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Rm 161A

DEPARTMENT OF HEALTH

FAX MESSAGE

TO: R. G. TUCKER Rm 161A.

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ACTION LATEST DRAFT of HIV HAEMOPHILIA
LITIGATION MAIN SETTLEMENT AGREEMENT
PLEASE NOTE, THIS IS NOT THE FINAL
VERSION (BUT I UNDERSTAND IT IS CLOSE TO
A FINAL VERSION)

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22.4.91

cc Mr. Condon
Mr. Savage
(Dr. Zjma. Cat a
copy already)

Re: HIV HAEMOPHILIA LITIGATION

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THE MAIN SETTLEMENT AGREEMENT

(For the avoidance of doubt the term "haemophiliac" in all cases includes sufferers from Von Willebrand's Disease.)

1. (1) A Trust to be called The Macfarlane (Special Payments) (No.2) Trust will be established for the purpose of paying the following sums as soon as reasonably possible to each category of infected haemophiliac intimates or Category G Plaintiff:

(i) Infant	£21,500 each
(ii) Single adult	£23,500 each
(iii) Married adult without dependant children	£32,000 each
(iv) Haemophiliac with dependant children	£60,500 each
(v) Infected intimates:	
(a) adults or married infants	£23,500 each
(b) unmarried infants	£21,500 each
(vi) Category G Plaintiffs	£ 2,000 each

and for this purpose the Department of Health will provide the Trust with a sum of £42 million.

(2) The definition of each of the categories is as follows:-

1. Infant - a haemophiliac under 18 years old on 13th December 1990 or if deceased by that date then under 18 years at the date of death who has been treated with cryoprecipitate, Factor VIII or Factor IX and has become infected with HIV, whether or not such infant has yet developed AIDS. For the avoidance of doubt, all those Plaintiffs whose code numbers and details are set out in Part 1 of Schedule One hereto plus all those deceased haemophiliacs whose code numbers and details are set out in Part 2 of Schedule One hereto shall be deemed to fall into this category.

2. Single adult - a haemophiliac who on 13th December 1990, or if deceased by that date then at the date of death, was 18 years or over and was unmarried, divorced or widowed with no dependants who has been treated

with cryoprecipitate, Factor VIII or Factor IX and who has been infected with HIV, whether or not such adult has yet developed AIDS. For the avoidance of doubt, all those Plaintiffs whose code numbers and details are set out in Part 1 of Schedule Two hereto plus all those deceased haemophiliacs whose code numbers and details are set out in Part 2 of Schedule Two hereto shall be deemed to fall into this category.

3. Married, but childless -

a haemophiliac without dependent children who on 13th December 1990, or if deceased by that date, then at the date of death, was married, divorced with a dependant former spouse, or over 18 years old and living with a partner, and who has been treated with cryoprecipitate, Factor VIII or Factor IX and has become infected with HIV whether or not such adult has yet developed AIDS. A list of all Plaintiffs and deceased haemophiliacs falling

within this Category is set out in Schedule Three hereto together with the name of their relevant spouse or former spouse or partner. For the avoidance of doubt, those haemophiliacs whose code numbers are set out in Schedule Three shall be deemed to fall into this Category and those haemophiliacs whose action numbers are set out in Parts 1(b) and 2(b) of Schedule 3 hereto shall be deemed to have been living with the partner there referred to on 13th December 1990 or on the date of their death if earlier.

- 4. Haemophiliac with children - a haemophiliac who on 13th December 1990, or if deceased by that date then at the date of death, had dependant children, (which expression shall include cases of haemophiliacs with children conceived before 13th December 1990 but born thereafter) who has been treated with cryoprecipitate, Factor VIII or Factor IX and has

become infected with HIV whether or not such person has yet developed AIDS. At Schedule Four hereto is set out a list of Plaintiffs and deceased haemophiliacs in this Category, together with the details of the persons who on 13th December 1990 or on the date of their death if earlier were:

(a) the spouse or former spouse of such Plaintiff or deceased haemophiliac;

(b) the partner of such Plaintiff or deceased haemophiliac;

(c) a dependant child of such haemophiliac.

For the avoidance of doubt, all those Plaintiffs and deceased haemophiliacs listed in Schedule Four hereto shall be deemed to fall into this category.

