Asbestos Victims Support Groups Forum UK

Response to the consultation Reforming Mesothelioma Claims

Full name	Anthony Whitston
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	Chair, Asbestos Victims Support Groups Forum
Date	23 September 2013
Company name/organisation (if applicable):	Asbestos Victims Support Groups Forum
Address	Windrush Millennium Centre 70 Alexandra Rd.
	Manchester
Postcode	M16 7WD
If you would like us to acknowledge receipt of your response, please tick this box	YES ☐ (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

The **Asbestos Victims Support Groups Forum** comprises many organisations providing support to asbestos victims, funding mesothelioma research and campaigning on important issues concerning asbestos in the workplace and in buildings. We have ten advice and support groups spread throughout England, Wales and Scotland which provide home visits to advise and support asbestos victims claim benefits and to give support to families through meetings, coffee mornings and dedicated mesothelioma support groups.

Asbestos Victims Support Groups Forum UK
Response to the consultation Reforming Mesothelioma Claims

Headline Statements

In recent years I have noticed that many mesothelioma claims have been settling more rapidly and I believe this is a result of the Mesothelioma Fast Track procedure set up by Senior Master Whitaker and operated by him and his colleagues. In cases dealt with through the Fast Track I am less frequently asked to comment on arguments raised by Defendants on liability and causation which are without merit and with no realistic prospect of standing up to scrutiny. From a medical perspective the Fast Track has greatly assisted mesothelioma sufferers and it would be a major setback for them if it were to be dismantled as a result of the proposed protocol. All that is needed to achieve the stated aim of speeding up mesothelioma claims is to extend the Mesothelioma Fast Track to all mesothelioma claims.

Dr Robin Rudd 9 September 2013

The consultation betrays a fundamental misconception of the claims process. Preparing evidence for, and sending a letter of claim, initiates a legal process to sue for damages under the tort of negligence. Issuing proceedings is simply a continuum of the claims process. The distinction between pre-action and issue of proceedings is misleading, as is the suggestion that there is no issue of liability at the onset of the claims process, or that claims are uncontested at the outset. The fact that ultimately there is no defence in many cases, is misleadingly interpreted as 'liability is not an issue and cases are uncontested.' and such cases are therefore candidates for a PAP.
This canard lies at the heart of the consultation. The truth is that claims are made in accordance with pre-action procedure, whatever the name of that procedure, and are invariably contested and early liability resisted prior to court proceedings.
The ABI proposals in this consultation paper have nothing to do with speeding up claims. Early liability could be admitted under the existing pre-action process – it is not. The intention is to take control of the claims process by: falsely describing claims as inappropriate for court action and imposing sanctions for doing so; demanding more information to position the defendant to resist claims, and; imposing fixed costs to limit the opportunity for claimants to have fair and expert representation.

Asbestos Victims Support Group Forum

Our view is that a deal was struck to include the ABI proposals in the consultation as part of the negotiations on the terms of the Mesothelioma Bill and that the extract below from Hansard supports that view.

***Lord McKenzie of Luton**: Can the minister say whether any of that (mesothelioma pre-action protocol/portal/fixed costs) featured in the discussions and negotiations that he had on the levy?*
***Lord Freud**: Yes. It was important to the industry that the MoJ undertook to look at those issues.*

If the ABI proposals are accepted and implemented our view will be confirmed

Asbestos Victims Support Group Forum

Introductory Comments

The Asbestos Victims Support Groups Forum comprises many organisations providing many different types of support, including: welfare advice; funding mesothelioma research and campaigning on important issues concerning asbestos in the workplace and in buildings, especially in schools.

In particular, we have ten advice and support groups spread throughout England, Wales and Scotland which provide home visits to advise and support asbestos victims to claim benefits, and to give support to families by organising meetings, coffee mornings and dedicated mesothelioma support groups.

In 2012, the groups visited over 900 mesothelioma sufferers, which accounts for approximately 40% of newly diagnosed mesothelioma sufferers in that year. Our close contact with mesothelioma victims and their families gives us a deep understanding of the difficulties, trauma and suffering that they endure.

The experience of mesothelioma sufferers
We would like to emphasise in this response how stressful and challenging it is for sufferers and their families to claim benefits and compensation, irrespective of the time it takes to conclude such claims. Even very straightforward benefit applications are a burden, and one of the most important aspects of our work is to smooth the path to claiming benefits.

As part of our contribution to the impact assessment for the Mesothelioma Bill we gave a very conservative estimate of the percentage of sufferers (14%) who declined to make a viable claim for compensation because they were so overwhelmed by their disease. It is extremely difficult for sufferers who are recovering from a very invasive biopsy, or commencing chemotherapy, and facing a daunting prognosis to contemplate taking on a legal claim.

It is regrettable that the consultation paper reiterates many of the same arguments which were found by claimants' organisations and Parliamentarians to be so distasteful, especially in respect of 'shopping around' for the best deal on costs. We comment on that argument in the body of our response. The suggestion in Annex A.11 which we have copied below is especially concerning.

'Under the LASPO reforms to the 'no win no fee' market claimants are expected to take a greater interest in the costs generated by their lawyers. As a result it is possible that more cases might use the mesothelioma PAP in future, as more claimants may express a preference to do so.'

The above statement, and many of the underlying assumptions in the consultation paper, betrays a fundamental lack of understanding of the dire predicament mesothelioma sufferers find themselves in. The ugly term **'skin in the game'** was used to express the desirability of mesothelioma sufferers taking a greater interest in the claims process was used in Parliamentary debates on the LASPO Bill. The very idea that those who had lost their health and would soon lose their lives had any more 'skin' to put in the game was abhorrent to many who participated in those debates. It is shameful that the same offensive and discredited argument is being recycled for the purposes of this consultation.

