

## ASBESTOS VICTIMS SUPPORT GROUPS FORUM - UK

### SPEEDING UP MESOTHELIOMA CLAIMS

#### PROPOSALS FOR IMPROVEMENT

#### **Introduction**

The Forum is grateful for the recent opportunity to meet with Janet Howe, Ministry of Justice (MoJ), about the draft mesothelioma pre-action protocol, and for the opportunity to re-engage in the discussion on the best way forward for speeding up mesothelioma claims.

The Asbestos Victims Support Groups Forum – UK (Forum) submitted proposals to the DWP for the improvement of mesothelioma claims in November 2006. Our proposals included suggestions for change to the Industrial Injuries Scheme, the Pneumoconiosis etc. (Workers Compensation) Act 1979 and to statute and common law rules (Appendix A).

We share the concerns of ministers and their officials about the many failings of the common law system which denies compensation to so many mesothelioma victims, and fails to deliver compensation in a timely way to those who are indeed ‘fortunate’ enough to succeed in their claims.

The cards are truly stacked against mesothelioma sufferers:

- their disease has the dubious distinction of having the longest latency of all, consequently tracing insurers is a nightmare;
- they often give up a claim in-life to secure financial security for dependants on death;
- they often do not live long enough to know the outcome of their claims;
- the delay in getting medical records can add sufficient additional delay to deny compensation in life;
- even when damages are won, the FSCS validation process can delay payment until after death;
- the latest insurers legal challenge (the ‘trigger issue’) is now delaying payments in some mesothelioma cases.

The government could make a huge difference, and deal a ‘better hand’ to mesothelioma sufferers by acting to remove the above obstacles and delays. Our proposals below address the concerns we have about the claims process, both pre-action and post-action.

#### **1. Mesothelioma Pre-Action Protocol**

The fast track court system for mesothelioma claims, developed by Senior Master Whitaker, has made the *greatest single improvement to date in progressing living mesothelioma claims*. The MoJ has incorporated this fast track system into a Practice Direction, which will soon take effect throughout the regions and expedite many more mesothelioma claims. It would be a disaster if a mesothelioma pre-action protocol were to be adopted which would deny early access to the fast track court system, and thereby undermine an initiative which has been universally acclaimed.

However, we share concerns that more could, and should, be done to improve claims, both pre-action and post-action. Government has already proposed improvements through interim and long term measures. We think the government's initial, interim approach with regard to the pre-action process was correct in looking for an early, standard letter of claim in the context of the Pre-Action Protocol for Disease and Illness Claims (Disease and Illness Protocol).

### Standard Letter of Claim

The announcement on 16 May 06 by John Hutton<sup>1</sup> that the DWP, ABI, APIL and the DCA had agreed to work together to speed up the settlement of claims for those suffering from mesothelioma was universally welcomed. On the 20 July 06 eight interim measures were announced, including the development of a Standard Claim Letter, which could be implemented relatively quickly. Action on most of the interim measures has now been taken, resulting in significant improvements.<sup>2</sup>

The development of a Standard Letter of Claim was overtaken by the ABI's unexpected, and unwelcome, draft mesothelioma pre-action protocol. We think that the initial proposal for a Standard Claim Letter should now be developed, and implemented, as a matter of urgency.

Appropriate reference to the letter of claim should be made in the existing Disease and Illness Protocol to the effect that:

- the letter of claim should be sent within 14 days of a defendant being identified<sup>3</sup> and before issuing proceedings;
- any delay in sending a letter of claim is unacceptable and we believe that sanctions should be imposed on a claimant's solicitor for failing to do so;
- 14 days should be allowed before proceedings are issued for a defendant to reply and admit liability and make an acceptable offer and an acceptable interim payment.

It is clear that in many cases the claimant's occupation and the defendant's industry sector, e.g. BR locomotive works, means that it is inevitable that liability will be accepted: it is only a matter of time until this is done. In these circumstances especially it is possible for a defendant to concede liability in response to a letter of claim within the specified period.

- proceedings may be issued at any time after the 14 days have elapsed from the claim being sent.

