1		Thursday, 9 June 2022	1		1980
2	(10.	.00 am)	2	A.	Yes.
3	SIR	BRIAN LANGSTAFF: Welcome, Mr Fenwick.	3	Q.	completed pupillage in July 1982 and became a silk,
4	TH	E WITNESS: Thank you.	4		a QC, in 1993; is that right?
5	SIR	BRIAN LANGSTAFF: Let me explain the set-up. You're	5	Α.	Correct.
6		talking to a select audience here at Aldwych House.	6	Q.	You remain in full time practice as a barrister and is
7		They are participants in front of you and the public.	7		it right that you've also sat as a judge in the civil
8		There may be representatives of the press at the back,	8		and in the criminal courts?
9		and the lawyers are to your left.	9	Α.	Yes, until the statutory age of retirement three years
10		Mr Hill will ask you questions in a moment once	10		ago.
11		you've been sworn. But you're talking, beyond this	11	Q.	You are able to give evidence today and indeed in your
12		room, to something in the region of 100 or so people who	12		witness statement because your former clients have
13		are watching online, live streamed and YouTube, as we go	13		waived privilege. Is it right that you give evidence as
14		along.	14		an individual and not as a representative of your former
15	TH	E WITNESS: That's very clear.	15		clients?
16	SIR	BRIAN LANGSTAFF: Rose, will you administer the oath,	16	Α.	Yes, it is. I have clarified with the Department in
17		please.	17		writing that I come here not to speak for the Department
18		JUSTIN FENWICK QC (sworn)	18		or Government or any of my former clients but as
19		Questioned by MR HILL	19		an individual doing my best to recollect and recount
20	SIR	BRIAN LANGSTAFF: Mr Hill?	20		what I remember of those days.
21	MR	HILL: Mr Fenwick, is it right that you're a barrister	21	Q.	Aside from your memory, is there any impediment to you
22		and a Queen's Counsel?	22		giving your evidence today, professional obligations or
23	Α.	It is.	23		any other form of obligation?
24	Q.	You came to the bar after a career in the army in the	24	Α.	Not that I'm aware of.
25		Grenadier Guards and you were called to the bar in	25	Q.	You have a copy of your witness statement with you? 2
					-
1	Α.	Yes, a blank one, which you kindly provided.	1		ultimately pursued and the litigation proceeded against
2	Q.	Thank you. I'm going to start by asking you a few	2		the manufacturer of the drug?
3		questions about your career before the HIV Litigation.	3	Α.	No, the litigation proceeded against all. The
4		You were instructed in the pertussis vaccine litigation,	4		manufacturers, Eli Lilly, at some stage entered in
5		according to your witness statement at paragraph 2.1; is	5		a global settlement with, I think, all those except
6		that correct?	6		those they considered to be statute-barred. There was
7	Α.	That is correct. One of the individuals involved in the	7		then a limitation hearing at first instance where,
8		pertussis vaccine research, Professor Miller, was	8		I think, only one plaintiff was permitted to continue
9		a person with some involvement and, as a result of that,	9		under section 33, and then there was a hearing in the
10		I was instructed and came to understand a little bit	10		Court of Appeal, whose outcome I cannot now recollect,
11	~	about the pertussis vaccine issues.	11		but in the end no allegations were, in effect, pursued
12	Q.	Were you then subsequently instructed by the Licensing	12		against those authorities. So the issue was never
13		Authority and the Committee on Safety of Medicines in	13	•	resolved.
14		the Opren litigation?	14	Q.	Is it right that neither the Committee on Safety of
15	A.	Yes, I was.	15		Medicines or the Licensing Authority contributed to the
16	Q.	That litigation concerned the safety of	16		settlement that was put forward by the manufacturer?
17		an anti-arthritis drug and concerned questions on	17	Α.	Correct. Absolutely nothing, nor did central
18		whether the Committee on Safety of Medicines and the	18	~	Government.
19 20		Licensing Authority owed a duty of care; is that	19	Q.	You were also instructed, according to your witness statement, in the benzodiazepine group litigation
20		correct?	20		
21 22	Α.	That was one of the issues. There were also, of course,	21 22	A.	Yes.
22 23		issues as to whether there was any breach of duty if there was a duty owed.	22	Q.	on behalf of, again, the Committee on Safety of Medicines and the Licensing Authority?
23 24	Q.	Is it right that the cases against the Committee on	23 24	А.	Yes, I don't think the Department was involved in that,
24 25	ખ.	Safety of Medicines and the Licensing Authority weren't	24 25	А.	I recollect those two.
20		Salety of Medicines and the Licensing Authority weren t	20		4

(1) Pages 1 - 4

1	Q.	That overlapped in time with the HIV Litigation but	1	Α.	
2		continued afterwards.	2		supplied to you. When I first was asked if I would give
3	Α.	Yes.	3		evidence, and before I looked at the two fat volumes of
4	Q.	In your statement you say that the claims were later	4		documents which were provided to me, I had certain
5		abandoned after substantial costs were incurred. First	5		overriding recollections of it, in terms of its general
6		of all, is that right and, secondly, was that a result	6		structure, the plight of the individuals, because I then
7		of the Legal Aid Board withdrawing funding?	7		went on, as you will cover, to human growth hormone and
8	Α.	I believe so and, from recollection, there was something	8		BSE and CJD so that was also very striking.
9		astronomical like I think it might even have been	9		l also had a very clear idea of the view we formed
10		£30 million, it was certainly £15 million or more, was	10		of the legal merits, and I have a strong overriding
11		spent by the legal aid fund, and they didn't even get to	11		recollection of my view throughout that, although we
12		the stage, I think, of there being a defence served	12		would win the litigation, the effect, in terms of the
13		before it was recognised that the merits were not such	13		public perception of the suffering which had been
14		that the Legal Aid Board continued to fund it.	14		endured by the haemophiliacs would lead, in any event,
15	Q.	When you say there was that money spent on it, in	15		to a massive outcry for a public inquiry.
16		effect, that money would have gone to the lawyers rather	16		So that's my recollection before I read the
17		than the plaintiffs in the case?	17		papers. I've now read the papers you provided to me.
18	Α.	I regret to say it would, and there was of course money	18		I've read nothing else, apart from reminding myself of
19		spent out of the resources of the Department of Health	19		the variant CJD scheme, because it was relevant to one
20		Licensing Authority on defending the case.	20		of your questions. And quite a lot has come back but
21	Q.	I'm going to turn now to the HIV Litigation, the bulk of	21		the extent to which it is reconstruction from the
22		my questions today are going to be about that.	22		documents, and recollection, is difficult to
23	Α.	Yes.	23		disentangle. I have tried in my statement, and I will
24	Q.	May I begin by asking how much you're able to recall of	24		try today, to make that distinction between what
25		your role in the litigation independently?	25		I remember and what I believe I would have done or said
		5			6
1		at the time.	1	٨	There was there were no concerns. I and the other
1 2		It is difficult and I'll do my best.	2	А.	barristers, and I think all the lawyers, were aware that
2	Q.	Thank you. It appears from the documents we provided	2		there could come a time when there was a conflict. For
4	ω.	you with, and you mention this at paragraph 5.1 of your	4		example, if the Department wanted to take one view in
5		statement, that you were instructed in about mid-1988 at	5		order to resolve the matter of not taking a particular
6		about the time when the writs in the litigation were	6		point, which was important to the, in those days,
7		served. You were instructed by the Department of	7		I think, about 25 or 30 individuals on the Committee on
8		Health, the Licensing Authority and the Committee on	8		Safety of Medicines, all eminent doctors. There never
9		Safety of Medicines, and we'll explore the different	9		came such a time, but we were always as in all
10		interests those groups had in due course.	10		litigation, where you have multiple clients, aware of
10	Α.	Yes, probably initially by the Treasury Solicitor.	10		the possibility.
12	л.	There was a change around that period. Until about then	12	Q.	I'd like to just quickly run through the names of those
13		all litigation was conducted of this kind of level by	13	α.	who were on your legal team because they will be
14		the Treasury Solicitor, with input from departmental	13		cropping up during the evidence today. You were the
15		lawyers. I think, over this period, there came a shift	15		only junior who was instructed throughout; is that
16		and the departmental lawyers became the instructing	16		right?
17		the solicitors formally, whilst the Treasury Solicitor	17	А.	I was the only junior who was instructed throughout. As
18		was in the background. But I can't recollect the exact	18		I read the papers, including some papers very recently
19		legal structure of it. In those days, of course,	19		sent to me, there were, in addition, I think,
20		barristers didn't have contracts, so it was where they	20		Michael Spencer was already a QC when he joined us. He
21		came from. But, in essence, the instructions were on	21		became a silk at about that time. Fiona Sinclair was,
22		behalf of all three of those bodies.	22		I think, my pupil, and turned up at one court hearing.
23	Q.	Were there any concerns, either then or later, that	23		Helen Rogers was involved at some stage. She sadly died
24		there was any conflict of interest between those three	24		of acute asthma, a few years later. But, in effect,
25		bodies?	25		I was the only junior.
		7			8

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 Q. Was it unusual this you'd be the only junior on such a large case? a those helping the licensing Authonly and the CSM were enciph men on the team?. If we had, it would have said so, and it hink by that sing the data difficult there being and, and several counsel, the plaintiffs, as they were then caled, had several counsel, the plaintiffs, as they were then caled, had several counsel, the plaintiffs, as they were then caled, had several counsel, the plaintiffs, as they were then caled, had several counsel, the plaintiffs, as they were then caled, had several counsel, the plaintiffs, as they were then caled, had several counsel, the plaintiffs, as they were then caled, had several counsel, the plaintiffs, as they were then caled, had several counsel, the plaintiffs, as they were then could have assisted at some othelp?, then ave societated by the transury Devine the plaintiffs a very small legal team and quile normal for juniors only to be instructed. The resury Devine receare a QC, by indition so the intiduction of QCs into defence teams, in those days, was unusual the issens of the bace and by unuery then and probably the als diver were then and probably the day that were mether? the issens of the bace and by unuery then and probably the day there mether? the issens of the bace and by unuery then and probably the day that were and the issens of the bace and very or the mether? the issens of the bace and very or the mether? the issens or the mether? the issens or the mether? the very then second the paint the plaintiffs and very ore and requestance						
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4 were not popular, certainly in Government circles in 4 enough men on the team". If we had, level has utiliated in the unce 5 brose days. I mean, in Opran, the manufacturers had 5 so, and I think by that stage I had sufficient influence 7 called, had several counsel. It pelainties, is they we then and the hard. It mean, you have to 7 then we would have got it. 8 recolled has to ba period when and entost all Government. 0 And for the assisted at some point? 9 Island Simon Boow who vent to the House of Lords. 10 So they would have assisted at some point? 10 Island Simon Boow who vent to the House of Lords. 10 A Yes. I chart think thy the attage I had. I need more half; in a the mists 11 the inhuman, and twas delegaled dwn to the panel. 14 Yes. I chart think thy that is the mists 12 be instanced. The Treasury Devil never became 14 Q. You were led by Andrew Collins OC, who wes a senior 13 a very smallegal team and ung the HIV Liggistion cause 17 A. Yes. I bink technically, istat-you earier question istance 14 John they the the tains. 100 the cobled at its the coble at the tains. 100 the cobled at its chart at the coble at			-			
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1		officials who had views about precedents and so on, but,	1		the vast majority of cases were of mild symptoms, of
2		really, which one it was I simply don't recollect.	2		brittle nails and so on. There were only the very
3	Q.	You mention Dr Rejman and strong views. Did they have	3		rarest of cases of more serious things, I think there
4		a particular influence on the way that you ran the case?	4		were two cases of renal failure. So it was a very
5	Α.	No. I mean, he was a source of information because	5		different kind of case.
6		certainly I am not an expert on either haemophilia	6		So I think we talked about this case a lot more
7		or HIV, although I got involved to a certain extent with	7		because it was important and, as you know and will come
8		Professor Miller when I was doing pertussis.	8		on to, it clearly attracted the attention of ministers,
9		He was, if you like, the person we asked when we	9		much more so than Opren ever did.
10		wanted to know the answer to a technical medical	10	Q.	
11		question, I think, and he would write papers, as far as	11		those issues, but before I do, and to assist those who
12		I recollect. But he is the only one of the doctors who	12		are following the evidence today, can I just ask for
13		remains in memory.	13		some fairly, if possible, straightforward explanations
14	Q.	Was there anything unusual about the way in which you	14		of some of the legal concepts involved in the case.
15		were instructed and the instructions that you received	15		It's always dangerous asking a lawyer for an explanation
16		in the HIV Litigation?	16		of legal concepts, but one of the issues that was raised
17	А.	I don't think so. I mean, we were going through	17		was breach of statutory duty.
18		a period when the traditional A2 instructions tied with	18	Α.	Yes.
19		a piece of white string because it was Government	19	Q.	Could you explain to those listening and watching what
20		work were being replaced by much more informal	20		that concept meant.
21		instructions. We of course had nothing like emails in	21	Α.	Yes. I mean, I haven't dealt with breach of statutory
22		those days. So quite a lot was verbal. There was	22		duty for about 25 years, I don't think. So my
23		a certain amount of instructions in writing. And it was	23		recollection is recollection rather than, so to speak,
24		a big and complex case. And although Opren was a big	24		a quasi-expert talking about what I'm doing in 2022.
25		case in the sense that there were 3,000 claimants,	25		Certain obligations are imposed on sometimes
		13			14
4		individuals but earthick on Covernment outbouilies and	4		these duties. In the associate which have service
1		individuals but certainly on Government authorities and	1		those duties. In the case with which I was concerned,
2		entities set up under statutory powers, including this	2		it was decided I was acting for another party that
3		Inquiry. Those who act under those statutes owe duties,	3		because the chief fireman on the day decided that he
4		obviously of care, to conduct whatever they're doing in	4		would switch off the sprinklers, the sprinkler system,
5 6		a proper way, but that duty is generally owed to the	5 6		then his breach of statutory duty was, if you like it
		public at large, to Government, rather than to			was also a common law duty, and that was held to be
7		individual specific plaintiffs. There are areas in which a statutory duty may give	7		actionable. It went all the way up to the Court of
8 9		, , , , , , , , , , , , , , , , , , , ,	8 9		Appeal on the allegation, no duty of care owed, purely
		rise to a claim actionable by individuals, and			to the public at large, and failed.
10		I mean, one of the early cases was about, I think it was	10		That's why, in this case, there was always a scope for the Department, the Health Authorities, not just
11		the Yorkshire Ripper Inquiry, whether the police owed	11		
12		a duty to the victims individually or simply a statutory	12		clinicians, to step beyond their role in performing
13		duty to the public at large to perform their duty in the	13		their public functions and carry out an action which the
14 15		correct way. And the general rule in this kind of case, where there are wide duties owed for the protection of	14 15		courts would regard as having a direct impact on an
16			16		individual, and therefore being arguably actionable.
17		the public, is that there will not be a duty owed to specific individuals unless there's something in the	10		So in general, a statutory duty was unlikely to give rise to a duty of care owed to individuals, the
18		statute which says there should be.	18		duty was to perform for the public interest. And again,
10		And I can give you an example which may sort of	19		equally, in order to show that there was a breach of
20		have some resonance from a different area, which is	20		a statutory duty, you would have to show that the
20 21		another case I did involving the Fire Brigade. The Fire	20		individual entity or minister or official acted in a way
21		Brigade is there they have a public function, they're	21		which is said to be unreasonable as opposed to merely
22 23		there set up by public statute to save lives and protect	22		negligent. The concept of Wednesbury unreasonableness,
23 24		property. Generally they will not be actionable, they	23 24		which is used in planning terms a lot, was there. And
24 25		will not have a duty to an individual in carrying out	24 25		the Court of Appeal, you will know, and you may have
20		15	23		16

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1		covered, concluded that there was unlikely to be a case	1		very difficult to identify in terms of individual parts
2		of statutory duty here but there might be, for precisely	2		of the claim; is that fair?
3		the reasons I've tried to identify rather clumsily.	3	Α.	Very difficult to identify, needs very considerable
4	Q.	And Wednesbury unreasonableness is the concept that no	4		thought in anybody who is going to argue either side of
5		individual, or no minister, properly informed could	5		the line, and, you know, is a sort of thing the judges
6		possibly have taken that decision, reasonably?	6		will agonise over in working out. It's not easy.
7	Α.	Yes, which is several stages beyond "He made a mistake	7	Q.	You've described there the general concepts of the duty
8		and that mistake was negligent in that there was	8		of care and breach of statutory duty. I'd like to ask
9		a failing of his duty of care". So you have to go that	9		you specifically about the importance of this issue to
10		stage further.	10		the Committee on Safety of Medicines and the Licensing
11	Q.	In terms of the duty of care and, as you've described,	11		Authority. This is something that you address at
12		there, a distinction which was drawn in some of the	12		paragraph 11.2 of your statement, but can I ask you just
13		papers as between an operational duty	13		plainly why it was so important to the CSM and the
14	Α.	Yes.	14		Licensing Authority that a duty of care was not
15	Q.	and the policy duty, am I right in understanding that	15	_	established in law against them?
16		the policy duty was the one that would have to be proved	16	Α.	Yes. I mean, the Committee on Safety of Medicines, and
17		to Wednesbury unreasonableness standards, as allocation	17		I don't know how much has already come out in the
18		of resources, decisions on major issues such as which	18		Inquiry about this, was an assembly of 20 to 30 very
19		project to pursue, but the operational policy, how	19		eminent medical people of all sorts of disciplines. And
20		a policy was implemented, would be actionable on the	20		they voluntarily sat on the Committee and gave up their
21		lower standard of negligence?	21		time to consider whether new pharmaceutical products
22	Α.	Assuming that it fell within the scope of duty because	22		should be licensed, whether any licence condition should
23		it was that side of the line, then it would be	23		be imposed, whether they should be withdrawn. And in
24	•	actionable on proof of negligence, yes.	24		doing so, they were balancing the interests of making
25	Q.	And that is a line which is easy to describe here but 17	25		medicines available sometimes at the frontier, where 18
					10
1		there may be risks involved and denving those	1		Now in making those decisions, those individuals
1		there may be risks involved and denying those medicines on the basis that they weren't sufficiently	1		Now, in making those decisions, those individuals
2		medicines on the basis that they weren't sufficiently	2		believed that they were acting for the public at large,
2 3		medicines on the basis that they weren't sufficiently proven.	2 3		believed that they were acting for the public at large, assisting the Department and the Licensing Authority.
2 3 4		medicines on the basis that they weren't sufficiently proven. And as we've seen with things to do with Covid	2 3 4		believed that they were acting for the public at large, assisting the Department and the Licensing Authority. But when I first addressed the Committee on Safety of
2 3 4 5		medicines on the basis that they weren't sufficiently proven. And as we've seen with things to do with Covid over the last two years, where the process has moved	2 3 4 5		believed that they were acting for the public at large, assisting the Department and the Licensing Authority. But when I first addressed the Committee on Safety of Medicines in about 1985 or '86, when they were first
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2 3 4 5 6 7		medicines on the basis that they weren't sufficiently proven. And as we've seen with things to do with Covid over the last two years, where the process has moved incredibly rapidly, there is always a balance between something which is so important in terms of its	2 3 4 5 6 7		believed that they were acting for the public at large, assisting the Department and the Licensing Authority. But when I first addressed the Committee on Safety of Medicines in about 1985 or '86, when they were first brought into the Opren litigation, the concept that those individuals could be sued, even with a Government
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2 3 4 5 6 7 8 9 10 11 12		medicines on the basis that they weren't sufficiently proven. And as we've seen with things to do with Covid over the last two years, where the process has moved incredibly rapidly, there is always a balance between something which is so important in terms of its therapeutic benefits that it should, if possible, be permitted to be marketed, with appropriate warnings if necessary. But, where there are signs of significant side effects which effectively change that balance from a balance in favour of making it available, subject to safeguards, to not making it available at all or	2 3 4 5 6 7 8 9 10 11 12 13		believed that they were acting for the public at large, assisting the Department and the Licensing Authority. But when I first addressed the Committee on Safety of Medicines in about 1985 or '86, when they were first brought into the Opren litigation, the concept that those individuals could be sued, even with a Government indemnity, for their decision-making process, was a matter of real concern, because, as opposed to trying to make a judgment for the overall benefit, reflecting the interests of each person who might be given that product, but also reflecting the risk to those who would
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(5) Pages 17 - 20

1		to be very carefully justified. And that was the way in	1		individuals who were appointed to be on the Committee on
2		which the ministers delegated that difficult	2		Safety of Medicines. They were sued as such. But, if
3		discretionary power to decide at what point a product	3		you like, there was no company that could be struck off.
4		should be licensed, cautioned against, side effects	4		So they were effectively, those who made up the
5		warned against, or withdrawn. That was their job. And	5		Committee on Safety of Medicines from time to time, who
6		the Licensing Authority had the formal job of approving	6		would have been sued. And there was a very real concern
7		or withdrawing the licence as a result.	7		that they would be named.
8		And when licences were withdrawn, you know, on the	8		I think at one stage, it was Abraham Goldberg, who
9		one hand manufacturers would scream and on the other	9		was the chairman of the CSM in Opren, and I'm not sure
10		hand those who were enjoying the benefits of the product	10		that at one stage some of the writs weren't addressed to
11		in alleviating suffering would object. When Opren was	11		Sir Abraham Goldberg and the members of the CSM. There
12		withdrawn, a number of people who found it very	12		was no self-way of insulating them from the risk.
13		beneficial for their arthritis were very upset. So	13	Q.	Was there then a genuine sense that if the duty of care
14		that's probably the long explanation of why it was	14		point was not successful defended, then the system may
15		considered very important that they should be able to	15		struggle and indeed collapse because people would not
16		continue to give that advice, operate in that way,	16		volunteer to do this?
17		without fear of individual actions being brought against	17	Α.	Yes. I mean, always dangerous to have that kind of sort
18		them.	18		of threat, either perceived or given, but I do know,
19	Q.	Can I just pick up on a couple of points from there.	19		because I had, in Opren particularly, four or five
20		You said that the individual members of the Committee on	20		meetings, round rooms with 22 people, each with their
21		Safety of Medicines would be sued. Is that correct,	21		rather old-fashioned microphones, talking into them when
22		that it would be those individuals rather than the body	22		they pressed a button. And there was a very real sense
23		itself that would face the action?	23		that, if we are going to be sued for this, we're just
24	Α.	The I'm searching back in my memory as to their	24		not going to be able to get people to replace us. We
25		precise legal status, but they were a collection of	25		might see out our turns but it's going to be very hard
		21			22
1		to do it.	1		one case by a jury in Texas, I think. The Opren
2		And that was certainly a view echoed by those in	2		plaintiffs tried to sue, I think, in the United States
2 3		And that was certainly a view echoed by those in the Department who were responsible for recruiting the	2 3		plaintiffs tried to sue, I think, in the United States first, and were told they couldn't, and Opren became the
2 3 4		And that was certainly a view echoed by those in the Department who were responsible for recruiting the next specialists, you know. These were the most eminent	2 3 4		plaintiffs tried to sue, I think, in the United States first, and were told they couldn't, and Opren became the first group action where there were multiple plaintiffs.
2 3 4 5		And that was certainly a view echoed by those in the Department who were responsible for recruiting the next specialists, you know. These were the most eminent people in their fields, virology, pharmacology and	2 3 4 5		plaintiffs tried to sue, I think, in the United States first, and were told they couldn't, and Opren became the first group action where there were multiple plaintiffs. In pertussis vaccine by contrast, it was
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2 3 4 5 6 7		And that was certainly a view echoed by those in the Department who were responsible for recruiting the next specialists, you know. These were the most eminent people in their fields, virology, pharmacology and I can't remember the disciplines any more. But, yes, it was a real concern that we wouldn't have what has been	2 3 4 5 6 7		plaintiffs tried to sue, I think, in the United States first, and were told they couldn't, and Opren became the first group action where there were multiple plaintiffs. In pertussis vaccine by contrast, it was an individual-by-individual approach, and that was a disaster. There were two cases which were tried, the
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1		It had a dual function. Of course, they were	1		there is no legal oversight, as it were, of the CSM?
2		there to try and represent the interests and promote the	2	Α.	I understand the concern, and I think the reason that
3		benefit of those who had suffered, but this was also	3		there is no duty of care owed is because the function
4		a way in which they could succeed now.	4		being carried out is one being carried out for the
5		Claims against pharmaceutical companies are	5		public at large and, therefore, is not one which gives
6		heavily defended. I think the concept was: if we sue	6		rise to a claim. I mean, we have moved in the last
7		the Government, they may be a softer target. And there	7		50 years from negligence cases being comparatively
8		was, therefore, this tendency to bring the American	8		difficult, to the sort of "where there's blame there's
9		blame culture across and have massive claims with	9		a claim" mentality.
10		multiple plaintiffs against the CSM and the Licensing	10		It was not at all unusual at that stage that
11		Authority, which, if successful, would have been very	11		genuine suffering would not give rise to a claim. If
12		damaging. And, of course, that went on into the other	12		there's been negligence somewhere down the line, then it
13		class actions.	13		does. And, of course, there are two aspects to that.
14		This was all legal aid funded, and benzodiazepine	14		First of all, if the clinician doesn't give the
15		was a classic example where there were I can't remember	15		appropriate warnings or doesn't consider the warnings
16		how many thousands of plaintiffs. But it came from	16		when deciding whether to treat their patient in
17		America, and a number of firms grew very large and	17		a particular way, they will be at fault and there will
18	_	successful on the back of it.	18		be a claim.
19	Q.	One point I've been asked to put to you by some of the	19		But there are certain things. If the Fire Brigade
20		Core Participants is that if the claim for a duty of	20		comes and arrives too late, they have no duty of care:
21		care against the Committee on Safety of Medicines is	21		it burns down, there is no recourse. If there was
22		successful resisted, is there not what lawyers would	22		a position where 22 men 25 men made a mistake, then
23		call a lacuna, in terms of the legal responsibilities of	23		the question is "Well, why shouldn't they be sued? Why
24		the CSM? How is that scare circle how is that circle	24		shouldn't we have damages for that?" But, of course,
25		squared? Is there a problem there, in the fact that	25		the concept of duty of care in professionals, following
		25			26
		the Deleveration of the second state laws	4		Development for which there would be a server of a time
1		the Bolam standard I'm sorry, it's back into law	1		Department, for which there would be a cause of action
2		again is that it's got to be a decision, not that no	2		in negligence.
3		reasonable minister that's the Wednesbury test but	3		So there isn't, I don't think, a lacuna of real
4 5		that no reasonably competent professional in that profession would do or no opinion they would hold.	4 5		significance. Where there are situations where the law
6			6		does not give a remedy, and the law is, I'm afraid, a pretty rough way of trying to do justice, because it
7		When you've got 20 or 25 or 30 eminent people and	7		has to be, it can't cater for everything, and judges, as
8		they all collectively decide to do something then the legal standard for "no reasonably competent practitioner	8		well as lawyers, are human, then there is that gap, and
9		would do it" could only be met in the most extreme	9		that is where Government action, if appropriate, is
		-	9 10		
10		circumstances. They all went out to dinner and got	11		needed to intervene. And that's an area you may discuss
11 12		drunk and had a licensing day the next day and passed the papers through without reading it. There would	12	~	later, which I have some pretty strong views on. We will come on to that shortly.
12		probably be a cause of action then because that would be	13	Q.	What I'd like to do now is take you to an advice
			14		that was written by Andrew Collins in October 1989. Can
14 15		an operational action. But when they all get together	14		-
16		and they think and read the papers and they debate and	16		we have on screen, please, Paul, DHSC0006484_012.
17		they decide, then it must follow, in my view, that you cannot say that no reasonably competent person would	17		If we could have the second page of that. That's just the fact summary. We can see it is entitled
18		have done it. So even if there was a duty of care, then	18		"Liability of the Department of Health and of the CSM in
		-			
19 20		you would fail on negligence on that test because	19		Respect of Personal Injury caused by Licensed Medicinal
20		they've considered it.	20		Products. Advice". Paragraph 1 says: "The need for this advice arises from two actions
21 22		Again, you have to have the position, if there's something they haven't considered, a piece of	21 22		
22 23		something they haven't considered, a piece of information which has been missed, then that's probably	22 23		which are currently being pursued against the Crown. The first is the so-called HIV Haemophiliacs Litigation,
23 24			23 24		in which a Master Statement of Claim has been served
24 25		something which the Department failed to provide to them, and that would be an operational duty of the	24 25		alleging breaches of duty and negligence against the
20		27	20		28

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1	Department, both as Licensing Authority and as having	1		the document. There is a redaction over the initials,
2	responsibility for the provision of medical services	2		but they are "AC", and we know from those initials and
3	under the National Health Scheme, the CSM and the	3		from the address of the chambers that that is
4	Regional and other Health Authorities. The allegations	4		Mr Collins, as he then was, 18 October 1989.
5	against the Department as Licensing Authority and the	5		So we have some context, we heard from
6	CSM are based on failures to vary or revoke licences	6		David Mellor last week (sic) that, at around this time,
7	because of the known risk of Hepatitis, the granting of	7		he was questioning whether or not the duty of care point
8	licences to non-heat-treated Factor VIII concentrates	8		should be taken, at least by the Department of Health,
9	and a failure to appreciate in time the AIDS risk.	9		and the CSM and Licensing Authority were also giving
10	Similar allegations are made against the CSM in that it	10		their views on that.
11	failed to give the necessary advice which would have led	11		The first question arising from this: why was it
12	to the removal of the offending product from the	12		that this advice was given about both of the actions
13	market."	13	_	rather than just the HIV Litigation?
14	I won't go on to read the rest of that paragraph		Α.	I don't know why it was. I can reconstruct at that
15	but if we could move on to the second paragraph, on	15		stage, because the attack on the CSM and the Licensing
16	page 3 of the electronic document:	16		Authority and the Opren litigation had raised these real
17	"The second group of actions (although only one	17		concerns which we discussed, but had been successfully,
18	has so far materialised) is a claim by a Plaintiff who	18		I think, by this stage, fought off, and it arose in two
19	alleges that he has been injured by becoming addicted to	19		contexts: one small group of plaintiffs, haemophiliacs,
20	Valium (benzodiazepine). It is said that the Department	20		very, very serious consequences; the other very large
21	and the CSM ought to have warned of the danger of	21		group of plaintiffs, usually much more mild
22	dependency."	22		consequences, addiction to Valium raised the
23	So this advice is being given in respect of both	23		possibility that this was the next wave of the onslaught
24	of those actions.	24		of trying to impose a duty on the Licensing Authority
25	Ifwe, Paul, could go briefly to the page 14 of	25		and the CSM, which would enable a claim to be brought
	29			30
1	against the public purse, through the CSM, every time	1		much, much more serious matters, with all the terrible
2	a medicinal product proved to have unexpected side	2		consequences which you've heard so much about.
3	effects and unexpected consequences.		o	I'm not going to go through all this advice. The
4	And that was regarded as very serious and needed	4		general tenor of it is that a duty of care point should
5	to be looked at, I think, together, so there was	5		be taken for the Department of Health and the Licensing
6	a consistent view taken between the two.	6		Authority and CSM.
7	And in a sense, as I put elsewhere, I think, in my	_	A.	A duty of care point?
8	advice, the combination of CSM and Licensing Authority			A duty, sorry, yes: a duty of care point. The case for
9	with the Department, raised the difficulty. The	9	ч.	the latter, the Licensing Authority and the CSM, was
10	combination of claims for benzodiazepines being brought,	10		particularly strong.
11	I don't think necessarily by exactly the same group of		A.	Yes.
12	lawyers, but there was some overlap at same time as		Q.	I am just going to take you to electronic page 13 and
13	this, meant that the consequences of any decision taken	12	ω.	paragraph 9. This is towards the end of the advice and
14	as to the way in which cases were to be handled, and the	13		this from Mr Collins. I emphasise that you weren't
15	consequences of the imposition of duty of care in	15		a signature to this advice:
16	either, was much wider than just limited to the	16		"I should add that, from the information I have
17	haemophiliac case.	10		seen, I think that there are reasonable defences to all
18	So it was unnecessary and, in retrospect,	18		claims on the merits. But I am sure that the existence
19	unsatisfactory aspect, that the importance of preserving	10		and, if it exists, the extent of any duty of care must
20	the position of the CSM and the Licensing Authority,	20		be settled and these cases are the vehicles to enable
20 21	separately from the Department, was all the stronger	20 21		that to be done. Once the decision has been made to
21	because of this perceived risk of benzodiazepine and	21		leave it to the courts, it must be dealt with properly,
~~	seconde of this perceived tisk of perizodiazepine and	44		is a set of the courts, it must be dealt with property,
23		23		taking all properly arguable points "
23 24	further claims down the line being brought.	23 24		taking all properly arguable points."
24	further claims down the line being brought. Benzodiazepine being a relatively mild condition, such	24		Am I right to read that as a fairly strong steer
	further claims down the line being brought.			

