12 Q. What I would like to take you to is electronic page 10,
13 page 229 of the law report. The third paragraph down
14 beginning "The Department of Health". Thank you.

15 This is Lord Justice Ralph Gibson but the other
16 judges agreed with him. This is what he said in that
17 section:

18 "The Department of Health has raised the matter of
19 public interest immunity so as to prevent the disclosure
20 of the documents listed above. The Department does not
21 do that in order to put difficulty in the way of the
22 plaintiffs, or to withhold from the cost documents which
23 might help the plaintiffs. The Department raises the
24 matter because it is the duty of the Department in law
25 to do so in support of the public interest in the proper

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1 conclusion that these claims were going to be very
2 difficult in law to bring home for the plaintiffs.

3 There was no suggestion that this was a case which
4 the Department should be settling because it was wrong,
5 nor was there a suggestion, in fairness to the
6 plaintiffs, that that they should pack up and go home.
7 But there was a warning that the case was going to be
8 a difficult one.

9 So that wasn't very different from our own
10 assessment, and I don't think it had any real impact,
11 other than just really reminding us of the balance
12 between the sympathy of the court to the plaintiffs'
13 position and their awareness of the trickiness of the
14 legal case.

15 Q. I'm not going to go through in detail what the court has
16 said. As you'll have gathered from my questions, the
17 Inquiry's primary interest is in how the Government and
18 the Department of Health conducted the litigation,
19 rather than the fine detail of the legal analysis.

20 A. Yes.

21 Q. What I will mention, for the record, is that we can see,
22 from the terms of the judgment which describes how the
23 application was made, at electronic page 7, that the
24 Department of Health had followed your advice as to the
25 different categories of documents and included, word for

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1 functioning of the public service, that is the executive
2 arm of the government: see per Lord Denning [in the
3 *Air Canada* case]. It is not for the Department but for
4 the court to determine whether the documents should be
5 produced. The plaintiffs acknowledge the validity of
6 the claim to public interest immunity but ask the court
7 to order production notwithstanding the existence of the
8 valid claim to immunity. It is essential that that
9 aspect of these proceedings should be clearly
10 understood."

11 If we go on to the next paragraph, please.

12 "The valid claim to immunity is to be overridden
13 by the order of the court if the law requires that it
14 should be overridden. The task of the court is properly
15 to balance the public interest in preserving the
16 immunity on the one hand, and the public interest in the
17 fair trial of the proceedings on the other."

18 We'll stop there before we go into the
19 authorities.

20 This, then, is the court approving of the fact
21 that the Department of Health had made the application
22 in the way that it had made it; is that fair?

23 A. Yes.

24 Q. Also the reference to the fact that the plaintiffs
25 acknowledged the validity of the claim to public

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1 interest immunity, would seem to indicate that they too
 2 agreed that it was right and proper, and indeed a duty,
 3 for such an application to be made?
 4 **A.** Yes.
 5 **Q.** It was then for the court to do that balancing exercise
 6 between the public interest in retaining confidentiality
 7 and the public interest in doing justice by having the
 8 documents disclosed.
 9 **A.** Exactly that.
 10 **Q.** Thank you. We can take that document down now.
 11 **A.** I just observe that one of the things that the Court of
 12 Appeal did was to actually give the judge the further
 13 task of actually reading the documents himself in order
 14 to decide which ones should be disclosed. So there was
 15 a very careful filter at each level.
 16 **Q.** In your witness statement, you responded to two
 17 questions that were asked by the Inquiry about your
 18 impression during the HIV Litigation -- and I stress
 19 this is just about the HIV Litigation -- about
 20 destruction of documents and PII. I am just going to
 21 read those to you, and then ask a couple of follow-up
 22 questions.
 23 **A.** Yes.
 24 **Q.** It is WITN7067001, page 21. If we could go down to the
 25 second half of the page, please, including
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1 involved in any of the details of any searches and am
 2 not able to say whether there was any deliberate
 3 destruction although I can say that I had no impression
 4 from any of the multiple officials with whom I met that
 5 they were being evasive and potentially inclined to
 6 destroy embarrassing documents. Any more detailed
 7 enquiry must be for others to answer."
 8 I pause there and say the reason that I stressed
 9 that this is about the HIV Litigation is that, after you
 10 had written this, you have been provided with some
 11 additional documents --
 12 **A.** Yes.
 13 **Q.** -- about the HCV Litigation, and we will come on to
 14 those separately.
 15 **A.** Yes.
 16 **Q.** But, in terms of the HIV Litigation, do you still stand
 17 by what is said in that paragraph?
 18 **A.** Yes, I have thought about it more as I have got ready
 19 for today. And there weren't as many documents as
 20 I would have liked, because when you're trying to put
 21 together your picture of the case, you want to fill in
 22 the gaps, and when there are gaps because documents
 23 aren't there, you say, "Surely there must be some
 24 documents, go and find some".
 25 But I had no perception of anybody being evasive,
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1 subparagraph d, thank you.
 2 The question posed by the Inquiry in its request
 3 for your written evidence was this:
 4 "Were you aware of any of the Central Defendants
 5 [just pausing there, that's the Department of Health,
 6 Committee on Safety of Medicines and the Licensing
 7 Authority] intentionally destroying documents for the
 8 purpose of ensuring that they were not disclosed as part
 9 of the HIV (or other) litigation?"
 10 Your answer was:
 11 "I have no recollection of being told or
 12 suspecting that there had been deliberate document
 13 destruction for this or any other improper purpose.
 14 I do not have any reason to suppose that such
 15 destruction took place for this reason. I do know that
 16 we were disappointed by how comparatively little
 17 material there was and consistently asked for further
 18 searches but in those pre-computerisation days many if
 19 not most of the documents we were provided with came
 20 from hard copy files of original memos and papers or
 21 carbon copies, rather than from a photocopy archive. If
 22 my memory is correct, files were regularly reviewed and
 23 what was considered to be outdated and no longer
 24 relevant was destroyed, simply to make the task of
 25 archiving the files manageable. I was however not
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1 none of those "Well, we'll try and look", no slightly
 2 shifty glances between people. Nothing to suggest that
 3 they weren't doing the best job that they could or that
 4 they were aware of some event which had happened where
 5 there'd been a dumping of documents. So I have no
 6 reason to change that.
 7 **Q.** I'm going to turn then to the next question that the
 8 Inquiry asked of you, which was this:
 9 "Were you aware of any of the Central Defendants
 10 seeking to abuse the PII process by claiming PII without
 11 proper reason in order to avoid disclosure of documents
 12 that might harm their case or otherwise cause
 13 embarrassment?"
 14 Your answer was this:
 15 "No. I do not believe that there was any such
 16 attempt. Of course, one of the categories of documents
 17 for which PII was claimed was advice to ministers which
 18 was often terse and relatively informal and there may
 19 have been a sensitivity about its disclosure because
 20 each phrase had not been carefully honed for wider
 21 publication. It is also not unusual for litigants and
 22 the administrators to be embarrassed by some of the
 23 documents they have authored over the years and to hope
 24 that it will not be necessary to disclose them. I do
 25 not recollect whether there were any such feelings
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1 expressed in this case. However, the categories were
 2 clearly defined in my advice and so far as I was able to
 3 do so, the claim was narrowly confined to documents
 4 falling within the relevant class. I was not conscious
 5 of any attempt improperly to influence my judgment or
 6 that of Andrew Collins or John Laws. I would not in any
 7 event have been influenced by such attempts and if I had
 8 been asked whether PII could be claimed for any document
 9 or documents which might on its face seem a little
 10 embarrassing I would have made clear that it would only
 11 be subject to a claim where that was in my view
 12 objectively justified."

13 Again, do you stand by that evidence?

14 **A.** Absolutely.

15 **Q.** A final question, then, on this, and just so there is no
 16 doubt about it, do you now or did you then have any
 17 concerns about the way in which the Department of
 18 Health, the Committee on Safety of Medicines and the
 19 Licensing Authority were discharging their duties to the
 20 court and to the plaintiffs in respect of disclosure of
 21 documents and PII?

22 **A.** In PII, absolutely none, because as you've already
 23 identified I looked at all the documents for which
 24 a claim was made and I was satisfied that it was
 25 properly made.

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1 team at this stage, I would have expected him to have
 2 been very actively involved in that side of it, so far
 3 as the counsel team is concerned. It's possible I was
 4 given CVs, it's possible I was told what was happening.
 5 I don't remember meeting anybody. But then -- I think
 6 I've seen reference somewhere to Professor Will having
 7 been involved in that early stage. I can't remember.
 8 That may have been -- I mean, he was involved in helping
 9 me over human growth hormone and variant CJD, but I have
 10 a blank on experts, I'm afraid, which suggests to me
 11 I probably didn't do very much.

12 **Q.** With that in mind, I'm just going to ask you a couple of
 13 questions which have arisen largely from other evidence.

14 **A.** Yes.

15 **Q.** The first is this: that we know from other documents
 16 that the central defendants instructed
 17 Dr Elizabeth Mayne --

18 **A.** Doctor?

19 **Q.** Elizabeth Mayne, from Belfast.

20 **A.** Yes.

21 **Q.** A haematologist from Belfast, who ran the Haemophilia
 22 Centre there, and the Health authorities instructed
 23 Professor Bloom from Cardiff as expert witnesses. Both
 24 were well known haematologists and both were involved in
 25 developing the practices on which they subsequently

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1 So far as disclosure is concerned, discovery in
 2 those days, as far as I recollect, and as far as I was
 3 able to do so, there was no evidence of any improper or
 4 inadequate approach. It's always -- in all old cases,
 5 you know, doing stuff like tobacco litigation back to
 6 the 1920s, you're trying to find records, and the
 7 quality of finding stuff from archives and whether
 8 you've gone to every warehouse is always difficult. But
 9 we did ask for a lot of work to be done and I have no
 10 reason to doubt -- I mean, all the people I was dealing
 11 with all appeared to be genuinely trying to find to get
 12 the information to get the answers, and I think many of
 13 the officials were as frustrated as I was that we
 14 couldn't find it.

15 **Q.** I'm going to move on then to the question of
 16 expert witnesses. You have said in your statement that
 17 you weren't involved in the selection of expert
 18 witnesses.

19 **A.** Not that I recollect. You may have a document which
 20 says I was, but I've got no recollection of doing so.

21 **Q.** I haven't seen such a document where you were so
 22 involved but do you have any recollection of what role,
 23 if any, you did play in respect of experts in the
 24 litigation?

25 **A.** No. I mean, I think if Michael Spencer was part of the

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1 opined in their expert reports.

2 Do you recall any discussion at the time of the
 3 difficulties that this may pose in the litigation, of
 4 having people who were actively involved in the events
 5 being the experts who commented upon them?

6 **A.** No, I don't. I mean, I think I can say from my general
 7 experience of this kind of case and other kind of cases
 8 that whilst you try to find experts who haven't been
 9 involved in it, if you actually want to have the people
 10 with the knowledge, they very often have been the ones
 11 who were involved in the development of the practices,
 12 because they're the ones who know most about it.

13 I can see there are arguments about whether
 14 there's a degree of self-protection or
 15 self-justification about it, on both sides. I don't
 16 remember a discussion -- I suspect that if we'd found
 17 people who were entirely separate who could have given
 18 evidence, we probably would have selected them. But
 19 beyond that, I really can't help.

20 **Q.** I'm going to take you to some evidence that was given to
 21 the Inquiry by Dr Rejman on 11 May 2022.

22 If we could have, please, onscreen, INQY1000204.

23 We can see of the first page of that document that
 24 this is the Inquiry's transcript of that evidence.

25 If we could have, please, electronic page 53. And

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1 then the bottom right-hand corner, so page 212 of the
 2 transcript, the sentence beginning "It may be
 3 submitted", line 17.
 4 This is a question from Ms Richards QC, counsel to
 5 the Inquiry:
 6 "It may be submitted that the Department
 7 [the Department of Health], in trying to secure experts
 8 for the haemophilia litigation, were engaged in a form
 9 of expert shopping, trying to find experts who supported
 10 the [Department of Health's] stance in the litigation.
 11 What if any response would you have to that submission
 12 if it were made?"
 13 The answer given by Dr Rejman is this:
 14 "Well, I think I explained yesterday that in
 15 essence the way we selected the expert witnesses were
 16 people I knew or people I knew of, or people, you know,
 17 that I could easily access, and then some of them
 18 obviously were from abroad. But in essence it was
 19 a case of, you know, you get an expert witness, and what
 20 you're really trying to get from that expert witness is
 21 what they can honestly say. Now, obviously, as we
 22 alluded to yesterday, if an expert witness comes up and
 23 they basically are critical of the Department from
 24 beginning to end, then I suspect we would not use them
 25 as an expert witness when a court case came, and that,

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1 if they have somebody, "We've asked them, they're very
 2 anti the Department, they don't think the Department did
 3 a good job at all, shall we call them as a witness?"
 4 Well, they're probably not the expert witness you want
 5 because they're not independent because they've already
 6 formed a view. But I don't think anything more than
 7 that would ever have happened.
 8 **Q.** Am I right then, you can't, as a matter of memory, you
 9 can't say whether or not you advised on an individual
 10 expert witness but you've got no recollection of doing
 11 so?
 12 **A.** Yes, exactly.
 13 **SIR BRIAN LANGSTAFF:** Can I just be clear.
 14 What Dr Rejman is saying seems to fit into two
 15 categories. If you look at -- as a matter of simply of
 16 language. If you look at the top of what's on the
 17 screen, round about paragraph 5, it's down to -- when he
 18 describes him as a QC, the end of paragraph 11 -- he's
 19 describing a process: this is what would normally happen
 20 and what you'd normally expect. He's not actually
 21 saying, "This is what happened."
 22 **A.** Yes.
 23 **SIR BRIAN LANGSTAFF:** But it is the next paragraph that is
 24 the one which does, I think, translate that general
 25 understanding into what he recollects, although he is

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1 I think, presumably, would have been the judgment of
 2 the QC, Justin Fenwick.
 3 "But I think those were a relatively small
 4 minority. I think the majority of the expert witnesses
 5 were trying to give their best evidence as they could see
 6 it."
 7 Now, that's what Dr Rejman said. Firstly, in
 8 response to that, and you may already have answered
 9 this, can you recall being consulted about whether or
 10 not a specific expert should be used?
 11 **A.** No. I may have been. I don't have any particular
 12 recollection of it. I don't think the approach is quite
 13 as Dr Rejman would have described. I see he refers to
 14 me as a QC, which of course, in that litigation,
 15 I wasn't --
 16 **Q.** Yes.
 17 **A.** -- although I was in the two subsequent bits of
 18 litigation in which he was involved.
 19 I have no idea whether he means that they would
 20 have asked me and it would have been my judgment as to
 21 what to do, or whether he means that he thought that I
 22 would say, "Don't use them". So I don't recollect it,
 23 no. I mean, I have no recollection of ... I don't think
 24 so. I mean, if you -- I know that if -- I can't
 25 distinguish one case from another from this period but

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1 not pressed on it, that happened in this case:
 2 "... I think those were a rather small minority."
 3 Which rather suggests that he had in mind that
 4 there were one or two, or maybe more -- one or two who
 5 did take that general view. But you can't recollect any
 6 of that? That may not have crossed your desk?
 7 **A.** I don't recollect any of it. I think if Michael Spencer
 8 was involved, I would have expected him to have been
 9 dealing with the expert side. I think that if we had
 10 had an expert who we regarded as an independent expert
 11 who was giving adverse views, then that's something
 12 which would have got into some of our other
 13 communications and advices, because if you got somebody
 14 who is a bona fide expert who says, "Actually, I think
 15 the Department got it wrong", that's relevant to your
 16 assessment of the merits, because if he does, so will
 17 the claimant and so will the judge.
 18 So I'm not sure whether he's referring to people
 19 who had -- I mean, I think I have to go back to the
 20 issue over MMR and triple vaccine, which, again, I was
 21 tangentially involved in and -- I can't remember how
 22 much -- and where there was, I think it was, Andrew
 23 Wakefield, who had a very specific view, which later
 24 became discredited.
 25 So if you have experts with a bee in their bonnet,

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1 then you might say that's not a suitable expert. But
 2 I have no recollection of it in this case, and I think
 3 if it was somebody who had given a genuinely independent
 4 adverse view, I would have known about it and it would
 5 have featured in our advice.

6 **SIR BRIAN LANGSTAFF:** Yes, thank you.

7 **MR HILL:** If I could turn to a different document. This
 8 is DHSC0044876.

9 We can see that this is a minute from Dr Rejman
 10 dated 18 January 1990. It is the note of a conference
 11 about HIV Haemophilia Litigation that took place on
 12 17 January 1990, and you were present, and also says
 13 your assistant was Helen -- presumably Helen Rogers.

14 **A.** Yes.

15 **Q.** I should say there are a significant number of these
 16 notes of conferences. We're not going to go through
 17 them all. You've referred to many of them in your
 18 witness statement. This is one that was not provided to
 19 you before you wrote that statement, which is why I'm
 20 going to it now.

21 If we could turn, please, to page 5 of that
 22 document. The second complete paragraph, beginning
 23 "Dr Rejman", the note says this:

24 "Dr Rejman to furnish a summary list of expert
 25 witnesses for the central defendants to Mr R Powell.

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1 **A.** No. It would all have been very much the same.

2 **Q.** The reference there to "Witnesses as to fact should also
 3 be considered", do you recall which witnesses or what
 4 consideration was given to the factual witnesses that
 5 the central defendants should call?

6 **A.** No, there must have been consideration given. I mean,
 7 that seems to put Dr Rejman in the centre of finding not
 8 merely experts but also factual witnesses. There was
 9 certainly a difficulty, with lots of people having
 10 retired, in finding people to give evidence of fact.
 11 I actually have a complete blank at this stage as to --
 12 I mean, I assume we got to the stage of having factual
 13 witness statements and exchanging them but I don't
 14 remember them.

15 **Q.** We're still trying to find out which factual witness
 16 statements were prepared but can I just ask a general
 17 question on that point. Would there have been any
 18 difficulty with seeking to obtain a witness statement
 19 from somebody who held a mid-ranking level role in the
 20 Civil Service in this litigation? Is there any reason
 21 why that wouldn't be done?

22 **A.** Just thinking. In all of these cases -- I mean, I've
 23 just been assembling some witnesses for a case that I --
 24 an old audit many years ago of a company which was
 25 consequently found to be fraudulent, and mid-ranking

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1 Witnesses as to fact should also be considered.

2 Mr Fenwick liked expert witnesses to prepare their
 3 reports in the format of initial skeleton reports and
 4 later structural reports. These would almost certainly
 5 need amendments during the course of the trial."

6 On the expert witnesses, is it correct that you
 7 did like that approach, of having a skeleton report
 8 prepared for you, or -- prepared, and what's later
 9 described as a structural report?

10 **A.** It must have been if it was recorded. I don't recollect
 11 it. I mean, the -- this is -- I can't remember the date
 12 of the Ikarian Reefer and whether I would have had that
 13 to hand, which is of course Peter Cresswell's seminal
 14 guidance on experts and how their reports should be
 15 prepared.

16 I think what I was probably saying then is
 17 that: we want to know broadly what they're going to say
 18 first so we can see if they're covering the correct
 19 areas. And then they write their reports. Sometimes
 20 you send off for an expert, if you just say, "Please
 21 write a report on this", they get entrenched and it
 22 doesn't actually cover the correct subject matter.

