

Government's Proposed Reforms Will Create Great Injustice to Victims of Mesothelioma - Harminder Bains, Leigh Day



20/09/13. The Government released a consultation on 24 July 2013 and is to be responded to by 2 October 2013.

The stated objective is to speed up claims without the need for litigation through the courts.

In summary, the Government proposes 4 major changes as follows:

1. A Mesothelioma Pre-Action Protocol ('MPAP');
2. A Secure Mesothelioma Claims Gateway ('SMCG');
3. Fixed Recoverable Costs ('FRC'); and
4. Removal of the exemption for mesothelioma claims under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO').

However these proposals will have a devastating effect and cause great injustice to victims of mesothelioma. They will reduce the compensation payments to those who are able to prove their claims and also, in many incidences, prevent victims of mesothelioma from recovering any compensation whatsoever.

1. MPAP

The disease pre-action protocol already exists and states "*in a terminal disease claim with a short life expectancy, for instance where a Claimant has a disease such as mesothelioma, the timescale of the protocol is likely to be too long. In such a claim the Claimant may not be able to follow the protocol and the Defendant would be expected to treat the claim with urgency including any request for an interim payment*". This together with the Practice Direction 3D – Mesothelioma Claims as set out in the White Book works well and therefore there is **no need** for yet another protocol.

The main problems with the proposed mesothelioma protocol are:

1. About half of the sufferers will die before the protocol permits claimants access to the Court system;
2. The reality of mesothelioma claims is that defendants/insurers will not settle promptly or on reasonable terms without the realistic prospect of litigation in the RCJ Mesothelioma List;
3. The protocol lacks flexibility. Mesothelioma cases are too complicated and urgent to fit into the protocol as drafted. The flexibility in the current systems which allows claimants to start court proceedings at an early stage is crucial in reducing delay;
4. In restricting or discouraging access to the RCJ Mesothelioma List and the show-cause procedure, the protocol will encourage unmeritorious defences and further delay. This means that more sufferers will not have their claims settled during life;
5. The protocol would recalibrate the present system, and disrupt the balance that has been achieved by the show-cause procedure;
6. Those claimants who are prepared to issue court proceedings – to try to circumvent the almost inevitable delay – risk being punished by losing a substantial part of their damages to pay sanctions on costs. They will be subject to invidious scrutiny as to whether or not their life expectancy was short enough to justify their conduct;
7. The protocol timetable is unrealistic and disclosure obligations are potentially open-ended. The potential for delay and dispute is obvious;
8. The defendants/insurers will be able to delay proceedings, and access to the show-cause procedure, by making extended requests for further information and rejecting letters of claim on the grounds of non-compliance. This will inevitably generate satellite litigation;
9. The protocol will impose unilateral and potentially unfair obligations of disclosure on claimants. This will confer a significant tactical advantage on defendants where liability is in dispute;
10. The protocol will not speed-up justice. Quite the reverse, it will delay settlement and impose an unbearable pressure on mesothelioma sufferers to either accept unreasonable settlements or to die without any compensation.

2. SMCG

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In addition, the Government proposes a secure mesothelioma claims gate ('SMCG'). The SMCG, as stated by Helen Grant in the Ministerial Forward is "to support quicker and more transparent information gathering and management in all mesothelioma claims, including those cases which do not go through the MPAP or for which a liable employer cannot be traced." The SMCG is to be set up and funded by the ABI.

It is proposed that the following will be sent through this electronic system:

1. GP notes;
2. Medical notes;
3. HMRC employer's schedules.

The consultation gives the above 3 categories by way of an example of the type of information which is to be submitted electronically. It does not restrict it to these 3 categories. So it is not known what other information, if implemented, will be requested to be sent electronically.

There is no current system in personal injury cases which requires this sort of information to be sent electronically.

The closest to this system is the RTA Portal which is used on cases of up to £25,000 in damages.

However it is important to recognise that in these cases are not usually obtained and the only information which is required for sending electronically is:

- (a) the claimant's full name;
- (b) address (but not telephone number);
- (c) date of birth;
- (d) National Insurance Number;
- (e) occupation; and
- (f) medical report (not medical records).