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1		run the duty of care points that you thought were	1		lawyers and that is everybody from the Attorney
2		properly arguable?	2		General and Solicitor General had to be consulted down
3	Α.	I'm sorry, can you repeat that?	3		through the departmental lawyers and the counsel team
4	Q.	Am I right in reading this as being a fairly strong	4		should be instructed to take the point. And if you take
5		steer to ministers from Mr Collins that the lawyers	5		the point, you have to take it seriously. You don't
6		should be left to run the duty of care points that they	6		take it halfheartedly. If you are going to take it
7		considered to be properly arguable?	7		halfheartedly, then you should waive it.
8	Α.	I don't think I'd put it quite like that. I mean,	8	Q.	I'm going to take you to one more piece of this advice
9		Andrew was always robust, and he came from a family	9		as well. Electronic page 9, paragraph 7.3.
10		tradition of robustness. His father was the dean of	10		Paragraph 7.2 concerns the legal arguments about
11		St Paul's and a leading member of the CND, and Andrew	11		whether or not there is a duty of care owed by the CSM
12		followed in his trenchant views. I think what was being	12		and there has been similar discussion about duty of care
13		said here is that, despite the fact that it was	13		owed by the Department. In 7.3 Mr Collins wrote this:
14		a reasonable defence on the merits, irrespective of the	14		"If this is right [his legal analysis], there is
15		legal duty, it was necessary, with claims being made,	15		no alternative Defendant in the Haemophiliac cases and
16		particularly against the CSM and Licensing Authority,	16		they will not be compensated through the courts. I note
17		that the existence of those of such a claim and its	17		that a decision had been taken not to compensate them in
18		nature, if it existed, needed to be determined for the	18		other ways, for example a scheme such as applied by the
19		future because, otherwise, if you say no duty, nobody is	19		Vaccine Damage Act. There is, I think, much to be said
20		just going to go away. The lawyers were keen to run the	20		for some such scheme to compensate those who fall
21		point, and if it were conceded, then there would be	21		victim, through no fault of their own, to a medical
22		serious consequences.	22		disaster. But that is a political and not a legal
23		So since it was clear that you couldn't just say	23		problem, although a sympathetic judge may be persuaded
24		"Well, let's put it to one side", you had to take the	24		to take asked of the absence of alternative compensation
25		point, once you decide to take the point, the Government	25		in deciding whether there is a duty of care, that being
		33			34
1		one of the surrounding circumstances."	1		is an absolutely massive case for some form of
2		First of all, did you agree with that paragraph	2		compensation of an extra legal sort. And I mean that
2		and the sentiments expressed in it?	2		certainly informed my view throughout, and we see it
4	A.	I can't remember whether I put it in my statement.	4		happening. You know, whether it is aid to Ukraine or
5	Λ.	I never would have quite used the trenchant language of	5		whether it is aid to victims of disasters at Aberfan or
6		Andrew, who was pretty senior, and I was pretty junior	6		anywhere else, that is a function of Government to fill
7		and still fresh from the Army, where we did what we were	7		in the gap between what the law will do and what it is
, 8		told, as opposed to saying what people should do.	, 8		proper to do. But the question of what it is proper to
9		I entirely agreed with the concept and, throughout	9		do is a political decision, not a legal decision.
10		my involvement in this, this is one of my strong	10		And that's why I was always careful not to push my
11		recollections, it is really important that part of the	11		views down the throat of those instructing me, in the
12		Government's function is to look with care and love at	12		way that Andrew probably felt able to do so, but to make
13		all those in its constituency, and where there is	13		clear whenever asked my view and, you know, you'll come
14		a legal claim, there is a legal claim, and you deal	14		on to it, but my absolute overriding view was that, in
15		with it under the law. Where there is not, you then	15		this case, the plaintiffs would all fail. They would
16		have to consider the human and the resource and the	16		all go through the agony of a trial and they would lose,
17		policy case. You cannot compensate everybody who is the	17		and get no compensation.
18		victim of misfortune. That is impossible in a society	18		But such is the terrible nature of the
19		with limited resources.	19		consequences on this already much afflicted group of
20		Therefore, if you have a really serious	20		people, that at the end of it, the public outcry for
21		misfortune and there are many medical misfortunes, as	21		compensation would have been all the louder and the
22		mistakes have been made and knowledge is learned, things	22		Government would have ended up paying lots of money to
23		you could have done 20 years ago, if somebody had	23		lawyers, which is not a thing I'm very keen on, and then
24		realised it, and then it was discovered. But Government	24		having to spend more money on compensation because of
25		should be there to make political decisions where there	25		the outcry. And my view is that I'd rather have all the
		35			36

(9) Pages 33 - 36

		and the second state of th	,		and the second of the second day of the second s
1	~	money go to compensation and dispense with the lawyers.	1		policy, and attempt to strike them out as
2	Q.	I'm going to finish on the duty of care point by just	2		non-justiciable, leaving the other aspects of the
3		briefly going to a further document which is	3		Department's involvement, ie its
4		DHSC0041034_007. It's dated 24 October 1989, so a few	4		administrative/operational function, intact.
5		days after what we were just looking at, and it is	5		"In this way perhaps, the Government would not be
6		a submission from Sue Armstrong, a solicitor to	6		seen as eroding its responsibilities, but merely
7		Mr Wilson in the Department of Health, and it is about	7		directing them towards the right quarter. It would also
8		the duty of care and how it should be run in the	8		reduce the complexity and cost of the litigation, thus
9		litigation.	9		assisting the Plaintiffs to some extent."
10		If we look at the second paragraph, we see:	10		Do we take from this that advice then is that, to
11		"Counsel advises that it would be very difficult	11		run the duty of care point in full for the Committee on
12		to take the point in Valium and not in HIV. Questions	12		Safety of Medicines and the Licensing Authorities, but
13		would inevitably be asked as to why we were doing so,	13		to draw that distinction which you were talking about
14		when the issues vis-a-vis the [Licensing Authority] and	14		earlier between the operational and the policy
15		the CSM are identical. This could in itself cause bad	15		distinctions for the Department of Health.
16		publicity about the Department's attitude to sufferers	16	Α.	
17		from tranquilliser dependency."	17		decision as to whether you go for earlier
18		Then we have a paragraph talking about a potential	18		self-sufficiency in blood products and Factor VIII, and
19		variation. Then we have this:	19		the resources you put to it is a policy non-justiciable,
20		"Counsel has suggested the following approach:	20		when you have decided what you are going to do, the way
21		"1) We take the point on behalf of the [Licensing	21		in which the Department goes about it and at the speed
22		Authority] and the [Committee on Safety of Medicines] in	22		it does so, and any failure to make progress or look at
23		both.	23		avenues, can go into the operational side.
24		"2) So far as the Department goes, in HIV we	24		So there is a remedy for the failure to do what
25		raised the issue of allegations that go to questions of 37	25		policy decides competently and in a timely manner, but 38
		0,			
4		the actual valid decision is cutaide the remit of the	4		Madisings and the Licensing Authority on
1		the actual policy decision is outside the remit of the	1		Medicines and the Licensing Authority on
2		court.	2		19 October 1989, so at the same time as this discussion
	~	The constitutional university has break that is that the			was taking alass
3	Q.	The constitutional principle behind that is that the	3		was taking place.
4	Q.	democratically elected Government is responsible to	3 4		We have, first of all I won't ask for it to be
4 5		democratically elected Government is responsible to Parliament for those political decisions?	3 4 5		We have, first of all I won't ask for it to be brought up, but there is a reference which is not in
4 5 6	A.	democratically elected Government is responsible to Parliament for those political decisions? Yes.	3 4 5 6		We have, first of all I won't ask for it to be brought up, but there is a reference which is not in your statement, so I give it for the transcript:
4 5 6 7		democratically elected Government is responsible to Parliament for those political decisions? Yes. To the best of your knowledge, is this the approach that	3 4 5 6 7		We have, first of all I won't ask for it to be brought up, but there is a reference which is not in your statement, so I give it for the transcript: DHSC0019630. Which is, in effect, an agenda for the
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4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23	А. Q. Q.	democratically elected Government is responsible to Parliament for those political decisions? Yes. To the best of your knowledge, is this the approach that was then taken for the rest of the litigation on behalf of the Defendants? Yes, I believe so. I've seen nothing I mean it sounds right. I've seen nothing in what you sent me to suggest that we changed. Just to conclude on this, at paragraph 17.2 of your statement, you state that there was a decision by Mr Justice Ognall not to try these matters as preliminary issues on 5 December 1989. Now, that is something that both the plaintiffs and the central defendants had wanted but other defendants had not wanted. Mr Justice Ognall said, "We're not going to have a trial about that now, we will try everything together in due course"; is that a fair summary? Yes. I'm going to move on, then, to a conference that you had	3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23		We have, first of all I won't ask for it to be brought up, but there is a reference which is not in your statement, so I give it for the transcript: DHSC0019630. Which is, in effect, an agenda for the conference which was sent by letter, by Mr Powell, sent to Mr Desai but also to you, and he said that he wanted to consider three issues: levels of compensation if the case is lost; advice on the likelihood of the success on the preliminary issues before going on to consider settlement; and, thirdly, the Sunday Times campaign for compensation that was running at the same time. It's that issue that I'd like to pick up on in particular. Yes. If we could have on screen, please, DHSC0041034_015. This is a note that was made of the conference by somebody who attended. It's not signed. You say in your statement at paragraphs 14.12 that "this was a rather sketchy note", and you express some concern about relying on this rather than on the written advices that you gave during the hearings, and that is
4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24	А. Q. Q.	democratically elected Government is responsible to Parliament for those political decisions? Yes. To the best of your knowledge, is this the approach that was then taken for the rest of the litigation on behalf of the Defendants? Yes, I believe so. I've seen nothing I mean it sounds right. I've seen nothing in what you sent me to suggest that we changed. Just to conclude on this, at paragraph 17.2 of your statement, you state that there was a decision by Mr Justice Ognall not to try these matters as preliminary issues on 5 December 1989. Now, that is something that both the plaintiffs and the central defendants had wanted but other defendants had not wanted. Mr Justice Ognall said, "We're not going to have a trial about that now, we will try everything together in due course"; is that a fair summary? Yes. I'm going to move on, then, to a conference that you had with the Department of Health and those representing the	3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24		We have, first of all I won't ask for it to be brought up, but there is a reference which is not in your statement, so I give it for the transcript: DHSC0019630. Which is, in effect, an agenda for the conference which was sent by letter, by Mr Powell, sent to Mr Desai but also to you, and he said that he wanted to consider three issues: levels of compensation if the case is lost; advice on the likelihood of the success on the preliminary issues before going on to consider settlement; and, thirdly, the Sunday Times campaign for compensation that was running at the same time. It's that issue that I'd like to pick up on in particular. Yes. If we could have on screen, please, DHSC0041034_015. This is a note that was made of the conference by somebody who attended. It's not signed. You say in your statement at paragraphs 14.12 that "this was a rather sketchy note", and you express some concern about relying on this rather than on the written advices that you gave during the hearings, and that is something, of course, that we will keep in mind. But if
4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23	А. Q. Q.	democratically elected Government is responsible to Parliament for those political decisions? Yes. To the best of your knowledge, is this the approach that was then taken for the rest of the litigation on behalf of the Defendants? Yes, I believe so. I've seen nothing I mean it sounds right. I've seen nothing in what you sent me to suggest that we changed. Just to conclude on this, at paragraph 17.2 of your statement, you state that there was a decision by Mr Justice Ognall not to try these matters as preliminary issues on 5 December 1989. Now, that is something that both the plaintiffs and the central defendants had wanted but other defendants had not wanted. Mr Justice Ognall said, "We're not going to have a trial about that now, we will try everything together in due course"; is that a fair summary? Yes. I'm going to move on, then, to a conference that you had	3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23		We have, first of all I won't ask for it to be brought up, but there is a reference which is not in your statement, so I give it for the transcript: DHSC0019630. Which is, in effect, an agenda for the conference which was sent by letter, by Mr Powell, sent to Mr Desai but also to you, and he said that he wanted to consider three issues: levels of compensation if the case is lost; advice on the likelihood of the success on the preliminary issues before going on to consider settlement; and, thirdly, the Sunday Times campaign for compensation that was running at the same time. It's that issue that I'd like to pick up on in particular. Yes. If we could have on screen, please, DHSC0041034_015. This is a note that was made of the conference by somebody who attended. It's not signed. You say in your statement at paragraphs 14.12 that "this was a rather sketchy note", and you express some concern about relying on this rather than on the written advices that you gave during the hearings, and that is

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1		final paragraph, what is recorded in the note is this:	1		litigation, there was an attempt to run a press campaign
2		"Regarding the articles appearing in the	2		in parallel with the legal proceedings in order to seek
3		Sunday Times, Counsel said that these were tiresome and	3		to influence a court of public opinion, and those who
4		showed that the plaintiffs know what is going on but the	4		were decision makers. And, you know, it happens all the
5		article[s] do not amount to concept. The articles might	5		time. And people do it in a plaintiffs will often
6		be an attempt to influence the trial Judge. All the	6		try to engage the press, try to get them there, try
7		articles boil down to saying, is that the Government	7		to it's the sort of stuff I do now, about
, 8		should provide compensation. Counsel has told the other	, 8		big commercial cases try to get public sympathy for,
9		side that they should be careful what they say in the	9		you know, the conduct of the defendant or whatever it
10		Sunday Times. In answer to a question from	10		may be.
11		Mrs S Armstrong [solicitor], Counsel said that press	11		In this case, by running it in parallel with the
12		publicity in Opren litigation was distinguishable from	12		litigation, and effectively suggesting that this was
13		the present press publicity because in Opren, the Court	13		the only correct outcome, there was no doubt that there
14		had a supervisory role and the object of the press	13		was a hope that this would influence both the judge and
15		cuttings was to influence the Court. Counsel said that	15		the defendants and government into taking an approach
16		there might be contempt of Court if there is a repeated	16		which was not strictly legal. And, you know, it's
17		and persistent campaign but contempt of Court had not	10		perfectly justifiable, I've seen it happen, I've seen
18		vet been committed. Counsel advised that the DHSS get	18		opening days the opening day of the human growth
19		the previous Judgment of Mr Justice Hirst and pass the	10		
20			20		hormone trial, there were about 60 press people there.
		press cuttings to the trial judge, Mr Justice Ognall."	20		Nobody left until the end. So press campaigns are used as a vehicle in
21 22		Are you able to recall now what that issue with Opren litigation was in respect of the press?	21		
		No, I can't recall specifically. In the Opren	22		litigation. I deplore the habit. I understand why
23 24	Α.	litigation, to my recollection, and because this became	23 24		people do it. I don't recollect what it was that made, by the
24 25			24 25		look of it, Mr Justice Hirst say something about
25		a frequent approach of plaintiff lawyers in this kind of 41	20		42
1		I suspect the manufacturers took a point in Opren. It	1		In my view, no. Had we tried to muzzle it? No.
2		would be more their style than the government's, to take	2		Written to the court and asked them to restrain it, try
3		a point and say, "You shouldn't be doing it".	3		to put pressure on it? I don't know what, if anything,
4		So I think the Department, as many, many	4		happened between Andrew Neil, I think was the editor in
5		defendants, particularly those public servants, are	5		question, and any influential people within Government,
6		uncomfortable with publicity, hence raising this	6		but I am not aware of anything which crosses a line
7		question.	7		between disliking publicity and enduring it.
8	Q.	Did you feel either then or at any time during the	8	Q.	Moving on to a separate part of the note then, if we
9		litigation that the Department was taking inappropriate	9		stay on the same page, please, electronic page 2 of that
10		attitude towards press coverage?	10		document, four paragraphs down, there is a discussion of
11	A.	No, because it didn't do anything about it. I mean,	11		the slightly gnomic comments on the merits of the
12		it's human nature not to like it. It doesn't actually	12		case and the issue about preliminary issues being tried.
13		help the decision-making process, whether within the	13		But then right at the bottom, just the final two
14		Department it, you know, puts potential witnesses off	14		sentences;
15		track. It's diversionary. You're doing litigation, you	15		"Counsel feels that the plaintiffs will lose the
16		are trying to get the best evidence in order to present	16		case. Ministers, he felt, should consider
17		the law and the facts to the court, and it's	17		compensation."
18		a distraction.	18		This not your note, but doing the best you can,
19		So they didn't like it. Is it inappropriate of	19		looking back on it, that second sentence "Ministers, he
20		them to say, "Can we do anything to stop it?" I think	20		felt, should consider compensation", what do you think
21		defendants do that all the time. Did we take any steps	21		you were saying
22		to do anything it looks as though we may have made	22	Α.	
23		sure that Mr Justice Ognall was aware of what was being	23		already I think today, which is that from what I knew
24		said in the press, if he didn't read it over his	24		about or believed to be the case about legal duties,
25		Rice Krispies in the morning. Is that inappropriate?	25		which we've covered, the extent of duty of care, what
		43	20		44

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1		I had seen of the documentation and the difficulty of	1		still there. So that is the kind of thinking which
2		proving an actual breach of duty, if there was a duty at	2		I had throughout, and which informed my view of
3		all, and the problems of causation, I was "confident"	3		subsequent litigation.
4		is a wrong word, but I was strongly of the view that the	4		And I was probably saying that in probably less
5		claims would fail as a matter of law, and the judge	5	~	sophisticated terms because I was 30 years younger.
6		would have to dismiss the claims on the law, but	6	Q.	I note for the transcript that you also deal with this
7		because I mean, the simple fact of haemophiliacs	7		point at paragraph 14.6 of your witness statement, to
8		suffering from HIV is poignant and tragic enough in	8		which people can refer later.
9		itself; if you have a trial where victims and their	9		Do you recall what response you got from the civil
10		family are recounting the consequences, you will get an	10		servants and the instructing lawyers when you made these
11		outcry for compensation. And the reason you get an	11		kind of points? Was there any pushback that you
12		outcry for compensation is not a sort of bad thing we	12		shouldn't be going there, you should just be giving the
13		want to try to avoid, it's because there is a really	13		legal advice?
14		strong case for compensation, and therefore it's not	14	Α.	No, I don't think so. I mean, there is a distinction
15		my job as a lawyer to say, "As a matter of policy you	15		between that which they recognised and took on board,
16		should compensate". It is my job as a lawyer to say,	16		and there was a theme, which comes through the papers
17		"There is a huge compassionate case here, and my best	17		you sent me, that we need to be very careful before we
18		judgment is that the consequences of a trial would be an	18		go down the route of ignoring whether or not we have
19		even greater outcry and one which ministers would find	19		a legal liability, because you get the floodgates
20		it very hard to resist". Particularly because it	20		argument. So there's always a balance between trying to
21		spanned two administrations and so it was not going to	21		do the right thing for a particular group, and creating
22		be a party and party issue, it was a cross-party issue.	22		a precedent.
23		And it's exactly I mean, you don't simply get	23		And then there's the question of, when you advise
24		closure because the case is lost and everybody goes	24		ministers, what do ministers do about it? You don't
25		home, because the haemophiliacs and their family are 45	25		advise ministers, "We have no liability, you should be 46
1		paying". It's like saying to an insurer, as an advisor,	1		difficult condition, the hereditary nature of it and
2		"This insurance policy does not cover this claim but	2		this blow of what is not only an appalling condition,
3		they're nice people and they've had a disaster, so you	3		where we all believed that everybody that became HIV
4		should pay". You have to say what the law is and they,	4		positive would die in a very short period but, in
5		insurers and Government ministers and departments, will	5		addition, the social stigma attached to HIV because of
6		on the whole expect you to hold the line of legal	6		its origins put them in a special case. And I think
7		liability until or unless someone decides to do	7		everybody recognised that.
8		something different.	8		There is a distinction because the Department, of
9		So these were comments deliberately not based on,	9		course, had to deal with lots and lots of cases of
10		"I think you as a minister or as a department should	10		medical problems and things that go wrong, whether it's
11		pay", it's "I think that these will be the consequences,	11		complaints about shortage of supplies in hospitals and
12		so I as a lawyer can legitimately tell you that this	12		people dying because they are waiting for treatment.
13		case is so strong compassionately that if we win it, you	13		So there has to be a slightly harder edge, but
14		will still lose in the sense that you'll have to	14		I have no doubt the haemophiliacs were particularly
15		compensate them."	15		recognised by the Department as requiring sympathy,
16	Q.	1	16		whatever the legal consequences turned out to be. And
17		personal sympathy for the plaintiffs and what they had	17		it was a tension between the need to preserve (a) assets
18		been through. Did you get a sense that that sympathy	18		and resources for the right thing, (b) the legal
19		was shared by those who were instructing you, the civil	19		precedent, and (c) do what one can, and you see that.
20		servants and the solicitors?	20		You missed out a paragraph, I think, somewhere earlier,
20 21	A.	Yes. I mean, I have to distinguish in my memory between	20		about an accretion to the Macfarlane Trust.
21	Π.	this, human growth hormone and variant CJD, because	21	Q.	Yes.
22 23		after 20 and 30 years they do tend to merge together.	22	Q. A.	So the Government was doing something outside
23 24			23 24	А.	litigation. And that was, I think, a recognition of the
		I think everybody was acutely aware of the unique			-
25		situation of the haemophiliacs. It's desperately 47	25		sympathy the Department and everybody else and ministers 48
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					(12) Pages 45 - 4

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1		had of this situation. So that's probably rather	1		usual rules of disclosure, which means that a Government
2		a long answer but that's my recollection.	2		department, in this instance, doesn't have to produce
2	MR	HILL: Just so that we have it in context, the	2		material to the other side in litigation because there
4	WIT	Macfarlane Trust had been set up the previous year and,	4		is an overriding public interest in maintaining the
5		shortly after this conference this is in	5		confidentiality of that material?
6		October 1989 in November 1989, a further payment was	6	A.	Almost. My understanding was and is that where
7		made to the Macfarlane Trust.	7	л.	a document falls into that class, it's not the
, 8		Sir, I note the time and I'm about to move on to	, 8		Department doesn't have to, but the Government must not.
9		a different topic.	9		The only person who can decide that the document should
10	SIR	BRIAN LANGSTAFF: Yes, well, we will take a break now	10		be handed over, despite that public interest, is the
11	0	until 11.45.	11		judge.
12		You know what I'm going to say now: you're giving	12	Q.	
13		evidence. You must not discuss the subject of your	13	ч.	but the point you make there about it being a duty and
14		evidence with anyone, whoever that person is. You can	14		not a discretion the Government must not allow this
15		talk about anything else you like. That, of course,	15		material to be disclosed is an important one.
16		applies to all breaks.	16		When you were asked to advise on public interest
17		11.45.	17		immunity during the HIV Litigation in 1989 and 1990, how
18	(11	.18 am)	18		much experience did you have in PII matters?
19	((A short break)	19	A.	Relatively little. I think, from reviewing some of the
20	(11	.45 pm)	20		documents you provided me with, that there was some
21	•	RIAN LANGSTAFF: Yes.	21		involvement in relation to Opren. It is possible that
22		HILL: Mr Fenwick, I'd like to turn now to the issue of	22		I had looked at it in relation to one or two other bits
23		public interest immunity in the HIV Litigation. Just so	23		of litigation I've handled for the Treasury Solicitor.
24		that those following understand in broad terms what this	24		But relatively little, which is why, as I think
25		means, would you agree that this is an exception to the	25		I recorded in my advice, I had discussed it in detail
		49			50
1		with Andrew Collins and then later discussed it with the	1		section 18 of your statement a conference that took
2		Treasury Devil.	2		place on 18 May 1990, of which we have a rough note.
2	Q.	That's John Laws?	2		The Inquiry has looked at that before. It's the note
4	A.	John Laws, yes.	4		that refers to "We must stop destruction on the date
5	Q.	Is it a fair assumption both of those had vast	5		that litigation comes on". I'm not going to take you to
6	ω,	experience in PII matters?	6		that because you've dealt with the issues in your
7	Α.	Vast experience, yes.	7		statement, and I'm merely draw people's attention to
, 8	Q.	You say in your statement at paragraph 18.2 that you	, 8		those. What I would like to take you to, though, is the
9	ч.	recall a telephone conversation with John Laws	9		written advice you gave on PII, which is 4 July 1990.
10		specifically on PII matters and that you took some	10		If we could have on screen, please, DHSC0004360_072.
11		reassurance in the fact that he agreed with the approach	11		Building on the discussion that we had earlier, am
12		that you had taken?	12		I right to conclude that your view is that this is
13	A.	Yes, what I recollect is discussing with Andrew Collins	13		a better evidence about the approach that was taken to
14	7.	in advance, doing my work, discussing it with the	14		PII than the rough note of that conference on 18 May.
15		Department, rechecking it, and then John Laws having	15	A.	Yes.
16		access to what I'd done and then saying he'd like to	16	Q.	This advice, I won't take you to the page, but it is
17		have a conversation with me. You know, in the odd way	17	ч.	signed by you alone, dated 4 July 1990, and it is
18		that memory helps you, I remember exactly where I was	18		entitled "Re: HIV Litigation Claim to Public Interest
19		sitting when I had that conversation. I knew John but	19		Immunity". If we just look at the first paragraph
20		this was the first time that I'd spoken to him and, so	20		there, what you write is this:
20		to speak, his subordinate doing an exercise of real	20		"The Classes of Documents Involved
21		importance to get it right.	21		"1. The documents which I have been instructed to
22 23	Q.	His view was that you had got it right?	22		consider fall into 6 different categories for each of
23 24	Q. A.	As far as I can recollect, yes.	23		which a possible claim to Public Interest Immunity may
24	Q.	You address at paragraph 18 of your statement or	24		be made out"
20		51	20		52

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1		I'm not going to take you through every word of	1		the direct basis for a submission to Ministers"
2		this document but if we just look at the different	2	Α.	Yes.
3		categories you identify, the first is there:	3	Q.	But if we go over to the next category:
4		"Documents revealing the process by which policy	4		"Briefings to Ministers directly relating to
5		decisions were arrived at, comprising:	5		Parliamentary questions or debates, and particularly
6		"(1) Submissions to Ministers and exchanges with	6		draft Parliamentary Answers and notes in respect of
7		Ministers	7		possible 'Supplementary' Questions"
8		"(2) Exchanges between senior officials	8		The next category is:
9		specifically forming part of the process by which	9		"Briefing notes and draft replies to letters,
10		submissions, draft submissions and policy documents were	10		consisting of:
11		brought into being."	11		"(1) Briefing notes to Ministers prior to other
12		If we go over to the next page, please sorry,	12		meetings at which they were expected to make a statement
13		the bottom of that page still. The second category of	13		or declare their views;
14		documents to which PII may be attached were:	14		"(2) Draft answers to be sent by ministers in
15		"Position papers and similar documents which were	15		response to letters received by them."
16		prepared by civil servants and directed towards the	16		5, the fifth category:
17		formulation of future policy and plans"	17		"The original unexpurgated versions of documents
18		Next page, please.	18		in or by which doctors and others supplied details of
19	Α.	There is that important caveat at the bottom.	19		patients' illnesses and/or adverse reactions in
20	Q.	Sorry, if we go back then, please. We'll read the whole	20		confidence to or for the CSM and/or Licensing Authority.
21		of that:	21		"6. Documents forming part of an exchange of
22		"Position papers and similar documents which were	22		information between the UK Government or foreign
23		prepared by civil servants and directed towards the	23		governments or government agencies, containing
24		formulation of future policy and plans, but which were	24		information or views expressed by such foreign
25		not designed to be placed before Ministers or to form 53	25		government on the basis of express or implied 54
		55			04
1		confidentiality between governments	1		nogo 3
1		confidentiality between governments. "	1		page 3.
2		I'll just pause there for a moment. The last two	2		You, in this section, set out the subject matter
2 3		I'll just pause there for a moment. The last two categories, 5 and 6, don't appear to have been argued	2 3		You, in this section, set out the subject matter of the documents that you have classified into those
2 3 4		I'll just pause there for a moment. The last two categories, 5 and 6, don't appear to have been argued over in the litigation that followed. Do you know if	2 3 4		You, in this section, set out the subject matter of the documents that you have classified into those six different categories. I am not going to go through
2 3 4 5	Δ	I'll just pause there for a moment. The last two categories, 5 and 6, don't appear to have been argued over in the litigation that followed. Do you know if PII was ever claimed over such documents?	2 3 4 5		You, in this section, set out the subject matter of the documents that you have classified into those six different categories. I am not going to go through that, but we can give just an example of one. If we
2 3 4 5 6	А.	I'll just pause there for a moment. The last two categories, 5 and 6, don't appear to have been argued over in the litigation that followed. Do you know if PII was ever claimed over such documents? I'm sure it was. I mean, 5 is a well-known thing, which	2 3 4 5 6		You, in this section, set out the subject matter of the documents that you have classified into those six different categories. I am not going to go through that, but we can give just an example of one. If we look at the subparagraph 1 there, this is category 1, so
2 3 4 5 6 7	A.	I'll just pause there for a moment. The last two categories, 5 and 6, don't appear to have been argued over in the litigation that followed. Do you know if PII was ever claimed over such documents? I'm sure it was. I mean, 5 is a well-known thing, which I'm sure you're practising here. What happened with the	2 3 4 5 6 7		You, in this section, set out the subject matter of the documents that you have classified into those six different categories. I am not going to go through that, but we can give just an example of one. If we look at the subparagraph 1 there, this is category 1, so the documents that had been in the process by which
2 3 4 5 6 7 8	A.	I'll just pause there for a moment. The last two categories, 5 and 6, don't appear to have been argued over in the litigation that followed. Do you know if PII was ever claimed over such documents? I'm sure it was. I mean, 5 is a well-known thing, which I'm sure you're practising here. What happened with the CSM and the Licensing Authority is adverse reactions	2 3 4 5 6 7 8		You, in this section, set out the subject matter of the documents that you have classified into those six different categories. I am not going to go through that, but we can give just an example of one. If we look at the subparagraph 1 there, this is category 1, so the documents that had been in the process by which policy decisions were arrived at.
2 3 4 5 6 7 8 9	A.	I'll just pause there for a moment. The last two categories, 5 and 6, don't appear to have been argued over in the litigation that followed. Do you know if PII was ever claimed over such documents? I'm sure it was. I mean, 5 is a well-known thing, which I'm sure you're practising here. What happened with the CSM and the Licensing Authority is adverse reactions were reported on what were called yellow cards, which	2 3 4 5 6 7 8 9		You, in this section, set out the subject matter of the documents that you have classified into those six different categories. I am not going to go through that, but we can give just an example of one. If we look at the subparagraph 1 there, this is category 1, so the documents that had been in the process by which policy decisions were arrived at. Then you subdivide that category into (a),
2 3 4 5 6 7 8 9	A.	I'll just pause there for a moment. The last two categories, 5 and 6, don't appear to have been argued over in the litigation that followed. Do you know if PII was ever claimed over such documents? I'm sure it was. I mean, 5 is a well-known thing, which I'm sure you're practising here. What happened with the CSM and the Licensing Authority is adverse reactions were reported on what were called yellow cards, which would include personal detail of the patients as well as	2 3 4 5 6 7 8 9 10		You, in this section, set out the subject matter of the documents that you have classified into those six different categories. I am not going to go through that, but we can give just an example of one. If we look at the subparagraph 1 there, this is category 1, so the documents that had been in the process by which policy decisions were arrived at. Then you subdivide that category into (a), "Documents relating to decisions which are clearly major
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2 3 4 5 6 7 8 9 10 11 12	A.	I'll just pause there for a moment. The last two categories, 5 and 6, don't appear to have been argued over in the litigation that followed. Do you know if PII was ever claimed over such documents? I'm sure it was. I mean, 5 is a well-known thing, which I'm sure you're practising here. What happened with the CSM and the Licensing Authority is adverse reactions were reported on what were called yellow cards, which would include personal detail of the patients as well as the adverse reaction. So what we're dealing with here is the original	2 3 4 5 6 7 8 9 10 11 12		You, in this section, set out the subject matter of the documents that you have classified into those six different categories. I am not going to go through that, but we can give just an example of one. If we look at the subparagraph 1 there, this is category 1, so the documents that had been in the process by which policy decisions were arrived at. Then you subdivide that category into (a), "Documents relating to decisions which are clearly major matters of policy". And you give as an example whether or not to adopt a policy of self-sufficiency in blood
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2 3 4 5 6 7 8 9 10 11 12 13 14 15 16	A.	I'll just pause there for a moment. The last two categories, 5 and 6, don't appear to have been argued over in the litigation that followed. Do you know if PII was ever claimed over such documents? I'm sure it was. I mean, 5 is a well-known thing, which I'm sure you're practising here. What happened with the CSM and the Licensing Authority is adverse reactions were reported on what were called yellow cards, which would include personal detail of the patients as well as the adverse reaction. So what we're dealing with here is the original unexpurgated versions, so there will have been disclosed a redacted version which hadn't got identifying marks. And that was, I think, not controversial. Then this question about documents, if there were	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16		You, in this section, set out the subject matter of the documents that you have classified into those six different categories. I am not going to go through that, but we can give just an example of one. If we look at the subparagraph 1 there, this is category 1, so the documents that had been in the process by which policy decisions were arrived at. Then you subdivide that category into (a), "Documents relating to decisions which are clearly major matters of policy". And you give as an example whether or not to adopt a policy of self-sufficiency in blood products. And you give some other examples as well. Then the second subcategory, at (b), is "Documents relating to decisions which contain some elements of policy but which are subordinate to major policy
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2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19	Α.	I'll just pause there for a moment. The last two categories, 5 and 6, don't appear to have been argued over in the litigation that followed. Do you know if PII was ever claimed over such documents? I'm sure it was. I mean, 5 is a well-known thing, which I'm sure you're practising here. What happened with the CSM and the Licensing Authority is adverse reactions were reported on what were called yellow cards, which would include personal detail of the patients as well as the adverse reaction. So what we're dealing with here is the original unexpurgated versions, so there will have been disclosed a redacted version which hadn't got identifying marks. And that was, I think, not controversial. Then this question about documents, if there were any between governments, in order to pass on information, but with an expectation of confidentiality, and the views are being expressed by a foreign	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19		You, in this section, set out the subject matter of the documents that you have classified into those six different categories. I am not going to go through that, but we can give just an example of one. If we look at the subparagraph 1 there, this is category 1, so the documents that had been in the process by which policy decisions were arrived at. Then you subdivide that category into (a), "Documents relating to decisions which are clearly major matters of policy". And you give as an example whether or not to adopt a policy of self-sufficiency in blood products. And you give some other examples as well. Then the second subcategory, at (b), is "Documents relating to decisions which contain some elements of policy but which are subordinate to major policy decisions of the kind set out above". And you give as an example what approach to take towards a widespread introduction of vaccination against
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20		I'll just pause there for a moment. The last two categories, 5 and 6, don't appear to have been argued over in the litigation that followed. Do you know if PII was ever claimed over such documents? I'm sure it was. I mean, 5 is a well-known thing, which I'm sure you're practising here. What happened with the CSM and the Licensing Authority is adverse reactions were reported on what were called yellow cards, which would include personal detail of the patients as well as the adverse reaction. So what we're dealing with here is the original unexpurgated versions, so there will have been disclosed a redacted version which hadn't got identifying marks. And that was, I think, not controversial. Then this question about documents, if there were any between governments, in order to pass on information, but with an expectation of confidentiality, and the views are being expressed by a foreign government. Again, I don't think that was challenged.	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20		You, in this section, set out the subject matter of the documents that you have classified into those six different categories. I am not going to go through that, but we can give just an example of one. If we look at the subparagraph 1 there, this is category 1, so the documents that had been in the process by which policy decisions were arrived at. Then you subdivide that category into (a), "Documents relating to decisions which are clearly major matters of policy". And you give as an example whether or not to adopt a policy of self-sufficiency in blood products. And you give some other examples as well. Then the second subcategory, at (b), is "Documents relating to decisions which contain some elements of policy but which are subordinate to major policy decisions of the kind set out above". And you give as an example what approach to take towards a widespread introduction of vaccination against hepatitis in the light of the AIDS problem.
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2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23		I'll just pause there for a moment. The last two categories, 5 and 6, don't appear to have been argued over in the litigation that followed. Do you know if PII was ever claimed over such documents? I'm sure it was. I mean, 5 is a well-known thing, which I'm sure you're practising here. What happened with the CSM and the Licensing Authority is adverse reactions were reported on what were called yellow cards, which would include personal detail of the patients as well as the adverse reaction. So what we're dealing with here is the original unexpurgated versions, so there will have been disclosed a redacted version which hadn't got identifying marks. And that was, I think, not controversial. Then this question about documents, if there were any between governments, in order to pass on information, but with an expectation of confidentiality, and the views are being expressed by a foreign government. Again, I don't think that was challenged. I certainly haven't seen any documents to suggest that it was.	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23		You, in this section, set out the subject matter of the documents that you have classified into those six different categories. I am not going to go through that, but we can give just an example of one. If we look at the subparagraph 1 there, this is category 1, so the documents that had been in the process by which policy decisions were arrived at. Then you subdivide that category into (a), "Documents relating to decisions which are clearly major matters of policy". And you give as an example whether or not to adopt a policy of self-sufficiency in blood products. And you give some other examples as well. Then the second subcategory, at (b), is "Documents relating to decisions which contain some elements of policy but which are subordinate to major policy decisions of the kind set out above". And you give as an example what approach to take towards a widespread introduction of vaccination against hepatitis in the light of the AIDS problem. Again, you give other examples as well. I'm just trying to give here a flavour of the approach that you
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 9 20 21 22 23 24		I'll just pause there for a moment. The last two categories, 5 and 6, don't appear to have been argued over in the litigation that followed. Do you know if PII was ever claimed over such documents? I'm sure it was. I mean, 5 is a well-known thing, which I'm sure you're practising here. What happened with the CSM and the Licensing Authority is adverse reactions were reported on what were called yellow cards, which would include personal detail of the patients as well as the adverse reaction. So what we're dealing with here is the original unexpurgated versions, so there will have been disclosed a redacted version which hadn't got identifying marks. And that was, I think, not controversial. Then this question about documents, if there were any between governments, in order to pass on information, but with an expectation of confidentiality, and the views are being expressed by a foreign government. Again, I don't think that was challenged. I certainly haven't seen any documents to suggest that it was. If we turn back to the documents in that first section, you've set out six different categories of	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24		You, in this section, set out the subject matter of the documents that you have classified into those six different categories. I am not going to go through that, but we can give just an example of one. If we look at the subparagraph 1 there, this is category 1, so the documents that had been in the process by which policy decisions were arrived at. Then you subdivide that category into (a), "Documents relating to decisions which are clearly major matters of policy". And you give as an example whether or not to adopt a policy of self-sufficiency in blood products. And you give some other examples as well. Then the second subcategory, at (b), is "Documents relating to decisions which contain some elements of policy but which are subordinate to major policy decisions of the kind set out above". And you give as an example what approach to take towards a widespread introduction of vaccination against hepatitis in the light of the AIDS problem. Again, you give other examples as well. I'm just trying to give here a flavour of the approach that you took to that advice. If we could then turn, please, to page 5, and

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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	ч.	at yes. Paragraph 3 there. And I guote:
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.
		57
1	Α.	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 is 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 Yes. It's -- I mean, there's an awful lot of documents Α. 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 with criminal matters. And I took the view, and I think 11 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 a challenge, which we expected there would be, then the 16 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 tying 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 59