23 **Q.** Do you recall taking any different approach to experts
 24 in this litigation to that which you took in your normal
 25 practice, if I may put it that way, at that time?

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1 people who were involved at the time often have
 2 a reluctance to come forward if they've retired.

3 What we would have done, I think, and again that
 4 would have been Michael Spencer as much as myself, is to
 5 look at the areas we wanted to cover, find out who was
 6 in post, who was still serving in the Civil Service and
 7 who had retired, approach them and persuade them to give
 8 evidence, unless they were unwilling to do so or unable
 9 to do so because of health.

10 Might there have been people who just didn't want
 11 to get involved? There often are. I don't have any
 12 particular recollection of it. But there should be no
 13 reason why, particularly civil servants -- I mean, it's
 14 rather different from employees who have moved on, my
 15 view of civil servants is that's what they are: they are
 16 a servant of the public. And if they've been involved
 17 in something, they should be ready to give evidence
 18 about it when called upon.

19 Human nature isn't always like that, but we would
 20 certainly -- if we'd wanted evidence, we would certainly
 21 have asked for it, we'd have identified the people we
 22 thought should give it, and asked somebody to go out and
 23 try and find them and persuade them to come and give
 24 evidence.

25 **Q.** Do you have any recollection of being frustrated or, in

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1 other words, encouraged not to seek such factual
 2 evidence during this process?
 3 **A.** I'm sure nobody encouraged me not to. If they did, they
 4 wouldn't have got a very good reaction from me. There
 5 was a sense of frustration at the lack of documents.
 6 I suspect that means there was probably a frustration at
 7 the lack of people to tell me what actually happened,
 8 but whether the genesis of that frustration was passage
 9 of years or some reluctance of people to come out and
 10 give evidence, I don't know.
 11 In my experience, over 40 years, there have been
 12 lots of occasions when people have not wanted to give
 13 evidence. I don't have any particular recollection
 14 of it here. But, you know, we would have wanted to try
 15 to get the best evidence we could find and, certainly,
 16 in the documents, and possibly -- the fact that I don't
 17 remember witnesses particularly, it means either
 18 I wasn't involved in it or that there weren't very many.
 19 If there'd been good strong witnesses indicating things,
 20 I probably would have remembered something of it.
 21 That's the best answer I can give you, I'm afraid.
 22 **Q.** Just finally then, on this area of questioning and back
 23 to experts rather than factual witnesses, during the
 24 litigation and looking back on it now, the
 25 HIV Litigation, did you have any concerns about pressure

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1 (The Short Adjournment)
 2 (2.00 pm)
 3 **SIR BRIAN LANGSTAFF:** Yes.
 4 **MR HILL:** Mr Fenwick, I'm going to move on to the way in
 5 which the litigation was settled. In order to provide
 6 some context I'm just going to run through some of the
 7 events and dates that led to that. The first date is
 8 26 June 1990, which was the date of the hearing before
 9 Mr Justice Ognall, in which he made what he described as
 10 a rare intervention --
 11 **A.** Yes.
 12 **Q.** -- in essence, to say that although he recognised the
 13 legal difficulties that the plaintiffs faced, he urged
 14 both sides to compromise the claim and said he wouldn't
 15 want the legal system to be perceived as, in his words,
 16 and I quote:
 17 "... a scapegoat for an unjust and inhumane denial
 18 of any significant measure of compensation to the
 19 plaintiffs."
 20 Just on that intervention, was it a rare and
 21 unusual intervention, in your experience, at that time?
 22 **A.** It was definitely a rare and unusual occurrence. I mean
 23 Harry Ognall was quite a plain speaking judge, so it was
 24 not totally uncharacteristic of him to make comments of
 25 what he thought was appropriate. The words you quoted

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1 being brought to bear on experts or any other form of
 2 inappropriate behaviour towards experts by the central
 3 defendants in the litigation?
 4 **A.** No, certainly nothing which came to my attention.
 5 My job, as I saw it, was to make sure that we got the
 6 best, in the sense of the most truthful and informed,
 7 evidence from the experts, rather than anything else.
 8 I think there will have had to be pressure in the form
 9 of encouragement of experts to give evidence.
 10 I note when you sent me, at some stage, the
 11 plaintiffs' own internal opinion as to merits, that they
 12 had difficulty in finding experts. People who are
 13 involved in the heart of a crisis, particularly one with
 14 consequences as tragic as this, are often unwilling to
 15 get involved. So there may have been pressure on people
 16 to give evidence. Pressure on people as to the content
 17 of their expert evidence, I certainly don't recollect.
 18 And, if I had, I would have probably said something
 19 about it pretty strong.
 20 **MR HILL:** Sir, I note the time and I'm about to move on to
 21 a different topic. I wonder if it might be a little
 22 early to break?
 23 **SIR BRIAN LANGSTAFF:** Well, we can take a break now, in that
 24 case, and come back at 2.00.
 25 (12.57 pm)

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1 are, of course, a clear steer that, although he was
 2 a judge, somebody else should be doing something
 3 different.
 4 So that's difficult. It could have led either
 5 side to make an application that he should be recused
 6 from being the judge in the case: the plaintiffs because
 7 he was casting doubt on the legal strength of the case;
 8 and the defendants because he was effectively saying
 9 that "I think it's jolly unjust if they don't get
 10 compensated".
 11 But I think it was taken by both sides in the
 12 spirit that it was meant. Here was somebody saying what
 13 many of us were feeling, what, as you've seen, I was
 14 saying and Andrew Collins was saying, it's a bad case in
 15 law, by which I mean one which is likely to fail, rather
 16 than one which should not be brought, but there is
 17 a strong element of compassion.
 18 And I think it's the sort of thing we expected
 19 from Harry Ognall, not in those terms, very unusual,
 20 unprecedented, and clearly had an effect that he was
 21 prepared to go that far.
 22 **Q.** You mentioned the possibility of an application for
 23 recusal.
 24 **A.** Mm.
 25 **Q.** We've seen that in the papers that was certainly

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1 discussed. What was your view on whether he should be
 2 asked to recuse himself?
 3 **A.** Definitely not. I mean, as far as I recollect. I seem
 4 to remember that it was being raised, was it, by the
 5 Health Authority or was it by -- because the
 6 manufacturers came in and out of the edges of the
 7 litigation and they appeared to have been present at
 8 certain hearings. Somebody suggested a possibility,
 9 I think was asked to advise about it.
 10 I think you take your judges as you find them and,
 11 in a sense, he was doing no more than expressing human
 12 feelings, which we'd already -- if you go back to those
 13 early advices of Andrew Collins, we would expect the
 14 court to be sympathetic to these plaintiffs, quite
 15 rightly so, but equally we expect them to be legally
 16 rigorous.
 17 He was almost saying, "If I'm going to be legally
 18 rigorous, I may well have to find against these
 19 plaintiffs on what I've seen so far, but I'm speaking my
 20 mind, in case it is possible to do something by which it
 21 is necessary", and, being Harry Ognall, urging everybody
 22 to go and do it. But also, I think, making sure that
 23 the plaintiffs side was in no doubt about the
 24 difficulties of their case. They weren't, but making
 25 sure -- making sure that we understood that there was

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1 **Q.** The response to that letter was sent on 3 October 1990,
 2 reiterating the Minister's decision to continue the
 3 litigation. Now, we can see from the papers, and you
 4 refer to it in your statement, that you provided advice
 5 on the terms in which that was to be communicated to the
 6 plaintiffs, but am I right in thinking that the decision
 7 was for the Minister and your advice was only about how
 8 that was presented?
 9 **A.** Very much so, and we're given our advice as to the legal
 10 merits, we'd given our views to the extent it was
 11 appropriate to do so, as to what he might do. It was
 12 the Minister's decision, or it came down to us from our
 13 instructions, so whether it was a minister or somebody
 14 down below, I don't know, but I presume it was
 15 a minister, and looking at some of the other stuff it
 16 probably was. And our job was to simply put it into
 17 wording which was clear enough, and as reasonable and
 18 appropriate as we could make it.
 19 **Q.** Just so there is no doubt about it, we have got
 20 evidence, and we will look at again with some future
 21 witnesses, that the submission went to both the
 22 Secretary of State and the Minister of State for Health
 23 and both gave the view that the litigation should
 24 continue --
 25 **A.** The Secretary of State was Ken Clarke who was --

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1 this strong compassionate feeling which, again, as
 2 you've seen, was well in view.
 3 **Q.** Following Mr Justice Ognall's intervention, there was
 4 a submission which went to the Secretary of State on
 5 24 July 1990. We looked at that with Kenneth Clarke on
 6 28 July last year, so I won't take you to it, but it
 7 contains some advice from counsel that you refer to at
 8 paragraphs 23 and 24, including Mr Collins saying that
 9 the Secretary of State should consider seriously
 10 Mr Justice Ognall's intervention. Was that advice that
 11 you agreed with?
 12 **A.** Yes.
 13 **Q.** In paragraph 27 and then on to paragraph 30, you refer
 14 to a number of documents, again I won't go to them for
 15 reasons of time but just to provide the chronology.
 16 A decision was taken by ministers to continue the
 17 litigation. On 7 September 1990, the plaintiffs wrote
 18 to the central defendants in response to
 19 Mr Justice Ognall's observations and proposed
 20 consideration of a settlement and, during the course of
 21 that letter, they stated that they placed a full value
 22 of the claim at between £80 to £90 million, that seems
 23 to be a figure for the claimants alone, not including
 24 people with haemophilia who were infected who --
 25 **A.** I think that must be right. Yes.

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1 **Q.** Virginia Bottomley.
 2 **A.** Virginia Bottomley. Right. Thank you.
 3 **Q.** You were then asked, or the counsel team as a whole were
 4 asked for some advice, a formal written advice on merits
 5 and on quantum, and that advice was expressed in a way
 6 to say that "We don't want to have any reference to
 7 settlement in the advice, we would just like advice on
 8 liability". You say at paragraph 22 of your witness
 9 statement that you presumed that was because they wanted
 10 to have a clear understanding of what the legal merits
 11 of the claim were.
 12 **A.** Yes.
 13 **Q.** I'm going to turn to that advice now. It is
 14 DHSC0007039_001. You can see it is headed "Re: HIV
 15 Haemophilic Litigation, Advice on Liability". If we go
 16 to the last page, electronic page 27, please. We can
 17 see this is signed by Andrew Collins, Michael Spencer
 18 and yourself.
 19 **A.** Yes.
 20 **Q.** It's dated October 1990, from the sequence of
 21 correspondence it appears to be after 18 October
 22 because --
 23 **A.** Right.
 24 **Q.** -- that's when the instructions went out. If we can
 25 turn back, please, to page 1, I'm not going to go

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1 through all of this advice and I stress again that we're
 2 not concerned with the fine detail of legal analysis and
 3 trying to reconstruct that after all this time. But
 4 there are a few points that we need to examine from it,
 5 particularly as they inform what happened later in terms
 6 of the settlement of the waiver of claims.

7 **A.** Mm-mn.

8 **Q.** If we look at paragraph 2, you state this and I quote:
 9 "At this stage, our advice must be qualified by
 10 the limited amount of material presently available. We
 11 have had access to the pleadings, the bundles of
 12 publications relied on by the Plaintiffs and have
 13 considered part of the Government Defendants' discovery
 14 documents and first draft expert reports. We have not
 15 seen any discovery from the Health Authorities or the
 16 CBLA, nor have we seen their expert reports or any
 17 expert reports served on behalf of the Plaintiffs. And
 18 these are available, it may affect our opinion as to the
 19 potential liability in particular of the Department of
 20 Health."
 21 A description there of what this advice was based
 22 on in terms of the material suit.
 23 If we go please to page 2, paragraph 4. You refer
 24 to:
 25 "Separate short Advices [that] are in preparation

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1 discussions I would have had with Andrew Collins and
 2 Michael Spencer, thus informing my general view. Which
 3 is that you either had to have some form of no fault
 4 compensation scheme, pure and simple, or it might be
 5 possible to say: if you will accept for the purposes of
 6 this litigation that there is no duty in relation to
 7 policy matters and/or to CSM and Licensing Authority,
 8 then we might be prepared to do some sort of compromise
 9 on an assumption -- no need to prove a breach of the
 10 operational duty. It would have been some way in which
 11 we could preserve what was really important, and yet at
 12 the same time find a way through the litigation.
 13 I mean, the no-fault compensation scheme or the --
 14 whatever you call the settlement, and it could be
 15 classified in a number of ways, was fairly
 16 unprecedented, as an approach. There had been
 17 no payments to vaccine damages without litigation. So
 18 I think that's the sort of thing we would have been
 19 discussing.
 20 What went into the advice, whether it was
 21 finalised, I don't know.

22 **Q.** When you say that one of the options would have been
 23 a no-fault compensation system, do you mean a general
 24 no-fault compensation system or just a no-fault
 25 compensation system in respect of people with

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1 on the following matters ..."

2 The first is quantum of damages. We have that
 3 advice. I am not going to go to it. But for the
 4 record, it is DHSC0007039_002.

5 Then there is also reference to a short advice on
 6 the:
 7 "ways in which some compromise of the litigation
 8 could be achieved without creating a precedent or
 9 affecting other pending and possible litigation."
 10 Now the Inquiry has not been able to find a copy
 11 of that advice, and I note that the paragraph begins by
 12 saying that those advices were "in preparation".

13 **A.** Yes.

14 **Q.** Do you know if such advice was ever produced?

15 **A.** I don't know. I would expect it was. I know we were
 16 giving active consideration to ways in which, if
 17 ministers decided they wanted to provide some form of
 18 compensation, that could be done without creating
 19 a damaging precedent. So I'm thinking it was likely it
 20 was prepared. More than that I can't say.

21 **Q.** Do you know what the general tenor of that advice was?
 22 How could it be done without creating a precedent?

23 **A.** I don't know what it was. I can tell you what I think
 24 it might have been, from my general approach to it, and
 25 the discussions -- well, what I believe to have been the

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1 haemophilia, infected --

2 **A.** People with -- we were focusing on haemophiliacs in
 3 their unique position. It was not intended to be
 4 a precedent of no-fault compensation scheme. It was
 5 a way of providing compensation to them, and I suspect
 6 we would have already had in mind the fact that if there
 7 was going to be a scheme irrespective of liability, it
 8 would need to extend to haemophiliacs, because otherwise
 9 if you give a no-fault compensation scheme to those who
 10 brought a claim, why should those who haven't brought
 11 a claim be excluded?

12 And I think we, to the best I recollect it, there
 13 was a clear view expressed that if you're going to
 14 compensate you have to compensate everybody, and not
 15 just say, "You haven't sued, so you can't have it."

16 **Q.** You say such a scheme would not have been intended to
 17 set a precedent but Treasury officials and, indeed,
 18 Department of Health offices may well say: well, we do
 19 not intend that, but it is going to set a precedent.

20 **A.** Yes, I'm sure they did, and of course they were right
 21 that it would be a precedent, but what one has to do in
 22 those circumstances, as we tried to do later on when we
 23 did the variant CJD, was to make clear that there has to
 24 be something which takes it very far out of the ordinary
 25 before such a scheme is considered.

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1 I mean, there was a very real concern at this
2 stage -- you know, now we are used to a society in which
3 medical practitioners and other professionals are very
4 careful, in some ways overcautious, because of the fear
5 of being sued, the massive amount of claims which are
6 being made. At this stage there were relatively few
7 negligence claims in medicine. I mean, you know -- as
8 in others. I mean when I suggested you might sue
9 a solicitor for negligence in an over-valuation case,
10 people looked at me askance. That was in about 1985,
11 1986.

12 So there was a real danger at this stage, because
13 the flood of claims was beginning, that if we open the
14 gates by saying, "We will in certain cases compensate
15 without fault", the Treasury and the -- you know, there
16 are always limited resources, limited resources, limited
17 resources, would be challenged. So it was an important
18 issue.

19 **Q.** Turning back to the advice that you did give in this
20 document, the advice on liability, if we could go,
21 please, to page 3. This sets out the principal
22 allegations made against the Department of Health. I'm
23 not going to go through them all but if we look at
24 number (3) we can see that that refers to an allegation
25 that:

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1 page 10 and paragraph 18, to read from that, and
2 I quote:

3 "Arising from those assertions, the Plaintiffs
4 allege that the Department failed to appreciate
5 sufficiently the risk of infection with Hepatitis and to
6 take any or any sufficient steps to remove or reduce
7 that risk by eliminating imported commercial
8 concentrate, encouraging heat treatment, reducing full
9 sizes and advising alternative forms of treatment."

10 **SIR BRIAN LANGSTAFF:** Do you think that's meant to read
11 "pool sizes"?

12 **A.** It must be. I mean, looking at it now, it clearly was
13 intended to be "pool sizes".

14 **SIR BRIAN LANGSTAFF:** I think one can pick that up, just
15 going back to what we were looking at earlier, where you
16 set out the allegations against the Department, go back
17 couple of pages, I think, to page 6 or 7, maybe 8.

18 **MR HILL:** I think page 3, point 5.

19 **SIR BRIAN LANGSTAFF:** Thank you.

20 **A.** Yes.

21 **SIR BRIAN LANGSTAFF:** Yes, that's what I had in mind so
22 you've mentioned it once there and here it must be --
23 must be "pool", mustn't it?

24 **A.** Yes.

25 **MR HILL:** I can confirm, from having looked at both the

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1 "the Department of Health failed to pay sufficient
2 regard to the risk of Hepatitis or other viral
3 infections and to take steps to reduce or eliminate the
4 risk of their transmission through blood products."

5 I'm just going to follow through in the document
6 what is said about that allegation. We can turn to
7 electronic page 4, paragraphs 6 and 7 set out the
8 principal allegations against the Licensing Authority
9 and the Committee on Safety of Medicines, and the first
10 item for both of those is again this point about the
11 failure to have sufficient regard to the risk of blood
12 products transmitting hepatitis and other viral
13 infections.

14 Then on please to page 8 and paragraph 16. This
15 refers to the Re-Amended Statement of Claim of the
16 plaintiffs, and it says that:

17 "In paragraphs 19 to 23 ... the Plaintiffs make
18 a number of assertions in relation to the association of
19 the risk of Hepatitis with the treatment of
20 haemophiliacs", and those assertions are then
21 summarised.

22 If we go on to the next page, please.

23 Paragraph 17 refers to the range of printed papers that
24 were pleaded in support of the plaintiffs' case on
25 hepatitis infection. Over, please, to electronic

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1 original pleadings and the re-amended pleadings, it is
2 about pool sizes.

3 **A.** Yes.

4 **Q.** There follows at paragraph 23, which is electronic
5 page 13, a discussion of the -- the issues of
6 self-sufficiency and how that affects the claim in
7 respect of both HIV and hepatitis. If we go to
8 paragraph 24, there is a section which then deals
9 specifically with what is described as the more
10 difficult question of the seriousness of hepatitis and
11 the difference between hepatitis B and
12 non-A, non-B hepatitis, and when that came to be
13 appreciated.

14 Then if we go, please, to electronic page 16 and
15 paragraph 29, just to give the summary of that advice.
16 It is this, and I quote:

17 "In summary therefore we consider that there is
18 some limited risk in this area but that the plaintiffs
19 are likely to fail to prove their allegations."

20 That is in respect of alleged breach of duty or
21 breach of statutory duty. There is an additional point
22 about causation which is dealt with at paragraphs 47 and
23 48 of the advice, which is at electronic page 22.

