Witness Name: Justin Fenwick
Statement No.: WITN7067001
Exhibits: None
Dated: 25/05/2022

INFECTED BLOOD INQUIRY

FIRST WRITTEN STATEMENT OF JUSTIN FENWICK

Section 1: Introduction

1. *Please set out your name, address, date of birth and professional qualifications.*

1.1. This is the statement of Justin Fenwick QC of 4 New Square Lincolns Inn London WC2A 3RJ. My date of birth is GRO-C 1949. I graduated from Cambridge in 1971 with a degree in Modern Languages and the History of Western Art. I was commissioned into the Grenadier Guards in 1968, rising to the rank of Major. I qualified for the Bar and was called in November 1980. I retired from the Army and began practice at the Bar in 1981, completing my pupillage in July 1982. I was appointed Queens Counsel in 1993 and remain in full time practice.

1.2. I have prepared this statement based on my recollection of events over 30 years ago, assisted by the documents that have been provided to me. I have not retained any documents from that period and there are clear gaps in the documentary record, but I have sought to set out my most accurate recollection of the relevant events in answer to the questions posed. I do have some considerable recollection of the general sequence of events and some of the core issues but little memory of the details or of the chronology of the AIDS epidemic and the response to it in relation to those suffering from Haemophilia, except to the extent prompted by re-reading the papers provided to me.

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2. *Please provide a brief overview of your career at the Bar, with particular reference to the period up to and including the HIV litigation.*

2.1. I began practice in a common law set, including crime, personal injury and matrimonial law. My then Chambers had a number of individuals on the Treasury Common Law Panel and Supplemental Panel, notably Andrew Collins. As a result, I was from time to time instructed by the Treasury Solicitor. This led, among other work including for the Department of Transport, to increasing work in relation to health and pharmaceutical matters. I was instructed on behalf of a clinician involved with research into whooping cough vaccine in relation to the Pertussis vaccine litigation and then on behalf of the Licensing Authority ("LA") and the Committee on Safety of Medicines ("CSM") in the Opren litigation. This case led to the formulation of early rules for group actions including costs sharing and I was responsible, with Andrew Collins QC and Michael Spencer, for much of the work in devising the rules for group actions subsequently adjusted and endorsed by the Judge appointed to manage the case, Mr Justice David Hirst. That case, in which manufacturers were also sued, involved consideration of whether the LA (acting as such) or the CSM owed duties of care to individual Plaintiffs.

2.2. After the resolution of that case, in which as I remember claims against the LA and the CSM were not in the end pursued, with the manufacturers, Eli Lilly, entering into a settlement to compensate those suffering side effects from Opren on a discounted basis, I was instructed to represent the LA and CSM in the Benzodiazepine group litigation, in which the claims were later abandoned after substantial costs had been incurred, and in relation to the HIV haemophiliac litigation.

2.3. In subsequent years, I continued to act in a number of cases for the DH and government agencies, notably the Aspirin (Reyes Syndrome) litigation, the Human Growth Hormone litigation and the Variant CJD litigation arising out of the BSE crisis. In that litigation, I was responsible for advising on and formulating the detail of the no fault compensation scheme set up to compensate the victims of vCJD, together with the then Leading Counsel for the Plaintiffs, Stephen Irwin QC (as he then was).

2.4. I was also involved for a time in the Nuclear Test Veterans Litigation for the MOD and also acted for Gallaher in the successful defence of the Tobacco Litigation group action.

2.5. In the 1990s, my practice developed gradually to have a closer focus on construction work and professional negligence and for the last 20 years, my work has been mainly in professional negligence involving accountants, lawyers and property professionals and international commercial litigation.

3. *Please set out your membership, past or present, of any committees or groups relevant to the Inquiry's Terms of Reference ('TOR'), which can be found on the Inquiry's website at www.infectedbloodinquiry.org.uk.*

3.1. None relevant.

4. *Please confirm whether you have provided any evidence or been involved in any other inquiries, investigations, criminal or civil litigation in relation to human immunodeficiency virus ('HIV') and/or hepatitis B virus ('HBV') and/or hepatitis C virus ('HCV') infections in blood and blood products. If you have, please provide details of your involvement.*

4.1. No.

Section 2: Initial Instruction

5. *When were you first instructed by the Central Defendants – the Department of Health ("DH"), the Committee on the Safety of Medicines ("CSM") and the Licensing Authority ("LA") – in connection with the HIV litigation? Insofar as you are now able to do so, please provide details of the matters upon which you were initially instructed.*

5.1. It appears from the materials provided to me that I was probably instructed in mid 1988 but I have no independent recollection. I believe, from recollection, that my instructions are likely to have been to act in the defence of the claim as junior to Andrew Collins QC and to consider in particular the legal issues arising out of the

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claim relating to duty of care in respect of each of the Central Defendants, the scope of any such duty and issues of causation. I do not recollect when I was first provided with documents and briefings in order to consider the factual issues.

6. *Who instructed you?*

6.1. The Treasury Solicitor's office, probably in conjunction with the legal department of the Department of Health. I do not remember all the individuals involved, but remember Mr Jayant Desai and Mr Ron Powell and also Charles Blake being involved. After this period of time, the different cases on which I was instructed for DH are difficult to distinguish in terms of personnel.

7. *Did you receive a single instruction, or were you instructed separately by the DH, the CSM and the LA? Was there any material difference in the way in which you were instructed by these defendants?*

7.1. I have no specific recollection but I am clear that I was always instructed to distinguish between the very different positions of the CSM, the LA and the DH. I had already had considerable involvement with the CSM over Opren and had attended meetings with the then committee on several occasions and so was familiar with their role and concerns. The position of the LA was analogous as in general the LA would act on the advice of the CSM and any failure to follow such advice would have been notable in itself. The position of the DH was different, involving consideration of its discretionary policy-making and resource allocation role on one hand and its operational role on the other.

8. *Who were your main points of contact with, (i) the DH, (ii) the CSM, (iii) the LA, and (iv) the Treasury Solicitors ("TSol")?*

8.1. I no longer remember. There were numerous conferences which were attended by multiple lawyers and officials, representing the different client interests. Some of the names of the individuals in the various documents provided to me seem familiar but I cannot say who represented which party. There was, however, a clear divide between the issues involving the CSM and LA, where the legal issues were familiar

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and relatively clear-cut and those involving DH which were more complex and multi-faceted. It is likely that a large part of my instructions were therefore in respect of the position of DH.

9. *To the best of your knowledge, why were you chosen for the case? You may be assisted by the document* ***DHSC0003674_001****, a letter from the Licensing Authority to the Treasury Solicitor dated June 1988, in particular the penultimate paragraph in which the Authority expresses a desire to instruct you.*

9.1. As stated above, I suspect that this was a combination of my involvement with earlier cases involving the CSM and LA and as someone used to working with Andrew Collins QC who was appointed to lead the defence team.

10. *How was the work on the HIV litigation divided between the counsel team? For example, did different members take responsibility for different areas of the case? If so, what were those areas? What was your role?*

10.1. I was the only junior on the team and was therefore involved on a day-to-day basis. Andrew Collins QC was the team leader responsible for giving advice on key issues and strategy, as well as being very familiar with issues involving the role of government from his many years as a senior member of the Treasury Solicitor's common law panel. Michael Spencer QC was brought into the team at some slightly later point, because of the need for input at a senior level and in view of his very extensive experience of medical negligence and pharmaceutical litigation. I believe, but do not precisely remember, that he will have been more involved in the factual, scientific and medical issues, being very much within his expertise.

11. *Did the DH indicate to you whether it had a specific objective in mind when you were first instructed? Did that objective change during the course of your instruction?*

11.1. In this case, as in each of the other cases where I was instructed by some or all of these defendants or by government in relation to group actions, I believe that my instructions would have been to advise on the merits of the claims as a matter of law and fact and to defend them robustly except to the extent that I and/or others

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on the counsel team considered that there was actionable fault on the part of one or more Defendants. However, in the case of the haemophiliacs and subsequently in the case of the individuals treated with Human Growth Hormone who subsequently contracted CJD, there was a real awareness of the importance and sensitivity of the fact that the plaintiffs were themselves blameless victims who had been receiving what was intended to be a life-preserving or enhancing therapeutic treatment which had as a side-effect caused them a dreadful condition which was then believed in each case to be inevitably terminal. Many of the same features existed in the BSE variant CJD litigation, but without the special feature of the condition being caused by treatment with a therapy.

11.2. I recollect that so far as the CSM and the LA were concerned, there was a very real concern to protect their role as not justiciable and not giving rise to a duty of care owed to individuals, which was at that time under strong challenge by certain groups of Plaintiff personal injury lawyers seeking to bring group litigation against them and to establish a duty of care at law, and thus opening up a route to claiming compensation whenever an unexpected side effect developed in a licensed product. This was particularly important in the case of the CSM, which was a body of eminent clinicians who gave up their time voluntarily in order to scrutinise and monitor medicinal products and who had already expressed concern at the impact that a finding of duty would have on the ability to recruit future members of the Committee, even if any liability was indemnified by the DH. The robustness of the licensing and monitoring system was seen as depending on the willingness of eminent practitioners in different fields remaining prepared to give advice independently with confidence that their balancing of risk and benefit, if carried out in good faith, would not subsequently be scrutinised and challenged. The position of the LA was seen as being very much linked to that of the CSM as there was an approach of consulting the CSM on all important issues and of invariably following their advice in the absence of some special circumstance. From recollection, I believe that the point was reserved in the Opren litigation but never tested because of the settlement put forward by manufacturers and the dropping of the claim against the LA and CSM.

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11.3. I have sought here to summarise the key elements of the legal position of the CSM. During these years I became fairly familiar with their method of working and with the monitoring of adverse reactions, although my work was always looking at matters retrospectively and I did not in this period get to know any of the clinicians involved other than at formal meetings.

11.4. The principal objective of the CSM and LA was therefore at all times to protect their position as a matter of law with anticipated further litigation, including the benzodiazepine litigation, in mind. However my instructions on behalf of all Defendants encompassed a continuing review of both legal and factual merits.

11.5. The objectives of the DH were more complex. There was a concern to test and if appropriate to defend robustly the defences based on non-justiciability of policy decisions including in particular issues of resource allocation in order to avoid a damaging precedent. It was considered important to protect this position if proper to do so in order to avoid the risk of a flood of claims in relation to policy decisions and resource allocation. At the same time, there was a recognition that some aspects of the involvement of the DH may be considered to fall into the operational sphere and therefore to be actionable, where the DH position on the facts would be highly relevant. In addition, there was a continuing concern about the plight of the individual plaintiffs and the public pressure on government to make a special case.

11.6. Against this background, so far as I recollect, the objectives which were being pursued were first a robust testing of and promotion of the available legal defences and at the same time a wish to test whether there were weaknesses in the factual position which could give rise to a finding of breach if a duty of care was imposed.

11.7. I am asked to consider whether those objectives changed over time. My perception was that over time, there developed within the DH an increased wish to find a way through which would permit compensation to be paid without compromising the position on either duty of care or the principle that compensation through litigation would not be paid except where fault was established or the DH was advised that there was likely to be a finding of legal liability.

12. *Please describe the general attitude of those instructing you, as you saw it, towards the HIV litigation. For example, would you classify the approach as being particularly aggressive, or in any way unusual? Did you have any concerns about the approach that was adopted by your lay and professional clients? How receptive were your lay and professional clients to the advice given to them by counsel?*

12.1. My general recollection, from dealings with the lawyers and officials with whom I was in contact, was that this case was treated in much the same general way as other group litigation against DH, LA and CSM in this period, save that there was a general recognition of the tragic and fatal consequences suffered by this group of Plaintiffs by comparison for example with Opren and Benzodiazepine plaintiffs. There was certainly a firm view that the legal position on duty of care and justiciability should not be eroded and that such defences should be protected for the future.