1		So this is you setting out the reason the basis
2		for which PII would be claimed (overspeaking)
3	Α.	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	Α.	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? 58
		30
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	Α.	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 Yes.
24 25	A.	
25	Q.	so that they could analyse whether or not that was 60

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1		a proper claim for PII?	1		a reference to the legal authorities, isn't it, the case
2	Α.	Yes.	2		law? That is the point that you were making earlier,
3	Q.	Just we will look in due course at the Court of	3		that if PII applies, it can't be waived by the
4		Appeal judgment, but we can see from that judgment that	4		Department, it must claim it?
5		the categories that you set out here did form the	5		I go back to the document, and I quote:
6		were used in the application that was made, and it was	6		"It is then a matter for the court to decide
7		ultimately signed by the Permanent Secretary rather than	7		whether the balance of the competing public interests
8		the minister	8		lies in favour of or against disclosure. There is
9	Α.	That was it, yes.	9		nothing in the documents that I have seen which I would
10	Q.	because	10		expect to have any significant adverse effects on the
11	Α.	Oh, yes, because there were two administrations. So,	11		case to be put forward on behalf of the Central
12		yes, Conservative and Labour. That was, I think, the	12		Defendants in this litigation. Indeed, any of them may
13		convention.	13		be helpful in explaining the careful consideration which
14	Q.	If we could turn, please, to page 8. Having gone	14		was given to various matters at the time. However,
15		through this process of identifying the categories for	15		that is not the point."
16		types of material within them and the public interest	16		By that are you saying that if PII applies, then
17		that may form the basis for the PII, you then go on to	17		it applies as much to a helpful document as it does to
18		discuss the various strengths and weaknesses of the	18		an unhelpful document?
19		claims for PII. What you say in paragraph 4 is this,	19	Α.	Yes, it applies to everything. I mean, it is important
20		and I quote:	20		so you can't cherrypick, clearly, but it's also
21		"It is clear from the authorities that where	21		important to note, for those who haven't read the
22		documents are protected by public interest immunity, the	22		documents in the way that I had, if there were any red
23		department or person concerned has no discretion but is	23		flag documents in there. Because if there's a red flag
24		under a duty to claim the privilege."	24		document, which is clearly favourable to the plaintiffs,
25		I pause there, "the authorities" there is	25		then that may affect the way in which it is described in
		61			62
1					
		the partificate or in the way in which we present it to	4		which we put forward when it want before the court we
		the certificate or in the way in which we present it to	1		which we put forward when it went before the court, we
2		the court. And this was signalling that there was	2		would have made clear that we do accept that there are
2 3		the court. And this was signalling that there was nothing there that, in my view, having read them, was,	2 3		would have made clear that we do accept that there are documents which may be of some relevance to this case,
2 3 4		the court. And this was signalling that there was nothing there that, in my view, having read them, was, if you like, a document of significant benefit to the	2 3 4		would have made clear that we do accept that there are documents which may be of some relevance to this case, as opposed to whatever we did do, which I'm afraid
2 3 4 5		the court. And this was signalling that there was nothing there that, in my view, having read them, was, if you like, a document of significant benefit to the plaintiffs, which they would be disadvantaged by not	2 3 4 5	0	would have made clear that we do accept that there are documents which may be of some relevance to this case, as opposed to whatever we did do, which I'm afraid I can't remember.
2 3 4 5 6		the court. And this was signalling that there was nothing there that, in my view, having read them, was, if you like, a document of significant benefit to the plaintiffs, which they would be disadvantaged by not having. They might not be able to have it because of	2 3 4 5 6	Q.	would have made clear that we do accept that there are documents which may be of some relevance to this case, as opposed to whatever we did do, which I'm afraid I can't remember. Returning, then, to this advice. If we could just turn
2 3 4 5 6 7		the court. And this was signalling that there was nothing there that, in my view, having read them, was, if you like, a document of significant benefit to the plaintiffs, which they would be disadvantaged by not having. They might not be able to have it because of the immunity.	2 3 4 5 6 7	Q.	would have made clear that we do accept that there are documents which may be of some relevance to this case, as opposed to whatever we did do, which I'm afraid I can't remember. Returning, then, to this advice. If we could just turn to electronic page 12. As I say, you go through
2 3 4 5 6 7 8		the court. And this was signalling that there was nothing there that, in my view, having read them, was, if you like, a document of significant benefit to the plaintiffs, which they would be disadvantaged by not having. They might not be able to have it because of the immunity. But I was seeking to be as fair because, again,	2 3 4 5 6 7 8	Q.	would have made clear that we do accept that there are documents which may be of some relevance to this case, as opposed to whatever we did do, which I'm afraid I can't remember. Returning, then, to this advice. If we could just turn to electronic page 12. As I say, you go through category by category discussing the merits of the case
2 3 4 5 7 8 9		the court. And this was signalling that there was nothing there that, in my view, having read them, was, if you like, a document of significant benefit to the plaintiffs, which they would be disadvantaged by not having. They might not be able to have it because of the immunity. But I was seeking to be as fair because, again, although the Department cannot waive it, if the judge is	2 3 4 5 6 7 8 9	Q.	would have made clear that we do accept that there are documents which may be of some relevance to this case, as opposed to whatever we did do, which I'm afraid I can't remember. Returning, then, to this advice. If we could just turn to electronic page 12. As I say, you go through category by category discussing the merits of the case for PII. And if we turn to paragraph 11, this is
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2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19		the court. And this was signalling that there was nothing there that, in my view, having read them, was, if you like, a document of significant benefit to the plaintiffs, which they would be disadvantaged by not having. They might not be able to have it because of the immunity. But I was seeking to be as fair because, again, although the Department cannot waive it, if the judge is aware and told "There are important documents in there but this is the privilege", he has to balance, as I put above, competing public interests in favour of disclosure or otherwise. If there had been such a document then would you have made explicit reference to it, both in this advice and subsequently in the certificate, so that the judge was particularly aware of that document? If there'd been something in it, I would have made clear that there were documents. Whether in this particular	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19	Q.	would have made clear that we do accept that there are documents which may be of some relevance to this case, as opposed to whatever we did do, which I'm afraid I can't remember. Returning, then, to this advice. If we could just turn to electronic page 12. As I say, you go through category by category discussing the merits of the case for PII. And if we turn to paragraph 11, this is a reference to the fourth category, which is the category for briefing notes and draft replies to the letters. What you say in the advice is this, and I quote: "11. The fourth category is rather more difficult. Ordinary briefings which do not relate to policy-formulation are in my view matters which ought to be disclosed, where their relevance and prima facie likelihood of assisting the Plaintiffs' case are established. However, if individual documents disclose
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2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22		the court. And this was signalling that there was nothing there that, in my view, having read them, was, if you like, a document of significant benefit to the plaintiffs, which they would be disadvantaged by not having. They might not be able to have it because of the immunity. But I was seeking to be as fair because, again, although the Department cannot waive it, if the judge is aware and told "There are important documents in there but this is the privilege", he has to balance, as I put above, competing public interests in favour of disclosure or otherwise. If there had been such a document then would you have made explicit reference to it, both in this advice and subsequently in the certificate, so that the judge was particularly aware of that document? If there'd been something in it, I would have made clear that there were documents. Whether in this particular document I would have identified them as opposed to making provision for them to be identifiable, I suspect that I don't know whether they would have gone into	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	Q.	would have made clear that we do accept that there are documents which may be of some relevance to this case, as opposed to whatever we did do, which I'm afraid I can't remember. Returning, then, to this advice. If we could just turn to electronic page 12. As I say, you go through category by category discussing the merits of the case for PII. And if we turn to paragraph 11, this is a reference to the fourth category, which is the category for briefing notes and draft replies to the letters. What you say in the advice is this, and I quote: "11. The fourth category is rather more difficult. Ordinary briefings which do not relate to policy-formulation are in my view matters which ought to be disclosed, where their relevance and prima facie likelihood of assisting the Plaintiffs' case are established. However, if individual documents disclose information about the policies currently under consideration, there is a good case for considering these documents as a subcategory of the first category
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23		the court. And this was signalling that there was nothing there that, in my view, having read them, was, if you like, a document of significant benefit to the plaintiffs, which they would be disadvantaged by not having. They might not be able to have it because of the immunity. But I was seeking to be as fair because, again, although the Department cannot waive it, if the judge is aware and told "There are important documents in there but this is the privilege", he has to balance, as I put above, competing public interests in favour of disclosure or otherwise. If there had been such a document then would you have made explicit reference to it, both in this advice and subsequently in the certificate, so that the judge was particularly aware of that document? If there'd been something in it, I would have made clear that there were documents. Whether in this particular document I would have identified them as opposed to making provision for them to be identifiable, I suspect that I don't know whether they would have gone into the certificate because we never got that far but	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23	Q.	would have made clear that we do accept that there are documents which may be of some relevance to this case, as opposed to whatever we did do, which I'm afraid I can't remember. Returning, then, to this advice. If we could just turn to electronic page 12. As I say, you go through category by category discussing the merits of the case for PII. And if we turn to paragraph 11, this is a reference to the fourth category, which is the category for briefing notes and draft replies to the letters. What you say in the advice is this, and I quote: "11. The fourth category is rather more difficult. Ordinary briefings which do not relate to policy-formulation are in my view matters which ought to be disclosed, where their relevance and prima facie likelihood of assisting the Plaintiffs' case are established. However, if individual documents disclose information about the policies currently under consideration, there is a good case for considering these documents as a subcategory of the first category [which is policy formulation documents]. The same
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2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23		the court. And this was signalling that there was nothing there that, in my view, having read them, was, if you like, a document of significant benefit to the plaintiffs, which they would be disadvantaged by not having. They might not be able to have it because of the immunity. But I was seeking to be as fair because, again, although the Department cannot waive it, if the judge is aware and told "There are important documents in there but this is the privilege", he has to balance, as I put above, competing public interests in favour of disclosure or otherwise. If there had been such a document then would you have made explicit reference to it, both in this advice and subsequently in the certificate, so that the judge was particularly aware of that document? If there'd been something in it, I would have made clear that there were documents. Whether in this particular document I would have identified them as opposed to making provision for them to be identifiable, I suspect that I don't know whether they would have gone into the certificate because we never got that far but	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23	Q.	would have made clear that we do accept that there are documents which may be of some relevance to this case, as opposed to whatever we did do, which I'm afraid I can't remember. Returning, then, to this advice. If we could just turn to electronic page 12. As I say, you go through category by category discussing the merits of the case for PII. And if we turn to paragraph 11, this is a reference to the fourth category, which is the category for briefing notes and draft replies to the letters. What you say in the advice is this, and I quote: "11. The fourth category is rather more difficult. Ordinary briefings which do not relate to policy-formulation are in my view matters which ought to be disclosed, where their relevance and prima facie likelihood of assisting the Plaintiffs' case are established. However, if individual documents disclose information about the policies currently under consideration, there is a good case for considering these documents as a subcategory of the first category [which is policy formulation documents]. The same

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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	Α.	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	Α.	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.	l really don't remember. I mean, I will almost
25		certainly have had some discussions about the kind of
		65
1		
	Q.	If we could go, please, to electronic page 14 of the
2	Q.	document. This is still within the discussion section.
2 3	Q.	document. This is still within the discussion section. About the in paragraph 15, about halfway down,
2 3 4	Q.	document. This is still within the discussion section. About the in paragraph 15, about halfway down, there's a sentence starting "Where, as here", if we
2 3 4 5	Q.	document. This is still within the discussion section. About the in paragraph 15, about halfway down, there's a sentence starting "Where, as here", if we could just highlight that.
2 3 4 5 6	Q.	document. This is still within the discussion section. About the in paragraph 15, about halfway down, there's a sentence starting "Where, as here", if we could just highlight that. What you write in the advices is this:
2 3 4 5 6 7	Q.	document. This is still within the discussion section. About the in paragraph 15, about halfway down, there's a sentence starting "Where, as here", if we could just highlight that. What you write in the advices is this: "Where, as here, the Plaintiffs raise adventurous
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1		
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
		finding the documents, but because they're within this
20		
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.
		66
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1		advocated in Air Canada [which was one of the
2		authorities you cited in the report]."
		authorities you cited in the report]." Should we understand that, then, to be
2		authorities you cited in the report]." Should we understand that, then, to be a suggestion that the court needs to consider whether or
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2 3 4 5		authorities you cited in the report]." Should we understand that, then, to be a suggestion that the court needs to consider whether or not there is actually a claim in law here as part of its
2 3 4 5 6	А.	authorities you cited in the report]." Should we understand that, then, to be a suggestion that the court needs to consider whether or not there is actually a claim in law here as part of its assessment of whether public interest lies in either
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(17) Pages 65 - 68

1		it must have been Mr Justice Rougier at first instance,	1
2		concluded that the statutory duty claim would not	2
3		succeed. Whether it made any difference to his choice	3
4		or not, I don't remember. And the Court of Appeal said	4
5		no, although weak, it was sufficiently arguable that any	5
6		document which might be relevant to it could be placed	6
7		in the balance with slightly more public interest in	7
8		favour of its disclosure.	8
9	Q.	We will come to the Court of Appeal judgment but that's	9
10		an accurate summary of it. And the point being that	10
11		this the point is taken in respect of public interest	11
12		immunity were the court to find that a particular	12
13		legal argument had no chance of success, then that would	13
14		obviously influence the attitude of the plaintiffs and	14
15		indeed to the litigation as a whole?	15
16	Α.	Yes.	16
17	Q.	The final point from this document. Electronic page 15,	17
18		please.	18
19	Α.	Yes, I just note when you're you're on 15, at the	19
20		bottom of it? Are you coming to the conclusion?	20
21	Q.	Yes. I am just briefly going to mention paragraph 16,	21
22		just to cover the point off that we mentioned earlier:	22
23		"Since the documents span administrations, it is	23
24		more appropriate that the Certificate should be signed	24
25		by the Permanent Secretary rather than by the	25
		69	
1		important.	1
1 2	Q.	important. In effect you were asking the most senior barrister	1 2
	Q.		
2	Q.	In effect you were asking the most senior barrister	2
2 3	Q. A.	In effect you were asking the most senior barrister instructed by the Government as to whether or not you'd	2 3
2 3 4		In effect you were asking the most senior barrister instructed by the Government as to whether or not you'd approach was correct?	2 3 4
2 3 4 5	A.	In effect you were asking the most senior barrister instructed by the Government as to whether or not you'd approach was correct? Yes.	2 3 4 5
2 3 4 5 6	A.	In effect you were asking the most senior barrister instructed by the Government as to whether or not you'd approach was correct? Yes. And to the best of your knowledge, he considered that it	2 3 4 5 6
2 3 4 5 6 7	A. Q.	In effect you were asking the most senior barrister instructed by the Government as to whether or not you'd approach was correct? Yes. And to the best of your knowledge, he considered that it was?	2 3 4 5 6 7
2 3 4 5 6 7 8	A. Q.	In effect you were asking the most senior barrister instructed by the Government as to whether or not you'd approach was correct? Yes. And to the best of your knowledge, he considered that it was? Yes. He certainly said it was right. Whether he made	2 3 4 5 6 7 8
2 3 4 5 6 7 8 9	A. Q. A.	In effect you were asking the most senior barrister instructed by the Government as to whether or not you'd approach was correct? Yes. And to the best of your knowledge, he considered that it was? Yes. He certainly said it was right. Whether he made some small adjustments, I cannot recollect.	2 3 4 5 6 7 8 9
2 3 4 5 6 7 8 9	A. Q. A.	In effect you were asking the most senior barrister instructed by the Government as to whether or not you'd approach was correct? Yes. And to the best of your knowledge, he considered that it was? Yes. He certainly said it was right. Whether he made some small adjustments, I cannot recollect. I'd like to go briefly to an additional advice that you	2 3 4 5 6 7 8 9 10
2 3 4 5 6 7 8 9 10 11	A. Q. A.	In effect you were asking the most senior barrister instructed by the Government as to whether or not you'd approach was correct? Yes. And to the best of your knowledge, he considered that it was? Yes. He certainly said it was right. Whether he made some small adjustments, I cannot recollect. I'd like to go briefly to an additional advice that you provided. This is slightly out of sequence because this	2 3 4 5 6 7 8 9 10 11
2 3 4 5 6 7 8 9 10 11 12	A. Q. A.	In effect you were asking the most senior barrister instructed by the Government as to whether or not you'd approach was correct? Yes. And to the best of your knowledge, he considered that it was? Yes. He certainly said it was right. Whether he made some small adjustments, I cannot recollect. I'd like to go briefly to an additional advice that you provided. This is slightly out of sequence because this is given after the Court of Appeal judgment but I am not	2 3 4 5 6 7 8 9 10 11 12
2 3 4 5 6 7 8 9 10 11 12 13	A. Q. A.	In effect you were asking the most senior barrister instructed by the Government as to whether or not you'd approach was correct? Yes. And to the best of your knowledge, he considered that it was? Yes. He certainly said it was right. Whether he made some small adjustments, I cannot recollect. I'd like to go briefly to an additional advice that you provided. This is slightly out of sequence because this is given after the Court of Appeal judgment but I am not going to it for that reason. If we could go, please, to	2 3 4 5 6 7 8 9 10 11 12 13
2 3 4 5 6 7 8 9 10 11 12 13 14	A. Q. A.	In effect you were asking the most senior barrister instructed by the Government as to whether or not you'd approach was correct? Yes. And to the best of your knowledge, he considered that it was? Yes. He certainly said it was right. Whether he made some small adjustments, I cannot recollect. I'd like to go briefly to an additional advice that you provided. This is slightly out of sequence because this is given after the Court of Appeal judgment but I am not going to it for that reason. If we could go, please, to DHSC0046936_082. We can see that this is headed "Re:	2 3 4 5 6 7 8 9 10 11 12 13 14
2 3 4 5 6 7 8 9 10 11 12 13 14 15	A. Q. A.	In effect you were asking the most senior barrister instructed by the Government as to whether or not you'd approach was correct? Yes. And to the best of your knowledge, he considered that it was? Yes. He certainly said it was right. Whether he made some small adjustments, I cannot recollect. I'd like to go briefly to an additional advice that you provided. This is slightly out of sequence because this is given after the Court of Appeal judgment but I am not going to it for that reason. If we could go, please, to DHSC0046936_082. We can see that this is headed "Re: HIV Litigation, Additional PII Documents Advice".	2 3 4 5 6 7 8 9 10 11 12 13 14 15
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16	A. Q. A.	In effect you were asking the most senior barrister instructed by the Government as to whether or not you'd approach was correct? Yes. And to the best of your knowledge, he considered that it was? Yes. He certainly said it was right. Whether he made some small adjustments, I cannot recollect. I'd like to go briefly to an additional advice that you provided. This is slightly out of sequence because this is given after the Court of Appeal judgment but I am not going to it for that reason. If we could go, please, to DHSC0046936_082. We can see that this is headed "Re: HIV Litigation, Additional PII Documents Advice". I won't take you to the page but it's signed by you on	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16
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2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18	A. Q. A.	In effect you were asking the most senior barrister instructed by the Government as to whether or not you'd approach was correct? Yes. And to the best of your knowledge, he considered that it was? Yes. He certainly said it was right. Whether he made some small adjustments, I cannot recollect. I'd like to go briefly to an additional advice that you provided. This is slightly out of sequence because this is given after the Court of Appeal judgment but I am not going to it for that reason. If we could go, please, to DHSC0046936_082. We can see that this is headed "Re: HIV Litigation, Additional PII Documents Advice". I won't take you to the page but it's signed by you on 1 October 1990. If we just look at the first paragraph, it says:	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18
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2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	A. Q. A.	In effect you were asking the most senior barrister instructed by the Government as to whether or not you'd approach was correct? Yes. And to the best of your knowledge, he considered that it was? Yes. He certainly said it was right. Whether he made some small adjustments, I cannot recollect. I'd like to go briefly to an additional advice that you provided. This is slightly out of sequence because this is given after the Court of Appeal judgment but I am not going to it for that reason. If we could go, please, to DHSC0046936_082. We can see that this is headed "Re: HIV Litigation, Additional PII Documents Advice". I won't take you to the page but it's signed by you on 1 October 1990. If we just look at the first paragraph, it says: "I have looked at the additional documents provided to me and agree that, except as set out below, the documents are correctly included within the claim for public interest immunity and fall within the	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22

That would indicate that you have looked at those

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25

Minister ..." And indeed that happened. Then if we go down to the conclusions, at paragraph 18: "Subject to the approval of John Laws, I would advise that the following approach should be taken to the question of claiming public interest immunity ..." Then you go through the different categories. A. That was particularly important because public interest immunity is a very powerful instrument affecting the disclosure of documents in this type of litigation. And it was, in my view, absolutely essential that there should be a consistent line taken. I mean, something went wrong when we came to the matters of the Scott Inquiry because -- I wasn't involved but the reported extent of the claim for PII privilege seemed to me to be just simply wrong, and I was very anxious to make sure that we were making a claim which was entirely orthodox, entirely conventional, and which was consistent with what the very experienced Treasury Devils through the generations, most of whom got to the House of Lords, had concluded was the correct advice to give, rather than me forming an independent view. So his endorsement of it was, in my view, very 70 individual documents ---A. Yes. Q. -- in order to see whether or not they fall for PII? A. Yes. In each case, I always looked at the individual documents, as opposed to giving the description and letting somebody else do the selection. Q. We'll see from the Court of Appeal judgment shortly that there were about 600 documents for which PII was originally claimed, so would you have looked at each one of those 600 documents? A. I'm afraid so. Q. I won't go through the rest of that advice but, as is

- 3 implied by the first paragraph, you've identified
- 4 documents where a claim for PII should not be made --
- 15 A. Correct.

25

- **Q.** -- as well as those for which it has been made.
 - Let's turn, then, to the Court of Appeal judgment.
- It was handed down on 20 September 1990. If we could
- have RLIT0000657, please. We can see that the Court of
- 0 Appeal was constituted of Lord Justice Ralph Gibson,
- 21 Lord Justice Bingham and Sir John Megaw. The
- 2 headnote -- and just for those not used to legal
- 3 authorities, this is a report summarising the key
- 24 findings of the judgment, which is then published in
 - 72

a law report.

(18) Pages 69 - 72

1	I won't take you all the way through it, we can	1		
2	see that just at the first sentence of it, that there	2		
3	are 962 applicants at that time, that number varies.	3		
4	A description of the case is given, and just towards the	4 5		
5	bottom of that paragraph we can see that:			
6 7	"Discovery was given by the Department of Health	6 7		!
8	of a large number of documents, but public interest immunity was claimed for some 600 documents dating from	8		
о 9	1972 to 1986, mainly on the ground that they related to	о 9		
9 10	matters of policy."	9 10		
11	That's where I got the figure of 600 documents	11		
12	from.	12		
13	The headnote then goes on to describe that the	13	Α.	,
14	Department of Health had raised the legal arguments that	14	А.	
15	you had suggested in your advice, and it's summarises	15		
16	the ruling of Mr Justice Rougier in this way, it says:	16		
17	"The judge held, for the purposes of the discovery	17	Q.	
18	application"	18	α.	,
19	So this is about three-quarters of the way down,	10		
20	just before (a), (b), (c), I don't know if we can expand	20	Α.	
21	that. A little further down. There we go, thank you.	21	Q.	
22	"The judge held, for the purposes of the discovery	22	ц.	
23	application;	23		
24	"(a) that the plaintiffs had no claim for breach	23		
25	of statutory duty;	25		ĺ
	73			
1	through that:	1		
2	"Held:	2		
3	"(1) If it were sufficiently clear on the	3		
4	material available for the court to decide that any	4		
5	cause of action put forward by the plaintiffs was bad in	5		į
6	law, then the court should say so, even though the	6		
7	effect of such a decision upon the future conduct of	7		,
8	these proceedings between all parties might be unclear.	8		,
9	"(2) On the other hand, if there were good	9		,
10	reasons for not making any decision with reference to	10		
11	the validity of causes of action, the court could	11		,
12	abstain from any such decision if, without making it,	12		,
13	the appeal could be properly and fairly decided. There	13		
14	were good reasons for not making any such decisions.	14		
	Deth with reference to breach of statutory duty and to	15		
15	Both with reference to breach of statutory duty and to	15		
15 16	negligence, the case raised questions of public	16		i
				i
16	negligence, the case raised questions of public	16		i
16 17	negligence, the case raised questions of public importance which were to be regarded as novel. It is	16 17		
16 17 18	negligence, the case raised questions of public importance which were to be regarded as novel. It is usually undesirable, unless the case is very clear, for	16 17 18		
16 17 18 19	negligence, the case raised questions of public importance which were to be regarded as novel. It is usually undesirable, unless the case is very clear, for such questions to be decided upon pleadings as	16 17 18 19		
16 17 18 19 20	negligence, the case raised questions of public importance which were to be regarded as novel. It is usually undesirable, unless the case is very clear, for such questions to be decided upon pleadings as contrasted with findings of fact."	16 17 18 19 20		
16 17 18 19 20 21	negligence, the case raised questions of public importance which were to be regarded as novel. It is usually undesirable, unless the case is very clear, for such questions to be decided upon pleadings as contrasted with findings of fact." "(3) It was not clear that Parliament intended to	16 17 18 19 20 21		
16 17 18 19 20 21 22	negligence, the case raised questions of public importance which were to be regarded as novel. It is usually undesirable, unless the case is very clear, for such questions to be decided upon pleadings as contrasted with findings of fact." "(3) It was not clear that Parliament intended to impose a duty under the 1977 Act [that's the NHS Act]	16 17 18 19 20 21 22		i i i i i i i
16 17 18 19 20 21 22 23	negligence, the case raised questions of public importance which were to be regarded as novel. It is usually undesirable, unless the case is very clear, for such questions to be decided upon pleadings as contrasted with findings of fact." "(3) It was not clear that Parliament intended to impose a duty under the 1977 Act [that's the NHS Act] which would be enforceable by individual civil action,	16 17 18 19 20 21 22 23		i i i i

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	А.	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	Α.	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
		74
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
		being true and capable of proof, the plaintiffs had
6		
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
		Jange, mis from acone mienter of flot the planting

would be deprived of the means of proper presentation of their case without disclosure to them of the documents." $$76\end{tabular}$

(19) Pages 73 - 76

,		On the driven of the second has do since second and as	,		
1		So looking at the way the decision went, and as	1		conclusion that these claims were going to be very
2		you described earlier, the Court of Appeal disagreed	2		difficult in law to bring home for the plaintiffs.
3		with Justice Rougier about the breach of statutory	3		There was no suggestion that this was a case which
4		duty	4		the Department should be settling because it was wrong,
5		Yes.	5		nor was there a suggestion, in fairness to the
6	Q.	and held that there was potentially, arguably a case	6		plaintiffs, that that they should pack up and go home.
7		in that respect.	7		But there was a warning that the case was going to be
8		How did the plaintiffs sorry, how did the	8		a difficult one.
9		defendants, central defendants, view this judgment and	9		So that wasn't very different from our own
10		the words the judges used to express their views of the	10		assessment, and I don't think it had any real impact,
11		strength or weaknesses of the plaintiffs' case?	11		other than just really reminding us of the balance
12	Α.	It's very hard to put myself back into the position.	12		between the sympathy of the court to the plaintiffs'
13		I didn't even remember this judgment until I read it.	13		position and their awareness of the trickiness of the
14		So it is reconstruction. I don't think it it meant	14	~	legal case.
15		that there was no immediate knockout blow, which is	15	Q.	I'm not going to go through in detail what the court has
16		I think, justified the fact we never attempted	16		said. As you'll have gathered from my questions, the
17		a strikeout, as opposed to preliminary issues. We	17		Inquiry's primary interest is in how the Government and the Department of Health conducted the litigation,
18		always expected courts to be sympathetic and, therefore,	18 19		rather than the fine detail of the legal analysis.
19 20		to allow a hearing to proceed where there was	20	Α.	Yes.
20 21		an arguable case, because of the severity of the consequences to the plaintiffs and their families.	20	Q.	What I will mention, for the record, is that we can see,
21		The wording of the judgment, which you may or may	21	ω.	from the terms of the judgment which describes how the
23		not go through, certainly in my view, looking at it	22		application was made, at electronic page 7, that the
23 24		again now, and trying to do my best as to what we	23		Department of Health had followed your advice as to the
25		thought at the time, was that it supported our	25		different categories of documents and included, word for
20		77	20		78
1		word, the way that you had described the documents that	1		functioning of the public service, that is the executive
2		fell within them, save for the fact that, as I mentioned	2		arm of the government: see per Lord Denning [in the
3		earlier, categories 5 and 6, concerning international	2		Air Canada case]. It is not for the Department but for
4		relations and the unexpurgated, unredacted versions of	4		the court to determine whether the documents should be
5		the yellow card system were not part of this litigation?	5		produced. The plaintiffs acknowledge the validity of
6	Α.	Yes, and I noticed when I looked you were passing	6		the claim to public interest immunity but ask the court
7	Λ.	through part of my advice, that it appeared there were	7		to order production notwithstanding the existence of the
, 8		only two documents at most in the foreign Government	, 8		valid claim to immunity. It is essential that that
9		category.	9		aspect of these proceedings should be clearly
10	Q.	Yes.	10		understood."
11	<u>а</u> .	So that may be why it fell out of consideration.	11		If we go on to the next paragraph, please.
12	Q.	What I would like to take you to is electronic page 10,	12		"The valid claim to immunity is to be overridden
13	.	page 229 of the law report. The third paragraph down	13		by the order of the court if the law requires that it
14		beginning "The Department of Health". Thank you.	14		should be overridden. The task of the court is properly
15		This is Lord Justice Ralph Gibson but the other	15		to balance the public interest in preserving the
16		judges agreed with him. This is what he said in that	16		immunity on the one hand, and the public interest in the
17		section:	17		fair trial of the proceedings on the other."
18		"The Department of Health has raised the matter of	18		We'll stop there before we go into the
19		public interest immunity so as to prevent the disclosure	19		authorities.
20		of the documents listed above. The Department does not	20		This, then, is the court approving of the fact
21		do that in order to put difficulty in the way of the	21		that the Department of Health had made the application
22		plaintiffs, or to withhold from the cost documents which	22		in the way that it had made it; is that fair?
23		might help the plaintiffs. The Department raises the	23	A.	Yes.
24		matter because it is the duty of the Department in law	24	Q.	Also the reference to the fact that the plaintiffs
25		to do so in support of the public interest in the proper	25		acknowledged the validity of the claim to public
		79			80

(20) Pages 77 - 80

1		interest immunity, would seem to indicate that they too	1		subparagraph d, thank you.
2		agreed that it was right and proper, and indeed a duty,	2		The question posed by the Inquiry in its request
3		for such an application to be made?	3		for your written evidence was this:
4	Α.	Yes.	4		"Were you aware of any of the Central Defendants
5	Q.	It was then for the court to do that balancing exercise	5		[just pausing there, that's the Department of Health,
6		between the public interest in retaining confidentiality	6		Committee on Safety of Medicines and the Licensing
7		and the public interest in doing justice by having the	7		Authority] intentionally destroying documents for the
8		documents disclosed.	8		purpose of ensuring that they were not disclosed as part
9	Α.	Exactly that.	9		of the HIV (or other) litigation?"
10	Q.	Thank you. We can take that document down now.	10		Your answer was:
11	Α.	I just observe that one of the things that the Court of	11		"I have no recollection of being told or
12		Appeal did was to actually give the judge the further	12		suspecting that there had been deliberate document
13		task of actually reading the documents himself in order	13		destruction for this or any other improper purpose.
14		to decide which ones should be disclosed. So there was	14		I do not have any reason to suppose that such
15		a very careful filter at each level.	15		destruction took place for this reason. I do know that
16	Q.	In your witness statement, you responded to two	16		we were disappointed by how comparatively little
17		questions that were asked by the Inquiry about your	17		material there was and consistently asked for further
18		impression during the HIV Litigation and I stress	18		searches but in those pre-computerisation days many if
19		this is just about the HIV Litigation about	19		not most of the documents we were provided with came
20		destruction of documents and PII. I am just going to	20		from hard copy files of original memos and papers or
21		read those to you, and then ask a couple of follow-up	21		carbon copies, rather than from a photocopy archive. If
22		questions.	22		my memory is correct, files were regularly reviewed and
23	Α.	Yes.	23		what was considered to be outdated and no longer
24	Q.	It is WITN7067001, page 21. If we could go down to the	24		relevant was destroyed, simply to make the task of
25		second half of the page, please, including	25		archiving the files manageable. I was however not
		81			82
1		involved in any of the details of any searches and am	1		none of those "Well, we'll try and look", no slightly
2		not able to say whether there was any deliberate	2		shifty glances between people. Nothing to suggest that
3		destruction although I can say that I had no impression	3		they weren't doing the best job that they could or that
4		from any of the multiple officials with whom I met that	4		they were aware of some event which had happened where
5		they were being evasive and potentially inclined to	5		there'd been a dumping of documents. So I have no
6		destroy embarrassing documents. Any more detailed	6	-	reason to change that.
7		enquiry must be for others to answer."	7	Q.	I'm going to turn then to the next question that the
8		I pause there and say the reason that I stressed	8		Inquiry asked of you, which was this:
9		that this is about the HIV Litigation is that, after you	9		"Were you aware of any of the Central Defendants
10		had written this, you have been provided with some	10		seeking to abuse the PII process by claiming PII without
11		additional documents	11		proper reason in order to avoid disclosure of documents
12	Α.	Yes.	12		that might harm their case or otherwise cause
13	Q.	about the HCV Litigation, and we will come on to	13		embarrassment?"
14		those separately.	14		Your answer was this:
15	A.	Yes.	15		"No. I do not believe that there was any such
16	Q.	But, in terms of the HIV Litigation, do you still stand	16		attempt. Of course, one of the categories of documents
17		by what is said in that paragraph?	17		for which PII was claimed was advice to ministers which
18	Α.	Yes, I have thought about it more as I have got ready	18		was often terse and relatively informal and there may
19 20		for today. And there weren't as many documents as	19		have been a sensitivity about its disclosure because
20		I would have liked, because when you're trying to put	20		each phrase had not been carefully honed for wider
21		together your picture of the case, you want to fill in	21		publication. It is also not unusual for litigants and
22		the gaps, and when there are gaps because documents	22		the administrators to be embarrassed by some of the
23		aren't there, you say, "Surely there must be some	23		documents they have authored over the years and to hope
24 25		documents, go and find some".	24		that it will not be necessary to disclose them. I do
25		But I had no perception of anybody being evasive, 83	25		not recollect whether there were any such feelings 84

