Tuesday, 12 July 2022

(10.00 am)

SIR ROBERT FRANCIS (continued)

Questioned by MS RICHARDS (continued)

MS RICHARDS: Sir, just before we start, there are inevitably a lot of questions arising out of Sir Robert's report reflecting the importance of this matter to those who were infected and affected, and to reflect that, sir, my suggestion is going to be that when I finish, at whatever time I finish going through the questions I'm asking, which I should say already reflect the questions I have been asked to ask by -- on behalf of Core Participants, that we have a longer than usual break, perhaps an hour and a half lunch break, which would enable those who are here and those who are not here to feed those questions through to their legal representatives who in turn can pass them on to me for consideration.

SIR BRIAN LANGSTAFF: So those who are watching online may expect that there won't be anything to watch for a rather longer period around lunchtime, starting perhaps just before our usual time, but certainly ending at least an hour and a half later?

MS RICHARDS: Yes. Yes. I'm hoping I will finish what I'm proposing to do before lunch in any event, so we might

start with an early lunch but, as you know, I'm terrible at giving time estimates.

SIR BRIAN LANGSTAFF: Yes.

MS RICHARDS: That said it all.

Sir Robert, can we pick up where we left off yesterday. We were looking at the position of those who were infected and what they might recover on your recommendations, and there was an issue we touched on relating to the Judicial Studies Board Guidelines and the cases of Simmons v Castle, it probably seems esoteric to those here, amongst which I include myself who don't practice in personal injury law, but I'm going to ask you to look at a document I know you looked at overnight. I'm going to read out what's been said about it to me by one of the legal representatives and then invite your comment.

Can we have RLIT0001640:

"Guidelines for the assessment of general damages in personal injury cases"

If we go over the page, we can see this is the document we were referring to yesterday, so the Judicial College's Guidelines. "General damages" refers essentially to damages for pain and suffering, and this is the 16th edition, which we mentioned in the course of yesterday afternoon.

If we go to page 13, please:

"Updated Note on 10% Uplift"

So this refers to the Simmons v Castle issue, which I raised yesterday afternoon.

If we just go to I think the last three paragraphs -- perhaps last two paragraphs. Sorry, can we start above that, my fault:

"Aside from mesothelioma cases (where different provisions apply and where in consequence we have continued to provide pre-uplift figures in the relevant part of Chapter 6), there are now likely to be very few ongoing cases in which the pre-uplift figures will be relevant. From the sixteenth edition, we have now only provided figures which include the 10% uplift:

"However, we are aware there will be some cases in which the pre-uplift figures remain relevant. In particular, we know there are lawyers working in our jurisdictions who use the Guidelines but where the 'Simmons' uplift does not apply. Should it be necessary to do so, the uplifted figure can be easily be converted back to a pre-uplift figure simply by multiplying by a factor of 0.909."

Just before I ask you to comment on that, can I give you what I have been asked to explore with you and then invite your comment.

So this is an observation from one of the co-authors of these guidelines.

If the aim is for the tariff in the compensation scheme largely to mirror what might be obtained in court, almost every award of general damages made today includes the 10%. Cases where the 10% uplift is not awarded today are so rare that the editors of the guidelines have chosen to drop the column which doesn't have the 10% uplift. In effect, therefore, what the man on the street sees as the right figure for damages in any given case is the figure which is uplifted by 10%.

With that rather lengthy introduction, Sir Robert, what if any observations do you have?

A. Well, I mean, with respect, I disagree, and I disagree to this extent, that the purpose of my recommendations is to reflect the compensation someone might get for their injury. The 10% uplift in these guidelines is intended to reflect an obligation to pay fees out of those damages to lawyers.

That, in relation to a compensation scheme, is perhaps an area we have yet to come to, and maybe you will be asking me about, but it's the actual damages -- sorry, the compensation, in my view, should be completely different from any consideration as to when, if at all, fees should be paid to a lawyer.

So I -- and in any event, the conditional fee agreements -- and I don't profess to be an expert in them -- do not apply, I would have thought, to a claim for compensation under a compensation scheme. The Act under which such agreements are lawful relates only to claims in court.

SIR BRIAN LANGSTAFF: Can I ask a few questions just really because I think I know the answers, I may be wrong, of course, but it is because those who are listening will not be personal injury lawyers with a long history of having had litigation under various different schemes.

Is the position this, that from 1990s onward the courts in particular have become increasingly concerned about the cost of going to law?

And you are nodding.

A. I'm sorry, yes. And, indeed, as have the Government, bearing in mind that many damages cases involve the payment of public funds.

SIR BRIAN LANGSTAFF: Legal Aid ceased to be generally available for personal injury cases in, I think, the mid-1990s.

A. Yes.

SIR BRIAN LANGSTAFF: And, therefore, had to be replaced by some method of funding personal injury claims.

A. Yes.

SIR BRIAN LANGSTAFF: Which, in America, is done by the lawyer taking a cut of the damages, but in this country it was thought that the principle should be that compensation should be 100 per cent, so the person who was entitled to it should get everything, every penny that they were seeking; is that correct?

A. That is correct, sir.

SIR BRIAN LANGSTAFF: The costs, however, might have to be paid. Now, there's always perhaps an element of your lawyer charging a bit more than your lawyer can recover from the other side, but that was, on the whole, marginal. The principle there being, perhaps, that most people want to go to litigation riding in, as it were, a Rolls Royce, whereas the system will pay for a mid-ranking car, not necessarily a Mini but something in between.

A. That rather depends but, yes --

SIR BRIAN LANGSTAFF: So there's always going to be perhaps a shortfall, a smaller shortfall, which inevitably will be paid by the claimant, or was.

A. Yes.

SIR BRIAN LANGSTAFF: However, under the system which replaced Legal Aid, costs had to be afforded somehow. That was by allowing the successful claimant to have their solicitors costs paid by the other side if they

succeeded.

A. Yes.

SIR BRIAN LANGSTAFF: And if they didn't succeed, then it was a no win, no fee.

A. They got nothing.

SIR BRIAN LANGSTAFF: So that meant that the fees were quite high or could be quite high, so far as the defendants were concerned.

A. Yes. The rationale being that for the claimant's lawyer to make a living, putting it bluntly, they had to charge more to each client so that -- in effect to cover the risk they had of not recovering any costs at all. The nature of the agreement was that if they lost the case, then they didn't get paid at all.

SIR BRIAN LANGSTAFF: So in a case where the prospects were roughly 50/50, the costs would be double.

A. Yes.

SIR BRIAN LANGSTAFF: And that would be recovered by the successful lawyer when they were successful and forfeited when they weren't.

A. Yes.

SIR BRIAN LANGSTAFF: That system ceased to be approved for various reasons relating to the increasing costs as it seemed when, in this millennium, the matters were revisited; is that correct?

A. Yes. The government of the day took a decision that it was -- too much money was being paid in this way and that, therefore, the ability to recover that element of the costs which related to the risk should not be recoverable from the defendant.

SIR BRIAN LANGSTAFF: So an element of the costs now had to be paid out of the damages.

A. Yes.

SIR BRIAN LANGSTAFF: That meant that the damages would not be 100 per cent of what someone should have been entitled to.

A. Exactly.

SIR BRIAN LANGSTAFF: It was recognised that problem then needed to be sorted, and that was what, in the case of Simmons v Castle, essentially the court said: well, in this situation where there is this type of agreement, we will add 10% on --

A. Yes.

SIR BRIAN LANGSTAFF: -- to the damages, the lump sum for pain, suffering and loss of immunity, as it's called, in order to cover that bit.

Have I got it broadly right?

A. Absolutely right, sir, yes.

SIR BRIAN LANGSTAFF: And that's where the 10% addition comes from.

A. Yes.
SIR BRIAN LANGSTAFF: It's to make sure that someone actually gets every penny they should have got rather than having it taken out of the sum they would otherwise have.
A. Yes.
SIR BRIAN LANGSTAFF: So your thesis is, well, the sum they would otherwise have is actually the sum they're getting under a scheme here where there isn't a lawyer involved who charges a fee which needs to be recovered.
A. Yes. Well, as I, say it seemed to me that the issue around legal representation or advice and so on in relation to the scheme needs to be considered clearly because it's a question, but it needs to be considered separately from the award compensation, and it's for that reason I suggested that, insofar as one refers to these guidelines, one should take the figure without the uplift and which you can get to -- I'm not sure the word "simply" is one I would agree with, but by multiplying the figure by the fraction that's mentioned here.
SIR BRIAN LANGSTAFF: Yes. Well, you need a calculator rather than --
A. It's not a thing I would wish to do in my head, I have to say. But then that's so with many things.
SIR BRIAN LANGSTAFF: Now, I hope those questions and

answers may clarify a bit. There are at least some people nodding. Thank you for that. But it may be that there are further questions which have not been asked which need to be asked and they can be asked later on.
MS RICHARDS: Exactly. I'm going to leave that point there for now and we can pick it up in due course if required.
Yesterday I was asking you about the kind of financial losses in terms of loss of earnings or support payment, continuation as an alternative.
In terms of other heads of financial loss, if we could have your report on screen, please, and go to page 118.
The second heading there is "Other possible heads of financial loss". You explain that:
"9.102 In conventional litigation, claims can be made for any additional loss incurred as a result of the injury."
Then you set out some examples which have been mentioned by those who've made submissions to you:
"- Equipment
"- Transport
"- Holidays
"- Insurance
"- Medical treatment (not available on NHS)
"- Counselling

"- Accommodation
"- Special dietary requirements ..."
Then you say at 9.103:
"It would be possible for the scheme to allow for claims under these, and indeed any head of claim where the applicant can show they have incurred a loss. I have already proposed that there would be a standard annual sum added to the support payment to cover this type of expense. It would be preferable to adopt a broad approach like that wherever possible. I suggest that the scheme allows for discretionary awards to be made for additional expenses where the applicant can show they are significantly in excess of the standard annual payment. The discretion should not generally be used in respect of goods and services available free of charge, either through the scheme or a state agency."
And the reference to a standard annual sum, if we go back to the bottom of page 115, you say in paragraph 9.88 that:
"... unless they ..."
That is the regular payments made by the scheme -- the current schemes:
"... already exceed this figure - and some do - the regular guaranteed annual payments under the support schemes should be brought to a level where it equates to

a total of the following ..."
The first point deals with your suggested increase in the regular support payments.
The second is:
"A tax free sum in recognition of additional financial losses caused by the diagnosis of HIV or HCV, for example, increased or hard to get insurance cover, convenient medical treatment, additional transport costs etc of, say, £10,000."
So, if we go back to page 118, is it right to understand your recommendation as follows? In terms of any future losses of this kind, so not earnings but other types of financial expenditure, your recommendation is that the best way to deal with this is by the additional annual sum, you've suggested £10,000, which would cover the majority of these kinds of expenses. The benefit of that presumably in part is it avoids both the individual having to make detailed claims potentially on an ongoing basis and it avoids the scheme having to adjudicate upon those kind of detailed claims?
A. Absolutely. I heard many stories from affected, infected people about the distress caused to them by the requirements of some of the previous support schemes, requiring them to produce invoices for washing machines

or arguments about the types of equipment that were required, whether you could get something that was cheaper or not. Which, of course, in my experience, is unhappily reflected in litigation where claims, when they are made for this sort of thing, are often incredibly detailed and, again, require the intervention of an expert to tell you how much any of these things cost, even though in many cases perhaps they could be proved by the production of an invoice from B&Q or wherever it is.

So it is a yet another complicated business, and the more you descend into detail the more resource you need to put into determining the outcome, and the more time it takes for that determination. So, again, it struck me that this was an area where a broad-brush approach should be adopted, which would cover most cases.

Now, what the sum is -- I mean, I've mentioned just for the sake of argument £10,000. That might not be the appropriate sum, and clearly that would have to be worked out, you know, through consultation. But I predict there ought to be a sum -- when one looks at the description that I would hope the medical panel would provide of the progress of these awful diseases, the sorts of things that are typically required, that it

would be possible to produce the typical picture, and that's what you would expect the sum to reflect, and, in that way, it would relieve applicants, and indeed the scheme, of a great deal of complexity and need to descend into detail.

Q. So it's potentially both in the interests of applicants, for the reasons you have described and which I am sure many here listening will well recognise --

A. Yes.

Q. -- but also potentially in the interests of those ultimately funding the scheme, because it avoids the expense and time that would need to be taken in minute analysis of these kind of ongoing claims?

A. Yes.

Q. What, then, about past losses for -- again, these are items of expenditure which are not loss of earnings, how, if at all, should those be dealt with?

A. Well, of course, I have said in relation to past losses that the support payment should not be, as it were, taken into account, so that's something no doubt out of which claimants will have -- use some of that for some of these needs.

I think the choice there is -- I would say, again, preferably would be to think of a standard sum. But, of course, you do have, in relation to the past, a clearer

picture about periods of time when such things might have been needed. I mean, there might be an ongoing need or absence of insurance, and difficulties about mortgages and so on, but you would probably need to be ill to have required special equipment and transport in any great degree. So it would perhaps be possible to come up with a lump sum which would be applicable to periods where it was clear that the illness required it.

I'm afraid, I don't think I've descended into quite that detail in the report, but clearly there should be a reflection in the award for the expenses incurred in the past.

Q. So can I then -- before we leave recommendation 8, I'm just going to recap the heads of award that you have recommended for an infected person.

So an infected person would receive an injury impact award that would reflect physical and mental health --

A. Yes.

Q. -- including the physical and medical consequences of treatment for the infections, and that would be a lump sum that would be paid.

A. Yes.

Q. The infected person would receive a social impact award. That, as you have explained, reflects the social consequences of the infection, stigma, social isolation,

impact on ability to have a family and form relationships and the like.

A. Yes.

Q. Again, that's a lump sum payment.

A. Yes.

Q. The autonomy award, again a lump sum payment, in part picking up on the concept of aggravated damages, but it reflects issues such as -- and, as you say, there is a potential overlap in relation to the social impact in relation to matters such as family life and children, but it reflects matters such as lack of informed consent, treatment without consent and so on. So those are three lump sum elements.

A. Yes.

Q. There is then an infected person could claim a care award and that could be both in respect of past care, which would be received as a lump sum, however calculated, and then future care, which could be received either as a lump sum or as a periodical payment; is that right?

A. Yes, and I think one thing we have not mentioned, although it's in the report, is that that sum, as it's intended to reflect the care provided on an unremunerated basis by a relative or a close friend, would be held on trust if it was claimed by the infected

applicant for those people, which is what happens in litigation, and it sounds terrifying, you've got money on trust, but actually in practice it seems that distributing the money very rarely causes contention, although in theory it could do.

Q. We will come back to the interrelationship between that and what an infected person might claim shortly.

Then the final element in relation to the infected person is the financial loss award, past loss, the main element of which would be -- would probably be a loss of earnings --

A. Yes.

Q. -- and that would be received as a lump sum.

A. For the past, yes.

Q. For the past. And then a future loss --

A. Yes.

Q. -- which again could be by way of lump sum or could be by way of periodical payments, but there one of the key points is the continuation of the support payments. You recommend those would continue uplifted and it may be in practice those would reflect the equivalent of a loss of earnings claims for individuals?

A. Yes.

Q. But those who might be able to show a greater future loss of earnings could elect to pursue that by way of

an additional claim?

A. Yes.

Q. Can we then turn to recommendation 9, the claims that could be made by an infected person -- affected person.

Could we have page 36 on screen, please, Lawrence.

We have the recommendations set out there and there are, I think, six components to it: the injury impact award, the social impact award, the family care award, the autonomy award, a bereavement award.

Then if we go over the page, I think we have a double (e) there, so this should probably read:

"f) a bereavement financial loss award ..."

Now, I want to approach this in stages, so I'm going to ask, first, about the claims that could, on your recommendations, be made by affected persons typically where the infected person is still alive.

A. Yes.

Q. So in terms of the injury impact award, the first of those, if we go to page 119, we can see this in paragraphs 9.106 and 9.107.

The "Injury Impact Award", you say:

"... will be assessed in accordance with the same principles as [you've] suggested should be applied to the impact awards for the infected, but with necessary differences. Clearly injury and distress have

a different origin and depend more on a relationship with the infected person rather than the effects of the disease itself. While I have mentioned physical injuries the much more likely injury is a mental one, and indeed a psychological one which may not result from a recognised psychiatric illness.

"9.107 However, it is not unreasonable when setting a general range of award to relate them to the severity of the suffering of the relevant infected person. I suggest that the approach taken should be for the assessors to consider the nature of the injury, if any, and the distress, anxiety and impact caused by the applicant's experience of witnessing the effects of the infection by reference to the guidelines and comparables already referred to and identify by that process an appropriate figure. However, the maximum payable should be the sum the infected person either has been awarded, or would have been awarded if they had made a claim."

Now, in terms of the injury impact award that an affected person could claim, if they had suffered physical health consequences as a result of their caring obligations or because -- or it could be exacerbation of existing physical health problems because of the witnessing the impact upon their loved one who is

infected, you would envisage that that would be captured in this injury impact award.