5. **Infected intimates** - those Plaintiffs who have issued and served Writs prior to 13th December 1990 and who fall within Category (c) and (d) as set out within paragraph 2 of the Re-Amended Main Statement of Claim and/or whose action numbers are set out in Schedule 5 hereto.

6. **Category G** - Plaintiffs who have issued and served Writs prior to 13th December 1990 and who fall within Category (g) as set out in paragraph 2 of the Re-Amended Main Statement of Claim and/or whose action numbers are set out in Schedule 6 hereto.

(3) For the purpose of this settlement:

(a) "dependant children" means children under the age of 18 and adult children in full-time education, and:-

(i) includes a child conceived at the date by reference to which entitlement to a payment is determined and subsequently born alive;

(ii) includes an adult child whose full-time education has been interrupted for a period or periods of not more than one year; and

(iii) does not include an adult child whose full-time education is provided by his employer as part of the terms and conditions of his employment or an adult child who during his full-time education receives payments from a person or body with whom he has undertaken to work on completion of his education;

(b) "living with a partner" means living:-

(i) as the husband or wife of that person, and

(ii) in the same household as that person.

(4) Where an infected haemophiliac or intimate has died prior to the date hereof, the appropriate sum as set out in paragraph 1(2) above will be provided to the new Macfarlane Trust for the purpose of paying such sum to their personal representatives for the benefit of the estates and dependants under The Fatal Accidents Act of such deceased person and the relevant payment shall be made by such

personal representatives in accordance with the provisions of Schedule 7 hereto. In the event that no personal representative has been appointed prior to 1st May 1991, the following provisions shall apply:-

- (i) where there is a current living Plaintiff to the action, the payment shall be made to that person;
- (ii) where there is no living Plaintiff, but a surviving spouse of the deceased haemophiliac or intimate, then the payment shall be made to that spouse upon the spouse undertaking in writing to the Macfarlane Trust to pay such sum in accordance with the provisions of Schedule 7 hereto;
- (iii) in any other case, no payment shall be made by the Macfarlane Trust until a personal representative has been appointed.

(5) For the avoidance of doubt, except in the case of Category G Plaintiffs, no person or their estate and/or dependants, shall be entitled to be included in more than one of the above categories (other than in the capacity of a personal representative or dependant of a deceased haemophiliac or intimate).

(6) In the event that the numbers of qualifying persons in

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Categories 1 to 6 above is such that the sum of £42 million is insufficient to provide for the making of the relevant payment to each of them, the First Central Defendant will pay to the new Macfarlane Trust Fund sufficient additional sums to make similar payments at the rates set out in paragraph 1(2) above to each qualifying person.

(7) The above payments will be made to :-

- (i) all plaintiffs in the existing co-ordinated arrangements whose reference numbers are set out in the Schedules hereto, and
- (ii) any other haemophiliacs infected with HIV through treatment in the United Kingdom with Factor VIII or Factor IX (whether cryoprecipitate or concentrate),
- (iii) HIV infected spouses or partners or former spouses or partners of haemophiliacs in paragraph (i) above provided that the names of such spouses or partners are included in Schedules 3 or 4, and
- (iv) any other HIV infected spouses or partners or former spouses or partners of a haemophiliac referred to in paragraph (i) or (ii) whether or not such spouses or partners

are plaintiffs in the existing co-ordinated arrangements, provided that such person was infected through their haemophilic spouse or partner before the 13th December 1990.

x
x

Provided that in the case of (ii), (iii) and (iv) applications made to the new Macfarlane Trust before 31st July 1991.

(8) The provisions of the new Macfarlane Trust will also apply to the following categories of persons who have not as yet been informed that they are HIV positive:-

- (1) any haemophilic who by 13th December 1990 had not been tested for HIV and who upon first testing is found to be HIV positive and who would otherwise be eligible under one of the sub-categories set out at sub-paragraphs 1(2) 1 to 1(2) 4 above;
- (2) the spouse of a haemophilic within sub-paragraph (1) above and any person who on 13th December 1990 was the spouse or widow of a haemophilic who had already been diagnosed as HIV positive by that date and any spouse, former spouse or partner whose details are set out in Schedule Three or Schedule Four hereto, provided that such person has either not previously been tested for HIV or has been tested and found to be HIV negative, and who after 13th December 1990 is tested and found

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to be HIV positive and who would otherwise be eligible under 1(2) 5 above;

(3) the child of a haemophiliac (who is not presently a plaintiff in these proceedings) who has been born or conceived before 13th December 1990 and who is found to be HIV positive (other than with passive antibodies) within five years from 13th December 1990 or within five years of birth, whichever is the later;

(4) any person who has been diagnosed as HIV positive, but has not yet been informed of that fact, and who would otherwise be eligible under one of the sub-categories set out in sub-paragraphs 1(2)1 to 1(2)4 or 1(8)2 above.