We would hope that any proposals for reform would smooth the path to making a claim for compensation. Unfortunately, we do not believe the proposed reforms will do this – we believe that they will make that path more difficult.

Our concerns about the consultation

One-sided nature of the consultation

In our letter of the 25 July we made a formal complaint to the MoJ about the consultation. In particular we complained about the Minister's refusal to include a proposal for reform set out in our letter of the 12 June, which would counterbalance the ABI proposals in the consultation paper. We say 'ABI' proposals because the MPAP was written by the ABI, the SMCG was designed and is to be operated by the ABI, and fixed costs have been advocated by the ABI for many years.

Prior to the publication of the consultation paper the ABI published their paper, *Reforming the civil justice system for mesothelioma*, which was sent to Parliamentarians on the eve of the Report debate in the House of Lords, 17 July 2013. The ABI paper set out their case for the three consultation proposals, using the same arguments, and much the same terminology, as that found in the consultation paper published on the 25 July.

We do not expect Government to include all the options put to them: it is their prerogative to determine the appropriate options. But, to exclude even one option from the claimants' perspective seems perverse, considering that the consultation represents the defendants' agenda only.

We have been reassured that proposals for reform may be submitted in a response to the consultation paper. It is regrettable that there are no questions on at least one proposal for reform from the claimants' community which respondents might answer. Our proposals are found at the end of the questionnaire.

Lack of data to better understand timescales

Our request for the raw data in the dataset used for the purposes of this consultation was refused due to confidentiality agreements. We believe that the data can be sufficiently anonymised so that it is not possible to identify any particular claimant and we believe that it is absolutely necessary to have that data to better understand where the delays occur in the claims process.

We were shocked that our request for additional data was refused and that we had to request it under the Freedom of Information Act. We are equally shocked that the MoJ are not concerned to interrogate the data in order to better understand and explain the delays in the claims process. For example, it is important to know how many claims are settled in life and how many commence in life but have to be continued by a dependant due to the death of a claimant. Clearly the latter claims will be delayed as the case has to be re-pleaded. It is important to distinguish claims that are included in the RCJ mesothelioma list dealt with by dedicated Masters to see if they are concluded more quickly than cases heard in other courts. There is so much scope for gaining a better understanding of the characteristics of cases in respect of the timescale in settling cases and it beggars belief that the MoJ are not interested in doing so.

BLF survey

Unfortunately, both the consultation paper and the ABI report to Parliamentarians 17 July quoted from an unpublished, draft version of the British Lung Foundation (BLF) survey, which the ABI had part-funded. The BLF has apologised to the Forum for wrongly giving permission to the ABI and MoJ to use the draft survey. That does not excuse either organisation from quoting from the survey. The ABI disgracefully, selectively quoted from the survey on almost every page of the report, misleading Parliamentarians who did not have the opportunity to reference the survey. In fact, even a cursory reading of the survey shows that it is defendants' behaviour which causes delay and so much distress to mesothelioma sufferers.

Lack of pre-consultation

At 2.2 the impact assessment states that pre-consultation views were sought from claimant groups, claimant representatives and the ABI. The Forum's views were not sought pre-consultation.

All of the above concerns give us no confidence in this consultation. We believe that the proposals will do irreparable harm to mesothelioma sufferers' ability to claim fair and timely compensation.

Our responses to the questionnaire are found on the below.

Executive Summary

The MPAP:

- defendants have the opportunity now to respond to claims expeditiously within the DPAP but do not do so. Changing the name and timescales for a PAP will not make any difference;
- The consultation betrays a fundamental misconception of the claims process. Preparing evidence for, and sending a letter of claim, initiates a legal process to sue for damages under the tort of negligence. Issuing proceedings is a continuum of the claims process.
- The suggestion that there is no issue of liability at the onset of the claims process, or that claims are uncontested at the outset is nonsense.
- front loading additional information required for a letter of claim will slow down the claims process;
- resolution of liability will be delayed by unnecessarily requiring information on causation and quantum at the same time as information on liability;
- payment of interim damages will be delayed;
- the threat of court action which is necessary to force defendants to respond on liability will be removed to the detriment of mesothelioma sufferers;
- the right of terminally ill claimants to take court action will be fettered due to sanctions on mesothelioma claimants.

The SMCG:

- confidential medical information will not be adequately protected;
- the information required for the claims process will have no value for medical research;
- medical records will still have to be provided in paper form;
- providing data electronically duplicates provision of data, much of which is provided by e mail and fax.
- there is no advantage to mesothelioma sufferers in having access to data for raising other claims. Mesothelioma is a terminal illness: they will not be raising other claims;
- there is no advantage to mesothelioma claimants in using an SMCG.

The FRC:

- fixed costs will remove the cost incentive for defendants to admit liability early;
- fixing costs for defendant solicitors will not make any difference as defendants have 'deep pockets', unlike claimants;
- mesothelioma cases are not simple or straightforward, even if liability is usually, eventually admitted. Many cases require considerable work. Solicitors will not take on complex cases if costs are fixed;
- less costly paralegals will undertake work leading to poor decisions;
- inexperienced solicitors will enter the mesothelioma claims field jeopardising claims;
- early, low offers are likely to be accepted ;

- the cost of 'shopping around' for the best legal costs would not be reduced;
- costs are already assessed by cost judges.

LASPO s 48

- the Mesothelioma Bill has nothing whatsoever to do with the effect of sections 44 and 46 on mesothelioma claims. The Bill should not be taken into consideration in the report required by s 48;
- the LASPO reforms do not compensate for the cost of success fees and disbursements, or ATE to cover the cost of disbursements and the risk of cost sanctions for 'claimant behaviour;
- the consultation reforms do not improve the mesothelioma claims process. They make the process worse
- mesothelioma claimants would be doubly worse off if the consultation proposals are used to bring into force sections 44 and 46.