A. Yes. As I say, there it is difficult to envisage what range of physical --

Q. Yes.

A. -- injury would typically be caused in this way and, as you say, it might well be through a caring obligation and a physical injury, and I have to say that is an area which would be an extension on what would generally be recoverable at Common Law --

Q. Yes.

A. -- and intentionally so. But I've heard -- frankly, I heard very little if anything about physical injuries caused. I heard a lot about mental distress and mental illness caused by the experience of these events.

Q. Again, importantly, and this may also be I think be an extension of the Common Law, you are envisaging, in terms of mental or psychological consequences, that there would be an award for that even if there is not a recognised psychiatric illness?

A. Yes. I recognise here that there would be a choice to be made as to whether that should be generally speaking part of the injury impact award or perhaps part of the social impact award, but one way or the other I would suggest that there needs to be recognition of that in

this very -- "remarkable" is the wrong word, but very awful and special case.

The law, if I can explain very briefly, generally restricts claims for mental injury caused by the experience of someone else's injury really quite strictly and you in effect either have to -- the definition has broadened a bit over the years but essentially you either have to be traumatised, if I can put it in a non-technical way, by witnessing a terrible event like an accident, but it has to be a shock, which is a sudden event, rather than what would be happening in the case here more typically an accretion over a period of time of stress and strain due to having to witness someone's deterioration and indeed death.

It's a moving area in the Common Law and there is more generosity than there used to be, but generally speaking it would be quite difficult to establish some of -- a claim in Common Law for some of the things I heard about, which seemed to me to have been inevitable, almost, consequences of inflicting this sort of infection on people in a family situation.

Q. So here your recommendation reflects less the Common Law and more your sense of what the moral and just case requires?

A. Yes. And I think, for that reason, care needs to be

adopted as to the level of that award because obviously the higher -- the more money that is awarded in this respect, the more difference there is between unfortunate people involved in this case as opposed to unfortunate people suffering quite similar injuries in cases, say, for instance, of a baby born with cerebral palsy needing lifetime care in -- a very demanding care obligations being imposed on a family, and I have certainly seen many such cases of serious harm being caused to parents. They can, generally speaking, claim nothing for that, and they would look askance at very large sums of money, so I sought to hint at least that there should be some recognition of that in how that sum is assessed.

Q. Ideally, would you envisage that it would be done again on a tariff-type basis?

A. Yes.

Q. But because the nature of the injuries there may be predominantly psychological and impact on mental health, it may be that the panel -- the medical panel which helps in drawing up some different parameters might perhaps benefit from psychiatric --

A. Oh, undoubtedly, yes.

Q. -- and psychological expertise?

A. Undoubtedly. But I think in addition to that, and it --

let's do this as a subjective view, but I was an independent reviewer entitled to a view, but it seemed to me that there needed to be -- it would make sense for there to be a relationship between the sort of sums that were awarded and the degree of severity of the injury suffered by the infected person, because instinctively it felt to me that if the affected person was getting some sum significantly more than the infected person, then that wouldn't look the right way round, so -- and that -- I doubt you would get a psychiatrist to back that up because I am sure there can be disproportionate reactions to small -- it's a relatively minor -- and I hope no one thinks I'm disrespecting things, I'm looking at it in a comparative way, compared to a minor infection, I would just feel that -- looking at the proportionality across the piece, including those who have no such claim, that we need to be careful how much is awarded in this way.

Q. So that's the first element of claim for the affected individual.

The second is the social impact award.

A. Yes.

Q. Again, it is a similar approach to -- and similar thinking to the social impact award in relation to the --

A. Absolutely.

Q. -- infected person, but again you are suggesting there should be a reflection in the sense that you don't give more, and I think your suggestion is probably it should be no more than the half of the award that would be given --

A. And, again, that's --

Q. -- to the infected person.

A. -- a subjective view and we could discuss that for a long time. But I think for me the important point here is that, again, this would be an award you would not be able to claim in a civil claim and -- but it struck me, and I'm sure it strikes many people, that this is a very unusual area in which the stigma of the socialisation -- social isolation affects not only the infected but probably almost as much the people surrounding them, and you know, and I have seen, the accounts demonstrating that. And, therefore, it seems to me again there's a special case for that but, again, because it's not something you can recover generally, there needs to be a sense of proportion about it.

Q. Can we just have the full page on screen then. The next item here is "Family Care Award". Before we look at that, the recommendation, recommendation 9, included an autonomy award --

A. Yes --
Q. -- for the affected --
A. -- which doesn't appear in this list.
Q. -- but that's not here.
A. And I think that is an omission, and I think what should have been there is a heading which basically referred back to what I said about the autonomy award previously.
Q. Obviously, if you are seeking to capture the interference with family and private life through the autonomy award --
A. Yes.
Q. -- that may be something that has been very intimately felt by family members. Again, in terms of --
A. Well, you take the parents who would probably have given the consent for treatment of their children, who would be directly -- feel directly responsible, quite wrongly obviously, but understandably, for what has happened.

So I say that is a direct interference in their family life. And to be -- I'm no expert in it but, at least arguably, there might be a human rights claim arising out of that. And the disruption to family life is something which, in my view, justifies compensation, difficult though it is to evaluate how much you should give for that.

Q. Now, the family care award you deal with at

paragraph 9.110:

"Where a Care Award has not been made to the infected person, Eligible affected persons as defined should be able to claim directly for claim they have provided free of charge to the infected person in the past. They should not be entitled to an award for future care, as the arrangements for this have to be in the hands of the infected person."

This is an alternative -- in terms of past care, an alternative to the care claim being made by the eligible infected person. If that's not done, the eligible affected person can claim for a degree of compensation --

A. Yes.
Q. -- for the cost of the care they provided in the past.
A. Yes. It's a bit of a belt and braces provision because one would envisage that in most cases the applicant -- the infected person's claim would include this. But I have seen enough cases in personal injury to know that families get estranged, not everyone is immediately thought of, and sometimes people appear who have actually given a lot of care who may no longer be part of the family but haven't been considered. It's that sort of situation I would envisage a separate claim being made.

Q. Might it also -- in the case of where the infected person has died, it may be more straightforward for the affected person --
A. True.
Q. -- to make the family care award rather than have to add it to a claim that might be made by the estate?
A. Yes, although, in terms of administration of the scheme, clearly it would be better and less complex if care claims were assessed in the round, because clearly they interrelate and are interdependent on each other.
Q. Now, you have not recommended financial loss awards for affected people. So those who may have had to give up work or those who have not been able, for example, as children to follow through their education with a potentially quite a direct and obvious impact upon their ability earn, you've not recommended financial awards for those categories of individual.
A. No.
Q. Why is that?
A. Probably I'm betraying my experience of the Common Law, care claims there are always measured by a cost of what the care would be if you bought it basically, and where -- and loss of earnings, on the whole I think this is still the case, cannot be claimed where those exceed that cost. The somewhat uncharitable theory behind that

is that the injured person could have organised, if they had the money, a sort of care, that's the value that's been lost.

I appreciate that's not what some people are going to feel is the case but, again, it's a question of the extent to which this scheme should depart from Common Law principles or not, and again it is a value judgment. My judgment was this was an area where you are compensating people for something that they had voluntarily done, albeit they may feel compelled by obligation to do it. So I understand that. But there is an element of choice in what they have done, and everyone's circumstances are slightly different, and sometimes very different. And, for instance, if you had a case where -- and you may have cases where a highly remunerated person gives up that job in order to care for their relatives, the question might be asked, kindly I hope; well, you could have afforded to pay for someone to come in to replace it, you didn't have to lose that sum of money. That's the sort of issue one would hope to avoid by not seeking to assess loss of earnings claims in this field.

Q. Can I perhaps raise an issue that might be said to explain why, in that context, that kind of question, as you say, are posed in Common Law damages claims might

not be so apt here. If one is thinking back to the 1980s and to the 1990s in particular and HIV, and the stigma, the fear, the social isolation, there may have been in reality no alternative for those family members in terms of care. They would not have been able to find people who would be willing to care because of the prejudice, the discrimination, the stigma. That might be, would you accept, a reason for taking a different approach in these cases?

A. Well, it might be but that would probably apply to many other diseases. If you go back that far, I'm afraid I remember that having a disabled baby might carry a stigma and there wasn't necessarily a willingness to undertake those tasks there. You could say there was a shortage of carers. There probably was and probably is today people who are prepared to be paid to do these jobs. We know that is the case.

Again, it's a question of where you draw a line, both in Common Law, where it is called remoteness, how remote is the claim that's being made from the injury, and I think what influences that to some extent is partly a sort of policy issue, we've got to have a limit on how much by way of damages is had generally. But it's actually partly on the fact the further away you get from the direct needs of the individual infected

person, the more random are the circumstances that surround what actually happened, and it's remote in the sense that in legal terms it's thought to be not reasonably foreseeable, all these different circumstances, and it's sort of unfair to ask the tortfeasor, the person who has been negligent, to pay in this random way.

So that's a policy decision that the law takes in relation to those, and it seems to me that it would probably be wrong for a compensation scheme like this to take a different approach. But, again, I absolutely accept that a different view could be taken.

Q. I don't want to put words into your mouth, but is this a fair way to look at it: your recommendation in this respect, or the absence of a recommendation of the ability to bring a financial losses claim for the affected, reflects the approach taken in Common Law damages claims --

A. Yes.

Q. -- and the policy considerations which underpin that?

A. Yes.

Q. On the other hand, you can also see the case that can be made on moral and fairness grounds?

A. I can. I have to say if such claims were to be allowed I could foresee a case also being made for that to be

scrutinised with some degree of care to do with the issues around choice, what was available and so on, some of which could end up being quite distressing and it would not be I think very helpful for many families for -- and if there were to be an investigation it won't -- Mrs Bloggs gave up a highly paid job in the City in order to care for the infected person, why didn't you choose Auntie Mabel who is sitting at home not doing very much? You know -- and all of which would be highly offensive to people, but I would foresee that if there was to be that sort of award there might need to be some enquiry into how reasonable the actions were which led to that loss.

Whereas when you are talking about care, the actual cost of care, in terms of hours and hourly rates and so on, you are establishing the actual need of an individual without much regard who actually -- in terms of its value, who provided it and you then distribute the money according to whoever provided it.

Q. I think it also follows from what's in your report and what's not in your report, that for the -- if we look at the "Injury Impact" section at the top of the page again, even where the affected person has suffered, let's say for the sake of argument, a recognised psychiatric illness as a result of their relationship,

their caring responsibilities and so on, and as a result of that is unable to work, you are not recommending a loss of earnings claim for that category of individual either?

A. I haven't, but I would accept it could be considered.

Q. You would see that as less of a remove from the policy -- (overspeaking) --

A. Yes. I think all -- there are two aspects of proportionality or parity, if you like, I think need to be had in regard to all these what are in the end value judgments. One is the comparison between what this group of victims receives as opposed to the victims of other forms of health care related negligence or culpability. That's one thing.

But also one thing that I was extremely impressed by was that -- from the people I met and who came to my meetings, I had a very powerful sense that they were in this together and they didn't want things to be done which divided them, and the regretted that in some cases there did seem to be divisions, as inevitably there are about opinions in an area as fraught as this, and obviously people are going to receive different amounts because their circumstances are different but the wider the differences are and the circumstances affecting each family there are, there will be more division in that

way.

While in a sense that might be a lesser point, one of the features absolutely central to this scheme is that it has to be a scheme people trust and think that overall, in terms of the entire community that has been affected in this way, is fair. So I just put that point out there.

So if you had, for instance, a family which had always had a modest income and, therefore, there was no -- the actual care claim was probably in excess of what they would have earned in a job, looking at a family where the, you know, fabled merchant banker was receiving a loss of earnings claim running into hundreds of thousands of pounds, so there might be a feeling we aren't all in this together.

Q. Just again to recap in relation to the eligible affected person where the infected person is still alive.

A. Yes.

Q. The elements of claim there are the ones we have described, the injury impact award, the social impact award, the autonomy award --

A. Yes.

Q. -- missing from this page but present in the recommendation, and the family care award, but that will represent past care, the care already given --

A. Yes.

Q. -- because it will be for the individual infected person to make the claim for future care?

A. Yes. Obviously one of the purposes of a future care award is to free up these unfortunate families from having to provide so much of the work themselves, although obviously they would be free to do so and to receive by way of remuneration, if that was the arrangement, what was there.

Q. Can I turn then to the position where the infected person has died, unfortunately all too common a position.

A. All too common.

Q. First of all, as we alluded to yesterday, the estate of that person, so those representing, as it were, that person --

A. Yes.

Q. -- would be able to bring a claim which would encompass all the past elements that we have looked at. So it would encompass -- they would be able to bring a claim on behalf of their late husband, or whoever it might be, that would attract the injury award, the social impact award, the autonomy award and past care award and past financial loss award.

A. Yes.

Q. How that is then distributed may depend upon the particular arrangements and family arrangements?

A. It is probably worth pointing out that the care award, in those circumstances the executors or whoever else it is of the estate would, I think, be obliged to distribute those fairly amongst those who'd provided the care, and that would be independent of any dependency award we are about to come on to.

Q. So there's that element, and then there are the two further elements you identify here under the heading "Bereavement Award and Bereaved Family Financial Loss Award". So these are claims that are made not by the estate but by the eligible affected person. There is the bereavement award which is, as you have indicated previously when talking about it yesterday, you've suggested it reflects the award that can be made in a damages claim which, as you've said, is low, some people would regard it as --

A. £15,000-odd, yes. It may be a little higher now. Someone will tell me what it is, but it is in that region.

Q. That obviously is a one-off payment?

A. Yes.

Q. Then, if we go to the top of the next page. The "Bereaved Family Financial Loss Award", and you say:

"9.112 This should be calculated as would a loss of dependency claim under the Fatal Accidents Act as described above. The claim would have to be brought by the personal representatives of the deceased infected person."

Again, for the benefit of those who will not be familiar necessarily with the concept of dependency claims under the Fatal Accidents Act, can you describe in a few sentences how that works?

A. I have attempted to do so elsewhere in the report, but essentially it is a claim made -- if we take, for instance, the children of a deceased person, who would have been expected, had their deceased person lived, to have received benefits from them which could -- financial benefits, so their -- as children they would have been maintained, their food would have been bought, accommodation provided and so on, and as adults they might have had a dependency because they might have been given money to help with their education, again they might have been given money to help with their family and so on. They are quite specific in terms of claim. So there are formulae which are, generally speaking, used in personal injury claims to work these things out. What you take off a person's resources out of which they might be supporting dependents would be what they would

have spent on themselves, for obvious reasons, and you -- what -- the rest you then divvy up, as it were, between the various dependents, if I can put it as crudely as that.

So it is a figure, and it is invariably awarded as a lump sum which reflects the amount of money, in money terms, the value that a deceased person, but for their death, would have provided to people dependent on them. So usually children but, of course, can involve adults. And, of course, if you have an adult who has special needs, for instance, of one sort or the other, the dependency claim might be higher, but it is governed by the amount of resource that the deceased person would have had, had they lived.

So it is a matter of starting with what their earnings would have been, and then you take off that what they would have spent on themselves -- and you would include in that, if a deceased person provided services to a member of the family, gardening, parental care and so on, that could be evaluated as well but there are fairly established -- or, very established principles by which such claims are calculated, and it struck me that the easier thing to do, rather than me trying to reinvent the wheel, would be to use those methodologies here.

Q. There are categories of affected people who, under the current support schemes, receive regular support payments -- widows, widowers -- support payments reflecting -- I think this is right for the English figures, again someone can correct me, please, in the break if I'm wrong -- for the first year 100 per cent of the support payment?

A. Yes.

Q. That the infected person would have got and thereafter I think it is 75%?

A. Yes.

Q. Consistent with your general recommendation that no one should be worse off, consistent with your general recommendation that the support payment should continue, would it follow that that should continue and that, therefore, those who are in that position might have a choice, they could continue to receive those support payments or they could bring a dependency claim but they are likely only to want to bring a dependency claim in terms of the future if they are going to recover more than the support payments?

A. I think my answer is, yes, there is quite a lot wrapped up in that question, if I may say so --

Q. Sorry.

A. -- but I would agree that the existing support payment

would continue in any event. But I would say, in line with what I have said about infected persons, that that should be taken into account, as it were, credited against --

Q. Yes.

A. -- the dependency, and in many cases that would probably -- it could well exceed the dependency, and -- so that being that position.

It occurs to me that there would, of course, be the slightly complicated but not impossible indication to be made, because the support payment is by definition a periodical payment, and so that would have to be capitalised in the sense of working out what the capital value of that was, in order to see whether it is more or less than the lump sum awardable under the Fatal Accidents Act. But that's, you need a big calculator to do it, but it's possible.

Q. But the important point, and again it just reflects some concerns or questions that have been raised with me, is those who are currently receiving those payments as widows and widowers they should continue to get those --

A. Yes.

Q. -- no question of that being taken away?

A. No.

Q. Just as with the infected person, no question of their

support payments being taken away, but for the future they wouldn't necessarily receive that and the dependency or loss of earnings.