(21) Pages 81 - 84

1 expressed in this case. However, the actegories were 1 So far as disclosure is concerned. discovery in 1 clearly defined in my advect and s far as i was an avery confined to documenta 3 able to do so, there was no evidence of any integer 1 failing within the relevant diss. How and you, a far as included, and as far as i was and be one of the documenta 2 of any stampt impoophy to influence my indugrent or invacions within fight or youch search was not evidence of any you're gone to every warehouse is alway official. But we did ask to a tor for work to be down of the odoes and the up antity of finding suff for an actives and whether or you're gone to every warehouse is alway official. But we did ask to a tor for work to be down of the odoes and the up antity of influences and whether you're gone to every warehouse is alway official. But we did ask to a tor for work to down and the odoes and the up antity of influences and whether you're gone to every warehouse is alway official. But we did ask to a tor for work to do one official ast for an antity of the down and the up antity of the down and the antity trying to find ecords, and the up antity of the down and the up antity antity of the down and the up						
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1		then you might say that's not a suitable expert. But	1		Witnesses as to fact should also be considered.
2		I have no recollection of it in this case, and I think	2		Mr Fenwick liked expert witnesses to prepare their
3		if it was somebody who had given a genuinely independent	3		reports in the format of initial skeleton reports and
4		adverse view, I would have known about it and it would	4		later structural reports. These would almost certainly
5		have featured in our advice.	5		need amendments during the course of the trial."
6	SIR	R BRIAN LANGSTAFF: Yes, thank you.	6		On the expert witnesses, is it correct that you
7	MR	HILL: If I could turn to a different document. This	7		did like that approach, of having a skeleton report
8		is DHSC0044876.	8		prepared for you, or prepared, and what's later
9		We can see that this is a minute from Dr Rejman	9		described as a structural report?
10		dated 18 January 1990. It is the note of a conference	10	Α.	It must have been if it was recorded. I don't recollect
11		about HIV Haemophilia Litigation that took place on	11		it. I mean, the this is I can't remember the date
12		17 January 1990, and you were present, and also says	12		of the Ikarian Reefer and whether I would have had that
13		your assistant was Helen presumably Helen Rogers.	13		to hand, which is of course Peter Cresswell's seminal
14	Α.	Yes.	14		guidance on experts and how their reports should be
15	Q.	I should say there are a significant number of these	15		prepared.
16		notes of conferences. We're not going to go through	16		I think what I was probably saying then is
17		them all. You've referred to many of them in your	17		that: we want to know broadly what they're going to say
18		witness statement. This is one that was not provided to	18		first so we can see if they're covering the correct
19		you before you wrote that statement, which is why I'm	19		areas. And then they write their reports. Sometimes
20		going to it now.	20		you send off for an expert, if you just say, "Please
21		If we could turn, please, to page 5 of that	21		write a report on this", they get entrenched and it
22		document. The second complete paragraph, beginning	22		doesn't actually cover the correct subject matter.
23		"Dr Rejman", the note says this:	23	Q.	Do you recall taking any different approach to experts
24		"Dr Rejman to furnish a summary list of expert	24		in this litigation to that which you took in your normal
25		witnesses for the central defendants to Mr R Powell.	25		practice, if I may put it that way, at that time?
		93			94
1	Α.	No. It would all have been very much the same.	1		people who were involved at the time often have
2	Q.	The reference there to "Witnesses as to fact should also	2		a reluctance to come forward if they've retired.
3		be considered", do you recall which witnesses or what	3		What we would have done, I think, and again that
4		consideration was given to the factual witnesses that	4		would have been Michael Spencer as much as myself, is to
5		the central defendants should call?	5		look at the areas we wanted to cover, find out who was
6	Α.	No, there must have been consideration given. I mean,	6		in post, who was still serving in the Civil Service and
7		that seems to put Dr Rejman in the centre of finding not	7		who had retired, approach them and persuade them to give
8		merely experts but also factual witnesses. There was	8		evidence, unless they were unwilling to do so or unable
9		certainly a difficulty, with lots of people having	9		to do so because of health.
10		retired, in finding people to give evidence of fact.	10		Might there have been people who just didn't want
11		I actually have a complete blank at this stage as to	11		to get involved? There often are. I don't have any
12		I mean, I assume we got to the stage of having factual	12		particular recollection of it. But there should be no
13		witness statements and exchanging them but I don't	13		reason why, particularly civil servants I mean, it's
14		remember them.	14		rather different from employees who have moved on, my
15	Q.	We're still trying to find out which factual witness	15		view of civil servants is that's what they are: they are
15 16	Q.	We're still trying to find out which factual witness statements were prepared but can I just ask a general			view of civil servants is that's what they are; they are a servant of the public. And if they've been involved
	Q.		15		
16	Q.	statements were prepared but can I just ask a general	15 16		a servant of the public. And if they've been involved
16 17 18 19	Q.	statements were prepared but can I just ask a general question on that point. Would there have been any	15 16 17 18 19		a servant of the public. And if they've been involved in something, they should be ready to give evidence
16 17 18 19 20	Q.	statements were prepared but can I just ask a general question on that point. Would there have been any difficulty with seeking to obtain a witness statement from somebody who held a mid-ranking level role in the Civil Service in this litigation? Is there any reason	15 16 17 18 19 20		a servant of the public. And if they've been involved in something, they should be ready to give evidence about it when called upon. Human nature isn't always like that, but we would certainly if we'd wanted evidence, we would certainly
16 17 18 19 20 21	Q.	statements were prepared but can I just ask a general question on that point. Would there have been any difficulty with seeking to obtain a witness statement from somebody who held a mid-ranking level role in the	15 16 17 18 19 20 21		a servant of the public. And if they've been involved in something, they should be ready to give evidence about it when called upon. Human nature isn't always like that, but we would
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1		other words, encouraged not to seek such factual	1		being brought to bear on experts or any other form of
2		evidence during this process?	2		inappropriate behaviour towards experts by the central
3	Α.	I'm sure nobody encouraged me not to. If they did, they	3		defendants in the litigation?
4		wouldn't have got a very good reaction from me. There	4	Α.	No, certainly nothing which came to my attention.
5		was a sense of frustration at the lack of documents.	5		My job, as I saw it, was to make sure that we got the
6		I suspect that means there was probably a frustration at	6		best, in the sense of the most truthful and informed,
7		the lack of people to tell me what actually happened,	7		evidence from the experts, rather than anything else.
8		but whether the genesis of that frustration was passage	8		I think there will have had to be pressure in the form
9		of years or some reluctance of people to come out and	9		of encouragement of experts to give evidence.
10		give evidence, I don't know.	10		I note when you sent me, at some stage, the
11		In my experience, over 40 years, there have been	11		plaintiffs' own internal opinion as to merits, that they
12		lots of occasions when people have not wanted to give	12		had difficulty in finding experts. People who are
13		evidence. I don't have any particular recollection	13		involved in the heart of a crisis, particularly one with
14		of it here. But, you know, we would have wanted to try	14		consequences as tragic as this, are often unwilling to
15		to get the best evidence we could find and, certainly,	15		get involved. So there may have been pressure on people
16		in the documents, and possibly the fact that I don't	16		to give evidence. Pressure on people as to the content
17		remember witnesses particularly, it means either	17		of their expert evidence, I certainly don't recollect.
18		I wasn't involved in it or that there weren't very many.	18		And, if I had, I would have probably said something
19		If there'd been good strong witnesses indicating things,	19		about it pretty strong.
20		I probably would have remembered something of it.	20	MR	HILL: Sir, I note the time and I'm about to move on to
21		That's the best answer I can give you, I'm afraid.	21		a different topic. I wonder if it might be a little
22	Q.	Just finally then, on this area of questioning and back	22		early to break?
23		to experts rather than factual witnesses, during the	23	SIR	RESEARCE Well, we can take a break now, in that
24		litigation and looking back on it now, the	24		case, and come back at 2.00.
25		HIV Litigation, did you have any concerns about pressure	25	(12	.57 pm)
		97			98
1	(0)	(The Short Adjournment)	1		are, of course, a clear steer that, although he was
2	•	00 pm)	2		a judge, somebody else should be doing something
2 3	SIF	00 pm) R BRIAN LANGSTAFF: Yes.	2 3		a judge, somebody else should be doing something different.
2 3 4	SIF	00 pm) R BRIAN LANGSTAFF: Yes. RHILL: Mr Fenwick, I'm going to move on to the way in	2 3 4		a judge, somebody else should be doing something different. So that's difficult. It could have led either
2 3 4 5	SIF	00 pm) R BRIAN LANGSTAFF: Yes. R HILL: Mr Fenwick, I'm going to move on to the way in which the litigation was settled. In order to provide	2 3 4 5		a judge, somebody else should be doing something different. So that's difficult. It could have led either side to make an application that he should be recused
2 3 4 5 6	SIF	00 pm) R BRIAN LANGSTAFF: Yes. HILL: Mr Fenwick, I'm going to move on to the way in which the litigation was settled. In order to provide some context I'm just going to run through some of the	2 3 4 5 6		a judge, somebody else should be doing something different. So that's difficult. It could have led either side to make an application that he should be recused from being the judge in the case: the plaintiffs because
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1		discussed. What was your view on whether he should be
2		asked to recuse himself?
3	Α.	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 17		rigorous.
18		He was almost saying, "If I'm going to be legally 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
20		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
20		101
,	~	
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 on the terms in which that was to be communicated to the
5 6		plaintiffs, but am I right in thinking that the decision
0 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	Α.	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	α.	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	Α.	The Secretary of State was Ken Clarke who was
		103

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 15		to a number of documents, again I won't go to them for
15 16		reasons of time but just to provide the chronology.
16 17		A decision was taken by ministers to continue the 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.
		102
1	Q.	Virginia Bottomley.
2	Α.	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 15		DHSC0007039_001. You can see it is headed "Re: HIV Haemophiliac 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	Α.	Yes.
20	Q.	It's dated October 1990, from the sequence of
21		correspondence it appears to be after 18 October
22		because
	A.	Right.
23 24	A. Q.	Right. that's when the instructions went out. If we can
23		that's when the instructions went out. If we can
23 24		

(26) Pages 101 - 104

1		through all of this advice and I stress again that we're	1		on the following matters"
2		not concerned with the fine detail of legal analysis and	2		The first is quantum of damages. We have that
3		trying to reconstruct that after all this time. But	3		advice. I am not going to go to it. But for the
4		there are a few points that we need to examine from it,	4		record, it is DHSC0007039_002.
5		particularly as they inform what happened later in terms	5		Then there is also reference to a short advice on
6		of the settlement of the waiver of claims.	6		the:
7	Α.	Mm-mn.	7		"ways in which some compromise of the litigation
8	Q.	If we look at paragraph 2, you state this and I quote:	8		could be achieved without creating a precedent or
9		"At this stage, our advice must be qualified by	9		affecting other pending and possible litigation."
10		the limited amount of material presently available. We	10		Now the Inquiry has not been able to find a copy
11		have had access to the pleadings, the bundles of	11		of that advice, and I note that the paragraph begins by
12		publications relied on by the Plaintiffs and have	12		saying that those advices were "in preparation".
13		considered part of the Government Defendants' discovery	13	Α.	Yes.
14		documents and first draft expert reports. We have not	14	Q.	Do you know if such advice was ever produced?
15		seen any discovery from the Health Authorities or the	15	Α.	I don't know. I would expect it was. I know we were
16		CBLA, nor have we seen their expert reports or any	16		giving active consideration to ways in which, if
17		expert reports served on behalf of the Plaintiffs. And	17		ministers decided they wanted to provide some form of
18		these are available, it may affect our opinion as to the	18		compensation, that could be done without creating
19		potential liability in particular of the Department of	19		a damaging precedent. So I'm thinking it was likely it
20		Health."	20	_	was prepared. More than that I can't say.
21		A description there of what this advice was based	21	Q.	Do you know what the general tenor of that advice was?
22		on in terms of the material suit.	22	_	How could it be done without creating a precedent?
23		If we go please to page 2, paragraph 4. You refer	23	Α.	I don't know what it was. I can tell you what I think
24		to:	24		it might have been, from my general approach to it, and
25		"Separate short Advices [that] are in preparation 105	25		the discussions well, what I believe to have been the 106
		100			100
1		discussions I would have had with Andrew Collins and	1		haemophilia, infected
2		Michael Spencer, thus informing my general view. Which	2	А.	People with we were focusing on haemophiliacs in
3		is that you either had to have some form of no fault	3	Λ.	their unique position. It was not intended to be
4		compensation scheme, pure and simple, or it might be	4		a precedent of no-fault compensation scheme. It was
5		possible to say: if you will accept for the purposes of	5		a way of providing compensation to them, and I suspect
6		this litigation that there is no duty in relation to	6		we would have already had in mind the fact that if there
7		policy matters and/or to CSM and Licensing Authority,	7		was going to be a scheme irrespective of liability, it
8		then we might be prepared to do some sort of compromise	, 8		would need to extend to haemophiliacs, because otherwise
9		on an assumption no need to prove a breach of the	9		if you give a no-fault compensation scheme to those who
10		operational duty. It would have been some way in which	10		brought a claim, why should those who haven't brought
11		we could preserve what was really important, and yet at	11		a claim be excluded?
12		the same time find a way through the litigation.	12		And I think we, to the best I recollect it, there
13		I mean, the no-fault compensation scheme or the	13		was a clear view expressed that if you're going to
14		whatever you call the settlement, and it could be	14		compensate you have to compensate everybody, and not
15		classified in a number of ways, was fairly	15		just say, "You haven't sued, so you can't have it."
16		unprecedented, as an approach. There had been	16	Q.	
17		no payments to vaccine damages without litigation. So	17		set a precedent but Treasury officials and, indeed,
18		I think that's the sort of thing we would have been	18		Department of Health offices may well say: well, we do
19		discussing.	19		not intend that, but it is going to set a precedent.
20		What went into the advice, whether it was	20	Α.	Yes, I'm sure they did, and of course they were right
21		finalised, I don't know.	21		that it would be a precedent, but what one has to do in
22	Q.	When you say that one of the options would have been	22		those circumstances, as we tried to do later on when we
23	,-	a no-fault compensation system, do you mean a general	23		did the variant CJD, was to make clear that there has to
		no-fault compensation system or just a no-fault	24		be something which takes it very far out of the ordinary
24					- , , ,
24 25		compensation system in respect of people with	25		before such a scheme is considered.
		compensation system in respect of people with 107	25		before such a scheme is considered. 108

(27) Pages 105 - 108

	111			112 (28) Pages 109 - 11
25	MR HILL: I can confirm, from having looked at both the	25		of causation and hepatitis infection is that the
24	A. Yes.	24		Now, the first issue for the plaintiffs in respect
23	must be "pool", mustn't it?	23		48 of the advice, which is at electronic page 22.
22	you've mentioned it once there and here it must be	22		about causation which is dealt with at paragraphs 47 and
21	SIR BRIAN LANGSTAFF: Yes, that's what I had in mind so	21		breach of statutory duty. There is an additional point
20	A. Yes.	20		That is in respect of alleged breach of duty or
19	SIR BRIAN LANGSTAFF: Thank you.	19		are likely to fail to prove their allegations."
18	MR HILL: I think page 3, point 5.	18		some limited risk in this area but that the plaintiffs
17	couple of pages, I think, to page 6 or 7, maybe 8.	17		"In summary therefore we consider that there is
16	set out the allegations against the Department, go back	16		It is this, and I quote:
15	going back to what we were looking at earlier, where you	15		paragraph 29, just to give the summary of that advice.
14	SIR BRIAN LANGSTAFF: I think one can pick that up, just	14		Then if we go, please, to electronic page 16 and
13	intended to be "pool sizes".	13		appreciated.
12	A. It must be. I mean, looking at it now, it clearly was	12		non-A, non-B hepatitis, and when that came to be
11	"pool sizes"?	11		the difference between hepatitis B and
10	SIR BRIAN LANGSTAFF: Do you think that's meant to read	10		difficult question of the seriousness of hepatitis and
9	sizes and advising alternative forms of treatment."	9		specifically with what is described as the more
8	concentrate, encouraging heat treatment, reducing full	8		paragraph 24, there is a section which then deals
7	that risk by eliminating imported commercial	7		respect of both HIV and hepatitis. If we go to
6	take any or any sufficient steps to remove or reduce	6		self-sufficiency and how that affects the claim in
5	sufficiently the risk of infection with Hepatitis and to	5		page 13, a discussion of the the issues of
4	allege that the Department failed to appreciate	4	Q.	There follows at paragraph 23, which is electronic
3	"Arising from those assertions, the Plaintiffs	3	Α.	Yes.
2	l quote:	2		about pool sizes.
1	page 10 and paragraph 18, to read from that, and	1		original pleadings and the re-amended pleadings, it is
20	109	20		110
25	that:	25		hepatitis infection. Over, please, to electronic
24	number (3) we can see that that refers to an allegation	24		were pleaded in support of the plaintiffs' case on
23	not going to go through them all but if we look at	23		Paragraph 17 refers to the range of printed papers that
22	allegations made against the Department of Health. I'm	22		If we go on to the next page, please.
21	please, to page 3. This sets out the principal	20		summarised.
20	document, the advice on liability, if we could go,	20		haemophiliacs", and those assertions are then
19	Q . Turning back to the advice that you did give in this	10		the risk of Hepatitis with the treatment of
18	issue.	18		a number of assertions in relation to the association of
17	resources, would be challenged. So it was an important	10		"In paragraphs 19 to 23 the Plaintiffs make
16	are always limited resources, limited resources, limited	16		plaintiffs, and it says that:
14	without fault", the Treasury and the you know, there	14		refers to the Re-Amended Statement of Claim of the
13 14	gates by saying, "We will in certain cases compensate	13		Then on please to page 8 and paragraph 16. This
12	So there was a real danger at this stage, because the flood of claims was beginning, that if we open the	12		products transmitting hepatitis and other viral infections.
12		12		_
10	1986.	10		failure to have sufficient regard to the risk of blood
10	people looked at me askance. That was in about 1985,	3 10		item for both of those is again this point about the
9	a solicitor for negligence in an over-valuation case,	9		and the Committee on Safety of Medicines, and the first
8	in others. I mean when I suggested you might sue	8		principal allegations against the Licensing Authority
6 7	being made. At this stage there were relatively few negligence claims in medicine. I mean, you know as	6 7		what is said about that allegation. We can turn to electronic page 4, paragraphs 6 and 7 set out the
5	.	5		I'm just going to follow through in the document
4	careful, in some ways overcautious, because of the fear of being sued, the massive amount of claims which are	4		risk of their transmission through blood products."
3	medical practitioners and other professionals are very	3		infections and to take steps to reduce or eliminate the
	stage you know, now we are used to a society in which	2		regard to the risk of Hepatitis or other viral
2	stage you know now we are used to a society in which			

(28) Pages 109 - 112

1		plaintiffs would have to show that negligent failure to	1		So just pausing there. The statement of claim and
2		protect for hepatitis would give rise to liability for	2		the amended statement of claim did not plead for damages
3		infection with HIV, which, for much of this time, would	3		for hepatitis infection, just for HIV infection; is that
4		have been an unknown virus. What you say about the	4		right?
5		defence that's open to the Government, about	5	Α.	That is right.
6		three-quarters of the way down that page, the sentence	6	Q.	So, in order to get to HIV infection through that route,
7		beginning "The defence open", I will just read that out	7		the claimants had to deal with that causation issue, but
8		to you.	8		are we right to read this as, in your view, being one of
9	Α.	Yes.	9		the areas where the Government was on weaker ground
10	Q.	"The defence open to the Government is to argue that the	10		compared to other areas?
11		Hepatitis risk and any negligence in relation to it is	11	Α.	That's certainly the view we came to collectively.
12		so wholly different from the utterly unforeseeable	12		I think, if anything, I was probably a little more
13		advent of the AIDS virus that any negligence in relation	13		bullish than the others about it but this is the view.
14		to Hepatitis and self-sufficiency was not causative of	14		I mean, it's very difficult. HIV is so very different
15		the damage actually suffered by the Plaintiffs."	15		from hepatitis or at least as it was then
16		If we go on to the next paragraph, please.	16		understood that it seemed to me that the sort of way
17		"We consider that such a defence is eminently	17		that courts looked at causation thereafter, from
18		arguable and would normally stand a reasonable prospect	18		Lord Hoffmann and his mountaineer's knee in SAAMCO, made
19		of success. However, it is open to the Court to hold	19		this is an argument that we should win.
20		that HIV is a virus as is Hepatitis and that the	20		But, again, I think we were right, collectively,
21		Government cannot shelter behind the increased severity	21		to reach the view that because of the sympathy the court
22		of the AIDS virus. Overall, we consider that there is	22		would find, if it could be classified as a virus, then
23		a reasonable prospect of our argument succeeding but	23		one virus is the same as another one: if you could have
24		this is one of the more difficult areas so far as the	24		foreseen damage by virus, then it doesn't matter which
25		Government Defendants are concerned."	25		virus, in fact, infects you.
		113			114
4			,		No
1		So it's that balance but, certainly, it was	1		"Overall assessment of the risk", I'm just going to read
2		an area which collectively we felt was one which we	2		through this. What you and your colleagues wrote is
3	~	might not win.	3		this:
4	Q.	Just so it is clear for everybody, that was not, of	4		"55. It will be clear from earlier parts of this
5		course, the only hurdle that the plaintiffs had to get	5 6		Advice that much more work needs to be done before a
6		over?			final assessment of the risk of Plaintiffs succeeding at
7	A.		7		trial can be established. However, at present it is our
8 9		One of many.	8 9		view that the Government Defendants will succeed in
	A.		Ū		defeating the Plaintiffs' claim on each of three
10	Q.	The second issue about causation, which is dealt with at	10		grounds:
11		paragraph 49, is that there will be a need to show that	11		"(1) the existence of a duty of care;
12		achieving self-sufficiency in blood products in England and Wales would have led to incidence of HIV either	12		"(2) negligence or breach of duty;
13 14		being eliminated or reduced, and that was another hurdle	13		"(3) causation. "56. However, it will be equally clear that there
14		that the plaintiffs would have to cross.	14 15		are a number of areas in which risks exist and it would
16	А.	Yes.	16		therefore not be appropriate to proceed on the
10	Q.	That, of course, is expressed by reference to HIV. If	17		assumption the Plaintiffs' claim will fail.
18	ω.	the claim had been for hepatitis damage, as well, then	18		"57. What is perhaps worth some consideration is
10		the same point would have applied to hepatitis, wouldn't	19		that it is possible that the Plaintiffs will succeed in
20		it? You would still have needed to prove that	20		showing negligence but will fail either to prove a duty
21		self-sufficiency would have eliminated or reduced the	20		of care or to prove causation or in appropriate places
22		risk	21		to prove Wednesbury unreasonableness. Even if the
22	Α.	Yes.	22		Courts do not succumb to the temptation to find the
24	Q.	- of hepatitis infection. If we could turn, then, to	23		Government Defendants liable if they can be shown to be
25		electronic page 26 of the document, the final page, the	25		negligent, the outcome of such a trial in which the
20		115	20		116

(29) Pages 113 - 116

1		Coverement was found to have been participant but to have	1		overall tenor of the view, as reflected in those three
1 2		Government was found to have been negligent but to have escaped liability because of what many would regard as	1 2		bullet points, a duty of care, breach and causation,
2		technicalities in the law, would no doubt bring adverse	2		would, I think, have been largely unchanged.
4		public comment."	4		I mean it's possible, and I don't remember but
5		That is the conclusion of your advice.	5		looking what's said here about the causation argument,
6		This advice, as we know, was written at some point	6		it's possible that the concept of a virus and
7		in October, so after the Court of Appeal decision in	7		therefore that's enough may have come into more
, 8		PII	, 8		prominence, and that's something which may have
9	A.		9		changed which may be why my recollection isn't being
10	Q.	and shortly before the settlement proceedings the	10		slightly more bullish than is written here. But that's
11	۰.	process leading to settlement began.	11		the only area I can think of.
12		Is it fair to say that this is probably the best	12	Q.	The overall thrust of your advice that it was your view
13		record that we have of the central defendants' counsel	13	_ .	that the Department of Health and the other central
14		team view of the strength and weakness of the	14		defendants were likely to win the
15		litigation?	15		case (overspeaking)
16	А.	Of the legal position of the litigation, yes.	16	A.	Yes.
17	Q.	Had your view changed very much over the course of your	17	Q.	I'm going to turn now to some documents which show how
18	ч.	involvement in the litigation?	18		the discussions which led to the settlement unfolded.
19	Α.	It's very hard to recollect. I mean, certainly not	19		If we can have, please, DHSC0046962_187.
20		significantly. It is always the case that as you get	20		This is a document, an internal Department of
21		more into a particular piece of litigation and you see	21		Health document headed "Present position on
22		more documents, and you think about it more, you see	22		HIV/Haemophilia Litigation". I just note from that
23		more areas of potential difficulty, you also see more	23		first paragraph that the trial was due to begin on
24		arguments in favour. So I think our views will have	24		4 March 1991.
25		shifted on particular topics from time to time but the	25		If we turn to a second page, please. References
		117			118
1		to "Out of Court Settlement". I'll just read through	1		Department.
1 2		to "Out of Court Settlement". I'll just read through what is said there.	1 2		Department. "In recent meetings with the Health Authorities'
2		what is said there.	2		"In recent meetings with the Health Authorities'
2 3		what is said there. "In July 1990 Mr Justice Ognall took the	2 3		"In recent meetings with the Health Authorities' solicitors and the Department's leading Counsel, the
2 3 4		what is said there. "In July 1990 Mr Justice Ognall took the exceptional step of asking the parties to consider	2 3 4		"In recent meetings with the Health Authorities' solicitors and the Department's leading Counsel, the plaintiffs have made written proposals for a settlement
2 3 4 5		what is said there. "In July 1990 Mr Justice Ognall took the exceptional step of asking the parties to consider a compromise settlement of the litigation. In its	2 3 4 5		"In recent meetings with the Health Authorities' solicitors and the Department's leading Counsel, the plaintiffs have made written proposals for a settlement in the range of £30 to £60 million. They invited the
2 3 4 5 6		what is said there. "In July 1990 Mr Justice Ognall took the exceptional step of asking the parties to consider a compromise settlement of the litigation. In its formal response, the Department rejected the proposal	2 3 4 5 6		"In recent meetings with the Health Authorities' solicitors and the Department's leading Counsel, the plaintiffs have made written proposals for a settlement in the range of £30 to £60 million. They invited the Department to make an offer in the upper end of the
2 3 4 5 6 7		what is said there. "In July 1990 Mr Justice Ognall took the exceptional step of asking the parties to consider a compromise settlement of the litigation. In its formal response, the Department rejected the proposal and said that moral and compassionate arguments had been	2 3 4 5 6 7		"In recent meetings with the Health Authorities' solicitors and the Department's leading Counsel, the plaintiffs have made written proposals for a settlement in the range of £30 to £60 million. They invited the Department to make an offer in the upper end of the range.
2 3 4 5 6 7 8		what is said there. "In July 1990 Mr Justice Ognall took the exceptional step of asking the parties to consider a compromise settlement of the litigation. In its formal response, the Department rejected the proposal and said that moral and compassionate arguments had been recognised by the Government's ex-gratia payments	2 3 4 5 6 7 8		"In recent meetings with the Health Authorities' solicitors and the Department's leading Counsel, the plaintiffs have made written proposals for a settlement in the range of £30 to £60 million. They invited the Department to make an offer in the upper end of the range. "Kenneth Clarke met Counsel on 1 November to
2 3 4 5 6 7 8 9		what is said there. "In July 1990 Mr Justice Ognall took the exceptional step of asking the parties to consider a compromise settlement of the litigation. In its formal response, the Department rejected the proposal and said that moral and compassionate arguments had been recognised by the Government's ex-gratia payments totalling £24m."	2 3 4 5 6 7 8 9		"In recent meetings with the Health Authorities' solicitors and the Department's leading Counsel, the plaintiffs have made written proposals for a settlement in the range of £30 to £60 million. They invited the Department to make an offer in the upper end of the range. "Kenneth Clarke met Counsel on 1 November to discuss this. The line was confirmed that there should
2 3 4 5 6 7 8 9 10		what is said there. "In July 1990 Mr Justice Ognall took the exceptional step of asking the parties to consider a compromise settlement of the litigation. In its formal response, the Department rejected the proposal and said that moral and compassionate arguments had been recognised by the Government's ex-gratia payments totalling £24m." I pause there to say that's in relation to	2 3 4 5 6 7 8 9 10		"In recent meetings with the Health Authorities' solicitors and the Department's leading Counsel, the plaintiffs have made written proposals for a settlement in the range of £30 to £60 million. They invited the Department to make an offer in the upper end of the range. "Kenneth Clarke met Counsel on 1 November to discuss this. The line was confirmed that there should be no offer from the Department. However, our Counsel
2 3 4 5 6 7 8 9 10 11		what is said there. "In July 1990 Mr Justice Ognall took the exceptional step of asking the parties to consider a compromise settlement of the litigation. In its formal response, the Department rejected the proposal and said that moral and compassionate arguments had been recognised by the Government's ex-gratia payments totalling £24m." I pause there to say that's in relation to Macfarlane Trust.	2 3 4 5 6 7 8 9 10 11		"In recent meetings with the Health Authorities' solicitors and the Department's leading Counsel, the plaintiffs have made written proposals for a settlement in the range of £30 to £60 million. They invited the Department to make an offer in the upper end of the range. "Kenneth Clarke met Counsel on 1 November to discuss this. The line was confirmed that there should be no offer from the Department. However, our Counsel would make known to the Plaintiffs that if they were to
2 3 4 5 6 7 8 9 10 11 12		 what is said there. "In July 1990 Mr Justice Ognall took the exceptional step of asking the parties to consider a compromise settlement of the litigation. In its formal response, the Department rejected the proposal and said that moral and compassionate arguments had been recognised by the Government's ex-gratia payments totalling £24m." I pause there to say that's in relation to Macfarlane Trust. "As a follow-up to Mr Justice Ognall's statement," 	2 3 4 5 6 7 8 9 10 11 12 13 14		"In recent meetings with the Health Authorities' solicitors and the Department's leading Counsel, the plaintiffs have made written proposals for a settlement in the range of £30 to £60 million. They invited the Department to make an offer in the upper end of the range. "Kenneth Clarke met Counsel on 1 November to discuss this. The line was confirmed that there should be no offer from the Department. However, our Counsel would make known to the Plaintiffs that if they were to offer a settlement around £20 to £25 million plus costs
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2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22		 what is said there. "In July 1990 Mr Justice Ognall took the exceptional step of asking the parties to consider a compromise settlement of the litigation. In its formal response, the Department rejected the proposal and said that moral and compassionate arguments had been recognised by the Government's ex-gratia payments totalling £24m." I pause there to say that's in relation to Macfarlane Trust. "As a follow-up to Mr Justice Ognall's statement, the lead firm of Solicitors for the plaintiffs, Pannone Napier, had suggested a settlement figure of £80 to £90 million plus costs. However in informal discussions with the solicitors for the Health Authorities, Pannone Napier had suggested that a settlement might be reached nearer £30 million. Kenneth Clarke did not wish to initiate any negotiations with the plaintiffs as this might imply some acceptance of liability for negligence. However with the Department's knowledge the Health Authorities encouraged Pannone Napier to explore with the other solicitors for the plaintiffs whether they could agree a realistic 	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24		"In recent meetings with the Health Authorities' solicitors and the Department's leading Counsel, the plaintiffs have made written proposals for a settlement in the range of £30 to £60 million. They invited the Department to make an offer in the upper end of the range. "Kenneth Clarke met Counsel on 1 November to discuss this. The line was confirmed that there should be no offer from the Department. However, our Counsel would make known to the Plaintiffs that if they were to offer a settlement around £20 to £25 million plus costs this might be considered. Any settlement would have to be acceptable to all plaintiffs and end the litigation. No money has been agreed with Treasury for an out of court settlement, and this can be difficult to obtain as the prospects for successfully defending the action are reasonable." Then another document, DHSC0004365_043. This takes this story forward a little further. It is a note made by Ronald Powell, the Department of Health's solicitors, of a telephone conversation with you on 7 November. I note that on 1 November, Geoffrey Howe resigned from Margaret Thatcher's
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 9 20 21 22 23		 what is said there. "In July 1990 Mr Justice Ognall took the exceptional step of asking the parties to consider a compromise settlement of the litigation. In its formal response, the Department rejected the proposal and said that moral and compassionate arguments had been recognised by the Government's ex-gratia payments totalling £24m." I pause there to say that's in relation to Macfarlane Trust. "As a follow-up to Mr Justice Ognall's statement, the lead firm of Solicitors for the plaintiffs, Pannone Napier, had suggested a settlement figure of £80 to £90 million plus costs. However in informal discussions with the solicitors for the Health Authorities, Pannone Napier had suggested that a settlement might be reached nearer £30 million. Kenneth Clarke did not wish to initiate any negotiations with the plaintiffs as this might imply some acceptance of liability for negligence. However with the Department's knowledge the Health Authorities encouraged Pannone Napier to explore with the other solicitors for 	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23		"In recent meetings with the Health Authorities' solicitors and the Department's leading Counsel, the plaintiffs have made written proposals for a settlement in the range of £30 to £60 million. They invited the Department to make an offer in the upper end of the range. "Kenneth Clarke met Counsel on 1 November to discuss this. The line was confirmed that there should be no offer from the Department. However, our Counsel would make known to the Plaintiffs that if they were to offer a settlement around £20 to £25 million plus costs this might be considered. Any settlement would have to be acceptable to all plaintiffs and end the litigation. No money has been agreed with Treasury for an out of court settlement, and this can be difficult to obtain as the prospects for successfully defending the action are reasonable." Then another document, DHSC0004365_043. This takes this story forward a little further. It is a note made by Ronald Powell, the Department of Health's solicitors, of a telephone conversation with you on 7 November. I note that on 1 November,