12.2. I have no recollection of any attitude which was inappropriately aggressive or defensive. There was clearly some sensitivity as to the complaints made against the Department and the possibility of criticism but I did not discern in this anything different from the anxiety and embarrassment experienced by officials and other professionals when faced with serious allegations over events where they felt strongly that they have acted with proper care. I was not of course involved in the internal conversations between officials but I can say that I was not aware of anything inappropriate in the approach taken by lay or professional clients.

12.3. I always had the impression that the advice given by the counsel team, and particularly by Andrew Collins QC on legal and policy issues and by Michael Spencer on medical and clinical issues, was listened to carefully and broadly followed. I was conscious throughout that there was a particular emphasis on probing our advice in order to establish the degree of confidence with which the advice was given on various topics. Re-reading the papers provided, it now seems likely that this was in part at least engendered by the wish to understand the legal case and its prospects as background to any policy decision to be made by Ministers.

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Section 3: Initial Advice

13. *There is evidence that the Minister of State for Health, David Mellor, was reluctant to argue the duty of care point in the HIV litigation, although he was content for it to be advanced in other litigation* ***[DHSC0041034_009]***.[1] *A minute of 24 October 1989 recorded Counsel advising that this would be a "*very difficult*" position, and proposing a compromise position where the duty of care point was taken in full in respect of the CSM and the LA, but only by the DH insofar as it applied to matters of policy* ***[DHSC0041034_007]***.[2]

a. *Were you the Counsel who put forward this suggestion? If not, do you know who did?*
b. *What was the rationale behind this advice?*

13.1. I do not remember if this suggestion was made by myself or Andrew Collins QC but I believe it would have reflected his view and it also reflected mine. The rationale behind it was that there was a well thought out and reasoned argument against imposing any duty of care on the CSM and/or LA and it was in our view important that that position was maintained in order to discourage multiple further group actions which were properly defensible. Although it might be possible to reserve the position while not taking it as a formal defence in this exceptional case, such a stance would inevitably lead to pressure not to take it in other less sensitive cases and/or encourage plaintiff solicitor groups to believe that it was an area where LA/CSM felt vulnerable. The position in relation to DH was, as set out above, somewhat different. This was a case where there was considerable emphasis in the pleaded case on allegations of failing to make the correct judgment on resource policy and allocation issues, which the legal team considered at the time to fall within the class of governmental actions which should not be justiciable at the suit of individual plaintiffs. However, it was at least arguable that some of the allegations fell within the operational sphere and therefore gave rise to a duty of care. I believe the suggestion was that if ministers wished to take a line in which they did not seek a blanket immunity from suit, the least damaging approach was to accept a wider scope of the "operational" sphere and accept a duty of care for some of the matters

[1] Minute: Rachel Wolley to Mr McKeon, 23 October 1989
[2] Minute: Sue Armstrong to Mr Wilson, 24 October 1989

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alleged. I do not recollect whether this response to a ministerial suggestion was developed further at that point.

14. *According to a DH note, a conference was held between officials and you on 19 October 1989* ***[DHSC0041034_015]****. In respect of that meeting and note, are you able to assist with any of the following points:*

a. *What access had you had, at that stage, to the papers in the case? On what factual basis was your advice given?*

14.1. I do not recollect what factual material I had at this stage. It is likely that I would by this stage have asked for all the available documents held by the defendants as it is my practice to look at the documents as the first source of a view on merits. I do recollect that there were relatively few available documents, most of which were copied from the surviving files, and that therefore the picture was still fairly sketchy, which was probably the cause of my observation that before giving more definitive advice the facts should be fully investigated.

b. *What thought was being given, and by whom, to* "widening the litigation to deal with the non-haemophiliac cases"*? Were you, as the note suggests, opposed to that suggestion, and if so why?*

14.2. I do not recollect how this issue arose, but from its position in the rather skeletal notes of the conference, I think it likely that I was either asked the question at the outset or it was included in my instructions, if there were any in writing. Nor do I recollect whether the proposal was in respect of infection via blood transfusion or on some other basis. I consider it likely that my advice would have been based on the view that the existing litigation in respect of haemophiliacs carried with it a number of serious and difficult legal and factual issues and that widening it would cause delay and would risk diverting from the special situation of the haemophiliacs and their intimates.

c. *What was the rationale behind the advice that,* "Any decision by Ministers must be on the grounds of policy or discretion. It must not be 'in consideration of you dropping

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the case, we will pay you £x as damages'"? *(The letter from Andrew Neil referred to in the note is at* ***[DHSC0006484_021]****.)*

14.3. This question again requires me to try to put myself back in the situation that I and the other members of the counsel team and our clients were in at that time. I can therefore only say what I think it is likely would have been in my mind, given my general recollection and views of this type of claim against government and LA/CSM. I believe my advice would then, as on other occasions, have been on the basis that any compromise of legal liability required a clear assessment of the expected outcome of litigation, including both legal and factual issues and that any such compromise could only represent a considered view of the merits and an appropriate discount based on those merits and the risk of an unexpected outcome. Such a compromise at that point would have been likely to have over-estimated or under-estimated the merits. More significantly, in a situation where it was the considered view of the legal team that the obstacles faced by the Plaintiffs both on the law and on the facts were formidable, a compromise would have acted as an unsatisfactory precedent on the legal issues. Any decision to settle on essentially political or policy-driven grounds, based on the "moral" and/or "human" factors, should be reflected in a discretionary payment outside the litigation, rather than in an apparent compromise of legal liability.

d. *Why did you feel (as reported) that* "the plaintiffs will lose the case"*?*

14.4. My view at that stage was, I believe, as it remained throughout the litigation, that the legal issues not only in relation to LA/CSM but also the DH policy decisions would be very difficult for the Plaintiffs to overcome. In addition, there were formidable difficulties in terms of causation, based on date of likely infection by comparison with when any alternative non-negligent step should have been put into effect, which would make it very difficult for most Plaintiffs to prove their case, depending on what findings were made. The Plaintiffs' alternative case, based on the argument that a breach of a duty to protect against hepatitis would as a matter of causation have prevented infection with HIV was difficult factually and also raised complex issues about scope of duty and remoteness, the outcome of which was difficult to predict but which would require an expansive view of causation and scope

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of duty for the Plaintiffs to succeed. The papers reflect my view, shared by others, that where the facts permitted, the Courts might well to strive to find an outcome which would result in compensation. Summing all these matters together, my view was that the Plaintiffs were significantly more likely to lose than to win, although before a concluded decision was made to fight the case to trial, there should be a full investigation of the facts.

e. *What did you mean by the comment (if accurately recorded):* "Ministers, he felt, should consider compensation"?

14.5. At this stage, I believe from reconstruction that we were discussing the different approaches of a no fault compensation scheme and defending claims in the courts and not providing compensation until or unless the courts found there to be liability. My comment is consistent with my overarching memory of the view that I took of the litigation at the time.

14.6. It needs to be remembered that my role was to give legal advice rather than policy advice so any comments from me were in response to requests intended to aid officials and ministers in deciding on their policy response to the claims and to the advice they were receiving. It was and remained my strong view throughout that, in the absence of some new and unexpected piece of crucial evidence emerging, the plaintiffs were very likely to lose their claims, following a lengthy and expensive trial in which both sides were wholly or largely funded out of the public purse. The whole process, as well as being lengthy and likely to cause long drawn-out suffering for the plaintiffs and their families was in my view likely to result in such harrowing tales of the sufferings of the innocent that the public outcry for a gratuitous no fault compensation scheme in the event of the claims failing would have been very powerful and would have imposed substantial pressures on ministers. Therefore, although it was not my role to make such observations unless asked, my expressed view was that there was a strong case for preventing the sufferings attendant on a contested trial involving dead or dying plaintiffs and making available at least all or part of the resources that would have been spent on lawyers in providing care for the victims of the crisis.

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14.7. That this remained my view is reinforced by the fact that when claims were later brought against government by those suffering from vCJD following the BSE crisis, I advised the then administration, when asked for my views, that a no fault compensation scheme may be appropriate when faced with appalling suffering for which it was, as was my view in that case also, highly unlikely that a trial of the issues would have resulted in a favourable legal outcome for the plaintiffs but the exposure of their suffering would have prompted the strongest calls for them to be compensated.

f. *Why did you think (as reported) that* "the Court would find liability for short periods of time on the AIDS sufferers ie between the time of screening and implementation"?

14.8. I do not recollect this discussion but think it likely that I was considering the position if the DH was found to have a duty of care, in which event the Judge at trial would have to answer the question whether certain steps should have been implemented faster with consequent reduction in the risk of infection with HIV. At that early stage of the investigation of the merits, there was clearly scope for a judge to find that the screening programme could have been introduced slightly earlier. Until the expert evidence was available and all the documents had been properly assessed, it was not possible to assess the extent of this risk but it was an obvious area of potential vulnerability. For the avoidance of doubt, I do not believe that I had seen any documents which suggested to me that there was clear evidence of fault in the delay in implementation of the screening programme. It was more a case of there not being sufficient material to form a concluded view.

g. Why did you think (as reported) that *"If the Department lost on the hepatitis issue, it would be liable to every hepatitis patient"*?

14.9. Again, doing my best to reconstruct the genesis of this comment, I think my view will have been that the allegations in respect of duties to take measures against hepatitis were so broad that if they succeeded, they would not only provide an alternative route to proof of causation for the haemophiliacs infected with HIV but

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would also give rise to a cause of action for every person infected with hepatitis by blood transfusions and blood products.

h. *What were the reasons for your reported view on the risks of liability being found on the basis of the arguments about hepatitis (see the penultimate paragraph of p.3 of the note)?*

14.10. I have found it difficult to capture what precisely was the view I expressed in this respect as recorded in the note. I think it likely that my view was that because the risks of hepatitis were widely known, the failure to achieve self-sufficiency in non-imported voluntary blood earlier would result in liability if the Court found that all or any of the Defendants had a duty to reduce the risk in this way, notwithstanding resource issues. The sentence "*Counsel said that he felt that negligence in respect of hepatitis could cause AIDS*" is particularly unclear. I think it unlikely that I was expressing the view that this route to causation for infection with HIV would succeed. The issues as to scope of any duty to avoid outcome A extending to providing compensation for those suffering outcome B when outcome B was not in itself reasonably foreseeable or the same as outcome A were difficult in themselves, and continue to cause difficulty as reflected by the run of cases beginning with *SAAMCO* and reflected most recently in the two Supreme Court decisions of *Manchester Building Society v Grant Thornton* and *Khan v Meadows*. At the time, I do not believe that I considered that the Plaintiffs were likely to win this issue although there was clearly scope for such a possible outcome.

i. *What did you mean when advising that the facts should be fully investigated (bottom of p.3)?*

14.11. I think it likely that I meant that if the Department wanted an evaluation of the legal risk of losing the case when considering whether to settle, then it would be appropriate to carry out a full factual investigation rather than to make assumptions as to what that investigation would reveal.

j. *Please provide any further comment on this document that you consider to be relevant to your statement.*

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14.12. I think it relevant to bear in mind that this was a rather sketchy note of one of a large number of meetings and reflected what was discussed in that meeting and points raised for discussion and further deliberation. It is not very clearly written and is not a substitute for the formal opinions and advices which were provided, some at least of which are contained in the papers provided to me.