A. No.

Q. Those are the questions I want to ask about recommendation 9.

I have no specific additional question in relation to recommendation 10, which I think probably pulls together a lot of what we've already discussed. We can just go back to the text of it, for the sake of completeness, at page 37.

So your recommendation 10 was:

"... [the] framework of tariff based compensation ... at rates which broadly reflect comparable rates of common law damages and other UK compensation schemes ... assessed basis for defined financial losses. The factors described in this report should inform the matters for which compensation is awarded. The rates of compensation should be based on the advice of the independent clinical and legal panels."

So I think recommendation 10 essentially pulls together a number of the earlier recommendations.

A. Yes, probably some critiques of the report should probably say it shouldn't be a recommendation in that form but I think it may be helpful to pull things

together in that form.
Q. Absolutely. If we then pick up recommendation 11. So there are three elements to recommendation 11:
"a) eligible infected and affected persons should not be required to accept the offer of an award in full and final settlement of any right to pursue legal actions related to the infection ..."
So they should not be required to sign a waiver --
A. No, and --
Q. -- essentially or undertaking not to sue.
A. -- I made that recommendation because many -- well, not many but there were certainly a number of people who told me of the distress caused to them and indeed what they saw as an interference with their choice and their autonomy at having to -- feeling they had to make such a waiver in order to receive what in reality were relatively small sums in settlement and it seemed to me that would not be the case here.
SIR BRIAN LANGSTAFF: I think there is also a matter of principle, isn't there --
A. Yes.
SIR BRIAN LANGSTAFF: -- that this is a question of entitlement not of contract --
A. Yes.
SIR BRIAN LANGSTAFF: -- whereas a settlement of a legal

action is a matter of contract?
A. Absolutely correct, sir.
SIR BRIAN LANGSTAFF: And so it is not in the same position.
A. No.
MS RICHARDS: You set that out in a little more detail, your thinking, we don't need to go to it, but in paragraph 9.7 of your report, page 95.
A. Yes. Can I make one other point, which is that one of the things I learned looking at other schemes, and again in particular perhaps the 9/11 scheme, which was part of the trust and confidence which was generated by that scheme was the fact that it did not insist on a waiver of the right to litigate on the basis that it was the intention of the scheme so to provide something sufficiently generous that people would not feel it was necessary to do that, and in that case it worked I think 100 per cent.
Now, of course, you can achieve that result by paying so much more money that it would be ridiculous to go to court, and I'm certainly not recommending that approach, but I do think that it makes this a more consensual process, and one would hope that compensation awarded would by and large satisfy people that they had no need to litigate at least in order for the purpose of getting damages. I can see there might be other reasons

to litigate.
Q. Can I just understand with you recommendations 11(b) and 11(c).
A. Yes.
Q. So 11(b):
"any accepted scheme award should be set off against any entitlement to damages for the same subject matter ..."
Now, is that viewing it from the perspective of a court assessing damages?
A. Yes. Well, clearly what I'm saying is that should, having received a compensation award, an applicant proceed with litigation in which damages were claimed for the same subject matter? And, for instance, a personal injury which was identical to the personal injury included in the impact award, that that -- in calculating any award of damages that the receipt of that award should be taken into account, in other words damages should be reduced by that amount.
Q. Just to spell that out in very straightforward terms, I hope, if someone has received, say, £120,000 --
A. Yes.
Q. -- as their impact injury award for the infection which they received and then they bring a claim, a legal claim, and they are seeking general damages for pain and

suffering, they wouldn't receive -- essentially there wouldn't be double recovery, they wouldn't receive that again.
A. No.
Q. The court would look at that and say: well, that actually is as much or more what we would have awarded.
A. I think what is true here, which perhaps isn't particularly apparent here, obviously it's the state who would be providing the compensation. It might or might not be the state who is the defendant in subsequent litigation, but my recommendation would be whoever is the defendant or paying party in litigation would be able to claim, as it were, the credit for what was in the compensation scheme where the claim was for the same subject matter.
Q. But, of course, there may be elements of a claim that could be brought by an individual through litigation which are distinct from what is set out in your compensation scheme, and those would be unaffected?
A. Yes.
Q. Then recommendation 11(c):
"the availability of an award under the scheme should be a factor to which the court could have regard when determining liability for costs in any court proceedings related to the infection."

Again, just to try to unpick and understand that, if a person chose not to make an application to the compensation scheme but to litigate and thereby incur legal costs, is the suggestion that the court could but wouldn't have to say, well, you are not going to get all your costs --

A. Yes.

Q. -- because you could have got the same from making an application under the compensation scheme?

A. It's already a feature of how courts award legal costs that the court will take into account or can take into account the conduct of the claimant, and indeed the defendant for that matter, but here what's relevant is the claimant, in the lead-up to the proceedings and, therefore, it seemed to me that, in those circumstances, say a claimant had decided not to go for an award of compensation at all but just for damages, the court might want to look at -- it wouldn't have to decide it adversely to the claimant but it would want to be able to look in justice at whether the claim could more conveniently have been made under the scheme. But also someone who has got an award under the scheme who then proceeds anyway to litigate, if, for instance, they, quote, "won" their litigation, but the difference -- the excess, as it were, in terms of damages was really

small, the court might want to look at whether it is proportionate behaviour to bring the litigation at all.

So the idea of this is in general and it is not just in this respect, but the costs regime is designed to make people think twice and preferably a lot more than twice before litigating in any event but particularly in those sort of circumstances.

Q. So the recommendation of 11(c) only arises in the event that somebody goes to court, and essentially it is there to reflect that which the court can do anyway in assessing costs?

A. Yes. But it removes any uncertainty as to whether that is the case.

Q. Recommendation 12 related to the issue of final awards rather than provisional, and then the second element is the choice between lump sum or periodical payments in relation to future loss.

We addressed that yesterday. I'm not going to ask you about that further, although it may be that Core Participants and their legal representatives may want me to return to it, but I'm not proposing to for current purposes.

SIR BRIAN LANGSTAFF: Can I ask a question then arising out of that. It's in relation to those who suffer from the infection of hepatitis C, who have not yet and may never

develop cirrhosis.

If their condition deteriorates to such an extent that they do develop cirrhosis, then it becomes a different magnitude of disease arguably, would it not be open -- it would be open in the Common Law courts to say, well, you've got hepatitis C at the moment, you are receiving treatment, which appears to be effective, but you did have hepatitis C for some long time, I can see there is a chance that you might develop cirrhosis but we'll pay you on the basis that you don't develop cirrhosis but allow you to come back for a top-up payment or rather more than a top-up payment if you do. That's what we would call provisional damages in the courts.

Why did you think such a situation, where there would be fairly clearly -- a fairly clear, it's not completely clear, but fairly clear demarcation between those who do not have cirrhosis or pre-cirrhosis and those who do?

A. Well, as I think I said yesterday, clearly that would be an option and, as you say, it would be an option and at the choice of the claimant in civil proceedings. I was impressed perhaps more -- and not everyone will agree -- with the need being expressed to me for finality, and I bear in mind that, if you take the case you mentioned,

it would be -- what would happen if you asked for a final award at the pre-cirrhosis stage would be that there would be an assessment made of the risk of getting cirrhosis and the damages would be -- or the award would take into account whatever that risk was, and I'm assuming that the risk could be in some way quantified and allow that to happen, which would mean some people -- or it could be done on the basis of probabilities as well, so you could say, well, someone is probably going to get cirrhosis, don't quite know when it might happen, or you could do it on the basis of the percentage risk of it happening. Both approaches, I suspect, could be possible on the basis of what I have seen in the descriptions of hepatitis C.

I was impressed by the fact that so many people spoke to me about wanting their affairs settled and, therefore, a final award would be the way to do that. If you have a provisional award system, as you say, you would make an initial award, which would assume the best, in effect, that the cirrhosis -- what would develop from that would not happen and you would then allow, in defined circumstances, a second claim to be made should the unwanted occur.

I won't say this is impossible to solve, but the circumstances aren't always as clear-cut as that, and

you have the issue, then, you've got cirrhosis, are you going to progress to liver failure? Are you going to progress to cancer? And how many times is a person able to have provisional awards dealing with the next stage of a disease? And with other areas, do you allow a provisional award for the quite variable effects of the treatment given for a disease and so on?

The amount -- the number of potential disputes you could invent have, I'm afraid, in relation to what would be suitable for a provisional award and what wouldn't be, could occupy a great deal of time both of applicants and the scheme, and again it's an area where, as I said, it's a value judgment to be made, I felt that it would be better for everyone to have a one-off payment and perhaps realistically with a generous perhaps over-pessimistic view being made of their prospects in the future. That was my reasoning, it either appeals or it doesn't.

SIR BRIAN LANGSTAFF: As a matter of principle, one may ask in whose -- who is best placed to decide that it should be final? Obviously, the scheme designer, but leave that aside for the moment. You've said that what has influenced you in this has been the demand, as you've heard it, for finality in those who have spoken to you. That is the demand from the infected and affected --

A. Yes, and I appreciate that it may not be the unanimous view --

SIR BRIAN LANGSTAFF: Well, if it's not unanimous, then those who wish finality would have it, those under this provisional-type -- a scheme which permitted provisional award, it -- they don't have to have it, they would have a final award, and those who wanted to come up against the later prospects could have the security, if you like, of the additional insurance policy.

The other aspect, of course, to finality is the paymaster. And I can see attraction -- I don't altogether know what the paymaster here might say. I can imagine that there may be two reactions. One is: well, having a provisional award means we pay less now, we pay some later, and the scheme is going to be front loaded so that it is a way of spreading -- making some of the payments later. Or they may simply say: well, we prefer a final scheme, we know exactly where we are.

A. Yes.

SIR BRIAN LANGSTAFF: But that is a matter for submissions to me in due course --

A. Yes, and obviously I know no more about what the view of the paymaster would be about that than you. But I think what worries me about allowing provisional awards is the

potential multiplicity of circumstance in which, in theory, such a provisional award could be made and almost every single case involves the prospect of changes in people's condition and as opposed to a situation where if you had a final award the scheme itself -- I mean, this may be a paymaster point rather than -- I have to look at both -- the scheme itself may never close until everyone, including the eligible affected, are no longer with us. That could be the scheme lasting a very long time indeed.

The resource involved in reassessment in relation to deterioration would be considerable. Individuals would be -- continually feel at least they were under surveillance having to maintain records, have intrusion into their lives in terms of subjectively in relation to whether they have deteriorated sufficiently to get another payment and so on. It introduces a great deal of uncertainty into people's lives in a way which the impression I had was people didn't want. But it is possible, but were it to happen I would firmly urge that you would have to -- I know we are asking the medical panel with a great deal but to ask them really to come up with really quite finite definitions of stages of deterioration which would make sense in relation to a provisional award.

SIR BRIAN LANGSTAFF: I was going to put that to you, the answer perhaps to the uncertainty, the idea of a menu which is never-ending of possibilities, that's potentially met by saying there are these circumstances where you could, if you wished, claim a provisional award and set out a limited number of circumstances, such as the example I put to you, somebody who has what is defined cirrhosis on whatever appropriate test is adopted or for that matter in medical opinion of their treating doctor requires to be put on a liver transplant list, and it may be those who have had transplants. There are three possibilities there.

A. Of course, that can be done. But I can then envisage a case where someone has -- isn't in those circumstances at all but for some maybe extraneous reasons suddenly their care needs are dramatically different to what they were before, and if we have these definitions they would not necessarily qualify for going back to court -- to the scheme for another slice of the care award.

They might feel they were being treated unfairly where if they couldn't do it but someone who had a more defined issue could, and that would worry me.

SIR BRIAN LANGSTAFF: So the question is the advantages -- the question of principle is advantages and disadvantages of extending choice in this area.

A. Yes. Of course, I recognise what could be done in theory in civil proceedings. I understand that. I then draw the distinction that we are talking about a scheme and in relation to -- I mean, I'm not saying -- if -- the paymaster should be given credit for the fact it is voluntary because there is a lot of history behind that which is unfortunate, but I do think that there are potential advantages on both sides here for finality and -- but others might feel that those are outweighed by the justice of being more precise -- which is what a provisional award does, being more precise about the difference between awards. That's all I think I can say.

MS RICHARDS: Sir, it has just gone 11.15 and we should probably take our break.

SIR BRIAN LANGSTAFF: Until 11.45 in that case. 11.45 am.

(11.16 am)

(A short break)

(11.45 am)

MS RICHARDS: I'm going to turn to recommendation 13. If we could have page 38 of the report. So recommendation 13:

"I recommend that interest be payable on awards for past financial losses and past provision of care, from the date of infection to the date of the award, in accordance with the practice in personal injury damages

claims; alternatively, that such awards are uplifted for inflation during that period."

If we just go to page 121 of your report.

I'm not going to read aloud paragraphs 9.123 through to 9.127 but I think it's fair to say you set out there the position in relation to claims. I think that reflects the position in England Wales, possibly Northern Ireland rather than Scotland.

A. Almost certainly.

Q. You set out the arguments, as it were, for and against either an uplift or inflation or the payment of interest in 9.124 and 9.125.

Then over the page, at 9.126, you say:

"Nonetheless, I consider that the effect of inflation must be recognised either by an award of interest, or by an uplift by reference to an inflation index. This does not, however, apply to lump sums awards awarded for non-financial losses (apart from the past value of care), where the award is made at the value of applicable at the date of the award."

So you recommend that either -- and we see in 9.127 -- this is effectively reflected in the terms of recommendation 13, interest or an uplift for inflation.

If the compensation scheme is put into effect and adopts this recommendation, in terms of the interest

rate, you haven't, I think, made a specific recommendation as to what the interest rate should be, other than referring to what the position is in personal injury claims in England, Wales and Northern Ireland.

A. Effectively, in personal injury claims, there is a statutory rate which is applied by reference to a formulae, which is then applied to it, and I think that's what I had in mind. But obviously greater minds than mine might have arguments to make about what the appropriate interest rate should be. But I think the principle is that it needs to be either interest or inflation, one of the two.

Q. So that is a decision that would have to be taken by those setting up the scheme?

A. Yes.

Q. But the starting point, the principle is that it should be built in?

A. Yes.

Q. The starting point would be to look at what the interest rates are in damages, claims, looking at both England, Wales, Northern Ireland and Scotland --

A. Yes.

Q. -- to see whether there is common ground or to the extent of any differences, and then identify the right rate.

A. I think any differences should be ironed out. The same interest rate should apply --

Q. Yes.

A. -- whichever country you live in.

Q. So if we then turn to recommendation 14, so we go back to page 38 -- thank you, Lawrence -- this is "Interim payments".

Now, we looked at that obviously yesterday in terms of some of the issues of principle, the reason why you made the recommendation for an interim payment and a degree of in a sense urgency that underpins it. Can I just ask you there a little bit why you express the recommendation in the way that you did in terms of its scope.

So if we go to page 122. You've set out -- again, I'm not going to read through the pages but they are there for those who want to read the report or re-read the report at 9.128 through to 9.137.

The recommendation is the making of interim payments to infected individuals -- eligible infected individuals who are alive; is that correct?

A. Yes.

Q. Why does your report not recommend interim payments to the estates of those deceased? At least those who are already known to the scheme and, therefore, there's no

eligibility issues?

A. I recognise that making an interim payment in advance of the scheme being set up was undoubtedly an exceptional measure and justifiable by reason of the urgent need of a particular group of people, and to my mind those were the eligible living infected claimants. And, of course, again it could be extended. And that was the need.

Whereas the calculations required for those who were no longer with us, firstly, I have not extended the suggestion to the living affected --

Q. Right.

A. -- and again in part that is due to -- I mean, I'm not for a moment saying there aren't people in all categories who have, as it were, an urgent need for money, but part of it is due to how simple or otherwise it is to determine what would be an appropriate amount to award actually. The thing about an interim payment is that you don't want to pay more than -- I mean, in the extreme case you don't want to pay more than what it turns out a person is entitled to because that leads to obvious complications. And in the court setting an interim payment will generally speaking be no more than the very minimum that someone might be expected to get in a particular circumstance, and so there is already a heavy discount involved in that.

It does seem to me that both for the living affected and the deceased infected, firstly, without wishing to -- understanding the dangers of over-generalisation the needs are not so urgent. The urgency of the need I identify for the eligible living infected is that many of them are worried about dying before they have any idea whether they are going to get compensation or not and not being able to settle their affairs. That is not a need, a shared -- in quite the same way by the estate by someone who has already died or by an affected person.

So I start with the point of view that this is utterly exceptional with the idea that you have an interim payment before the scheme is set up and the rules are explored and known, but happily there is a means by which such payments can be made already because there are support schemes. There is an administration. There is an identity available as to who is eligible and, therefore, it's partly the ease of identification and also partly because of the very striking need of this very narrowly defined -- quite narrowly defined group of people.

Q. Can I just explore one or two additional points with you arising out of that. By only making interim payments to those infected who are still alive, that may continue to

leave those who receive no support at all, an example might be parents who's child died or children in some cases died, waiting longer for any form of compensation and that may in fact -- they may never live to see that, bearing in mind that they may be of an older generation.

