

UK Legal News Analysis

What could the introduction of the Mesothelioma Pre-Action Protocol mean in practice?

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Abstract

Personal Injury analysis: Harminder Bains, partner and asbestos/mesothelioma claims expert at Leigh Day, warns that government proposals will reduce the compensation payments to sufferers of mesothelioma who are able to prove their claims and also, in many incidences, prevent victims of mesothelioma from recovering any compensation whatsoever.

Analysis

Original news

Victims of asbestos cancer could see reduction in damages

The Times, 23 September 2013: Government reforms will cut the amount of compensation received by sufferers of asbestos-related cancer, charities have warned. They claim the reforms, aimed at accelerating the claims process, will make the process more expensive thereby reducing the amount of compensation paid to sufferers.

Why has the insurance industry pushed for the creation of an out-of-court scheme?

The Association of British Insurers (ABI) have realised that incidences of mesothelioma are increasing and epidemiologists have advised that it is yet to peak. The reason why the ABI is pursuing the Mesothelioma Pre-Action Protocol (MPAP) is in an attempt to try and reduce the numbers of victims of mesothelioma in succeeding in the future to prove their claim for compensation. The ABI is looking after their stakeholders' interests and attempting to make savings in payments that it makes to mesothelioma sufferers.

In 2007 the ABI attempted to bring in an identical pre-action protocol. I and others who represent victims of mesothelioma fought against it being introduced. Subsequently the Practice Direction 3D - Mesothelioma Claims, ie show cause procedure, was introduced. The ABI consented to this Practice Direction at a

meeting with all interested parties in a hotel in Oxford in 2008.

How would the out-of-court scheme change the procedure for pursuing an asbestos-related claim?

The Mesothelioma Pre-Action Protocol together with Secure Mesothelioma Claims Gateway (SMCG) and Fixed Recoverable Costs (FRC) and the removal of the s 48 exemption from the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO 2012) will have a devastating effect and cause great injustice to victims of mesothelioma.

These proposals will reduce the compensation payments to sufferers of mesothelioma who are able to prove their claims and also, in many incidences, prevent victims of mesothelioma from recovering any compensation whatsoever.

In summary the MPAP proposes that no court proceedings can be issued unless numerous onerous steps have been taken prior to issue. In essence however, it is important to note that by the time the steps have been undertaken as set out in the timetable, about 50% of the claimants will have died--thus preventing some claimants receiving an interim payment of £50,000 to purchase vital equipment such as wheelchairs and paying for nursing care. In addition it will prevent some claimants obtaining any compensation whatsoever because vital experts' reports and witness statements will not have been obtained as a result of restrictions placed within the timetable.

It is important to note that, if a solicitor commences a court case prior to the timetable ending, costs sanctions are envisaged against the victim and/or the solicitor.

The MPAP also proposes fixed costs. The fees suggested in the consultation range from £6,700 to £9,300. It is far too low an amount as a great deal more work is required to prove the claimant's case. Perhaps the ABI should be reminded that asbestos/mesothelioma cases involve some of the most complex issues in personal injury law. Such as 'latency, fibre counts; divisible and indivisible injuries'. These issues are complex and the insurance industry has sought to prevent claimants from obtaining any compensation in numerous cases which have set precedents and are known industry-wide. Such cases have a significant impact not only in asbestos cases but also on personal injury cases in general: for example, *Fairchild v Glenhaven Funeral Services Ltd (t/a GH Dovener & Son)* [2001] All ER (D) 12 (Feb), *Trigger Litigation Cases (Durham v BAI (Run Off) Ltd (in scheme of arrangement)* [2012] UKSC 14, [2012] 3 All ER 1161, *Sienkiewicz v Greif (UK) Ltd; Willmore v Knowsley Metropolitan Borough Council* [2011] UKSC 10, [2011] 2 AC 229, *Williams v University of Birmingham* [2011] EWCA Civ 1242, [2011] All ER (D) 25 (Nov).

The insurers will know that there will be further costs incurred by them delaying the litigation or continuing to defend without making sensible offers to settle. They will know that any such delay will cause further difficulties to mesothelioma sufferers and their legal advisors and are likely to use such delays to try and force claimants into accepting lower and inadequate settlements, depriving them of the appropriate level of compensation. This is a wholly unacceptable and significantly detrimental consequence to mesothelioma sufferers and is completely contrary to the stated aims of this consultation.

Under para 4.2 of MPAP, there is an imposition on the claimant to unilaterally disclose a statement. Under the current Practice Direction there is no such imposition. This creates an 'inequality of arms' because the claimant has effectively lost control of when to disclose its evidence. This undermines one of the basic elements of our judicial system which requires each party to be given a reasonable opportunity to present its case under conditions that do not place that party at a substantial disadvantage against its opponent.

What concerns do charities have in relation to these changes?

Charities are understandably concerned because it is proposed that exemption 48 of LASPO 2012 is removed and accordingly, if this proceeds, the 10% uplift of general damages and One Way Qualified Cost Shifting will not be sufficient to cover the costs of paying for after the event insurance, disbursements and success fee. Therefore victims of mesothelioma will be worse off, as they will pay for these from their own pockets.

What challenges are victims facing when pursuing a claim?

Victims will have to prove, as they do now, liability and causation. However, unlike now, they will have no alternative but to undertake a number of potentially onerous procedural steps, such as responding to insurers often voluminous, time-consuming, impossible to answer, standard lengthy lists of questions, which have little or nothing to do with the case. But the insurers will complain vociferously if each and every request is not considered and, in accordance with the MPAP, costs sanctions will be imposed upon the victim of mesothelioma.

Harminder Bains specialises in catastrophic injuries arising from road traffic accidents and work accidents and mesothelioma and asbestos disease cases. Several of her cases have set precedents and have been reported, notably: Frank Baker v Tate & Lyle plc (ground-breaking judgment against Tate & Lyle, sued as occupier for victim of mesothelioma); Najib v John Laing (highest award to date for general damages for a mesothelioma victim); Beesley v New Century Group (highest care award to date in a mesothelioma case). Harminder is an APIL Fellow and advises the Parliamentary Asbestos Committee.

Interviewed by Kate Beaumont.

The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.