24 Now, the first issue for the plaintiffs in respect
25 of causation and hepatitis infection is that the

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1 plaintiffs would have to show that negligent failure to
 2 protect for hepatitis would give rise to liability for
 3 infection with HIV, which, for much of this time, would
 4 have been an unknown virus. What you say about the
 5 defence that's open to the Government, about
 6 three-quarters of the way down that page, the sentence
 7 beginning "The defence open", I will just read that out
 8 to you.
 9 **A.** Yes.
 10 **Q.** "The defence open to the Government is to argue that the
 11 Hepatitis risk and any negligence in relation to it is
 12 so wholly different from the utterly unforeseeable
 13 advent of the AIDS virus that any negligence in relation
 14 to Hepatitis and self-sufficiency was not causative of
 15 the damage actually suffered by the Plaintiffs."
 16 If we go on to the next paragraph, please.
 17 "We consider that such a defence is eminently
 18 arguable and would normally stand a reasonable prospect
 19 of success. However, it is open to the Court to hold
 20 that HIV is a virus as is Hepatitis and that the
 21 Government cannot shelter behind the increased severity
 22 of the AIDS virus. Overall, we consider that there is
 23 a reasonable prospect of our argument succeeding but
 24 this is one of the more difficult areas so far as the
 25 Government Defendants are concerned."

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1 So it's that balance but, certainly, it was
 2 an area which collectively we felt was one which we
 3 might not win.
 4 **Q.** Just so it is clear for everybody, that was not, of
 5 course, the only hurdle that the plaintiffs had to get
 6 over?
 7 **A.** No.
 8 **Q.** One of many.
 9 **A.** (Witness nodded)
 10 **Q.** The second issue about causation, which is dealt with at
 11 paragraph 49, is that there will be a need to show that
 12 achieving self-sufficiency in blood products in England
 13 and Wales would have led to incidence of HIV either
 14 being eliminated or reduced, and that was another hurdle
 15 that the plaintiffs would have to cross.
 16 **A.** Yes.
 17 **Q.** That, of course, is expressed by reference to HIV. If
 18 the claim had been for hepatitis damage, as well, then
 19 the same point would have applied to hepatitis, wouldn't
 20 it? You would still have needed to prove that
 21 self-sufficiency would have eliminated or reduced the
 22 risk --
 23 **A.** Yes.
 24 **Q.** -- of hepatitis infection. If we could turn, then, to
 25 electronic page 26 of the document, the final page, the

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1 So just pausing there. The statement of claim and
 2 the amended statement of claim did not plead for damages
 3 for hepatitis infection, just for HIV infection; is that
 4 right?
 5 **A.** That is right.
 6 **Q.** So, in order to get to HIV infection through that route,
 7 the claimants had to deal with that causation issue, but
 8 are we right to read this as, in your view, being one of
 9 the areas where the Government was on weaker ground
 10 compared to other areas?
 11 **A.** That's certainly the view we came to collectively.
 12 I think, if anything, I was probably a little more
 13 bullish than the others about it but this is the view.
 14 I mean, it's very difficult. HIV is so very different
 15 from hepatitis -- or at least as it was then
 16 understood -- that it seemed to me that the sort of way
 17 that courts looked at causation thereafter, from
 18 Lord Hoffmann and his mountaineer's knee in SAAMCO, made
 19 this is an argument that we should win.
 20 But, again, I think we were right, collectively,
 21 to reach the view that because of the sympathy the court
 22 would find, if it could be classified as a virus, then
 23 one virus is the same as another one: if you could have
 24 foreseen damage by virus, then it doesn't matter which
 25 virus, in fact, infects you.

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1 "Overall assessment of the risk", I'm just going to read
 2 through this. What you and your colleagues wrote is
 3 this:
 4 "55. It will be clear from earlier parts of this
 5 Advice that much more work needs to be done before a
 6 final assessment of the risk of Plaintiffs succeeding at
 7 trial can be established. However, at present it is our
 8 view that the Government Defendants will succeed in
 9 defeating the Plaintiffs' claim on each of three
 10 grounds:
 11 "(1) the existence of a duty of care;
 12 "(2) negligence or breach of duty;
 13 "(3) causation.
 14 "56. However, it will be equally clear that there
 15 are a number of areas in which risks exist and it would
 16 therefore not be appropriate to proceed on the
 17 assumption the Plaintiffs' claim will fail.
 18 "57. What is perhaps worth some consideration is
 19 that it is possible that the Plaintiffs will succeed in
 20 showing negligence but will fail either to prove a duty
 21 of care or to prove causation or in appropriate places
 22 to prove Wednesbury unreasonableness. Even if the
 23 Courts do not succumb to the temptation to find the
 24 Government Defendants liable if they can be shown to be
 25 negligent, the outcome of such a trial in which the

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1 Government was found to have been negligent but to have
2 escaped liability because of what many would regard as
3 technicalities in the law, would no doubt bring adverse
4 public comment."

5 That is the conclusion of your advice.

6 This advice, as we know, was written at some point
7 in October, so after the Court of Appeal decision in
8 PII --

9 A. Yes.

10 Q. -- and shortly before the settlement proceedings -- the
11 process leading to settlement began.

12 Is it fair to say that this is probably the best
13 record that we have of the central defendants' counsel
14 team view of the strength and weakness of the
15 litigation?

16 A. Of the legal position of the litigation, yes.

17 Q. Had your view changed very much over the course of your
18 involvement in the litigation?

19 A. It's very hard to recollect. I mean, certainly not
20 significantly. It is always the case that as you get
21 more into a particular piece of litigation and you see
22 more documents, and you think about it more, you see
23 more areas of potential difficulty, you also see more
24 arguments in favour. So I think our views will have
25 shifted on particular topics from time to time but the

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1 to "Out of Court Settlement". I'll just read through
2 what is said there.

3 "In July 1990 Mr Justice Ognall took the
4 exceptional step of asking the parties to consider
5 a compromise settlement of the litigation. In its
6 formal response, the Department rejected the proposal
7 and said that moral and compassionate arguments had been
8 recognised by the Government's ex-gratia payments
9 totalling £24m."

10 I pause there to say that's in relation to
11 Macfarlane Trust.

12 "As a follow-up to Mr Justice Ognall's statement,
13 the lead firm of Solicitors for the plaintiffs,
14 Pannone Napier, had suggested a settlement figure of £80
15 to £90 million plus costs. However in informal
16 discussions with the solicitors for the Health
17 Authorities, Pannone Napier had suggested that
18 a settlement might be reached nearer £30 million.
19 Kenneth Clarke did not wish to initiate any negotiations
20 with the plaintiffs as this might imply some acceptance
21 of liability for negligence. However with the
22 Department's knowledge the Health Authorities encouraged
23 Pannone Napier to explore with the other solicitors for
24 the plaintiffs whether they could agree a realistic
25 settlement figure which could be offered to the

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1 overall tenor of the view, as reflected in those three
2 bullet points, a duty of care, breach and causation,
3 would, I think, have been largely unchanged.

4 I mean it's possible, and I don't remember but
5 looking what's said here about the causation argument,
6 it's possible that the concept of a virus -- and
7 therefore that's enough -- may have come into more
8 prominence, and that's something which may have
9 changed -- which may be why my recollection isn't being
10 slightly more bullish than is written here. But that's
11 the only area I can think of.

12 Q. The overall thrust of your advice that it was your view
13 that the Department of Health and the other central
14 defendants were likely to win the
15 case -- (overspeaking) --

16 A. Yes.

17 Q. I'm going to turn now to some documents which show how
18 the discussions which led to the settlement unfolded.
19 If we can have, please, DHSC0046962_187.

20 This is a document, an internal Department of
21 Health document headed "Present position on
22 HIV/Haemophilia Litigation". I just note from that
23 first paragraph that the trial was due to begin on
24 4 March 1991.

25 If we turn to a second page, please. References
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1 Department.

2 "In recent meetings with the Health Authorities'
3 solicitors and the Department's leading Counsel, the
4 plaintiffs have made written proposals for a settlement
5 in the range of £30 to £60 million. They invited the
6 Department to make an offer in the upper end of the
7 range.

8 "Kenneth Clarke met Counsel on 1 November to
9 discuss this. The line was confirmed that there should
10 be no offer from the Department. However, our Counsel
11 would make known to the Plaintiffs that if they were to
12 offer a settlement around £20 to £25 million plus costs
13 this might be considered. Any settlement would have to
14 be acceptable to all plaintiffs and end the litigation.
15 No money has been agreed with Treasury for an out of
16 court settlement, and this can be difficult to obtain as
17 the prospects for successfully defending the action are
18 reasonable."

19 Then another document, DHSC0004365_043.

20 This takes this story forward a little further.

21 It is a note made by Ronald Powell, the Department of
22 Health's solicitors, of a telephone conversation with
23 you on 7 November. I note that on 1 November,
24 Geoffrey Howe resigned from Margaret Thatcher's
25 Government, prompting a reshuffle, which led to

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1 Kenneth Clarke leaving the Department of Health and
 2 William Waldegrave becoming the Secretary of State.
 3 **A.** That's helpful.
 4 **Q.** What Mr Powell wrote of the conversation is this:
 5 "Mr Fenwick said that Andrew Collins had spoken to
 6 Rupert Jackson [that's the lead or one of the lead QCs
 7 for the plaintiffs] last Friday and had arranged for
 8 them to meet on Monday."
 9 The Friday was 2 November, the Monday was
 10 5 November.
 11 "They met on Monday at 8.00 am. Those attending
 12 were Andrew Collins, Rupert Jackson, Justin Fenwick,
 13 Michael Brooke and Dan Brennan."
 14 Just pausing there, obviously we know your name
 15 and Mr Collins' name. Mr Jackson, Mr Brooke and
 16 Mr Brennan were all barristers for the plaintiffs' side?
 17 **A.** Yes.
 18 **Q.** Going back to the document:
 19 "Andrew Collins put our position to them. We
 20 could not initiate a compromise but were prepared to
 21 listen to what they had to say. They did not balk at
 22 this.
 23 "They were told that the figures we might have in
 24 mind were not on the paper that they had submitted. The
 25 top range of figures were out of the question. If the
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1 settle the litigation, but were instructed to listen to
 2 offers --
 3 **A.** Yes.
 4 **Q.** -- and perhaps indicate the kind of range of offers that
 5 might be acceptable; is that fair?
 6 **A.** Yes.
 7 **Q.** Did that cause any difficulties for you in the
 8 negotiations? The fact that you weren't able to make an
 9 offer yourself?
 10 **A.** Well, everything always makes a difference. If I am
 11 instructed that you can go up to 20 million, 30 million,
 12 40 million, then you have a position and you can
 13 negotiate. This was a case in which effectively the
 14 Government was saying: We will fight this case, but we
 15 recognise that there is an argument for making some kind
 16 of arrangement -- I'm using that as a neutral word --
 17 but within resources which we, the Government, regard as
 18 manageable. Therefore, if you would like to bring this
 19 to an end, then you must come forward with a figure.
 20 I think that was actually, in some ways, quite
 21 helpful. I mean, those were our instructions, so that's
 22 what we did. It was quite helpful in the sense that,
 23 once the defendant side puts forward a figure and the
 24 claimant side puts forward another figure and you're
 25 then negotiating between them, it's a sort of horse
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1 figures they would settle for were only to the middle or
 2 the right-hand side of the list of figures then it was
 3 best for us to accept that we would have to go to
 4 Court."
 5 I pause there to note that this obviously refers
 6 to a document which isn't provided with the note, but
 7 indicates that the Government was prepared to listen to
 8 an offer within a certain settlement range but not at
 9 another range.
 10 **A.** Yes.
 11 **Q.** Is that a fair interpretation --
 12 **A.** Yes.
 13 **Q.** -- read it with the other note. Returning to the
 14 document:
 15 "The Steering Committee met on Monday evening and
 16 a further meeting between Counsel concerned has been
 17 arranged for 6.00 pm this evening. Mr Fenwick suspects
 18 that they will come back asking for about £40m as
 19 openers. He will report back after the meeting but has
 20 got the impression that their sights are not set high."
 21 Then the document goes on to note four matters
 22 that you raised. I'm going to come back to one of those
 23 in a second, but before I do, it seems clear from these
 24 documents that your instructions were that the central
 25 defendants were not to make any offer themselves to
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1 trade.
 2 Whereas this had to be a figure we were asking for
 3 that the plaintiffs themselves, through their legal
 4 team, would regard as being appropriate in all the
 5 circumstances. Less than they would have liked for
 6 their clients, but appropriate given their perception of
 7 (a) the legal strength of the case and (b) the
 8 difficulty of persuading Government to make an ex gratia
 9 or out-of-the-litigation settlement, so that -- and that
 10 represents something which would potentially, and
 11 I think we'll come on to this later, remove the need for
 12 any kind of horse trade where we were trying to push
 13 down the plaintiffs so that they were compromising.
 14 This was intended to illicit from them their realistic
 15 figure for what they thought would be a good outcome in
 16 all the circumstances, given the legal difficulties.
 17 So I think it in some ways made it easier, because
 18 if we'd had a figure then we'd have been under pressure
 19 to produce it, and that might have led to horse trading.
 20 In other ways it was more different because we had to
 21 hold back.
 22 **Q.** Was this form of instructions usual, in your experience?
 23 **A.** Oh gosh, um ... now, perhaps not. I mean, I'm often in
 24 a position where plaintiffs have very large claims, and
 25 we made very low payments into court, or whatever they
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1 are, settlement offers and we think our case is strong,
 2 and we say to the plaintiffs "If you want to settle this
 3 case you've got to be realistic, come to us".
 4 I think in those days it was probably a little bit
 5 less usual. It was unusual also in the sense that this
 6 was not being done by "We think your case is rubbish, we
 7 might be prepared to pay you something to go away".
 8 This was "We're talking about something different here
 9 and we're therefore going to do it in a different way".
 10 So I think it was the reasons for it which were
 11 different, more than necessarily the actual approach.
 12 **Q.** Finally on this point, in your view, was there anything
 13 inappropriate about instructing you in that way?
 14 **A.** No, I don't think so. I mean, I think it was intended
 15 to facilitate a settlement in a way which ministers
 16 would regard as acceptable, and it was leaving it open.
 17 I mean, if we had been dealing with a weak legal team,
 18 I think it might have been a little unfair, but we were
 19 dealing with advocates of really very high calibre, and
 20 I don't think -- in the circumstances, I don't think it
 21 was at all inappropriate, no.
 22 **Q.** Just on those advocates, Mr Jackson became a judge in
 23 the Court of Appeal, subsequently.
 24 **A.** Yes.
 25 **Q.** Mr Brennan was a QC and is now Lord Brennan.

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1 going on.
 2 Did you ever learn whether or not that was
 3 correct?
 4 **A.** Not that I can think of. I can't recollect anybody
 5 saying, "We have to go to the Legal Aid Board". I don't
 6 think they would have done because, bluntly, they
 7 shouldn't have done so. I mean, they knew that we would
 8 know that they would have to report back to the Legal
 9 Aid Board in stages because you always do, in cases of
 10 this magnitude. In just the same way as a plaintiff
 11 knows that the defendant will have to report to his
 12 insurers from time to time and, therefore, will regard
 13 certain stages as pressure points. And in settlements
 14 of litigation, immediately before they have to agree to
 15 pay a brief fee, there are moments in a case where the
 16 other side will have to assess his position carefully.
 17 Given here the quality of the advocates and their
 18 obligations to the Legal Aid Board, we will have known
 19 that they will have had to report, probably around this
 20 stage as disclosure, or discovery as it was, finished.
 21 But no, I'm sure they wouldn't have told me that, but it
 22 would have been obvious on both sides that that was
 23 going to happen at some stage.

24 What we didn't know and what I had absolutely no
 25 idea of until I read with interest their own report,

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1 **A.** Yes, he was appointed by Mr Blair to the House of Lords
 2 for services to something.
 3 **Q.** But not a Law Lord, we should --
 4 **A.** Not a Law Lord. He never had a judicial post. He may
 5 have been a deputy High Court judge, I can't remember.
 6 **Q.** Michael Brooke later became a silk and was involved
 7 in --
 8 **A.** He became a silk. And I think -- I mean, he was in my
 9 chambers, I should know -- became a circuit judge and
 10 then sadly died --
 11 **Q.** Yes.
 12 **A.** -- relatively young.
 13 **Q.** Turning to one of the other issues you raise in that
 14 note on page 3, I won't read through all of this, but
 15 what you suggested to Mr Powell is that one of the
 16 reasons why the plaintiffs side may be keen on settling
 17 at this stage was because they may have to go back to
 18 the Legal Aid Board to have their funding renewed and,
 19 at that stage, their counsel would have to give
 20 an honest and frank advice about their prospects of
 21 success, and that may lead to the Legal Aid Board
 22 choosing not to renew the funding.
 23 **A.** Yes.
 24 **Q.** Now, the way that it is expressed there is that that was
 25 your best effort at trying to work out what might be

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1 which was, I think, sent to me in the second set of
 2 papers I received --
 3 **Q.** Yes, that's right --
 4 **A.** -- was the way that they were, in fact, looking at the
 5 case and the way in which clearly they would actually
 6 have had to report to the Legal Aid Board. We had no
 7 inkling of that. We might have thought that they would
 8 have to advise cautiously, possibly very cautiously.
 9 I think I'm pleased that we didn't know the nature of
 10 their actual advice, because that could have encouraged
 11 hawks to say "Well, in that case, we won't settle".
 12 I hope not and I've no reason to think it would have
 13 done, but we certainly had no idea that that was their
 14 view. We would have understood that they recognised the
 15 difficulties of the case, but certainly not to that
 16 extent.
 17 **Q.** I'm not going to go to that advice but other evidence
 18 and questions which have been posed by the Core
 19 Participants lead me to ask this: were you ever aware,
 20 during the course of the HIV Litigation, of any attempts
 21 by civil servants or by ministers to influence the
 22 decision making of the Legal Aid Board, in respect of
 23 the plaintiffs in the HIV Litigation?
 24 **A.** No. I mean -- well, there are two ways in which that
 25 might have happened. One would be a formal open letter

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1 or communication to the plaintiff's solicitors, "Please
2 ensure the Legal Aid Board is aware of this", which is
3 what one often does in litigation, to make sure that the
4 real decision-makers know -- I don't recollect that
5 happening at all -- of anything done by way of indirect
6 or private communication. I'm not aware of it. And
7 I think it is most unlikely that -- well, I don't know.
8 But I would have been very surprised to hear about it.
9 Have I seen anything which suggests that? No,
10 I don't think so. I mean, I'm not aware even of what
11 decisions the Legal Aid Board did make but I'm not aware
12 of any such communication or attempt.
13 **Q.** If you and Mr Collins and Mr Spencer had been asked
14 whether that was appropriate, what would your advice
15 have been?
16 **A.** Well, I think I can speak for them. Unequivocally, that
17 is wholly inappropriate. We do have not only separation
18 of legislature and executive but when you appoint
19 a Legal Aid Board you make them independent and you
20 don't challenge their independence, otherwise you
21 destroy the system.
22 **Q.** You have said in your statement that you were aware of
23 a change in mood around this time, you were asked about
24 whether or not the change from Mr Clarke to
25 Mr Waldegrave or Mrs Thatcher to Mr Major made any

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1 So that was a slightly softer way of looking at it.
2 I do think that the elevation of John Major to Prime
3 Minister made a difference, partly because of difference
4 of personalities, but also I think I perceived it as
5 "this is an opportunity to make a change", because it
6 came very rapidly after the change in power, and I think
7 this was John Major indicating -- I mean, as I saw it,
8 I had no idea of what went on, but I very much got the
9 feeling that John Major said, "Well, we really ought to
10 do something about that. How can we do it?" That's my
11 perception.
12 **Q.** Sorry for speaking over to you. Just so that we have
13 the chronology, the 1 November, as I mentioned, was when
14 Mr Waldegrave took over as Secretary of State.
15 John Major came in as Prime Minister on 28 November, and
16 between 1 November and 28 November there was obviously
17 a challenge to the Prime Minister and the first and
18 second round of the leadership ballots, which may
19 explain why there was a -- the responses to the
20 settlement litigation were a little slow at that time,
21 and one or two other --
22 **A.** I'd forgotten that, yes. Yes.
23 **Q.** I'm going to turn now to the proposed settlement that
24 came in from the plaintiffs, and we know from other
25 documents that this was put forward on 9 November 1990.