Any reflections on that?

A. As in so many areas of this there are lines, it seems to me, one has to draw. The claim made by a parent would be of necessity a less certain claim than one for an eligible infected living person. Therefore, the assessment of that, it would be very difficult I think to identify a common figure which could be awarded to all cases. This has to be a common figure because, by definition, the scheme is not in existence. We haven't gone through the medical panel issues, the legal panel issues, we haven't got assessors, so we are dealing with something that needs to be a very generalised payment in terms of what it is.

I'm obviously making a suggestion about the amount but whatever the amount is and the more people you include in the category, the lower the general shared amount is going to be, by definition, I think logically.

Q. Might it be said the longer it takes for the government to respond to your report -- and, of course, at the moment there is no response -- and assuming that there

is ultimately a response which says there will be some kind of scheme, the longer it takes to set up a scheme, the stronger a case might be for a wider range of interim payments precisely so that the kind of categories of individuals who I've given an example of don't die still waiting for something?

A. I think you could make a case of varying degrees of compelling -- necessary compulsion for virtually everyone who could make a claim. There's no doubt that everybody who aspires to receiving compensation will want the matter settled as soon as possible. That's part of the underlying reason for many of the recommendations I've made.

What I'm seeking to address here is a very particular need. I would agree that the longer it takes for there to be a response, the urgency in relation to the group I've identified gets greater. There's no doubt, by definition. And I'm not sure I could say that applies -- there is an existing need to settle things that everyone else shares, but I'm not persuaded myself that that falls into -- that more people then fall into this category.

And, as I said, the wider you draw the category, the less easy it will be for the government, I suspect, to identify what they would consider to be the appropriate

figure to pay. So, actually it might be slightly self-defeating in the sense that they talk about complexity, and I acknowledge there is complexity in everything in this report, as your question demonstrates, and the idea of this was that it would be something that -- maybe I'm being naive, it should be quite simple to make a decision about, can I put it that way?

Q. The figure of £100,000 for the interim payment for those who you've recommended should receive it and, as I understand it, reflects an assessment of that's a proportion of what people are likely to get and so there shouldn't be an issue. If you pay that you are not likely to have to be in the situation of having overpaid them?

A. Yes, and I will be the first to admit that my attempt to produce a figure was not based on a hugely sophisticated calculation but I did take into account what looked like a potential and arguable range of awards for the impact award and really it is around that and perhaps the autonomy and so on that we are talking about here.

But the idea -- my idea was that it would be a significant -- an award no one could say was not a significant sum of money but was likely to be one which most, if not all, infected applicants would

reasonably expect to get either that or more or something close to that, and I would hope that there might be a group of people for whom that would be sufficient. I mean, clearly it wouldn't be sufficient for many but for them it would be a start and it would put money in their hand, which would enable them to make choices, to increase -- remedy some of the issues around autonomy and in particular, of course, to enable them to start thinking in terms of how they would dispose of their assets to others upon their death, but actually rather -- even more important than that, what they could do for themselves was clearly, they say, the first priority.

Q. If there were to be an interim payment to the estates of those who have died, those who were infected and died, leaving aside what you've said about the difference you saw in terms of the immediacy of need but if there were to be, presumably it could, in terms of the magnitude of it, be along the same lines, because the estate claim is unlikely to be less than the figure that you have identified as an interim payment?

A. I agree with that but then I'm talking here about, as I repeat, an exceptional measure, and the need of the injured individual, by definition, sadly, no longer exists, and therefore, if we are then talking about --

if the reality is the money will be going to elsewhere, it may be going to affected people, but not necessarily, when it goes to the estate, there will be all sorts of issues arising as to who should receive the money from an estate, and it would, in my view, be better if all that were sorted out as a complexity in one go rather than several goes.

Q. I anticipate there may be some further questions that people will want me to ask in relation to that but I will wait and see, rather than ask you anything further on recommendation 14 at this stage.

Could we go then to recommendation 15, which is page 38. Thank you, Lawrence.

We can go through, I think, some of it pretty quickly but there are a handful of points I wanted to just explore further. The first point is:

"a) in assessing compensation ... no account should be taken of any past payments made under the support schemes or their predecessors."

As I understand it, that includes any past payments made from the Macfarlane Special Payments No. 2 Trust, which was the amounts paid following the 1990/1991 settlement of the HIV Haemophilia Litigation?

A. Yes.

Q. So those are to be excluded -- sorry, no account taken

of those either?

A. Yes.

Q. Then:

"b) the current annual payment under the support schemes should be continued (or merged into the compensation scheme) and guaranteed for life, by legislation or secured government undertaking."

Just picking up that point of undertaking, you have suggested that one way of giving that security is a formal undertaking by Her Majesty's Government that these will continue for life?

A. Yes. I received a very strong message that, firstly, people wanted these payments to continue, but one of the things they worried about was the security and assurance that they would continue. Because there was no -- well, the difficulty being, governments -- except by this method -- just because one government has said they are going to continue something, you might have seen in a number of other fields, doesn't mean the next government is going to do the same thing. That is the feeling of the people. But, for instance, the periodical payments that are made in damages cases are secured by a government undertaking, and whether that requires rules or legislation I will leave to others but it is possible for that to happen. Clearly,

exceptionally, it should happen here. It doesn't in relation to any form of social security, which, as we know, the rules can change from government to government, but this, it seems to me, is a support payment that -- where there should be a guarantee for life, in the same way, in effect, there is for our pensions.

Q. When you say the payments under the support schemes could be merged into the compensation scheme, does that effectively mean the compensation scheme, the arm's length body, would take over the administration of the existing -- (overspeaking) --

A. Yes, I have been fairly sketchy by design, if not encouraged, I think, really, by the terms of reference to go into the weeds of the administration, but it does seem to me that if it the support payments are to continue and there is going to be a compensation scheme and there is going to be a relationship between the two, it makes sense for the administration of both to be shared.

Q. We have already, I think, addressed recommendation 15(c), the taking into account of payments for the future in terms of assessing future financial loss or care provision, and I don't propose to ask you anything further at this stage about

(e) and (f), tax, but I do want to ask you a little more about the position in relation to benefits.

Could we go to page 116.

So, at paragraph 9.90 you say -- and this is having set out, as we have seen, your recommendation of an uplift in the annual support payments and the tax-free sum for additional financial issues -- you say at 9.90:

"I recommend that in exchange for the lifetime guarantee of this increased annual sum, uprated annually for inflation ... such payments should be taken into account in the assessment of entitlement to any means tested state benefits. The payments should still be disregarded against any entitlement to non-means tested benefits such as disability living allowance."

Then if we could turn to page 129, you set out in paragraph 10.10 the current position, which is:

"... a range of means-tested benefits administered by the Department for Work and Pensions (DWP) discount infected blood scheme payments for the purposes of calculating a beneficiary's income or capital ..."

Then you set out the DWP benefits to which the exemption relates.

Then you say that:

"[You] recommend that this exemption continues to

apply to the annual payments that continue to be made under the support schemes, or their equivalent under the compensation scheme."

Is there a contradiction between paragraphs 9.90 and 10.10 or have I misunderstood?

A. I don't think there is a contradiction. This is about recognising and accepting the continuation of this exemption in terms of the account to be taken of support payments, in relation to other state benefit, as I understand it.

What I'm talking about in the recommendation that you looked at is a slightly different issue, which would be subject to this exemption I think, that where there are other benefits -- so, for instance, income support, which is independent of anything to do with infected blood, or there are social security issues around that, that those should be taken into account in the same way -- sorry, there should be a clawback in relation to that in the same way as there would be in a personal injury claim. So, in other words, we don't take account of payments that are being made to do with the infected blood but there will be people who receive payments who have nothing to do with this at all, they may have been on support in any event. So that's what I'm seeking to address. Whether I have expressed that sufficiently

clearly is for others to judge, but that's what I'm trying to get at.

Q. Again, it may be --

A. Can I just explain, where in a personal injury's claim an award is made of damages, say for loss of earnings, but it is required in every single personal injury case that the Department of Work and Pensions is asked for a certificate as to what has been received by way of defined benefit, and there is a list of them in the last I think it's three years, it may be five years, it's a period, and then that can be reclaimed by the Department and in effect is reclaimed out of the damages. So that is what I'm suggesting. But clearly in this case it would be subject to the exemption that applies to anything that's in these regulations or any similar regulations which exempt those being taken into account for the purposes of those income support and other benefits.

Q. So in terms of any current exemptions, you are not suggesting that should change?

A. No.

Q. Can I then move to recommendation 16 through to 19.

So page 39, please, Lawrence.

Sir, I just to read them out and then I want to pick up, again, on a handful of issues relating to them.

Recommendation 16, the recommendation of the:

"... Arms Length Body ... to administer the compensation scheme, with guaranteed independence of judgment and accountable directly to Parliament for the expenditure of public funds and the fulfillment of its terms of reference ..."

A. Yes.

Q. Then you identify four aspects of process:

"a) ... regard to the need of applicants for simplicity of process, accessibility, involvement, proactive support, fairness and efficiency;

"b) ... a review and independent, preferably judicially led, appeal process."

I'm sorry, a review process and an appeal process, I think that means.

A. Yes.

Q. "c) involve potentially eligible persons and their representatives in the review and improvement of the scheme, for example, by way of an advisory forum;

"d) has access to the records held by or on behalf of any previously publicly funded support scheme."

So that is the basis for the scheme.

If we then just look at 17, you suggest it should include provision of support services:

"a) an advice and advocacy service, supplemented

where necessary by discretionary access to independent legal advice and representation, to assist and advise applicants."

Just pausing there. Where there is a necessity for discretionary access to independent legal advice and representation, that would be funded by the scheme? That's how I have read this, but I just wanted to check.

A. Oh, sorry, yes.

Q. Then:

"b) a financial and advice and support services to assist recipient in the management of awards and in accessing financial services; and

"c) facilitation of access to appropriate health, care and counselling services."

We may want to come back to that.

"Recommendation 18:

"... the compensation scheme should be delivered locally within each devolved nation. Consideration should be given by the UK and devolved governments to entering an agreement under which either a partnership board is created to oversee the compensation scheme's ALB, into which the administration of the local support schemes be merged, or the ALB commissions or delegates the local administration of the compensation scheme to the devolved support schemes."

Pausing there, are there two features that one draws from this and from the contents of your report? Firstly, that the compensation scheme, whatever form it takes, whatever the levels might be, should be a UK-wide scheme?

A. Yes.

Q. There should be parity between the four nations and none of the disparity that we've previously seen?

A. Yes, and it follows on from the developments really in the support scheme, which has been a move towards -- although I don't think it's perfect yet -- a move towards parity between the nations.

Q. And so --

A. And it is, to answer your question directly, to be a UK government funded scheme.

Q. So the same across all parts of the UK, but it may be administered locally, so there might be, in terms of the way in which -- that then UK-wide scheme is delivered and there may be assessors in England, assessors in Wales, assessors in Scotland, assessors in Northern Ireland, so there is still a degree of local connection and support?

A. Well, I looked at this really from the applicant's point of view, where it seemed to me absolutely essential that they have a local -- that service of this compensation

scheme is delivered to them locally and, in many cases, as I have already indicated, personally. And I was very struck by the value that was placed by many people I saw, particularly from Scotland, because there were a lot of people from Scotland, but also from Ireland and Wales, that they appreciated that local connection and the ability of locally-based administrators to understand the context in which people were coming to them. I think that, therefore, is really important. And, you know, if we are talking about England, obviously it is a larger place and one would imagine one would have to make a decision, if you were administering it, whether you would have more than -- the ability to access service from cities other than London, frankly.

Q. To what extent, if at all, have you considered whether the implementation of this scheme would have to be by legislation?

A. I suspect that certain aspects of this will require at least some form of regulation. I have not, deliberately not, considered that in detail. And the reason I have done that -- not done so as it seemed to me much more important to work out, first, what are the leads of the scheme and then to decide what would be required by way of legislation or regulatory change to bring that about. I mean, obviously schemes demonstrably are brought about

without legislation but many do have it and, of course, legislation is one good way of ensuring that something stays permanent and doesn't disappear with the next government round the corner.

Q. Now, in terms of arm's length bodies, there is more than one kind of arm's length body.

A. Yes.

Q. And so -- I mean, I can think of certainly three types. There may well probably be more. There is a non-ministerial department, an executive agency and a non-departmental public body. Would it be right to understand that what you are advocating is something which is as independent from and institutionally separate from government as possible?

A. Yes. I think I'm probably inclined towards the last of those.

Q. Yes.

A. Just to give some concrete examples, and I suppose it's my own personal experience, a lot of my practising life was spent dealing with the General Medical Council. I now sit on the board as a non-executive director of the Care Quality Commission. Those are bodies which are -- one might describe as fiercely independent but funded by the government. In the case of the Care Quality Commission is potentially subject to government

direction, but not in relation to its operational judgment. So it is that sort of body I would think. And, of course, that is -- there is undoubtedly in the expense and resource implication to the setting up of a body like that, as opposed to having, say, a department within the Department of Work and Pensions, but it does seem to me that the history of this matter and indeed, however hard we try, the complexity of what is required here does require that sort of organisation, hopefully not overwhelmingly expensive in terms of what it does. But it would have a limited remit.

There is often a fear about arm's length bodies that they grow like fungus and start taking over more and more things, but this is a very specific thing, and indeed could be possibly one almost might identify a limited life for it. In other words, it's not something that would necessarily go on forever because the need -- sadly the need for this will at some time stop. And indeed that time could come -- once the assessments are done and everything has been finalised, the actual administration of payments, for instance, might well be -- at that stage be something an arm's length body wouldn't be required to deal with. But at the stage of assessment, determination of awards, the provision of the advice advocacy and other forms of

support service that's a complex operation which I think requires an arm's length body.

Q. In relation to some of the history of the schemes, one concern that's been raised in the past, for example in terms of appointments to the Macfarlane Trust, is the extent to which these were appointments of trustees made by the Department of Health.

Would it be important to ensure that the appointments that are made to the arm's length body are as independent as possible, potentially with the involvement of the commission of public appointments or something along those lines?

A. Yes, I think it's difficult to conceive of a situation where the appointments aren't made by or on behalf of the government, but one can certainly have appointments that are supervised by the commission, as you've mentioned. I mean, in one sense, you know, the judges of this country are appointed via a Judicial Appointments Commission but the government is involved, but I think there's quite a strong history in this country of independently minded people being appointed to lead both as non-executives and executives this sort of operation.

Of course, the principles of -- the Nolan principles and all the rest of it need to be imported into these

appointments and they need to be transparent appointments, and there needs to be -- in my view, there would need to be or should be involvement of, as it were, a consumer/customer interest in it as well, in terms of the board at least.

Q. You recommend in recommendation 16 the involvement of the potentially eligible individuals and their representatives, for example by way of an advisory forum. Would you support, for example, representation from some of the existing bodies who represent the infected and affected or at the very least their close involvement in the work of the advisory forum?

A. I don't think I would wish to go further than saying that it's important that those who have lived experience of these conditions and those who advise them should be involved and consulted in the design of whatever the service is going to be.

Q. In terms of the appeal process, and you've said it should be independent, preferably judicially led, and I think there may be above some discussion yesterday which picked up on the possibility of the Tribunal Service performing some function in that regard --

A. Yes.

Q. -- one of the issues again that's arisen with various incarnations of previous schemes has been the lack of

an oral hearing. Would you regard an oral hearing as an important part of the process to ensure the full involvement of the potential --

A. Are we talking about the appeal?

Q. The appeal.

A. Well, if it was an appeal -- I'm thinking of something either similar to judicial review or something coming through the Tribunal Service, which, unless I'm wrong, which I could easily be, would automatically involve an oral hearing. The nature of that hearing must depend on what the remit of the appeal was. Not all appeals -- some appeals are about the proprietary of a process as opposed to looking deeply into the merit. I would see the review being at the stage more where there might be a rehearsal of the evidence, if you like, as opposed to the reasons for the decision, which is what an appeal tends to be about.

What I would like to see avoided if at all possible is a process of what would seem to the applicants of perpetual litigation before they get to a determination.

Q. Recommendation 19 I didn't refer to but if we go back, page 40 -- thank you, Lawrence, you're ahead of me on all of these:

"I recommend that the proposals for the design and administration of the Scheme, contained within this

report, should be reviewed by the Government in the light of the findings and recommendations of the Inquiry, and thereafter, on a periodic basis and reported on to Parliament."

If we leave aside the findings and recommendations of the Inquiry because that obviously triggers -- likely to trigger an obligation on the government to consider what the Inquiry reports, what did you have in mind in terms of periodic review and reporting to Parliament?

A. Well, in part this is covered by the arm's length body recommendation because, as you will recall, I recommended it should be accountable directly to Parliament, by which I mean rather like the Care Quality Commission or indeed the General Medical Council, a report is sent annually to Parliament and the accountable officers are summoned to give evidence to select committees about the performance, sometimes in quite robust terms. But it is a safeguard against one of the things that I note some people are concerned about, which is, as it were, the biased interference, as they would see it, of the government or departments of the government in the performance of this -- what would then be an obligation.