In mesothelioma cases medical records will, more often than not, comprise of over 1000 pages. However no information has been given as to how the ABI intends to address the security of such sensitive and personal data and there have been a number of high profile recent incidents in which personal data has been lost or accidentally disclosed by major organisations including HMRC, DWP and MOD.

The MoJ states that through widespread use of the gateway for claims, it will enable industry-wide statistics on the incidence of mesothelioma to be captured for actuarial use and reporting to the relevant authorities. Statistics on the incidences of mesothelioma are already recorded by the Coroners as there is a duty upon a registrar to report a death to the coroner where the cause of death was an industrial disease. In addition the Compensation Recovery Unit of the Department for Work and Pensions already records the number of payments made to claimants for mesothelioma.

It also suggests through requesting the agreement of sufferers (or their personal representatives) on the gateway, provide a repository of information which could be made available for clinical research. This is a nonsense. Firstly the data collected in this process will be of little, if any, value for medical research. Secondly, there are strict rules governing use of patient data for medical research. A specific protocol has to be approved by the Research Ethics Committee and each patient whose data is to be used has to sign a detailed consent form approved by the REC which sets out the research aims and guaranteed confidentiality in use of patient data.

3. FRC

"It is the Government's provisional view that it would be reasonable and proportionate to introduce a structure of FRCs to act as a **constraint**..." (paragraph 41).

"A FRC regime could support the MPAP by indicating how much work is envisaged and by encouraging **no more work than that is to be undertaken**" (paragraph 43).

"Cases conducted outside the MPAP would still go through the RCJ fast track procedure where costs and settlements will be decided separately. Where cases do not use the MPAP, legal costs would be subject to the current guideline hourly rates. **However the settlement of legal costs for cases which do not use the MPAP might take into consideration whether those cases might reasonably have been resolved in accordance with the MPAP**" (paragraph 45).

Perhaps the ABI and the MOJ 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 defendants have sought to prevent claimants from obtaining any compensation whatsoever 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. To propose fixed costs in such a difficult area of law is obscene.

4. LASPO

The removal of Section 44 i.e. preventing the claimant mesothelioma sufferer from recovering a success fee against the defendant will only result in the claimant having to pay its solicitor's success fee from the claimant's compensation. Thus, reduce the compensation received. The increase in general damages of 10% will not compensate for the loss of success fee as the success fee is a lot higher than 10% in general damages.

The removal of Section 46 will prevent the recovery of conditional fee insurance premiums from the defendant. This again will reduce the claimant's damages because the claimant will have to pay the premium from damages recovered.

If the Government was genuinely interested in improving speed and assisting victims of mesothelioma, it would implement the Third Parties (Rights Against Insurers) Act 2010. This was put forward by the Law Commission as

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long ago as 2001 i.e. almost 13 years ago. This Bill proposes to give mesothelioma claimants the right to enforce against the insurer without having to establish liability against the defunct company first.

The ABI have lobbied and fought hard to prevent paying victims of mesothelioma 100% compensation under the Mesothelioma Bill. Instead, the Government proposes to pay victims of mesothelioma 75% of the average damages and only pay victims for mesothelioma who were diagnosed after 25 July 2012 and not before that date.

The real reason behind the mesothelioma pre-action protocol is that the ABI have realised that incidences of mesothelioma are increasing and epidemiologists have advised that is yet to peak. The reason they wish to implement the pre-action protocol and to set up the secure mesothelioma claims gateway is in an attempt to try and reduce the number of claimants succeeding in the future as they are concerned about their stakeholders having to make payments to mesothelioma sufferers.

If the MOJ were genuinely concerned about mesothelioma sufferers, they would simply applaud the success of the High Court "*Show Cause*" procedure and put funds towards increasing the capacity by funding more administration staff. Instead, the MOJ ignore the success of the "*Show Cause*" procedure and have produced the MPAP which does nothing more than deny victims of mesothelioma justice.

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