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1 difference.
2 **A.** Mm.
3 **Q.** Are you able to expand on what that change of mood was,
4 and why it came about?
5 **A.** Well, of course, there were also all those adjournment
6 debates which were going on in Parliament at the same
7 time.
8 **Q.** Yes.
9 **A.** So there was increasing pressure from outside the
10 litigation on Government at that stage. So the move
11 from "We don't settle cases unless we are advised that
12 we lose them or have a significant chance of losing
13 them", and "We don't set any precedents", I think
14 gradually gave way to "If we can find a way of providing
15 compensation to these victims without damaging (a) our
16 willingness to fight cases on their merits; and (b) not
17 creating a precedent, then we should do so", I think,
18 came in.
19 The changes of personalities may have made that
20 appear more accentuated. I mean, William Waldegrave --
21 I certainly attended meetings with both of them and
22 I can't remember whether it was one or two or more;
23 William Waldegrave had a very different style to
24 Kenneth Clarke.
25 I think they both had exactly the same concerns.

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1 Could we have on screen, please, DHSC0046962_067.
2 I'm so sorry, I've given you the wrong reference
3 DHSC0003654_117.
4 Thank you. The heading is "HIV Haemophiliac
5 Litigation, Proposed Heads of Compromise", and I'll just
6 read through the first two paragraphs and take you to
7 the figures:
8 "1. The Plaintiffs' Counsel would be prepared to
9 advise the Steering Committee and individual Plaintiffs
10 to settle their cases for payments of categorised
11 amounts to the Macfarlane (Special Payments) Trust
12 totalling approximately £42 [million], subject to what
13 is set out below.
14 "2. The proposal is made on the instructions of
15 the Plaintiffs' Steering Group of solicitors but without
16 the knowledge of the lay clients and their individual
17 solicitors; accordingly it is subject to Counsel
18 advising their clients and taking appropriate
19 instructions from lay clients.
20 "3. In response to the Government's desire to
21 make payments to all haemophiliacs and not just those
22 who were suing, the figures cover all the haemophiliacs
23 registered with the Macfarlane Trusts as well as all the
24 Plaintiffs ('the claimants'). It is exclusive of all
25 previous payments to the Macfarlane Trusts. It is to be

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1 emphasised that the Plaintiffs' solicitors and Counsel
 2 do not act for and are not instructed by haemophiliacs
 3 outside this litigation.
 4 "The figure is derived as follows ..."
 5 We then see a table setting out different figures
 6 for different categories of claimants: child, single
 7 man, married but childless, married with children,
 8 infected intimates and category G. We know from other
 9 documents that category G are people who concerned that
 10 they may become infected with HIV, generally because
 11 they had been intimate with people who were infected.
 12 Different figures were given for the quantum for
 13 each of those categories and the different numbers
 14 contained in the table as well, and the total, the grand
 15 total -- so this is for all people with haemophilia who
 16 were infected with HIV plus category G, plus
 17 intimates -- the grand total was just under £42 million.
 18 I won't go through the rest of the document but it
 19 sets out how the table was calculated, and then it
 20 refers to certain conditions that would have to be met,
 21 one of which is that state benefits would not be
 22 affected by the payments.
 23 Another of the requirements was that medical
 24 negligence cases, which would be brought against the
 25 Health Authorities, rather than the central defendants,

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1 appeared to be responsible in recognising the
 2 difficulties. It would still provide some substantial
 3 compensation when you added it -- added Macfarlane
 4 payments and Social Security benefits and the cost
 5 provisions, which were very important. And it was
 6 something which I think I thought there was a reasonable
 7 prospect that Government, the Department, Secretary of
 8 State, would accept. So it wasn't so high
 9 that I thought, "We'll never get this through", nor was
 10 it so low that I thought, "This is going to be the worst
 11 of both worlds, because we'll be paying something and
 12 it'll be not nearly enough."
 13 So I thought it was a pragmatic carefully thought
 14 out proposal by -- and Dan Brennan was a personal
 15 injuries specialist, Rupert Jackson was a professional
 16 negligence and general specialist, with a lot of
 17 experience, Michael Brooke was a personal injury
 18 specialist for all his career. So it was carefully
 19 thought out -- and there were experienced solicitors
 20 behind them. The fact that I don't mention the
 21 solicitors is because I don't remember the individuals,
 22 not because they played no part in it.
 23 So this seemed to us to be something that had been
 24 carefully thought out that they were prepared to
 25 recommend. They must in doing so, I felt, have

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1 would be allowed to continue if they fell within certain
 2 criteria --
 3 A. Yes.
 4 Q. -- and also that the settlement should be announced in
 5 open court with an opportunity for counsel to mention
 6 the settlement and, in appropriate cases, explain why it
 7 should be approved.
 8 Now that approval was a legal requirement at the
 9 time, wasn't it, and indeed now, that if a settlement is
 10 put forward for somebody who was under the age of 18 or
 11 who doesn't have capacity --
 12 A. Yes.
 13 Q. -- then the court must approve that?
 14 A. Yes, that's exactly right.
 15 Q. And in this case "the court" meant Mr Justice Ognall?
 16 A. Yes.
 17 Q. What was your response and the response of the counsel
 18 team for the central defendants to this proposal?
 19 A. When you say our response, you mean how did we
 20 personally view it as opposed to --
 21 Q. Yes.
 22 A. Um ... I thought it was -- I mean, I must be
 23 reconstructing here because I've got no specific memory.
 24 I mean, I remember the time, and I remember being,
 25 I think, pleased that there was an offer here which

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1 concluded that this was advice that they could properly
 2 give to their clients which their clients would, on the
 3 whole, be likely to accept, bearing in mind that there
 4 were not just the lead solicitors but also other firms
 5 of solicitors up and down the country representing
 6 individual plaintiffs, so a large group of people. And
 7 we thought it was something we could take to the
 8 Department and recommend.
 9 Q. In your statement, and there are documents referred to
 10 in your statement that underlie this as well, there is
 11 reference to a note that was provided to the Secretary
 12 of State which included an assessment of, as it were,
 13 the cold legal analysis of how much the claim was worth
 14 if one gives a discount for litigation risk, and that
 15 figure was about £27 million. You say in your statement
 16 that you suspect that that probably came from
 17 Michael Spencer because that would have been his area of
 18 specialism.
 19 A. I think so. Or those within the Department. I mean,
 20 I don't remember reaching that figure, and I'm not sure
 21 that -- I certainly wouldn't have wanted to reach that
 22 kind of figure with my level of experience without
 23 Michael Spencer having endorsed it. So which of it it
 24 was, I don't know, but I would expect that was Michael's
 25 area.

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1 Q. So in effect, the plaintiffs' proposal was about
 2 £15 million more than the brass tacks analysis
 3 undertaken on behalf of the central defendants. There
 4 was some discussion within the Department of Health
 5 about whether or not efforts should be made to seek to
 6 negotiate the price down.
 7 A. Yes.
 8 Q. What was your view on whether such efforts should be
 9 made?
 10 A. Definitely not. I mean, for two reasons: I think if
 11 you're going to settle something on this kind of scheme,
 12 you need to do so by way -- with goodwill rather than
 13 penny pinching; and secondly, I think if you go back,
 14 you get into the kind of horse trading that I'm talking
 15 about. I mean, this was an offer. I did not think it
 16 was unreasonable. I did not think -- I mean,
 17 affordability was not my job, but it seemed to me
 18 reasonable where we would avoid the trial and we would
 19 avoid the consequences of the trial, which I've talked
 20 about earlier. And I thought it would be a mistake to
 21 try to push the plaintiffs down. It might also make it
 22 more difficult for them to obtain agreement.
 23 I don't think I would have paused very long before
 24 expressing that view fairly trenchantly if and when
 25 asked.

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1 were given back in October? Had anything changed?
 2 A. I think that sounds as though it's a little bit more
 3 pessimistic. But on the other hand one has to look at
 4 the purposes of the advice. The October advice was
 5 a rigorous assessment on the limited material we had,
 6 you know, by leading counsel, junior counsel. This was
 7 my trying to say, you know: we have a good case, we
 8 should win, I think we will win, but there are risks as
 9 in all litigation, and, you know, you shouldn't send
 10 back the message "We don't need to pay this because we
 11 will win."
 12 So I don't think any of our analysis had changed
 13 but probably in the course of conversation being asked
 14 to give percentages, they seem a little more pessimistic
 15 but not much.
 16 Q. There is some reference in Treasury documents to the
 17 legal advice that the Department of Health was
 18 receiving, becoming more cautious and erring on the
 19 gloomy side. Now, I stress it's referring to legal
 20 advice generally, not necessarily to counsel. Do you
 21 think that you were becoming more cautious or erring on
 22 the gloomy side?
 23 A. No, I don't think we were. I certainly don't think we
 24 were gloomy as a counsel team, whatever was -- remember
 25 there were Departmental solicitors involved as well,

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1 Q. I have certainly seen no documents to suggest that you
 2 were ever instructed to negotiate the matter down.
 3 A. Yes.
 4 Q. It seems to have been something that was floated and
 5 then wasn't taken forward?
 6 A. I think people always say, particularly when you've got
 7 Treasury people there: do we need to pay that much
 8 money? And the answer to the Treasury people is: yes,
 9 if we're going to do this at all.
 10 Q. I'm not going to go through the submissions of the
 11 document, some of which you refer to in your statement,
 12 others of which we have looked at with other witnesses.
 13 You were called upon -- you and your colleagues on the
 14 counsel team were called upon from time to time to give
 15 advice, in particular on 4 December 1990, so very
 16 shortly before the settlement was announced. Ron Powell
 17 called you, and there's a note of a conversation that
 18 you had, and you refer to this at paragraph 43 of your
 19 statement.
 20 You appear to have gone through the legal
 21 arguments and ascribed a percentage chance as best you
 22 could to each of them, and overall come to the
 23 conclusion that there was about a one-third chance of
 24 losing.

Was this broadly in line with the advice that you

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1 and, I mean, from the point of view of the Department,
 2 if the resources can be put together from Treasury, then
 3 a settlement would obviously take away a huge amount of
 4 workload and angst. And they also have in mind their
 5 duties to the patients.
 6 Was it more cautious? I think what we were
 7 probably anxious at that stage to make sure was that
 8 Treasury and decision-makers didn't get carried away by
 9 the thought that we were so bound to win that they
 10 didn't need to take these things seriously. So it's
 11 more a matter of nuance. The essence of the advice in
 12 terms of the legal analysis was always unchanged.
 13 Q. Finally on this point, the announcement of the
 14 settlement was made in Parliament by the Prime Minister
 15 on 11 December 1990, followed up by a written statement
 16 from the undersecretary of State for Health. The
 17 Inquiry has heard that the announcement was made before
 18 individual plaintiffs had been consulted, certainly
 19 before they'd given instructions on whether they were
 20 going to accept the settlement.
 21 A. Yes.
 22 Q. Were you consulted at the time about the timing of the
 23 announcement and how the announcement was going to be
 24 made?
 25 A. I might have been but I have no recollection, and

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1 I wouldn't necessarily have expected to have been
 2 consulted. I mean, I don't remember that. I mean, it's
 3 very soon after the change of Prime Minister, isn't it?
 4 **Q.** Yes.
 5 **A.** And that had been an agreement in principle to be put to
 6 plaintiffs. I don't remember being consulted, and
 7 I think my view would normally be wait until you've got
 8 a settlement signed before you talk about it in
 9 Parliament, but ...
 10 **Q.** One possible reason for taking that approach was that
 11 there was a risk that if individual plaintiffs had been
 12 consulted then there was a risk that this would have
 13 leaked and may have let to a further round of
 14 negotiations. Was that something that you were
 15 concerned about at the time?
 16 **A.** I don't remember it. I mean, there was always a risk
 17 that the plaintiffs wouldn't accept the advice. But if
 18 there was advice to take that offer to legally aided
 19 plaintiffs, then there would be an obligation to
 20 consider whether the litigation should continue to be
 21 funded, and that offer rejected. So I don't think
 22 I expected there to be any further negotiations.
 23 I can see that that might have been a Departmental
 24 concern, but I don't -- I mean, I may have been
 25 consulted; I don't recollect it. I don't think that

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1 Andrew Collins rather than to me. I was sort of
 2 somewhere at the back of your room here, with the
 3 minions, in the sort of pecking order.
 4 **Q.** I am going to move on now to the negotiation of the
 5 final terms of the settlement, because obviously what
 6 has been put forward by the plaintiffs there was the
 7 heads of settlement, but not the detail.
 8 If we could have on screen, please,
 9 WITN7067001_48 -- sorry page 48. And paragraph 44.1.
 10 You were asked by the Inquiry what role you played in
 11 finalising the agreement, and what you said is this, and
 12 I quote:
 13 "I believe I was involved on a day-to-day basis
 14 when available, and that I would have done much of the
 15 drafting insofar as done by Counsel and would also have
 16 been the main counsel involved in checking and amending
 17 departmental in drafts where we were asked to review
 18 them."
 19 You were then asked by the Inquiry:
 20 "Insofar as you are now able to do so, please set
 21 out the division of labour between you and the other
 22 counsel instructed by the Central Defendants in this
 23 process and explain the reasons behind that approach."
 24 And what you said in response is:
 25 "As throughout, Mr Collins provided direction and

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1 that necessarily would have been my idea of a good
 2 thing.
 3 **Q.** When you say it may not have been your idea of a good
 4 thing, (a) why not? And (b) do you think it was
 5 appropriate?
 6 **A.** I hadn't thought about it before because I wasn't aware
 7 of it. I think there was so much public interest in
 8 it -- it was undoubtedly a very significant departure
 9 from defending the claims. We had haemophiliacs who
 10 were dying at the time. It was imperative that action
 11 should be taken. If it was going to be taken at all, it
 12 was important that they should know what was being said.
 13 I don't think it's for me to conclude whether
 14 statements being made in Parliament were appropriate or
 15 not. As I say, I don't remember being asked. I can see
 16 why people might have done it. I can see they wanted to
 17 get the news out to people early. If somebody had said
 18 to me, "Shall we say anything about it until we've got
 19 it written down on paper?", my normal reaction would be
 20 "Get it signed first, because you never know what will
 21 happen."
 22 **Q.** Do you recall any complaint or issue being raised with
 23 you by, for example, Rupert Jackson or any of the other
 24 counsel for the plaintiffs' side about this point?
 25 **A.** I don't. But I would have expected that to have gone to

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1 final approval of important matters, Michael Spencer was
 2 leading on the technical and medical issues and
 3 I believe that he became rather more involved during
 4 this period because of availability and workload. I did
 5 what I was required to do and was the contact point on
 6 a day-to-day basis."
 7 Is that an accurate reflection of --
 8 **A.** As far as I recollect, yes.
 9 **Q.** I note the position of the junior doing what you were
 10 required to through at the behest of the leaders?
 11 **A.** Well, it's fair to say that Andrew Collins was a very
 12 pragmatic and supportive leader, encouraged people to
 13 get on with it and keep him consulted. So I probably
 14 had more -- I was allowed to do more and draft more in
 15 the first instance than might have been expected.
 16 I mean, some QCs like to draft everything themselves,
 17 but he was always aware exactly what was going on.
 18 **Q.** Did you feel suitably supported and adequately
 19 instructed during this process?
 20 **A.** Yes, I think so. I mean, I think fractionation of
 21 instructions within the Department, I can't remember.
 22 I think there may have been, I've seen some of the
 23 documents, but I can't quite remember how the iterations
 24 worked. Certainly I didn't feel that I was left on
 25 a limb as a junior member of the counsel team. And

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1 I seem to remember that there were Departmental
2 solicitors involved in helping at each stage. So yes,
3 I don't have any concerns.

4 **Q.** Were your instructions mainly coming from the solicitors
5 or was there any involvement of civil servants, for
6 example Dr Rejman?

7 **A.** I'm sure there were no direct instructions to me from
8 Dr Rejman. There were civil servants in the form of
9 administrators, who would have been present and
10 participating in discussions. But it would have been
11 the lawyers who were passing those on, or at least
12 present in the room. I mean, if a senior civil servant
13 is there in the room saying things and the solicitors
14 are supporting it, then I'll do it. But -- I can't
15 think of any particular example or individual of
16 somebody who was driving the process.

17 **Q.** Finally, on this point, to the best of your recollection
18 was there anything unusual about the way in which you
19 were instructed in terms of drafting the settlement?

20 **A.** No, I mean looking back and reading it, he would have
21 taken quite a while to get there with the drafting, but
22 I don't remember anything unusual, certainly nothing
23 inappropriate.

24 **MR HILL:** Sir, I'm about to go through a number of drafts to
25 deal with the question of how the waiver of hepatitis

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1 you read out the plaintiffs' offer, whether they said
2 anything about abandoning the litigation and waiver of
3 claims or not, I can't remember.

4 **Q.** Let's go back to it.

5 **A.** I'm sorry, that's probably the right starting point.

6 **Q.** Yes, you're quite right. We'll go back to it. If we
7 could have please DHSC0003654_117.

8 We read the first page. I'm just scanning it.

9 I don't think there is anything said there.

10 **A.** There's nothing there.

11 **Q.** If we go over please to page 2. We have a section on
12 the calculation of the table.

13 **A.** Nothing there.

14 **Q.** Nothing there either. Page 3, nothing that I can pick
15 up there.

16 Speaking in general terms, when litigation is
17 settled, would you expect there to be an agreement that
18 the recipient of any settlement sum would end those
19 proceedings and agree not to take further proceedings on
20 the matters in the case?

21 **A.** Yes, in relation to the same subject matter and that,
22 I think, is what we'll be coming to.

23 **Q.** Let's look, then, at DHSC0003654_032. If we could go to
24 page 3 of that document, please. We can see it's marked
25 at the top from Ron Powell at 2.00 pm, 12 December. We

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1 claims came about. I wonder if it might be appropriate
2 to stop now, have our break now, and then go through
3 those drafts in one go afterwards? I imagine it will
4 take probably about 15 minutes or so.

5 **SIR BRIAN LANGSTAFF:** Fifteen?

6 **MR HILL:** Fifteen.

7 **SIR BRIAN LANGSTAFF:** Well, in that case, might it not be
8 more economical of time if we dealt with it now?
9 Providing that you're happy to sacrifice your break for
10 a little while longer.