So I'm really suggesting that in addition to the performance, as it were, of the body and the

accountability to Parliament, because this is, frankly, something very novel and also, there is no doubt about, I'm afraid, expensive in terms of taxpayer's money, but as it's novel, as it progresses there is likely to be learning about how things could be improved and there should be, as it were, a Parliamentary input to that as well as input from everybody else, and it seems to me that if there's the obligation to report, and I think it would be the arm's length body itself doing that report, there would be a forum within which, you know, issues of where people were dissatisfied could be aired and improvements made.

Q. Then picking up on recommendation 17 again, and the reference to support services.

If we go to page 139, please.

So this is the issue of legal support.

Again, this is a matter which, I think for the very reasons you articulate here, is a matter of some importance, of concern to those present.

So you say:

"It is inevitable that the scheme be complex for many applicants to understand, to prepare their case for compensation and to respond to an offer or assessment of compensation. If, as they did, the Home Affairs Committee considered the Windrush scandal victims

required legal support, it is difficult to see how the same conclusion cannot be reached for the victims of the infected blood scandal."

And you set out a number of reasons why that might be the case, and you outline the kind of advice and assistance at different stages that individuals might need in order to be able to access the compensation scheme fairly.

If we go then to paragraph 12.2, the next paragraph, you say it could be provided in one, or both, of two ways: "support unit staffed by lawyers and paralegals". So part of the scheme but independent of those undertaking the assessment; is that right? Is that what the first bullet point --

A. Sorry, could you repeat that?

Q. The reference there to a "support unit staffed by lawyers and paralegals", you say there that's part of the scheme but independent of the general scheme of administration --

A. Yes.

Q. -- so that would be lawyers and paralegals who would be separate from those doing the assessment?

A. Yes.

Q. So that is one way of doing it. Another way would be "independent lawyers".

A. And, I should say, the independent -- the internal unit, I think, was something that -- again going back to the 9/11 scheme they had, although I'm bound to say that was made easier, remarkably, by the fact that no lawyer charged a fee for what they did, which is one of the reasons for the success of the scheme.

I have no expectation that the lawyers doing the same thing here and I wouldn't criticise them for not doing it.

Q. And you say in relation the second bullet point, last sentence, you recommend:

"... consideration be given to including all the RLRs [recognised legal representatives] at the Inquiry on the panel, but there may be other firms who can demonstrate appropriate competence."

Or:

"A combination of the two."

A. Yes.

Q. The point I have been asked by a number of groups of Core Participants it's more to emphasise, than as a question, but picking up on that it's to say that there are many who have built up a long-standing now relationship with their legal representatives who have a knowledge of their own particular circumstances, the history and the background, which would make securing

representation by their existing legal representatives something of some importance to them.

A. I understand that.

Q. And presumably, potentially, also of practical assistance to the scheme, because you wouldn't have lawyers who were new to this and having to reinvent the wheel?

A. Well, indeed. I -- there is often amongst those who have to pay out money, whether it be insurance companies or others, a bit of a distrust about lawyers representing people who are claiming money off them, and sometimes that is justified but, actually, more often than not the intervention of a lawyer assisting a claimant who is familiar with the background and so on saves everyone time and can save money.

Obviously there need to be safeguards. This is an area, I'm afraid, where, to protect individuals from perhaps being exploited by slightly less scrupulous lawyers, I'm not saying there are many of those but they do exist, and we have seen that in other fields, so -- but I think this is an area where actually the scheme itself could well be assisted by someone who is able to formulate a claim and articulate it in a way the scheme understands, whereas the claimant acting on their own might not and, therefore, the time taken to process

things and the investigations required might be much longer.

Q. That completes what I wanted to ask you about the -- for present purposes in any event -- the recommendations themselves. I've just got a handful of other points that have been suggested to me, which I haven't picked up on along the way.

One of the features of the scheme that we've discussed and that you've referred to in your report is that for some aspects of the compensation there might be the tariff payments, but there might be circumstances in which there should be a more bespoke assessment in certain respects. Would that be a choice for the individual, do you think?

A. I would envisage that being a choice for the individual but with perhaps a backstop safeguard that there needs to be some grounds for moving to a bespoke assessment. I mean, this scheme is going to be difficult enough as it is, but it's going to be challenged in its ability to deliver what it has to do if every claim has to be bespoke. If that's the position, then there would be a heightened risk of this scheme not satisfying its objectives and you might be inclined to go to the alternative, which is the Republic of Ireland situation with all the disadvantages that might have in terms of

the time taken to undertake assessment.

I think there would need to be a bit of a conversation about why you might be better off -- significantly better off with a bespoke assessment. I think while there may be a choice about raising the issue, I'm not sure I would advocate that it is -- the claimant's view is completely determinative.

Q. There will be clearly instances in which, whether it is to establish eligibility or to elucidate the claim itself for one aspect or other of the compensation awards, where individuals are going to need to either collate medical information from their records or potentially have in some instances medical reports, although, as I understand, your recommendation, medical reports are not an integral part of the scheme, indeed to some extent you are trying to avoid that. But if there is a need in an individual case to get a medical report or obtain medical records, would it be right to understand that your expectation is that the costs of doing it will be borne by the scheme?

A. Well, in terms of expert reports, while obviously one with the scheme could not stop applicants getting such reports and then the scheme would be expected to take those into account, I think I would expect in addition, as it were, to the medical panel solution it seems

almost inevitable to me that administratively the scheme would require its own access to ongoing medical advice in some cases, and I would have thought if we adopt a genuinely collaborative approach about this that that might be sufficient and perhaps a more economical way of dealing with it than a lot of independent experts being instructed by individual claimants, but I think one would have to test that by experience.

So I think what that boils down to is that the scheme would have to retain a discretion as to whether or not it was prepared to fund an independent expert, given the merits of an individual case.

Q. If the scheme or the assessor within the scheme were accessing medical advice or medical input perhaps from their own panel or otherwise, would you agree that that would have to be shared with the applicant?

A. Oh, definitely, yes.

Q. Again, that is one of the historic concerns.

A. Any decision it effectively made or -- would come with it a need for transparency about the material upon which that decision was made.

Q. Then if we just go back to recommendation 16(d), page 39. 16(d) provides for the arm's length body to:

"[have] access to the records held by on behalf of any previously publicly funded support scheme."

Is it right to understand the rationale for that is so that the individual applicants don't themselves have to gather everything that they have already previously submitted to the support schemes and submit it again?

A. Yes, it is a short circuit of what appears to be, currently, a rather elaborate process. There are potential issues of consent, I see that, here, but those records haven't always been made readily available and they clearly are, where they exist, potentially very important, as they will show, in my suggestions, eligibility in some cases.

Q. The concern that I have been asked to express, I think an understandable concern, is that whilst the existing support schemes might well be able to, for example, confirm the status of already eligible people or they might be able to provide specific relevant information, there is a concern about the entire personal records of the individual held by any existing support scheme simply being handed over to the arm's length body?

A. I'm afraid I think transparency goes two ways in that if -- I mean, I appreciate these are sensitive -- sensitive personal information -- but I -- obviously what the scheme needs is whatever is relevant to the claim for compensation and nothing else, but one can envisage that sensitive information that an applicant

would rather not be disclosed would actually be relevant to the determination of the award, and it seems to me that I see no particular justification why that should not be -- the scheme should not have access to that information should a person elect to make a claim.

Q. Then if we go to recommendation 17, paragraph (c), that's the recommendation that the support services through the scheme should include:

"c) facilitation of access to appropriate health, care and counselling services."

If we could go on to page 137. I have been asked to ask you a little more about that and I just want to look at what's said at paragraph 11.32, first of all. Under the heading "Non-Financial Support":

"The scheme should have a support unit which is available to provide or arrange the provision of medical, psychological and social support to infected and affected persons appropriate to the needs caused by the consequences of the infection. The Archer Inquiry recommended that the infected should be issued with a card entitling them to benefits not freely available under the NHS, including free prescriptions, counselling, physiotherapy and support services. This recommendation should be revisited and consideration given to whether such a scheme or comparable facility

should be provided via the administration of the compensation scheme or otherwise."

Just picking up on that latter point, first of all, the re-visiting of the recommendation of the Archer Inquiry, is that something you are suggesting the Department of Health should be doing or something that's for -- the arm's length body have set up to consider?

A. This emanates partly from the Archer Inquiry but also from my understanding that something similar to that actually happens in Ireland, and there it is not -- I do not think it is a matter that the Tribunal Service does but there is a card which gives people -- and obviously they have a different system of health care which entitles people to benefits they wouldn't otherwise readily get here.

What I have an impression of, and I have by no means looked at all the evidence that might be relevant to this that the Inquiry will have, is that there are certain aspects of support currently provided, whether it be way of actual care or counselling or support services, which is not coordinated and is difficult for people in some places to identify. I was also impressed by the fact that some of the devolved nations do provide sometimes a bit of, in *ad hoc* way, support to people about things like financial advice and services and

things of that nature.

What I'm seeking to suggest is there is a combination of needs that this particular group has, which is rather different probably from that of other people who suffer from other illnesses, and there is a need for an understanding of what it is about these awful infections and the social consequences of them that shouldn't have to be repeated every time to someone in order for them to understand what support this individual needs.

So it struck me there should be an investigation into whether in effect individuals can be issued with a card which at least will tell the reader of that card who provides a service that these are people who are entitled to it without having to repeat a lot of distressing history. But also there needs to be a facilitation of access to the multiplicity of services that this particular group need. Whether that is prepared by the Department of Health, NHS England or the arm's length body or a combination of those, I think is not for me to say, but all I'm identifying here is a need for signposting, for coordination of services and for evidencing eligibility for services which isn't being met in some cases in some places, and one route to that could be by way of the compensation scheme

organisation.

So I emphasise something I think I may have said yesterday, which is to my mind compensation here isn't just about money. To put people as near as possible back in the position they would have been without the injury involved -- or should involve the state providing all sorts of care targeted for these people. It may well be care that is available and should be available on the NHS or through social security or wherever else, but it's not getting to everyone because of difficulties of access and organisation, and this group I believe is large enough for a coordination, as I believe there probably is now in relation to the actual treatment of the diseases.

Q. We don't need to go to it but you've given some more background to the recommendation in relation to access to health and care services and some of the points that you just developed on page 135, section 11 of your report.

Then, just without going back to the sections of the report or the recommendations that deal with the position of the affected, can I just -- we can take that down thank you -- can I just describe two categories of affected and ask whether what, if any, consideration have you given to their situation.

The Inquiry has heard of those placed into foster care after the death of a parent or incapacity of a parent due to infection. How does the scheme reflect that? Is that through the affected person's autonomy or loss of autonomy and social impact awards?

A. Well, it is also through the Fatal Accidents Act equivalent award through a dependency because the loss of a parent and the replacement of that by an inevitably less -- I should not in any way disrespect lovely foster parents -- is an identifiable loss for which I think one would expect to be reflected in a dependency award, so all of that, yes.

Q. The Inquiry has also heard accounts of the position of those who have lost both parents. Again, would you expect that would be something that could or should be captured in some sense through the awards that we've described, a dependency award?

A. Again, I would see that as being part of the loss of a dependency. And the care being provided by grandparents rather than parents would be something classically on which a reflection could be made in an award, so yes.

Q. Then, I think the final points I wanted to pick up are arising out of the issues that we have discussed is the position in relation to Scotland. You, again, quite

candid that you focused upon the guidance that can be drawn from, and the approach to, the assessment of damages in England, Wales and Northern Ireland, as opposed to the distinct system in Scotland.

There are aspects in which the Scottish system is different. There may be elements of compensation that are more generous, for example, in Scotland. I am not going to go through specific details or examples. But would it be important, do you think, for the legal panel, who would be potentially populating your grids or tariffs with suggested amounts or bands of compensation, to include appropriate expertise from Scotland, almost certainly Wales, Northern Ireland, England as well, but reflecting the different nature of the legal system in Scotland, to ensure that it is not a lowest common denominator approach necessarily and that appropriate regard is had to the way in which awards are structured in Scotland?

A. No, I'd agree that regard should be had to those differences and it would be obviously helpful for those to be identified. While one wouldn't want to go for the lowest common denominator, you would not necessarily wish to go for the highest common one either, and I think one has to come to a fair solution for the entirety of the UK.

Q. But it is a matter that should be at least considered, should be part of the assessment process?
A. Yes.
Q. Then the other point in relation to Scotland in particular --
A. Could I just add to that point? We would have to bear in mind, and the panel would have to bear in mind, this, and I have said this before, but we are talking about categories of compensation being awarded, which, I suspect, are no more awardable in Scotland than they are in England. So one has to take into account the rough with the smooth to some extent.
Q. The other point in relation to Scotland, in terms of the Damages (Scotland) Act 2011 -- and I think we gave you a couple of extracts --
A. You very kindly did.
Q. I'm no more an expert on Scottish law that, I think, you are, so I'm very grateful to Mr Dawson(?) for that.
The short point, without, I think, going through the detail of it, is that in Scottish law a wider category of relatives is recognised for the purposes of bringing what might be the equivalent of claims under the Fatal Accidents Act. Is it fair to say that you had not in your report given any consideration to that?
A. No.

Q. So that might be something upon which further reflection might be required by those --
A. Yes, at the end of the day there clearly has to be consultation between the governments of the devolved nations and the UK government anyway, and no doubt that would be one matter to take into account.
Q. The last question then just relates to implementation. If we go in your report to page 122.
This is in the context of a discussion about interim payments, but you say in paragraph 9.130:
"... it seems unlikely that the scheme could become operational until after the publication of the Inquiry report and a process of discussion and consultation, although some elements of the scheme could possibly be set up in advance."
Leaving aside interim payments, were there particular elements of the scheme that you thought could or should be set up now?
A. Well, if -- and obviously it is a big "if" -- the principle of a compensation scheme were accepted, if -- and, again, it is a big "if" -- a framework along the lines of that which I have recommended were considered appropriate, you could, for instance, consider setting up, in shadow form, an arm's length body. You could consider, in shadow form, setting up the panel -- or,

less than shadow form, probably, the panels, to start the work of considering some of the detail, because I absolutely accept that the work of those panels is going to be quite complex. It will require consultation amongst other things, a lot of research, and I don't see that happening overnight. Frankly, if it'd -- been able to do that overnight I might have considered doing it in my own review, but I couldn't. So we need -- and I don't see that that sort of exercise needs to await the outcome of this Inquiry.
But I completely understand it might be difficult to go beyond that because -- but possibly, and I speculate, would it be possible to -- having identified, say, a range of awards potentially for injury, you could start thinking about that?
I think when it comes actually to making awards and determinations though, that is probably the point at which you have to stop. So the ability of a scheme in shadow form to actually distribute money, apart from the interim payment I think would be questionable, and of course I have not spoken to and wouldn't intend to speak to the Treasury, but I would be quite surprised if the Treasury agreed to release money on that rather speculative basis.
Q. But getting the panels to start their work now would

mean that, if the decision is then taken to -- us to green light the scheme, the process of assessing and paying out money would then be -- would not be delayed as much as it might otherwise be?
A. No, and it's -- there are many instances in which -- you know, in advance of a reorganisation, for instance, taking full effect, that bodies are set up in shadow form which will take over that role as and when it is given to them and be designing what they have to design. It's a perfectly normal part of government these days. So, I mean, of course, it runs the risk that at the end of the day a completely different solution is either advocated -- is advocated, which turns out to be a better way of doing it but it should be done in a way where the work will not be wasted at all possible.
MS RICHARDS: Sir, that's where I propose to leave matters, ahead of 1 o'clock, I'm happy to say, notwithstanding the earlier scepticism about my time estimate.
SIR BRIAN LANGSTAFF: The scepticism was entirely on your part.
MS RICHARDS: As I indicated earlier, if we could take a lunch break of an hour and a half --
SIR BRIAN LANGSTAFF: Yes.
MS RICHARDS: -- because I think there will be a lot. I know already from those speaking behind me that there

is a lot they want me to consider.

SIR BRIAN LANGSTAFF: You don't need to go any further persuading me. We will take a break until 2.20 pm. That is no earlier than 2.20 pm, the reason which have applied before, it may be later but it will be at least until 2.20 pm. The purpose of this you will probably anticipate but let me say it anyway. There are a number of Core Participants, a large number who are represented by legal representatives, they are entitled to ask counsel to put questions to you, it's part of the collaborative enterprise which this Inquiry is, and she must then have a chance to look at those questions and order them and arrange them so that they can ask them when you return. I can't promise you how long it will take after 2.20, assuming we start then, we may start later, it depends how many questions are coming through. It will be however long it takes.

A. I understand.

MS RICHARDS: Can I just say, I know there are some here who are unrepresented Core Participants or unrepresented infected/affected, they should feel free to approach myself and Ms Scott and suggest questions as well.

SIR BRIAN LANGSTAFF: That's very kind of you.