15. *A further note records a conference between DH officials, Andrew Collins Q.C. and you on 29 November 1989* ***[DHSC0007045_006]***.

a. *Please comment on what advice you were asked to give, and what advice you gave, concerning* "whether to approach Attorney-General or Judge (J) to muzzle Sunday Times".

15.1. I believe that concern had been expressed as to the campaign by the Sunday Times and a letter from Andrew Neil, the Editor, included in the papers provided to me. I imagine I was being asked if any steps could be taken to prevent such a campaign on grounds that it was seeking to influence the legal outcome and/or was a contempt of court. It seems clear that I did not consider that the material that had been published fell within a category in respect of which the Court would be prepared to take action, although the matter could be re-assessed in the light of any further material published. I think it likely that my view at the time was that although one-sided reporting can often be unsatisfactory and difficult to deal with without engaging in a battle of press briefings, in itself highly undesirable, any attempt to restrict publication was likely to be both difficult legally and undesirable as adding to suspicion.

b. *The note states that Andrew Collins was* "less optimistic about success on preliminary issue (relating to hepatitis) than [you]". *Was this accurate, to the best of your recollection? Please explain, insofar as you are now able to do so, the nature of the preliminary issue concerning hepatitis, the advice that you gave on this point and how and why your advice differed from that of Andrew Collins.*

15.2. I do not have any recollection of this conversation. It seems likely that we were discussing a potential preliminary issue of law concerning the hepatitis causation

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issue I have referred to above. I cannot at the moment envisage any other issue relating to hepatitis which could have been thought potentially suitable for a preliminary issue. The reference to manufacturers suggests that we may have been discussing the fact that it would be necessary to conduct the issue on the assumption (for that purpose only) that there was fault in relation to hepatitis and/or that possible changes would have altered the risk of infection with hepatitis and/or HIV. I cannot recollect the different views expressed by myself and Andrew Collins, but can well understand that he may have been more cautious about such an issue being triable and/or as to its prospects of success. At that stage of my career, I and those we were advising would very much have looked to Mr Collins to take the lead on such an issue.

c. *Please explain your position on whether or not the manufacturers of blood products should have been joined to the claim (see §15). You may be assisted by the reference in the note of the conference on 5 December 1989 to the agreement that,* "Armour should be kept out of the main proceedings if at all possible." ***[DHSC0007045_007]***

15.3. Again, I do not recollect this discussion. However, I think it likely that the comment would have arisen out of two issues. First, for DH to join manufacturers as third parties, it would be necessary both to formulate allegations of breach and causation against them and to carry the risk of paying their costs out of public funds if the litigation failed either altogether or against the manufacturers, and secondly adding such additional parties would inevitably add to the complexity, length and expense of the litigation. So far as the LA and CSM were concerned, that would divert attention away from the important issues of duty of care into the detail of events.

d. *Please explain the reference to the problems involved in obtaining expert witnesses, and in particular why there had been* "many letters of refusal" *(insofar as this is within your knowledge).*

15.4. I note the reference in the note but do not recollect any detail. I was not involved in contacting potential experts. However, I have become familiar with the difficulty in persuading clinicians to become involved in litigation against victims suffering fatal

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or life-threatening consequences of treatment, particularly within an area of medical practice where the number of patients is limited and their experience so appalling.

16. *In the note of the conference of 29 November 1989, it is recorded that the Haemophilia Society* "do not want to be seen to push the litigation as Counsel advised they would lose at the outset" ***[DHSC0007045_006]***.

a. *Do you recall the source for this information?*

16.1. No. I seem to remember that the Chairman of the Haemophilia Society had kept in contact with DH during the litigation.

b. *Did you have, or were you aware of, any contact with the Haemophilia Society, or Counsel for the Haemophilia Society, in respect of the HIV litigation?*

16.2. I do not believe I had such contact. I do not remember if I ever knew the identity of the person referred to. The only contact of which I have a recollection is that set out above.

c. *Please provide any further details that you are able to provide about your knowledge of the Haemophilia Society's position.*

16.3. I am afraid that I cannot offer any further relevant information.

17. *A further note records the Summons for Directions on 5 December 1989* ***[DHSC0007045_008]*** *and a conference with Counsel on the same day* ***[DHSC0007045_007]***.

a. *To the best of your knowledge, and based on your reading of the documents, were you present at the hearing and conference on 5 December 1990 (see in particular §6 of the note of the conference)? If not, which Counsel would have been?*

17.1. I have no direct recollection but the reference to my speaking with Andrew Collins suggests that I must have been there and therefore was presumably also at the

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hearing. I think it reasonably likely that at such a hearing, Michael Spencer would have been present if Andrew Collins was not available, but I may well have done the hearing on my own and been the Counsel referred to in the note of the conference.

b. *The Summons for Directions records the judge's direction that there would be no trial of any preliminary issues. How did this affect the Central Defendants' approach to the case?*

17.2. I have no direct recollection. I am clear that at least as far as the LA and CSM were concerned, it was regarded as important to have the duty of care issue determined as soon as possible. The same is likely to have been the position for the DH as far as resource allocation and similar policy issues were concerned. If, as we considered likely, the defendants won on these issues, then all or most of the case would collapse, leaving a potential rump against the DH and Health Authorities. If, on the other hand, the defendants failed on some or all of the preliminary issues, it would have led to a re-assessment of the case and simplified the issues for trial, while removing some of the obstacles to settlement. As a result of the decision not to have such preliminary issues, the case would have to proceed to a full trial, with very significant costs on both sides, so the focus of the legal team inevitably will have turned to trial preparation and decision-makers will have been aware of this.

c. *The note of the conference with Counsel refers to the* "further payment promised via the Macfarlane Trust ... clearly having some impact." *Are you able to assist with what lay behind that observation?*

17.3. I have again no direct recollection. I believe that the support of the Plaintiffs for preliminary issues may have been as a result of their own cautious approach as to whether they could succeed in the preliminary issues and a wish to establish whether the case was winnable through the preliminary issues before exposing individual Plaintiffs to the trauma and potential cost of a full trial.

d. *The note also records Counsel's hope that instructions for the Defence would* "require the duty of care points to be taken robustly." *Was that also your view? Is*

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there any significance to the fact that it appears to have been raised again in this conference?

17.4. I believe that my view at that time was that the duty of care defences were important for the long term viability of the CSM and its role with the LA and needed to be put forward clearly and robustly so that they could be decided on their merits and establish a precedent one way or the other. So far as the DH was concerned, I do not believe that the position was so stark, but as I recollect my view was that if the position was to be maintained by government that there was no duty of care in relation to policy matters, the points needed to be taken firmly and precisely defined. My role was of course at that stage to advise on how the claims could best be defended and these were strong points that were an important plank of the defences.

18. *A note records a conference between DH officials, Mr Collins and you on 18 May 1990, primarily concerning Public Interest Immunity ("PII")* ***[DHSC0043223]****. A written advice by you on PII follows on 4 July 1990 [****DHSC0004360_072****].*

a. *Please explain, in general terms, the approach you advised on PII and the principles that guided you.*

18.1. It is many years since I had to consider or advise on PII issues and my recollection of the issues is less than perfect. I believe that I will have reviewed contemporary legal precedents and guidance from the Treasury Solicitors office and discussed it with Andrew Collins who had vast experience. The principle that I concluded, in common with those I consulted, was that where PII was applicable the DH had a duty to assert the immunity and it was for the Courts to consider if that challenge was to be maintained. It seems from my advice, a copy of which has been made available to me but the details of which I no longer recollect, that I sought to avoid any blanket approach to the claim and to identify the various categories for which privilege could be claimed, on the basis that any relevant document would need to be considered carefully and placed in an appropriate category only if it met the criteria. It seems that I also sought to identify those categories for which the claim

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seemed stronger or less strong, it being a matter for the Department and possibly the Law Officers, to take a final view.

b. *Please explain what role John Laws (as he then was) played in advising on the position to be adopted in respect of PII (see p.1 of the conference note, and p. 15, §18 of the written advice). Why did you plan to consult him?*

18.2. John Laws was then the Senior Counsel to the Crown (Common Law) known as "The Treasury Devil" and therefore was the senior practicing barrister acting as such charged with advising government on legal matters and responsible for the carriage of most important government litigation. Those in the role generally did not become QCs in those days, but were virtually full time employed on government work and appointed on retirement from the role directly to the High Court. Most were appointed in due course to the House of Lords, including Lord Bridge, Lord Woolf and Lord Simon Brown. As a result, it was appropriate that Mr Laws should be consulted on the principle and broad detail of the approach being taken on PII so that he could comment on it and approve or direct modifications to the approach or classification of the categories. I do recollect that he was in fact consulted both generally and in relation to the end product and I remember a telephone discussion with him when he had read my advice and perhaps further work product in which he commented on and gave approval to the approach that I had been taking. I remember being relieved and pleased that my analysis of this difficult issue appeared to have been correct and to accord with that of the most senior government adviser on the topic. I believe it likely that I would also have discussed and agreed the approach with Andrew Collins during my work on this topic although again I have no direct recollection.

c. *Please provide what assistance you can on what lay behind the following comments, as recorded in the notes of the 18 May 1990 conference:*

i. *"We must stop destruction on the date the litigation comes on."*

18.3. I do not remember this comment and as written it makes little sense to me. Andrew Collins and I would have been well aware of the duty to preserve documents and

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we are likely to have advised that all documents which still existed and which were relevant or potentially relevant must be preserved until the conclusion of the litigation and that routine document destruction policies should therefore be suspended. This may have been a comment on the starting point for preservation, namely the first time that the possibility of a claim arose, but may also have been dealing with how far back the document trawl should go. Given the allegations in relation to hepatitis, that was likely to include many historic documents from much earlier periods if they still existed.

ii. *"Hepatitis virtually nothing. Most of it has already been destructed."*

18.4. I am afraid that I do not recollect this but it is consistent with my memory that we had seen relatively little in relation to the hepatitis threat and response to it and were told that most of the historic material had been destroyed under routine destruction policies or could not be found. There is no doubt that there was a dearth of relevant documentation which made the piecing together of the factual narrative and formulating the defence more challenging.

d. *Were you aware of any of the Central Defendants intentionally destroying documents for the purpose of ensuring that they were not disclosed as part of the HIV (or other) litigation?*

18.5. I have no recollection of being told or suspecting that there had been deliberate document destruction for this or any other improper purpose. I do not have any reason to suppose that such destruction took place for this reason. I do know that we were disappointed by how comparatively little material there was and consistently asked for further searches but in those pre-computerisation days many if not most of the documents we were provided with came from hard copy files of original memos and papers or carbon copies, rather than from a photocopy archive. If my memory is correct, files were regularly reviewed and what was considered to be outdated and no longer relevant was destroyed, simply to make the task of archiving files manageable. I was however not involved in any of the details of any searches and am not able to say whether there was any deliberate destruction although I can say that I had no impression from any of the multiple officials with

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whom I met that they were being evasive and potentially inclined to destroy embarrassing documents. Any more detailed enquiry must be for others to answer.

e. *Were you aware of any of the Central Defendants seeking to abuse the PII process by claiming PII without proper reason in order to avoid disclosure of documents that might harm their case or otherwise cause embarrassment?*

18.6. No. I do not believe that there was any such attempt. Of course, one of the categories of documents for which PII was claimed was advice to ministers which was often terse and relatively informal and there may have been a sensitivity about its disclosure because each phrase had not been carefully honed for wider publication. It is also not unusual for litigants and administrators to be embarrassed by some of the documents they have authored over the years and to hope that it may not be necessary to disclose them. I do not recollect whether there were any such feelings expressed in this case. However, the categories were clearly defined in my advice and so far as I was able to do so, the claim was narrowly confined to documents falling within the relevant class. I was not conscious of any attempt improperly to influence my judgment or that of Andrew Collins or John Laws. I would not in any event have been influenced by such attempts and if I had been asked whether PII could be claimed for any document or documents which might on its face seem a little embarrassing I would have made clear that it would only be subject to a claim where that was in my view objectively justified.

f. *Was there anything unusual about the approach adopted to PII in the HIV litigation when compared to your experience of similar cases?*

18.7. At that stage my experience of PII was comparatively limited which was why I regarded it as important that others more senior and experienced, such as John Laws, should be involved. The intention was to retain only the existing approach to PII and not to seek to alter or widen its boundaries. The only distinguishing feature that I can now think of is that the way in which the documents were described in my advice and their detailed categorisation, were perhaps more specific and detailed than might have been expected because of the importance of ensuring a transparent rather than blanket approach to the task, not least because of the

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anticipated challenges to the claim and the importance of trying so far as possible to define the classes in such a way as the Judge dealing with any challenge (in this case it seems both the trial judge and the Court of Appeal) could understand and make rulings on the documents in the light of an understanding of their categorisation. I should add however that I now have no recollection of how the challenges were heard or determined or even as to whether I was present in court for them, apart from having now re-read the decision of the Court of Appeal which appears to endorse the approach taken as to the duty to assert the privilege with the Court then having to test the claim and balance the arguments for and against disclosure.