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INQY1000213 0030

1		Kenneth Clarke leaving the Department of Health and	1		figures they would settle for were only to the middle or
2		William Waldegrave becoming the Secretary of State.	2		the right-hand side of the list of figures then it was
3	A.	That's helpful.	3		best for us to accept that we would have to go to
4	Q.	What Mr Powell wrote of the conversation is this:	4		Court."
5	-4.	"Mr Fenwick said that Andrew Collins had spoken to	5		I pause there to note that this obviously refers
6		Rupert Jackson [that's the lead or one of the lead QCs	6		to a document which isn't provided with the note, but
7		for the plaintiffs] last Friday and had arranged for	7		indicates that the Government was prepared to listen to
8		them to meet on Monday."	8		an offer within a certain settlement range but not at
9		The Friday was 2 November, the Monday was	9		another range.
10		5 November.	10	Α.	Yes.
11		"They met on Monday at 8.00 am. Those attending	11	Q.	Is that a fair interpretation
12		were Andrew Collins, Rupert Jackson, Justin Fenwick,	12	A.	Yes.
13		Michael Brooke and Dan Brennan."	13	Q.	read it with the other note. Returning to the
14		Just pausing there, obviously we know your name	14		document:
15		and Mr Collins' name. Mr Jackson, Mr Brooke and	15		"The Steering Committee met on Monday evening and
16		Mr Brennan were all barristers for the plaintiffs' side?	16		a further meeting between Counsel concerned has been
17	A.	Yes.	17		arranged for 6.00 pm this evening. Mr Fenwick suspects
18	Q.	Going back to the document:	18		that they will come back asking for about £40m as
19		"Andrew Collins put our position to them. We	19		openers. He will report back after the meeting but has
20		could not initiate a compromise but were prepared to	20		got the impression that their sights are not set high."
21		listen to what they had to say. They did not balk at	21		Then the document goes on to note four matters
22		this.	22		that you raised. I'm going to come back to one of those
23		"They were told that the figures we might have in	23		in a second, but before I do, it seems clear from these
24		mind were not on the paper that they had submitted. The	24		documents that your instructions were that the central
25		top range of figures were out of the question. If the 121	25		defendants were not to make any offer themselves to 122
4			,		4-4-
1		settle the litigation, but were instructed to listen to	1		trade.
		offere	0		
2		offers	2		Whereas this had to be a figure we were asking for
3	A.	Yes.	3		Whereas this had to be a figure we were asking for that the plaintiffs themselves, through their legal
3 4	A. Q.	Yes. and perhaps indicate the kind of range of offers that	3 4		Whereas this had to be a figure we were asking for that the plaintiffs themselves, through their legal team, would regard as being appropriate in all the
3 4 5	Q.	Yes. and perhaps indicate the kind of range of offers that might be acceptable; is that fair?	3 4 5		Whereas this had to be a figure we were asking for that the plaintiffs themselves, through their legal team, would regard as being appropriate in all the circumstances. Less than they would have liked for
3 4 5 6	Q. A.	Yes. and perhaps indicate the kind of range of offers that might be acceptable; is that fair? Yes.	3 4 5 6		Whereas this had to be a figure we were asking for that the plaintiffs themselves, through their legal team, would regard as being appropriate in all the circumstances. Less than they would have liked for their clients, but appropriate given their perception of
3 4 5 6 7	Q.	Yes. and perhaps indicate the kind of range of offers that might be acceptable; is that fair? Yes. Did that cause any difficulties for you in the	3 4 5 6 7		Whereas this had to be a figure we were asking for that the plaintiffs themselves, through their legal team, would regard as being appropriate in all the circumstances. Less than they would have liked for their clients, but appropriate given their perception of (a) the legal strength of the case and (b) the
3 4 5 6 7 8	Q. A.	Yes. and perhaps indicate the kind of range of offers that might be acceptable; is that fair? Yes. Did that cause any difficulties for you in the negotiations? The fact that you weren't able to make an	3 4 5 6 7 8		Whereas this had to be a figure we were asking for that the plaintiffs themselves, through their legal team, would regard as being appropriate in all the circumstances. Less than they would have liked for their clients, but appropriate given their perception of (a) the legal strength of the case and (b) the difficulty of persuading Government to make an ex gratia
3 4 5 6 7 8 9	Q. A. Q.	Yes. and perhaps indicate the kind of range of offers that might be acceptable; is that fair? Yes. Did that cause any difficulties for you in the negotiations? The fact that you weren't able to make an offer yourself?	3 4 5 6 7 8 9		Whereas this had to be a figure we were asking for that the plaintiffs themselves, through their legal team, would regard as being appropriate in all the circumstances. Less than they would have liked for their clients, but appropriate given their perception of (a) the legal strength of the case and (b) the difficulty of persuading Government to make an ex gratia or out-of-the-litigation settlement, so that and that
3 4 5 6 7 8 9	Q. A.	Yes. and perhaps indicate the kind of range of offers that might be acceptable; is that fair? Yes. Did that cause any difficulties for you in the negotiations? The fact that you weren't able to make an offer yourself? Well, everything always makes a difference. If I am	3 4 5 6 7 8 9 10		Whereas this had to be a figure we were asking for that the plaintiffs themselves, through their legal team, would regard as being appropriate in all the circumstances. Less than they would have liked for their clients, but appropriate given their perception of (a) the legal strength of the case and (b) the difficulty of persuading Government to make an ex gratia or out-of-the-litigation settlement, so that and that represents something which would potentially, and
3 4 5 7 8 9 10 11	Q. A. Q.	Yes. and perhaps indicate the kind of range of offers that might be acceptable; is that fair? Yes. Did that cause any difficulties for you in the negotiations? The fact that you weren't able to make an offer yourself? Well, everything always makes a difference. If I am instructed that you can go up to 20 million, 30 million,	3 4 5 6 7 8 9 10 11		Whereas this had to be a figure we were asking for that the plaintiffs themselves, through their legal team, would regard as being appropriate in all the circumstances. Less than they would have liked for their clients, but appropriate given their perception of (a) the legal strength of the case and (b) the difficulty of persuading Government to make an ex gratia or out-of-the-litigation settlement, so that and that represents something which would potentially, and I think we'll come on to this later, remove the need for
3 4 5 6 7 8 9 10 11 12	Q. A. Q.	Yes. and perhaps indicate the kind of range of offers that might be acceptable; is that fair? Yes. Did that cause any difficulties for you in the negotiations? The fact that you weren't able to make an offer yourself? Well, everything always makes a difference. If I am instructed that you can go up to 20 million, 30 million, 40 million, then you have a position and you can	3 4 5 6 7 8 9 10 11 12		Whereas this had to be a figure we were asking for that the plaintiffs themselves, through their legal team, would regard as being appropriate in all the circumstances. Less than they would have liked for their clients, but appropriate given their perception of (a) the legal strength of the case and (b) the difficulty of persuading Government to make an ex gratia or out-of-the-litigation settlement, so that and that represents something which would potentially, and I think we'll come on to this later, remove the need for any kind of horse trade where we were trying to push
3 4 5 6 7 8 9 10 11 12 13	Q. A. Q.	Yes. and perhaps indicate the kind of range of offers that might be acceptable; is that fair? Yes. Did that cause any difficulties for you in the negotiations? The fact that you weren't able to make an offer yourself? Well, everything always makes a difference. If I am instructed that you can go up to 20 million, 30 million, 40 million, then you have a position and you can negotiate. This was a case in which effectively the	3 4 5 6 7 8 9 10 11 12 13		Whereas this had to be a figure we were asking for that the plaintiffs themselves, through their legal team, would regard as being appropriate in all the circumstances. Less than they would have liked for their clients, but appropriate given their perception of (a) the legal strength of the case and (b) the difficulty of persuading Government to make an ex gratia or out-of-the-litigation settlement, so that and that represents something which would potentially, and I think we'll come on to this later, remove the need for any kind of horse trade where we were trying to push down the plaintiffs so that they were compromising.
3 4 5 6 7 8 9 10 11 12 13 14	Q. A. Q.	Yes. and perhaps indicate the kind of range of offers that might be acceptable; is that fair? Yes. Did that cause any difficulties for you in the negotiations? The fact that you weren't able to make an offer yourself? Well, everything always makes a difference. If I am instructed that you can go up to 20 million, 30 million, 40 million, then you have a position and you can negotiate. This was a case in which effectively the Government was saying: We will fight this case, but we	3 4 5 6 7 8 9 10 11 12 13 14		Whereas this had to be a figure we were asking for that the plaintiffs themselves, through their legal team, would regard as being appropriate in all the circumstances. Less than they would have liked for their clients, but appropriate given their perception of (a) the legal strength of the case and (b) the difficulty of persuading Government to make an ex gratia or out-of-the-litigation settlement, so that and that represents something which would potentially, and I think we'll come on to this later, remove the need for any kind of horse trade where we were trying to push down the plaintiffs so that they were compromising. This was intended to illicit from them their realistic
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3 4 5 6 7 8 9 10 11 12 13 14 15 16 17	Q. A. Q.	Yes. and perhaps indicate the kind of range of offers that might be acceptable; is that fair? Yes. Did that cause any difficulties for you in the negotiations? The fact that you weren't able to make an offer yourself? Well, everything always makes a difference. If I am instructed that you can go up to 20 million, 30 million, 40 million, then you have a position and you can negotiate. This was a case in which effectively the Government was saying: We will fight this case, but we recognise that there is an argument for making some kind of arrangement I'm using that as a neutral word but within resources which we, the Government, regard as	3 4 5 6 7 8 9 10 11 12 13 14 15 16 17		Whereas this had to be a figure we were asking for that the plaintiffs themselves, through their legal team, would regard as being appropriate in all the circumstances. Less than they would have liked for their clients, but appropriate given their perception of (a) the legal strength of the case and (b) the difficulty of persuading Government to make an ex gratia or out-of-the-litigation settlement, so that and that represents something which would potentially, and I think we'll come on to this later, remove the need for any kind of horse trade where we were trying to push down the plaintiffs so that they were compromising. This was intended to illicit from them their realistic figure for what they thought would be a good outcome in all the circumstances, given the legal difficulties. So I think it in some ways made it easier, because
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3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	Q. A. Q.	Yes. and perhaps indicate the kind of range of offers that might be acceptable; is that fair? Yes. Did that cause any difficulties for you in the negotiations? The fact that you weren't able to make an offer yourself? Well, everything always makes a difference. If I am instructed that you can go up to 20 million, 30 million, 40 million, then you have a position and you can negotiate. This was a case in which effectively the Government was saying: We will fight this case, but we recognise that there is an argument for making some kind of arrangement I'm using that as a neutral word but within resources which we, the Government, regard as manageable. Therefore, if you would like to bring this to an end, then you must come forward with a figure. I think that was actually, in some ways, quite helpful. I mean, those were our instructions, so that's what we did. It was quite helpful in the sense that,	3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	Q.	Whereas this had to be a figure we were asking for that the plaintiffs themselves, through their legal team, would regard as being appropriate in all the circumstances. Less than they would have liked for their clients, but appropriate given their perception of (a) the legal strength of the case and (b) the difficulty of persuading Government to make an ex gratia or out-of-the-litigation settlement, so that and that represents something which would potentially, and I think we'll come on to this later, remove the need for any kind of horse trade where we were trying to push down the plaintiffs so that they were compromising. This was intended to illicit from them their realistic figure for what they thought would be a good outcome in all the circumstances, given the legal difficulties. So I think it in some ways made it easier, because if we'd had a figure then we'd have been under pressure to produce it, and that might have led to horse trading. In other ways it was more different because we had to hold back. Was this form of instructions usual, in your experience?
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3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23	Q. A. Q.	Yes. and perhaps indicate the kind of range of offers that might be acceptable; is that fair? Yes. Did that cause any difficulties for you in the negotiations? The fact that you weren't able to make an offer yourself? Well, everything always makes a difference. If I am instructed that you can go up to 20 million, 30 million, 40 million, then you have a position and you can negotiate. This was a case in which effectively the Government was saying: We will fight this case, but we recognise that there is an argument for making some kind of arrangement I'm using that as a neutral word but within resources which we, the Government, regard as manageable. Therefore, if you would like to bring this to an end, then you must come forward with a figure. I think that was actually, in some ways, quite helpful. I mean, those were our instructions, so that's what we did. It was quite helpful in the sense that, once the defendant side puts forward a figure and the	3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23		Whereas this had to be a figure we were asking for that the plaintiffs themselves, through their legal team, would regard as being appropriate in all the circumstances. Less than they would have liked for their clients, but appropriate given their perception of (a) the legal strength of the case and (b) the difficulty of persuading Government to make an ex gratia or out-of-the-litigation settlement, so that and that represents something which would potentially, and I think we'll come on to this later, remove the need for any kind of horse trade where we were trying to push down the plaintiffs so that they were compromising. This was intended to illicit from them their realistic figure for what they thought would be a good outcome in all the circumstances, given the legal difficulties. So I think it in some ways made it easier, because if we'd had a figure then we'd have been under pressure to produce it, and that might have led to horse trading. In other ways it was more different because we had to hold back. Was this form of instructions usual, in your experience? Oh gosh, um now, perhaps not. I mean, I'm often in

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1		are, settlement offers and we think our case is strong,	1	A.	`
2		and we say to the plaintiffs "If you want to settle this	2		1
3		case you've got to be realistic, come to us".	3	Q.	
4		I think in those days it was probably a little bit	4	Α.	I
5		less usual. It was unusual also in the sense that this	5		
6		was not being done by "We think your case is rubbish, we	6	Q.	I
7		might be prepared to pay you something to go away".	7		i
8		This was "We're talking about something different here	8	Α.	I
9		and we're therefore going to do it in a different way".	9		(
10		So I think it was the reasons for it which were	10		1
11		different, more than necessarily the actual approach.	11	Q.	`
12	Q.	Finally on this point, in your view, was there anything	12	Α.	
13		inappropriate about instructing you in that way?	13	Q.	-
14	Α.	No, I don't think so. I mean, I think it was intended	14		1
15		to facilitate a settlement in a way which ministers	15		١
16		would regard as acceptable, and it was leaving it open.	16		1
17		I mean, if we had been dealing with a weak legal team,	17		ł
18		I think it might have been a little unfair, but we were	18		1
19		dealing with advocates of really very high calibre, and	19		é
20		I don't think in the circumstances, I don't think it	20		á
21		was at all inappropriate, no.	21		5
22	Q.	Just on those advocates, Mr Jackson became a judge in	22		(
23		the Court of Appeal, subsequently.	23	Α.	,
24	A.	Yes.	24	Q.	1
25	Q.	Mr Brennan was a QC and is now Lord Brennan. 125	25		1
		. = 0			
1			1		1
1 2		going on. Did you ever learn whether or not that was	1 2		1
		going on.		Q.	
2	A.	going on. Did you ever learn whether or not that was	2	Q. A.	
2 3	A.	going on. Did you ever learn whether or not that was correct? Not that I can think of. I can't recollect anybody	2 3		
2 3 4	A.	going on. Did you ever learn whether or not that was correct?	2 3 4		
2 3 4 5	A.	going on. Did you ever learn whether or not that was correct? Not that I can think of. I can't recollect anybody saying, "We have to go to the Legal Aid Board". I don't	2 3 4 5		\
2 3 4 5 6	A.	going on. Did you ever learn whether or not that was correct? Not that I can think of. I can't recollect anybody saying, "We have to go to the Legal Aid Board". I don't think they would have done because, bluntly, they	2 3 4 5 6		
2 3 4 5 6 7	A.	going on. Did you ever learn whether or not that was correct? Not that I can think of. I can't recollect anybody saying, "We have to go to the Legal Aid Board". I don't think they would have done because, bluntly, they shouldn't have done so. I mean, they knew that we would know that they would have to report back to the Legal	2 3 4 5 6 7		
2 3 4 5 6 7 8	A.	going on. Did you ever learn whether or not that was correct? Not that I can think of. I can't recollect anybody saying, "We have to go to the Legal Aid Board". I don't think they would have done because, bluntly, they shouldn't have done so. I mean, they knew that we would	2 3 4 5 6 7 8		
2 3 4 5 6 7 8 9	A.	going on. Did you ever learn whether or not that was correct? Not that I can think of. I can't recollect anybody saying, "We have to go to the Legal Aid Board". I don't think they would have done because, bluntly, they shouldn't have done so. I mean, they knew that we would know that they would have to report back to the Legal Aid Board in stages because you always do, in cases of	2 3 4 5 6 7 8 9		
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2 3 4 5 6 7 8 9 10 11 12 13	A.	going on. Did you ever learn whether or not that was correct? Not that I can think of. I can't recollect anybody saying, "We have to go to the Legal Aid Board". I don't think they would have done because, bluntly, they shouldn't have done so. I mean, they knew that we would know that they would have to report back to the Legal Aid Board in stages because you always do, in cases of this magnitude. In just the same way as a plaintiff knows that the defendant will have to report to his insurers from time to time and, therefore, will regard certain stages as pressure points. And in settlements	2 3 4 5 6 7 8 9 10 11 12 13		
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- Yes, he was appointed by Mr Blair to the House of Lords
- for services to something.
- But not a Law Lord, we should --
- Not a Law Lord. He never had a judicial post. He may
- have been a deputy High Court judge, I can't remember.
- Michael Brooke later became a silk and was involved in ---
- He became a silk. And I think -- I mean, he was in my chambers, I should know -- became a circuit judge and
- then sadly died --
- Yes.
- -- relatively young.
- Turning to one of the other issues you raise in that
- note on page 3, I won't read through all of this, but
- what you suggested to Mr Powell is that one of the
- reasons why the plaintiffs side may be keen on settling
- at this stage was because they may have to go back to the Legal Aid Board to have their funding renewed and,
- at that stage, their counsel would have to give
- an honest and frank advice about their prospects of
- success, and that may lead to the Legal Aid Board
- choosing not to renew the funding.
- Yes.
- Now, the way that it is expressed there is that that was
 - your best effort at trying to work out what might be 126
- which was, I think, sent to me in the second set of
- papers I received --
- Yes, that's right --
- -- was the way that they were, in fact, looking at the
- case and the way in which clearly they would actually
- have had to report to the Legal Aid Board. We had no
- inkling of that. We might have thought that they would have to advise cautiously, possibly very cautiously.
- I think I'm pleased that we didn't know the nature of
- their actual advice, because that could have encouraged
- hawks to say "Well, in that case, we won't settle".
- I hope not and I've no reason to think it would have
- done, but we certainly had no idea that that was their
- view. We would have understood that they recognised the
- difficulties of the case, but certainly not to that extent.
- I'm not going to go to that advice but other evidence and questions which have been posed by the Core
- Participants lead me to ask this: were you ever aware,
- during the course of the HIV Litigation, of any attempts
- by civil servants or by ministers to influence the
- decision making of the Legal Aid Board, in respect of
- the plaintiffs in the HIV Litigation?
- No. I mean -- well, there are two ways in which that
- might have happened. One would be a formal open letter 128

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1		or communication to the plaintiff's solicitors, "Please	1		difference.
2		ensure the Legal Aid Board is aware of this", which is	2	A.	Mm.
3		what one often does in litigation, to make sure that the	3		Are you able to expand on what that change of mood was,
4		real decision-makers know I don't recollect that	4		and why it came about?
5		happening at all of anything done by way of indirect	5	A.	Well, of course, there were also all those adjournment
6		or private communication. I'm not aware of it. And	6		debates which were going on in Parliament at the same
7		I think it is most unlikely that well, I don't know.	7		time.
8		But I would have been very surprised to hear about it.	8	Q.	Yes.
9		Have I seen anything which suggests that? No,	9	Α.	So there was increasing pressure from outside the
10		I don't think so. I mean, I'm not aware even of what	10		litigation on Government at that stage. So the move
11		decisions the Legal Aid Board did make but I'm not aware	11		from "We don't settle cases unless we are advised that
12		of any such communication or attempt.	12		we lose them or have a significant chance of losing
13	Q.		13		them", and "We don't set any precedents", I think
14	-	whether that was appropriate, what would your advice	14		gradually gave way to "If we can find a way of providing
15		have been?	15		compensation to these victims without damaging (a) our
16	A.		16		willingness to fight cases on their merits; and (b) not
17		is wholly inappropriate. We do have not only separation	17		creating a precedent, then we should do so", I think,
18		of legislature and executive but when you appoint	18		came in.
19		a Legal Aid Board you make them independent and you	19		The changes of personalities may have made that
20		don't challenge their independence, otherwise you	20		appear more accentuated. I mean, William Waldegrave
21		destroy the system.	21		I certainly attended meetings with both of them and
22	Q.	You have said in your statement that you were aware of	22		I can't remember whether it was one or two or more;
23	ч.	a change in mood around this time, you were asked about	23		William Waldegrave had a very different style to
24		whether or not the change from Mr Clarke to	24		Kenneth Clarke.
25		Mr Waldegrave or Mrs Thatcher to Mr Major made any 129	25		I think they both had exactly the same concerns. 130
1		So that was a slightly softer way of looking at it.	1		Could we have on screen, please, DHSC0046962_067.
2		I do think that the elevation of John Major to Prime	2		I'm so sorry, I've given you the wrong reference
3		Minister made a difference, partly because of difference	3		DHSC0003654_117.
4		of personalities, but also I think I perceived it as	4		Thank you. The heading is "HIV Haemophiliac
5		"this is an opportunity to make a change", because it	5		Litigation, Proposed Heads of Compromise", and I'll just
6		came very rapidly after the change in power, and I think	6		read through the first two paragraphs and take you to
7		this was John Major indicating I mean, as I saw it,	7		the figures:
8		I had no idea of what went on, but I very much got the	8		"1. The Plaintiffs' Counsel would be prepared to
9		feeling that John Major said, "Well, we really ought to	9		advise the Steering Committee and individual Plaintiffs
10		do something about that. How can we do it?" That's my	10		to settle their cases for payments of categorised
11		perception.	11		amounts to the Macfarlane (Special Payments) Trust
12	Q.	Sorry for speaking over to you. Just so that we have	12		totalling approximately £42 [million], subject to what
13		the chronology, the 1 November, as I mentioned, was when	13		is set out below.
14		Mr Waldegrave took over as Secretary of State.	14		"2. The proposal is made on the instructions of
15		John Major came in as Prime Minister on 28 November, and	15		the Plaintiffs' Steering Group of solicitors but without
16		between 1 November and 28 November there was obviously	16		the knowledge of the lay clients and their individual
17		a challenge to the Prime Minister and the first and	17		solicitors; accordingly it is subject to Counsel
18		second round of the leadership ballots, which may	18		advising their clients and taking appropriate
19		explain why there was a the responses to the	19		instructions from lay clients.
20		settlement litigation were a little slow at that time,	20		"3. In response to the Government's desire to
21		and one or two other	21		make payments to all haemophiliacs and not just those
22	Α.	I'd forgotten that, yes. Yes.	22		who were suing, the figures cover all the haemophiliacs
23	Q.	I'm going to turn now to the proposed settlement that	23		registered with the Macfarlane Trusts as well as all the
24		came in from the plaintiffs, and we know from other	24		Plaintiffs ('the claimants'). It is exclusive of all
25		documents that this was put forward on 9 November 1990. 131	25		previous payments to the Macfarlane Trusts. It is to be 132
					(33) Darps 129 1

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1	emphasised that the Plaintiffs' solicitors and Counsel	1		would be allowed to continue if they fell within certain
2	do not act for and are not instructed by haemophiliacs	2		criteria
3	outside this litigation.	3	Δ	Yes.
4	"The figure is derived as follows"	4	Q.	and also that the settlement should be announced in
5	We then see a table setting out different figures	5	ч.	open court with an opportunity for counsel to mention
6	for different categories of claimants: child, single	6		the settlement and, in appropriate cases, explain why it
7	man, married but childless, married with children,	7		should be approved.
, 8	infected intimates and category G. We know from other	, 8		Now that approval was a legal requirement at the
9	documents that category G are people who concerned that	9		time, wasn't it, and indeed now, that if a settlement is
10	they may become infected with HIV, generally because	10		put forward for somebody who was under the age of 18 or
11	they had been intimate with people who were infected.	10		who doesn't have capacity
12	Different figures were given for the quantum for	12	۸	Yes.
13	each of those categories and the different numbers	12	Q.	then the court must approve that?
14	contained in the table as well, and the total, the grand	14		Yes, that's exactly right.
15	total so this is for all people with haemophilia who	14	Q.	And in this case "the court" meant Mr Justice Ognall?
16	were infected with HIV plus category G, plus	16	Q. A.	Yes.
17	intimates the grand total was just under £42 million.	10	Q.	What was your response and the response of the counsel
18	I won't go through the rest of the document but it	18	ы.	team for the central defendants to this proposal?
19	sets out how the table was calculated, and then it	10	٨	
			А.	When you say our response, you mean how did we
20	refers to certain conditions that would have to be met, one of which is that state benefits would not be	20	~	personally view it as opposed to Yes.
21 22	affected by the payments.	21		
22		22	Α.	Um I thought it was I mean, I must be
23	Another of the requirements was that medical	23		reconstructing here because I've got no specific memory.
24 25	negligence cases, which would be brought against the	24		I mean, I remember the time, and I remember being,
25	Health Authorities, rather than the central defendants, 133	25		I think, pleased that there was an offer here which 134
1	appeared to be responsible in recognising the	1		concluded that this was advice that they could properly
2	difficulties. It would still provide some substantial	2		give to their clients which their clients would, on the
3	compensation when you added it added Macfarlane	3		whole, be likely to accept, bearing in mind that there
4	payments and Social Security benefits and the cost	4		were not just the lead solicitors but also other firms
5	provisions, which were very important. And it was	5		of solicitors up and down the country representing
6	something which I think I thought there was a reasonable	6		individual plaintiffs, so a large group of people. And
7	prospect that Government, the Department, Secretary of	7		we thought it was something we could take to the
8	State, would accept. So it wasn't so high	8		Department and recommend.
9	that I thought, "We'll never get this through", nor was	9	Q.	In your statement, and there are documents referred to
9 10	it so low that I thought, "This is going to be the worst	9 10	ц.	
11	of both worlds, because we'll be paying something and	11		in your statement that underlie this as well, there is reference to a note that was provided to the Secretary
12	it'll be not nearly enough."	12		of State which included an assessment of, as it were,
13	So I thought it was a pragmatic carefully thought	12		the cold legal analysis of how much the claim was worth
14	out proposal by and Dan Brennan was a personal	13		if one gives a discount for litigation risk, and that
14		14		
16	injuries specialist, Rupert Jackson was a professional negligence and general specialist, with a lot of	16		figure was about £27 million. You say in your statement
17	experience, Michael Brooke was a personal injury	10		that you suspect that that probably came from Michael Spencer because that would have been his area of
18	specialist for all his career. So it was carefully	18		specialism.
19 20	thought out and there were experienced solicitors	19	Α.	I think so. Or those within the Department. I mean,
20	behind them. The fact that I don't mention the	20		I don't remember reaching that figure, and I'm not sure
21 22	solicitors is because I don't remember the individuals,	21		that I certainly wouldn't have wanted to reach that
22	not because they played no part in it.	22		kind of figure with my level of experience without
23	So this seemed to us to be something that had been	23		Michael Spencer having endorsed it. So which of it it
24 25	carefully thought out that they were prepared to	24		was, I don't know, but I would expect that was Michael's
	recommand. They must in doing as I falt have	25		0700
20	recommend. They must in doing so, I felt, have 135	25		area. 136

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	~			~	
1	Q.	So in effect, the plaintiffs' proposal was about	1	Q.	I have certainly seen no documents to suggest that you
2 3		£15 million more than the brass tacks analysis undertaken on behalf of the central defendants. There	2 3	A.	were ever instructed to negotiate the matter down. Yes,
4		was some discussion within the Department of Health	4	Q.	It seems to have been something that was floated and
5		about whether or not efforts should be made to seek to	5	ч.	then wasn't taken forward?
6		negotiate the price down.	6	A.	I think people always say, particularly when you've got
7	A.	Yes.	7	Λ.	Treasury people there: do we need to pay that much
, 8	Q.	What was your view on whether such efforts should be	, 8		money? And the answer to the Treasury people is: yes,
9	ч.	made?	9		if we're going to do this at all.
10	A.	Definitely not. I mean, for two reasons: I think if	10	Q.	I'm not going to go through the submissions of the
11		you're going to settle something on this kind of scheme,	11	-4.	document, some of which you refer to in your statement,
12		you need to do so by way with goodwill rather than	12		others of which we have looked at with other witnesses.
13		penny pinching; and secondly, I think if you go back,	13		You were called upon you and your colleagues on the
14		you get into the kind of horse trading that I'm talking	14		counsel team were called upon from time to time to give
15		about. I mean, this was an offer. I did not think it	15		advice, in particular on 4 December 1990, so very
16		was unreasonable. I did not think I mean,	16		shortly before the settlement was announced. Ron Powell
17		affordability was not my job, but it seemed to me	17		called you, and there's a note of a conversation that
18		reasonable where we would avoid the trial and we would	18		you had, and you refer to this at paragraph 43 of your
19		avoid the consequences of the trial, which I've talked	19		statement.
20		about earlier. And I thought it would be a mistake to	20		You appear to have gone through the legal
21		try to push the plaintiffs down. It might also make it	21		arguments and ascribed a percentage chance as best you
22		more difficult for them to obtain agreement.	22		could to each of them, and overall come to the
23		I don't think I would have paused very long before	23		conclusion that there was about a one-third chance of
24		expressing that view fairly trenchantly if and when	24		losing.
25		asked.	25		Was this broadly in line with the advice that you
		137			138
,			,		
1		were given back in October? Had anything changed?	1		and, I mean, from the point of view of the Department,
2	Α.	I think that sounds as though it's a little bit more	2		if the resources can be put together from Treasury, then
3		pessimistic. But on the other hand one has to look at	3		a settlement would obvious take away a huge amount of
4 5		the purposes of the advice. The October advice was	4 5		workload and angst. And they also have in mind their
6		a rigorous assessment on the limited material we had, you know, by leading counsel, junior counsel. This was	6		duties to the patients. Was it more cautious? I think what we were
7		my trying to say, you know: we have a good case, we	7		probably anxious at that stage to make sure was that
8		should win, I think we will win, but there are risks as	8		Treasury and decision-makers didn't get carried away by
9		in all litigation, and, you know, you shouldn't send	9		the thought that we were so bound to win that they
10		back the message "We don't need to pay this because we	10		didn't need to take these things seriously. So it's
11		will win."	11		more a matter of nuance. The essence of the advice in
12		So I don't think any of our analysis had changed	12		terms of the legal analysis was always unchanged.
13		but probably in the course of conversation being asked	13	Q.	Finally on this point, the announcement of the
14		to give percentages, they seem a little more pessimistic	14		settlement was made in Parliament by the Prime Minister
15		but not much.	15		on 11 December 1990, followed up by a written statement
16	Q.	There is some reference in Treasury documents to the	16		from the undersecretary of State for Health. The
17		legal advice that the Department of Health was	17		Inquiry has heard that the announcement was made before
18		receiving, becoming more cautious and erring on the	18		individual plaintiffs had been consulted, certainly
19		gloomy side. Now, I stress it's referring to legal	19		before they'd given instructions on whether they were
20		advice generally, not necessarily to counsel. Do you	20		going to accept the settlement.
			04	Α.	Yes.
21		think that you were becoming more cautious or erring on	21		
		think that you were becoming more cautious or erring on the gloomy side?	21	Q.	Were you consulted at the time about the timing of the
21	A.				
21 22	A.	the gloomy side?	22		Were you consulted at the time about the timing of the
21 22 23	A.	the gloomy side? No, I don't think we were. I certainly don't think we	22 23	Q.	Were you consulted at the time about the timing of the announcement and how the announcement was going to be

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1		I wouldn't necessarily have expected to have been	1		that necessarily would have been my idea of a good
2		consulted. I mean, I don't remember that. I mean, it's	2		thing.
2		very soon after the change of Prime Minister, isn't it?	2	Q.	· · · · · · · · · · · · · · · · · · ·
4	0	Yes.	4	ч.	thing, (a) why not? And (b) do you think it was
5	A.	And that had been an agreement in principle to be put to	5		appropriate?
6	л.	plaintiffs. I don't remember being consulted, and	6	A.	
7		I think my view would normally be wait until you've got	7	Π.	of it. I think there was so much public interest in
, 8		a settlement signed before you talk about it in	, 8		it it was undoubtedly a very significant departure
9		Parliament, but	9		from defending the claims. We had haemophiliacs who
10	Q.		10		were dying at the time. It was imperative that action
11	α.	there was a risk that if individual plaintiffs had been	11		should be taken. If it was going to be taken at all, it
12		consulted then there was a risk that this would have	12		was important that they should know what was being said.
13		leaked and may have let to a further round of	13		I don't think it's for me to conclude whether
14		negotiations. Was that something that you were	14		statements being made in Parliament were appropriate or
15		concerned about at the time?	15		not. As I say, I don't remember being asked. I can see
16	A.	I don't remember it. I mean, there was always a risk	16		why people might have done it. I can see they wanted to
17	Λ.	that the plaintiffs wouldn't accept the advice. But if	10		get the news out to people early. If somebody had said
18		there was advice to take that offer to legally aided	18		to me, "Shall we say anything about it until we've got
19		plaintiffs, then there would be an obligation to	19		it written down on paper?", my normal reaction would be
20		consider whether the litigation should continue to be	20		"Get it signed first, because you never know what will
20		funded, and that offer rejected. So I don't think	20		happen."
22		I expected there to be any further negotiations.	22	Q.	
22		I can see that that might have been a Departmental	22	ч.	you by, for example, Rupert Jackson or any of the other
23 24		concern, but I don't I mean, I may have been	23		counsel for the plaintiffs' side about this point?
25		consulted; I don't recollect it. I don't think that	25	٨	I don't. But I would have expected that to have gone to
25		141	25	A.	142
1		Andrew Collins rather than to me. I was sort of	1		final approval of important matters, Michael Spencer was
2		somewhere at the back of your room here, with the	2		leading on the technical and medical issues and
3		minions, in the sort of pecking order.	3		I believe that he became rather more involved during
4	Q.	I am going to move on now to the negotiation of the	4		this period because of availability and workload. I did
5		final terms of the settlement, because obviously what	5		what I was required to do and was the contact point on
6		has been put forward by the plaintiffs there was the	6		a day-to-day basis."
7		heads of settlement, but not the detail.	7		Is that an accurate reflection of
8		If we could have on screen, please,	8	Α.	As far as I recollect, yes.
9		WITN7067001_48 sorry page 48. And paragraph 44.1.	9	Q.	I note the position of the junior doing what you were
10		You were asked by the Inquiry what role you played in	10		required to through at the behest of the leaders?
11		finalising the agreement, and what you said is this, and	11	Α.	Well, it's fair to say that Andrew Collins was a very
12		I quote:	12		pragmatic and supportive leader, encouraged people to
13		"I believe I was involved on a day-to-day basis	13		get on with it and keep him consulted. So I probably
14		when available, and that I would have done much of the	14		had more I was allowed to do more and draft more in
15		drafting insofar as done by Counsel and would also have	15		the first instance than might have been expected.
16		been the main counsel involved in checking and amending	16		I mean, some QCs like to draft everything themselves,
17		departmental in drafts where we were asked to review	17		but he was always aware exactly what was going on.
18		them."	18	Q.	Did you feel suitably supported and adequately
19		You were then asked by the Inquiry:	19		instructed during this process?
20		"Insofar as you are now able to do so, please set	20	Α.	Yes, I think so. I mean, I think fractionation of
21		out the division of labour between you and the other	21		instructions within the Department, I can't remember.
22		counsel instructed by the Central Defendants in this	22		I think there may have been, I've seen some of the
23		process and explain the reasons behind that approach."	23		documents, but I can't quite remember how the iterations
24		And what you said in response is:	24		worked. Certainly I didn't feel that I was left on
25		"As throughout, Mr Collins provided direction and	25		a limb as a junior member of the counsel team. And
		143			144
					(36) Pages 141 - 1/