Questionnaire

Question 1: What in your view are the benefits and disadvantages of the current DPAP for resolving mesothelioma claims quickly and fairly?

The consultation betrays a fundamental misconception of the claims process. Preparing evidence for, and sending a letter of claim, initiates a legal process to sue for damages under the tort of negligence. Issuing proceedings is simply a continuum of the claims process. The distinction between pre-action and issue of proceedings is misleading, as is the suggestion that there is no issue of liability at the onset of the claims process, or that claims are uncontested at the outset. The fact that ultimately there is no defence in many cases, is misleadingly interpreted as 'liability is not an issue and cases are uncontested.' and such cases are therefore candidates for a PAP.

This canard lies at the heart of the consultation. The truth is that claims are made in accordance with pre-action procedure, whatever the name of that procedure, and are invariably contested and early liability resisted prior to court proceedings.

The ABI proposals in this consultation paper have nothing to do with speeding up claims. Early liability could be admitted under the existing pre-action process – it is not. The intention is to take control of the claims process by: falsely describing claims as inappropriate for court action and imposing sanctions for doing so; demanding more information to position the defendant to resist claims, and; imposing fixed costs to limit the opportunity for claimants to have fair and expert representation.

One important benefit of the DPAP is that it allows the provision of information as it becomes available so that the question of liability can be addressed as soon as possible. This is extremely important in mesothelioma claims, which are complex, and it can take considerable time to provide all the information required.

A most important benefit is that it allows terminally ill mesothelioma sufferers to exit the DPAP and to issue proceedings if there is delay, or there is likely to be delay. The importance of this flexibility cannot be overestimated. It is only the threat of court action which provides a meaningful incentive for insurers to deal with the issue of liability without delay.

In paragraph 31 of the consultation paper, views are requested on how the more relatively straightforward cases, where the question of liability is not an issue, can be dealt with without litigation. This question shows a basic misunderstanding of mesothelioma cases. In our understanding, liability is always an issue, i.e. until evidence and information is provided which might resolve it, and that is not determined at the outset, i.e. prior to sending a letter of claim. If they are 'relatively straightforward' then defendants should swiftly accept liability. There is nothing in the MPAP which incentivises defendants to do so.

Clearly, there are some cases involving British Rail locomotive works and asbestos lagging companies where evidence is much more easily obtained, but they are now the minority of cases. The mesothelioma sufferers we see now have often worked for several construction companies, often small companies, or their exposure was limited and secondary to their main occupation. The complexity of cases, and scope and opportunity to refute liability is increasing, and is likely to increase.

It is not that the DPAP timetable is too lengthy, which it is, but that there is no incentive in the DPAP for defendants to admit liability: therein lies the main disadvantage of the DPAP, and the MPAP for that matter. The ability to impose discipline, and provide incentive to address the issue of liability is only found within the court process, or the threat of court action.

Overall, the MPAP gives control of the claims process over to the insurers. There are no sanctions on defendants for non-compliance with the PAP. Claimants who do not comply with the PAP by exiting early will face cost sanctions.

The Practice Direction D3, and the mesothelioma list in the Royal Courts of Justice, revolutionised mesothelioma claims, as described in Senior Master Whitaker's account, 11 April 2013, which he provided on request from the Forum (see Appendix 1). The opportunity for mesothelioma sufferers to have their claims expedited through a fast-track court process should not be fettered in the way proposed in this consultation.

If the DPAP (and we believe the MPAP will not have a better time scale due to front-loading information) has not, to date, significantly reduced times to settlement compared to the times achieved in the RCJ, we see no reason why a marginally changed pre-action protocol will make a difference. We believe the assertion that cases will be settled within three months in the PAP is illusory.

Mesothelioma sufferers deserve to know that their case will be dealt with in a consistent manner, expeditiously and efficiently. That can only be guaranteed in the court process. Within a PAP there are no drivers to make defendants respond properly to claims. The only driver is the oversight of a court.

The ABI's disgraceful briefing which we have already referred to makes it very clear to us that their behaviour has not changed, and will not change on the introduction of their MPAP, which has, in our view, been drafted by them to suit their interests, not the interests of mesothelioma sufferers.

Question 2: How far do you think that a new dedicated MPAP would address the problems and meet the objectives set out above?

Objectives

- **Encourage provision of early and full information about a claim, notably through an early intimation letter.**

There is already provision in the DPAP for early notification in mesothelioma claims. There is no reason why a change of name to 'early intimation letter' should make any difference.

- **Tighten time scales and avoid litigation**

A major disadvantage of the MPAP is that it front-loads so much information required for a letter of claim. The sheer amount of information is acknowledged at 2.23 impact assessment, where it is suggested that the PAP might support litigation activity, because it is so comprehensive. For this reason, the additional information required in the MPAP has been described as a 'trial bundle'.

The information required is additional to that required in the DPAP:

- complete set of medical records;
- witness statement;
- all other witness statements;
- letters of administration or grant of probate.

The DPAP sensibly asks that relevant documents, such as health records, are identified and disclosed following receipt of letter of acknowledgement of claim. Just as sensibly, the DPAP asks for letters of administration or grant of probate if obtained by the date of the letter of claim. Such information is provided as soon as possible, but not required at the time of the letter of claim.

One consequence of front-loading information in this way will be the slowing down of the claims process. Simply put, solicitors will not be able to provide this bundle of information within the time scale laid down in the MPAP. It is not necessary to provide information for resolving issues of causation and quantum prior to that which is necessary for resolving liability.