19. *In your written advice of 4 July 1990, you recorded that:* "There is nothing in the documents that I have seen which I would expect to have any significant adverse effects on the case to be put forward on behalf of the Central Defendants in this litigation. Indeed, many of them may be helpful in explaining the careful consideration which was given to various matters at the time. However, that is not the point." *Please explain or expand, insofar as you are able now to do so, what you meant by this observation and the reasons for it.*

19.1. I have no specific recollection but it is clear that I did not regard any of the documents for which PII was to be asserted as offering any material assistance to the Plaintiffs' case and that I thought that some of them would be helpful to the Central Defendants, but that assessment did not affect whether or not the claim for privilege should be made. It did however provide some information to those I was advising as to whether the claim for PII would be concealing documents important for the Plaintiffs' arguments on the merits.

20. *The note of 18 May 1990 refers to advice being given on the approach to be taken to a limitation defence in the HIV litigation. This appears to be to the effect that the Central Defendants should plead this as a defence to retain the option of arguing this point at a later stage if it was decided to do so.*

a. *Is this a correct interpretation of the note, and of the advice you (or other counsel) gave at the conference?*

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20.1. I have little direct recollection of this. I do not remember thinking that limitation was likely to be a viable defence in many if any case, largely because of section 33 of the Limitation Act. However, it appeared that it may be relevant in a few cases and since the pleadings were intended to be generic, it was important to take the point in order to preserve it, but in full awareness that no such defence may be viable and that there may be other reasons why the DH would not in individual cases seek to take such a defence. By way of background, there had been hearings on limitation defences and section 33 in the Opren litigation, which from memory went to the Court of Appeal, and I suspect that it would not have seemed appropriate to abandon such a defence for all cases at that early point.

b. *Please explain why you gave the advice that you did on the limitation point.*

20.2. I have I believe adequately covered this in my previous answer.

Section 4: The intervention of Ognall J

21. *At a hearing in chambers on 26 June 1990, Ognall J took what he described as a* "rare ... initiative" *by inviting the parties to* "give anxious consideration to the prospect of any compromise of these proceedings." *A written copy of his remarks is at* ***[DHSC0046964_024]***.

a. *Were you present at the hearing? If not, how did you learn of Ognall J's comments?*

21.1. I believe it was likely that I was present although I have no direct recollection.

b. *What did the comments suggest to you, at the time, about Ognall J's analysis of the legal merits of the case? How did this compare to your own analysis?*

21.2. I was reminded of this intervention by reading the papers helpfully provided to me. My analysis was, I think, trying now to reconstruct my thoughts, that Ognall J had clearly formed a view that the legal issues on justiciability, duty and causation were likely to be very difficult for the plaintiffs but that the compassionate case was very strong. I would have concluded that on the factual analysis he would have been

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influenced by the strong, but incomplete, summary in the Statement of Claim of the delays in taking various steps and that this may have affected his view of the conduct of the department.

c. *What was your response to Ognall J's comments? How did it affect your approach to the case, and the advice that you gave on it? (You may be assisted by §7 of the note at DHSC0004360_147, which is discussed further below.)*

21.3. I believe that the view which both Andrew Collins and I took as a result of the intervention is well summarised in paragraphs 6-8 of the Note referred to. The remarks gave some confirmation of our views both as to the legal obstacles faced by the Plaintiffs and to the likelihood of judicial sympathy for them. They also gave further cause for the DH to consider some form of ex gratia compensation.

22. *On 20 July 1990, Sir Donald Acheson, the Chief Medical Officer ("CMO"), sent a minute to the Secretary of State and others expressing his hope that,* "for humanitarian reasons the Government will find some way to make an ex gratia settlement to the infected haemophiliacs in relation to this unique tragedy." ***[HSOC0017025_004]***

a. *Were you made aware of this minute, or the view expressed in it?*

22.1. I believe I will have been made aware of it and probably saw it.

b. *If so, what effect, if any, did it have on your approach to, and advice on, the HIV litigation?*

22.2. It will have had no direct effect on my approach to the litigation or my advice as to the legal merits. It would have strengthened my view that I should be prepared to give advice, if and when asked, as to methods of making an ex gratia payment without causing unacceptable adverse effect on the policy and duty defences which were perceived as important to protect for future cases.

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c. *A subsequent article in The Guardian suggested that the CMO was* "particularly concerned that the Government's previous policy of blood importation should not be subject to cross-examination in open court" ***[DHSC0020866_150]***. *Were you aware of any such concerns being expressed by the CMO or anyone else connected to the Central Defendants?*

22.3. I have no recollection of such a view being expressed. It was clear that at any trial each stage of the chronology would have been subject to careful and sustained challenge and I was aware of a view that minute examination of each decision taken on policy issues could damage public confidence, however justified in objective terms the decisions taken may have been.

23. *A note on options for the HIV litigation was circulated to the private offices of the Secretary of State and ministers under cover of a minute dated 24 July 1990* ***[DHSC0046964_003, DHSC0004360_147]***. *The note records that Mr Collins had* "confirmed his earlier view that we have a very good chance of a successful outcome for the great majority of cases" *[§6]. The note goes on to summarise that advice, as well as identifying claims in which* "the legal arguments are more finely balanced" *[§6].*

a. *Did you agree with this assessment?*

23.1. Yes, so far as I recollect. I do not recollect whether this reference to the more finely-balanced legal arguments related to the DH or the health authorities but there was always scope for some aspects of the implementation of policy decisions to fall into the operational sphere, whilst still requiring the relevant plaintiffs to overcome other legal obstacles such as causation.

b. *Are you able to assist with whether that advice was given orally or in writing? (The Inquiry has not identified any written advice from Mr Collins at this time.)*

23.2. I do not recollect. It may well have been oral. There were many conferences on this case including several consultations with Andrew Collins.

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24. *The note records Mr Collins'* "personal view" *that* "the government would do well to make a further 'political' gesture to avoid the embarrassment of a legal wrangle likely to continue through the whole of 1991" *[§8].*

a. *Did you share Mr Collins's view that the government should make a 'political' gesture? If yes, why? If not, why not?*

24.1. This report of Mr Collins' comments is reflective of his characteristic robust view to advising government, for whom he had acted almost exclusively for many years while on the Treasury panel, and also of his independent-mindedness. I would not have thought it appropriate to express my views in those direct terms. However they reflect my general view throughout, as described earlier in this statement, that although the plaintiffs were likely to lose the litigation (except possibly in a handful of cases falling within the operational sphere) it would be costly, lengthy and involve acute investigation both of individual tragedies and of the inner workings of a government department. An ex gratia arrangement which avoided setting a legal precedent was therefore something which should be carefully considered. The difficulty lay in avoiding the precedent, although I shared Andrew Collins' view that it should be possible to achieve this.

b. *Please provide any further comment you wish to provide on the options discussed in the paper.*

24.2. I was not party to the discussions on strategy beyond the legal advice given but over time became aware of some of the considerations being discussed. I do not recollect being asked to comment on the specific options put forward including for a commission of enquiry or a "behind the scenes" settlement, if this was intended to convey more than a discussion between Counsel as to how the litigation could be resolved.

25. *The note records that,* "Ministers may wish to hear Counsel's advice at first hand before deciding" *[§23]. Do you recall whether Mr Collins did personally advise ministers at this stage in the litigation? (The Inquiry has not identified any document indicating that Mr Collins did or did not advise ministers at this point in time.)*

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25.1. I cannot now recollect if Mr Collins met ministers although I think it likely that he did. I recollect attending meetings with Virginia Bottomley, Kenneth Clarke (I think but am not sure) and William Waldegrave. I have a dim recollection that Mr Collins may have been at the meeting with Virginia Bottomley.

26. *The note raises the possibility of consulting the Prime Minister,* "in light of her earlier interest" *[§21]. Were you aware of the Prime Minister's interest in this matter? If so, what did you understand her interest and views to be?*

26.1. I think it likely that I was informed that Mrs Thatcher had taken an interest in the matter but do not know what her views were, except to the extent that they were reflected in the views of government passed to us in discussions with officials and ministers.

Section 5: The Plaintiffs' proposal to settle and the Central Defendants' response

27. *By letter dated 7 September 1990, the lead solicitors for the Plaintiffs in the litigation, Pannone Napier, put forward a proposal for settling the claim* ***[DHSC0020866_134]****. This was the subject of a submission to the Secretary of State on 18 September 1990* ***[DHSC0020866_091]****. Following that submission, a decision was taken for a formal response to Ognall J's intervention to be given in the form of a letter, dated 3 October 1990, from a DH official to the solicitor dealing with the claims in TSol, which was to be passed to the judge* ***[DHSC0046936_091]****. An undated document from the DH files appears to be a note of a conference with Counsel, possibly from around this time* ***[DHSC0020866_127]****.*

a. *Based on your recollection, and the documents provided and available to you, please explain (insofar as you are able to do so) your role in advising on the responses for Ognall J and the Plaintiffs.*

27.1. I do not remember what involvement I had at this stage. It is likely that Andrew Collins and Michael Spencer would also have been involved. Reconstructing things as best I can from the documents provided to me, I think we will have been asked

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to express our up-to-date views on the legal merits and prospects, the advantages and disadvantages of some sort of ex gratia settlement or separate payment, and then to have drafted or commented on drafts of formal responses.

b. *Please explain what role, if any, other members of the Counsel team played.*

27.2. See above.

c. *To what extent, if at all, did you liaise with the legal representatives of the other Defendants in the HIV litigation when advising the Central Defendants? In particular, were you involved in, or aware of, the discussion summarised at [§10] of* ***[DHSC0020866_091]****?*

27.3. I cannot now recall any such discussion although I believe I may have been involved in discussing with counsel for the Health Authorities, I believe Nicholas Underhill, their views as to whether attempts should be made to have Ognall J replaced as trial judge. I have no recollection of the matters set out in paragraph 10 of the Note. I note the reference to a meeting with the Solicitor General. I have no present recollection of such a meeting although I do have a recollection of having to find my way to the Law Officers' offices at some point, which is likely to have been in connection with this litigation but may have been in relation to one of the other group actions referred to earlier in this statement.