(36) Pages 141 - 144

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 Reiman?
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	Α.	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
		145
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.	claims or not, I can't remember. Let's go back to it.
4 5	Q. A.	
	Α.	Let's go back to it. I'm sorry, that's probably the right starting point.
5 6		Let's go back to it. I'm sorry, that's probably the right starting point. Yes, you're quite right. We'll go back to it. If we
5 6 7	Α.	Let's go back to it. I'm sorry, that's probably the right starting point. Yes, you're quite right. We'll go back to it. If we could have please DHSC0003654_117.
5 6 7 8	Α.	Let's go back to it. I'm sorry, that's probably the right starting point. Yes, you're quite right. We'll go back to it. If we could have please DHSC0003654_117. We read the first page. I'm just scanning it.
5 6 7 8 9	Α.	Let's go back to it. I'm sorry, that's probably the right starting point. Yes, you're quite right. We'll go back to it. If we could have please DHSC0003654_117. We read the first page. I'm just scanning it. I don't think there is anything said there.
5 6 7 8 9 10	A. Q. A.	Let's go back to it. I'm sorry, that's probably the right starting point. Yes, you're quite right. We'll go back to it. If we could have please DHSC0003654_117. We read the first page. I'm just scanning it. I don't think there is anything said there. There's nothing there.
5 6 7 8 9 10 11	Α.	Let's go back to it. I'm sorry, that's probably the right starting point. Yes, you're quite right. We'll go back to it. If we could have please DHSC0003654_117. We read the first page. I'm just scanning it. I don't think there is anything said there. There's nothing there. If we go over please to page 2. We have a section on
5 6 7 8 9 10 11	A. Q. A.	Let's go back to it. I'm sorry, that's probably the right starting point. Yes, you're quite right. We'll go back to it. If we could have please DHSC0003654_117. We read the first page. I'm just scanning it. I don't think there is anything said there. There's nothing there. If we go over please to page 2. We have a section on the calculation of the table.
5 6 7 8 9 10 11	A. Q. A.	Let's go back to it. I'm sorry, that's probably the right starting point. Yes, you're quite right. We'll go back to it. If we could have please DHSC0003654_117. We read the first page. I'm just scanning it. I don't think there is anything said there. There's nothing there. If we go over please to page 2. We have a section on
5 6 7 8 9 10 11	А. Q. А. Q.	Let's go back to it. I'm sorry, that's probably the right starting point. Yes, you're quite right. We'll go back to it. If we could have please DHSC0003654_117. We read the first page. I'm just scanning it. I don't think there is anything said there. There's nothing there. If we go over please to page 2. We have a section on the calculation of the table.
5 6 7 8 9 10 11 12 13	А. Q. А. Q.	Let's go back to it. I'm sorry, that's probably the right starting point. Yes, you're quite right. We'll go back to it. If we could have please DHSC0003654_117. We read the first page. I'm just scanning it. I don't think there is anything said there. There's nothing there. If we go over please to page 2. We have a section on the calculation of the table. Nothing there.
5 6 7 8 9 10 11 12 13 14	А. Q. А. Q.	Let's go back to it. I'm sorry, that's probably the right starting point. Yes, you're quite right. We'll go back to it. If we could have please DHSC0003654_117. We read the first page. I'm just scanning it. I don't think there is anything said there. There's nothing there. If we go over please to page 2. We have a section on the calculation of the table. Nothing there. Nothing there either. Page 3, nothing that I can pick
5 6 7 8 9 10 11 12 13 14 15	А. Q. А. Q.	Let's go back to it. I'm sorry, that's probably the right starting point. Yes, you're quite right. We'll go back to it. If we could have please DHSC0003654_117. We read the first page. I'm just scanning it. I don't think there is anything said there. There's nothing there. If we go over please to page 2. We have a section on the calculation of the table. Nothing there. Nothing there either. Page 3, nothing that I can pick up there.
5 6 7 8 9 10 11 12 13 14 15 16	А. Q. А. Q.	Let's go back to it. I'm sorry, that's probably the right starting point. Yes, you're quite right. We'll go back to it. If we could have please DHSC0003654_117. We read the first page. I'm just scanning it. I don't think there is anything said there. There's nothing there. If we go over please to page 2. We have a section on the calculation of the table. Nothing there. Nothing there either. Page 3, nothing that I can pick up there. Speaking in general terms, when litigation is settled, would you expect there to be an agreement that
5 6 7 8 9 10 11 12 13 14 15 16 17 18	А. Q. А. Q.	Let's go back to it. I'm sorry, that's probably the right starting point. Yes, you're quite right. We'll go back to it. If we could have please DHSC0003654_117. We read the first page. I'm just scanning it. I don't think there is anything said there. There's nothing there. If we go over please to page 2. We have a section on the calculation of the table. Nothing there. Nothing there either. Page 3, nothing that I can pick up there. Speaking in general terms, when litigation is settled, would you expect there to be an agreement that the recipient of any settlement sum would end those
5 6 7 8 9 10 11 12 13 14 15 16 7 18 19	А. Q. А. Q.	Let's go back to it. I'm sorry, that's probably the right starting point. Yes, you're quite right. We'll go back to it. If we could have please DHSC0003654_117. We read the first page. I'm just scanning it. I don't think there is anything said there. I don't think there is anything said there. There's nothing there. If we go over please to page 2. We have a section on the calculation of the table. Nothing there. Nothing there either. Page 3, nothing that I can pick up there. Speaking in general terms, when litigation is settled, would you expect there to be an agreement that the recipient of any settlement sum would end those proceedings and agree not to take further proceedings on
5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20	A. Q. A. Q.	Let's go back to it. I'm sorry, that's probably the right starting point. Yes, you're quite right. We'll go back to it. If we could have please DHSC0003654_117. We read the first page. I'm just scanning it. I don't think there is anything said there. There's nothing there. If we go over please to page 2. We have a section on the calculation of the table. Nothing there. Nothing there. Nothing there either. Page 3, nothing that I can pick up there. Speaking in general terms, when litigation is settled, would you expect there to be an agreement that the recipient of any settlement sum would end those proceedings and agree not to take further proceedings on the matters in the case?
5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21	А. Q. А. Q.	Let's go back to it. I'm sorry, that's probably the right starting point. Yes, you're quite right. We'll go back to it. If we could have please DHSC0003654_117. We read the first page. I'm just scanning it. I don't think there is anything said there. There's nothing there. If we go over please to page 2. We have a section on the calculation of the table. Nothing there. Nothing there either. Page 3, nothing that I can pick up there. Speaking in general terms, when litigation is settled, would you expect there to be an agreement that the recipient of any settlement sum would end those proceedings and agree not to take further proceedings on the matters in the case? Yes, in relation to the same subject matter and that,
5 6 7 8 9 10 11 12 13 14 15 16 17 8 9 20 21 22	A. Q. A. Q. A. Q.	Let's go back to it. I'm sorry, that's probably the right starting point. Yes, you're quite right. We'll go back to it. If we could have please DHSC0003654_117. We read the first page. I'm just scanning it. I don't think there is anything said there. There's nothing there. If we go over please to page 2. We have a section on the calculation of the table. Nothing there. Nothing there either. Page 3, nothing that I can pick up there. Speaking in general terms, when litigation is settled, would you expect there to be an agreement that the recipient of any settlement sum would end those proceedings and agree not to take further proceedings on the matters in the case? Yes, in relation to the same subject matter and that, I think, is what we'll be coming to.
5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23	A. Q. A. Q.	Let's go back to it. I'm sorry, that's probably the right starting point. Yes, you're quite right. We'll go back to it. If we could have please DHSC0003654_117. We read the first page. I'm just scanning it. I don't think there is anything said there. There's nothing there. If we go over please to page 2. We have a section on the calculation of the table. Nothing there. Nothing there either. Page 3, nothing that I can pick up there. Speaking in general terms, when litigation is settled, would you expect there to be an agreement that the recipient of any settlement sum would end those proceedings and agree not to take further proceedings on the matters in the case? Yes, in relation to the same subject matter and that, I think, is what we'll be coming to. Let's look, then, at DHSC0003654_032. If we could go to
5 6 7 8 9 10 11 12 13 14 15 16 17 8 9 20 21 22	A. Q. A. Q. A. Q.	Let's go back to it. I'm sorry, that's probably the right starting point. Yes, you're quite right. We'll go back to it. If we could have please DHSC0003654_117. We read the first page. I'm just scanning it. I don't think there is anything said there. There's nothing there. If we go over please to page 2. We have a section on the calculation of the table. Nothing there. Nothing there either. Page 3, nothing that I can pick up there. Speaking in general terms, when litigation is settled, would you expect there to be an agreement that the recipient of any settlement sum would end those proceedings and agree not to take further proceedings on the matters in the case? Yes, in relation to the same subject matter and that, I think, is what we'll be coming to. Let's look, then, at DHSC0003654_032. If we could go to page 3 of that document, please. We can see it's marked
5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23	A. Q. A. Q. A. Q.	Let's go back to it. I'm sorry, that's probably the right starting point. Yes, you're quite right. We'll go back to it. If we could have please DHSC0003654_117. We read the first page. I'm just scanning it. I don't think there is anything said there. There's nothing there. If we go over please to page 2. We have a section on the calculation of the table. Nothing there. Nothing there either. Page 3, nothing that I can pick up there. Speaking in general terms, when litigation is settled, would you expect there to be an agreement that the recipient of any settlement sum would end those proceedings and agree not to take further proceedings on the matters in the case? Yes, in relation to the same subject matter and that, I think, is what we'll be coming to. Let's look, then, at DHSC0003654_032. If we could go to page 3 of that document, please. We can see it's marked at the top from Ron Powell at 2.00 pm, 12 December. We
5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24	A. Q. A. Q. A. Q.	Let's go back to it. I'm sorry, that's probably the right starting point. Yes, you're quite right. We'll go back to it. If we could have please DHSC0003654_117. We read the first page. I'm just scanning it. I don't think there is anything said there. There's nothing there. If we go over please to page 2. We have a section on the calculation of the table. Nothing there. Nothing there either. Page 3, nothing that I can pick up there. Speaking in general terms, when litigation is settled, would you expect there to be an agreement that the recipient of any settlement sum would end those proceedings and agree not to take further proceedings on the matters in the case? Yes, in relation to the same subject matter and that, I think, is what we'll be coming to. Let's look, then, at DHSC0003654_032. If we could go to page 3 of that document, please. We can see it's marked

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	R BRIAN LANGSTAFF: Fifteen?
6	MR	HILL: Fifteen.
7	SIR	R 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	Α.	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	Α.	· · · · · · · · · · · · · · · · · · ·
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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 24	A.	Yes. Do you happen to know whether or not this draft or the
24 25	Q.	Do you happen to know whether or not this draft or the first draft, if this was the first draft, came from the
20		148

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1		plaintiffs or came from the defendants?
2	Α.	Um, can we have a look at the last page?
3	Q.	If we go, please, to electronic page 12.
4	Α.	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	Α.	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	Α.	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. 149
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1		other Government Department, Health Authority or
2		other Government Department, Health Authority or treating doctor, save that those Plaintiffs who have
2 3		other Government Department, Health Authority or treating doctor, save that those Plaintiffs who have already made allegations as to medical negligence or who
2 3 4		other Government Department, Health Authority or treating doctor, save that those Plaintiffs who have already made allegations as to medical negligence or who are given leave by the Court to do so pursuant to an
2 3 4 5		other Government Department, Health Authority or treating doctor, save that those Plaintiffs who have already made allegations as to medical negligence or who are given leave by the Court to do so pursuant to an application made prior to [some date in] January 1991
2 3 4 5 6		other Government Department, Health Authority or treating doctor, save that those Plaintiffs who have already made allegations as to medical negligence or who are given leave by the Court to do so pursuant to an application made prior to [some date in] January 1991 shall be entitled to pursue that element only of these
2 3 4 5 6 7		other Government Department, Health Authority or treating doctor, save that those Plaintiffs who have already made allegations as to medical negligence or who are given leave by the Court to do so pursuant to an application made prior to [some date in] January 1991 shall be entitled to pursue that element only of these claims against the relevant Health Authority provided
2 3 4 5 6 7 8		other Government Department, Health Authority or treating doctor, save that those Plaintiffs who have already made allegations as to medical negligence or who are given leave by the Court to do so pursuant to an application made prior to [some date in] January 1991 shall be entitled to pursue that element only of these claims against the relevant Health Authority provided that they comply with the procedure laid down in
2 3 4 5 6 7 8 9		other Government Department, Health Authority or treating doctor, save that those Plaintiffs who have already made allegations as to medical negligence or who are given leave by the Court to do so pursuant to an application made prior to [some date in] January 1991 shall be entitled to pursue that element only of these claims against the relevant Health Authority provided that they comply with the procedure laid down in Schedule 2 hereto."
2 3 4 5 6 7 8 9		other Government Department, Health Authority or treating doctor, save that those Plaintiffs who have already made allegations as to medical negligence or who are given leave by the Court to do so pursuant to an application made prior to [some date in] January 1991 shall be entitled to pursue that element only of these claims against the relevant Health Authority provided that they comply with the procedure laid down in Schedule 2 hereto."
2 3 4 5 6 7 8 9 10 11		other Government Department, Health Authority or treating doctor, save that those Plaintiffs who have already made allegations as to medical negligence or who are given leave by the Court to do so pursuant to an application made prior to [some date in] January 1991 shall be entitled to pursue that element only of these claims against the relevant Health Authority provided that they comply with the procedure laid down in Schedule 2 hereto." So an amendment to the requirements for bringing the medical negligence claims but also the inclusion now
2 3 4 5 6 7 8 9 10 11 12		other Government Department, Health Authority or treating doctor, save that those Plaintiffs who have already made allegations as to medical negligence or who are given leave by the Court to do so pursuant to an application made prior to [some date in] January 1991 shall be entitled to pursue that element only of these claims against the relevant Health Authority provided that they comply with the procedure laid down in Schedule 2 hereto." So an amendment to the requirements for bringing the medical negligence claims but also the inclusion now in that clause of the greater degree of detail, that
2 3 4 5 6 7 8 9 10 11 12 13		other Government Department, Health Authority or treating doctor, save that those Plaintiffs who have already made allegations as to medical negligence or who are given leave by the Court to do so pursuant to an application made prior to [some date in] January 1991 shall be entitled to pursue that element only of these claims against the relevant Health Authority provided that they comply with the procedure laid down in Schedule 2 hereto." So an amendment to the requirements for bringing the medical negligence claims but also the inclusion now in that clause of the greater degree of detail, that what is being waived is a right to bring proceedings
2 3 4 5 6 7 8 9 10 11 12 13 14		other Government Department, Health Authority or treating doctor, save that those Plaintiffs who have already made allegations as to medical negligence or who are given leave by the Court to do so pursuant to an application made prior to [some date in] January 1991 shall be entitled to pursue that element only of these claims against the relevant Health Authority provided that they comply with the procedure laid down in Schedule 2 hereto." So an amendment to the requirements for bringing the medical negligence claims but also the inclusion now in that clause of the greater degree of detail, that what is being waived is a right to bring proceedings against "any defendant or against any other Government
2 3 4 5 6 7 8 9 10 11 12 13 14 15	Α	other Government Department, Health Authority or treating doctor, save that those Plaintiffs who have already made allegations as to medical negligence or who are given leave by the Court to do so pursuant to an application made prior to [some date in] January 1991 shall be entitled to pursue that element only of these claims against the relevant Health Authority provided that they comply with the procedure laid down in Schedule 2 hereto." So an amendment to the requirements for bringing the medical negligence claims but also the inclusion now in that clause of the greater degree of detail, that what is being waived is a right to bring proceedings against "any defendant or against any other Government Department, Health Authority or treating doctor".
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16	A. Q.	other Government Department, Health Authority or treating doctor, save that those Plaintiffs who have already made allegations as to medical negligence or who are given leave by the Court to do so pursuant to an application made prior to [some date in] January 1991 shall be entitled to pursue that element only of these claims against the relevant Health Authority provided that they comply with the procedure laid down in Schedule 2 hereto." So an amendment to the requirements for bringing the medical negligence claims but also the inclusion now in that clause of the greater degree of detail, that what is being waived is a right to bring proceedings against "any defendant or against any other Government Department, Health Authority or treating doctor". Yes.
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17	A. Q.	other Government Department, Health Authority or treating doctor, save that those Plaintiffs who have already made allegations as to medical negligence or who are given leave by the Court to do so pursuant to an application made prior to [some date in] January 1991 shall be entitled to pursue that element only of these claims against the relevant Health Authority provided that they comply with the procedure laid down in Schedule 2 hereto." So an amendment to the requirements for bringing the medical negligence claims but also the inclusion now in that clause of the greater degree of detail, that what is being waived is a right to bring proceedings against "any defendant or against any other Government Department, Health Authority or treating doctor". Yes. So we can see a refinement, as it were, of the terms,
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18		other Government Department, Health Authority or treating doctor, save that those Plaintiffs who have already made allegations as to medical negligence or who are given leave by the Court to do so pursuant to an application made prior to [some date in] January 1991 shall be entitled to pursue that element only of these claims against the relevant Health Authority provided that they comply with the procedure laid down in Schedule 2 hereto." So an amendment to the requirements for bringing the medical negligence claims but also the inclusion now in that clause of the greater degree of detail, that what is being waived is a right to bring proceedings against "any defendant or against any other Government Department, Health Authority or treating doctor". Yes. So we can see a refinement, as it were, of the terms, but still would you agree quite broad, in that it
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 9	Q.	other Government Department, Health Authority or treating doctor, save that those Plaintiffs who have already made allegations as to medical negligence or who are given leave by the Court to do so pursuant to an application made prior to [some date in] January 1991 shall be entitled to pursue that element only of these claims against the relevant Health Authority provided that they comply with the procedure laid down in Schedule 2 hereto." So an amendment to the requirements for bringing the medical negligence claims but also the inclusion now in that clause of the greater degree of detail, that what is being waived is a right to bring proceedings against "any defendant or against any other Government Department, Health Authority or treating doctor". Yes. So we can see a refinement, as it were, of the terms, but still would you agree quite broad, in that it doesn't specify what kind of claims we're talking about?
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20		other Government Department, Health Authority or treating doctor, save that those Plaintiffs who have already made allegations as to medical negligence or who are given leave by the Court to do so pursuant to an application made prior to [some date in] January 1991 shall be entitled to pursue that element only of these claims against the relevant Health Authority provided that they comply with the procedure laid down in Schedule 2 hereto." So an amendment to the requirements for bringing the medical negligence claims but also the inclusion now in that clause of the greater degree of detail, that what is being waived is a right to bring proceedings against "any defendant or against any other Government Department, Health Authority or treating doctor". Yes. So we can see a refinement, as it were, of the terms, but still would you agree quite broad, in that it doesn't specify what kind of claims we're talking about? Still quite broad, expanded out to cover Health
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 9	Q.	other Government Department, Health Authority or treating doctor, save that those Plaintiffs who have already made allegations as to medical negligence or who are given leave by the Court to do so pursuant to an application made prior to [some date in] January 1991 shall be entitled to pursue that element only of these claims against the relevant Health Authority provided that they comply with the procedure laid down in Schedule 2 hereto." So an amendment to the requirements for bringing the medical negligence claims but also the inclusion now in that clause of the greater degree of detail, that what is being waived is a right to bring proceedings against "any defendant or against any other Government Department, Health Authority or treating doctor". Yes. So we can see a refinement, as it were, of the terms, but still would you agree quite broad, in that it doesn't specify what kind of claims we're talking about? Still quite broad, expanded out to cover Health Authority or treating doctor, suggesting that probably
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21	Q.	other Government Department, Health Authority or treating doctor, save that those Plaintiffs who have already made allegations as to medical negligence or who are given leave by the Court to do so pursuant to an application made prior to [some date in] January 1991 shall be entitled to pursue that element only of these claims against the relevant Health Authority provided that they comply with the procedure laid down in Schedule 2 hereto." So an amendment to the requirements for bringing the medical negligence claims but also the inclusion now in that clause of the greater degree of detail, that what is being waived is a right to bring proceedings against "any defendant or against any other Government Department, Health Authority or treating doctor". Yes. So we can see a refinement, as it were, of the terms, but still would you agree quite broad, in that it doesn't specify what kind of claims we're talking about? Still quite broad, expanded out to cover Health Authority or treating doctor, suggesting that probably the Health Authority defendants had been consulted at
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	Q.	other Government Department, Health Authority or treating doctor, save that those Plaintiffs who have already made allegations as to medical negligence or who are given leave by the Court to do so pursuant to an application made prior to [some date in] January 1991 shall be entitled to pursue that element only of these claims against the relevant Health Authority provided that they comply with the procedure laid down in Schedule 2 hereto." So an amendment to the requirements for bringing the medical negligence claims but also the inclusion now in that clause of the greater degree of detail, that what is being waived is a right to bring proceedings against "any defendant or against any other Government Department, Health Authority or treating doctor". Yes. So we can see a refinement, as it were, of the terms, but still would you agree quite broad, in that it doesn't specify what kind of claims we're talking about? Still quite broad, expanded out to cover Health Authority or treating doctor, suggesting that probably

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

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It's quite early, isn't it? 1 Α. 2 Q. It is. It's the 12th, so it's the day after. There is a version of 18 December. All of the references are at 3 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 Α. Can you just go back to the first page? 12 0 First page, please. 13 Α. Yes, I see, I'm just looking at the changes to the new 14 trust. Yes, thank you. 15 We can see that the typed version is 21 January 1991. Q. 16 Α. Yes 17 Q. And there are amendments which seem to have been made on 18 1 March 1991 by hand. 19 A. Yes. 20 It's the typed version that we're interested in here. Q. 21 Right. Α. 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 150 Q. Taken at face value, saying that the plaintiffs will 1 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 Yes, it's too vague. I mean, it clearly was -- well, it Α. 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 Α. 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	1
2		laid down by the Court on 1st March 1991."	2
3		That second part is a reference to the ongoing	3
4		medical negligence claims.	4
5	Α.	Yes.	5
6	Q.	But we can see that the further refinement here is	6
7		made that the claims are those "in respect of the	7
8		administering of cryoprecipitate, Factor VIII or	8
9		Factor IX". So a further refinement about what is being	9
10		waived.	10
11	Α.	Yes.	11
12	Q.	If we then go to the next iteration that I'm going to	12
13		you to, and it doesn't necessarily mean that it was the	13
14		next iteration of the draft, DHSC0003661_022, we can see	14
15		that this is dated 16 April 1991, and it's headed	15
16		"Plaintiffs' suggested amendments by riders".	16
17	Α.	Mm-hm.	17
18	Q.	So instead of going through the entire draft, they are	18
19		saying what they would like to see changed, and then	19
20		indicating where in the draft it should come.	20
21		If we look at number 4 of the riders, what they	21
22		suggest is adding the words, subparagraph (2):	22
23		"Nothing herein shall prevent a Plaintiff from	23
24		bringing proceedings in respect of the administering	24
25		prior to 13th December 1990 of Cryoprecipitate,	25
		153	
4		percent 5. This as Lunderstand it is the	1
1 2		paragraph 5. This, as I understand it, is the	1
2 3		incorporation of what has been suggested into the draft: "The Plaintiffs will discontinue their actions	2 3
3 4		against all Defendants and will undertake not to bring	4
4 5		fresh proceedings against any Defendant or against any	4 5
6		other Government Department, Health Authority or	6
7		treating doctor in respect of the administering prior to	7
8		13th December 1990 of cryoprecipitate, Factor VIII or	8
9		Factor IX, save that:	9
9 10			9 10
11		"(1) those Plaintiffs whose code numbers are set out in Part 1 of Schedule Eight hereto shall be entitled	10
12		to pursue that element only of these claims which	12
12		relates to the allegations of medical negligence against	12
13 14		the relevant Health Authorities provided that they	13
14 15		comply with the directions laid down by the Court on	14
16		1st March 1991; and	16
17 10		"(2) nothing herein shall prevent the Plaintiff from bringing proceedings in respect of the	17
18			18
19		administering prior to the 13th December 1990 of	19
20 21		cryoprecipitate, Factor VIII or Factor IX, where:	20
21 22		"(i) that has caused damage to such Plaintiff	21
22		which had not been diagnosed prior to	22
23 24		13th December 1990; and/or	23
24 25		"(ii) the damage alleged does not include	24
25		infection or the risk of infection by HIV and/or the 155	25

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	Α.	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	А.	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	Α.	Yes.
19	Q.	That's where they're suggesting putting it.
20	Α.	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	Α.	Yes.
25	Q.	Then page 14 sorry, page 15, electronic 15,
		154
1		hepatitis viruses."
2		'I'll give you a moment to digest that.
2 3	А.	l'Il give you a moment to digest that. Yes. So this is the plaintiffs' amendment incorporated
2 3 4		I'll give you a moment to digest that. Yes. So this is the plaintiffs' amendment incorporated into the draft, and excluding yeah, got it.
2 3 4 5	A. Q.	I'll give you a moment to digest that. Yes. So this is the plaintiffs' amendment incorporated into the draft, and excluding yeah, got it. It seems, then, that over these drafts we have seen
2 3 4 5 6		I'll give you a moment to digest that. Yes. So this is the plaintiffs' amendment incorporated into the draft, and excluding yeah, got it. It seems, then, that over these drafts we have seen a refinement of the term about what is being waived.
2 3 4 5 6 7		I'll give you a moment to digest that. Yes. So this is the plaintiffs' amendment incorporated into the draft, and excluding yeah, got it. It seems, then, that over these drafts we have seen a refinement of the term about what is being waived. Initially there was an inclusion of who the
2 3 4 5 6 7 8	Q.	I'll give you a moment to digest that. Yes. So this is the plaintiffs' amendment incorporated into the draft, and excluding yeah, got it. It seems, then, that over these drafts we have seen a refinement of the term about what is being waived. Initially there was an inclusion of who the defendants against whom claims were being waived.
2 3 4 5 6 7 8 9	Q. A.	I'll give you a moment to digest that. Yes. So this is the plaintiffs' amendment incorporated into the draft, and excluding yeah, got it. It seems, then, that over these drafts we have seen a refinement of the term about what is being waived. Initially there was an inclusion of who the defendants against whom claims were being waived. Yes.
2 3 4 5 6 7 8 9	Q.	I'll give you a moment to digest that. Yes. So this is the plaintiffs' amendment incorporated into the draft, and excluding yeah, got it. It seems, then, that over these drafts we have seen a refinement of the term about what is being waived. Initially there was an inclusion of who the defendants against whom claims were being waived. Yes. There is then a refinement saying that those claims
2 3 4 5 6 7 8 9 10 11	Q. A.	I'll give you a moment to digest that. Yes. So this is the plaintiffs' amendment incorporated into the draft, and excluding yeah, got it. It seems, then, that over these drafts we have seen a refinement of the term about what is being waived. Initially there was an inclusion of who the defendants against whom claims were being waived. Yes. There is then a refinement saying that those claims concern the administration of cryoprecipitate,
2 3 4 5 6 7 8 9 10 11 12	Q. A.	I'll give you a moment to digest that. Yes. So this is the plaintiffs' amendment incorporated into the draft, and excluding yeah, got it. It seems, then, that over these drafts we have seen a refinement of the term about what is being waived. Initially there was an inclusion of who the defendants against whom claims were being waived. Yes. There is then a refinement saying that those claims concern the administration of cryoprecipitate, Factor VIII or Factor IX. And then through this
2 3 4 5 6 7 8 9 10 11 12 13	Q. A.	I'll give you a moment to digest that. Yes. So this is the plaintiffs' amendment incorporated into the draft, and excluding yeah, got it. It seems, then, that over these drafts we have seen a refinement of the term about what is being waived. Initially there was an inclusion of who the defendants against whom claims were being waived. Yes. There is then a refinement saying that those claims concern the administration of cryoprecipitate, Factor VIII or Factor IX. And then through this amendment, seemingly proposed by the plaintiff, there
2 3 4 5 6 7 8 9 10 11 12 13 14	Q. A.	I'll give you a moment to digest that. Yes. So this is the plaintiffs' amendment incorporated into the draft, and excluding yeah, got it. It seems, then, that over these drafts we have seen a refinement of the term about what is being waived. Initially there was an inclusion of who the defendants against whom claims were being waived. Yes. There is then a refinement saying that those claims concern the administration of cryoprecipitate, Factor VIII or Factor IX. And then through this amendment, seemingly proposed by the plaintiff, there is, first of all, an inclusion of a cut-off date, so
2 3 4 5 6 7 8 9 10 11 12 13 14 15	Q. A.	I'll give you a moment to digest that. Yes. So this is the plaintiffs' amendment incorporated into the draft, and excluding yeah, got it. It seems, then, that over these drafts we have seen a refinement of the term about what is being waived. Initially there was an inclusion of who the defendants against whom claims were being waived. Yes. There is then a refinement saying that those claims concern the administration of cryoprecipitate, Factor VIII or Factor IX. And then through this amendment, seemingly proposed by the plaintiff, there is, first of all, an inclusion of a cut-off date, so 13 December 1990, which is obviously two days after the
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16	Q. A.	I'll give you a moment to digest that. Yes. So this is the plaintiffs' amendment incorporated into the draft, and excluding yeah, got it. It seems, then, that over these drafts we have seen a refinement of the term about what is being waived. Initially there was an inclusion of who the defendants against whom claims were being waived. Yes. There is then a refinement saying that those claims concern the administration of cryoprecipitate, Factor VIII or Factor IX. And then through this amendment, seemingly proposed by the plaintiff, there is, first of all, an inclusion of a cut-off date, so 13 December 1990, which is obviously two days after the proposed settlement was announced, and secondly, saying
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17	Q. A.	I'll give you a moment to digest that. Yes. So this is the plaintiffs' amendment incorporated into the draft, and excluding yeah, got it. It seems, then, that over these drafts we have seen a refinement of the term about what is being waived. Initially there was an inclusion of who the defendants against whom claims were being waived. Yes. There is then a refinement saying that those claims concern the administration of cryoprecipitate, Factor VIII or Factor IX. And then through this amendment, seemingly proposed by the plaintiff, there is, first of all, an inclusion of a cut-off date, so 13 December 1990, which is obviously two days after the proposed settlement was announced, and secondly, saying that the types of claim that are being waived are claims
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18	Q. A.	I'll give you a moment to digest that. Yes. So this is the plaintiffs' amendment incorporated into the draft, and excluding yeah, got it. It seems, then, that over these drafts we have seen a refinement of the term about what is being waived. Initially there was an inclusion of who the defendants against whom claims were being waived. Yes. There is then a refinement saying that those claims concern the administration of cryoprecipitate, Factor VIII or Factor IX. And then through this amendment, seemingly proposed by the plaintiff, there is, first of all, an inclusion of a cut-off date, so 13 December 1990, which is obviously two days after the proposed settlement was announced, and secondly, saying that the types of claim that are being waived are claims about infection with HIV or with hepatitis, but other
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19	Q. A.	I'll give you a moment to digest that. Yes. So this is the plaintiffs' amendment incorporated into the draft, and excluding yeah, got it. It seems, then, that over these drafts we have seen a refinement of the term about what is being waived. Initially there was an inclusion of who the defendants against whom claims were being waived. Yes. There is then a refinement saying that those claims concern the administration of cryoprecipitate, Factor VIII or Factor IX. And then through this amendment, seemingly proposed by the plaintiff, there is, first of all, an inclusion of a cut-off date, so 13 December 1990, which is obviously two days after the proposed settlement was announced, and secondly, saying that the types of claim that are being waived are claims about infection with HIV or with hepatitis, but other infections could be claimed for. Is that a fair
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20	Q. A. Q.	I'll give you a moment to digest that. Yes. So this is the plaintiffs' amendment incorporated into the draft, and excluding yeah, got it. It seems, then, that over these drafts we have seen a refinement of the term about what is being waived. Initially there was an inclusion of who the defendants against whom claims were being waived. Yes. There is then a refinement saying that those claims concern the administration of cryoprecipitate, Factor VIII or Factor IX. And then through this amendment, seemingly proposed by the plaintiff, there is, first of all, an inclusion of a cut-off date, so 13 December 1990, which is obviously two days after the proposed settlement was announced, and secondly, saying that the types of claim that are being waived are claims about infection with HIV or with hepatitis, but other infections could be claimed for. Is that a fair assessment?
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21	Q. A.	I'll give you a moment to digest that. Yes. So this is the plaintiffs' amendment incorporated into the draft, and excluding yeah, got it. It seems, then, that over these drafts we have seen a refinement of the term about what is being waived. Initially there was an inclusion of who the defendants against whom claims were being waived. Yes. There is then a refinement saying that those claims concern the administration of cryoprecipitate, Factor VIII or Factor IX. And then through this amendment, seemingly proposed by the plaintiff, there is, first of all, an inclusion of a cut-off date, so 13 December 1990, which is obviously two days after the proposed settlement was announced, and secondly, saying that the types of claim that are being waived are claims about infection with HIV or with hepatitis, but other infections could be claimed for. Is that a fair assessment? Yes, it's excluding risk of infection by HIV and/or
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	Q. A. Q.	 I'll give you a moment to digest that. Yes. So this is the plaintiffs' amendment incorporated into the draft, and excluding yeah, got it. It seems, then, that over these drafts we have seen a refinement of the term about what is being waived. Initially there was an inclusion of who the defendants against whom claims were being waived. Yes. There is then a refinement saying that those claims concern the administration of cryoprecipitate, Factor VIII or Factor IX. And then through this amendment, seemingly proposed by the plaintiff, there is, first of all, an inclusion of a cut-off date, so 13 December 1990, which is obviously two days after the proposed settlement was announced, and secondly, saying that the types of claim that are being waived are claims about infection with HIV or with hepatitis, but other infections could be claimed for. Is that a fair assessment? Yes, it's excluding risk of infection by HIV and/or hepatitis viruses. So prior anything which has been
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23	Q. A. Q.	 I'll give you a moment to digest that. Yes. So this is the plaintiffs' amendment incorporated into the draft, and excluding yeah, got it. It seems, then, that over these drafts we have seen a refinement of the term about what is being waived. Initially there was an inclusion of who the defendants against whom claims were being waived. Yes. There is then a refinement saying that those claims concern the administration of cryoprecipitate, Factor VIII or Factor IX. And then through this amendment, seemingly proposed by the plaintiff, there is, first of all, an inclusion of a cut-off date, so 13 December 1990, which is obviously two days after the proposed settlement was announced, and secondly, saying that the types of claim that are being waived are claims about infection with HIV or with hepatitis, but other infections could be claimed for. Is that a fair assessment? Yes, it's excluding risk of infection by HIV and/or hepatitis viruses. So prior anything which has been diagnosed I mean, it's the "and/or". Okay, I see
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24	Q. A. Q.	 I'll give you a moment to digest that. Yes. So this is the plaintiffs' amendment incorporated into the draft, and excluding yeah, got it. It seems, then, that over these drafts we have seen a refinement of the term about what is being waived. Initially there was an inclusion of who the defendants against whom claims were being waived. Yes. There is then a refinement saying that those claims concern the administration of cryoprecipitate, Factor VIII or Factor IX. And then through this amendment, seemingly proposed by the plaintiff, there is, first of all, an inclusion of a cut-off date, so 13 December 1990, which is obviously two days after the proposed settlement was announced, and secondly, saying that the types of claim that are being waived are claims about infection with HIV or with hepatitis, but other infections could be claimed for. Is that a fair assessment? Yes, it's excluding risk of infection by HIV and/or hepatitis viruses. So prior anything which has been diagnosed I mean, it's the "and/or". Okay, I see what's being said.
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23	Q. A. Q.	 I'll give you a moment to digest that. Yes. So this is the plaintiffs' amendment incorporated into the draft, and excluding yeah, got it. It seems, then, that over these drafts we have seen a refinement of the term about what is being waived. Initially there was an inclusion of who the defendants against whom claims were being waived. Yes. There is then a refinement saying that those claims concern the administration of cryoprecipitate, Factor VIII or Factor IX. And then through this amendment, seemingly proposed by the plaintiff, there is, first of all, an inclusion of a cut-off date, so 13 December 1990, which is obviously two days after the proposed settlement was announced, and secondly, saying that the types of claim that are being waived are claims about infection with HIV or with hepatitis, but other infections could be claimed for. Is that a fair assessment? Yes, it's excluding risk of infection by HIV and/or hepatitis viruses. So prior anything which has been diagnosed I mean, it's the "and/or". Okay, I see

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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	Α.	Yes.
8	Q.	Then if we go to page 7 of that document, we can see the
9		proposed settlement terms.
10	Α.	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"
		157
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	Α.	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

- 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 --159

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 158

1 Q. Yes.

2	Α.	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	Α.	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	Α.	No, but I think how long is the next break?
16	Q.	I think it's 30 minutes.
17	Α.	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	Α.	Yes, exactly that.
25	SIR	BRIAN LANGSTAFF: That's missing.
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INQY1000213_0040

1	MD	HILL: Ves there is a series of pieces of correspondence	1		(A short break)
1 2	IVI FS	HILL: Yes, there is a series of pieces of correspondence	1	(4.05	
2	cip	about that we can look at. I wonder, sir ! BRIAN LANGSTAFF: Well, we're probably due a break about	2 3		5 pm) BRIAN LANGSTAFF: Have you had long enough?
4	Sin	now, aren't we?	4		
4 5	MD	HILL: I think we are, yes.	4 5		Yes, thank you, sir. BRIAN LANGSTAFF: Yes?
6			6		
0 7	Sin	BRIAN LANGSTAFF: During that break you'll be able to	7		Before you begin, can I just make one point? As I was
8		pick up the questions from Core Participants, or do you	8		looking through the documents we were discussing, I came
	MD	have further questions?			past the note of Ron Powell in the discussion with me on
9		HILL: I'm afraid I still have some further questions.	9		4 November 1990, you remember the one-third risk point? HILL: Yes, yes.
10	SIN	BRIAN LANGSTAFF: Right, well, I think probably those	10		
11	MD	further questions how long are they going to be?	11		And I noted that I actually had said, or he records me
12		HILL: Probably about half an hour.	12		as saying that:
13	SIR	BRIAN LANGSTAFF: Right, okay. My attempts to save	13		" I thought it reasonable to think in terms of
14		a little bit of time have not come to anything. But	14		overall chance of success between 60 and 75 per cent, we
15		there we are. We'll take the half hour break now, and	15		could of course lose. He did not think we should lose,
16		then come back for your further questions, and then such	16		however, he did not think we will. Any doubts, however,
17		further break as you need for Core Participants to let	17		were bound to be resolved in the Plaintiffs' favour. He
18		you have their final questions. If they can helpfully	18		thought the Treasury would be wise to presume
19		give you anything during this break, then I think	19		a one-third chance of our losing."
20		everyone will be grateful.	20		So that's where the one third came from in terms
21	Α.	Thank you, and I've got with me the documents I was	21		of financial risk to the Treasury, rather than
22		provided. So I will have a look through these documents	22		evaluation of odds, which is in the previous paragraph.
23	010	to see if I can see anything more of help.	23		That's why I couldn't quite get it to when you asked me
24		BRIAN LANGSTAFF: Thank you very much.	24		the question.
25	(3.3	36 pm) 161	25	Q.	Thank you, that's very helpful. 162
1		I just want to come back to the point that was	1	0	If we go, please, to electronic page 16. It's
2		raised just before the break, about the term which	2		subclause (1) actually, sorry, back one page, please,
2		didn't make it through to the final settlement about the	2		Paul, electronic page 15. The stem of paragraph 5 is
4		cut-off date for a diagnosis.	4		that the plaintiffs will discontinue their action
5	٨	Is that right?	5		except, and then two exceptions are given, firstly for
6		Let's just look at SCGV0000233_040, page 16 of that	6		medical negligence cases, and, secondly, that the stem
7	ч.	document.	7		wouldn't prevent people bringing actions where and if
8	٨	Can I see page 1?	8		we go over to page 2, please, two conditions are set
9		Page 1. I think actually probably page 2 is more	9		out:
10	ч.	helpful, which shows the date?	10		"(i) [that the action is about something] that has
11	A.	l just want to	11		caused damage to such Plaintiff which had not been
12	Q.	Oh, sorry, do you mean for your paper copy?	12		diagnosed prior to 13th December 1990; and/or.
13	Q. A.	22 of	13		"(ii) the damage alleged does not include
14	Q.	Of April.	14		infection or the risk of infection by HIV and/or the
15	A.	Yes.	15		hepatitis viruses."
16	Q.	Page 1 of the document is a coversheet, which I'm not	16		Now, the second of those conditions remained in
17	ч.	sure I	17		the final draft.
18	A.	Right. What's the coversheet?	18	A.	
19	Q.	If we just go back to page 1, please, Paul.	19		The first of those conditions does not make it through
20	A.	Yes, so this is the last draft but not the final	20		to the final draft, and is cut.
20	<i>n</i> .	version.	20		Yes.
21	Q.		22		Is that what you were referring to?
23	A.	Yes, got it.	23		No, it's not.
24	Q.	22 April 1991.	24		No
24	A.	Yes.	24		That's a separate point, which I think, from my reading,
20	74	163	20		164