11 The reason for this is that otherwise we have
12 a break now, come back for 15 minutes and then have
13 another break for Core Participants to put their
14 questions to counsel to ask you.

15 **A.** I'm quite happy to continue.

16 **MR HILL:** I will push on then, sir.

17 What I'm going to do is go through number of
18 versions of the draft. I'm afraid there's going to be
19 quite a bit of reading out and not many questions but
20 the issue that we're exploring here is now it came to be
21 that the final draft settlement contained a waiver of
22 rights to bring claims for hepatitis C, as well as HIV
23 infection.

24 That's underlying issue.

25 **A.** I understand that. You didn't include in your -- when

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1 can see at the top left-hand corner a fax date of
2 12 December 1990, 1.16 in the afternoon. So this is the
3 day after the announcement has been made and it appears
4 to be an early draft of the detailed terms of
5 settlement. We can see the top says:

6 "The sum of £42 million to be provided to the
7 Macfarlane Trust", so adopting the sum that was put
8 forward by the plaintiffs.

9 If we could turn, please, to page 9, and
10 paragraph 5. This is the paragraph of the draft
11 settlement that we're going to look at in different
12 iterations. The first one reads as follows:

13 "The plaintiffs will discontinue their actions
14 against all Defendants and will undertake not to bring
15 fresh proceedings, save that those Plaintiffs who have
16 already made allegations as to clinical management shall
17 be entitled to pursue that element only of these claims
18 against the relevant Health Authority."

19 So I won't go on to read the rest of that
20 paragraph, but would you agree that is a very broad use
21 of terms to describe the effect of discontinuing the
22 action and agreeing not to bring a further action?

23 **A.** Yes.

24 **Q.** Do you happen to know whether or not this draft or the
25 first draft, if this was the first draft, came from the

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1 plaintiffs or came from the defendants?

2 **A.** Um, can we have a look at the last page?

3 **Q.** If we go, please, to electronic page 12.

4 **A.** I don't know. I mean, it looks as if it might have come

5 from the plaintiffs but, sorry, I'm really unable to

6 say. I'd have to look at the whole thing again.

7 **Q.** If it had come from the defendants, would it have been

8 you who would have been tasked with drafting it or at

9 least contributing to the drafting?

10 **A.** I would expect so, yes.

11 **Q.** Do you remember being given a blank sheet of paper, as

12 it were, and told to get on and draft detailed terms of

13 settlement?

14 **A.** No. I mean, what I will do when we have our next break

15 is I will read the whole of this document and I will try

16 to give you a more informed answer on it then.

17 If it was me I will probably be able to remember

18 it because of the use of language, but I don't know.

19 I didn't particularly look at that when I went through

20 the papers.

21 **Q.** Thank you, we'll be grateful for that. What I should

22 say is that although this is the first iteration that

23 I have been able to find, it doesn't necessarily mean

24 that it is the first draft of the detailed terms of

25 settlement.

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1 other Government Department, Health Authority or

2 treating doctor, save that those Plaintiffs who have

3 already made allegations as to medical negligence or who

4 are given leave by the Court to do so pursuant to an

5 application made prior to [some date in] January 1991

6 shall be entitled to pursue that element only of these

7 claims against the relevant Health Authority provided

8 that they comply with the procedure laid down in

9 Schedule 2 hereto."

10 So an amendment to the requirements for bringing

11 the medical negligence claims but also the inclusion now

12 in that clause of the greater degree of detail, that

13 what is being waived is a right to bring proceedings

14 against "any defendant or against any other Government

15 Department, Health Authority or treating doctor".

16 **A.** Yes.

17 **Q.** So we can see a refinement, as it were, of the terms,

18 but still would you agree quite broad, in that it

19 doesn't specify what kind of claims we're talking about?

20 **A.** Still quite broad, expanded out to cover Health

21 Authority or treating doctor, suggesting that probably

22 the Health Authority defendants had been consulted at

23 this stage. And obviously there must have been some

24 iterations between the plaintiffs and the defendants

25 over that, whatever it is, six-week period.

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1 **A.** It's quite early, isn't it?

2 **Q.** It is. It's the 12th, so it's the day after. There is

3 a version of 18 December. All of the references are at

4 paragraph 49 of your witness statement, so I won't go

5 through them. The 18 December version is in the same

6 terms.

7 On 21 January, there is an amendment,

8 DHSC0004523_091. If we could turn, please, to page 11

9 of the document.

10 Same paragraph but slightly --

11 **A.** Can you just go back to the first page?

12 **Q.** First page, please.

13 **A.** Yes, I see, I'm just looking at the changes to the new

14 trust. Yes, thank you.

15 **Q.** We can see that the typed version is 21 January 1991.

16 **A.** Yes.

17 **Q.** And there are amendments which seem to have been made on

18 1 March 1991 by hand.

19 **A.** Yes.

20 **Q.** It's the typed version that we're interested in here.

21 **A.** Right.

22 **Q.** Page 11, paragraph 5. What the paragraph now says is:

23 "The Plaintiffs will discontinue their actions

24 against all Defendants and will undertake not to bring

25 fresh proceedings against any Defendant or against any

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1 **Q.** Taken at face value, saying that the plaintiffs will

2 discontinue their actions against all defendants and

3 will undertake not to bring fresh proceedings against

4 any defendant, et cetera, et cetera, that in theory

5 could cover any kind of proceedings in the future,

6 couldn't it?

7 **A.** Yes, it's too vague. I mean, it clearly was -- well, it

8 looks to me as if it was intended to cover "arising out

9 of the subject matter of these proceedings", but it

10 doesn't say that. I hope it was narrowed down a bit

11 later on but I don't remember.

12 **Q.** Well, it was, and we will come to that now.

13 DHSC0003660_019. We can see, the top left-hand corner,

14 22 March 1991 --

15 **A.** Yes.

16 **Q.** -- page 12, please, paragraph 5:

17 "The Plaintiffs will discontinue their actions

18 against all Defendants and will undertake not to bring

19 fresh proceedings against any Defendant or against any

20 other Government Department, Health Authority or

21 treating doctor in respect of the administering of

22 cryoprecipitate, Factor VIII or Factor IX, save that

23 those Plaintiffs whose code numbers are set out in

24 Schedule Seven hereto shall be entitled to pursue that

25 element only of these claims against the relevant Health

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1 Authority provided that they comply with the directions
 2 laid down by the Court on 1st March 1991."
 3 That second part is a reference to the ongoing
 4 medical negligence claims.
 5 A. Yes.
 6 Q. But we can see that the further refinement here is
 7 made -- that the claims are those "in respect of the
 8 administering of cryoprecipitate, Factor VIII or
 9 Factor IX". So a further refinement about what is being
 10 waived.
 11 A. Yes.
 12 Q. If we then go to the next iteration that I'm going to
 13 you to, and it doesn't necessarily mean that it was the
 14 next iteration of the draft, DHSC0003661_022, we can see
 15 that this is dated 16 April 1991, and it's headed
 16 "Plaintiffs' suggested amendments by riders".
 17 A. Mm-hm.
 18 Q. So instead of going through the entire draft, they are
 19 saying what they would like to see changed, and then
 20 indicating where in the draft it should come.
 21 If we look at number 4 of the riders, what they
 22 suggest is adding the words, subparagraph (2):
 23 "Nothing herein shall prevent a Plaintiff from
 24 bringing proceedings in respect of the administering
 25 prior to 13th December 1990 of Cryoprecipitate,

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1 paragraph 5. This, as I understand it, is the
 2 incorporation of what has been suggested into the draft:
 3 "The Plaintiffs will discontinue their actions
 4 against all Defendants and will undertake not to bring
 5 fresh proceedings against any Defendant or against any
 6 other Government Department, Health Authority or
 7 treating doctor in respect of the administering prior to
 8 13th December 1990 of cryoprecipitate, Factor VIII or
 9 Factor IX, save that:
 10 "(1) those Plaintiffs whose code numbers are set
 11 out in Part 1 of Schedule Eight hereto shall be entitled
 12 to pursue that element only of these claims which
 13 relates to the allegations of medical negligence against
 14 the relevant Health Authorities provided that they
 15 comply with the directions laid down by the Court on
 16 1st March 1991; and
 17 "(2) nothing herein shall prevent the Plaintiff
 18 from bringing proceedings in respect of the
 19 administering prior to the 13th December 1990 of
 20 cryoprecipitate, Factor VIII or Factor IX, where:
 21 "(i) that has caused damage to such Plaintiff
 22 which had not been diagnosed prior to
 23 13th December 1990; and/or
 24 "(ii) the damage alleged does not include
 25 infection or the risk of infection by HIV and/or the

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1 Factor VIII, or Factor IX where:
 2 "(i) that has caused damage to such Plaintiff
 3 which had not been diagnosed by 13th December 1990;
 4 and/or
 5 "(ii) the damage alleged does not include
 6 infection or risk of infection by HIV and/or the
 7 hepatitis viruses."
 8 A. Let me just look at that.
 9 Q. What I might do is take you to how that sits within the
 10 next draft when it's translated into it. It might be
 11 easier to understand.
 12 A. Fine. Thank you.
 13 Q. Just to complete this document, that's marked number 4.
 14 And if we go to page 6 of the document, we can see that
 15 handwritten 4 is included at the bottom of what had been
 16 paragraph 5 of the previous iteration of the document,
 17 so the paragraph that we have been looking at.
 18 A. Yes.
 19 Q. That's where they're suggesting putting it.
 20 A. Yes.
 21 Q. If I show it to you in context, if we could have
 22 SCGV0000233_040, if we could, first of all, please, have
 23 page 2. We can see now that this is 22 April 1991.
 24 A. Yes.
 25 Q. Then page 14 -- sorry, page 15, electronic 15,

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1 hepatitis viruses."
 2 I'll give you a moment to digest that.
 3 A. Yes. So this is the plaintiffs' amendment incorporated
 4 into the draft, and excluding ... yeah, got it.
 5 Q. It seems, then, that over these drafts we have seen
 6 a refinement of the term about what is being waived.
 7 Initially there was an inclusion of who -- the
 8 defendants against whom claims were being waived.
 9 A. Yes.
 10 Q. There is then a refinement saying that those claims
 11 concern the administration of cryoprecipitate,
 12 Factor VIII or Factor IX. And then through this
 13 amendment, seemingly proposed by the plaintiff, there
 14 is, first of all, an inclusion of a cut-off date, so
 15 13 December 1990, which is obviously two days after the
 16 proposed settlement was announced, and secondly, saying
 17 that the types of claim that are being waived are claims
 18 about infection with HIV or with hepatitis, but other
 19 infections could be claimed for. Is that a fair
 20 assessment?
 21 A. Yes, it's excluding risk of infection by HIV and/or
 22 hepatitis viruses. So prior -- anything which has been
 23 diagnosed -- I mean, it's the "and/or". Okay, I see
 24 what's being said.
 25 Q. The section on the diagnosis before 13 December 1990 is

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1 subsequently cut. So I will take you to that.
 2 HSOC0023174, paragraph 79.
 3 What we have here is a covering letter dated
 4 1 May 1991 from Ronald Powell sent to the plaintiffs'
 5 solicitors in essence saying: these are the terms that
 6 we are prepared to settle on.
 7 **A.** Yes.
 8 **Q.** Then if we go to page 7 of that document, we can see the
 9 proposed settlement terms.
 10 **A.** Yes.
 11 **Q.** This being the final draft, 26 April 1991.
 12 Then if we go, please, to page 20, the paragraph
 13 that we've been considering before. I will only read
 14 the sections which are relevant. Subparagraph 1 is
 15 about the medical negligence claims.
 16 The relevant sections for us are:
 17 "The Plaintiffs will discontinue their actions
 18 against all Defendants and will undertake not to bring
 19 fresh proceedings against any Defendant or against any
 20 other Government Department, Health Authority or
 21 treating doctor in respect of the administering prior to
 22 13th December 1990 of cryoprecipitate, Factor VIII or
 23 Factor IX, save that ...
 24 "(2) nothing herein shall prevent a Plaintiff from
 25 bringing" --

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1 or regional health authority or any other Government
 2 body involving any allegations concerning the spread of
 3 the human immuno-deficiency virus or hepatitis viruses
 4 through Factor VIII or Factor IX (whether
 5 cryoprecipitate or concentrate) administered before
 6 13th December 1990."
 7 **A.** Yes, I just -- I have two questions you may be able to
 8 help me with, either before or after you ask the
 9 question you intended to. Firstly, I seem to remember
 10 that there is a carve-out for those who had not been
 11 tested before December 1990, with a cut-off date for
 12 testing, unless I'm wrong. And, secondly, I notice this
 13 inclusion of the words "allegations concerning the
 14 spread of the human HIV or hepatitis viruses", as
 15 opposed to "concerning infection from". And I don't
 16 know whether they're relevant or but I just see those as
 17 you read them to me.
 18 **Q.** In response to those, firstly I'm not aware of
 19 a carve-out for those not tested. But that's something
 20 I can ask my colleagues about over the break. In terms
 21 of the reference to the spread of the human
 22 immunodeficiency virus, I'm afraid that's not something
 23 I can assist with. I don't know why that wording
 24 would --
 25 **A.** Can we go back to the last wording of the offer --

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1 **SIR BRIAN LANGSTAFF:** All right, can we have the next page.
 2 **MR HILL:** Sorry.
 3 "(2) nothing herein shall prevent a Plaintiff from
 4 bringing proceedings in respect of the administering
 5 prior to 13th December 1990 of cryoprecipitate,
 6 Factor VIII or Factor IX where the damage alleged does
 7 not include infection or the risk of infection by HIV
 8 and/or the hepatitis viruses."
 9 That is the final term.
 10 **Q.** I will take you now to the terms of the waiver that had
 11 to be signed by somebody who wished to take advantage of
 12 the settlement.
 13 That is MACF0000086_225.
 14 We can see this is entitled "Undertaking to be
 15 given by an individual not under a disability in
 16 accordance with clauses 12, 15, 17, 18 or 20 of the deed
 17 of the Macfarlane (special payments) (No. 2) trust."
 18 And what it says at paragraph 1 is:
 19 "In expectation of receiving from the Macfarlane
 20 (Special Payments) (No. 2) Trust the sum of £23,500
 21 I undertake with the Secretary of State for Health
 22 that I will not at any time hereafter bring any
 23 proceedings against the Department of Health, the Welsh
 24 Office, the Licensing Authority under the Medicines Act
 25 1968, the Committee on Safety of Medicines, any district

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1 **Q.** Yes.
 2 **A.** -- and then think about these in the break.
 3 **Q.** HSOC0023174 --
 4 **SIR BRIAN LANGSTAFF:** Page 20, I think. Page 20.
 5 **MR HILL:** Page 20. Actually, can we have pages 20 and 21
 6 together, the bottom part of page 20, if possible.
 7 **A.** That would be helpful.
 8 Yes, in the settlement here it refers to
 9 administering. The waiver is of something which is
 10 slightly different, which is the spread of the virus
 11 rather than the administration. It may not make any
 12 difference but I just notice there's a change there.
 13 **Q.** I think I can predict your answer to this but do you
 14 know how or why that came about?
 15 **A.** No, but I think -- how long is the next break?
 16 **Q.** I think it's 30 minutes.
 17 **A.** That will give me enough time to give you a better
 18 answer. It may be I still don't know but at least
 19 I will have looked at it again in the light of your
 20 questions.
 21 **SIR BRIAN LANGSTAFF:** Yes, I think the opt-out or the
 22 cut-out was in respect of the people who didn't know if
 23 they got infected.
 24 **A.** Yes, exactly that.
 25 **SIR BRIAN LANGSTAFF:** That's missing.

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1 **MR HILL:** Yes, there is a series of pieces of correspondence
 2 about that we can look at. I wonder, sir --
 3 **SIR BRIAN LANGSTAFF:** Well, we're probably due a break about
 4 now, aren't we?
 5 **MR HILL:** I think we are, yes.
 6 **SIR BRIAN LANGSTAFF:** During that break you'll be able to
 7 pick up the questions from Core Participants, or do you
 8 have further questions?
 9 **MR HILL:** I'm afraid I still have some further questions.
 10 **SIR BRIAN LANGSTAFF:** Right, well, I think probably those
 11 further questions -- how long are they going to be?
 12 **MR HILL:** Probably about half an hour.
 13 **SIR BRIAN LANGSTAFF:** Right, okay. My attempts to save
 14 a little bit of time have not come to anything. But
 15 there we are. We'll take the half hour break now, and
 16 then come back for your further questions, and then such
 17 further break as you need for Core Participants to let
 18 you have their final questions. If they can helpfully
 19 give you anything during this break, then I think
 20 everyone will be grateful.
 21 **A.** Thank you, and I've got with me the documents I was
 22 provided. So I will have a look through these documents
 23 to see if I can see anything more of help.
 24 **SIR BRIAN LANGSTAFF:** Thank you very much.
 25 **(3.36 pm)**

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1 I just want to come back to the point that was
 2 raised just before the break, about the term which
 3 didn't make it through to the final settlement about the
 4 cut-off date for a diagnosis.
 5 **A.** Is that right?
 6 **Q.** Let's just look at SCGV0000233_040, page 16 of that
 7 document.
 8 **A.** Can I see page 1?
 9 **Q.** Page 1. I think actually probably page 2 is more
 10 helpful, which shows the date?
 11 **A.** I just want to --
 12 **Q.** Oh, sorry, do you mean for your paper copy?
 13 **A.** 22 of --
 14 **Q.** Of April.
 15 **A.** Yes.
 16 **Q.** Page 1 of the document is a coversheet, which I'm not
 17 sure I --
 18 **A.** Right. What's the coversheet?
 19 **Q.** If we just go back to page 1, please, Paul.
 20 **A.** Yes, so this is the last draft but not the final
 21 version.
 22 **Q.** Yes.
 23 **A.** Yes, got it.
 24 **Q.** 22 April 1991.
 25 **A.** Yes.

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1 **(A short break)**
 2 **(4.05 pm)**
 3 **SIR BRIAN LANGSTAFF:** Have you had long enough?
 4 **A.** Yes, thank you, sir.
 5 **SIR BRIAN LANGSTAFF:** Yes?
 6 **A.** Before you begin, can I just make one point? As I was
 7 looking through the documents we were discussing, I came
 8 past the note of Ron Powell in the discussion with me on
 9 4 November 1990, you remember the one-third risk point?
 10 **MR HILL:** Yes, yes.
 11 **A.** And I noted that I actually had said, or he records me
 12 as saying that:
 13 "... I thought it reasonable to think in terms of
 14 overall chance of success between 60 and 75 per cent, we
 15 could of course lose. He did not think we should lose,
 16 however, he did not think we will. Any doubts, however,
 17 were bound to be resolved in the Plaintiffs' favour. He
 18 thought the Treasury would be wise to presume
 19 a one-third chance of our losing."
 20 So that's where the one third came from in terms
 21 of financial risk to the Treasury, rather than
 22 evaluation of odds, which is in the previous paragraph.
 23 That's why I couldn't quite get it to when you asked me
 24 the question.
 25 **Q.** Thank you, that's very helpful.