Accepting liability must be quickly followed by a meaningful offer of compensation. Too often this does not happen and a long delay ensues, leading to eventual 'haggling' on the steps of the court. Anyone who has stood with a widow and witnessed this sordid spectacle will understand the frustration and anguish caused by the claims process. This is why it is essential that proceedings may be issued even if liability is admitted.

### Fatal Claims

We believe that in contrast to living claims, fatal mesothelioma claims are not expedited as they should. It is not acceptable that some fatal claims should take years to conclude. We think that the Disease and Illness Protocol is not currently followed and we think it should be

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<sup>1</sup> The then Secretary of State for Works and Pensions

<sup>2</sup> These include: a leaflet for mesothelioma sufferers; ABI telephone helpline to support the Code of Practice for tracing ELCI policies; best practice guidance for expediting IIDB claims, and; speedier provision of Revenue and Customs employment records.

<sup>3</sup> An exception would be where a mesothelioma sufferer elects to wait until death (see dependency claims)

effectively enforced, and sanctions should be imposed for delay. Fatal mesothelioma claims should be monitored to assess the effectiveness of the Disease and Illness Protocol.

## **2. Overcoming delays to mesothelioma claims pre and post-action.**

A government long term solution was unveiled at the Mesothelioma Summit on the 13 March 2007 to provide a lump sum payment to all mesothelioma sufferers.<sup>4</sup> This dramatic government announcement, taken together with the interim measures already implemented, amount to a major step forward for mesothelioma sufferers.

Notwithstanding these important government initiatives, including the practice direction already referred to, much more needs to be done to improve claims, especially pre-action.

**We are convinced that unless government addresses serious remaining obstacles to mounting mesothelioma claims all government initiatives now and in the future will remain partial and fail to achieve the government's declared objectives.**

In our submission to the DWP in November 2006 we identified the following obstacles to mesothelioma claims. We believe that it is essential that they are removed.

### **Employers Liability Compulsory Insurance**

A mesothelioma claim cannot be effectively pursued if an insurer cannot be traced where the employer is no longer trading. Many legitimate claims fail simply because of this. Furthermore, time is lost in tracing an insurer, so that in many cases a mesothelioma sufferer will have died by the time an insurer has been traced.

The proposals below are essential, in many cases, to the issue of an early letter of claim and to improve the pre-action process.

#### Establish a central repository for employers liability insurance

There is currently a requirement to keep employers liability insurance records (ELI) for 40 years. However, there is no system for central storage of insurance records, without which it is very likely that the current difficulties in tracing ELI records will continue into the future. As companies cease trading it is not possible to ensure that their records are accessible and traceable. There should be a compulsory requirement for all responsible organisations to record their ELI policies in an agreed central storage system.

#### Impose a specific duty to make available and deposit all ELI records

The code of practice for tracing employers' liability insurance is not proving effective. There is a substantial amount of information held by insurers, brokers and others. We believe that the parties who hold this information will not voluntarily make available all the information they have. We believe there should be a specific duty placed on specified organisations (e.g. insurance companies, employers, solicitors, and others) to lodge all ELI information available to them in a designated, central storage system. This is an urgent issue as information is gradually being lost or destroyed.

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<sup>4</sup> This initiative, allowing recovery of Pneumoconiosis etc. (Workers Compensation) 1979 Act payments, has been a long standing Forum demand which has at last been acceded to. It is not possible to congratulate government on doing what should have been done many years ago, but it is most welcome that recovered monies will be used for all mesothelioma sufferers, and for that we are extremely grateful.

## **Dependency Claims**

Many mesothelioma claims are delayed because a claim made after death can be more advantageous for a mesothelioma sufferer's dependants. We know that mesothelioma sufferers wish to die secure in the knowledge that the best financial arrangements have been made. We do not think an acceptable solution to this dilemma is for an interim payment to be made pending completion of the claim after death.

The MoJ have proposed options which might satisfactorily resolve this dilemma in their consultation paper CP9/07, and also remove the discrepancy in this aspect of law between Scotland and England and Wales.<sup>5</sup> We think that the options in the consultation paper should be considered as a matter of urgency and a satisfactory solution agreed to provide just compensation and to avoid unnecessary delay in settlement of claims and anguish to mesothelioma sufferers and their families.