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1	which I haven't re-read, about (inaudible)	1		first contracted hepatitis after that date, and I think
2	 internally, is because the only plaintiffs to whom 	2		the thrust of your question is why is there this cut-off
3	that would apply would be the category G plaintiffs,	3		for hepatitis; is that right? You had rather better ask
4	because all the other plaintiffs had already been	4		me the questions rather than me trying to pre-empt them.
5	diagnosed with HIV. What I had in mind was that which	5	Q.	The question behind this is that the litigation was
6	is in the final version, and I have it I think you	6		brought in respect of damage caused by HIV?
7	took me to the 1 May 1991 document, HSOC0023174_1.	7	Α.	Yes.
8	SIR BRIAN LANGSTAFF: (Inaudible).	8	Q.	The clause that you've just taken us to shows that
9	MR HILL: HSOC0023174.	9		people who contract, or find that they have contracted,
10	A. Yes, and I am looking at page 16 of this.	10		HIV after the date of the settlement can still bring
11	Q. Can we bring that up on screen, please, Paul?	11		themselves within the terms of it. But what people
12	A. And this was a provision this would not obviously	12		signing the undertaking were being asked to do was to
13	have applied to the plaintiffs because plaintiffs had	13		waive claims for damages not just for HIV but also for
14	already contracted HIV, but to haemophiliacs, who by	14		hepatitis.
15	13 December 1990 had not been tested and who upon first	15	Α.	Yes.
16	testing were found to be HIV positive and therefore	16	Q.	The question the fundamental question is: why was that?
17	eligible, and then spouses and so on, with a cut-off	17	Α.	Why was that? Well, I don't remember it. I'm just
18	date of, I think, five years 12 months from first	18		trying to put myself back into the position as to how
19	becoming aware they were HIV positive, or five years of	19		that came about. It is, I think, as you've shown me,
20	13 December 1990.	20		the result of an insertion put in by the plaintiffs in
21	So there was provision for those who became aware	21		their amendment, rather than something which came from
22	that they had been infected on first testing to claim,	22		the Department. Let me interject, unless I forget it,
23	whether or not the damage whether or not the cause of	23		you asked me about that first version, whether it came
24	action accrued before the cut-off date on 13 December.	24		from us or the plaintiffs. I can answer that when
25	That did not include a provision for those who	25		you're ready to ask it but I won't intervene now.
	165			166
1	The point about this is that many of those who	1		and matters that is damage they knew about
2	were suing for their HIV infection had also contracted	2		therefore, it would have been caught by the
3	hepatitis. Their claims did not include any claim for	3		discontinuance subject matter clause.
4	hepatitis. There was no claim for damages for	4		As a result, by giving up the hepatitis claim,
5	hepatitis. Whether that was because they recognised	5		they were simply saying, "We will not revive that claim
6	that hepatitis was known about and was an inevitable	6		again".
7	risk of the process, whether it was because it just	7		If they had brought a claim in respect of
, 8	paled into insignificance, or appeared to at that stage,	, 8		hepatitis, which I can see would be logical, and I can't
9	by comparison to HIV, I don't know, but no claims were	9		now say why they didn't, then it would have been
10	brought in respect of the hepatitis damage suffered by	10		necessary for the Government to decide, do we give
11	any of the 900-odd plaintiffs.	11		compensation to cover the hepatitis damage separately
12	Therefore, there was no question of those who had	12		from the HIV damage, or not? And what provisions do we
13	contracted HIV claiming also for damages for contracting	13		make?
14	hepatitis. It was not part of the claim.	14		The reason that I took you to the cut-off for that
15	The reason that claims, in respect of hepatitis,	15		at page 16 of that document 23174 is because that
16	was settled by the litigation is because the subject	16		applied to non-plaintiffs because they contracted HIV.
17	matter of the cause of action was the failure to	17		Now, I suppose if somebody had thought about it,
18	introduce measures to reduce hepatitis risk in time. So	18		they could have said, "Well, what about if somebody
19	exactly the same facts and matters would be in issue in	19		doesn't contract, or contracts HIV but also suffers from
20	relation to hepatitis, as were in relation to that first	20		hepatitis? Should they get compensation for the
21	part of the HIV claim, which we discussed earlier.	21		hepatitis element?" Well, firstly, if they were to do
22	By discontinuing the if the claim had gone to	22		so, it would put the non-plaintiffs in a better position
23	judgment and had won or lost, those plaintiffs would not	23		than the plaintiffs who had decided not to claim for it.
24	normally have been allowed to bring a fresh claim for	24		And, secondly, in order to prove their hepatitis claim
25	hepatitis damage because it arose out of the same facts	25		prior to December 2000, they would have had to run
	167			168

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1		exactly the same arguments which were being run in this	1	
2		litigation, which the whole purpose of the settlement	2	
3		was to avoid. So I think that nobody thought about	3 4	A.
4 5		claims for hepatitis because they'd never been brought, and nobody thought of putting the non-plaintiff	4 5	Q. A.
		haemophiliacs into a better position than the plaintiff	6	
6 7		haemophiliacs, who had already contracted HIV, and who	0 7	Q.
8		were all expected to die.	8	A.
9		Now, if the claim had included a claim in respect	9	Q.
10		of hepatitis, I do not know whether that would have	10	ч.
11		added to the damages significantly, given the	11	
12		differences between the effects of the two, or whether	12	A.
13		the compensation would have been different, but I can	13	Q.
14		see that if such a claim had been brought, I would have	14	
15		expected the cut-off in this page 16 for non-plaintiff	15	Α.
16		haemophiliacs who haven't contracted HIV, to apply to	16	Q.
17		those who contracted HIV and/or hepatitis, or there	17	A.
18		would be a carve-out for hepatitis.	18	Q.
19		There was no reason in principle why one couldn't	19	
20		say "If you have not been tested for hepatitis, and	20	
21		contracted and you're found on first administration	21	
22		to have it, then you can sue". But nobody was thinking	22	Α.
23		of hepatitis at that stage. It wasn't raised.	23	
24	Q.	Can I suggest and pick up on one of the things which you	24	
25		said there, a possible reason why it wasn't raised. All	25	
		169		
				~
1		was because they arose out of the same facts and	1	Q.
2		matters, I assume, otherwise they wouldn't have	2	Q. A.
2 3	0	matters, I assume, otherwise they wouldn't have introduced that amendment.	2 3	
2 3 4	Q.	matters, I assume, otherwise they wouldn't have introduced that amendment. In your statement you say that this didn't appear to be	2 3 4	
2 3 4 5	Q.	matters, I assume, otherwise they wouldn't have introduced that amendment. In your statement you say that this didn't appear to be a significant issue between the parties at the time.	2 3 4 5	
2 3 4 5 6	Q.	matters, I assume, otherwise they wouldn't have introduced that amendment. In your statement you say that this didn't appear to be a significant issue between the parties at the time. I won't take you to the documents but, just so that	2 3 4 5 6	
2 3 4 5 6 7	Q.	matters, I assume, otherwise they wouldn't have introduced that amendment. In your statement you say that this didn't appear to be a significant issue between the parties at the time. I won't take you to the documents but, just so that they're on the record, DHSC0003662_090 is a submission	2 3 4 5 6 7	
2 3 4 5 6 7 8	Q.	matters, I assume, otherwise they wouldn't have introduced that amendment. In your statement you say that this didn't appear to be a significant issue between the parties at the time. I won't take you to the documents but, just so that they're on the record, DHSC0003662_090 is a submission to the Secretary of State about the reasons why the	2 3 4 5 6 7 8	
2 3 4 5 6 7 8 9		matters, I assume, otherwise they wouldn't have introduced that amendment. In your statement you say that this didn't appear to be a significant issue between the parties at the time. I won't take you to the documents but, just so that they're on the record, DHSC0003662_090 is a submission to the Secretary of State about the reasons why the settlement had taken some time to be achieved.	2 3 4 5 6 7 8 9	
2 3 4 5 6 7 8 9	A.	matters, I assume, otherwise they wouldn't have introduced that amendment. In your statement you say that this didn't appear to be a significant issue between the parties at the time. I won't take you to the documents but, just so that they're on the record, DHSC0003662_090 is a submission to the Secretary of State about the reasons why the settlement had taken some time to be achieved. Yes.	2 3 4 5 6 7 8 9 10	
2 3 4 5 6 7 8 9 10 11		matters, I assume, otherwise they wouldn't have introduced that amendment. In your statement you say that this didn't appear to be a significant issue between the parties at the time. I won't take you to the documents but, just so that they're on the record, DHSC0003662_090 is a submission to the Secretary of State about the reasons why the settlement had taken some time to be achieved. Yes. And it raises various things, including the Social	2 3 4 5 6 7 8 9 10 11	
2 3 4 5 6 7 8 9	A.	matters, I assume, otherwise they wouldn't have introduced that amendment. In your statement you say that this didn't appear to be a significant issue between the parties at the time. I won't take you to the documents but, just so that they're on the record, DHSC0003662_090 is a submission to the Secretary of State about the reasons why the settlement had taken some time to be achieved. Yes.	2 3 4 5 6 7 8 9 10	
2 3 4 5 6 7 8 9 10 11 12	A.	matters, I assume, otherwise they wouldn't have introduced that amendment. In your statement you say that this didn't appear to be a significant issue between the parties at the time. I won't take you to the documents but, just so that they're on the record, DHSC0003662_090 is a submission to the Secretary of State about the reasons why the settlement had taken some time to be achieved. Yes. And it raises various things, including the Social Security aspect, but it doesn't mention anything about	2 3 4 5 6 7 8 9 10 11 12	
2 3 4 5 6 7 8 9 10 11 12 13	A.	matters, I assume, otherwise they wouldn't have introduced that amendment. In your statement you say that this didn't appear to be a significant issue between the parties at the time. I won't take you to the documents but, just so that they're on the record, DHSC0003662_090 is a submission to the Secretary of State about the reasons why the settlement had taken some time to be achieved. Yes. And it raises various things, including the Social Security aspect, but it doesn't mention anything about hepatitis and the hepatitis waiver. So and from your	2 3 4 5 6 7 8 9 10 11 12 13	
2 3 4 5 6 7 8 9 10 11 12 13 14	A.	matters, I assume, otherwise they wouldn't have introduced that amendment. In your statement you say that this didn't appear to be a significant issue between the parties at the time. I won't take you to the documents but, just so that they're on the record, DHSC0003662_090 is a submission to the Secretary of State about the reasons why the settlement had taken some time to be achieved. Yes. And it raises various things, including the Social Security aspect, but it doesn't mention anything about hepatitis and the hepatitis waiver. So and from your memory, was this a matter that was the cause of much	2 3 4 5 6 7 8 9 10 11 12 13 14	
2 3 4 5 6 7 8 9 10 11 12 13 14 15	A. Q.	matters, I assume, otherwise they wouldn't have introduced that amendment. In your statement you say that this didn't appear to be a significant issue between the parties at the time. I won't take you to the documents but, just so that they're on the record, DHSC0003662_090 is a submission to the Secretary of State about the reasons why the settlement had taken some time to be achieved. Yes. And it raises various things, including the Social Security aspect, but it doesn't mention anything about hepatitis and the hepatitis waiver. So and from your memory, was this a matter that was the cause of much debate between the sides?	2 3 4 5 6 7 8 9 10 11 12 13 14 15	
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16	A. Q.	matters, I assume, otherwise they wouldn't have introduced that amendment. In your statement you say that this didn't appear to be a significant issue between the parties at the time. I won't take you to the documents but, just so that they're on the record, DHSC0003662_090 is a submission to the Secretary of State about the reasons why the settlement had taken some time to be achieved. Yes. And it raises various things, including the Social Security aspect, but it doesn't mention anything about hepatitis and the hepatitis waiver. So and from your memory, was this a matter that was the cause of much debate between the sides? I don't remember any debate at all, and the inclusion of	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16	
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17	A. Q.	matters, I assume, otherwise they wouldn't have introduced that amendment. In your statement you say that this didn't appear to be a significant issue between the parties at the time. I won't take you to the documents but, just so that they're on the record, DHSC0003662_090 is a submission to the Secretary of State about the reasons why the settlement had taken some time to be achieved. Yes. And it raises various things, including the Social Security aspect, but it doesn't mention anything about hepatitis and the hepatitis waiver. So and from your memory, was this a matter that was the cause of much debate between the sides? I don't remember any debate at all, and the inclusion of that amendment from the plaintiff side suggests to me	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17	
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18	A. Q. A.	matters, I assume, otherwise they wouldn't have introduced that amendment. In your statement you say that this didn't appear to be a significant issue between the parties at the time. I won't take you to the documents but, just so that they're on the record, DHSC0003662_090 is a submission to the Secretary of State about the reasons why the settlement had taken some time to be achieved. Yes. And it raises various things, including the Social Security aspect, but it doesn't mention anything about hepatitis and the hepatitis waiver. So and from your memory, was this a matter that was the cause of much debate between the sides? I don't remember any debate at all, and the inclusion of that amendment from the plaintiff side suggests to me that there wasn't any discussion of it.	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18	
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19	A. Q. A.	matters, I assume, otherwise they wouldn't have introduced that amendment. In your statement you say that this didn't appear to be a significant issue between the parties at the time. I won't take you to the documents but, just so that they're on the record, DHSC0003662_090 is a submission to the Secretary of State about the reasons why the settlement had taken some time to be achieved. Yes. And it raises various things, including the Social Security aspect, but it doesn't mention anything about hepatitis and the hepatitis waiver. So and from your memory, was this a matter that was the cause of much debate between the sides? I don't remember any debate at all, and the inclusion of that amendment from the plaintiff side suggests to me that there wasn't any discussion of it. You mentioned the first draft and I'll ask you about	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19	
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20	A. Q. A. Q.	matters, I assume, otherwise they wouldn't have introduced that amendment. In your statement you say that this didn't appear to be a significant issue between the parties at the time. I won't take you to the documents but, just so that they're on the record, DHSC0003662_090 is a submission to the Secretary of State about the reasons why the settlement had taken some time to be achieved. Yes. And it raises various things, including the Social Security aspect, but it doesn't mention anything about hepatitis and the hepatitis waiver. So and from your memory, was this a matter that was the cause of much debate between the sides? I don't remember any debate at all, and the inclusion of that amendment from the plaintiff side suggests to me that there wasn't any discussion of it. You mentioned the first draft and I'll ask you about that now. Can you tell who the first draft came from?	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20	
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21	A. Q. A. Q.	matters, I assume, otherwise they wouldn't have introduced that amendment. In your statement you say that this didn't appear to be a significant issue between the parties at the time. I won't take you to the documents but, just so that they're on the record, DHSC0003662_090 is a submission to the Secretary of State about the reasons why the settlement had taken some time to be achieved. Yes. And it raises various things, including the Social Security aspect, but it doesn't mention anything about hepatitis and the hepatitis waiver. So and from your memory, was this a matter that was the cause of much debate between the sides? I don't remember any debate at all, and the inclusion of that amendment from the plaintiff side suggests to me that there wasn't any discussion of it. You mentioned the first draft and I'll ask you about that now. Can you tell who the first draft came from? I think so. I mean, I	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21	
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24	A. Q. A. Q.	matters, I assume, otherwise they wouldn't have introduced that amendment. In your statement you say that this didn't appear to be a significant issue between the parties at the time. I won't take you to the documents but, just so that they're on the record, DHSC0003662_090 is a submission to the Secretary of State about the reasons why the settlement had taken some time to be achieved. Yes. And it raises various things, including the Social Security aspect, but it doesn't mention anything about hepatitis and the hepatitis waiver. So and from your memory, was this a matter that was the cause of much debate between the sides? I don't remember any debate at all, and the inclusion of that amendment from the plaintiff side suggests to me that there wasn't any discussion of it. You mentioned the first draft and I'll ask you about that now. Can you tell who the first draft came from? I think so. I mean, I Would it help to go back to it? I found it because I think it was in the second lot of documents. That's one which is 3654_032, isn't it?	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24	
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23	A. Q. A. Q.	matters, I assume, otherwise they wouldn't have introduced that amendment. In your statement you say that this didn't appear to be a significant issue between the parties at the time. I won't take you to the documents but, just so that they're on the record, DHSC0003662_090 is a submission to the Secretary of State about the reasons why the settlement had taken some time to be achieved. Yes. And it raises various things, including the Social Security aspect, but it doesn't mention anything about hepatitis and the hepatitis waiver. So and from your memory, was this a matter that was the cause of much debate between the sides? I don't remember any debate at all, and the inclusion of that amendment from the plaintiff side suggests to me that there wasn't any discussion of it. You mentioned the first draft and I'll ask you about that now. Can you tell who the first draft came from? I think so. I mean, I Would it help to go back to it? I found it because I think it was in the second lot of	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23	

of the plaintiffs in this claim had been infected by

- Yes.
- Many had died prior to the settlement.
- Yes.
- Others had full-blown AIDS, as it was referred to
- then --
- Yes.
- -- at the time of the settlement. And you said there
- that the expectation at the time was that these people
- would die.
- Yes, sadly.
- And would die in a particularly horrible and horrific
- way.
- Yes.
- And the damages were intended to reflect that.
- Yes.
 - Does it follow that for such plaintiffs, on that
- assumption, it is unlikely that there would have been
- much in terms of additional value in bringing a claim
- for hepatitis?
- Yes, exactly that, which is why I assume the claim was
- not brought. But I can't tell, because I didn't bring
- the claim. The plaintiffs did. And they understood
- that the reason for excluding the hepatitis-type claims 170
- 12 December is, yes, DHSC0003654_032. That's the one. I see that -- this comes from Ron Powell, 12 December. And looking at the notes he made, by 12 December, and the things which were crossed out in it, like, for example, on page 11, paragraph 9, which was one of the things asked for by the plaintiffs, which is: "The Government resolved to take all steps ... reasonably possible to give affected haemophiliacs and their affected intimates, as well as all others infected with AIDS, the best available treatment ..." That was crossed out. It doesn't look as though it is a Department of Health draft. I don't think I wrote this, looking at all the wording. It's not my style. I also note, if I go back -- and I'm sorry to take you out of order here -- but there is a comment at the back ... yes. DHSC0003655_028, which is a memo of 17 December to Mr Dobson. So this is 17 December, we'll "be sending a new draft today to the plaintiffs' counsel". So, doing the best I can, I would have thought the first draft came from them, marked up by Mr Powell, then further discussed, and I was then instructed to send 172

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HIV.

1		a draft back to the plaintiffs' counsel with some	1		a re
2		changes in it. So that is the best I can do. But	2		Dec
3		I don't think it was my draft and it doesn't look like	3		to d
4		a Departmental draft.	4	Q.	Yes
5	Q.	It would follow, then, that if it was the plaintiffs who	5	Α.	ľm:
6		put the first draft forward, that included a fairly	6		reco
7		broad term for what was being waived. That was refined	7	Q.	It is
8		through the different drafts in a process of	8		
9		consultation and discussion between plaintiffs and	9		will
10		defendants, and the specific wording about hepatitis was	10		sub
11		introduced by the plaintiffs to further refine what had	11	Α.	Of
12		been a broad clause into a more narrow one?	12	Q.	\
13	Α.	Yes. I mean, it was too broad to begin with but that's	13		poir
14		because the main goal for the plaintiffs, I think, was	14		if I r
15		to get the settlement for these individuals who were	15		ass
16		sadly, you know, dying day by day.	16		this
17		I think the refinements may have been part of the	17		an e
18		provision with the cut-off date because, of course, it	18		quic
19		does not settle any cause of action accruing after	19		was
20		December 1990. Whereas I think the original version	20		plai
21		would settle all claims of all sorts, including claims	21		an e
22		in relation to Factor VIII administered after	22		life.
23		December 1990.	23	Α.	Tha
24		So just standing back from that, as	24		two
25		I understand it, somebody who contracted hepatitis C as 173	25		a w
1		I completely agree that if we had known then that,	1		l do
2		with the advent of experimental treatment, those who	2		was
3		became HIV positive would have an extended period of	3		I thi
4		life, perhaps indefinite and as we know, many have	4		plai
5		survived for 30 and more years because of these	5		muo
6		treatments then it would have made a difference to	6		ther
7		everybody's perception of the appropriate compensation,	7		bec
8		both by way of full damages if they were to succeed, and	8		and
9		by way of compensation on this kind of scheme. For two	9		a cl
10		reasons, and in two opposite directions: firstly, there	10		a i al a
11		was not the inevitability of early death in a terrible	11		side
12		manner; but secondly, there was the long-lasting effect	12		of th
13		of having to go through experimental treatment and	13		
14		continuing treatment in addition to the treatment for	14		eve
15		haemophilia.	15	~	agro
16		Now, I have not sought to analyse, and none of us	16	Q.	Ofo
17		did at the time, whether the removal of the certainty of	17		had
18		death, but the addition of many years of suffering with	18	A.	Yes
19		HIV positive, would increase, decrease, or leave the	19	Q.	But
20		same the level of damages. But it would certainly have	20		leve

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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- esult of the administration of this after ecember 1990 could still bring a claim if they wished do so. S. sorry I hope that's helpful. That's all I can collect. And I'll now put away the files. s extremely helpful. Thank you very much. One point that follows on from that, and there I be an opportunity for all Core Participants to make bmissions about this in due course -course won't trouble you with those submissions, but one int that follows from that is that there seems to be, may put if it this way, something of a working sumption that hepatitis claims would be waived during s process, and that if that was done on the basis of expectation that the plaintiffs would die fairly ickly of HIV-related illnesses, then the thing that asn't factored in was the possibility that the aintiffs may survive for an extended period, to such extent that HIV may have a greater impact on their at -- I mean, you're asking one question, but positing o there. I don't mean that critically, I mean it's vider debate. 174 on't know, I haven't studied it, but no tests which as generally admitted as reliable for hepatitis C until nink about 1991. It is entirely possible that the aintiffs themselves would have said: hepatitis C is uch more serious than other forms of hepatitis, erefore there is an incremental form of damages and, cause there is a longer lifespan, that could get worse d could become more serious, therefore we'll include claim for it. So those two elements were missing, both in each le's thinking, and in the formulation and settlement the claim. So what has actually happened is different to what erybody expected when that settlement was proposed, reed and made.
- course, you had to act upon the knowledge that you d at the time.
- S.
- It the fact that that settlement was made in 1991, that el of knowledge wouldn't have prevented a government 21 from making further payments later on when knowledge 22 changed, would it?
- 23 Α. 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 176

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1		what they could have done. I agree that it is at least	1	~	in knowledge.
2		a matter that could have been and still could be	2	Q.	I will leave the HIV settlement and indeed the
3		envisaged by Government that because of that longer	3		HIV Litigation there.
4		lifespan and those changes, some changes should be made.	4	A.	Right.
5		But I think it would be wrong to assume that	5	Q.	We will move on to a short section on the
6		damages in terms of general damages I don't mean	6		HCV Litigation, Hepatitis C Litigation, brought by
7		special damages for loss of earnings and other expenses,	7 8		people who weren't part of this scheme Yes.
8		which I don't know enough about but I think it would be wrong to assume that damages for long-lasting	o 9	A.	because they didn't have they weren't affected by
9 10		5 5 5 5	9 10	Q.	because they digit have they weren't affected by HIV.
10 11		suffering with treatment, difficult, intrusive, and so	10		
12		on, to control the HIV positive virus, would attract greater damages or significantly greater damages than	12		If we could have, please, DHSC actually sorry, if we can go to WITN5426076. These are a set of
13		death. I haven't looked at it and I couldn't say	12		preliminary instructions, they are draft instructions
13		immediately, yes, that makes a very big difference to	13		which were sent to you and Fiona Sinclair. They are
14		it.	14		we know from other papers, that they were sent in or
16		If you take, by way of contrast, something I know	16		around April 1996.
17		more about, which CJD and variant CJD, which, when it is	10	А.	Yes. I should say, because, of course, these documents
18		contracted, it is invariably fatal over a relatively	18	А.	were sent to me after I made my statement, when I'd
19		short period of time, because of the special needs of	19		referred to peripheral involvement in it, that although
20		somebody who suffers from it, if their life expectancy	20		these events all took place between five and ten years
20		was going to be five years rather than six months, that	20		later than HIV haemophiliacs, I have much less
22		would have made a significant difference, in my view, to	22		recollection of them. Probably because the haemophiliac
23		the level of damages. And that's probably about as far	23		case was one of the most significant cases I did in this
23		as I can usefully say and I can't comment on what the	23		area of my practice. I just don't remember this at all
25		Government could or should have done after the change of	25		well.
20		177	20		178
1	0	As we will see from the documents, it may be that your	1		there is one point I'd like to pick up from page 7
1	Q.	As we will see from the documents, it may be that your involvement was really quite limited, as you say	1		there is one point I'd like to pick up from page 7, paragraph 22. What is written there is:
2	Q.	involvement was really quite limited, as you say,	2		paragraph 22. What is written there is:
2 3	Q.	involvement was really quite limited, as you say, peripheral to it.	2 3		paragraph 22. What is written there is: "As Counsel will have noticed, the Statement of
2 3 4	Q.	involvement was really quite limited, as you say, peripheral to it. The instructions are, if we go to page 2, to draft	2 3 4		paragraph 22. What is written there is: "As Counsel will have noticed, the Statement of Claim has been in effect lifted from the reamended Main
2 3 4 5	Q.	involvement was really quite limited, as you say, peripheral to it. The instructions are, if we go to page 2, to draft a defence in response to a statement of claim which has	2 3 4 5		paragraph 22. What is written there is: "As Counsel will have noticed, the Statement of Claim has been in effect lifted from the reamended Main Statement of Claim from the HIV haemophilia litigation."
2 3 4 5 6	Q.	involvement was really quite limited, as you say, peripheral to it. The instructions are, if we go to page 2, to draft a defence in response to a statement of claim which has been brought by an individual who has contracted	2 3 4 5 6		paragraph 22. What is written there is: "As Counsel will have noticed, the Statement of Claim has been in effect lifted from the reamended Main Statement of Claim from the HIV haemophilia litigation." Would that seem to suggest that, as you said
2 3 4 5 6 7	Q.	involvement was really quite limited, as you say, peripheral to it. The instructions are, if we go to page 2, to draft a defence in response to a statement of claim which has been brought by an individual who has contracted hepatitis C through the use of blood products.	2 3 4 5 6 7		paragraph 22. What is written there is: "As Counsel will have noticed, the Statement of Claim has been in effect lifted from the reamended Main Statement of Claim from the HIV haemophilia litigation." Would that seem to suggest that, as you said earlier, hepatitis claims were going to be going over
2 3 4 5 6 7 8	Q.	involvement was really quite limited, as you say, peripheral to it. The instructions are, if we go to page 2, to draft a defence in response to a statement of claim which has been brought by an individual who has contracted hepatitis C through the use of blood products. The second and third elements of the instructions,	2 3 4 5 6 7 8	A	paragraph 22. What is written there is: "As Counsel will have noticed, the Statement of Claim has been in effect lifted from the reamended Main Statement of Claim from the HIV haemophilia litigation." Would that seem to suggest that, as you said earlier, hepatitis claims were going to be going over the same facts that had been
2 3 4 5 6 7 8 9	Q.	involvement was really quite limited, as you say, peripheral to it. The instructions are, if we go to page 2, to draft a defence in response to a statement of claim which has been brought by an individual who has contracted hepatitis C through the use of blood products. The second and third elements of the instructions, which are annotated with the words "later" and "in due	2 3 4 5 6 7 8 9	A. Q.	paragraph 22. What is written there is: "As Counsel will have noticed, the Statement of Claim has been in effect lifted from the reamended Main Statement of Claim from the HIV haemophilia litigation." Would that seem to suggest that, as you said earlier, hepatitis claims were going to be going over the same facts that had been Yes.
2 3 4 5 6 7 8 9	Q.	involvement was really quite limited, as you say, peripheral to it. The instructions are, if we go to page 2, to draft a defence in response to a statement of claim which has been brought by an individual who has contracted hepatitis C through the use of blood products. The second and third elements of the instructions, which are annotated with the words "later" and "in due course", are to advise in writing about general	2 3 4 5 6 7 8 9 10	Q.	paragraph 22. What is written there is: "As Counsel will have noticed, the Statement of Claim has been in effect lifted from the reamended Main Statement of Claim from the HIV haemophilia litigation." Would that seem to suggest that, as you said earlier, hepatitis claims were going to be going over the same facts that had been Yes. raised in the HIV Litigation?
2 3 4 5 6 7 8 9 10 11	Q.	involvement was really quite limited, as you say, peripheral to it. The instructions are, if we go to page 2, to draft a defence in response to a statement of claim which has been brought by an individual who has contracted hepatitis C through the use of blood products. The second and third elements of the instructions, which are annotated with the words "later" and "in due course", are to advise in writing about general liability and about liability in public law. The	2 3 4 5 6 7 8 9 10 11	Q. A.	paragraph 22. What is written there is: "As Counsel will have noticed, the Statement of Claim has been in effect lifted from the reamended Main Statement of Claim from the HIV haemophilia litigation." Would that seem to suggest that, as you said earlier, hepatitis claims were going to be going over the same facts that had been Yes. raised in the HIV Litigation? Yes.
2 3 4 5 6 7 8 9 10 11 12	Q.	involvement was really quite limited, as you say, peripheral to it. The instructions are, if we go to page 2, to draft a defence in response to a statement of claim which has been brought by an individual who has contracted hepatitis C through the use of blood products. The second and third elements of the instructions, which are annotated with the words "later" and "in due course", are to advise in writing about general liability and about liability in public law. The compensation scheme or payment scheme was not set up.	2 3 4 5 6 7 8 9 10 11 12	Q.	paragraph 22. What is written there is: "As Counsel will have noticed, the Statement of Claim has been in effect lifted from the reamended Main Statement of Claim from the HIV haemophilia litigation." Would that seem to suggest that, as you said earlier, hepatitis claims were going to be going over the same facts that had been Yes. raised in the HIV Litigation? Yes. If we could then, please, go forward in time to 2000.
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2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23		involvement was really quite limited, as you say, peripheral to it. The instructions are, if we go to page 2, to draft a defence in response to a statement of claim which has been brought by an individual who has contracted hepatitis C through the use of blood products. The second and third elements of the instructions, which are annotated with the words "later" and "in due course", are to advise in writing about general liability and about liability in public law. The compensation scheme or payment scheme was not set up. Do you know if you did ever provide those general advices? Um I don't know. This is 1996. So this is right in the middle of the Human Growth Hormone Litigation, when we also had the first case of variant CJD, which was actually announced whilst I was calling either Professor Ironside or Dr Will, the two Glasgow scientists or Edinburgh scientists who were at the forefront, so we were very much looking at that. I did give some advice in relation to blood and blood products at some stage. I just don't recollect. Again, it was	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23	Q. A. Q.	paragraph 22. What is written there is: "As Counsel will have noticed, the Statement of Claim has been in effect lifted from the reamended Main Statement of Claim from the HIV haemophilia litigation." Would that seem to suggest that, as you said earlier, hepatitis claims were going to be going over the same facts that had been Yes. raised in the HIV Litigation? Yes. If we could then, please, go forward in time to 2000. The Inquiry saw some of these documents yesterday so I won't go through them in detail. They have been provided to you and I stress they were provided to you after you provided your written statement, which is why they're not referred to there. But we know that you were instructed for a conference on 3 March 2000 to advise about some documents that it had been missing Yes. through the disclosure exercise of the hepatitis C I'm going to take you to a submission to the