The MPAP will not achieve the objective of speeding up claims; it will slow them down.

The MPAP may well avoid, or rather deter, litigation through threats and cost sanctions on claimants, but to the detriment of claimants.

- **Support efficient management of proceedings in accordance with Practice Direction 3D**

In so far as preparing what amounts to a 'trial bundle' for the purposes of a letter of claim, the Practice Direction may well be 'supported'. But the cost to claimants of the consequent delay in the pre-action period and the ceding of all control of a case to a defendant, and the threat of sanctions for exiting the PAP early, far outweighs any residual 'support' for the practice Direction.

Question 3: What are your detailed views on the ABI's proposed MPAP at Annex B? What further issues might it address? Do you think the criteria for entering the MPAP are the appropriate ones? If not, what criteria would you suggest and why? In what circumstances, if any, should a case fall out of the MPAP?

The additional information referred to above should not be required with the letter of claim, but should be provided as soon as possible, at or after the issue of the letter of claim, as is required in the DPAP. See details of additionally required information in bullet points above.

We understand that the criteria for entering the MPAP are those set out at paragraph 44 impact assessment, i.e. 'where a solvent compensator has been identified and **where**

liability is confirmed'. The second criterion, 'where liability is confirmed' cannot apply. It is not possible to determine liability prior to sending a letter of claim, i.e. prior to entering the MPAP.
It seems self-evident that the criteria for entering the MPAP are met if a preliminary claim is lodged and investigations are made, negligence is alleged and a viable compensator is found.

The MPAP jettisons the flexibility contained in the DPAP. The only concession to terminally ill mesothelioma sufferers to exit the MPAP is if a clinician states that the claimant is unlikely to survive the timescale of the PAP. We have appended (Appendix 2) Dr. Robin Rudd's view that it is not possible for clinicians to predict the likelihood of patients surviving the timescale in the PAP.

It is completely inappropriate to base a protocol upon the assumption that a medical expert can predict reliably that a patient will survive long enough for a timetable to be worked through. The most rapid possible settlement of every claim must be the goal. Dr Robin Rudd

As previously stated, if the flexibility in the DPAP is withdrawn defendants will no longer be under threat of court action and are at will to engage in delaying tactics. The current flexibility in the DPAP should be retained.

Question 4: To what extent do you think the proposed MPAP will result in reduced legal costs in mesothelioma claims?

Since it is most likely that cases will be delayed, rather than expedited, it follows that it is unlikely that there will be any reduced costs.

Question 5: To what extent do you think a SMCG will help achieve the Government's objective of ensuring that claims are settled quickly and fairly?

Electronic information is currently used to speed up information exchange. The time and cost of scanning and uploading information is not justified, and even if it were, it is not at all clear why duplicating information would speed up claims. Certainly, a case has not been made to demonstrate that an SMCG would help in settling claims quickly and fairly.

At paragraph 39 consultation paper, it is envisaged that an SMCG should enable solicitors to raise subsequent claims in respect of a sufferer without needing to reload information. This cannot be an advantage as mesothelioma sufferers die. They will not make a subsequent claim.

Question 6: How should the SMCG work (if at all) with the MPAP and procedure in traced mesothelioma cases generally, and what features should the SMCG have in order to complement those procedures effectively and efficiently?

The SMCG would just duplicate information, which, in any case can be faxed, e mailed and shared efficiently without recourse to an expensive, time consuming and insecure Gateway.

Question 7: What do you see as the risks of a SMCG and what safeguards might be required?

Uploading medical records is extremely problematic for several reasons.

Confidentiality is a major concern and there is no indication in the consultation paper or impact assessment about how this issue is to be addressed.

Sorting medical records is extremely difficult electronically and is done using paper records (see Dr. Rudd's advice Appendix 2). Also, according to Dr. Rudd, accessing CT scans would be 'at best a complex and time consuming exercise and at worst impossible.

Furthermore, Dr. Rudd believes that using data gathered through the PAP for medical research is unrealistic, and conforming to the rules of the Research Ethics Committee would be far too onerous (see Appendix 2).

The suggestion that data gathered through the protocol could be used for medical research is unrealistic. Firstly, the data collected in this process would 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 a Research Ethics Committee (REC) and each patient whose data is to be used has to be sign a detailed consent form, approved by the REC, which sets out the research aims and guarantees confidentiality in use of patient data.
Dr Robin Rudd

There are no discernible advantages in using an SMCG and we do not believe that a case has been made, or even seriously attempted, in the consultation paper/impact assessment.

Question 8: Do you agree that a fixed recoverable costs regime should be introduced to support a dedicated MPAP? If so should this apply primarily to claimant costs? Should any measures also apply to defendant costs? If so what form might they take?

An FRC regime should not be introduced.

It is surprising that a FRC regime is contemplated at all as costs are assessed by cost judges whose job it is to ensure that no costs are awarded for any work over and above that necessary in a case. It appears that concern about unnecessary legal work is not the reason for a FRC regime, but rather a determination to drive costs down regardless of the consequences this might have on claimants.

Fixed costs would negate any incentive for a defendant to settle quickly.

If fixed costs are not commensurate with the increased front-loaded work, less costly paralegals will take over work currently undertaken by expert solicitors, leading to poor decisions, and early acceptance of offers and poor judgment about complexity of cases. This risk is recognised in the equality statement, but wrongly does not relate this risk to mesothelioma claimants:

'The IA (at pages 7-11) identifies the risk that claimant lawyers undertake less mesothelioma cases as they seek lower cost cases and avoid more complex cases whose higher costs would not be covered by the Fixed Recoverable Costs regime.'