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1 **Q.** If we go, please, to electronic page 16. It's
 2 subclause (1) -- actually, sorry, back one page, please,
 3 Paul, electronic page 15. The stem of paragraph 5 is
 4 that the plaintiffs will discontinue their action
 5 except, and then two exceptions are given, firstly for
 6 medical negligence cases, and, secondly, that the stem
 7 wouldn't prevent people bringing actions where -- and if
 8 we go over to page 2, please, two conditions are set
 9 out:
 10 "(i) [that the action is about something] that has
 11 caused damage to such Plaintiff which had not been
 12 diagnosed prior to 13th December 1990; and/or.
 13 "(ii) the damage alleged does not include
 14 infection or the risk of infection by HIV and/or the
 15 hepatitis viruses."
 16 Now, the second of those conditions remained in
 17 the final draft.
 18 **A.** Yes.
 19 **Q.** The first of those conditions does not make it through
 20 to the final draft, and is cut.
 21 **A.** Yes.
 22 **Q.** Is that what you were referring to?
 23 **A.** No, it's not.
 24 **Q.** No --
 25 **A.** That's a separate point, which I think, from my reading,

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1 which I haven't re-read, about (inaudible)
 2 ^ internally, is because the only plaintiffs to whom
 3 that would apply would be the category G plaintiffs,
 4 because all the other plaintiffs had already been
 5 diagnosed with HIV. What I had in mind was that which
 6 is in the final version, and I have it -- I think you
 7 took me to the 1 May 1991 document, HSOC0023174_1.

8 **SIR BRIAN LANGSTAFF:** (Inaudible).

9 **MR HILL:** HSOC0023174.

10 **A.** Yes, and I am looking at page 16 of this.

11 **Q.** Can we bring that up on screen, please, Paul?

12 **A.** And this was a provision -- this would not obviously
 13 have applied to the plaintiffs because plaintiffs had
 14 already contracted HIV, but to haemophiliacs, who by
 15 13 December 1990 had not been tested and who upon first
 16 testing were found to be HIV positive and therefore
 17 eligible, and then spouses and so on, with a cut-off
 18 date of, I think, five years -- 12 months from first
 19 becoming aware they were HIV positive, or five years of
 20 13 December 1990.

21 So there was provision for those who became aware
 22 that they had been infected on first testing to claim,
 23 whether or not the damage -- whether or not the cause of
 24 action accrued before the cut-off date on 13 December.

25 That did not include a provision for those who
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1 The point about this is that many of those who
 2 were suing for their HIV infection had also contracted
 3 hepatitis. Their claims did not include any claim for
 4 hepatitis. There was no claim for damages for
 5 hepatitis. Whether that was because they recognised
 6 that hepatitis was known about and was an inevitable
 7 risk of the process, whether it was because it just
 8 paled into insignificance, or appeared to at that stage,
 9 by comparison to HIV, I don't know, but no claims were
 10 brought in respect of the hepatitis damage suffered by
 11 any of the 900-odd plaintiffs.

12 Therefore, there was no question of those who had
 13 contracted HIV claiming also for damages for contracting
 14 hepatitis. It was not part of the claim.

15 The reason that claims, in respect of hepatitis,
 16 was settled by the litigation is because the subject
 17 matter of the cause of action was the failure to
 18 introduce measures to reduce hepatitis risk in time. So
 19 exactly the same facts and matters would be in issue in
 20 relation to hepatitis, as were in relation to that first
 21 part of the HIV claim, which we discussed earlier.

22 By discontinuing the -- if the claim had gone to
 23 judgment and had won or lost, those plaintiffs would not
 24 normally have been allowed to bring a fresh claim for
 25 hepatitis damage because it arose out of the same facts
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1 first contracted hepatitis after that date, and I think
 2 the thrust of your question is why is there this cut-off
 3 for hepatitis; is that right? You had rather better ask
 4 me the questions rather than me trying to pre-empt them.

5 **Q.** The question behind this is that the litigation was
 6 brought in respect of damage caused by HIV?

7 **A.** Yes.

8 **Q.** The clause that you've just taken us to shows that
 9 people who contract, or find that they have contracted,
 10 HIV after the date of the settlement can still bring
 11 themselves within the terms of it. But what people
 12 signing the undertaking were being asked to do was to
 13 waive claims for damages not just for HIV but also for
 14 hepatitis.

15 **A.** Yes.

16 **Q.** The question the fundamental question is: why was that?

17 **A.** Why was that? Well, I don't remember it. I'm just
 18 trying to put myself back into the position as to how
 19 that came about. It is, I think, as you've shown me,
 20 the result of an insertion put in by the plaintiffs in
 21 their amendment, rather than something which came from
 22 the Department. Let me interject, unless I forget it,
 23 you asked me about that first version, whether it came
 24 from us or the plaintiffs. I can answer that when
 25 you're ready to ask it but I won't intervene now.
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1 and matters -- that is damage they knew about --
 2 therefore, it would have been caught by the
 3 discontinuance subject matter clause.

4 As a result, by giving up the hepatitis claim,
 5 they were simply saying, "We will not revive that claim
 6 again".

7 If they had brought a claim in respect of
 8 hepatitis, which I can see would be logical, and I can't
 9 now say why they didn't, then it would have been
 10 necessary for the Government to decide, do we give
 11 compensation to cover the hepatitis damage separately
 12 from the HIV damage, or not? And what provisions do we
 13 make?

14 The reason that I took you to the cut-off for that
 15 at page 16 of that document 23174 is because that
 16 applied to non-plaintiffs because they contracted HIV.

17 Now, I suppose if somebody had thought about it,
 18 they could have said, "Well, what about if somebody
 19 doesn't contract, or contracts HIV but also suffers from
 20 hepatitis? Should they get compensation for the
 21 hepatitis element?" Well, firstly, if they were to do
 22 so, it would put the non-plaintiffs in a better position
 23 than the plaintiffs who had decided not to claim for it.
 24 And, secondly, in order to prove their hepatitis claim
 25 prior to December 2000, they would have had to run
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1 exactly the same arguments which were being run in this
 2 litigation, which the whole purpose of the settlement
 3 was to avoid. So I think that nobody thought about
 4 claims for hepatitis because they'd never been brought,
 5 and nobody thought of putting the non-plaintiff
 6 haemophiliacs into a better position than the plaintiff
 7 haemophiliacs, who had already contracted HIV, and who
 8 were all expected to die.

9 Now, if the claim had included a claim in respect
 10 of hepatitis, I do not know whether that would have
 11 added to the damages significantly, given the
 12 differences between the effects of the two, or whether
 13 the compensation would have been different, but I can
 14 see that if such a claim had been brought, I would have
 15 expected the cut-off in this page 16 for non-plaintiff
 16 haemophiliacs who haven't contracted HIV, to apply to
 17 those who contracted HIV and/or hepatitis, or there
 18 would be a carve-out for hepatitis.

19 There was no reason in principle why one couldn't
 20 say "If you have not been tested for hepatitis, and
 21 contracted -- and you're found on first administration
 22 to have it, then you can sue". But nobody was thinking
 23 of hepatitis at that stage. It wasn't raised.

24 Q. Can I suggest and pick up on one of the things which you
 25 said there, a possible reason why it wasn't raised. All

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1 was because they arose out of the same facts and
 2 matters, I assume, otherwise they wouldn't have
 3 introduced that amendment.
 4 Q. In your statement you say that this didn't appear to be
 5 a significant issue between the parties at the time.
 6 I won't take you to the documents but, just so that
 7 they're on the record, DHSC0003662_090 is a submission
 8 to the Secretary of State about the reasons why the
 9 settlement had taken some time to be achieved.

10 A. Yes.

11 Q. And it raises various things, including the Social
 12 Security aspect, but it doesn't mention anything about
 13 hepatitis and the hepatitis waiver. So -- and from your
 14 memory, was this a matter that was the cause of much
 15 debate between the sides?

16 A. I don't remember any debate at all, and the inclusion of
 17 that amendment from the plaintiff side suggests to me
 18 that there wasn't any discussion of it.

19 Q. You mentioned the first draft and I'll ask you about
 20 that now. Can you tell who the first draft came from?

21 A. I think so. I mean, I --

22 Q. Would it help to go back to it?

23 A. I found it because I think it was in the second lot of
 24 documents. That's one which is 3654_032, isn't it?
 25 12 December.

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1 of the plaintiffs in this claim had been infected by
 2 HIV.

3 A. Yes.

4 Q. Many had died prior to the settlement.

5 A. Yes.

6 Q. Others had full-blown AIDS, as it was referred to
 7 then --

8 A. Yes.

9 Q. -- at the time of the settlement. And you said there
 10 that the expectation at the time was that these people
 11 would die.

12 A. Yes, sadly.

13 Q. And would die in a particularly horrible and horrific
 14 way.

15 A. Yes.

16 Q. And the damages were intended to reflect that.

17 A. Yes.

18 Q. Does it follow that for such plaintiffs, on that
 19 assumption, it is unlikely that there would have been
 20 much in terms of additional value in bringing a claim
 21 for hepatitis?

22 A. Yes, exactly that, which is why I assume the claim was
 23 not brought. But I can't tell, because I didn't bring
 24 the claim. The plaintiffs did. And they understood
 25 that the reason for excluding the hepatitis-type claims

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1 Q. 12 December is, yes, DHSC0003654_032.

2 A. That's the one. I see that -- this comes from
 3 Ron Powell, 12 December. And looking at the notes he
 4 made, by 12 December, and the things which were crossed
 5 out in it, like, for example, on page 11, paragraph 9,
 6 which was one of the things asked for by the plaintiffs,
 7 which is:

8 "The Government resolved to take all steps ...
 9 reasonably possible to give affected haemophiliacs and
 10 their affected intimates, as well as all others infected
 11 with AIDS, the best available treatment ..."

12 That was crossed out.

13 It doesn't look as though it is a Department of
 14 Health draft. I don't think I wrote this, looking at
 15 all the wording. It's not my style.

16 I also note, if I go back -- and I'm sorry to take
 17 you out of order here -- but there is a comment at the
 18 back ... yes.

19 DHSC0003655_028, which is a memo of 17 December to
 20 Mr Dobson.

21 So this is 17 December, we'll "be sending a new
 22 draft today to the plaintiffs' counsel".

23 So, doing the best I can, I would have thought the
 24 first draft came from them, marked up by Mr Powell, then
 25 further discussed, and I was then instructed to send

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1 a draft back to the plaintiffs' counsel with some
 2 changes in it. So that is the best I can do. But
 3 I don't think it was my draft and it doesn't look like
 4 a Departmental draft.

5 Q. It would follow, then, that if it was the plaintiffs who
 6 put the first draft forward, that included a fairly
 7 broad term for what was being waived. That was refined
 8 through the different drafts in a process of
 9 consultation and discussion between plaintiffs and
 10 defendants, and the specific wording about hepatitis was
 11 introduced by the plaintiffs to further refine what had
 12 been a broad clause into a more narrow one?

13 A. Yes. I mean, it was too broad to begin with but that's
 14 because the main goal for the plaintiffs, I think, was
 15 to get the settlement for these individuals who were
 16 sadly, you know, dying day by day.

17 I think the refinements may have been part of the
 18 provision with the cut-off date because, of course, it
 19 does not settle any cause of action accruing after
 20 December 1990. Whereas I think the original version
 21 would settle all claims of all sorts, including claims
 22 in relation to Factor VIII administered after
 23 December 1990.

24 So just standing back from that, as
 25 I understand it, somebody who contracted hepatitis C as

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1 I completely agree that if we had known then that,
 2 with the advent of experimental treatment, those who
 3 became HIV positive would have an extended period of
 4 life, perhaps indefinite -- and as we know, many have
 5 survived for 30 and more years because of these
 6 treatments -- then it would have made a difference to
 7 everybody's perception of the appropriate compensation,
 8 both by way of full damages if they were to succeed, and
 9 by way of compensation on this kind of scheme. For two
 10 reasons, and in two opposite directions: firstly, there
 11 was not the inevitability of early death in a terrible
 12 manner; but secondly, there was the long-lasting effect
 13 of having to go through experimental treatment and
 14 continuing treatment in addition to the treatment for
 15 haemophilia.

16 Now, I have not sought to analyse, and none of us
 17 did at the time, whether the removal of the certainty of
 18 death, but the addition of many years of suffering with
 19 HIV positive, would increase, decrease, or leave the
 20 same the level of damages. But it would certainly have
 21 been approached in a different manner.

22 Equally, and this is a hidden bit of the question,
 23 if -- at this stage, from recollection, hepatitis C was
 24 still called non-A, non-B. There was no reliable test,
 25 so it is said, and there may be debate about this,

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1 a result of the administration of this after
 2 December 1990 could still bring a claim if they wished
 3 to do so.

4 Q. Yes.

5 A. I'm sorry I hope that's helpful. That's all I can
 6 recollect. And I'll now put away the files.

7 Q. It is extremely helpful. Thank you very much.

8 One point that follows on from that, and there
 9 will be an opportunity for all Core Participants to make
 10 submissions about this in due course --

11 A. Of course.

12 Q. -- I won't trouble you with those submissions, but one
 13 point that follows from that is that there seems to be,
 14 if I may put it this way, something of a working
 15 assumption that hepatitis claims would be waived during
 16 this process, and that if that was done on the basis of
 17 an expectation that the plaintiffs would die fairly
 18 quickly of HIV-related illnesses, then the thing that
 19 wasn't factored in was the possibility that the
 20 plaintiffs may survive for an extended period, to such
 21 an extent that HIV may have a greater impact on their
 22 life.

23 A. That -- I mean, you're asking one question, but posing
 24 two there. I don't mean that critically, I mean it's
 25 a wider debate.

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1 I don't know, I haven't studied it, but no tests which
 2 was generally admitted as reliable for hepatitis C until
 3 I think about 1991. It is entirely possible that the
 4 plaintiffs themselves would have said: hepatitis C is
 5 much more serious than other forms of hepatitis,
 6 therefore there is an incremental form of damages and,
 7 because there is a longer lifespan, that could get worse
 8 and could become more serious, therefore we'll include
 9 a claim for it.

10 So those two elements were missing, both in each
 11 side's thinking, and in the formulation and settlement
 12 of the claim.

13 So what has actually happened is different to what
 14 everybody expected when that settlement was proposed,
 15 agreed and made.

16 Q. Of course, you had to act upon the knowledge that you
 17 had at the time.

18 A. Yes.

19 Q. But the fact that that settlement was made in 1991, that
 20 level of knowledge wouldn't have prevented a government
 21 from making further payments later on when knowledge
 22 changed, would it?

23 A. Nothing prevents the Government from doing things which
 24 are lawful at any stage when it is lawful for them to do
 25 so. It is not a matter for me as a lawyer to comment on

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1 what they could have done. I agree that it is at least
2 a matter that could have been and still could be
3 envisaged by Government that because of that longer
4 lifespan and those changes, some changes should be made.

5 But I think it would be wrong to assume that
6 damages in terms of general damages -- I don't mean
7 special damages for loss of earnings and other expenses,
8 which I don't know enough about -- but I think it would
9 be wrong to assume that damages for long-lasting
10 suffering with treatment, difficult, intrusive, and so
11 on, to control the HIV positive virus, would attract
12 greater damages or significantly greater damages than
13 death. I haven't looked at it and I couldn't say
14 immediately, yes, that makes a very big difference to
15 it.

16 If you take, by way of contrast, something I know
17 more about, which CJD and variant CJD, which, when it is
18 contracted, it is invariably fatal over a relatively
19 short period of time, because of the special needs of
20 somebody who suffers from it, if their life expectancy
21 was going to be five years rather than six months, that
22 would have made a significant difference, in my view, to
23 the level of damages. And that's probably about as far
24 as I can usefully say and I can't comment on what the
25 Government could or should have done after the change of

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1 **Q.** As we will see from the documents, it may be that your
2 involvement was really quite limited, as you say,
3 peripheral to it.

4 The instructions are, if we go to page 2, to draft
5 a defence in response to a statement of claim which has
6 been brought by an individual who has contracted
7 hepatitis C through the use of blood products.

8 The second and third elements of the instructions,
9 which are annotated with the words "later" and "in due
10 course", are to advise in writing about general
11 liability and about liability in public law. The
12 compensation scheme or payment scheme was not set up.
13 Do you know if you did ever provide those general
14 advices?

15 **A.** Um ... I don't know. This is 1996. So this is right in
16 the middle of the Human Growth Hormone Litigation, when
17 we also had the first case of variant CJD, which was
18 actually announced whilst I was calling either
19 Professor Ironside or Dr Will, the two Glasgow
20 scientists or Edinburgh scientists who were at the
21 forefront, so we were very much looking at that. I did
22 give some advice in relation to blood and blood products
23 at some stage. I just don't recollect. Again, it was
24 something on the edges of my practice at the time.

25 **Q.** I won't go through the details of these instructions but

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1 in knowledge.

2 **Q.** I will leave the HIV settlement and indeed the
3 HIV Litigation there.

4 **A.** Right.

5 **Q.** We will move on to a short section on the
6 HCV Litigation, Hepatitis C Litigation, brought by
7 people who weren't part of this scheme --

8 **A.** Yes.

9 **Q.** -- because they didn't have -- they weren't affected by
10 HIV.

11 If we could have, please, DHSC -- actually sorry,
12 if we can go to WITN5426076. These are a set of
13 preliminary instructions, they are draft instructions
14 which were sent to you and Fiona Sinclair. They are --
15 we know from other papers, that they were sent in or
16 around April 1996.

17 **A.** Yes. I should say, because, of course, these documents
18 were sent to me after I made my statement, when I'd
19 referred to peripheral involvement in it, that although
20 these events all took place between five and ten years
21 later than HIV -- haemophiliacs, I have much less
22 recollection of them. Probably because the haemophiliac
23 case was one of the most significant cases I did in this
24 area of my practice. I just don't remember this at all
25 well.

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1 there is one point I'd like to pick up from page 7,
2 paragraph 22. What is written there is:

3 "As Counsel will have noticed, the Statement of
4 Claim has been in effect lifted from the reamended Main
5 Statement of Claim from the HIV haemophilia litigation."

6 Would that seem to suggest that, as you said
7 earlier, hepatitis claims were going to be going over
8 the same facts that had been --

9 **A.** Yes.

10 **Q.** -- raised in the HIV Litigation?

11 **A.** Yes.

12 **Q.** If we could then, please, go forward in time to 2000.
13 The Inquiry saw some of these documents yesterday so
14 I won't go through them in detail. They have been
15 provided to you and I stress they were provided to you
16 after you provided your written statement, which is why
17 they're not referred to there.

18 But we know that you were instructed for
19 a conference on 3 March 2000 to advise about some
20 documents that it had been missing --

21 **A.** Yes.

22 **Q.** -- through the disclosure exercise of the hepatitis C --

23 I'm going to take you to a submission to the
24 permanent secretary which followed that conference and
25 which gives a summary of the advice there.