28. *Does the minute of 18 September 1990 accurately convey the advice that you had given on this matter? If not, please explain what your advice was.*

28.1. The Minute records the advice given by counsel as to how to communicate the decision which it appears that the Secretary of State had reached at that point based on advice from law officers and our advice on the merits and options, which I do not believe had changed materially since that recorded in the 24 July submission referred to above. I cannot remember which of the counsel gave the advice recorded in the 18 September memo as to the best way to communicate the decision but it is likely that I was involved and I have no reason to doubt that it accurately records that advice.

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a. *Do you recall whether you provided advice in writing or orally?*

28.2. I assume that it was given orally but do not know. It appears that we had prepared draft letters and I would expect that I would have carried out the drafting in the first instance.

b. *Please explain, in broad terms, the reasons for the advice that you gave.*

28.3. Given the decision of the Secretary of State, the objective was, I believe from looking at the note, that we would wish to respond as sensitively as possible, emphasising the important precedent of the legal duty of care arguments and at the same time seeing if there was a way in which the plaintiffs could be encouraged to narrow their case in a way which might remove some of the arguments which gave rise to the most serious risk of precedent. I do not recall precisely what areas we had in mind, but removal of the CSM and LA as defendants and some narrowing of the wide allegations of fault over a long period might have been a desirable objective that we had in mind. However, that verges closer to speculation than to recollection.

29. *The minute refers to a proposed meeting between the Solicitor General and* "the Department's lawyers on Thursday (20 September)" *[§5]. A further internal DH minute, dated 8 October 1990, contains marginalia that records:* "Our Counsel gave the impression (at a meeting with Solicitor General on 24.9) that they felt that the Central Defendants were also (relatively) more vulnerable on the late seroconverters. They still assess the odds for this group as 60:40 in our favour. I have asked Mr Canavan to clarify this point with Counsel." ***[DHSC0046936_074]***

a. *Do you recall attending such a meeting?*

29.1. As stated above, I do not recollect the meeting, but the documents suggest that I may have attended.

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b. *To the best of your knowledge, does the handwritten addition to the minute accurately reflect advice that you or your colleagues gave on this point? If so, what were the reasons for that advice?*

29.2. The notes reflect the issue of the possibility that decisions on implementation, for example of the screening programme, may have been treated as in the operational sphere and also gave rise to a risk of a judicial finding favourable to the Plaintiffs to the effect that more could have been done earlier. The odds for this group seem fairly to reflect my views on this aspect, by contrast with the significantly higher odds of the defendants succeeding on other parts of the claim.

30. *Do you recall attending a conference that may have given rise to the note at* ***[DHSC0020866_127]****? Please provide what assistance you can on what was said at that conference and who was present.*

30.1. I am afraid that I have no recollection of such a conference. Nor is it easy to say at what stage it took place. Although some of the points mentioned were among those under discussion, it is difficult for me to speculate as to more than what is written. It seems clear that there was discussion of numbers and how they would relate to a finding of full liability with or without the Macfarlane Trust payments and of the legal costs and the possible consequences if some but not all plaintiffs accepted the offer and withdrew from the litigation. I will endeavour to answer the specific questions set out below using recollection and reconstruction.

a. *Do you know what was meant by the phrase:* "Can't go on any longer without ceiling figure"*?*

30.2. I do not know but suspect that it was a reference to the need to have some idea of the overall cost before Treasury support could be sought or achieved for any payment.

b. *Do you know what was meant by the phrase:* "Payment must not be 'nuisance'"*?*

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30.3. I assume that this is a reference to a view expressed, with which I would have agreed if present, that any payment must be substantial and have some correlation, albeit discounted, with the broad level of damages that might be expected if the litigation succeeded.

c. *Should the reference to the Court not being able to take into account the* "£34m" *be taken to be a reference to payments already made through the Macfarlane Trust? Was it your view that while a Court could not take these into account, the point could be made in settlement negotiations that these payments had already been provided?*

30.4. I assume so. It is clear that the view was expressed that a Court could not take these into account, as it had been agreed that they would be ignored in any litigation, but the fact of such payments could be used in a discussion of the overall compensation being received by sufferers (including non-plaintiffs), if an ex gratia payment was to be made.

d. *Do you know what was meant by the phrase:* "Will prob. [inserted] win – likely hurdle [with] causation." *Was that your view of the Central Defendant's prospects in the litigation? Is there any significance to the fact that causation is mentioned, whereas duty and breach are not?*

30.5. My view was certainly that the Central Defendants would very probably win the litigation. My view was always that the principal legal battle-ground was in relation to duty, but that there was a further formidable obstacle facing the plaintiffs in proving causation. This may have been mentioned as a reminder that it was another factor in the assessment of the likelihood of success or failure. So far as I recollect, causation was never seen as the decisive issue.

e. *Do you know what significance there was to settling the litigation,* "before 5 April: phase between this year & next"*?*

30.6. I do not know but suspect that this is a funding point, in that if the settlement was before 5 April, the costs could be apportioned between the budgets/costs for the current and following year, which would have helped given the other constraints on

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the health budget and the lack of an obvious available fund within the departmental budget to meet the claim.

f. *Do you know what was meant by the phrase:* "Disting feature: suffered because of treatment thro nobodies fault"*?*

30.7. I do not know but assume that there was discussion as to how this case could be distinguished from other claims for serious personal injury by stressing that this was a wholly unforeseen consequence of what was intended to be a life-protecting and enhancing treatment, which had occurred without fault on the part of anyone concerned.

g. *Was it your advice that the Central Defendants would* "win" *the litigation, but that there was* "always hazard"*?*

30.8. I doubt that I would have used such words but I recollect that I was always of the view that the Central Defendants were very likely to win the litigation and I would then and now always have qualified any views on prospects with a warning of the risks of litigation. In this case, the comparative absence of written historic material would have suggested to me an increased risk of something unexpected emerging, either in documentary form or by way of expert opinion, which might require a re-appraisal of prospects.

h. *Was it your advice that the Government would end up paying the legal costs of the litigation in any event, and that it would be better if that money went to people with haemophilia who had been infected with HIV rather than lawyers* ("better to Hem than lawyers")*? Is the reference to* "£15m" *an estimate of the legal costs? If so, who made that estimate, on what basis, and what was it intended to cover?*

30.9. It was certainly always my view that with a majority of legally-aided plaintiffs and all defendants being public bodies, the almost inevitable result is that the public purse would end up meeting all or virtually all of the costs whether the litigation was won or lost. It was certainly my view that in any case of human suffering where the public purse is involved, money is far better spent on either the victims of the

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tragedy or on primary health care, than in paying lawyers. In the case of haemophiliacs who already suffered multiple problems because of their condition I was certainly of the view that every penny that could be spent on them and on helping with haemophilia was preferable to spending the same money on lawyers. It was of course not my role to make such judgments but I would certainly have given that view if asked and suspect that it would have been clear from my general approach.

30.10. The problem however, at a time of a growing culture of pursuing government with the benefit of legal aid for medical and pharmaceutical misfortunes, was how to achieve that result without setting a precedent encouraging future perhaps less deserving claims and whilst balancing the needs of haemophiliacs suffering from HIV with those of other patients who had suffered appalling side effects and also having regard to the general needs of the health service with its stretched resources.

Section 6: Further advice and further proposals for settlement

31. *On 20 September 1990, the Court of Appeal gave judgment in the appeal and cross-appeal against Rougier J's first instance decision on the PII application* ***[RLIT0000657]****. In doing so, the Court held, among other matters, that the Plaintiffs had an arguable case against the Central Defendants. What influence, if any, did the judgment have on efforts to settle the litigation?*

31.1. So far as I recollect, the guarded tones in which the Court of Appeal found that the case was arguable reinforced my views as to the overall merits and likely outcome. The ruling on PII confirmed the correctness of the approach that had been taken by the Department based on advice from myself and other counsel. I anticipate that the cautious approach as to the merits will have affected the confidence with which the Plaintiffs approached the litigation and I certainly considered that it would assist in promoting a more realistic view by the Plaintiff legal team as to the likely outcome. However, the sympathy expressed by the Court for the Plaintiffs confirmed our view that a Court would be likely to make findings favourable to the Plaintiffs whenever it was open to it to do so. In view of the contents of the PII

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documents, rather than their status as attracting the privilege, the order for wider disclosure did not affect our view of the likely outcome. Overall, I do not recollect this judgment having a significant impact, other than bringing it closer in focus to ministers and parliament.

32. *On 18 October 1990, the Secretary of State for Health met the Prime Minister and the Lord Chancellor to discuss the HIV litigation* ***[CABO0000044_002]****. Were you informed of this meeting? If so, what were you told about it, and how (if at all) did this influence your approach to and advice on the HIV litigation?*

32.1. I expect that we will have been informed that it had taken place. It did not affect my views as to merits but when communicated it gave direction to the way in which we conducted the defence of the litigation. It was I think clear to us from about this point if not before that the litigation was being monitored by ministers to an unusual extent.

33. *On the same day, 18 October 1990, a Department of Health minute recorded a request from the Secretary of State for further legal advice on three specific points* ***[DHSC0046936_041]****.*

a. *Do you know why the Secretary of State requested that the advice on legal liability should contain* "no reference to settlement"*? If you do not know, are you able to assist – from your knowledge and experience of the litigation, and from the papers provided and available to you – as to why the request should be made in this way?*

33.1. I do not know why the instruction was framed in this way, but I assume from looking at the papers provided and my experience and recollection, that it was to ensure that there was the clearest possible advice on legal merits, separate from any view of moral or compassionate or public relations/political considerations.

b. *Was this the instruction that was conveyed to you?*

33.2. I do not remember but assume so. However, I note that the advice on liability refers to a separate paper on how the litigation could be resolved without creating a

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precedent although that paper does not appear in those documents provided to me and I do not recollect its contents or indeed whether it was completed. I do however recall that during this period there was much thought given as to whether and how it would be possible to provide extra compensation without creating a precedent, if that was the decision made by the department and/or ministers.

c. *Was it unusual, in your experience, to be instructed in such terms?*

33.3. I do not think the concept of an advice purely on the merits was in any way unusual. It was a little unusual for it to be expressed in that way but I bear in mind that discussion of some form of alternative to litigation was often included in discussions with Counsel and in comments from Andrew Collins.

34. *You, Mr Collins and Mr Spencer produced written advice on liability and quantum dated October 1990* ***[DHSC0007039_001, DHSC0007039_002]***.

a. *Was this advice provided in response to the Secretary of State's request, as recorded in the minute of 18 October 1990? If not, please explain the circumstances in which it came to be produced.*

34.1. I expect that we were instructed to provide such advice but do not recollect the terms of our instruction except as appears from the advices themselves.

b. *Please explain, insofar as you are now able to do so, the division of labour between you, Mr Collins, and Mr Spencer in producing the advice.*

34.2. I cannot now remember but expect that we followed the approach that the general thrust and content of the advice would have been directed by Mr Collins and he would have amended and approved our drafts. Mr Spencer and I worked closely together and would have discussed and agreed each element with him taking the lead on factual and quantum issues. I suspect that the bulk of the initial drafting of the advice on liability would have been done by me and on quantum by Mr Spencer but I have no independent recollection. I note that Fiona Sinclair appeared with us in the Court of Appeal but I suspect that that was because she

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was or had been shortly before my pupil. I cannot remember what if any further involvement she had in the case.

c. *To the best of your recollection, were there any significant areas of disagreement between counsel on the matters contained in the advice, or in the general approach to the case?*

34.3. I do not believe that there was any significant difference between the three of us on any aspect of any importance but I have no specific recollections as to this.

d. *What was the significance, if any, to the fact that you concluded the advice on liability in the way that you did [§57]? Was the paragraph intended to persuade the Central Defendants towards settlement?*

34.4. The paragraph was certainly not intended to persuade the Central Defendants towards settlement or any other course as we did not perceive that to be our role. Rather, it was a fairly strongly held view that although we would win the case on liability, the trial process and press publication of the evidence would evoke great public sympathy for the Plaintiffs, as noted earlier in this statement, so that the Defendants and the public purse would spend very large amounts in meeting the costs of all parties, court time and the time of officials and still face a strong call for ex gratia compensation at the end of the process. That was a likelihood that we regarded it as relevant to bring to the attention of the Central Defendants.