There is also a concern that firms of solicitors new to this type of case will see an opportunity to get a guaranteed payment for quick work, settling cases on first offers and, as with paralegals, failing to, or not wishing to, understand the complexity of this type of legal work.

The prospect of mesothelioma claimants 'shopping around' for the best deal on legal costs was considered by many Parliamentarians to be abhorrent. It was one of the main reasons why Peers voted twice for their amendment which resulted in s.48 LASPO.

It is suggested at 44 of the consultation paper that **'FRCs may also reduce the costs to claimants of 'shopping around' to find the best deal on legal representation**'. It is clear from this statement that mesothelioma claimants will still have to 'shop around'.

However, It is not the case that costs will be lowered. Prior to the LASPO Act, success fees were fixed at 27.5% of base costs. Post LASPO, they may be up to 100% of base costs, but capped at 25% of general damages, including past losses. This allows success fees to increase, so that even if base costs are less, a greater proportion of those costs may be applied to success fees. Of course, for litigated cases, hourly rates apply. For both litigated and non-litigated cases mesothelioma sufferers will be in the same position which was found unacceptable by Parliamentarians.

This theme is taken up in the impact assessment in Annex A where it is suggested that because success fees are a proportion of the underlying claimant's lawyer costs, the reduction in claimant costs associated with the mesothelioma PAP might imply lower success fees. The same objection applied to the effect of a FRC applies to this argument.

The fact that solicitors *may* choose not to charge any success fee, as suggested in the consultation paper, is sheer conjecture. The effects of sections 44 and 46 should not be based on conjecture.

It is notable that the ABI uses very similar terminology as that used in the consultation paper with reference to 'shopping around'. In the ABI paper distributed to Parliamentarians, 17 July 2013, they say, 'It would also mean that the claimant would no longer have to worry about **'shopping around' to find the best deal in legal representation.'**

As far as applying a FRC to defendants as well as claimants, we can only say that defendants have 'deep pockets', unlike claimants, and fixed costs will make no difference to the behaviour of defendants.

Question 9: Which proposed design of fixed recoverable costs structure do you support? Please explain your answer.

We do not support a FRC regime.

Question 10: What are the key drivers of legal costs, both fixed and variable costs, and how strong are these drivers?

We can say, from the outset, mesothelioma claims are time consuming and difficult, largely because of the very long latency period associated with mesothelioma. Work involved in tracing insurers, finding witnesses, discovering evidence take time and is inevitably costly.

Defendants' failure to concede liability in a timely way is a major driver of legal costs. Fixed costs will not address that problem. On the contrary, a major incentive to concede liability will be stripped.

Legal practitioners are best placed to identify other drivers of legal costs.

Question 11: Do you have any views on what the level of fixed recoverable costs should be, in relation to your favoured design? Please explain your answer.

We do not support a FRC regime.

Question 12: Do you agree that the fixed recoverable costs regime should apply only to cases which fall under the MPAP?
We do not support a FRC regime.

Question 13: To what extent do you think the reforms apply to small and micro businesses?

We are extremely concerned about small or micro businesses entering the field of mesothelioma claims. Inexperienced legal providers who look to take on so-called simple claims within the MPAP will not have the experience to determine which claims are inappropriate for the PAP. In fact, they will have a financial incentive to keep a claim within the PAP and to accept low offers rather than challenge a defendant through the court process.

Question 14: To what extent do you think the reforms might generate differential impacts (both benefits and costs) for small and micro businesses? How might any differential costs be mitigated?

We are not in a position to answer this question.

Question 15: Do you agree that sections 44 and 46 of the LASPO Act 2012 should be brought into force in relation to mesothelioma claims, in the light of the proposed reforms described in this consultation, the increase in general damages and costs protection described above, and the Mesothelioma Bill?

NO, for the following reasons

The Mesothelioma Bill establishes a levy, an hypothecated tax, to pay compensation from public money (the levy) to mesothelioma claimants where a negligent employer is no longer trading and the insurer cannot be traced, whereas sections 44 and 46 relate to claims against a viable defendant or insurer. The Mesothelioma Bill has nothing whatsoever to do with the effects of sections 44 and 46. It is axiomatic that, despite its many shortcomings, the Mesothelioma Bill is a 'good thing', but that doesn't make it relevant to the review.

The LASPO reforms: 10% uplift of general damages and One Way Qualified Cost Shifting. Peers did not accept the argument that these reforms offset the effects of sections 44 and 46, i.e. compensate for the effects of paying success fees and ATE insurance to cover disbursements and protect against cost sanctions. In fact, they leave claimants worse off. Suggesting that the LASPO reforms mitigate the effects of sections 44 and 46 is simply recycling discredited arguments and adds nothing to the review of the effects of sections 44 and 46.

Of course, if one resorts to the ABI's disingenuous version of LASPO Act reforms in their scurrilous briefing to Parliamentarians on the eve of the House of Lords Report debate which conveniently omits claimants' liability for disbursements, then the argument does appear convincing.

The three ABI proposals: MPAP; SMCG; FRC
We do not accept that the Mesothelioma Bill, or the LASPO Act reforms are relevant to the review. We are therefore left with the three ABI proposals in the consultation paper as the basis for bringing into force sections 44 and 46: a MPAP, SMCG and FRC.

As argued above, we do not believe that the three ABI proposals justify bringing into effect sections 44 and 46. In fact, if introduced, they will put mesothelioma claimants in a worse position than if sections 44 and 46 applied to them on the introduction of the LASSPO Act in April 2012, and they had not had to face these current so-called reforms.