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1 WITN6955032.
 2 This is dated 8 March 2000. It is from
 3 Marilynne Morgan, who was a lawyer to the Permanent
 4 Secretary, copied to Anita James, Charles Lister, and
 5 the deputy chief officer, Pat Troop.
 6 Again, this document was raised yesterday so I'm
 7 not going to go through it in detail, but on page 1 it
 8 refers to the two types of hepatitis C claims. The
 9 first type were claims from people with haemophilia, and
 10 we have seen an example of one of those claims
 11 from 1996.
 12 A. Yes.
 13 Q. It says the Department has on its book nine cases, which
 14 were presently stayed.
 15 The second type of claim were claims from patients
 16 with blood transfusions, and that led to the litigation
 17 known as *A and Others v the National Blood Authority*.
 18 The Department of Health was not a party to that
 19 litigation but was asked to provide disclosure, which is
 20 how the identification of the missing documents came to
 21 be noticed.
 22 If we could go, please, to page 2. Paragraph 21,
 23 first of all. It says:
 24 "At a time in the mid-1990s when the Department
 25 thought it was going to be a major party in the

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1 annotated list of documents."
 2 It goes on to say the steps that had been taken in
 3 respect of that.
 4 "Counsel proposed to talk on a counsel to counsel
 5 basis to the National Blood Authority's lawyers to
 6 smooth things there. Ministers will need to be informed
 7 of the position in due course."
 8 The next page, please.
 9 "6. However, the real problem is in relation to
 10 the stayed litigation (the first category mentioned in
 11 paragraph 1). There, the Department has a duty to
 12 the Court not to destroy documents."
 13 It mentions the firms that are representing
 14 the claimants. And then at the bottom of the paragraph
 15 it says:
 16 "Counsel's advice is that if necessary, the
 17 Department will have to settle the claims (£15-£30k per
 18 case), but this could easily be represented as 'lost the
 19 papers and paid us off.'
 20 Paragraph 7:
 21 "In addition Counsel was of the view that there
 22 should be a small, and probably in-house, investigation
 23 into the destruction of the documents. The investigator
 24 should interview Dr Metters and his secretary,
 25 the person at the [Department of Health] who signed the

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1 litigation, leading counsel, Justin Fenwick QC, advised
 2 us to be prepared."
 3 It goes on to describe the steps that were taken,
 4 so it appears that you gave some kind of advice in the
 5 mid-1990s about getting ready for this litigation.
 6 A. Yes. I mean, document retention, document gathering,
 7 I imagine. But that was presumably at the time of that
 8 first writ that you've shown me. I don't remember it,
 9 but that's what I would have done.
 10 Q. If we go to paragraph 5, there is a description given of
 11 the discovery of the missing documents. What it says is
 12 this:
 13 "After discussions with me about the situation,
 14 Anita James and Charles Lister consulted
 15 Justin Fenwick QC on 3rd March 2000. Counsel questioned
 16 both Anita and Charles as to how they knew documents had
 17 been destroyed. I gather he was rather incredulous
 18 about the matter. So far as immediate action was
 19 concerned he agreed with out view that we write to DMS
 20 [the solicitors for the claimants]; copies of our letter
 21 and their reply are attached. Obviously, what has
 22 happened is a potential source of embarrassment. DMS's
 23 response is very reasonable but they are of course
 24 concerned. They ask for a further understanding of the
 25 Department's position by next Tuesday, in the form of an

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1 destruction authorisation (whom we know to be still at
 2 DH) and Dr Rejman. This should not be a witch hunt but
 3 the investigator should report and make recommendations
 4 about such matters in the future. Counsel was of the
 5 view that as part of the investigation Heywood Stores
 6 should be visited. In this way, the Department would
 7 have audited what has happened. It occurs to me that
 8 this is a function which could probably be carried out
 9 by internal audit."
 10 Just a couple of points arising from that. Why
 11 were you, or were you, and if so why, rather incredulous
 12 about the matter?
 13 A. Yes, I'm not sure "incredulous" would be the correct
 14 word. I mean, I can't remember it. I think I was
 15 probably absolutely furious. Having given advice on
 16 document retention, having spent, by this stage,
 17 over 15 years representing the Department of Health and
 18 the CSM, having gone through the problems of lack of
 19 documents in HIV, the idea that when we knew about
 20 litigation, and the same group of people were involved,
 21 they should have allowed documents to go missing was
 22 intensely frustrating. And I should think I made it
 23 known how cross I was about it because -- I mean, not
 24 from my point of view but from the point of view of the
 25 Department.

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1 So it's not incredulous that I didn't believe what
2 they were saying, it was just that: how could this
3 possibly have been allowed to happen?
4 **Q.** The Inquiry that you recommended, it's described as
5 being a small and probably in-house investigation. Was
6 there any reason why it would have been an in-house
7 investigation?
8 **A.** Yes. I think the main objective, as I saw it, was
9 actually to find out what had happened, to see if there
10 was some stone which hasn't been turned over which might
11 lead to some results, make sure that people actually
12 gave an accurate and full account and make sure that
13 steps were taken to prevent it happening again.
14 I'd already advised that both ministers and the
15 plaintiffs' solicitors should be told about it, so there
16 was no question of a cover-up, but my view was that if
17 you have a relatively low-key enquiry, you're more
18 likely to get to the truth and be able to do something
19 about it.
20 I think I'm right in saying that both Dr Rejman
21 and Dr Metters had retired by that stage, so there was
22 not much you could do about that. But if you put an
23 enquiry and you make it too major, then people will tend
24 to clam up, they become very defensive, and you don't
25 get the answers you want.

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1 at this stage I was just out of tobacco and into
2 variant vCJD and BSE, so this was -- and a growing
3 commercial practice as well. So I doubt I would have
4 done much more. I might have done. They may have been
5 to see me, if they'd asked me. Certainly, if I'd been
6 asked about terms of reference or anything else, I think
7 I would have said "You've got to talk so far as you can
8 to the individuals concerned", then you talk to the
9 secretaries and then you talk to the people who run the
10 warehouse, and so on. But I don't know.
11 **Q.** Sorry, do you know whether you were told the name of the
12 person who signed the destruction authorisation?
13 **A.** I don't know but you may be able to tell me if I was.
14 **Q.** I can't tell you if you were. I think it makes my next
15 question of whether you can remember that name
16 redundant.
17 **A.** Yes. Now, I don't think there's anything in the
18 documents that you kindly send me, which -- I did read
19 the witness statement of Anita James, who was a very
20 careful and cautious departmental lawyer. And I vaguely
21 remember that she said something about it at the time
22 but she may not have mentioned it. That's the only
23 source I have, therefore, is my reading of documents
24 you've got.
25 **Q.** In terms of the claims that had been stayed by people

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1 If, of course, that low-key enquiry had discovered
2 wrongdoing by somebody, as opposed to chaos, then
3 that -- the fact that it was a low-key internal inquiry
4 wouldn't mean that you then brushed it under the carpet.
5 But the best way of getting the answer is to approach
6 things in a relatively low-key way. That was my view.
7 It was not a matter of go in all thunder and say, "Who's
8 done this? Heads must roll". It was: "Let's find out
9 what's happening. Let's see if we can't find out
10 whether there" -- because very often, I mean, documents
11 turn up. I was dealing with a case only last week where
12 documents which were thought to have been missing for
13 many years turned up halfway through a trial.
14 So this kind of investigation is intended to try
15 to get to the truth, and find the documents, as opposed
16 to have a witch hunt.
17 **Q.** But it would involve, would it not, going to the
18 individuals concerned and trying to find out what went
19 wrong?
20 **A.** I assume so. Certainly that's what I expected to
21 happen.
22 **Q.** Were you consulted about the terms of reference and how
23 it was going to be done or did you just give the general
24 advice that there should be some form of inquiry?
25 **A.** I don't know. I don't know if I had a junior. I think

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1 with haemophilia against the Department of Health, do
2 you know if the court were informed about the loss and
3 destruction of the documents?
4 **A.** No, and I don't know what happened to those claims.
5 I think I gave advice, it was stayed, I don't remember
6 what they were stayed until, whether it was pending the
7 outcome of the hepatitis C litigation, and I don't
8 know -- I mean, I've no idea what happened to them at
9 all. But, clearly, if they were stayed, they must have
10 been stayed for a reason and for a purpose. And, at
11 some stage, somebody must deal with that. But I don't
12 recollect why claims were stayed, I'm afraid. If
13 there's any document you can show me, I'll try and do my
14 best.
15 **Q.** There is none.
16 A final point on this, and if we could have the
17 document back on screen, please, Paul, page 3 of the
18 document. You appear to have advised the four people in
19 particular being interviewed, Dr Metters -- and we can see
20 written in handwriting, as well -- Dr Metters, his
21 secretary, the person at the DH who signed the
22 destruction authorisation, and Dr Rejman. We know that
23 the missing or destroyed files include both the
24 registered file and the files that had been in
25 Dr Metters' possession and in his office.

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1 By referring to those four people, am I right to
 2 conclude that your suggestion was that the investigation
 3 should look at both sets of destruction or loss, both
 4 Dr Metters' files and the registered files?
 5 **A.** Yes. I don't know why, because I can't remember. But
 6 if there were two sources of documents, it was plainly
 7 important to look at both, in order to see if between
 8 the two they could be put together. I note that one --
 9 from one of the documents you sent me, that I was asked
 10 if I had any old papers and I produced some photocopied
 11 papers. By then the photocopier was better than it had
 12 been in the '80s, and I had some papers which filled in
 13 some gaps so by going to both, you increase the chances
 14 of finding them and, obviously, if there has been
 15 destruction, you want to know why both sets have been
 16 destroyed, and if there's a good reason for one or other
 17 or both.
 18 **Q.** Final question on this, and indeed the final question
 19 for now, were you able to form any view at the time
 20 about the underlying motives for the loss and
 21 destruction? Whether they had been motives to conceal
 22 these documents or whether this had been a mistake,
 23 an error that had led to the destruction?
 24 **A.** I don't think so. I think -- I mean, I do a lot of
 25 audit work and there's a moment when the auditor's job

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1 So not before 5.05.

2 (4.50 pm)

3 (A short break)

4 (5.14 pm)

5 **SIR BRIAN LANGSTAFF:** Yes.

6 **MR HILL:** Mr Fenwick, a few questions which have been raised
 7 by Core Participants, so I'm afraid there will be some
 8 jumping about.

9 **A.** Yes, sure.

10 **Q.** First of all, the HIV Litigation and Scotland and Wales.

11 **A.** And what?

12 **Q.** And Scotland and Wales.

13 **A.** Yes.

14 **Q.** We know that some claims were brought in Scotland
 15 concerning infection with HIV through the use of blood
 16 products. Did you have any role in advising on claims
 17 that were brought in Scotland?

18 **A.** Not as far as I recollect.

19 **Q.** Are you qualified in Scottish law?

20 **A.** No. So, I mean, it is conceivable that the Department
 21 asked me questions relating to litigation in Scotland,
 22 but I would not have been acting in Scottish cases or
 23 advising the Scottish Authority.

24 **Q.** To the best of your recollection, were you aware of
 25 these ongoing claims in Scotland at the time?

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1 turns from being watchdog into bloodhound. I think at
 2 this stage, I was probably thinking we need to be a bit
 3 of a bloodhound here, rather than a watchdog. This sort
 4 of destruction requires an explanation. It is more
 5 likely to be a mistake and a negligent error than
 6 a deliberate one but, nonetheless, the fact that people
 7 who had been involved in the previous litigation had had
 8 their files destroyed was something which needed to be
 9 taken seriously. I don't think I formed a view. I was
 10 just surprised that it should happen, as well as
 11 annoyed.

12 So I think -- I don't think I would have formed
 13 a view either way, but I think I would still have had
 14 an open mind at that stage.

15 **MR HILL:** Sir, those are the questions that I have for
 16 Mr Fenwick now. We have very helpfully received some of
 17 the questions from the Core Participants over the
 18 previous break. Could I suggest a break of about
 19 20 minutes -- or 15 minutes to start with, possibly
 20 extending to 20?

21 **SIR BRIAN LANGSTAFF:** Yes, it'll be 5.10 then that we meet
 22 again.

23 **MR HILL:** Perhaps if we could go for 5.05, hopefully we
 24 should be able to be done by then.

25 **SIR BRIAN LANGSTAFF:** Let's say not before 5.05, shall we?
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1 **A.** I don't remember them now. I've no idea whether I was
 2 told at the time.

3 **Q.** I think it probably follows from that that the answer to
 4 the next question is already answered. Do you remember
 5 having any liaison or co-ordination with anybody in
 6 Scotland about those claims?

7 **A.** No. I'm pausing because there was some other
 8 litigation, which involved some interplay with Scotland.
 9 But I don't have any recollection of anything to do with
 10 HIV.

11 **Q.** Moving on, then, to Wales. Documents which we didn't
 12 provide you with indicate that the Treasury Solicitor
 13 was acting not only for the Department of Health but
 14 also for the Welsh Office in respect of claimants who
 15 had been infected in Wales?

16 **A.** Yes.

17 **Q.** Do you recall whether or not there was any significance
 18 to the claim about the fact that the Welsh Office were
 19 also part of the litigation?

20 **A.** No, I don't. I mean I think that, very often, Wales is
 21 treated the same as England, whereas Scotland is not,
 22 because of the way devolution was working in 1990.
 23 There were, of course, a number of other defendants, and
 24 I can't now remember who they are, but looking at the --
 25 some of the documents. Whether the Welsh Office were
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1 a separate defendant or whether it was dealt with --
 2 I don't know, but there was certainly nothing different
 3 in the way that I acted because of Wales, and I don't
 4 remember any Welsh-specific advice.
 5 Q. Just finally on this, do you remember being informed
 6 about any actions being brought in Northern Ireland
 7 about the HIV Litigation?
 8 A. No.
 9 Q. Turning to the waiver, there's a document which has not
 10 previously been provided to you, but was provided to you
 11 over the break.
 12 A. Yes.
 13 Q. I'm going to bring that up on screen, now, please.
 14 A. Good.
 15 Q. DHSC0004766_068. This is not a document which you would
 16 have seen at the time --
 17 A. No.
 18 Q. -- but it is a minute from Dr Rejman to Mr Powell, dated
 19 22 February 1991, which the Inquiry has looked at
 20 before, but to give the full context, I will read all
 21 of it. It says this, heading "HIV Haemophilia
 22 Litigation":
 23 "1. During a brief conversation with
 24 Dr Peter Kernoff of the Royal Free Hospital, he
 25 mentioned to me that he has received a couple of writs

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1 opposed to the policy resource aspect. It would have
 2 been a claim, if it had been brought by a haemophiliac
 3 in this litigation, which could have been within the
 4 carve-out for claims against Health Authorities for
 5 negligence in their clinical treatment. So that is
 6 probably why we weren't involved. It would not have
 7 been, therefore, banned.
 8 I'm not sure that Dr Rejman is correct in what he
 9 says in paragraph 3. Now, I stress in what I'm saying,
 10 I'm not either seeking to replicate the advice of those
 11 advising those plaintiffs, nor of the Department, nor am
 12 I acting for the Department. I'm giving a view looking
 13 at it now and seeing it.
 14 There is a difference between the undertakings
 15 given by plaintiffs, which we've looked at, and the
 16 nature of the undertaking which the settlement agreement
 17 required to be given by non-plaintiffs, which are to be
 18 found, if we can just look at it, HSOC0023174-22. And
 19 I think I'm right in this, but I've only had about five
 20 minutes to look at it, so ...
 21 This deals with a:
 22 "... qualifying non-plaintiff ... entitled to
 23 receive benefits from the new Macfarlane Trust ..."
 24 And we looked at the carve-out for diagnosis:
 25 "... corresponding to their circumstances upon

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1 in respect of hepatitis infection in haemophiliacs.
 2 "2. These are individuals who are HIV negative,
 3 and as such would not be covered by the HIV haemophilia
 4 general settlement.
 5 "3. I believe that any that are HIV positive
 6 would have to agree not to raise hepatitis in any
 7 further litigation, but this obviously does not exclude
 8 those not in the scheme.
 9 "4. Dr Kernoff did not believe that the
 10 Department of Health was a named defendant at present,
 11 but I felt you would wish to be aware of this."
 12 That is the minute that was sent to Mr Powell.
 13 First of all, do you have any recollection of being
 14 informed in February 1991 that there had been writs
 15 issued in respect of hepatitis infection, of people with
 16 haemophilia who were not infected with HIV?
 17 A. No, I don't. But -- I do have some thoughts in relation
 18 to this but no, I don't have any recollection of being
 19 told at the time.
 20 Q. If I can invite you to give those thoughts?
 21 A. Yes, certainly. I mean, the -- it's Dr Kernoff from the
 22 Royal Free Hospital, so these will have been writs to
 23 the Royal Free Hospital as, I think, a Special Health
 24 Authority, or similar. They will therefore be related,
 25 almost certainly, to the clinical negligence aspect, as

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1 signing an undertaking not to bring proceedings against
 2 any Defendant or against any other Government body in
 3 respect of the administration of cryoprecipitate
 4 [et cetera] before ... December 1990, save that nothing
 5 prevents a qualifying non-plaintiff from bringing
 6 proceedings in respect of the administering prior to
 7 13th December ... of cryoprecipitate Factor VIII or
 8 Factor IX where:-
 9 "(1) that has caused damage to such Plaintiff
 10 which had not been diagnosed by 13th December 1990; and
 11 "(2) the damage alleged does not include infection
 12 or the risk of infection by HIV and/or the hepatitis
 13 viruses."
 14 So the non-diagnosis is -- keeps in for those
 15 non-plaintiffs other treatment damage, excluding
 16 hepatitis and HIV. But the undertaking is in respect of
 17 what's called a government body. Now, I do not know why
 18 we have that wording, compared with the wording you have
 19 at page 20 of this document, paragraph 5.
 20 And there the undertaking is "not to bring fresh
 21 proceedings against any defendant or against any other
 22 Government Department, Health Authority or treating
 23 doctor".
 24 Now, a treating doctor is undoubtedly not
 25 a government body. It appears to me -- and nobody has

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1 instructed me to do it, so I'm doing this as a thinking
2 lawyer, rather than somebody's adviser -- that a Health
3 Authority would normally be treated as a government
4 body. So -- and, of course, if somebody was diagnosed
5 with HIV, who was not a plaintiff, and that person also
6 had a clinical negligence claim -- I call it that for
7 simplicity -- the claims carved out against the local
8 Health Authorities, then one would expect them to be put
9 in no worse a situation than the plaintiffs.

10 So, in other words, plaintiffs in the litigation
11 who had a claim for treatment against the Health
12 Authority, whether for hepatitis or for HIV, whether
13 for, if you like, a full settlement, full compensation
14 for HIV because of their treatment, for example they did
15 not need to be given imported Factor VIII, or whatever
16 it was, or who had a claim they wanted to bring for
17 hepatitis, wouldn't be prevented from doing so because
18 of the carve-out from the settlement.

19 I would have expected that if a non-plaintiff was
20 subsequently diagnosed with HIV, and also had a claim
21 for hepatitis arising from their treatment, as opposed
22 to arising from the sources, that they would either have
23 obtained confirmation or their lawyers would either have
24 obtained confirmation from the Macfarlane Trust, that
25 that reference to -- let me get the right word -- spread

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1 Equally, a non-plaintiff should, in my view, have
2 been put in the same position. And I think the wording
3 seemed to me to omit it.

4 **Q.** When you're referring to non-plaintiffs there, so we are
5 clear, you're talking about people who didn't bring
6 a claim in the HIV Litigation --

7 **A.** Yes.

8 **Q.** -- but who were allowed access to the scheme because
9 they became infected by HIV?

10 **A.** They were haemophiliacs who subsequently became infected
11 with HIV, and the aim was to bring them in and give them
12 the same rights and the same compensation as the
13 plaintiffs. Now, that being the case, it would have
14 been surprising and unintended if the effect of that was
15 a clinical negligence type claims which were permitted
16 outside the settlement in the Macfarlane Trust, would
17 not be also open to such non-plaintiffs.

18 Now, I have no personal knowledge of it, but
19 certainly if anybody had asked me at the time what the
20 position would have been, that would have been, I think,
21 my response.