Provided that such persons apply to the new Macfarlane Trust within a period of twelve months from their first becoming aware that they are HIV positive or within five years of 13th December 1990. (or in the case of infected spouses and intimates before 31st December 1999) whichever is the earlier, then they shall be entitled to the appropriate payment for the category into which they fall as set out above provided that they satisfy the new Macfarlane Trust and the Department of Health that they fall within that category and provided that they sign an undertaking as set out in paragraph 8 below. The First Central Defendant will

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pay to the new Macfarlane Trust such additional sums as may be necessary to permit the Trust to make such payments to such persons. For the avoidance of doubt, references to those who "upon first testing are found to be HIV positive" means those who are correctly so found, disregarding false positive and false negative tests.

(9)(1) Those Plaintiffs in respect of whom the Defendants have not been supplied with the documentary material evidencing the category of payment which is appropriate for them by 17th April 1991 are shown with an asterisk in the Schedule relating to the category which such Plaintiff's solicitor has asserted as appropriate.

(2) In each such case, the Plaintiff will supply such material to the First Central Defendant's solicitors as soon as possible and by 30th April 1991 at the latest.

(10) Those Plaintiffs in respect of whom the First Central Defendant has not yet accepted that they fall within the category claimed are shown with a # sign in the Schedule relating to the category which such Plaintiff's solicitor has asserted as appropriate.

(11) The Plaintiffs and First Central Defendant will use their best endeavours to agree the appropriate category for

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such Plaintiffs as soon as possible and by 30th April 1991 at the latest.

(12) In the event that the category of a Plaintiff cannot be agreed between the parties, or that any Plaintiff or the First Central Defendant wishes to assert at any time prior to 31st October 1991 that a Plaintiff has by error been placed in the wrong category, the issue of the category to which that Plaintiff properly belongs shall be tried by Mr. Justice Ognall whose decision shall be final and binding.

2. The sum of £42 million will be paid not later than 30th April 1991.

3. The Secretary of State for Health will procure that there are laid before Parliament regulations providing that sums received from the new Macfarlane Trust will be ignored in assessing entitlement since 13th December 1990 to social security benefits of the beneficiaries of the Trust and certain others, so as to implement the assurance given by the Secretary of State for Health in Parliament on 11th December 1990 that payments from the new Macfarlane Trust will not affect entitlement to social security and other statutory benefits. The Secretary of State for Health will use his best endeavours to ensure that such regulations having been laid are approved and brought into being.

4. (1) These payments are made on behalf of the First Central Defendants and not on behalf of any other Defendant and are

made without any admission of negligence, breach of statutory duty or other liability. The First Central Defendant maintains its denial of any legal liability whatever.

(2) For the avoidance of doubt the Second and Third Central Defendants are not contributing to this settlement and firmly deny any duty of care owed to individual plaintiffs and any breach of any duty whatsoever.

5. The Plaintiffs will discontinue their actions against all Defendants and will undertake not to bring fresh proceedings against any Defendant or against any other Government Department, Health Authority or treating doctor in respect of the administering prior to 13th December 1990 of cryoprecipitate, Factor VIII or Factor IX, save that:-

(1) those Plaintiffs whose code numbers are set out in Part 1 of Schedule Eight hereto shall be entitled to pursue that element only of these claims which relates to allegations of medical negligence against the relevant Health Authorities provided that they comply with the directions laid down by the Court on 1st March 1991; and

(2) nothing herein shall prevent the Plaintiff from bringing proceedings in respect of the administering prior to 13th December 1990 of cryoprecipitate, Factor

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VIII or Factor IX where:-

- (i) that has caused damage to such Plaintiff which had not been diagnosed prior to 13th December 1990; and/or
- (ii) the damage alleged does not include infection or the risk of infection by HIV and/or the hepatitis viruses.