(12.52 pm)

(The luncheon adjournment)

(3.00 pm)

MS RICHARDS: Sir Robert, I've got a range of questions, and because I'm going to ask them as they have been presented to me from representatives of Core Participants, they won't follow, necessarily, a particular topic or a single recommendation, so we may leap around from topic to topic and then come back to some of those topics when I come on to the next set of questions.

A. I understand.

Q. The first question regards the issue of eligibility and cut-off dates. Would it be right to understand the effect of what you say in your report and what you said yesterday as follows: the starting point you anticipate would be the current scheme cut-off dates, if any? You are not advocating yourself any changes to those?

A. No.

Q. You also, in terms of your underlying principle in the section of your report where you set out principles, set out that claimants should not be worse off than they would be without a scheme. Is it something that you anticipate that, if there was to be an alternative cut-off date or criterion, it might have the effect of extending the present cut-off dates if the evidence and

findings of the Inquiry supported that? For example, the early tests being fallible, all that kind of thing?

A. Cut-off dates for the scheme or for the support scheme?

Q. Cut-off dates for eligibility. So the periods within which the infection or the treatment would have taken place?

A. Well, I think I would expect -- I hoped -- frankly outside my terms of reference -- that if there was a change in the perception of the cut-off dates for, say, the support scheme, that that would be mirrored in the compensation scheme.

Q. And --

A. And if there was a change in -- so that it became different dates, then different circumstances, for instance.

Q. But that would be something that might flow or not flow from the findings and recommendations of the Inquiry rather than from anything you are advocating?

A. Yes, I have no ability to make that judgment.

Q. The second point, in relation to hepatitis B. Given, as you indicated yesterday and as I think your report accepts, those who clear hepatitis C with or without treatment would be included within the scheme, even though they may not have suffered extensive symptoms and, therefore, come within the lowest of the

hepatitis C tariffs, does this not create a disparity with the exclusion of those with non-serious hepatitis B on whom the impact of their infection may be similar or even worse?

A. I think that depends on, firstly, a value judgment and that depends on a more precise description and understanding of the similarities and differences between the two. And insofar as the assumptions which I describe in my report are changed, then that argument gets either weaker or stronger.

Q. The third question now moves to issues of calculations of financial loss. Your report does not refer explicitly to pensions but pension losses that can be recovered in Common Law claims. Should that be included in appropriate cases in the calculation of financial loss within the compensation scheme?

A. I would see no reason why not.

Q. I think the next question's answer is probably clear from your report and your evidence but, again, for the benefit of those listening, in terms of interim payments, is it right that on your recommendation infected people who are not eligible for the current schemes cannot apply for interim payments?

A. That would be the effect of my recommendation. I think I would qualify that. When you say not eligible, in

other words, they don't fulfil the test. That's different from whether they have in fact been accepted on the scheme. If it was possible easily to establish eligibility, then that might be a different matter.

Q. So that I think distinguishes between people who wouldn't currently be eligible under the existing schemes, for example in hepatitis C because the infection post dated September 1991, and then those on the other hand for whom they are new applicants but might be able to quickly establish eligibility if they tried.

A. Yes.

Q. The next question is --

A. I emphasise that because this is something which is being, as it were, put upon to the existing support scheme, it's got to be something which the assessment process of the support scheme can deal with, and that they are dealing, as I understand it, with new applications, so there is no reason why that shouldn't apply to the interim payment.

Q. My next question is a practical one but an understandably important one. What happens if an infected individual dies while the assessment process is under way? Would the family then have to re-apply as bereaved affected individuals and start the process

again?

A. Well, clearly, if the applicant dies in the course of the process then the assessment is going to be different and -- but procedurally I would hope that that change, as it were, could be made in the least painful way, the least burdensome way possible, but clearly different information might then be required. So there would be a difference in the process. But I don't see -- the whole point of it not being a legal process is that you wouldn't, as it were, have to go away and issue a new writ or court summons or anything like that, so the procedure ought to be as flexible as possible.

Q. Consistent with what you suggested should be the underlying principles of the claim and of the practical proactive sympathetic approach that should be taken, presumably you would expect those administering the scheme to gather together the information that they already had, they would be able to work out then what additional information they needed and ask just for that additional information, rather than expecting a bereaved family to go through everything all over again?

A. Exactly.

Q. The current schemes include those infected through not just blood but through transplant, so through tissue. That's not I think expressly referenced in your report

but you are not suggesting any different approach in relation to that --

A. No, I certainly focused on blood and blood products because that's what people were talking to me about. I think perhaps I would prefer just to say that's not an area I specifically considered or whether there are any specific issues arising out of that that would need to be taken into account in the scheme. But in very general principle I would see no reason why such people should not be entitled to compensation.

Q. The next question looks at the awards that might be made, whether to an infected or affected person. The point is this, there will be many who have undergone substantial personal stress, fighting for decades for compensation, for recognition, aside from the effects of their own illness or the illness of their loved one. Would you anticipate that those kind of factors could be reflected in the autonomy award?

A. I do, because it seems to me that such experiences, to the extent that they are established, would be an aggravation of the interference with people's autonomy, a lack of information given to them and so on. So, yes.

Q. Then, again, picking up on that idea of people having fought for compensation for decades, many having died

without it, might that justify at least consideration of a higher rate of interest on past loss?

A. No.

Q. And why is that your answer?

A. Because the -- the payment of interest is there to ensure that people receive compensation, as it were, in today's values and so the compensation is what it is, it is not a means which I would suggest should be used, although they could be used in the court system, I appreciate that, as a substitute for punitive damages. If we're going to have a punitive award for exemplary damages or compensation let's have that and let's deal with it on that basis, not I would suggest through interest, which should be purely about making sure people are not under compensated because of the length of time that passed if they incurred a loss.

Q. So if that factor were to be corrected in some way, the correct way would be potentially through exemplary damages which, for the reason you've already explained, would be something that would be -- would have to depend upon the findings of the Inquiry?

A. Yes, and then I think a further consideration of how you would import that into a compensation system.

Q. Next question leaps now to the arm's length body, and you've referred to some examples of arm's length bodies

in passing, and some, of course, may have their own challenges or have been subjected to criticism.

A. There was no such thing as an arm's length body which has not been subjected to criticism.

Q. Out of the arm's length bodies that you can think of, whether it is those you have already referred to or otherwise, are there any that you would say are particularly close in terms of scale and form to that which you envisage?

A. I'm trying to think whether the Criminal Injuries Compensation Scheme is an arm's length body, I'm not sure it is, but an organisation like that, whatever the form it takes -- I mean, leave aside whether it is an arm's length body -- would, I think, bear significant similarities.

Q. The next point is a point of clarification. I think when I was asking you about hepatitis B we touched on the question of whether you had received representations or information on the question of compensation for infection with hepatitis B. I took you, I think, to a couple of passages in your report. I wasn't proposing to go back to that. Is it right to understand from your report -- this is how I read it but I may be wrong -- that in the oral meetings in -- which you conducted, hepatitis B was not raised but it was raised in at least

one set of -- (overspeaking) -- submissions?

A. Certainly that's my -- my memory. If it was raised, it wasn't raised in a way which attracted my attention, I will be honest about that. There were a limited number I think of written representations about it and in fact I did receive at least one representation about it but after the publication of the report.

Q. Can I then come to the question of the extent to which compensation -- well, the extent to which monies recovered through the settlement of previous claims might be taken into account.

A. Yes.

Q. You explained earlier, and we looked at the relevant part of your report, that previous payments received under any of the support schemes or their precursors you would not envisage being taken into account, and you explained your reasoning in the report, and they were often described as ex gratia payments, they weren't compensation as such and so on, and you confirmed that that would also apply in relation to payments from the Macfarlane Special Payments No. 2 Trust.

In terms then of any other settlements, your statement I think -- sorry, your report I think suggests that, if we look at, just by way of example, paragraph 9.6. I think it is page 95, Lawrence.

So paragraph 9.6, I had asked you about the first part of it, potentially, but not the second.

You say fifth line down:

"... any sum received in the settlement should be taken into account as a deduction from any lump sum award for past financial losses or provision of care, in so far as it can be identified what part of any settlement was attributable to such losses or provision."

Is this correct, leaving aside, as I say, all the various incarnations of the support schemes and ex gratia payments, if there was something that was the payment of compensation as part of either a court award -- well, sorry, if as part of a court award, it would presumably identify what it was referable to.

A. One would hope so.

Q. And then could fall to be taken into account against the relevant item of compensation under the scheme.

If it is a settlement, is this right, it would -- you would envisage it would be taken into account but only insofar as you can identify from the settlement that it or part of it is referable to a particular head of loss?

A. The very limited information NHS Resolution were able to give me about settlements indicated, firstly, most of

them seemed to be for relatively small sums of money. Insofar as they were larger sums of money, they may have information about -- well, not that they offered me anyway -- as to how that figure was arrived at, and it said that it is a potential challenge, obviously, but until one looked at the specific case it would be difficult to say whether it was possible to determine it. For instance, in any case which had been prepared with any level of sophistication, with a negotiated settlement, there would be likely to have been a pleaded claim in which items would have been set out, and it might well be possible to reference that in terms of how the settlement was arrived at, albeit, no doubt, for the reasons I mentioned, a settlement might well have been discounted heavily or perceived to be the prospects of success and failure in the case.

I'm afraid that would have to be dealt with on a case-by-case basis but I have deliberately said that this should be -- it being taken into account should be conditional on it being possible to attribute the settlement or part of it to any particular head of claim.

SIR BRIAN LANGSTAFF: In general terms, during your practice, when you have settled cases --

A. Yes.

SIR BRIAN LANGSTAFF: -- have you, in the process of settlement, broken up the settlement figure into A, B, C: A, a sum for pain, suffering loss, immunity; B, a sum for past loss; C, a sum for future loss?

A. Yes.

SIR BRIAN LANGSTAFF: Or has it largely been a question of global figures?

A. Sometimes the latter but more usually, sir, it would be -- a calculation would be made as to what the claim -- what one anticipated the claim would achieve if it was fought out. And then modifications would be made for that to calculate the risks and degrees of uncertainty of that outcome.

What makes it more challenging is whatever the view might be on one side or the other may not have been fully or frankly disclosed to the other side because that is privileged information, and so each side might have an entirely different concept as to why it was they were offering or accepting a particular sum.

So that's why there is a particular challenge. But it would seem to me that in the sort of cases we are talking about, and I'm talking about those where -- but if it is a very small payment, it's almost certainly what we, as lawyers, I'm afraid rather disparagingly, call a "nuisance payment", which is to buy off the cost

of litigating something which it is thought the defendant would succeed in.

Such a settlement, in my view, would not be something you would take off any particular heads of damages in future. But if you had a six figure sum, it seems to me it is likely that there will be a document somewhere which would enable you to say, well, a proportion of the overall claim being made was for loss of earnings, or something of that nature, and therefore it would be fair to deduct that sum.

But I'm afraid it would have to be dealt with on a case-by-case basis in accordance with material available, which might be very limited.

SIR BRIAN LANGSTAFF: And if it were a group action, when different -- technically it would be a combination, let's suppose it were 100 claimants, there would be 100 individual claims, albeit litigated as a group.

A. Yes.

SIR BRIAN LANGSTAFF: And it might then be virtually impossible to say what in each individual case the amount of damages at Common Law would be recoverable.

A. Yes. I accept that.

SIR BRIAN LANGSTAFF: Quite apart from presumably the different values which the paying party and the receiving party would give to other pressures, pressures

such as the cost of litigation, the time it might take, the uncertainties of litigation, knowledge particularly of one party that a witness might be rather more wobbly than had been thought, and simply a feeling on behalf of some members of the cohort, "Well, I have had enough I just really want to get this settled".

A. Yes. All those features, sir, would, of course, lead to a reduction in what might otherwise have been anticipated would be claimed. That doesn't necessarily mean that justice or fairness might not require at least to look to see whether it would be right and proper to take the payment into account when, as it were, one might describe as proper 100 per cent compensation is now being offered. But I appreciate -- and, of course, there are these difficulties and they could end up by being difficulties where proportionality would mean it would be actually wiser and fairer and a better use of resource not to make the argument at all. But I don't think I could properly looking at the -- balancing the interests of those claiming things and those paying for them not say that it should not be taken into account at all.

SIR BRIAN LANGSTAFF: What you've described is seeking to find a system which would be quick --

A. Yes.

SIR BRIAN LANGSTAFF: -- understandable, easy to apply and free from some of the difficulties and uncertainties which may be thought to be set in litigation.

A. Yes.

SIR BRIAN LANGSTAFF: All of those advantages would be perhaps rather inconsistent with the need to have a very careful look at what was a settlement in order to work out how much money should come off the sum now being suggested.

A. So clearly it is a matter of proportionality, in my view. You will appreciate that the information that I was able to obtain in relation to the nature of settlements or the history of them was extremely limited, and that may be all the information there is, I don't know, but it would seem to me it would be unwise of me not to ask the question in effect about that.

SIR BRIAN LANGSTAFF: So ultimately the decision might be a question of finding out what in general terms would be a proportional allowance to be made for sums given in the past.

A. Yes.

SIR BRIAN LANGSTAFF: Without spending too long on the assessment.

A. Well, again, it's an area which ideally would -- a broad-brush approach, if it could be taken, should be

taken. And, as I say, what appears to me to have been -- insofar as there were cases, a lot of them were settled for a very small sum of money, comparatively speaking, then it might well not be worth anyone's while looking very long at that.

MS RICHARDS: Just picking up on that, a specific area I have been asked to raise with you. I appreciate much may depend upon the individual case but whilst it might be proportionate, for example, if there is still an existing settlement agreement or a court approval to look at that and see whether you could identify a head of loss that was comparable to that for which the compensation was being sought, but you wouldn't in general expect there, for example, to be an attempt to interrogate litigation files and look at whether there were notes of settlement meetings and try to reconstruct what might have been in the minds of those --

A. I think that would be almost impossible. You give the example of an approval by the court, which I think almost invariably would involve the court having been shown an advice of a legal adviser analysing why they were accepting the sum on offer and suggesting to the court that was a reasonable sum to offer. And similarly there may be other cases where the court's approval is not required but such advice exists.

Now I appreciate there might be issues of privilege around that advice, but it would seem to me not unreasonable to expect an applicant to be able to explain why a particular sum was accepted in transparent terms. And if they didn't do that, well, maybe certain consequences could follow.

But as I say, it all depends on the amounts involved and the proportionality. It is just that I would feel that some might suggest it would be unfair if a significantly large sum, and if we are talking in six figures I would think of that as being a large sum, was not looked at, because otherwise the risk of double recovery is really quite substantial.

Q. The next question is one which I think is completely answered in your report but perhaps important to deal with because I didn't ask you, I think, about it expressly earlier. The question is: can claims in relation to affected people be brought on behalf of an affected person's estate? And you answer that in terms: yes.

A. I did.

Q. So I'll -- I haven't answered it for you, effectively, and we don't need to put the page up, but I will just read the paragraph number. It is paragraph 2.20 on page 19 of your report.

Moving on from that, some infected with hepatitis C, HIV, hepatitis B have, as I understand it, had compound damage caused by constant reinfection. Would you anticipate that those are the kinds of considerations that the medical panel, the clinical panel, would be considering when drawing up their different categories?

A. Oh, definitely. That would go to the severity of the disease, and that is partly catered for, in my rather simplistic grid, by the co-infections line, if you like. But clearly that could be developed.

But as I have said, I think, in the report, the fact that one has more than one disease or co-infection doesn't necessarily mean you double up the award but you certainly take it into account.

Q. My next question relates to interim payments and the limitation of the interim payments to those affected and are living, and it in particular concerns the position of those who are widows or widowers where the infected partner has died. I'm going to set out a handful of propositions and then ask for your comment.

So one example, and this is not a typical example in terms of the circumstances of which the Inquiry is aware, a widow currently getting payments from the schemes, already registered (so in that sense in the same position as the infected applicants

administratively), and whom we have recommended an interim payment, a husband lost the opportunity to sort out his affairs before death, lost the opportunity to settle the estate and make provision for their children, which was the factor that you identified as being one of the factors in support of an interim payment, that widow or widower, bereaved partner, now has exactly the same desire to sort out family affairs for their children, her children, his children, the children of the deceased infected individual, and age is not in their favour, why is there any less urgency in alleviating their suffering is the question for your comment --

A. My sympathies are entirely with such people but actually the issue you raise could be said to exist in relation to any eligible affected person as well. And there will be many in that category who are elderly or would like to sort out their affairs. But I'm dealing -- or seeking to address a situation unfortunately where there is no compensation scheme in existence, where the level of assessment available without the scheme to assess who should get what is very limited indeed.

What I have suggested, and I repeat it, is an exceptional measure to recognise a group of people who are alive, who have been personally directly

infected, and I think that is something which separates them from even widows and widowers of infected people who have died, who are, I believe in this sense, and maybe this sense only, in the same category as any other eligible person who understandably, and I am sure virtually everyone in these categories whatever they are, want to sort things out as quickly as possible so they can dispose of the -- sort out their own lives and indeed sort out everyone else's lives as well.