22 **Q.** Yes. So it certainly -- if that was a consequence, it
23 was certainly not an intended one on your part?

24 **A.** Certainly not intended by me. We may not have thought
25 about it. There is a difference in the wording, and

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1 of the virus through Factor VIII, as opposed to
2 administration of the virus, so that does not prevent me
3 bringing my claim for clinical negligence for being
4 given hepatitis when measures could have been taken to
5 have given me heat-treated Factor VIII, or whatever, or
6 would have said "I'm not going to advise my client to
7 sign that undertaking, I want first to have a carve-out
8 so I can pursue my clinical negligence claim".

9 Now, I don't know whether that happened, I haven't
10 considered it before this document arrived on my table
11 ten minutes ago, but I note the distinction between the
12 two. I expect there was a reason for the difference in
13 wording. I think it may have been that but I'm
14 speculating. But I'm not sure that it would be correct
15 to characterise the undertaking which was required by
16 paragraph 8 of the settlement agreement to preclude
17 claims in clinical negligence for hepatitis --

18 **Q.** That's --

19 **A.** -- or indeed for HIV. So, for example, if somebody who
20 was not a plaintiff had a very good claim, "we should
21 not" -- "I should not have been given heat-treated
22 product and, therefore, although I can only get this
23 settlement out of the Macfarlane Trust, I can still
24 pursue my claim for full settlement against the Health
25 Authority".

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1 I drew attention earlier to the reference to "spread"
2 of it. It struck me as being -- there must be a reason
3 we put that in. And I now draw attention to the
4 difference between paragraph 5 and paragraph 8, and
5 there must have been some reason for that, and the fact
6 that it clearly excludes doctors seems to me to suggest
7 that it was not intended to require there to be
8 a covenant not to sue treating clinicians.

9 But that's really as far as I can take it.
10 Anything more would be speculation.

11 **Q.** Thank you. That's very helpful.

12 Another set of potential litigants, including the
13 one who may have issued the writs of Dr Kernoff for
14 people who were not infected with HIV, they would not
15 have been captured by this scheme at all, so they would
16 not have signed any waiver, so they could go ahead and
17 brought whatever claim they wished to bring.

18 **A.** Yes.

19 **Q.** The question I've been asked to put to you arising out
20 of Dr Rejman's minute of 22 February, is this: do you
21 recall Dr Rejman or Mr Powell or anyone else from the
22 central defendants suggesting to you, around 22 February
23 or any time thereafter, that there needed to be specific
24 reference to waiving hepatitis claims in the settlement
25 agreement?

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1 A. No, I don't. I mean, they may have done. I don't
 2 recollect it. We've looked at how the reference to
 3 hepatitis came in through the plaintiffs' drafting. If
 4 you're asking whether somebody suggested that we should,
 5 if you like, get a free pass on hepatitis claims out of
 6 this, I have no recollection of it, and I certainly
 7 would not have wanted to be party to that without it
 8 being fully discussed and openly discussed, because it
 9 would not be what we were intending to do.

10 Q. When you say fully and openly discussed, you mean fully
 11 and openly discussed with the plaintiffs?

12 A. Well, certainly in the first instance, to understand
 13 what we're trying to do. And then if we are trying to
 14 do something which goes beyond the settlement which was
 15 intended, then I think we'd have to say, you know: that
 16 wording, by the way, you do understand, will do this.
 17 Because -- if it's something which nobody would have
 18 spotted. So if somebody somewhere thought, "Oh good,
 19 there's a word excluding hepatitis claim, let's keep
 20 it", I was not aware of it, and would have acted
 21 differently. And it's impossible to say how, but, you
 22 know, I don't -- the role of counsel advising Government
 23 in my view has always been rather different from the
 24 role of counsel advising private litigants, because
 25 there is always a duty of care in -- not in a legal

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1 1990 -- that people would have brought claims simply for
 2 hepatitis, in relation to very difficult and what
 3 I still call novel -- I think Lord Justice Ralph Gibson
 4 described as novel claims, on policy and resourcing
 5 issues.

6 Q. Moving on to the deed that we've just -- that you just
 7 mentioned, I don't think we need to bring it up but if
 8 we do, then please say. Do you recall whether or not
 9 the wording of the deed that we've looked at was the
 10 product of the same sort of discussions,
 11 counsel-to-counsel level, between the claimants and the
 12 defendants?

13 A. The waiver deed, do you mean?

14 Q. The waiver deed, yes.

15 A. No, I don't actually recollect it as a document at all.
 16 I mean, I may well have been involved in it. I'm just
 17 going to go back to it. Because the wording is quite
 18 wide:

19 "Any proceedings ..."

20 I mean, this looks to me like what I call
 21 a committee document. Everyone has had their bit into
 22 it "any district or Regional Health Authority or any
 23 other Government body".

24 I don't know whether it was; I don't know when it
 25 was first actually prepared; and I don't know whether it

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1 sense, but there is a duty to help Government to make
 2 the right decisions as opposed to simply to protect its
 3 corner and, like another litigant, to avoid having to
 4 pay or whatever.

5 So I regard my duty when acting for Government as
 6 being slightly different.

7 Q. If I may put it this way: there was no attempt, then, to
 8 sneak this past the plaintiffs?

9 A. Not to my knowledge.

10 Q. Now, we've seen from the documents that it was plainly
 11 an iterative process that led to the drafting of the
 12 settlement agreement. The fact that the words
 13 "hepatitis" and "HIV" came from the plaintiffs, doesn't
 14 necessarily preclude the possibility that you had
 15 discussed it with them as part of the negotiation that
 16 took place; is that fair?

17 A. That's absolutely fair and we may well have done, for
 18 the reason which I think I tried to explain in my
 19 statement, that what we did not want to do was to
 20 resolve this litigation and find that the resource
 21 argument for self-sufficiency was raised again. So that
 22 was the importance of dealing with the hepatitis claims
 23 in that way. Of course, it didn't prevent somebody who
 24 did not contract HIV from bringing the argument, but
 25 it's unlikely that -- or certainly as perceived in

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1 was the subject of discussion or whether it was intended
 2 by somebody to reflect what we'd agreed. My focus was
 3 on the settlement agreement and what it provided for.
 4 I don't think I even saw the terms of the new
 5 replacement Macfarlane Trust.

6 Q. A couple of other questions about the waiver. Are you
 7 aware of any evidence that the hepatitis waiver was
 8 included as a trade-off for the Government disregarding
 9 the settlement sum for the purposes of benefits?

10 A. No. I mean, we looked at benefits separately. There
 11 were questions about with benefits -- I mean, I think it
 12 took a little bit of shuffling to get the Treasury to
 13 agree it and its terms. I know there were issues about
 14 how far it extended to in whether inheritances, and so
 15 on, but I don't recollect there being any trade-off.
 16 And I think if there had been, it would have been there
 17 in the exchanges.

18 And I think I would have seen it here. But
 19 I don't recollect it. I'm not sure it would have been
 20 right anyway. I mean, it's not what we were trying to
 21 do.

22 Q. When you say not right, do you mean morally not right?

23 A. In the spirit of what we were trying to achieve, it
 24 would have been inconsistent with trying to help the
 25 haemophiliacs, without creating a precedent, to have

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1 required a trade-off for something which wasn't
2 included. But one has to recollect, there were no
3 claims for hepatitis damage. So I think it was a given
4 that claims for the infection with hepatitis, whether --
5 well, in conjunction with HIV, were not being pursued,
6 and therefore weren't under consideration. So there was
7 nothing to trade off. I mean, that's the best I can do,
8 I'm afraid.

9 **Q.** We know from some of the documents we've looked at
10 today, and indeed from others, that there was
11 a requirement from the Government that if this
12 settlement was going to work and take place, then there
13 was an expectation that all or almost all plaintiffs
14 would need to sign up for it. Firstly, is that a fair
15 summary of the situation?

16 **A.** That ... let me be clear about this. It was certainly
17 the wish of the Government if they were going to settle
18 it, they were going to settle it all, rather than having
19 leftover litigation. It was, I think, implicit in the
20 agreement by Treasury and Government to compensate that
21 those who accepted it would settle, and there was always
22 the possibility that individuals would not. However,
23 it's absolutely right to say that we felt that it was
24 most unlikely that a settlement of this kind,
25 represented by two very senior leading counsel,

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1 for different groups of individuals. The purpose of the
2 scheme put forward was a scheme which treated all those
3 who suffered from this terrible condition equally
4 fairly, however good or bad their prospect of success in
5 litigation was.

6 So -- but I think that -- you know, as I say, in
7 the variant CJD litigation, the view that I formed,
8 which Stephen Irwin, who was leading counsel for the
9 claimants -- plaintiffs still in those days -- agreed
10 with, was that if anyone wanted to pursue their claim
11 they should be able to do so, but would have to give
12 credit for all benefits which they had received.

13 **Q.** If those people were to pursue their claims in the vCJD
14 scheme, they would firstly take advantage of the scheme
15 and have to give credit for it as you said.

16 **A.** Yes.

17 **Q.** But how would they fund the ongoing litigation?

18 **A.** They would fund the ongoing litigation -- well, of
19 course we're now back at 2000/2001, so legal aid has,
20 for all practical purposes, disappeared, so they would
21 have had to do so by what would then have been an early
22 version, conditional fee agreement where they could
23 recover the uplift if successful. So they would have
24 had to find lawyers who were of the view that their
25 prospects of success were better than the percentage of

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1 Dan Brennan and Rupert Jackson, that if any individuals
2 decided not to accept it, that they would get continued
3 legal aid funding for it, so that, in practice, if the
4 majority accepted the recommendation and didn't sack
5 their counsel and carry on with another team, then it
6 would bring the litigation to an end probably.

7 There may well be some refuseniks, and those
8 people who decided -- I don't mean that pejoratively,
9 but those who decided they just didn't want it and they
10 wanted their day in court. And as I think I put in my
11 statement, one of the factors which led to the slightly
12 different treatment in the variant CJD litigation was
13 the view that those who felt passionately that they
14 wanted to proceed should be able to do so. And that is
15 also allied to the fact that inevitably all those who
16 were compensated were compensated in a way which
17 differed from their own individual chance of success in
18 the litigation.

19 Just to explain that, those who had seroconverted
20 early would have a less good prospect of success if the
21 duty of care arguments could be overcome than those who
22 were infected later. So there would have been
23 a spectrum whereby some were more likely to succeed and
24 some were less likely to succeed, and a litigation
25 compromise would have ended up with different amounts

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1 likely damages reflected by the amount given to them.

2 So, in other words, if -- and I can't remember, if
3 we assume that they got 40 or 50 per cent of their
4 likely claim value, then the odds would have had to have
5 been significantly better than 50 per cent for anyone to
6 be prepared to take it on under a CFA, or you'd have to
7 have a benefactor who is prepared to fund it.

8 **Q.** Was that included in the vCJD scheme, in response to
9 your experience of the HIV Litigation, any sense that
10 those who wished to continue their claim would have been
11 taking an enormous risk in not taking the funding and
12 indeed having to fund the litigation themselves if they
13 didn't get legal aid?

14 **A.** I think it would be wrong to say that it was my
15 experience in HIV which led me to include that. I mean,
16 the document was produced with close involvement with
17 Alan Milburn, the then Secretary of State for Health,
18 and the Treasury. It was put together by myself and
19 Stephen Irwin, acting for the plaintiffs, so it was
20 a collaborative document. And I think it arose from
21 a sense there was a very strong but small group of
22 plaintiffs who felt very much that they wanted to have
23 the right to have their day in court, and not simply to
24 accept the compensation.

25 I think we all thought the compensation was fair,

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1 and such claims were unlikely to be pursued. If we had
2 formed the view that a lot of them were still likely to
3 bring the claims, there may have been no settlement, and
4 my own view is that, if it had been a condition imposed
5 by the plaintiffs in HIV, they should be permitted to
6 claim, having received the compensation. It would have
7 been significantly more difficult to get Government
8 approval and support for it.

9 **Q.** I'm going to take you to a document unrelated to that
10 issue, DHSC0003654_108. This is a document dated
11 4 December 1990.

12 **A.** Yes, which we've looked at before, isn't it?

13 **Q.** Yes.

14 **A.** This is the one with one-third chance for Treasury.

15 **Q.** I didn't take you to it before but it's the one that you
16 looked at --

17 **A.** You told me about it, which is why I went back and
18 looked at it.

19 **Q.** Yes, exactly. Ronald Powell to Mr Canavan recording
20 a conversation with you. It's paragraph 5 that I've
21 been asked to ask you about. I'll just read it to you
22 first of all:

23 "As to whether or not there had been actual
24 negligence in the early years on the question of self
25 sufficiency, he [that's you] pointed out that there are
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1 say, that this didn't amount to negligence in the legal
2 sense. Now, if there had been terrible gaps in terms of
3 activity -- so, in other words, an instruction, I don't
4 know, "Please make arrangements to see if we can
5 increase the facilities here, there or other", and there
6 had been a failure to take proper steps, that would have
7 been negligence in the legal sense.

8 So I think -- "terrible gaps" and "neglect"
9 I think is a reference to gaps in the record. I'm sure
10 that's right. I remember the gaps in the record. And
11 inactivity. Neglect in the sense of things not
12 happening.

13 If I had thought that there had actually been
14 culpable failure to act, then I would not have said
15 there was no negligence in the legal sense, and the
16 advice which we gave would have been different, because
17 that would have been clear evidence of negligence, which
18 would have been amounting to a breach of duty if a duty
19 of care was found to exist, and might well have fallen
20 within the operational side and therefore not excluded
21 by the policy decision.

22 Assume there is a policy decision, as I think it
23 was Dr Owen who said, "Let's go the self-sufficiency
24 with some estimates", and assume that he, having made
25 that decision, there was a failure by the Department to
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1 some terrible gaps. He said there was obviously quite
2 a lot of neglect which he thought was inevitable if
3 money was tight and decisions were having to be made on
4 the basis of not where can we spend money, but where can
5 we avoid spending it. He thought, however, that this
6 did not amount to negligence in the legal sense and that
7 the chances of resisting a claim even with a sympathetic
8 Court were 60% in our favour."

9 The section that I've had my attention drawn to is
10 the comment:

11 "... he pointed out that there are some terrible
12 gaps."

13 In your witness statement at paragraph 43.4, you
14 say that:

15 "I believe that this is shorthand for the fact
16 that the documentary record was very thin and there were
17 substantial time periods during which there was no
18 written evidence of what steps were being taken."

19 What I've been asked to put to you is that a more
20 likely reading of the document is that the terrible gaps
21 refers to a gap in steps actually being taken at the
22 time, failure to do something. What is your response to
23 that?

24 **A.** My response to that is that I don't recollect having
25 that thought. It's also inconsistent with what I did
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1 implement that in some way, through carelessness,
2 slowness, too much on the desk, that would amount to
3 negligence and might well be in the operational sphere.

4 So I wouldn't have given the advice that I gave,
5 including that last sentence, if the earlier wording
6 meant what's been suggested. So that's I think the best
7 I can do. They're not my words.

8 **Q.** Of course. They're Mr Powell's words.

9 Finally on this, you have said in your evidence
10 earlier, and indeed just now, that there were relatively
11 few surviving documents at the time that you came to
12 look at them, late 1980s.

13 **A.** Mm-hm.

14 **Q.** I've been asked to ask this: were you not surprised by
15 that absence of documentary records, given that the
16 events concerned were not that long before you were
17 looking at them back then? And did you ever ask or were
18 you ever told why there were so few documents available?

19 **A.** I'm sure I asked. I do remember there being relatively
20 few documents. I don't remember what the explanations
21 were. I think I've said something in my statement.
22 I mean, I've done quite a lot, or did in those days,
23 quite a lot of litigation about long tail issues going
24 back to the '20s, '30s, '40s, '50s, and even more
25 recently. And until you get the word processor and the
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1 photocopier, you get -- no, you get Miss Jones in the
 2 typing pool typing a letter or a note with two carbons.
 3 So there were only ever one, two or three copies of
 4 a document. And when they go into files and files gets
 5 misplaced, or somebody culls them -- I mean, document
 6 retention policies have developed hugely. By way of
 7 example, and it's good to put these things in context,
 8 for about the first five or ten years after the
 9 introduction of email, firms of solicitors,
 10 Government departments, big organisations, would
 11 routinely only keep 12 months of back-up and would then
 12 delete everything longer than that because there was no
 13 capacity to store them. The idea now that you can store
 14 an infinite amount of documentation allows much tougher
 15 retention policies.

16 So I think I was surprised. I expected there to
 17 be more. I was disappointed that there wasn't more.
 18 But I don't remember being either provided with a sort
 19 of unsatisfactory explanation, in the sense of culpable,
 20 or being concerned that there had been some form of
 21 deliberate destruction. There just wasn't very much,
 22 but I could understand why.

23 I don't think, probably, there had been
 24 sufficiently effective document retention systems. We
 25 all used routinely, in those days, when I was in the

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1 opportunity, as I did with, for example, Human Growth
 2 Hormone and certain other cases. But there is no doubt
 3 that this was a massive tragedy, that it was a wholly
 4 disastrous effect on the haemophiliacs, which deserves
 5 to be recognised. We recognised it in the way that was
 6 available to us at the time. But it doesn't take away
 7 any of that, and it does mean that I emphasise -- it's
 8 in my written statement, I don't take time repeating it
 9 now -- that my view remains stronger than ever, having
 10 learned again about all of this by reading it, that
 11 consideration of at least a selective procedure for
 12 no-fault compensation in major tragedies is really
 13 worthy of reconsideration.

14 **SIR BRIAN LANGSTAFF:** Well, thank you for that thought.
 15 Thank you too for your evidence and the clarity and the
 16 evident thought you have given to it, in particular the
 17 way you have been so obviously careful to make sure
 18 that, as far as you can, you can recollect, if you can,
 19 and the efforts which you've done to help us by, for
 20 instance, looking at papers during what would otherwise
 21 would have been your tea break. It's very much
 22 appreciated. Thank you very much.

23 **MR HILL:** Mr Gutowski tomorrow, sir.

24 **SIR BRIAN LANGSTAFF:** Yes, tomorrow, ten o'clock,
 25 Mr Gutowski.

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1 army, for example, working with the Duke of Edinburgh,
 2 we had great files and you would have to cull older
 3 documents which you thought weren't important in order
 4 to make room for the new ones. So it was a different
 5 world.

6 So yes, I was surprised. Did I think that there
 7 was something suspicious about the explanation? Not
 8 that I now remember.

9 **MR HILL:** Thank you, Mr Fenwick. Those are the questions
 10 I have for you.

11 I turn to you, sir.

12 **SIR BRIAN LANGSTAFF:** No, I have no questions of my own.

13 **A.** Thank you.

14 **MR HILL:** Mr Fenwick, you're not legally represented, so
 15 there's nobody else to consult but we give all of the
 16 witnesses an opportunity to say anything further that
 17 they wish to say at the end of their evidence.

18 **A.** Yes, I don't know who is listening. I don't know who is
 19 here. I don't know what they are. My aim, whenever
 20 I've been in court representing Government or
 21 manufacturers, or other people adversely affected in
 22 this kind of way, is to make sure that the process of
 23 defending the claims, which is my job, or was my job
 24 here, is done with proper sympathy for their position.

25 Now, we never got to court, so I never had that

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1 (5.54 pm)

2 (The hearing adjourned until 10.00 am the following day)

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(95) speculative - sufficient

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