35. *A document entitled,* "Present Position on HIV/Haemophilia Litigation" *refers to a meeting between Kenneth Clarke, the Secretary of State, and Counsel on 1 November 1990* ***[DHSC0046962_187****, found at the final paragraph of p.2****]****. The report contains a brief summary of what appears to have been discussed.*

a. *To the best of your knowledge, did you attend such a meeting?*

35.1. I have no direct recollection but think it quite likely that I did attend such a meeting.

(The following questions are based on the assumption that you did attend,

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or were made aware of the events of the meeting.)

b. *To the best of your knowledge, why was the meeting called?*

35.2. I assume because the Secretary of State wished to hear first-hand from the counsel team their views on the merits and the prospects of reaching a settlement on acceptable terms both as to cost and as to its effect on the issues of principle of wider applicability, especially duty of care and justiciability.

c. *Who else attended, and what was discussed? Do you think that the document cited above contains an accurate summary?*

35.3. I believe that it is almost certain that Andrew Collins attended as the Secretary of State would have been far more interested in his views than mine. I have no recollection of what was discussed save as recorded and as set out in my previous answer. I have no reason to think that this was not a conscientious attempt to record the gist of the meeting but the note is very short and the description of the prospects as "reasonable" would have been made in the context of the more detailed assessment contained in the written advice referred to in the next paragraph of the minute.

d. *Was a record of the meeting kept? If so, do you have (or would you be able to locate) a copy of it?*

35.4. I doubt that I kept a record beyond possibly some headline notes. I would have expected a note to have been taken by at least one of the officials attending the meeting. I certainly have no such note and do not have any recollection of having seen one.

e. *If no record was kept, why was this? (The Inquiry has not been able to identify any record of this meeting, other than the document cited.)*

35.5. This is outside my knowledge save that it was not my practice to take notes of meetings as this would normally be the function of my instructing solicitors.

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36. *According to a note by a DH solicitor, Ronald Powell, he had a conversation with you on 7 November 1990* ***[DHSC0004365_043]****. You are recorded as reporting on further discussions between you and Mr Jackson on Monday 5 November 1990.*

a. *In the first paragraph under the subheading entitled 'Generally', you observed that there* "did not seem to be any claim in law against the CBLA." *Why did you believe this to be the case?*

36.1. I do not specifically recollect this as I was not acting for the CBLA but I believe that it would have followed from my assessment of the low prospects of establishing a duty of care owed to individuals.

b. *The note describes your assessment that the Plaintiffs* "may now be in a position where they need the matter to be settled" *in view of the need to extend legal aid certificates. Please explain your thoughts on that matter. In what ways, and to what extent, did this fact inform your advice on settlement?*

36.2. I will try to put myself back in the mindset that I was in at that time. Having read the background materials and prepared this statement, I believe I am able to give a reasonable account of my thought process on this point.

36.3. The impression that I had from the fact that the Plaintiffs were, in my view unusually, pressing for preliminary issues on the duty points was that they believed that they had a difficult obstacle to surmount and wanted some resolution or comfort on that point in order to advise positively. I was also aware that there appeared to be no strong points for them arising out of disclosure and I would have expected their analysis to have been at least to some extent similar to the analysis which we had carried out and which had informed our advice on liability. I was also aware of the attempts that they had made on the PII applications to press the strength of the merits of their claim and the relatively limited comfort and support that they received in the various judgments. I was aware that they would at some point have to advise in relation to legal aid as it was unlikely that they would at the outset have received a certificate all the way to trial. This appeared likely to be one

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of the stages at which they would need to review their advice and assess whether the documents supported the very serious allegations of fault that they had put forward, irrespective of issues of duty. My view was that they were unlikely to be particularly bullish and might well have difficulty in advising sufficiently positively on the merits to obtain an extension to their certificates. This led me to indicate that it was possible that they would be pressing for a settlement at realistic levels as a better option than to advise in terms which might lead to the collapse of the action after the withdrawal of funding.

36.4. It is of course quite possible that this reconstruction has been affected by my knowledge of the terms in which the Plaintiffs described their prospects and their view of the merits in the statements they made when the settlement was brought before the Court, but I believe that what they said there reflected broadly the view that I already expected the very experienced and conscientious legal team for the Plaintiffs to have reached.

37. *By this time, William Waldegrave had replaced Kenneth Clarke as Secretary of State for Health.*

a. *What difference, if any at all, did you detect in approach taken by Mr Clarke as compared to Mr Waldegrave with respect to the HIV litigation?*

37.1. There was certainly a change of mood at around this time, but I am quite unable to say whether it was a result of a difference in the attitude of each Secretary of State for Health or a reflection of views within the department and government. Apart from one or perhaps two meetings with each, I had little knowledge of either except as an interested member of the public reading the press, but it was clear that their personal styles were very different, irrespective of whether their views and judgments were similar. I do recollect that there was around this time, and shortly before serious settlement discussions began, a change in Prime Minister and my recollection is that I detected a greater enthusiasm of Mr Major to find a way of resolving the litigation by providing compensation without giving up important legal arguments for the future. At this elapse of time, I am unable to identify the basis for that impression but it remains fairly clear in my mind.

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b. *An internal DH minute contained the following observation:* "There was, I think, little formal difference between his [Mr Waldegrave's] line and Mr Clarke's: that it would be sensible to reach a settlement with the plaintiffs if that can be done at acceptable cost. Behind that similarity however lay a greater inclination to settle, and I suspect some willingness to settle at a somewhat higher cost" ***[DHSC0020866_101**, §1]*. *Was this your experience and impression of the attitudes of the two men and their respective approaches to the litigation?*

37.2. I have set out my recollections on this matter in answer to the previous question and do not think I can make any useful additional comment.

38. *The Plaintiffs' formal Proposed Heads of Compromise were provided to the Central Defendants at or around 9 November 1990* ***[DHSC0046962_067, DHSC0003654_117]***. *The proposal was for settlement of most of the claims in the sum of £42 million, with the* "medical negligence" *claims to be settled separately, and the Plaintiffs' costs to be paid. What were your views of the proposed settlement? To the best of your knowledge, what were the views of Mr Collins and Mr Spencer?*

38.1. I believe that we all thought that this represented a constructive and realistic approach to settlement by the Plaintiff legal team. While it in our view overvalued the claim in terms of legal merits, it ended with a figure which we thought not inconsistent with a fair ex gratia payment to end the litigation. We welcomed the recognition that it covered all haemophiliacs affected and not merely those who had become Plaintiffs. It required further work to make sure costs payable were reasonable for the public purse to meet whilst not penalising non legally aided plaintiffs who signed up to it.

39. *A DH minute of 12 November 1990 contained a detailed analysis of the proposed compromise* ***[DHSC0046962_028]***.

a. *To the best of your knowledge, did you see this document at the time? If so, do you recall your response to it?*

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39.1. I do not recall the note but it seems consistent with the sort of discussions we were having with DH at the time.

b. *Looking at the document now, do you agree with the analysis that it presents? Please identify and explain any areas of disagreement. To the best of your recollection, would you have held those views at that time?*

39.2. I think that at the time I would broadly have agreed with this analysis. Paragraph 2 clearly contains a mistype and "unreasonable" should read "reasonable".

39.3. I agree with the importance of the settlement bringing the litigation to an end if the making of a payment was to be justified to a significant extent on the savings in legal costs and court and management time.

39.4. I also agree that the making of a payment to category G plaintiffs required careful consideration, particularly if they retained an entitlement to receive compensation if they subsequently became diagnosed as HIV positive. This type of payment to a group described in other litigation as the "worried but well" risked creating a precedent of much wider application with far-reaching financial consequences.

39.5. I also considered that it was important to try to find a mechanism for resolving speedily the medical negligence cases. Although this was principally a matter for the health authorities, if the trial of such claims covered the same grounds as the main action would have done, the proceedings would be lengthy, expensive and take away the cost and other benefits of the settlement. However, there clearly needed to be a way of providing compensation where such claims fell within the operational sphere and there was evidence of inadequate skill and care.

39.6. There was certainly a need to make sure that costs claimed were properly scrutinised and I did consider that a normal legal aid taxation was the most appropriate way of achieving this, so long as non-legally aided plaintiffs were not unfairly prejudiced. Such a mechanism would protect them in respect of generic costs as it would mean their lawyers could not claim more from them than was awarded by the legal aid taxation, even if their contractual liabilities were greater.

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39.7. The comment on paragraph 12 was not a matter on which I believe I had any involvement or any particular view.

39.8. I note the comment on counsel perhaps seeking to negotiate the figure down. While I was of course bound to follow whatever instructions I was given, if proper to do so, I believe that I would not have favoured such an approach and would have counselled against it. A significant benefit of the proposal was that it was the Plaintiffs' lawyers, with their best assessment of the merits of the case and its prospects, who were putting this forward as an acceptable level of compensation and I would not have considered it appropriate to have tried to cut it down if it were otherwise acceptable.

40. *A handwritten minute and note record a meeting in the Secretary of State's room on 19 November 1990* ***[DHSC0020866_083, DHSC0020866_084]****. The names of Mr Collins and Mr Spencer are contained in the top left-hand corner of the note.*

a. *To the best of your knowledge, did you attend a meeting with the Secretary of State (or with others in his room) on 19 November 1990?*

40.1. I do not recollect whether I was at such a meeting and would have expected to have my name included if I was. It may be that I was unavailable for professional reasons or that just the senior members of the counsel team were required. However, the brief note echoes views consistent with mine, as described earlier in this statement.

b. *Was any other record of the meeting kept? If so, do you have (or would you be able to locate) a copy of it?*

c. *If no record was kept, why was this? (Please note that the Inquiry has not been able to identify any record of this meeting, other than this note.)*

40.2. My response to these questions is the same as set out in my responses at 35.4 and 35.5.

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41. *A minute dated 23 November 1990 was sent to the private office of the Secretary of State, containing information on the HIV litigation, seemingly ahead of a meeting with the Chief Secretary to the Treasury (Norman Lamont)* ***[DHSC0003654_115]****. The Secretary of State's speaking note recorded:* "I have consulted colleagues and our leading Counsel. I now incline to the view that, if we can secure the proposed package, we should aim to do so." *It also recorded that* "Counsel advise that the plaintiffs might be prepared to settle for a figure of around £30m on the basis of the balance of risks", *but that there were a number of difficulties associated with pursuing such an outcome.*

a. *What role do you play in providing written or oral advice?*

41.1. I doubt that I played any direct part in drafting this material but much of its contents in relation to merits and advantages and disadvantages of the settlement is reflective of the discussions I would have been involved in at the time.

b. *Did you agree with the analysis of the position, as set out in the minute, the speaking note, and the attached documents? Please identify and explain any areas of disagreement.*

41.2. Looking carefully at the contents of the note, I see no significant element that I would be likely to have disagreed with if asked. However, I do not recognise the figures in the "Minimum Cost" Settlement note, where the figures may have come from Michael Spencer from his greater experience of this type of litigation.

