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Draft Pre-Action Protocol for claims for damages for mesothelioma

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Introduction

1.1 This protocol applies to claims for mesothelioma. There is a separate protocol for other disease and illness cases.

1.2 This protocol sets out conduct that the court would normally expect the parties to follow before commencement of proceedings. It establishes a reasonable process and timetable for the exchange of relevant information. The timescales reflect a need for particular urgency in mesothelioma claims brought on behalf of the sufferer while still alive ('living claims').

1.3 Where the Court considers non-compliance, and the sanctions to impose where it has occurred, it will amongst other things be concerned about whether the parties have complied in substance with the relevant principles and requirements and is not likely to be concerned with minor or technical shortcomings (see paragraphs 4.3 to 4.5 of the Practice Direction on Pre-Action conduct).

1. Overview of Protocol General Aim

2.1 The protocol's objectives are:

2.1.1 To encourage the provision of early and full information about the claim;

2.1.2 To enable the parties to avoid litigation by agreeing a resolution of the claim before proceedings are commenced; and

2.1.3 To support the efficient management of proceedings in accordance with Practice Direction 3D where litigation cannot be avoided.

2. Intimation Letter

3.1 As soon as sufficient information is available to identify proposed Defendants the Claimant should send them two copies of a letter of intimation clearly marked 'MESOTHELIOMA'. Where the Defendants' insurers are known to the Claimant one copy should be sent directly to all identified insurers. The intimation letter should provide:-

3.1.1 Name, address, date of birth and national insurance number of the Claimant/deceased

3.1.2 Name and address of each employer/third party who is alleged to have exposed the Claimant/deceased to asbestos

3.1.3 Details of the circumstances of exposure to include the Claimant's/deceased's occupation and periods of exposure to include date of cessation of exposure.

3.1.4 Date of diagnosis

3.1.5 In a living claim details of the Claimant's net weekly income. In a deceased claim whether there are any dependants.

3.1.6 Direct email address of the Claimant's solicitor.

3.2 The purpose of the letter of intimation is to allow the proposed Defendant/insurer to begin investigations. This should be done immediately. If the Claimant's solicitor already has sufficient information to send a letter of claim, this should be sent instead of a letter of intimation.

3. Letter of Claim

4.1 As soon as sufficient information is available the Claimant shall send a formal letter of claim to the proposed Defendants, or their insurers if known. To the extent not previously been notified the letter of claim should provide the information required in a letter of intimation together with :-

4.1.1 A summary of the facts on which the claim is based including a chronology of all lifetime exposure to asbestos whether wrongful or otherwise with details of all employers/other third parties alleged to have been responsible for that exposure.

4.1.2 Details of claims made or intended to be made against any other proposed Defendant/insurer together with contact details if known.

4.1.3 In living claims details of the Claimant's present condition and prognosis.

4.2 As soon as possible and in any event within 21 days of service of the letter of claim the Claimant should provide an employment and asbestos exposure history statement certified by a statement of truth. This should include:-

4.2.1 Circumstances and dates of all asbestos exposure to include dates of cessation of exposure where appropriate. This must include episodes of exposure in relation to which no claim has been intimated, including exposure caused by the Claimant/deceased's own activities. Sufficient detail should be provided to permit a reasonable analysis of liability in relation to all exposures.

4.2.2 The identity of all employers/third parties where exposure is alleged to have occurred.

4.3 If the Claimant has other statements supporting his account of asbestos exposure these should also be provided.

4.4 The letter of claim should be accompanied by the following documentation. If any of the documentation is unavailable this should be stated and should be provided to all proposed Defendants/identified insurers as soon as possible

4.4.1 HMRC Schedule of Employment

4.4.2 A schedule of loss with copies of any documents substantiating the financial claim. To the extent reasonably necessary this should include statements from witnesses of fact.

4.4.3 A copy of any expert medical report in accordance with paragraph **6.1** below.

4.4.4 Copies of complete and up to date medical records including all GP and Hospital notes and any post mortem report.

4.4.5 Copies of all records from benefits applications made to the DWP.

4.4.6 In claims made on a dependency basis the Claimant should also provide a death certificate, marriage certificate and letters of administration/grant of probate.

4.5 Where the Defendant is unable to determine liability (including potential claims for contribution) or assess quantum on the basis of the information provided he may request clarification. This should be done as soon as possible. In living claims such request should be made within 21 days of receiving a protocol compliant employment and exposure statement for breach of duty requests or schedule of loss for quantum requests

4.6 The documents listed above are not intended to be exhaustive. The Claimant may provide and the Defendant may request such documents as are reasonably necessary to prove the Claimant's case as to liability or quantum.

4.7 Letters of intimation and letters of claim are not intended to have the same status as a statement of case in proceedings. Matters may come to light as a result of subsequent investigation particularly after the Defendant's response.