- They will pay legal costs which will far outweigh LASPO reforms.
- They will be required to 'put skin in the game' by shopping around for the best legal deal.
- They will be less willing to sue for compensation fearing the uncertainty of legal costs.
- They will lose their right to take court action without threats of sanctions.
- They will lose expert representation as costs are fixed.
- They will cede control of their claim to defendants or their insurers.

We believe that a deal was struck to include the ABI proposals in the consultation as part of the negotiations on the terms of the Mesothelioma Bill and that the extract below from Hansard supports that belief.

***Lord McKenzie of Luton**: Can the minister say whether any of that (mesothelioma pre-action protocol/portal/fixed costs) featured in the discussions and negotiations that he had on the levy?*
***Lord Freud**: Yes. It was important to the industry that the MoJ undertook to look at those issues.*

If the ABI proposals are accepted and implemented our view will be confirmed

---

Our options for change

Provide adequate funding for all litigated mesothelioma cases to be listed in the RCJ as an alternative to the three ABI reforms

The only improvements to the mesothelioma claims process to date have been the Practice Direction and the efficient and cost-effective mesothelioma list in the RCJ. We would like to see the mesothelioma list include all litigated cases, in order to establish one, expert court which would have the following advantages:

- One specialised, expert court providing consistent, expert decisions.
- Cost effective fast track procedure
- The only process which can give directions, brooking no delay and guaranteeing efficient claims handling.
- Provides greater compensation than non-litigated process.
- Provides equality of arms so that no tactical advantage is given to any side
- Gives the right for all mesothelioma sufferers for their case to be heard in court

Bring into force the Third Parties (Rights against Insurers) Act 2010

The delay in bringing into force the Third Parties (Rights against Insurers) Act 2010 is not acceptable. We have waited since 2010 and any further delay is unacceptable, especially since the Law Commission first published their report recommending change in 2001. When it suits Government, amendments to Acts can be done quickly. How can mesothelioma sufferers take seriously Government's stated commitment to speeding up claims when they have tolerated such a prolonged delay.

Legislative parity with the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007

Currently, in England and Wales, mesothelioma sufferers have to make the invidious choice of staying their claim until after their death in order that their families might be more financially secure. In Scotland, this is not the case. A case may be settled in life, and after death, dependency payments may be made. Senior Master Whitaker makes particular reference to the situation mesothelioma sufferers find themselves in, stating that settling a claim in life can put dependants at a significant financial disadvantage.

In 2007, the Department for Constitutional Affairs issued a consultation paper, CP 9/07 providing options to achieve the outcome envisioned in the then Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill. The Forum responded positively to the consultation options which would achieve this desired outcome. Nothing has been done to achieve parity with Scottish mesothelioma sufferers.

The Government could act, indeed could have acted long ago, to give dying mesothelioma sufferers the solace of knowing that their claim would be settled in life without jeopardising their families' financial security.

The following charities have given their support for the Forum submission

The June Hancock Mesothelioma Research Fund

The Mick Knighton Mesothelioma Fund

Mesothelioma UK

Appendix 1

How his administration of mesothelioma claims, particularly with reference to his Practice Direction, improved the mesothelioma claims process? Essentially, we would like to know what works well and why.

I recognised early in the existence of the asbestos list in the QBD in 2002, that to the vast majority of claims there is no defence with any real prospect of success yet previously it was commonplace for every issue to be defended and claimants run right up to trial thus enabling defendants to be make unrealistically low offers in respect of damages. Many victims were dying before the issue of liability could be disposed of.

The primary purpose of the mesothelioma list is to enable the issue of liability to be determined as early as possible on a summary basis, something that is possible in 97 – 98% of cases. Once liability is resolved as an issue the case can proceed, after interim payment of damages, to an assessment of damages. Less than 1% of claims that go to assessment fail to settle before an assessment hearing.

Living Victims

A summary judgment on liability issues allows an order for an interim payment to be made to living victims hopefully before death. I should stress that it is not the aim necessarily to have total resolution of the claim in the case of living victims before death (though this does happen in many cases). This is because many claims are worth a great deal more on a fatal basis and the settlement of those claims before death would put dependants at a significant disadvantage. In such cases (following Court of Appeal authority) the assessment of damages will be held over till after death, but the issue of liability will have been disposed of during lifetime at a point when the living victim will often be able to clarify the evidence. In other cases the victim will die after judgment on liability has been given and the claim will then have to be re-pleaded on a fatal basis. This can usually be done without undue delay and the matter timetabled to assessment. Therefore the essence of the system is the early elimination of liability as an issue so that an interim payment of damages and costs can be ordered.

Deceased Victims

The same case management principles can be applied to claims in which the victim is dead. The urgency is less but the opportunity to streamline the claims and eliminate liability as an issue at as early a stage as possible is still there. This promotes savings in costs and reduces the burden on the court's resources.

Show Cause

The speedy and summary resolution of liability is achieved by a court imposed summary judgment filter, known as the "show cause" procedure. Once the claimant has produced sufficient evidence to establish exposure in breach of duty, the evidential burden shifts to the defendant to produce the evidence on which it relies to demonstrate that it has a real prospect success in its defence. The overall burden of proof remains on the claimant. In fact it is the existence of the procedure rather than its actual use that promotes early elimination of liability issues. It has made defendants make an earlier and more pragmatic set of decisions as to whether to pursue defences. The result is that in the vast majority of claims

judgment is entered and a timetable to assessment set at the first and what is usually the only 30 minute Case Management Conference hearing the court has to conduct, or the defendants are given some extra time to make a decision an, if they decide not to show cause judgment is entered automatically. Those comparatively infrequent claims that need a hearing at which the defendants will show cause add a further hour or hour and a half. The show cause procedure is normally conducted on a 'costs in the case' basis. There is no risk on costs to defendants who attempt to show cause. There are some rare cases where it is obvious from the start that there is a defence and they tend to be timetabled straight to trial. A proportion of cases, maybe 10 percent will need a second Case Management Conference of 30 minutes because everything could not be concluded at the first Case Management Conference. Overall the use of the court's resources in comparison with other types of claim is very small. The vast majority of claims need no more that a 30 minute hearing. All hearings except assessments of damages and trials are held on the telephone to save costs.