Unfortunately a line, in my view, has to be drawn somewhere and -- just in terms of the practicalities of it, and I sought to suggest something which is simple, entirely in line with -- in effect, just asking the people who run the support scheme to sign another cheque, notionally, and I'm not sure that is the case in relation to anyone other than the category I've mentioned.

Q. And again --

A. And also what you are suggesting, suggests to me a level of assessment would be required in order to assess the merit and urgency of the individual cases, which then gets you into the territory of someone having to make that judgment in what may well be, at that stage, a significantly large number of people.

Q. I think the suggested extension for the purposes of

these questions to the scope of the recommendation is an extension not to all those affected or --

A. No, you asked me about widows and widowers.

Q. And the particular reason for pressing that point or being asked to press that point is really twofold. The first is that that's not a category where it is likely to be particularly difficult to investigate the position. If you've got those who are already registered with the scheme, their circumstances are known, the existence of the relationship is known, they have already been accepted as someone eligible, for example, for support payments, so you don't have any problems there?

A. That applies to a number of other categories as well, I would think.

Q. But the second factor that may apply to the bereaved partner is that of age and potentially their own ill health.

A. Everything you say attracts a huge amount of sympathy from me. The problem, if you like, is caused by the absence of a scheme. Some have suggested it should have been put in place many years ago. That hasn't happened. What I'm therefore faced with is trying to find or identify pragmatic, easy-to-apply solutions which, to be fair -- I know it's difficult to -- some people -- to be

completely fair, but to be fair to those who have to put in place the arrangements for these schemes, which include the funding for them, may require a certain degree of certainty and ease of administration without which support schemes themselves might become overwhelmed. More sophisticated arrangements might need to be put in place to administer it. And the more that is likely to be the case, the less easy those who might otherwise agree to this might find it. That would be my speculation, I don't know.

And of course it would be open to any government to say, "No, Francis is wrong about that, we could very easily accommodate the people you have mentioned", and I would be the first to welcome that. But it is just simply in terms of what I feel it is pragmatic to recommend and it is by no means through a lack of sympathy on my part for these people's needs.

Q. The next topic is in relation to the absence of a recommendation that affected people could claim financial loss awards.

I'm reminded that you describe one of the difficulties of such an award is needing -- in terms of some of the policy matters that underlie the approach at Common Law -- needing to ask unpleasant questions about why a person gave up their career and didn't simply pay

for the care so that they could continue with their careers. The question is this: that essentially reflects a concept of mitigation of loss. No other element of your recommendations appears to consider an obligation to mitigate loss, so why should affected claimants be burdened with it?

A. Well, I think what I'm seeking to reflect is not actually a mitigation of loss but the effect of a policy which is in legal cases applied to provide some line to define what is thought to be fair to require a paying tortfeasor, wrongdoer they have to pay for and what not, and there always has to be such a line. It is by no means -- to say it is mitigation would be to suggest I'm implicitly seeking to criticise those who care for their loved ones and, of course, I'm not doing any such thing.

But the legal logic that regards care costs is to be valued on the costs of -- the notional costs of the care, rather than the financial loss is where a line is drawn. As a barrister, I would be very happy to go to court in such a case and seek to argue that the line should be drawn somewhere else, and I suspect people do that all the time, but I'm not aware that they have yet succeeded, but it does seem to me that what I'm looking at here is the need for a degree of parity between those -- in an area where it is directly comparable

between those who have a claim for negligence against the whole service in a more routine way and someone who has a claim for compensation here in relation to something they are getting free of the obligation to litigate.

Q. The premise underlying the next question is this, that there is for some at least of those infected through treatment with blood products a generation where because of the effects of haemophilia, but possibly also the effects of infection, the affected partner may have been the primary earner in the household.

And the question is this: in such cases would it be equitable to permit substitution of the infected person's loss of earnings for the affected person? In other words, you're not advancing a claim by the affected person for their loss of earnings, but looking at it as a household you are allowing the claim to be based upon the higher earner.

A. That's, I think I would be right in saying, a novel concept, and it is seeking to compensate something different to that which the principle of compensation is for. In other words, you compensate an injured person for the consequential loss to them of what they would have earned themselves. It is -- again, I would hazard a guess, and I'm happy to be shown to be wrong by

cleverer lawyers than I, but that that would not be admitted as a claim in an ordinary litigation claim for the reasons, really, largely that I have explained.

SIR BRIAN LANGSTAFF: If I may, I'm not really sure it would actually create any practical difference for this reason, that the earning capacity of the infected person would be what would be subject to compensation. So let us suppose somebody with haemophilia has the added disadvantage, huge disadvantage of HIV or hepatitis C or hepatitis B or a combination and that means they can no longer pursue the career they would otherwise reasonably, it is assessed, have followed. They would be compensated for that. Albeit there is an element of guesswork about what it would have been. That would be part of your award, the loss of earnings to date.

A. Yes.

SIR BRIAN LANGSTAFF: The individual who is the higher earner would presumably be capable of earning those higher earnings anyway.

A. Yes, subject to the care point obviously.

SIR BRIAN LANGSTAFF: And that's where care comes in.

A. So it is the same point really.

SIR BRIAN LANGSTAFF: And really the question then is the theoretical approach to care, as to which might be said that the approaches, is there a loss? Answer: yes,

because the infected person needs care.

And then what is the -- how does one assess that loss? What actually has been incurred? Answer: the loss of, let's say, £30,000 a year earnings for care which could be supplied, on one view, for £20,000 by someone employed off the market to do it.

And it would then be the question whether the -- this I think comes back to the -- I follow the logic of the litigation of loss question I think by saying, well, is it unreasonable, because I think that's probably the test, is it unreasonable for someone to claim £30,000 a year rather than 20 when you could have got it down for 20? Is it reasonable to do it? As to which lots of considerations might come in, might they not, such as the degree of love and affection which is necessary, the sheer difficulty of having someone employed to provide care which might be needed at all times of the day or night, in a particular situation dealing with night sweats, et cetera. You can picture the situation quite easily. Plus the sheer horror at the idea of asking for someone to come and cater for somebody who has, let's suppose, HIV because of the stigma that applies to HIV.

All those considerations would, arguably, form a case. I mean, you can put a case the other side, and I'm just demonstrating how it might be argued.

A. I'm not in any way, sir, seeking to suggest that that is not theoretically a way in which one could approach this. What I was seeking to do was to point to what I believed to be the legal position with the recovery of damages, that cost of care is, generally speaking, limited to the commercial cost, for reasons of -- in effect for reasons of policy, and if it not be the case, then the answer to your question is much easier. But if it is the case, then there is an issue whether parity requires us to follow the same approach in a compensation case scheme such as this.

Not to do so would mean, if one went along the loss of earnings route, that there would be considerable disparity between what individuals in this scheme would receive for -- in relation to exactly the same care each of them has had.

So anyone who needed five hours care a week, it doesn't matter what it is, some will find it is limited to commercial rate because their carer wasn't in work, whereas others might be receiving very large sums of money indeed because, for the reasons you mention, it was not unreasonable for them to give up their job. So that brings with it its own set of problems.

SIR BRIAN LANGSTAFF: Yes. At Common Law -- I mean, I appreciate we're talking about a scheme not Common Law

but you are using Common Law as the comparison --
A. Yes.
SIR BRIAN LANGSTAFF: -- it comes down to what the principle actually is when it comes to --
A. Yes, and I would accept that probably the principle is not immutable, let's put it that way. But my understanding would be where it is at the moment.
MS RICHARDS: The next few questions deal with aspects of -- arising out of how things are approached in Common Law claims.

Where individuals are claiming ongoing future financial losses using multiplier and multiplicand, how would you propose the scheme would look at life expectancy? Would there have to be bespoke medical expert evidence for each applicant or consistent with the more rough and ready broad-brush approach, would it be a question of really taking the statistical average life expectancy?

A. I would have thought the latter.
Q. The second question was the extent to which there might be scope for a "lost years" claim in the scheme.
A. Yes. I have not included such a recommendation. Of course it would be possible. It is -- I think it always has been -- somewhat controversial --I mean, it's accepted in damages claim. It, by definition, is

not something which is for the benefit of the infected person. It is a sum of money which, if awarded, would, by definition, be distributed to the dependents of the infected. And I didn't put this in the report but, I mean, I confess I did consider that, the "lost years" issue, and I felt that, in relation to a scheme, it was probably a step too far and probably, in the whole, unnecessary, bearing in mind it is actually quite a complicated calculation and it is probably an area which involves a degree of speculation about all sorts of things, including someone's earnings in their later years and so on, and often actually produces a surprisingly small amount of money.

So I think for those reasons it seemed to me one of those areas where not having it would reinforce the benefits of speed and simplicity, because the advantages of being able to claim that are probably somewhat limited in the scale of what we are talking about here.

Q. So those factors would militate against its inclusion in the scheme, but militating in favour of its inclusion might be reflecting the Common Law approach and what might be awarded by the court?
A. Exactly.
Q. Next question. If we just go to the report, please. Page 116, please, Lawrence, top of the page.

The reference at the top to "5% above national median earnings". The question is this: do you mean people should get median earnings plus 5% or the 55th centile of national earnings?

A. Could I go back -- could you just remind me of --
Q. Yes, absolutely.
A. -- the beginning of this sentence, please.
Q. It is about increasing the regular payments under the support scheme.
A. Thank you.

Well, I've said 5% not the 55th centile and I think that's what I meant. The purpose of it, which is perhaps more important than the precise figure, would be to seek to be generous in relation to those cases where it was necessary to take or advisable to take, as it were, a standardised figure and might reflect yet again another example of something which is going towards the aggravation, if you like, of this. And also because, certainly in the 9/11 scheme there was a big -- and that was a case involving a lot of very high earners -- sadly many of the victims were very high earners -- and it was thought right to take an average there more comparable to what they were earning but above that, and part of the reason for that was to provide sufficient satisfaction to make it most unlikely that people would

want to sue. And so a similar approach here, perhaps rather less mercenary, in my view, would be to provide people with assurance that this -- a rough and ready approach was one which provided them with a sufficiency without them feeling the need to go the extra mile of demanding much more.

Q. And then if we go --
A. Sorry, let me finish that. What that figure is, whether it is 5% or a 55th centile or whatever, it seems to me might be a matter for economists to debate.
Q. If we go to the next page, please, page 117. The question is this, looking at paragraph 9.99 where you say in the second sentence:

"The assessed future loss of earnings would be calculated by multiplying the predicted annual loss by the number of years the loss is expected to last discounted for acceleration of receipt."

That envisages future loss of earnings paid as a lump sum.

A. Yes.
Q. Were you meaning to suggest that that could be the only way it was paid?
A. No.
Q. So periodical payments would be --
A. But it would be -- as it happened, for reasons I have

never quite understood actually, the practice of awarding -- asking for periodical payments in personal injury cases, it is usually about anticipated costs such as care rather than loss of earnings, and I think the reason for that is largely that many people and their advisers prefer to have the compensation for loss of earnings as a lump sum because they are then free to invest it and use it in ways which provide more benefit to them, because the loss of earnings aspect is that discretionary part of life where you need the freedom of how is it you spend your earnings. Whereas care costs, equipment costs and the like tend to be things you know you're going to need, therefore -- and you know you're going to need them on a regular basis, so it's an aspect of autonomy but it is a matter of choice.

All I'm saying here is if you are providing it as a lump sum, then the well trodden methods of calculating those in personal injury cases should be used.

Q. Then if you have those who claim a higher amount for loss perform earnings on the basis that they would indeed have received more by way of earnings than they are able to establish that to the satisfaction of the scheme, would you envisage if at some date in the future their annual income would have reduced perhaps because of retirement that it would be structured so that they

would then transfer back, as it were, to the regular support payments?

A. Well, obviously if that's -- the calculation would be done as you say, it should be responsive to predicted either increases or decreases in salary at today's values, and -- but that figure, the loss of earnings figure, essentially would have a -- whether you were going to go down the periodical payments route or the lump sum route, you would work out on an annual or periodic basis what the loss was for each year, for instance, you would then deduct from that, at that stage, the support payment, which might either be the same or less than. If it was more than, then the award is nil. You would then take that as a figure to which you would apply the discount for acceleration of receipt if you were providing a lump sum, or if it's a periodic payment it would be the balance that you would be awarding. I don't know how clear that is, but I think the situation.

Q. The next point is in fact not a question but a point, so I will just make the point, if I may, as I have been asked to.

Your report -- I don't think we need look it up -- it's paragraph 9.28, page 101, gives the maximum general damages award as currently being a particular figure.

A. Yes.

Q. 344,640.

A. It may not be that now.

Q. No, exactly. The point is it's now, I'm told, 403,990. If you upgraded that further by RPI to today, it would be 441,000-odd. So that's a point I think rather than a question.

A. No, that would be perfectly correct, yes, but I can't re-write the report every week.

Q. No.

The next question looks at the way in which there might be an assessment of the awards in relation to stigma. So the social impact award.

One of the factors that you identified was the length of time that people were subjected to stigma. Might it also be relevant to look at the intensity of the stigma and also the particular period of time during which individuals experienced stigma. So the daubing of houses in the '80s, for example, might not be reflected in terms of what people have experienced in the 2010s.

A. I think that would be difficult. Part of the reason I have already mentioned, a stigma is inflicted and suffered, if you like, in very different ways by different people but is serious nonetheless. I accept that there will be a specific cases where very specific

awful things have happened to people, but there are also cases where those things haven't happened, where, firstly, they may fear them happening and, secondly, where their experience of stigma is very deep indeed. Some people, on the other hand, may be more resilient to that sort of thing than others -- they shouldn't be penalised for that.

It is an area, if I may say so, like bereavement. To distinguish between the various types of stigma people had would be highly distressing, in any event come to a figure which everyone would think of as artificial, and that's why I rather thought it would be better -- it is a strong case here for having a standardised figure of -- albeit reflected by the length of time. I appreciate that means that some people may feel the sort of awful situation you described hasn't been taken into account, but I just feel that's the justice of it.

I think this isn't something that a court would ever have to grapple with -- no doubt judges will be grateful for that -- but there are potential comparators because damages are awarded for unlawful discrimination, for instance. But I think this is an area where, in a sense, the community as a whole might feel, and I can't obviously speak for them, that this is a shared

experience, admittedly -- covered a little, somewhat, by the length of time they suffered the stigma. That's my view.

Q. Loss of chance to have children, which you've identified as something that could be part of the social impact award, is that a loss which could, in principle, could be claimed by an estate?

A. Yes.

Q. And the evidential basis then would really depend upon what information was available about the family circumstances?

A. Yes.

Q. The next question reflects the accounts of individuals. Diagnosed with hepatitis C, said to have cleared it or not to have much to worry about, their liver function tested normal, but then they are in due course discovered to have liver cancer. The first question arising out of that: does that not support the right of the individual to choose a provisional award?

A. It does. I think we discussed the pros and cons of that.

Q. Yes. But the second is this, would it suggest that the amount -- and you suggested a figure of 10,000 per annum that would reflect a range of different costs -- but that an express element of those costs the scheme could

compensate might be the cost of private precautionary regular six-month liver scanning?

A. It might. I personally would be concerned if such scanning, if it is clinically necessary, was not being provided for on the NHS.

Q. Unfortunately that is a narrative the Inquiry has heard.

A. Well, maybe the Inquiry might wish to make an observation about that. Because I have said -- I mean, clearly, clinically necessary treatment and screening should be made available free of charge to this group of people. Then if that's not done generally, then it should be done as part of the compensation scheme.

Q. If as a consequence of infection, in order to be able to have a family, families had to go through IVF and incur the costs of IVF privately, is that something which should be recognised and compensated for under the scheme?

A. Assuming that case is made out, I would see that as being a financial loss, yes.

Q. In relation to again the stigma element of the social impact award, would a factor that might fall to be considered as part of that, a recognition of stigma surrounding childlessness where that has resulted from infection?

A. Well, I think the effect of childlessness would be reflected by whatever the award might be for the loss of opportunity to have children.

Q. Then the next is again a reflection of an experience of an individual but not a unique reflection, so someone who is themselves infected and who lost siblings to infection. The question -- and I'm going to read it out as given to me because I think it is powerful -- is this: why is there no category for as an adult watching your adult brother die horribly of the same infections you have and having to wonder why him and not me and when will it be me and I don't want to die like that? That's the first question. And the follow-up is: should that be a specific factor that could be taken into account in the injury award for an infected person?

A. Well, what you describe there is the effect of suffering of an infected person is having on another member of the family, a sibling, and they are affected by that and I would have thought that that would -- they may well have an entitlement in relation to their own infection, they are also an affected person, so that --

Q. This is in adulthood --

A. It could still come within (f). I mean, subject to the evidence and fulfilling those requirements. But the reason for having (f) on my list was to cover

a multitude of cases. The one thing I think people probably ought to understand, it is quite impossible, even if I had had two years to do this, or, if I may say so, as long as Sir Brian has to do, to describe every single circumstance that might cover compensation or might be covered by compensation. One has to have, in any event, broad categories. The choice you then have to make is whether you have a bespoke assessment in every single case or you put these together to provide some sort of broad justice and -- but certainly the example you provide, I would expect that suffering to be recognised as being the suffering of someone who is an eligible affected person, probably in category (f).