## **The FSCS validation rule**

The Financial Services Compensation Scheme (FSCS) validation process causes long delays in payment of damages to mesothelioma sufferers, so that in many instances they die before payment is made. These delays could be eradicated if the mesothelioma sufferer were paid prior to the conclusion of the validation process. The FSCS can afford to wait for payment and would lose nothing in doing so. It is unacceptable to delay payment for no other reason than bureaucratic convenience.

## **Arrangements for provision of medical records**

The delay, in some instances, in the provision of medical records, can slow down the claims handling process. While clinical treatment is a priority, the importance of making records available to expedite mesothelioma claims is not always sufficiently understood.

The majority of hospital trusts in Merseyside have agreed to a Terminal Illness Protocol which prioritises solicitors' requests for medical records by accepting a new form, titled, "URGENT – Terminal Illness Case (TIC)". It was noted in discussions that the current fee for providing medical records is insufficient. A higher fee, particularly for solicitors' priority requests, would enhance the capacity of trusts to provide information in a timely manner.

## **The insurers' latest challenge: the 'trigger' issue**

Insurers are threatening to withhold compensation in mesothelioma cases pending the outcome of the legal challenge, the 'trigger' issue. We have been contacted by claimants who have been advised by their solicitors that payment might be delayed. One of the biggest impediments to mesothelioma claims has been the continuous attempts by defendant and their insurers to challenge the right of mesothelioma sufferers to compensation; first the Fairchild case, then the Barker case and now the 'trigger' issue. We do not accept the assurances given to government by insurers that they are eager to provide timely to compensation to mesothelioma sufferers, when, at the same time, they are working day and night to defeat legitimate claims. If this latest attack on mesothelioma claims is successful it will cause chaos and lead swiftly to the end of compensation for mesothelioma sufferers.

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<sup>5</sup> Currently the law in Scotland, Rights of relatives to Damages (mesothelioma) Act 2007 allows dependants to claim bereavement damages and funeral expenses after death where a claim has been settled in life.

### **3. Additional changes to provide fair and just benefits and compensation**

In addition to the above proposals to eradicate delays to mesothelioma claims, we have proposed changes (Appendix A) that would improve benefits and compensation for mesothelioma sufferers. These do not amount to a ‘wish list’ of changes, but relate to many small and large injustices faced by mesothelioma sufferers all of which deserve action.

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## **Appendix A: Summary of the Forum’s proposals to the DWP**

### 1. Industrial Injuries Scheme

1(i) Disregard the whole of IIDB, or at least a substantial percentage of IIDB, where means tested benefits are paid

1(ii) Automatically pay Constant Attendance Allowance (CAA) and Exceptionally Severe Disablement Allowance (ESDA) to mesothelioma sufferers.

### 2. Pneumoconiosis etc. (Workers Compensation) Act 1979

2(i) Automatically treat a mesothelioma IIDB claim as a claim for a 79 Act payment.

2(ii) Automatically make a 79 Act payment on IIDB assessment

2(iii) Recover 79 Act payments from employers/insurers

2(iv) Equalise 79 Act payments for in-life and posthumous claims

### 3. Common Law

3(i) Extend Master Whitaker’s fast-track system for mesothelioma claims and provide adequate resources to ensure that system can work effectively

3(ii) Establish a central repository for employers liability insurance

3(iii) Impose a specific duty to make available and deposit all ELI records

3(iv) Establish an insurer of last resort for mesothelioma claimants

3(v) Amend the FSCS validation rule

3(vi) Pay 100% compensation in pre-72 mesothelioma FSCS claims.

3(vii) Allow a dependency claim on the death of a mesothelioma sufferer who has settled a claim for compensation in life.

3(viii) Improve arrangements for provision of medical records

3 (ix) The government should send a message to insurers that they must stop their attempts to prevent compensation being paid to mesothelioma victims

### 4. Improving take-up of benefits for mesothelioma sufferers

4. (i) APIL should take strenuous steps to ensure that solicitors give mesothelioma sufferers advice on benefits or sign post mesothelioma sufferers to expert sources on benefits advice.
  4. (ii) Provide a DS1500 to all mesothelioma sufferers
  4. (iii) Provide government funding for accredited asbestos victims support groups
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