All of this also promotes speedy resolution by settlement and occasionally by trial. The aim in most cases is to come to a resolution within 6 months of issue. The average is probably more in the region of 8 months.

What works well therefore is (1) the show cause procedure (2) the universal use of telephone Case Management Conferences (3) the extensive use of email for the promulgation of documents by parties and by the Court in the course of the litigation (3) the standardisation of procedures (4) the certainty of outcomes that tends to be produced by a consistent expert approach to the management of the claims.

The Senior Master

11th April 2013

Appendix 2

DR R M RUDD MA MD FRCP 54 New Cavendish Street
London
W1G 8TQ
Tel: 020 7486 3247
E-mail: robin@robinrudd.com

I am Dr Robin Rudd, a consultant physician with a special interest in research into and treatment of mesothelioma. I have been looking after patients with mesothelioma and providing reports for the Court in relation to claims for damages for more than 30 years. I have given evidence in several major cases, arising from attempts by insurers to avoid paying damages to mesothelioma victims, which set precedents or resulted in changes to the law, including Fairchild and the mesothelioma 'trigger litigation'.

Clinical Features

Pleural mesothelioma arises in the chest cavity. It typically presents with rapid onset of breathlessness due to development of a pleural effusion and or chest pain of insidious onset. Loss of appetite, weight loss, general malaise and profuse sweats, particularly at night, often occur. As the mesothelioma progresses the affected side of the chest becomes contracted causing curvature of the spine. Pain usually becomes progressively worse due to infiltration of nerve roots or other tissues of the chest wall. Painful chest wall nodules and masses may develop. Large doses of morphine and other pain relieving drugs are needed, frequently causing side effects of constipation and sedation. Oxygen is commonly needed for breathlessness.

Late features may include venous obstruction causing gross swelling of the face and upper body. The mesothelioma may involve the heart causing increased breathlessness and swelling of the legs and abdomen. The mesothelioma may spread through the diaphragm to the abdominal cavity and may metastasise widely to all areas including the lung, lymph nodes, liver, bone and brain.

In a minority of cases mesothelioma starts in the peritoneum, the lining of the abdominal cavity. Peritoneal mesothelioma commonly presents with ill defined symptoms extending over months. Gross abdominal distension due to accumulation of fluid is commonly the development which leads to the diagnosis. Progression causes intestinal obstruction resulting in pain, nausea, vomiting and constipation.

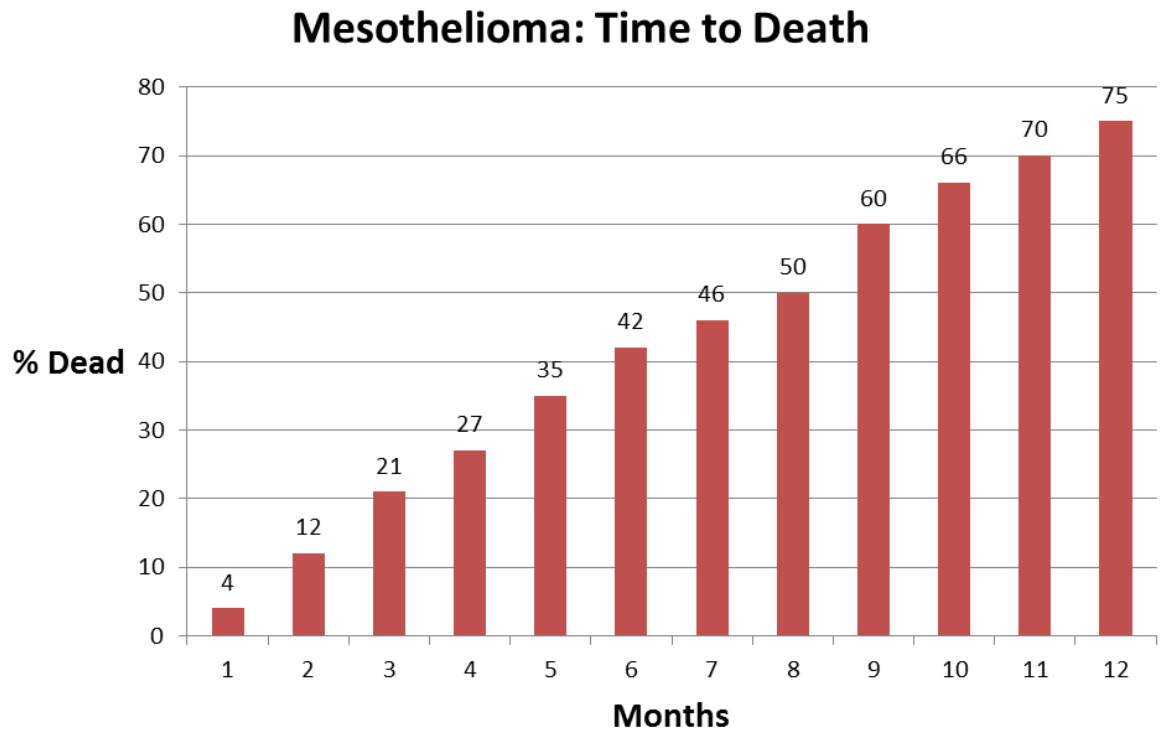
Treatment

Often supportive care only is appropriate because the patient is too ill for specific treatment. In many cases deterioration is rapid. Repeated drainage of pleural fluid from the chest is often necessary and sometimes a tube is left in the chest permanently. Major surgery is sometimes used but is often of little or no benefit. Chemotherapy may be used and commonly causes toxicity including nausea, vomiting, mouth ulcers, fatigue and infection. Radiotherapy may be used to shrink chest wall masses and for pain relief. For intractable severe pain cordotomy, ie cutting the pain pathway in the spinal cord, may be used.