For the purpose of this settlement allegations as to medical negligence shall be those parts of Sections 7 and 8 of paragraph 92 of the Re-Amended Main Statement of Claim which involve specific allegations of medical negligence in individual cases, as further defined in Part 2 of Schedule Eight hereto.

6. In the event that any Plaintiff pursues claims against Health Authorities for medical negligence, the entirety of such sums as that Plaintiff may receive under the terms of this settlement through the new Macfarlane Trust shall be brought into account in assessing what damages if any such Plaintiff is entitled to receive from the appropriate Health Authorities in respect of the allegations of medical negligence made against such Health Authorities, but only insofar as such damages are awarded in respect of infection or the increased risk of infection of the Plaintiff with HIV or other viruses. For the avoidance of doubt, the fact that a Plaintiff pursues claims against Health Authorities for medical negligence shall not

disentitle or delay such Plaintiff from receiving all sums due to it under this agreement save insofar as set out above.

7. The First Central Defendant will use its best endeavours to secure that sums received under this settlement shall not be taken into account in assessing entitlement to legal aid or any contribution thereto in respect of the pursuance of such claims against Health Authorities for medical negligence and shall not be subject to the Legal Aid Board's statutory charge in respect of costs incurred in pursuing such claims for medical negligence.

8. Any qualifying non-plaintiff shall be entitled to receive benefits from the new Macfarlane Trust corresponding to their circumstances upon signing an undertaking not to bring proceedings against any Defendant or against any other Government body in respect of the administering of cryoprecipitate, Factor VIII or Factor IX before 13th December 1990, save that nothing herein shall prevent a qualifying non-plaintiff from bringing proceedings in respect of the administering prior to 13th December 1990 of cryoprecipitate Factor VIII or Factor IX where:-

- (1) that has caused damage to such Plaintiff which had not been diagnosed by 13th December 1990; and
- (2) the damage alleged does not include infection or the risk of infection by HIV and/or the hepatitis viruses.

9. The First Central Defendants will indemnify the Plaintiffs

against any claim for costs by any other party (other than costs relating to issues of medical negligence which are pursued beyond 30th April 1990 notwithstanding this settlement) and will pay to the Plaintiffs their costs of these proceedings against all Defendants together with interest on such costs from 30th April 1991 until payment at the Judgment Act rate on the following basis:

(1) The proportionate liability of all legally-aided Plaintiffs for the generic costs of the Plaintiffs shall be ascertained in the manner laid down in the Order of Mr Justice Ognall made on 24th July 1989.

(2) There shall be a legal aid taxation of all such generic costs of legally-aided Plaintiffs and all such costs shall be paid by the Legal Aid Fund on the usual basis. The First Central Defendants will give the Legal Aid Fund a complete indemnity in respect of such costs.

(3) The proportionate liability of all non-legally-aided Plaintiffs for the generic costs of the Plaintiffs shall be ascertained in the manner provided for in the order of Mr Justice Ognall made herein on 24th July 1989.

(4) There shall be a taxation of the generic costs of such non-legally aided Plaintiffs on an indemnity basis and the First Central Defendant shall pay the non-legally-aided Plaintiffs' taxed generic costs.

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(5) The taxation provided for under sub-paragraph (4) above shall take place at the same time as or after the legal aid taxation provided for under sub-paragraph (2) above, as the Court may direct or as may be agreed between the Plaintiffs and the First Central Defendants.

(6) For the avoidance of doubt, generic costs shall include all work incurred in and for the co-ordination of the HIV litigation group and all costs reserved from time to time by the Court and shall include the selection and preparation of lead cases.

(7) There shall be a legal aid taxation of the individual non-generic costs of legally aided Plaintiffs and the First Central Defendants will give the Legal Aid Fund a complete indemnity in respect of such costs;

(8) The individual non-generic costs of the non-legally aided Plaintiffs will be taxed on an indemnity basis and will be paid by the First Central Defendants.

10. The settlement will be announced in Open Court and Counsel for the Plaintiffs and all Defendants will have an opportunity in appropriate cases to explain why it should be approved.