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1		WITN6955032.	1		litigation, leading counsel, Justin Fenwick QC, advised
2		This is dated 8 March 2000. It is from	2		us to be prepared."
3		Marilynne Morgan, who was a lawyer to the Permanent	3		It goes on to describe the steps that were taken,
4		Secretary, copied to Anita James, Charles Lister, and	4		so it appears that you gave some kind of advice in the
5		the deputy chief officer, Pat Troop.	5		mid-1990s about getting ready for this litigation.
6		Again, this document was raised yesterday so I'm	6	Α.	Yes. I mean, document retention, document gathering,
7		not going to go through it in detail, but on page 1 it	7		I imagine. But that was presumably at the time of that
8		refers to the two types of hepatitis C claims. The	8		first writ that you've shown me. I don't remember it,
9		first type were claims from people with haemophilia, and	9		but that's what I would have done.
10		we have seen an example of one of those claims	10	Q.	If we go to paragraph 5, there is a description given of
11		from 1996.	11		the discovery of the missing documents. What it says is
12	Α.	Yes.	12		this:
13	Q.	It says the Department has on its book nine cases, which	13		"After discussions with me about the situation,
14		were presently stayed.	14		Anita James and Charles Lister consulted
15		The second type of claim were claims from patients	15		Justin Fenwick QC on 3rd March 2000. Counsel questioned
16		with blood transfusions, and that led to the litigation	16		both Anita and Charles as to how they knew documents had
17		known as A and Others v the National Blood Authority.	17		been destroyed. I gather he was rather incredulous
18		The Department of Health was not a party to that	18		about the matter. So far as immediate action was
19		litigation but was asked to provide disclosure, which is	19		concerned he agreed with out view that we write to DMS
20		how the identification of the missing documents came to	20		[the solicitors for the claimants]; copies of our letter
21		be noticed.	21		and their reply are attached. Obviously, what has
22		If we could go, please, to page 2. Paragraph 21,	22		happened is a potential source of embarrassment. DMS's
23		first of all. It says:	23		response is very reasonable but they are of course
24		"At a time in the mid-1990s when the Department	24		concerned. They ask for a further understanding of the
25		thought it was going to be a major party in the	25		Department's position by next Tuesday, in the form of an
		181			182
4		annotated list of documents."	4		destruction outbaciestics (where we know to be still at
1			1		destruction authorisation (whom we know to be still at
2 3		It goes on to say the steps that had been taken in	2 3		DH) and Dr Rejman. This should not be a witch hunt but
4		respect of that. "Counsel proposed to talk on a counsel to counsel	4		the investigator should report and make recommendations about such matters in the future. Counsel was of the
4 5		basis to the National Blood Authority's lawyers to	4 5		view that as part of the investigation Heywood Stores
6		smooth things there. Ministers will need to be informed	6		should be visited. In this way, the Department would
7		of the position in due course."	7		have audited what has happened. It occurs to me that
8		The next page, please.	8		this is a function which could probably be carried out
9			9		by internal audit."
10		"6. However, the real problem is in relation to the stayed litigation (the first category mentioned in	10		Just a couple of points arising from that. Why
11		paragraph 1). There, the Department has a duty to	11		were you, or were you, and if so why, rather incredulous
12		the Court not to destroy documents."	12		about the matter?
13		It mentions the firms that are representing	13	A.	Yes, I'm not sure "incredulous" would be the correct
14		the claimants. And then at the bottom of the paragraph	14	Λ.	word. I mean, I can't remember it. I think I was
15		it says:	15		probably absolutely furious. Having given advice on
16		"Counsel's advice is that if necessary, the	16		document retention, having spent, by this stage,
17		Department will have to settle the claims (£15-£30k per	17		over 15 years representing the Department of Health and
18		case), but this could easily be represented as 'lost the	18		the CSM, having gone through the problems of lack of
19		papers and paid us off."	19		documents in HIV, the idea that when we knew about
20		Paragraph 7:	20		litigation, and the same group of people were involved,
20		"In addition Counsel was of the view that there	20		they should have allowed documents to go missing was
22		should be a small, and probably in-house, investigation	22		intensely frustrating. And I should think I made it
23		into the destruction of the documents. The investigator	23		known how cross I was about it because I mean, not
24		should interview Dr Metters and his secretary,	24		from my point of view but from the point of view of the
25		the person at the [Department of Health] who signed the	25		Department.
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1		So it's not incredulous that I didn't believe what	1		If, of course, that low-key enquiry had discovered
2		they were saying, it was just that: how could this	2		wrongdoing by somebody, as opposed to chaos, then
3		possibly have been allowed to happen?	3		that the fact that it was a low-key internal inquiry
4	Q.	The Inquiry that you recommended, it's described as	4		wouldn't mean that you then brushed it under the carpet.
5		being a small and probably in-house investigation. Was	5		But the best way of getting the answer is to approach
6		there any reason why it would have been an in-house	6		things in a relatively low-key way. That was my view.
7		investigation?	7		It was not a matter of go in all thunder and say, "Who's
8	Α.	Yes. I think the main objective, as I saw it, was	8		done this? Heads must roll". It was: "Let's find out
9		actually to find out what had happened, to see if there	9		what's happening. Let's see if we can't find out
10		was some stone which hasn't been turned over which might	10		whether there" because very often, I mean, documents
11		lead to some results, make sure that people actually	11		turn up. I was dealing with a case only last week where
12		gave an accurate and full account and make sure that	12		documents which were thought to have been missing for
13		steps were taken to prevent it happening again.	13		many years turned up halfway through a trial.
14		I'd already advised that both ministers and the	14		So this kind of investigation is intended to try
15		plaintiffs' solicitors should be told about it, so there	15		to get to the truth, and find the documents, as opposed
16		was no question of a cover-up, but my view was that if	16		to have a witch hunt.
17		you have a relatively low-key enquiry, you're more	17	Q.	But it would involve, would it not, going to the
18		likely to get to the truth and be able to do something	18		individuals concerned and trying to find out what went
19		about it.	19		wrong?
20		I think I'm right in saying that both Dr Rejman	20	Α.	I assume so. Certainly that's what I expected to
21		and Dr Metters had retired by that stage, so there was	21		happen.
22		not much you could do about that. But if you put an	22	Q.	Were you consulted about the terms of reference and how
23		enquiry and you make it too major, then people will tend	23		it was going to be done or did you just give the general
24		to clam up, they become very defensive, and you don't	24		advice that there should be some form of inquiry?
25		get the answers you want.	25	Α.	I don't know. I don't know if I had a junior. I think
		185			186
1		at this stage I was just out of tobacco and into	1		with haemophilia against the Department of Health, do
2		variant vCJD and BSE, so this was and a growing	2		you know if the court were informed about the loss and
2 3		variant vCJD and BSE, so this was and a growing commercial practice as well. So I doubt I would have	2 3		you know if the court were informed about the loss and destruction of the documents?
2 3 4		variant vCJD and BSE, so this was and a growing commercial practice as well. So I doubt I would have done much more. I might have done. They may have been	2 3 4	А.	you know if the court were informed about the loss and destruction of the documents? No, and I don't know what happened to those claims.
2 3 4 5		variant vCJD and BSE, so this was and a growing commercial practice as well. So I doubt I would have done much more. I might have done. They may have been to see me, if they'd asked me. Certainly, if I'd been	2 3 4 5	A.	you know if the court were informed about the loss and destruction of the documents? No, and I don't know what happened to those claims. I think I gave advice, it was stayed, I don't remember
2 3 4 5 6		variant vCJD and BSE, so this was and a growing commercial practice as well. So I doubt I would have done much more. I might have done. They may have been to see me, if they'd asked me. Certainly, if I'd been asked about terms of reference or anything else, I think	2 3 4 5 6	A.	you know if the court were informed about the loss and destruction of the documents? No, and I don't know what happened to those claims. I think I gave advice, it was stayed, I don't remember what they were stayed until, whether it was pending the
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1		By referring to those four people, am I right to	1	turns from being watchdog into bloodhound. I think at
2		conclude that your suggestion was that the investigation	2	this stage, I was probably thinking we need to be a bit
3		should look at both sets of destruction or loss, both	3	of a bloodhound here, rather than a watchdog. This sort
4		Dr Metters' files and the registered files?	4	of destruction requires an explanation. It is more
5	А.	Yes. I don't know why, because I can't remember. But	5	likely to be a mistake and a negligent error than
6		if there were two sources of documents, it was plainly	6	a deliberate one but, nonetheless, the fact that people
7		important to look at both, in order to see if between	7	who had been involved in the previous litigation had had
8		the two they could be put together. I note that one	8	their files destroyed was something which needed to be
9		from one of the documents you sent me, that I was asked	9	taken seriously. I don't think I formed a view. I was
10		if I had any old papers and I produced some photocopied	10	just surprised that it should happen, as well as
11		papers. By then the photocopier was better than it had	11	annoyed.
12		been in the '80s, and I had some papers which filled in	12	So I think I don't think I would have formed
13		some gaps so by going to both, you increase the chances	13	a view either way, but I think I would still have had
14		of finding them and, obviously, if there has been	14	an open mind at that stage.
15		destruction, you want to know why both sets have been	15	MR HILL : Sir, those are the questions that I have for
16		destroyed, and if there's a good reason for one or other	16	Mr Fenwick now. We have very helpfully received some of
17		or both.	17	the questions from the Core Participants over the
18	Q.	Final question on this, and indeed the final question	18	previous break. Could I suggest a break of about
19		for now, were you able to form any view at the time	19	20 minutes or 15 minutes to start with, possibly
20		about the underlying motives for the loss and	20	extending to 20?
21		destruction? Whether they had been motives to conceal	21	SIR BRIAN LANGSTAFF: Yes, it'll be 5.10 then that we meet
22		these documents or whether this had been a mistake,	22	again.
23		an error that had led to the destruction?	23	MR HILL: Perhaps if we could go for 5.05, hopefully we
24	Α.	I don't think so. I think I mean, I do a lot of	24	should be able to be done by then.
25		audit work and there's a moment when the auditor's job	25	SIR BRIAN LANGSTAFF: Let's say not before 5.05, shall we?
		189		190
1		So not before 5.05.	1	A. I don't remember them now. I've no idea whether I was
1 2	(4.5	So not before 5.05. i0 pm)	1 2	A. I don't remember them now. I've no idea whether I was told at the time.
	(4.5			
2		i0 pm)	2	told at the time.
2 3	(5.1	i0 pm) (A short break)	2 3	told at the time. Q . I think it probably follows from that that the answer to
2 3 4	(5.1 SIR	i0 pm) (A short break) 4 pm)	2 3 4	told at the time.Q. I think it probably follows from that that the answer to the next question is already answered. Do you remember
2 3 4 5	(5.1 SIR	i0 pm) (A short break) 4 pm) BRIAN LANGSTAFF: Yes.	2 3 4 5	 told at the time. I think it probably follows from that that the answer to the next question is already answered. Do you remember having any liaison or co-ordination with anybody in
2 3 4 5 6	(5.1 SIR	0 pm) (A short break) 4 pm) BRIAN LANGSTAFF: Yes. HILL: Mr Fenwick, a few questions which have been raised	2 3 4 5 6	 told at the time. I think it probably follows from that that the answer to the next question is already answered. Do you remember having any liaison or co-ordination with anybody in Scotland about those claims?
2 3 4 5 6 7	(5.1 SIR MR	0 pm) (A short break) 4 pm) BRIAN LANGSTAFF: Yes. HILL: Mr Fenwick, a few questions which have been raised by Core Participants, so I'm afraid there will be some	2 3 4 5 6 7	 told at the time. Q. I think it probably follows from that that the answer to the next question is already answered. Do you remember having any liaison or co-ordination with anybody in Scotland about those claims? A. No. I'm pausing because there was some other
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2 3 4 5 6 7 8 9 10	(5.1 SIR MR A. Q.	60 pm) (A short break) 4 pm) BRIAN LANGSTAFF: Yes. HILL: Mr Fenwick, a few questions which have been raised by Core Participants, so I'm afraid there will be some jumping about. Yes, sure. First of all, the HIV Litigation and Scotland and Wales.	2 3 4 5 6 7 8 9 10 11	 told at the time. Q. I think it probably follows from that that the answer to the next question is already answered. Do you remember having any liaison or co-ordination with anybody in Scotland about those claims? A. No. I'm pausing because there was some other litigation, which involved some interplay with Scotland. But I don't have any recollection of anything to do with HIV. Q. Moving on, then, to Wales. Documents which we didn't
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1		a separate defendant or whether it was dealt with	1		in respect of hepatitis infection in haemophiliacs.
2		I don't know, but there was certainly nothing different	2		"2. These are individuals who are HIV negative,
3		in the way that I acted because of Wales, and I don't	3		and as such would not be covered by the HIV haemophilia
4		remember any Welsh-specific advice.	4		general settlement.
5	Q.	Just finally on this, do you remember being informed	5		"3. I believe that any that are HIV positive
6		about any actions being brought in Northern Ireland	6		would have to agree not to raise hepatitis in any
7		about the HIV Litigation?	7		further litigation, but this obviously does not exclude
8	A.	No.	8		those not in the scheme.
9	Q.	Turning to the waiver, there's a document which has not	9		"4. Dr Kernoff did not believe that the
10		previously been provided to you, but was provided to you	10		Department of Health was a named defendant at present,
11		over the break.	11		but I felt you would wish to be aware of this."
12	A.	Yes.	12		That is the minute that was sent to Mr Powell.
13	Q.	I'm going to bring that up on screen, now, please.	13		First of all, do you have any recollection of being
14	A.	Good.	14		informed in February 1991 that there had been writs
15	Q.		15		issued in respect of hepatitis infection, of people with
16		have seen at the time	16		haemophilia who were not infected with HIV?
17	A.	No.	17	Α.	No, I don't. But I do have some thoughts in relation
18	Q.	but it is a minute from Dr Rejman to Mr Powell, dated	18		to this but no, I don't have any recollection of being
19		22 February 1991, which the Inquiry has looked at	19		told at the time.
20		before, but to give the full context, I will read all	20		If I can invite you to give those thoughts?
21		of it. It says this, heading "HIV Haemophilia	21	Α.	Yes, certainly. I mean, the it's Dr Kernoff from the
22		Litigation":	22		Royal Free Hospital, so these will have been writs to
23		"1. During a brief conversation with	23		the Royal Free Hospital as, I think, a Special Health
24		Dr Peter Kernoff of the Royal Free Hospital, he	24		Authority, or similar. They will therefore be related,
25		mentioned to me that he has received a couple of writs 193	25		almost certainly, to the clinical negligence aspect, as 194
1		opposed to the policy resource aspect. It would have	1		signing an undertaking not to bring proceedings against
1 2		been a claim, if it had been brought by a haemophiliac	2		any Defendant or against any other Government body in
2		in this litigation, which could have been within the	2		respect of the administration of cryoprecipitate
4		carve-out for claims against Health Authorities for	4		[et cetera] before December 1990, save that nothing
5		negligence in their clinical treatment. So that is	5		prevents a qualifying non-plaintiff from bringing
6		probably why we weren't involved. It would not have	6		proceedings in respect of the administering prior to
7		been, therefore, banned.	7		13th December of cryoprecipitate Factor VIII or
8		I'm not sure that Dr Rejman is correct in what he	8		Factor IX where:-
9		says in paragraph 3. Now, I stress in what I'm saying,	9		"(1) that has caused damage to such Plaintiff
10		I'm not either seeking to replicate the advice of those	10		which had not been diagnosed by 13th December 1990; and
11		advising those plaintiffs, nor of the Department, nor am	11		"(2) the damage alleged does not include infection
12		I acting for the Department. I'm giving a view looking	12		or the risk of infection by HIV and/or the hepatitis
13		at it now and seeing it.	13		viruses."
14		There is a difference between the undertakings	14		So the non-diagnosis is keeps in for those
15		given by plaintiffs, which we've looked at, and the	15		non-plaintiffs other treatment damage, excluding
16		nature of the undertaking which the settlement agreement	16		hepatitis and HIV. But the undertaking is in respect of
17		required to be given by non-plaintiffs, which are to be	17		what's called a government body. Now, I do not know why
18		found, if we can just look at it, HSOC0023174-22. And	18		we have that wording, compared with the wording you have
19		I think I'm right in this, but I've only had about five	19		at page 20 of this document, paragraph 5.
20		minutes to look at it, so	20		And there the undertaking is "not to bring fresh
20		This deals with a:	20		proceedings against any defendant or against any other
22		" qualifying non-plaintiff entitled to	22		Government Department, Health Authority or treating
22		receive benefits from the new Macfarlane Trust"	22		doctor".
24		And we looked at the carve-out for diagnosis:	23		Now, a treating doctor is undoubtedly not
25		" corresponding to their circumstances upon	25		a government body. It appears to me and nobody has
		195	20		196

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1		instructed me to do it, so I'm doing this as a thinking	1		of the virus through Factor VIII, as opposed to
2		lawyer, rather than somebody's adviser that a Health	2		administration of the virus, so that does not prevent me
3		Authority would normally be treated as a government	3		bringing my claim for clinical negligence for being
4		body. So and, of course, if somebody was diagnosed	4		given hepatitis when measures could have been taken to
5		with HIV, who was not a plaintiff, and that person also	5		have given me heat-treated Factor VIII, or whatever, or
6		had a clinical negligence claim I call it that for	6		would have said "I'm not going to advise my client to
7		simplicity the claims carved out against the local	7		sign that undertaking, I want first to have a carve-out
8		Health Authorities, then one would expect them to be put	8		so I can pursue my clinical negligence claim".
9		in no worse a situation than the plaintiffs.	9		Now, I don't know whether that happened, I haven't
10		So, in other words, plaintiffs in the litigation	10		considered it before this document arrived on my table
11		who had a claim for treatment against the Health	11		ten minutes ago, but I note the distinction between the
12		Authority, whether for hepatitis or for HIV, whether	12		two. I expect there was a reason for the difference in
13		for, if you like, a full settlement, full compensation	13		wording. I think it may have been that but I'm
14		for HIV because of their treatment, for example they did	14		speculating. But I'm not sure that it would be correct
15		not need to be given imported Factor VIII, or whatever	15		to characterise the undertaking which was required by
16		it was, or who had a claim they wanted to bring for	16		paragraph 8 of the settlement agreement to preclude
17		hepatitis, wouldn't be prevented from doing so because	17		claims in clinical negligence for hepatitis
18		of the carve-out from the settlement.	18	Q.	That's
19		I would have expected that if a non-plaintiff was	19	Α.	or indeed for HIV. So, for example, if somebody who
20		subsequently diagnosed with HIV, and also had a claim	20		was not a plaintiff had a very good claim, "we should
21		for hepatitis arising from their treatment, as opposed	21		not" "I should not have been given heat-treated
22		to arising from the sources, that they would either have	22		product and, therefore, although I can only get this
23		obtained confirmation or their lawyers would either have	23		settlement out of the Macfarlane Trust, I can still
24		obtained confirmation from the Macfarlane Trust, that	24		pursue my claim for full settlement against the Health
25		that reference to let me get the right word spread	25		Authority".
		197			198
1		Equally, a non-plaintiff should, in my view, have	1		I drew attention earlier to the reference to "spread"
2		been put in the same position. And I think the wording seemed to me to omit it.	2 3		of it. It struck me as being there must be a reason
3 4	0		4		we put that in. And I now draw attention to the
4 5	Q.	When you're referring to non-plaintiffs there, so we are clear, you're talking about people who didn't bring	5		difference between paragraph 5 and paragraph 8, and there must have been some reason for that, and the fact
6		a claim in the HIV Litigation	6		
7	A.	•	7		that it clearly excludes doctors seems to me to suggest that it was not intended to require there to be
8	Q.	but who were allowed access to the scheme because	8		a covenant not to sue treating clinicians.
9	ω.	they became infected by HIV?	9		But that's really as far as I can take it.
10	Α.	They were haemophiliacs who subsequently became infected	10		Anything more would be speculation.
11	л.	with HIV, and the aim was to bring them in and give them	11	Q.	Thank you. That's very helpful.
12		the same rights and the same compensation as the	12	·	Another set of potential litigants, including the
13		plaintiffs. Now, that being the case, it would have	13		one who may have issued the writs of Dr Kernoff for
14		been surprising and unintended if the effect of that was	14		people who were not infected with HIV, they would not
15		a clinical negligence type claims which were permitted	15		have been captured by this scheme at all, so they would
16		outside the settlement in the Macfarlane Trust, would	16		not have signed any waiver, so they could go ahead and
17		not be also open to such non-plaintiffs.	17		brought whatever claim they wished to bring.
18		Now, I have no personal knowledge of it, but	18	Α.	Yes.
19		certainly if anybody had asked me at the time what the	19	Q.	The question I've been asked to put to you arising out
20		position would have been, that would have been, I think,	20		of Dr Rejman's minute of 22 February, is this: do you
21		my response.	21		recall Dr Rejman or Mr Powell or anyone else from the
22	Q.	Yes. So it certainly if that was a consequence, it	22		central defendants suggesting to you, around 22 February
23		was certainly not an intended one on your part?	23		or any time thereafter, that there needed to be specific
24	Α.	Certainly not intended by me. We may not have thought	24		reference to waiving hepatitis claims in the settlement
25		about it. There is a difference in the wording, and	25		agreement?
		199			200

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1	Α.	No, I don't. I mean, they may have done. I don't	1		sense, but there is a duty to help Government to make
2		recollect it. We've looked at how the reference to	2		the right decisions as opposed to simply to protect its
3		hepatitis came in through the plaintiffs' drafting. If	3		corner and, like another litigant, to avoid having to
4		you're asking whether somebody suggested that we should,	4		pay or whatever.
5		if you like, get a free pass on hepatitis claims out of	5		So I regard my duty when acting for Government as
6		this, I have no recollection of it, and I certainly	6	~	being slightly different.
7		would not have wanted to be party to that without it	7	Q.	If I may put it this way: there was no attempt, then, to
8		being fully discussed and openly discussed, because it	8		sneak this past the plaintiffs?
9		would not be what we were intending to do.	9	A.	Not to my knowledge.
10	Q.	When you say fully and openly discussed, you mean fully	10	Q.	, , , , , , , , , , , , , , , , , , ,
11		and openly discussed with the plaintiffs?	11		an iterative process that led to the drafting of the
12	Α.	Well, certainly in the first instance, to understand	12		settlement agreement. The fact that the words
13		what we're trying to do. And then if we are trying to	13		"hepatitis" and "HIV" came from the plaintiffs, doesn't
14		do something which goes beyond the settlement which was	14		necessarily preclude the possibility that you had
15		intended, then I think we'd have to say, you know: that	15		discussed it with them as part of the negotiation that
16		wording, by the way, you do understand, will do this.	16		took place; is that fair?
17		Because if it's something which nobody would have	17	Α.	That's absolutely fair and we may well have done, for
18		spotted. So if somebody somewhere thought, "Oh good,	18		the reason which I think I tried to explain in my
19		there's a word excluding hepatitis claim, let's keep	19		statement, that what we did not want to do was to
20		it", I was not aware of it, and would have acted	20		resolve this litigation and find that the resource
21		differently. And it's impossible to say how, but, you	21		argument for self-sufficiency was raised again. So that
22		know, I don't the role of counsel advising Government	22		was the importance of dealing with the hepatitis claims
23		in my view has always been rather different from the	23		in that way. Of course, it didn't prevent somebody who
24		role of counsel advising private litigants, because	24		did not contract HIV from bringing the argument, but
25		there is always a duty of care in not in a legal 201	25		it's unlikely that or certainly as perceived in 202
		201			202
1		1990 that people would have brought claims simply for	1		was the subject of discussion or whether it was intended
1 2		hepatitis, in relation to very difficult and what	2		by somebody to reflect what we'd agreed. My focus was
2		I still call novel I think Lord Justice Ralph Gibson	2		on the settlement agreement and what it provided for.
4		described as novel claims, on policy and resourcing	4		I don't think I even saw the terms of the new
5		issues.	5		replacement Macfarlane Trust.
6	Q.	Moving on to the deed that we've just that you just	6	0	A couple of other questions about the waiver. Are you
7	ы.	mentioned, I don't think we need to bring it up but if	7	ω.	aware of any evidence that the hepatitis waiver was
8		we do, then please say. Do you recall whether or not	8		included as a trade-off for the Government disregarding
9		the wording of the deed that we've looked at was the	9		the settlement sum for the purposes of benefits?
9 10		product of the same sort of discussions,	9 10	٨	No. I mean, we looked at benefits separately. There
10		counsel-to-counsel level, between the claimants and the	10	А.	were questions about with benefits I mean, I think it
		defendants?	12		•
12 13		The waiver deed, do you mean?	12		took a little bit of shuffling to get the Treasury to agree it and its terms. I know there were issues about
13	A. Q.	The waiver deed, yes.	14		how far it extended to in whether inheritances, and so
14		No, I don't actually recollect it as a document at all.	14		on, but I don't recollect there being any trade-off.
16	Α.	•	16		
17		I mean, I may well have been involved in it. I'm just going to go back to it. Because the wording is quite	10		And I think if there had been, it would have been there in the exchanges.
18		wide:	18		And I think I would have seen it here. But
10			10		I don't recollect it. I'm not sure it would have been
20		"Any proceedings" I mean, this looks to me like what I call	20		
					right anyway. I mean, it's not what we were trying to
21		a committee document. Everyone has had their bit into	21 22	0	do. When you say not right, do you mean morally not right?
22		it "any district or Regional Health Authority or any	22	Q.	When you say not right, do you mean morally not right?
22 23		other Government body"	22	٨	In the spirit of what we were trying to achieve, it
23		other Government body".	23 24	Α.	In the spirit of what we were trying to achieve, it
23 24		I don't know whether it was; I don't know when it	24	Α.	would have been inconsistent with trying to help the
23		-		Α.	

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1		required a trade-off for something which wasn't	1		Dan Brennan and Rupert Jackson, that if any individuals
2		included. But one has to recollect, there were no	2		decided not to accept it, that they would get continued
3		claims for hepatitis damage. So I think it was a given	3		legal aid funding for it, so that, in practice, if the
4		that claims for the infection with hepatitis, whether	4		majority accepted the recommendation and didn't sack
5		well, in conjunction with HIV, were not being pursued,	5		their counsel and carry on with another team, then it
6		and therefore weren't under consideration. So there was	6		would bring the litigation to an end probably.
7		nothing to trade off. I mean, that's the best I can do,	7		There may well be some refuseniks, and those
8		l'm afraid.	8		people who decided I don't mean that pejoratively,
9	Q.	We know from some of the documents we've looked at	9		but those who decided they just didn't want it and they
10		today, and indeed from others, that there was	10		wanted their day in court. And as I think I put in my
11		a requirement from the Government that if this	11		statement, one of the factors which led to the slightly
12		settlement was going to work and take place, then there	12		different treatment in the variant CJD litigation was
13		was an expectation that all or almost all plaintiffs	13		the view that those who felt passionately that they
14		would need to sign up for it. Firstly, is that a fair	14		wanted to proceed should be able to do so. And that is
15		summary of the situation?	15		also allied to the fact that inevitably all those who
16	Α.	That let me be clear about this. It was certainly	16		were compensated were compensated in a way which
17		the wish of the Government if they were going to settle	17		differed from their own individual chance of success in
18		it, they were going to settle it all, rather than having	18		the litigation.
19		leftover litigation. It was, I think, implicit in the	19		Just to explain that, those who had seroconverted
20		agreement by Treasury and Government to compensate that	20		early would have a less good prospect of success if the
21		those who accepted it would settle, and there was always	21		duty of care arguments could be overcome than those who
22		the possibility that individuals would not. However,	22		were infected later. So there would have been
23		it's absolutely right to say that we felt that it was	23		a spectrum whereby some were more likely to succeed and
24		most unlikely that a settlement of this kind,	24		some were less likely to succeed, and a litigation
25		represented by two very senior leading counsel,	25		compromise would have ended up with different amounts
		205			206
1		for different groups of individuals. The purpose of the	1		likely damages reflected by the amount given to them.
2		scheme put forward was a scheme which treated all those	2		So, in other words, if and I can't remember, if
2 3		scheme put forward was a scheme which treated all those who suffered from this terrible condition equally	2 3		So, in other words, if and I can't remember, if we assume that they got 40 or 50 per cent of their
2 3 4		scheme put forward was a scheme which treated all those who suffered from this terrible condition equally fairly, however good or bad their prospect of success in	2 3 4		So, in other words, if and I can't remember, if we assume that they got 40 or 50 per cent of their likely claim value, then the odds would have had to have
2 3 4 5		scheme put forward was a scheme which treated all those who suffered from this terrible condition equally fairly, however good or bad their prospect of success in litigation was.	2 3 4 5		So, in other words, if and I can't remember, if we assume that they got 40 or 50 per cent of their likely claim value, then the odds would have had to have been significantly better than 50 per cent for anyone to
2 3 4 5 6		scheme put forward was a scheme which treated all those who suffered from this terrible condition equally fairly, however good or bad their prospect of success in litigation was. So but I think that you know, as I say, in	2 3 4 5 6		So, in other words, if and I can't remember, if we assume that they got 40 or 50 per cent of their likely claim value, then the odds would have had to have been significantly better than 50 per cent for anyone to be prepared to take it on under a CFA, or you'd have to
2 3 4 5 6 7		scheme put forward was a scheme which treated all those who suffered from this terrible condition equally fairly, however good or bad their prospect of success in litigation was. So but I think that you know, as I say, in the variant CJD litigation, the view that I formed,	2 3 4 5 6 7		So, in other words, if and I can't remember, if we assume that they got 40 or 50 per cent of their likely claim value, then the odds would have had to have been significantly better than 50 per cent for anyone to be prepared to take it on under a CFA, or you'd have to have a benefactor who is prepared to fund it.
2 3 4 5 6 7 8		scheme put forward was a scheme which treated all those who suffered from this terrible condition equally fairly, however good or bad their prospect of success in litigation was. So but I think that you know, as I say, in the variant CJD litigation, the view that I formed, which Stephen Irwin, who was leading counsel for the	2 3 4 5 6 7 8	Q.	So, in other words, if and I can't remember, if we assume that they got 40 or 50 per cent of their likely claim value, then the odds would have had to have been significantly better than 50 per cent for anyone to be prepared to take it on under a CFA, or you'd have to have a benefactor who is prepared to fund it. Was that included in the vCJD scheme, in response to
2 3 4 5 6 7 8 9		scheme put forward was a scheme which treated all those who suffered from this terrible condition equally fairly, however good or bad their prospect of success in litigation was. So but I think that you know, as I say, in the variant CJD litigation, the view that I formed, which Stephen Irwin, who was leading counsel for the claimants plaintiffs still in those days agreed	2 3 4 5 6 7 8 9	Q.	So, in other words, if and I can't remember, if we assume that they got 40 or 50 per cent of their likely claim value, then the odds would have had to have been significantly better than 50 per cent for anyone to be prepared to take it on under a CFA, or you'd have to have a benefactor who is prepared to fund it. Was that included in the vCJD scheme, in response to your experience of the HIV Litigation, any sense that
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2 3 4 5 6 7 8 9 10 11 12		scheme put forward was a scheme which treated all those who suffered from this terrible condition equally fairly, however good or bad their prospect of success in litigation was. So but I think that you know, as I say, in the variant CJD litigation, the view that I formed, which Stephen Irwin, who was leading counsel for the claimants plaintiffs still in those days agreed with, was that if anyone wanted to pursue their claim they should be able to do so, but would have to give credit for all benefits which they had received.	2 3 4 5 6 7 8 9 10 11 12	Q.	So, in other words, if and I can't remember, if we assume that they got 40 or 50 per cent of their likely claim value, then the odds would have had to have been significantly better than 50 per cent for anyone to be prepared to take it on under a CFA, or you'd have to have a benefactor who is prepared to fund it. Was that included in the vCJD scheme, in response to your experience of the HIV Litigation, any sense that those who wished to continue their claim would have been taking an enormous risk in not taking the funding and indeed having to fund the litigation themselves if they
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2 3 4 5 6 7 8 9 10 11 12 13 14 15 16	A.	scheme put forward was a scheme which treated all those who suffered from this terrible condition equally fairly, however good or bad their prospect of success in litigation was. So but I think that you know, as I say, in the variant CJD litigation, the view that I formed, which Stephen Irwin, who was leading counsel for the claimants plaintiffs still in those days agreed with, was that if anyone wanted to pursue their claim they should be able to do so, but would have to give credit for all benefits which they had received. If those people were to pursue their claims in the vCJD scheme, they would firstly take advantage of the scheme and have to give credit for it as you said. Yes.	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16		So, in other words, if and I can't remember, if we assume that they got 40 or 50 per cent of their likely claim value, then the odds would have had to have been significantly better than 50 per cent for anyone to be prepared to take it on under a CFA, or you'd have to have a benefactor who is prepared to fund it. Was that included in the vCJD scheme, in response to your experience of the HIV Litigation, any sense that those who wished to continue their claim would have been taking an enormous risk in not taking the funding and indeed having to fund the litigation themselves if they didn't get legal aid? I think it would be wrong to say that it was my experience in HIV which led me to include that. I mean, the document was produced with close involvement with
2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17	A. Q.	scheme put forward was a scheme which treated all those who suffered from this terrible condition equally fairly, however good or bad their prospect of success in litigation was. So but I think that you know, as I say, in the variant CJD litigation, the view that I formed, which Stephen Irwin, who was leading counsel for the claimants plaintiffs still in those days agreed with, was that if anyone wanted to pursue their claim they should be able to do so, but would have to give credit for all benefits which they had received. If those people were to pursue their claims in the vCJD scheme, they would firstly take advantage of the scheme and have to give credit for it as you said. Yes. But how would they fund the ongoing litigation?	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17		So, in other words, if and I can't remember, if we assume that they got 40 or 50 per cent of their likely claim value, then the odds would have had to have been significantly better than 50 per cent for anyone to be prepared to take it on under a CFA, or you'd have to have a benefactor who is prepared to fund it. Was that included in the vCJD scheme, in response to your experience of the HIV Litigation, any sense that those who wished to continue their claim would have been taking an enormous risk in not taking the funding and indeed having to fund the litigation themselves if they didn't get legal aid? I think it would be wrong to say that it was my experience in HIV which led me to include that. I mean, the document was produced with close involvement with Alan Milburn, the then Secretary of State for Health,
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,		and and a later was well a bate to a surround. More that	,		
1		and such claims were unlikely to be pursued. If we had	1		some terrible gaps. He said there was obviously quite
2		formed the view that a lot of them were still likely to	2		a lot of neglect which he thought was inevitable if
3		bring the claims, there may have been no settlement, and	3 4		money was tight and decisions were having to be made on the basis of not where can we spend money, but where can
4 5		my own view is that, if it had been a condition imposed	4 5		we avoid spending it. He thoughts, however, that this
6		by the plaintiffs in HIV, they should be permitted to	6		
0 7		claim, having received the compensation. It would have	0 7		did not amount to negligence in the legal sense and that
		been significantly more difficult to get Government	8		the chances of resisting a claim even with a sympathetic Court were 60% in our favour."
8	~	approval and support for it.			
9 10	Q.	I'm going to take you to a document unrelated to that	9		The section that I've had my attention drawn to is
10		issue, DHSC0003654_108. This is a document dated	10		the comment:
11		4 December 1990.	11		" he pointed out that there are some terrible
12	A.	Yes, which we've looked at before, isn't it?	12 13		gaps."
13	Q.	Yes.			In your witness statement at paragraph 43.4, you
14	A.	This is the one with one-third chance for Treasury.	14		say that: "I believe that this is shorthand for the fact
15	Q.	I didn't take you to it before but it's the one that you	15		
16		looked at You tald me shout it which is why locant back and	16		that the documentary record was very thin and there were
17	Α.	You told me about it, which is why I went back and	17		substantial time periods during which there was no
18	~	looked at it.	18		written evidence of what steps were being taken."
19	Q.		19		What I've been asked to put to you is that a more
20		a conversation with you. It's paragraph 5 that I've	20		likely reading of the document is that the terrible gaps
21		been asked to ask you about. I'll just read it to you	21 22		refers to a gap in steps actually being taken at the
22		first of all:			time, failure to do something. What is your response to
23		"As to whether or not there had been actual	23		that?
24		negligence in the early years on the question of self	24	Α.	My response to that is that I don't recollect having
25		sufficiency, he [that's you] pointed out that there are 209	25		that thought. It's also inconsistent with what I did 210
1		say, that this didn't amount to negligence in the legal	1		implement that in some way, through carelessness,
2		sense. Now, if there had been terrible gaps in terms of	2		slowness, too much on the desk, that would amount to
3		activity so, in other words, an instruction, I don't	3		negligence and might well be in the operational sphere.
4		know, "Please make arrangements to see if we can	4		So I wouldn't have given the advice that I gave,
5		increase the facilities here, there or other", and there	5		including that last sentence, if the earlier wording
6		had been a failure to take proper steps, that would have	6		meant what's been suggested. So that's I think the best
7		been negligence in the legal sense.	7		I can do. They're not my words.
8		So I think "terrible gaps" and "neglect"	8	Q.	Of course. They're Mr Powell's words.
9		I think is a reference to gaps in the record. I'm sure	9		Finally on this, you have said in your evidence
10		that's right. I remember the gaps in the record. And	10		earlier, and indeed just now, that there were relatively
11		inactivity. Neglect in the sense of things not	11		few surviving documents at the time that you came to
12		happening.	12		look at them, late 1980s.
13		If I had thought that there had actually been	13	A.	Mm-hm.
14		culpable failure to act, then I would not have said	14	Q.	I've been asked to ask this: were you not surprised by
15		there was no negligence in the legal sense, and the	15		that absence of documentary records, given that the
16		advice which we gave would have been different, because	16		events concerned were not that long before you were
17		that would have been clear evidence of negligence, which	17		looking at them back then? And did you ever ask or were
18		would have been amounting to a breach of duty if a duty	18		you ever told why there were so few documents available?
19		of care was found to exist, and might well have fallen	19	Α.	I'm sure I asked. I do remember there being relatively
20		within the operational side and therefore not excluded	20		few documents. I don't remember what the explanations
21		by the policy decision.	21		were. I think I've said something in my statement.
22		Assume there is a policy decision, as I think it	22		I mean, I've done quite a lot, or did in those days,
23		was Dr Owen who said, "Let's go the self-sufficiency	23		quite a lot of litigation about long tail issues going
24		with some estimates", and assume that he, having made	24		back to the '20s, '30s, '40s, '50s, and even more
25		that decision, there was a failure by the Department to	25		recently. And until you get the word processor and the
		211			212

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INQY1000213 0053

(5.54 pm)

world.

A. Thank you.

that I now remember.

I turn to you, sir.

I have for you.

army, for example, working with the Duke of Edinburgh,

documents which you thought weren't important in order

So yes, I was surprised. Did I think that there

to make room for the new ones. So it was a different

was something suspicious about the explanation? Not

MR HILL: Thank you, Mr Fenwick. Those are the questions

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

MR HILL: Mr Fenwick, you're not legally represented, so

they wish to say at the end of their evidence.

A. Yes, I don't know who is listening. I don't know who is

I've been in court representing Government or

there's nobody else to consult but we give all of the

witnesses an opportunity to say anything further that

here. I don't know what they are. My aim, whenever

manufacturers, or other people adversely affected in

this kind of way, is to make sure that the process of

defending the claims, which is my job, or was my job

here, is done with proper sympathy for their position.

(The hearing adjourned until 10.00 am the following day)

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

we had great files and you would have to cull older

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 213
	213
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	available to us at the time. But it doesn't take away any of that, and it does mean that I emphasise it's
7 8	available to us at the time. But it doesn't take away any of that, and it does mean that I emphasise it's in my written statement, I don't take time repeating it
7 8 9	available to us at the time. But it doesn't take away any of that, and it does mean that I emphasise it's in my written statement, I don't take time repeating it now that my view remains stronger than ever, having
7 8 9 10	available to us at the time. But it doesn't take away any of that, and it does mean that I emphasise it's in my written statement, I don't take time repeating it now that my view remains stronger than ever, having learned again about all of this by reading it, that
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