42. *An internal Treasury minute was sent to the Chief Secretary on 29 November 1990 regarding the HIV litigation* ***[HMTR0000002_011]****. This note contained a summary of what the author described as* "more cautious" *DH legal advice, including, (i) liability in the 20-30* "medical negligence" *cases was* "quite likely to be established", *(ii) the number of Plaintiffs involved in late infection cases, where the prospects were* "60/40", *may be as high as 500, and (iii) an expectation that judges would* "do everything in their power to be as favourable as possible to the haemophiliacs."

a. *Did you share the views attributed to the DH legal advisors in the minute?*

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42.1. The specific numbers of plaintiffs in these categories do not strike any memory in me and I would not have expected to be in a position to take an informed view at that stage as these details were more in the hands of the health authorities and officials than the Central Defendant counsel team, although Mr Spencer may have had some involvement. Our advice was consistently that medical negligence cases would need to be looked at and this work may have been done in the context of the settlement proposal's seeking to carve out such claims. The worst-case figure of 500 cases in the late infection category is unfamiliar and I suspect came from departmental sources.

b. *On your interpretation of the note, were the prospects of the* "late infection" *cases considered to be 60/40 in favour of the Central Defendants, or in favour of the Plaintiffs?*

42.2. My view at the time remained, as we had advised, that the prospects of defeating the late claims were around 60:40 in favour of the Defendants succeeding.

c. *To the best of your knowledge, what was the basis for the estimate of up to 500 late conversion cases? Was this a figure that had been reached relatively recently in the analysis of the litigation? If so, what was that?*

42.3. I have provided my best recollection of this point at a. above.

d. *What is your view of the assessment of the Treasury legal advisors that the DH's legal advice was* "likely to err on the gloomy side"*? Did you ever discuss the case with Treasury legal advisors?*

42.4. I am afraid that I have no such recollection of discussions with Treasury advisers although there may well have been Treasury officials at some conferences, where the number of attendees was frequently a dozen or more. If this legal advice is intended to refer to advice from myself or other counsel for the Central Defendants, I do not agree that it was likely to err on the gloomy side. Our advice was, I believe, clear, consistent and intended to be as accurate an assessment of prospects and options as we were professionally able to put together. I can however envisage

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from the numbers in this note that estimates of numbers of plaintiffs in each category might have been thought pessimistic.

43. *A minute of 4 December 1990 recorded a conversation between you and Mr Powell. You are recorded as giving your analysis of the prospects of success on different elements within the litigation* ***[DHSC0003654_108]*** *and concluding that the Central Defendants had an overall chance of success of somewhere in the region of 60% to 75%. Your analysis seems to have been worked up into a note that was attached to a minute that was sent to the Secretary of State's private office the following day, 5 December 1990* ***[DHSC0003383_006]****. You are recorded as referring to "some terrible gaps" on self-sufficiency.*

a. *Please explain your thinking about the prospects of success, insofar as you are now able to do so. (Please refer to your earlier answers if it would assist to do so.)*

43.1. As was clear from the note of my advice, I was trying, in conjunction with consideration of the settlement proposals, to put percentage figures onto a range of different and overlapping issues where there were sufficient variables to make a precise mathematical task almost impossible. I was also conscious of the importance of not giving an artificially optimistic view which might lead to a failure to appreciate the possible downside risks, nor so pessimistic a view as to obscure the overall judgment that we were substantially more likely to win all or the vast majority of claims altogether.

43.2. In formulating the numbers I would also have been conscious of the need to find a way of making clear that although cases are decided on the balance of probabilities, a 65% chance of winning carries with it a 35% chance of losing, a point that is often overlooked by those receiving and giving advice in percentage terms, as I successfully established some years later in the Court of Appeal in the case of *Levicom v Linklaters*. That risk was I believe part of my thinking even at this early stage of my career.

43.3. Having qualified my answer in this way, I believe that my advice as reported accurately reflected my views in the context of a potential settlement. In retrospect

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my assessment on duty of care at only 50% appears cautious and is likely to have been intended to refer to imposing a duty on DH and including arguments as to the policy/operational divide between duty and no duty.

b. *What were the* "terrible gaps" *that you pointed out on the question of self-sufficiency?*

43.4. I believe that this is shorthand for the fact that the documentary record was very thin and there were substantial time periods during which there was no written evidence of what steps were being taken. Oral evidence from those involved would therefore have been very important and might or might not have filled all or some of the gaps.

c. *The noted recorded you as saying that there had been* "quite a lot of neglect" *resulting from the financial situation. Is that a reference to neglect of the pursuit of self-sufficiency in blood products, or some other area or areas of neglect?*

43.5. I believe that this is likely to have been a reference to lack of progress towards self-sufficiency. The contrast with legal negligence a little later suggests that I may have been referring to failures to make progress which might have been justified on resource allocation and other arguably sound grounds or might have indicated areas where DH could be criticised.

d. *You are also recorded as stating that* "Opinions [are] bound to vary between Counsel". *What do you recall being the areas of disagreement between Counsel at the time? Were these disagreements significant?*

43.6. I believe that the paragraph as a whole explains the differences that I had particularly in mind. Andrew Collins as a public law specialist was clear as to the extent of any duty of care, which Michael Spencer as a medical negligence specialist was minded to be less optimistic. However, these were differences of nuance rather than disagreement on any fundamental issue or important point.

Section 7: The Settlement

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44. *On 11 December 1990, the Secretary of State for Health announced in the House of Commons that the Government intended to settle the litigation in line with the Plaintiffs' proposal, and that as a result an additional £42 million would be provided to the Macfarlane Trust. The Secretary of State also gave other details, including that payments from the Macfarlane Trust would not affect a recipient's eligibility for social security benefits* ***[DHSC0020866_034]****. That announcement was followed by efforts to finalise the settlement, dealing with outstanding issues such as costs, the ongoing medical negligence litigation, and the drafting of the settlement order. Please consider the following documents and answer the questions that follow.*

a. *What role did you play in finalising the agreement?*

44.1. I believe I was involved on a day-to-day basis when available and that I would have done much of the drafting in so far as done by Counsel and would also have been the main counsel involved in checking and amending departmental drafts where we were asked to review them.

b. *Insofar as you are now able to do so, please set out the division of labour between you and the other counsel instructed by the Central Defendants in this process, and explain the reasons behind that approach.*

44.2. As throughout, Mr Collins provided direction and final approval of important matters, Michael Spencer was leading on the technical and medical issues and I believe that he became rather more involved during this period because of availability and workload. I did what I was required to do and was the contact point on a day-to-day basis.

45. *The terms of the settlement included a provision to the effect that those wishing to take advantage of it would have to waive their right to bring further litigation against the Government in connection with infection by HIV or hepatitis viruses through the use of blood products. What was your role in negotiating for the Central Defendants on this specific point?*

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45.1. I do not recollect what role I played, other than drafting in accordance with instructions. Michael Spencer may have had more involvement but that is speculation.

46. *What was the rationale behind the requirement that those accessing the settlement should waive their legal rights in this way? In particular, why were hepatitis viruses included as well as HIV? Was this rationale challenged by those negotiating on behalf of the Plaintiff?*

46.1. I believe that the rationale was that a large part of the claim was predicated on the failure to reduce the risk of contracting hepatitis, which was said to be causative of infection with HIV. From my recollection, which is not particularly good on this point, what was principally in mind was infection with Hepatitis A and Hepatitis B which were considered comparatively mild by way of comparison with the benefits of Factor 8. I do not recollect much discussion of what was then described as Non-A, Non-B hepatitis or Hepatitis C. I do not recollect this being challenged by the Plaintiff counsel team. Of course Michael Brooke, who was the senior junior on the Plaintiff side later led the plaintiff team in the Hepatitis C litigation against the health authorities, in which I had no direct involvement, but I do not know whether he had yet begun his involvement with that issue.

47. *How significant an issue was this during the settlement discussions? How controversial was it? Please answer in respect of:*

a. *The importance of this topic during discussions with the legal representatives of the Plaintiffs.*
b. *The importance placed on this topic by those instructing you.*

47.1. My recollections in respect of hepatitis are as set out above, save that it was I think considered important that future claims in hepatitis should not give rise to the same series of arguments as had been raised in this case. It is difficult to think of litigation against the Central Defendants in relation to hepatitis which did not involve the same issues as in the HIV haemophiliac litigation. The position in respect of clinical treatment decisions giving rise to hepatitis risk would probably have been

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considered by the health authorities during the settlement process but I was not involved. To the best of my recollection, the Hepatitis C litigation was brought in the end only against health authorities and not against the Central Defendants, which reinforces my recollection. It is also important to note that the pleaded claim did not include any claim for damages for infection with hepatitis. Although I cannot usefully speculate on the reasons for this, I believe it is likely to have been a combination of the fact that this was a known side-effect of the treatment with Factor 8 and the fact that the recoverable damages, even if negligent breach of duty had been established, would not have justified an action of this scale.

47.2. So far as a settlement of HIV related claims was concerned, it was I believe recognised and understood that in the then climate, and with the estimates of merits made on both sides, a settlement would only be achievable if it brought to an end all the current litigation and did not give rise to satellite litigation. That importance was reflected in the extension of the compensation offer to all haemophiliacs and their families and not just the plaintiffs, and in the provision for future compensation of those who were diagnosed as HIV positive after the settlement was concluded.

48. *To the best of your knowledge, what lay behind the instructions you received on this point from the Central Defendants?*

48.1. As far as I recollect, no question of preserving claims for hepatitis infection prior to the cut-off date in December 1990 was ever raised by the Plaintiffs. The absence of any claim for such damage in the pleading is perhaps an indication of the importance placed on it by the Plaintiffs. It was important to exclude claims for hepatitis because, for the Central Defendants, it raised exactly the same issues as to self-sufficiency and the concentration on unpaid donors as the existing claim and there was no suggestion of any other claim that could be brought against the Central Defendants based on other breaches.

49. *Are you able to assist with the way in which the provision containing the waiver developed? In particular, who originally proposed the relevant term, why was it amended in the way that it was, and what were the reasons for the position adopted*

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on this point by the Central Defendants? When answering these questions, please consider the following documents:

- *DHSC0003654_032: Draft Terms of Agreement. Please see §6 and §7 in particular.*
- *DHSC0003655_022: Draft Terms of Settlement marked as being "Revised as at 18/12/90 Noon". Please see §5 and §7 in particular*
- *DHSC0004523_091: Draft Terms of Settlement dated 21.1.91. Please see §5 and §8 in particular.*
- *DHSC0003660_019: Draft Terms of Settlement dated 22.3.91. Please see §5 and §8 in particular.*
- *DHSC0003661_021 and DHSC0003661_022: Amended Draft Terms of Settlement, and Mr Mildred's covering letter of 16 April 1991. Please see in particular §5 and §8, and the marginalia next to it. If you recognise the handwriting, please state who wrote the comments next to these paragraphs.*
- *SCGV0000233_040: Draft Terms of Settlement dated 22.4.91. Please see in particular §5 and §8.*
- *DHSC0003662_076: Minute from Mr Powell dated 23 April 1991 recording a conversation with you.*
- *SCGV0000233_038: Minute from you to Mr Powell dated 24 April 1991, attaching a draft Terms of Settlement. Please explain the reasons behind your proposed changes to the Settlement Agreement, particularly in respect of the waiver of claims.*
- *DHSC0045721_004: Draft Terms of Settlement dated 24.4.91. Please see in particular §5 and §8.*
- *HSOC0023174: Letter from Mr Powell to the Plaintiffs' solicitors inviting settlement and attaching the Final Settlement Agreement (dated 26.4.91). The Inquiry understands this to be the final Settlement Agreement. Please see in particular §5 and §8.*

49.1. I have looked carefully at all the documents referred to. There was from the outset an acceptance by both sides that those who wished to take advantage of the settlement would have to waive claims arising out of the subject-matter of the action. I do not recognise the handwriting on these documents although some of the changes to other documents look as if they might have been in my handwriting.