11. The First Central Defendants' liability for costs will extend up to but not beyond costs incurred prior to 13th December 1990 (including costs incurred prior to 13th December 1990

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bringing and pursuing claims herein for medical negligence by any Health Authority Defendant) save that the First Central Defendants will pay on the above basis the costs of conveying the proposed Terms of Settlement to the Plaintiffs, their reasonable costs of being advised as to the proposed settlement, the reasonable costs of considering and negotiating the terms of the proposed Settlement and of any application to the Court in connection with the proposed Settlement other than the hearing on 27th March 1991, and the costs of concluding the approval of this settlement and of co-ordinating the obtaining of all documentation and information required within the terms of the settlement in order to carry it into effect. For the avoidance of doubt this will include the reasonable costs of advice prior to 30th April 1991 in relation to issues of medical negligence in the case of those Plaintiffs who subsequently discontinue all proceedings including the consideration of the reasons for rejection of such claims by the Health Authorities but shall not extend to any costs incurred after 13th December 1990 in relation to medical negligence issues by those who pursue claims against the Health Authorities for medical negligence beyond 1st May 1991.

12. The provisions of these terms of settlement will not apply to any person who has already brought proceedings in Scotland or Northern Ireland in respect of the infection of a haemophiliac with HIV through blood products or the consequences thereof.

13. All copies of all documents disclosed on discovery by any

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Defendant shall be returned to such Defendant's Solicitors or destroyed:-

(1) in the case of documents held by Solicitors for individual Plaintiffs within 28 days of the completion of taxation or agreement of costs on behalf of such Plaintiff;

(2) in the case of documents held by Solicitors on the Steering Committee, within 28 days of the completion of the taxation or agreement of the generic costs of the Plaintiffs represented by them or as otherwise directed by the Court pursuant to an application made by any party to the settlement;

(3) in the event of one or more Plaintiffs electing not to enter into this Settlement but to continue with this litigation (other than where the continuation is limited to claims for medical negligence) the obligations imposed by sub-paragraphs (1) and (2) above will be discharged by delivering up such documents to such solicitor or other person as the Court may direct upon application made by any party hereto, save that Plaintiffs pursuing claims for medical negligence against Health Authorities shall be at liberty to retain documents disclosed by such Health Authorities until the conclusion of such litigation. All solicitors to whom documents have been disclosed by any Defendant shall provide such Defendant within the time stated above with a certificate confirming that all copies

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of all such documents have been returned or destroyed.

14. For the avoidance of doubt all parties undertake that they will not make any further use of any information acquired from documents disclosed on discovery in this litigation without leave of the Court or agreement of the party by whom such document was disclosed save for the proper purpose of pursuing such claims for medical negligence against Health Authorities as may be permitted hereunder. For the avoidance of doubt, this paragraph shall apply were lawyers acting for any of the Plaintiffs in the coordinated arrangements are instructed to act in cases concerning HIV ~~infection by blood transfusion or hepatitis infection by~~ blood transfusion or treatment with blood products.

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SCHEDULE EIGHT

PART 2

1. 'Allegations as to medical negligence' means only allegations of negligence which fall under one or more of the sub-paragraphs under Heads 7 and 8 of the Particulars of Negligence under paragraph 92 of the Re-Amended Statement of Claim, save that the allegations lettered (AS), (BF) and that part of sub-paragraph (BP) which refers to such sub-paragraphs shall be struck out.

2. For the avoidance of doubt it is the intention of the parties that:

(a) A Plaintiff is at liberty if so advised to bring or continue proceedings for medical negligence in relation to his clinical management.

(b) In those proceedings:

i) He is at liberty to contend that the Central Defendants as a fact took or did not take certain steps, but

ii) He is barred from contending that the Central Defendants could or should have taken certain steps or could or should not have done.

In other words: A distinction is to be drawn between did and didn't, and could/should.

3. Allegations as to clinical management shall thus be construed so as to refer only to allegations of negligence by the treating doctor or other Authority staff in relation to the treatment, medical negligence and/or counselling of a particular plaintiff or the haemophiliac in respect of whose treatment a "derivative" plaintiff sues.

4. In the event of a dispute between any Plaintiff to a medical negligence action and the Central Defendants as to the pleading of that action, there be liberty to apply to Mr. Justice Ognall for his resolution of that dispute, his decision being final both on the merits and as to the costs of the application.