

ASBESTOS DISEASE SUFFERERS VERSUS LASPO

In 1995 Conditional Fee Agreements (CFA's) became lawful and the success fee and ATE premium was paid by the Claimant. After a few years due to the injustices caused by this, the then Lord Chancellor Lord Irvine issued a consultation in 1998. The consultation considered whether the insurance premium and the success fee should be recovered against the losing party.

Harminder Bains, Partner and Joint Head of the Asbestos and Mesothelioma Team at Leigh Day Solicitors reports.



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After much consultation with the insurance industry, the Access to Justice Act 1999 was enacted. The Government decided to extend the use of CFA's by abolishing Legal Aid for almost all personal injury litigation. One of the main objections to this had been that, Legally Aided personal injury clients, who had the benefit of Legal Aid for their personal injury litigation suffered little or no deduction from their compensation by way of contribution to fees. If they were forced to use CFA's they would end up paying success fees and premiums out of their compensation. Lord Irvine's solution was to enact the Access to Justice Act 1999 which allowed the successful party to recover the cost of the success fee and the ATE premium from the losing party. In effect, the Government was transferring the cost of providing assistance to victims of injury in bringing injury cases, from the taxpayer to the losing party's insurers.

Incensed by the additional financial burden, the insurance industry constantly made challenges to CFA's and argued that even single minor breaches voided the CFA thus preventing their liability to pay.

In 2004 the Civil Justice Council (CJC) commenced mediations. Data was obtained from interested parties. As a result of the mediations the CJC Annual Report 2005 announced that an "industry agreement" on levels of success fees in asbestos cases had been reached. This agreement worked well, until, Lord Justice Jackson commenced a review in December 2009, which resulted in the LASPO 2012. It had a dramatic impact on the provision of Legal Aid and how legal costs are paid in asbestos disease cases. It allowed up to 25% of asbestos disease sufferer's compensation to be paid for legal costs, in addition to the ATE premium.

Section 48 exemption from LASPO 2012

Much debate ensued in Parliament and many argued that asbestos disease sufferers should be exempted and eventually a Section 48 exemption, was obtained for sufferers of mesothelioma, as the Government accepted there was a "special case".

Inexplicably, on 4th December 2013, only six months after announcing this exemption the Government announced that it would now proceed to remove the Section 48 exemption from LASPO 2012.

The Asbestos Victims Support Groups Forum UK (the Forum) commenced a Judicial Review on 3rd March 2014 represented by Harminder Bains. The Forum argued that the Government had a statutory obligation to carry out a review into the "likely effect" of the abolition of recoverability of success fees and the ATE insurance premium from the losing party and not to bring in such provisions until the Lord Chancellor had published a report on the conclusion on the review. The Association of British Insurers (ABI) intervened in the Judicial Review proceedings as it supported the Government. Some suspected that the Government's decision was based on a "secret deal" having been made between it and the ABI. It was believed that the ABI and the Government agreed that there would be a lifting of the Section 48 exemption to fund the Diffuse Mesothelioma Payment Scheme, introduced by the Mesothelioma Act in 2014. These concerns were justified when as a result of the Justice Select's Committee's investigation on the 13th May 2014, James Dalton on behalf of the ABI was forced to provide a copy of the "secret agreement" entitled "Mesothelioma Heads of Agreement between Her Majesty's Government and the Association of British Insurers dated 13th July 2012". It stated that "this document is confidential and remains the property of the ABI. Neither the contents of this paper nor the document itself may be disclosed to a third party including under a request under the Freedom of Information Act without prior written consent from the ABI".

On the 1st August 2014 the Justice Select Committee published its report and criticised the Government over its approach to compensation for victims of mesothelioma. It said the Government's approach had been "maladroit" and a promised review to the effects of LASPO had not been conducted in an even-handed manner. The Committee stated "we are concerned that the Government had not been transparent or open either with us or other interested parties about the fact that its overall policy in relation to mesothelioma has been shaped in accordance with an agreement however informal and elastic which it had reached with employer's liability insurers. It is hard to see how a balanced and informed public debate can take place where a prior agreement has been reached between two of the principal parties to that debate and that agreement is not known to other participating in the debate including victims".

On 2nd October 2014 William Davis J gave judgment in the Forum's Judicial Review. He agreed with the Forum in that the Government had not conducted a proper review of the "likely effect" of LASPO. He found that the Lord Chancellor had acted "unlawfully". Therefore, mesothelioma Claimant's success fees and ATE premiums are continued to be paid by the losing party.

On 30th October 2017 the then Lord Chancellor David Lidington presented a post-legislative memorandum to the Justice Select Committee which stated "the content and purpose of a post-implementation review is different to a post-legislative memorandum; post-implementation reviews are primarily concerned with assessing the reforms from an analytical perspective, in the manner of an impact assessment, rather than reporting certain elements of the Act's implementation and operation. As such, the analysis provided in the preliminary assessment sections of this memorandum is at a high level. The Ministry of Justice intends to undertake a more thorough and substantive analysis in the post-implementation review".

However, when the post-implementation review of the effect of LASPO was published on the 7th February 2019 it confirmed that there would be "no change" in respect of the effects on LASPO regarding any cases including those with asbestosis, pleural thickening and lung cancer. The Forum found this decision indefensible considering the effect of LASPO on victims of these diseases. The Forum instructed Harminder Bains to commence a Judicial Review and it argued that the review published on 7th February 2019 had not discharged the Lord Chancellor's obligation to carry out a "thorough and detailed impact assessment" of the LASPO reforms with regard to asbestos related disease sufferers.

Sadly, the Forum did not succeed, as the Judgment on 31st July 2020 confirmed that there was "not a clear and unambiguous promise" of any kind to deal with the effect of LASPO. This was despite the fact the Lord Chancellor had accepted there was a clearly expressed intention that the post-implementation review would assess the LASPO reforms. As a consequence of the judgment the Forum has made an application for permission to appeal to the Court of Appeal and is awaiting the decision.

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