Survival In Malignant Pleural Mesothelioma

A recent study of all 146 patients presenting to a district service in Leeds between 2002 and 2005 reported median survival from diagnosis of 8.9 months (Chapman A et al 2008). Only 18% of patients received chemotherapy either because they were not fit to receive it or because they declined it. This is reasonably representative of the situation in the UK currently.

In a multi-centre randomized trial of chemotherapy versus supportive care carried out across the UK which included 409 patients the median survival for patients who received supportive care was 7.6 months and for those who received chemotherapy it was 8.5 months, a non-significant advantage (Muers MF et al 2008). The chart shows the percentage of patients who received supportive care who had died at various time points.



Prediction of Survival In An Individual Case

When a medical expert estimates likely survival in an individual case he is really saying this would be the average survival among a large group of patients with the characteristics of this patient. Among that group there will be a large range of survival times. Consider the chart above: the median survival is 8 months but for most patients survival is less than or more than 8 months. It is salutary to realise that in most cases the physician's estimate for an individual will necessarily be wrong

Compensation

From my experience of treating thousands of patients with mesothelioma over more than 30 years I can say that a major priority for many patients is to have their claim

for damages concluded before they die. Knowing that their illness will inevitably prove fatal soon, patients wish to know that their loved ones will be provided for. There can be no situation which more poignantly illustrates the veracity of the maxim that justice delayed is justice denied. Having experienced lawyers handling their claims rapidly and sensitively alleviates anxiety and improves quality of life for patients and their families.

In recent years I have noticed that many mesothelioma claims have been settling more rapidly and I believe this is a result of the Mesothelioma Fast Track procedure set up by Senior Master Whitaker and operated by him and his colleagues. In cases dealt with through the Fast Track I am less frequently asked to comment on arguments raised by Defendants on liability and causation which are without merit and with no realistic prospect of standing up to scrutiny. From a medical perspective the Fast Track has greatly assisted mesothelioma sufferers and it would be a major setback for them if it were to be dismantled as a result of the proposed protocol. All that is needed to achieve the stated aim of speeding up mesothelioma claims is to extend the Mesothelioma Fast Track to all mesothelioma claims.

Specific Comments on the Protocol

1. It is completely inappropriate to base a protocol upon the assumption that a medical expert can predict reliably that a patient will survive long enough for a timetable to be worked through. The most rapid possible settlement of every claim must be the goal.

2. The proposal that a required stage in the process should involve medical records being uploaded to a website is of considerable concern for several reasons.

2.1 It often takes months for hospitals to make records available and an initial medical report needed to set a claim in motion has to be prepared on the basis of limited records, often those provided by the general practitioner, or sometimes even just copies of hospital letters in the possession of the patient, with supplementary reports later as more information becomes available.

2.2 The records in mesothelioma cases are often voluminous, documenting not only the illness due to mesothelioma but also other medical conditions throughout the lifetime of the patient which have to be considered for the purpose of valuing the claim. Records amounting to more than 1000 pages are common. The task of scanning these and uploading them would be time consuming and expensive.

2.3 To prepare a medical report it is necessary to sort relevant documents from different sections of the records, eg clinical notes, both hand written and typed, pathology and radiology reports, and collate them into chronological order in order to construct a coherent account. It is much more time consuming to review medical records on computer than in paper form, and almost impossible if the records are very extensive. For this reason if I receive records in computerised form I have them printed out before I attempt to review them.

2.4 It is also necessary for the medical expert to review all the radiology which may comprise thousands of images. A single CT scan commonly includes hundreds of

separate images and the patient usually has several such scans during the course of the illness. The images are supplied on password protected CDs or DVDs which include software for viewing the images. There are many different software systems in use in the NHS which are mutually incompatible. Some are incompatible with current versions of operating systems such as Windows 7 and have to be viewed using older versions of Windows. It commonly takes many minutes, sometimes as long as 20 to 30 minutes, for all the images on a disc to download onto a PC. Uploading all of the radiographic images from multiple sources to a website and ensuring that they can be viewed adequately would be at best a complex and time consuming exercise and at worst impossible.

2.5 Specific patient consent to the process would have to be sought and many patients would be reluctant to consent because of justifiable concerns about maintenance of confidentiality of medical records and images uploaded to a website.

3. The suggestion that data gathered through the protocol could be used for medical research is unrealistic. Firstly, the data collected in this process would 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 a Research Ethics Committee (REC) and each patient whose data is to be used has to be sign a detailed consent form, approved by the REC, which sets out the research aims and guarantees confidentiality in use of patient data.

References

Chapman A, Mulrennan S, Ladd B, Muers MF. Population based epidemiology and prognosis of mesothelioma in Leeds, UK. Thorax 2008;63:435-9.

Muers MF, Stephens RJ, Fisher P, Darlison L, Higgs CM, Lowry E, Nicholson AG, O'Brien M, Peake M, Rudd R, Snee M, Steele J, Girling DJ, Nankivell M, Pugh C, Parmar MK; MS01 Trial Management Group. Active symptom control with or without chemotherapy in the treatment of patients with malignant pleural mesothelioma (MS01): a multicentre randomised trial. Lancet 2008;371:1685-94.

Dr Robin Rudd 9 September 2013