4. Defendant's Response

5.1 The Defendant should send an acknowledgement within 21 days of receiving the letter of claim, identifying who will be dealing with the claim and providing an email address. If no acknowledgement is sent within 21 days the Claimant will be entitled to issue proceedings without criticism as to conduct.

5.2 Each Defendant shall within one calendar month of the letter of claim notify the Claimant of the identity of each insurer relevant to the claim and the periods of relevant cover.

5.3 Within two calendar months of the protocol date of the letter of acknowledgement each Defendant shall provide a reasoned answer to the claim.

5.3.1 If the claim is admitted the Defendant should say so in clear terms. Where paragraph **5.4** applies the Defendant will accompany the admission with an interim payment on account of damages, the amount of which will be set by reference to the Courts' current practice under Practice Direction 3D.

5.3.2 If the claim is admitted in part the Defendant must make clear which parts are admitted and which remain in issue and why.

5.3.3 If the claim is not admitted the Defendant must explain why.

5.3.4 The Defendant must accompany both partial and total non admission responses with disclosure of all documents relevant to the dispute between the parties and which would be likely to be ordered to be disclosed by the Court in substantive proceedings.

5.3.5 Where there is more than one Defendant the timetable will begin for each by reference to the date of the letter of claim to them.

5.4 If breach of duty is admitted and the medical report and records establish causation the Defendant must make an interim payment on account of damages within 21 days of the date of the admission or the date of provision of the medical report and records whichever is the later.

5.5 If the parties reach agreement on some elements of the Claim but time is needed to resolve other issues they should attempt to agree a reasonable deadline for the resolution of the remaining issues.

5.6 Where it is not reasonably possible for the Defendant to complete enquiries within two months he should notify the Claimant as soon as that becomes apparent, giving reasons. Where a proper explanation is provided the parties should attempt to agree an appropriate extension of time. The lapse of time since the asbestos exposure does not by itself constitute a proper explanation.

5. Experts

6.1 The Claimant must send a medical report to all Defendants. The report must address the mesothelioma diagnosis, life expectancy (both resulting from that diagnosis and in the absence of it) and any co-morbid conditions affecting either life expectancy or physical capacity.

6.2 Any party to the claim may send questions directly to the Claimant's expert. Copies of the questions should be sent simultaneously to the other parties. The expert should reply to each party directly and separately.

6.3 Defendants are encouraged to attempt to resolve issues by questioning the Claimant's expert but may seek its own expert evidence where appropriate.

6.4 The cost of an expert's report will normally be borne by the instructing party. The expert's cost of answering questions will be borne by the party asking them.

6.5 Defendants should give early consideration to a request for medical evidence as to a dependant's life expectancy. Where requested such evidence should be obtained by the Claimant's solicitor.

6.6 Expert evidence on issues relating to breach of duty should not normally be obtained until after the time given for the relevant Defendant's response under **5.3**. Where the Claimant anticipates that such evidence may be necessary in any given claim he should notify the Defendant explaining the reasons for the instruction.

6. Resolution of Issues

7.1 All parties should consider before issue of proceedings whether to make a Part 36 offer. The offer or must always supply enough information and evidence to allow the offer to be properly considered.

7.2 Where a claim is not resolved the parties should review matters in dispute to determine precise definitions of those issues and the evidence necessary for their determination before proceedings begin.

7.3 Subject to **8.1** below the Claimant should delay issuing proceedings for 21 days after service of the statement of employment and exposure, schedule of loss, medical records or medical report whichever is the latest.

7.4 The Defendant will normally be expected to nominate solicitors to act in the proceedings and accept service of those proceedings.

7. General Provisions

8.1 In living claims involving a severely limited life expectancy it may not always be possible to follow the protocol. All parties should still attempt to comply with the provisions and the spirit of the protocol so far as that is reasonably possible. In such cases all parties are under a duty to raise and answer requests for information/disclosure as quickly as possible. Where the Claimant's life expectancy as anticipated by his expert is likely to permit this protocol to be followed it should be. All parties are under a duty to deal with living mesothelioma claims as quickly as possible and to regard the timetables in this protocol as minimum requirements rather than targets.

8.2 If by reason of complying with any part of this protocol a Claimant's claim may be statute barred under the Limitation Act 1980 or any other legislation imposing a time limit for bringing an action the Claimant may commence proceedings without complying with the protocol. It is recognised that in such cases the Court may permit the Defendants additional time under subsequent directions and may expect the Claimant to make particular efforts to assist the Defendants with their proper enquiries. It is also recognised that to the extent such circumstances are caused or contributed by the conduct of the Claimant or his representatives the Court may make special provision for dealing with costs.

8.3 If any Defendant does not admit liability and the Claimant is so unwell that there is a risk that he may die before trial proceedings may be commenced to take evidence on commission under P34 CPR. Proceedings may also be issued in other circumstances where the Court believes that this would be in the parties' interests and the interests of justice.

8.4 Following receipt of the letter of intimation communication by instant means such as email, fax or telephone is encouraged.