Q. In the case of two parents who have lost children, would each be able to claim the full amount of the appropriate award? If we leave aside -- bereavement would be a single award.

A. The bereavement would be a single award. The Fatal Accidents Act equivalent would be one award which would be distributed to dependents in accordance with a process, which can lead to dispute. But there is one award arising out of the death of the individual. How the proceeds of that award are divided then becomes a matter either of the Fatal Accidents Act or the dispositions made under the will or an intestacy.

Q. But would it be right to understand that each parent might be able to make a claim as an affected person for the injury, social stigma and autonomy awards?
A. Yes, exactly.
Q. How should the scheme deal with the situation where parents have divorced and may no longer be in contact and there may be a degree of acrimony perhaps because of the appalling experiences that they have suffered?
A. Are we talking about a living infected person or a deceased infected person?
Q. I'm afraid I was asked the question in those general terms.
A. Where they have their own potential claims as an affected person for whatever time they were in contact with their child, they have a potential claim as bereaved parents, for instance. And -- but again, and it's unhappily not uncommon in the personal injury world where parents have separated, there can be a bit of a dispute about who gets what. But that has to be sorted out and there is a limit I think to how far the scheme can intervene in adjudicating on what are in effect matrimonial or other family disputes.
Q. That would militate in favour of I think the point we touched on earlier, which is where there is a scheme arising out of -- sorry, where there is an application

and there may be other family members --
A. Yes.
Q. -- who might also have a claim or where there may be questions of allocation in terms of a dependency or --
A. Yes, it's best to deal with them all at once, so far as is possible.
Q. And important for the scheme trying to be proactive in then that regard?
A. Yes. And I think it would be very important, wouldn't it, for when someone comes forward with that sort of claim that every step is taken to ensure so far as possible that all potentially interested people are contacted so that there is a full set of information and, you know, one would expect whatever the circumstances, for instance, of a separation that a separated spouse would draw attention to the fact that there is separate -- another spouse in the background.
Q. Next question relates again to hepatitis B but in a slightly different way. A person who has contracted hepatitis B from blood products or blood, not in the serious category that you've described but someone who was not informed about the risks of transfusion or products, would they not -- should they not qualify at least for the loss of autonomy award if nothing else?
A. I have a little difficulty with that on the basis that

I imagine every single person who received blood or blood products, whether infected or not, has been deprived of that degree of autonomy because they were not warned of the risks. I'm not sure that of itself is a reason for including them in the category.
Q. The next question is this: should the scheme reflect the particular difficulties for those infected as children to reflect the inevitable consequences for them of infection on the entirety of their lives, growth, development, education, social development and so on?
A. I would hope the scheme would do that. I mean, there are a variety of circumstances in which infected people will have been suffering for various lengths of time but, clearly, someone infected in childhood by definition will be infected for a very long time and that is something which, in my understanding of it, would play into how severe the condition is.
Q. Can I then just go back to the issue of vCJD, and recognising you were not suggesting that risk of vCJD alone should qualify for an award, as I understand it.
A. No.
Q. We discussed yesterday the particular significance of being told that you were at risk or might be at risk of vCJD for those already infected, who may of course have received previous assurances that risks to them were

small, so for them it is a potentially more problematic issue because they have a unique experience of risk.

I'm asked to suggest to you that that, combined with the way in which people were informed about the existence of the exposure to vCJD, and I appreciate you may not yourself have seen the evidence in relation to that, coupled with the fact that many patients, as the Inquiry has heard, were told that they were regarded as high risk, they had operations cancelled, put to the end of the operating list, treated in a different manner, would you accept that those kind of factors could and should be taken into account through the existing awards that you have identified: the injury, social impact, loss of autonomy awards? Perhaps in particular the loss of autonomy awards?
A. I think I have said that the sort of appearance over the horizon, if you like, of the vCJD risk in relation to those who are infected with hepatitis C or HIV can be dealt with in that way.

But if you are suggesting or it is being suggesting that there is some freestanding entitlement for someone who has been warned of such a risk but has no other injury, then I would not be with that.
Q. No.
A. But I think that if -- I mean, the experience that

people have of not having symptoms then being diagnosed and then informed often late in the day of hepatitis C or HIV and then on top of that being told about vCJD is actually an element of the suffering they are getting from the first two, and I think to try to separate out and discount the vCJD bit would be artificial.

Q. Thank you.

The next topic, services that would otherwise have been rendered by an infected person to an affected person but which by reason of the infection they cannot, and that might be parenting services or it could be a range of other services, we touched on that in the context of a dependency claim but should such an award be available also where in life the infected person has been unable to render those circumstances?

A. Well, I would say part of the consideration generally of the injury impact award will be a consideration (screen freezes) includes an inability to enjoy and provide parenting, that's something that I believe should play into that of the injury element of the award. I mean, if you are suggesting that there are then financial costs, in terms of replacing parenting, and I imagine -- I would imagine not many cases, there are some that may be so, it may be that could be a financial loss but I think it has to be one or the other. Most of it will

be the impact on the individual of being unable to enjoy and provide parenting -- and I have seen descriptions of that -- in the normal way.

Q. Next question is about the operation of the scheme. You said today it must be a scheme that people trust. You said that was a feature essential to the scheme. Given what you and the Inquiry have learned about the scepticism the infected and affected have in terms of trusting in officialdom, is the idea of a collaborative approach whilst understandable in principle somewhat unrealistic for this community without at least the involvement of trusted lawyers?

A. Well, I'm sorry, choices have to be made I think here, and I appreciate any scheme has to earn that trust from a pretty low starting point, but I have sought to propose a means by which that can be done. I mean, inevitably apply trusted lawyer or no, there will be arguments about entitlement, whoever is running the scheme and there will be incidents of complaints being made. That's why there needs to be an appeal system.

I don't think it automatically follows that every individual needs to have, as it were, their legal adviser at their side at all points, as it were, in this process, and that may be a matter of choice, but what you are really asking actually is whether that should be

funded.

Q. Yes.

A. And my issue around that is the extent to which that is a reasonable thing to expect the fund to do, and I have given my answer there. It is a reasonable thing for the fund to be expected to do in cases where it is proper for a -- complicated and requires a lawyer. But I'm rather hoping a lot of this will be sufficiently simple for people to understand. They might need lawyers at a point but not, as it were, continually. I do understand it all depends on a scheme like this being fairly run, collaboratively run and having the support services available within it that I have described.

Q. And then --

A. Can I just add to that? And I think the proof that something like that can be done is actually potentially provided by not the English support scheme but by what I have heard about some of the other schemes.

Again, I'm not suggesting I have heard they are perfect in any way but I was struck how, in some cases, there appeared to be a level of trust and confidence in the people running those schemes which made it much easier for things to be done in a collaborative way.

Q. A further question about support services or what might be available. Where significant lump sums might be

awarded, do you consider a recipient should have access to independent financial advice to manage their investment?

A. I don't think that would be unreasonable. I mean, it is quite near the borderline. I simply say because in personal injury litigation, as you will know, sir, the cost of investment advice and so on is only usually recoverable on the part of claimants who are mentally incapacitated or children, where there are particular responsibilities for ensuring the safety of the fund. Generally those who receive a large award of damages do not get an extra element for financial advice.

But part of the issue in many of the cases I have heard about, the infection itself and the injury caused by it has in itself caused a challenge in obtaining even financial services of any description and so I think there may be a case here of a degree of financial advice to be provided.

Whether that should be as it were a constant advice may be a different matter, but I think you are right in principle that some recognition of the need for support, at least in the first instance, "What am I going to do with this large sum of money?", would not be unreasonable.

Q. Then returning to an issue I raised earlier today about

aspects of the law in Scotland.

If the purpose of the scheme is, as you indicated, in part at least the need for an applicant to go to court, wouldn't it be necessary for the highest common denominator approach be taken to damages, as otherwise, for example, Scottish claimants might still need to go to court to get the full amounts that might be available to them at law?

A. If it's my opinion that matters, no. I believe the fairness of -- the parity between all these people who have been injured by -- in an avoidable way by an agency of the UK government should receive compensation based on the same criterion.

Q. The suggestion is not, I think, that those in Scotland should receive a higher amount but that the amount should be set by reference to the highest amount?

A. Well, I think, as I said, those setting the amounts should have regard to what happens in Scotland, but I think they also need to have regard to the fact that this scheme, if it follows my recommendations, would be awarding items that can't be awarded in Scotland or in England, so there is some give and take involved here about what is reasonable.

Q. Lastly, I'm asked to illustrate and invite your comment on what might be said to be the importance of

a financial loss claim for an affected person who might have suffered diagnosable psychiatric injury.

Here I'm going to just read out the description. It is a description of an individual case but, again, it is not alone, based upon the Inquiry's knowledge.

Will there be any recognition or recompense for the financial losses of parents caused by the impact of their child being infected and dying, the need to have to move to escape stigma, loss of job, change of working patterns to enable them to cope with caring, marriage break-up caused by stress and strain of caring for an infected child and loss of child?

I think your answer, in terms of your recommendation, is that there is no recompense for such financial losses. Is that fair? Is that just?

A. Sorry, I ask, is that the result of my recommendations? We are talking about parents who are -- of children?

Q. Yes.

A. Who have been directly -- sorry, affected by --

Q. We are talking about the financial loss claims. So obviously they would be able to claim injury awards, social impact awards, autonomy award. But their child died, in some cases children died, but no financial loss that they would be able to bring, leaving aside the possibility of care claim.

A. Well, what you say is obviously a very serious case, and I appreciate that. I have heard such cases. The difficulty is at what point again do you draw a line around this, and the thing is if this scheme encompasses every single hard case, when you talk about hard cases, we might as well go to the Republic of Ireland scheme, and the trouble with that would be some of this would just not be recoverable at all. So you either -- this is a scheme which is -- I'm trying to produce something which does its best to cross the whole range of people here. I may have failed. I may have failed. But I'm trying to create something or suggest something which is completely new, which is going beyond in some ways what people aspire to get in legal proceedings, and at some point -- fortunately it is not me that has to make the decision -- a line has to be drawn, if you -- those who listen to this and say what you say, a line has to be drawn there, well, then a whole range of financial losses suffered by people who have not been infected themselves could conceivably come in. Where that stops makes it quite difficult to know where this fund stops.

I think, difficult though that is, we may be exposing some of the, as it were, gaps in our legal system generally in terms of damages, but it is not every form of loss that is recoverable in Common Law,

and I'm not sure this would, although -- so that's the way I put it. I can't put it any -- but please I hope no one believes that I lack sympathy with the point you make.

MS RICHARDS: Sir, those are the questions I'm proposing to ask from those that have been suggested to me.

SIR BRIAN LANGSTAFF: Yes, well, I just have this one area to ask you about.

Let us assume for the purpose of this question that the government does not respond as it might to the interim payment suggestion, nor does it respond to the suggestion made in the course of today's proceedings that there might be a shadow legal panel and a shadow medical panel and some form of shadow administration ready to go.

A. Yes.

SIR BRIAN LANGSTAFF: If there were not, then it would take some time presumably to have those panels be chosen, meet, come to decisions and have the government consider and then accept those decisions, if the government was still involved and hadn't divested itself of its -- hadn't created a fully independent scheme already.

Then you have the problem of the fact that the door's open but there is a huge crowd of people, all of whom, let us suppose, have been recipients of the

support schemes thus far, together with a group who have not. And all are seeking an award which, to some extent, is set out in accordance with your scheme on a tariff basis but, on the other, is assessed with the possibility of internal review should the assessment not satisfy the claimant and appeal should it still not satisfy the claimant.

How long would such a process generally take?

I'm going to ask you in a moment to compare it with how you think, from your knowledge of the Irish scheme, the same number of people will be dealt with under that scheme. These have to be very broad-brush estimates.

A. One reason it's not possible fully to answer your question, sir, is I certainly don't -- have not been able to establish, and I don't know if it is possible to establish, how many -- the base point, which is how many infected people there are. I am sure it is known how many infected people there are who have been eligible to the scheme, to one or other of the support schemes, which would be a starting point, but what I don't think is establishable -- it may be by your Inquiry, I don't know -- is even an estimate of how many others there are out there who are unknown about.

But it may be possible to produce a figure and -- with a bit of estimation as to how many primary

claimants, whether alive or now deceased, there are and from that it might be possible to make an estimation. Again, it would have to be averages on how many eligible affected people there are.

I did give the example from the vCJD trust where there was one case reported by the trustee where they were looking at 88 eligible people in relation to one claimant and one -- that impressed me sufficiently in relation to having -- feeling there needed to be some care about the drawing up of who is eligible as an affected person.

So I think it might be possible, but beyond my knowledge, to still come up with a number, roughly. The experience of the Irish scheme is that -- and it affects -- several hundred cases a year are processed out of some thousands, and the scheme has now been going really quite some time. Obviously it is a question of what resource was put into the scheme, how quickly one does this. But it would seem to me that any sensible administration setting this out would need to understand that this has to be a front loaded event. The staff and the resources you need at the beginning are going to be considerably greater than they will be later on.

But, certainly there will have to be a queue and that does give rise -- well, firstly, it does give rise

to another issue about, in addition to the immediate interim payment I'm suggesting now, whether there should be a process of interim payment further down the line. Which there could be. I haven't suggested that but there's no reason why you couldn't do that. But that in itself then adds another layer of process to what you do, and so it will take time.

But one has to consider the alternatives, and the alternative is no scheme at all and leaving people to their own devices, and that is, no doubt, even less desirable in terms. Some might have litigation prospects, some might not. Whatever those are, that would undoubtedly be a longer process than any compensation scheme would offer.

So I think -- I haven't answered your question directly as to how long because the simple answer is I don't know because it depends on the number of variables, but it is undoubtedly going to take a long time.

SIR BRIAN LANGSTAFF: Well, you've, I think, given a sense which, coupled with the way I put the question, suggests it would not be a particularly short period.

If that is right, then that would seem to argue very strongly, if one wants to achieve results quickly, and I throughout this Inquiry have wanted to achieve what

can be done as fast as is reasonably possible, consistent with being sufficiently thorough, if it is to be done quickly, then that would argue quite strongly, would it, in favour of the interim payment scheme, quick to administer scheme, as you tend to suggest, and also the establishment of arrangements in readiness, if I put it broadly like that, for whatever scheme the government thinks it ought to adopt?

A. It also suggests I think the need for -- so far as is possible being consistent with fairness, to have -- to minimise the amount of assessment required in individual cases and the application of broad figures. In other words, to make it as easy as possible, therefore as quick as possible, for a determination to be made for those who want that determination to be made quickly, both not just as a matter of interim payment but also a more final one.

SIR BRIAN LANGSTAFF: You said earlier, I think in the course of your answering questions, that if you wanted to explore every complexity to get it absolutely right and be sure that you had, you would take two or three years -- I think you intended to say three, but you said two --

A. I did say two, but as I -- I may have said three as well. But I have said this is, personally, I find,

extraordinarily difficult, because only one has to listen to the stories I've heard and the ones that counsel has just put, and of course you think: where do I fit that into a scheme? Should it be fitted into a scheme? But every such case and the detail it brings with it, insofar as it brings another complication to the picture, may deprive loads of people and others of a simpler and slightly more generous solution.

I'm afraid I can't see a way round there being a degree of trade-off in any solution we come up with.

SIR BRIAN LANGSTAFF: So what you are saying is there is, as you see it, an inevitable compromise between the need to get things done quickly in order to deliver a just solution and the desire for complete accuracy in individual cases, which inevitably would take longer?

A. Yes.

SIR BRIAN LANGSTAFF: I see. Thank you very much.

A. Thank you.

MS RICHARDS: Sir Robert, is there anything further that you wanted to add?

A. Well, only to reflect on and express my gratitude for the help I received from so many people who are here today and may be listening and who are not. And, as I said in my report, the cost to them of co-operating with yet another Inquiry, as they would see it, into

something which might raise expectations which they have -- probably wonder whether they will be met or not, and I have every sympathy with that and, of course, with the tragedies that so many have suffered. And I hope that nothing I have said indicates anything other than I have the deepest respect for everyone involved and their dignity and their willingness to help and, of course, for the suffering they have had.

SIR BRIAN LANGSTAFF: If I'm not much mistaken, I think you have earned the dubious distinction of being the person for whom Core Participants' questions have taken the longest time yet to assemble. I think the right way to look at that is actually that is a reflection of the interest which your evidence has given and your work, and I think anyone who has listened would have understood the great care, and difficulty, of the task which you undertook and which you have explained and which myself -- you have given me quite a lot to ponder, as I suspect you have given all of us quite a bit to ponder, and I just want to thank you very much indeed for coming to do that.

A. Not at all, it has been a privilege.

MS RICHARDS: Sir, tomorrow we have the evidence of Rowena Jecock.

SIR BRIAN LANGSTAFF: Thank you.

Rowena Jecock tomorrow at 10 o'clock.

(4.31 pm)

(The Inquiry adjourned until 10.00 am on Wednesday, 13 July 2022)

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