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I believe that the development of the wording was simply to define more accurately what claims would be waived and in relation to what period. The cut-off date for infection meant that there was in theory nothing to prevent claims in relation to future breaches, in particular against the health authority, so long as they did not arise out of the matters already pleaded.

50. *What discussions, if any, took place about the possibility that individuals accessing the settlement would be required to waive their rights of action in respect of hepatitis viruses at a time when they were unaware whether they were infected with such viruses? Was this a source of concern to you, or to any of those involved in the negotiations?*

50.1. I am not aware that this was raised as a concern by anyone. It would in theory have been possible to cover those who were already suffering from hepatitis from treatment administered prior to December 1990 but were unaware of it by putting in a clause similar to those who first tested positive for HIV after that date, with a time cut off for such testing, but since there were no existing or threatened claims for hepatitis injury, that would have been difficult to explain or justify. For those who already knew they were infected, no claim had been brought and I think I would have assumed that it had been decided that no claim lay for such infection or in respect of hepatitis other than as a reason for earlier self-sufficiency. If damages for hepatitis had been included as a head of claim in the Main Statement of Claim, it would have been necessary to decide whether such damage was in itself something for which there should have been compensation and if so, what sum should be allocated for such injury. However, as then perceived, injury by hepatitis did not have any of the characteristics of exceptional and appalling suffering as justified the special treatment for infection by HIV and the development of Aids.

51. *Did you have any concerns, at the time, about the appropriateness of requiring a waiver in the terms agreed as a condition of settlement? Were you aware of anyone else having such concerns? Do you have any such concerns in retrospect?*

51.1. I do not believe that I had any such concerns and I do not recollect any being expressed by others. In retrospect, I do not believe that a settlement could at that

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stage have been achieved without a waiver of claims in relation to infection with HIV before the cut-off date. So far as claims in hepatitis are concerned, if anyone had identified a viable claim arising out of clinical management, I expect that the answer would have been that no such claims had been brought by existing plaintiffs who sued in relation to HIV infection alone. Non-plaintiffs were being offered a benefit of similar value and I did not at any stage consider that there were grounds for giving them more preferential treatment than plaintiffs.

51.2. I should add that although this first resolution of existing litigation by payments without proof or admission of liability was, I believe, ground-breaking, I and all concerned would have been aware that if there was a cause of action at all, some Plaintiffs would have a better than average prospect of success on liability and causation and some a less good prospect, particularly the early victims. However, this was a settlement that treated all equally on a basis that a very responsible and experienced plaintiff legal team thought appropriate to put forward. I can understand the feeling of some that an across-the-board settlement did not do justice to the strength of their case. However, no mechanism was put forward by the plaintiffs for a sliding scale of damages based on the strength of individual cases rather than the common tragedy, and I believe that such a grading would have been both difficult and divisive and would have been a move away from a form of compensation based on the seriousness of the medical condition endured by Plaintiffs. Without allowing accepting plaintiffs to continue their claims, thus incurring the same costs and use of resources as the settlement was intended to avoid, there was no obvious mechanism for allowing such claims to continue and none was put forward by the Plaintiffs.

51.3. I believe that the issue arose again in the BSE vCJD litigation and although I have not been able to review the details of that settlement, I believe that we did make provision for plaintiffs to continue their claim on the basis of giving credit for all receipts under the no fault scheme. I do not know to what extent if at all such claims were brought or if brought whether they succeeded but as I believe that I had no involvement in any such claims, I suspect that none were in the end pursued.

GRO-C

52. *Did you (or do you) know how individual Plaintiffs were informed and advised about the effect of the waiver provisions? Please provide any details that you can. Do you recall having any concerns at the time about how the Plaintiffs were being so informed and advised?*

52.1. I have no knowledge of this but assume that all plaintiffs were informed of the detail of the settlement and provided with adequate advice about their options and the reasons for advising them to settle. I certainly have no reason to believe that informed consent was not obtained in each case by their lawyers.

53. *Following the settlement, recipients of funds from the Macfarlane Trust were required to sign a Deed of Undertaking precluding future litigation against,* "the Department of Health, the Welsh Office, the Licensing Authority under the Medicines Act 1968, the Committee on Safety of Medicines, any district or regional health authority or any other Government body involving any allegations concerning the spread of the human immuno-deficiency virus or hepatitis viruses through Factor VIII or Factor IX (whether cryoprecipitate or concentrate) administered before 13th December 1990." ***[MACF0000086_225]***.

a. *What role, if any, did you play in drafting the wording of this Deed?*

53.1. I have no specific recollection of this. However I may well have been involved in drafting it or commenting on the draft although the identity of the entities to whom the waiver was given would have been decided by others.

b. *If you did have a role, please explain, insofar as you are now able to do so, what instructions you received on the wording of this Deed, and what discussion took place around it.*

53.2. I do not recollect any such discussion other than that the clear intention was that those accepting would not be able to pursue litigation based on the existing pleaded allegations.

GRO-C

54. *The settlement was announced in open Court on 10 June 1991 (see documents listed in the table above for this date).*

a. *Please consider Ognall J's remarks (as recorded in the Davies Arnold Cooper note), and in particular his comment that he considered that,* "all parties have been well advised to compromise these actions on the terms before me and I acknowledge their good will in so doing" ***[NHBT0091944]***. *Were you ever made aware of Ognall J's reasons for making this observation, or his wider view of the litigation, and the way in which he was settled?*

54.1. No. I assume that this represented his view based on his involvement in and knowledge of the case.

b. *Please consider the speaking notes of Rupert Jackson Q.C.* ***[NHBT0091946]*** *and Daniel Brennan Q.C.* ***[DHSC0003663_042]***. *To what extent did their analysis of the strengths and weaknesses of the parties' positions in the case accord or differ from the one that you had formed at the time? Please identify and explain (insofar as you are able to do so) any significant difference of view. Were you surprised in any way by their analysis?*

54.2. I believe that their analysis was rather more optimistic from the Plaintiffs' point of view than mine but I regarded their comments as realistic and responsible and as representing the considered view of senior respected practitioners and their legal teams.

c. *Have your views on the legal merits of the claims changed over time?*

54.3. No. I have not had cause to reconsider my views until asked to give this statement but my reading and recollection reinforce my view. If anything, my views as to the role of the CSM and the Licensing Authority and my views as to legal and factual causation have become firmer in supporting the conclusion that the claims would have failed.

Section 8: General Questions

GRO-C

55. *What further role, if any, did you have in matters relating to the HIV litigation?*

55.1. None, so far as I recollect.

56. *What further role, if any, did you have in any other matter relevant to the Inquiry's Terms of Reference?*

56.1. I have already indicated that I had a role in the perhaps equally tragic case of those infected with CJD by Human Growth Hormone, in which the issues were mainly involved with the unusual operational role adopted by the Medical Research Council in manufacturing the growth hormone. I have also provided material in relation to my involvement in the BSE vCJD litigation in which I worked with the Plaintiffs Leading Counsel Stephen Irwin QC to devise a suitable No Fault compensation scheme intended to benefit the first group of victims in circumstances where it was wholly uncertain whether the number of victims would in the end be in the low hundreds or in tens of thousands.

56.2. I also had a brief involvement for the Central Defendants in the Hepatitis C litigation before it became clear that the litigation was being pursued only against health authorities but my involvement was very limited and I did not become familiar with the issues or the merits of the claims.

56.3. Otherwise I have had no further relevant involvement except my role in defending the tobacco litigation where issues of specific causation would have been very material if the litigation had continued rather than being dropped following a decision on limitation issues.

57. *Reflecting on the way in which the HIV litigation was conducted:*

a. *Do you, personally, have any regrets or concerns about the advice that you gave, or the actions that you took, in respect of the HIV litigation? If so, please give details.*

55.1. No.

GRO-C

b. *Do you have any regrets or concerns about the advice given, or the actions taken, by any other member of your team of Counsel? If so, please give details.*

55.2. No.

c. *Do you have any regrets or concerns about the instructions given, or the actions taken, by the Central Defendants? If so, please give details.*

55.3. My only regret is that there was not then and still is not any system that provides a mechanism for a no fault compensation scheme which can be called upon in the event of a major health crisis such as the haemophiliacs and HIV, Human Growth Hormone and CJD or BSE and vCJD. Such a system would require careful work to avoid abuse and an unjustifiable call on the public purse and/or health budget but would provide large savings in legal costs and avoid the perceived need to bring litigation to secure compensation. I have also been attracted to the model of insured no fault compensation on the New Zealand model advocated in speeches by Lord Hoffmann and others but recognise the formidable resource and practical implications. These are however my own personal views from my experience of such claims and are not in any way intended to be critical of my instructions or the way in which the Central Defendants acted. They arise from my experience of seeking to deal with tragic events such as this, irrespective of fault and a strong wish that funds spent by the health services on legal costs could be channelled into primary health care or compensation of those suffering from those events.

d. *Do you consider that those representing the Central Defendants acted appropriately in the course of the litigation? If not, please explain why.*

55.4. Yes.

e. *Do you consider that the Central Defendants themselves acted appropriately in the course of the litigation? If not, please explain why.*

55.5. Yes, in so far as I was aware of their actions and discussions.

GRO-C

f. *During the course of the litigation, were you in any way surprised by the instructions that you received from the Central Defendants? If so, please give details.*

55.6. Not that I recollect.

g. *Do you have any concerns over how the Plaintiffs in the HIV litigation were advised or represented during the course of the HIV litigation? If so, please explain what those concerns are.*

55.7. My only regret, which is not intended as a criticism of the plaintiff legal team who were no doubt putting their clients' case forward to the best of their ability, was that the claims included claims against the CSM and LA. The legal arguments for such claims were in my view always weak, they added little to the case against the DH and required a strong policy defence to discourage the attempt to use such claims to obtain compensation for unexpected side effects of medicines. The inclusion of such claims in this case engaged the same issues as in Opren and in the Benzodiazepine litigation which eventually collapsed at huge cost to the legal aid fund and the public purse when it became clear to the Plaintiffs that such claims faced insuperable difficulties. If such claims had not been made in this case, some of the obstacles to resolution would have been removed. I recognise that the Plaintiffs considered it necessary to bring claims in respect of policy decisions in order to give early victims a chance of establishing a case, which would have still involved important issues of principle but a settlement might have been easier if the claims had been limited by the exclusion of such policy issues. This is again a personal view with the benefit of hindsight and not something that I recollect being discussed at the time except to the extent reflected in my earlier answers.

Statement of Truth

I believe that the facts stated in this written statement are true.

Signed GRO-C

Justin Fenwick QC

Dated 25 May 2022

NOT RELEVANT

GRO-C