

ASBESTOS VICTIMS SUPPORT GROUPS' FORUM

RESPONSE TO THE MINISTRY OF JUSTICE CONSULTATION CP 9/07

“THE LAW ON DAMAGES”

INTRODUCTION

The asbestos Victims Support groups' Forum (the Forum) is comprised of nine asbestos victims support groups (AVGs)¹. AVGs provide advice on benefits and compensation and support to asbestos victims and their families. We attend the Parliamentary All Party Asbestos Sub-Committee and campaign for improvements in benefits and compensation for asbestos victims and their families. Each year we visit hundreds of asbestos victims, especially sufferers of mesothelioma, a disease which is increasing and is unlikely to reach its peak until 2015.

We welcome the Consultation Paper CP 9/07, which takes forward proposals by the Law Commission on several aspects of the law on damages. Recent changes in Scottish law have improved the position of personal injury claimants in Scotland, especially mesothelioma sufferers, and we hope that this consultation will end the current disadvantage suffered by English asbestos victims compared to their Scottish counterparts.

MESOTHELIOMA CLAIMS

The consultation paper (paras. 27-30) rightly identifies concerns that mesothelioma sufferers, who face a very poor prognosis, should, with their families, have to consider delay in a settlement of damages in life to achieve additional payments to their dependants upon their imminent demise, i.e. bereavement damages and funeral expenses and calculation of loss of income. In our experience, all mesothelioma sufferers want a settlement of their case in life; it is a great source of comfort for them to know that their cases have been concluded before their death. We believe it is unacceptable to confront mesothelioma sufferers with the invidious choice of settling a case in life or delaying a settlement to achieve a better outcome for their dependants on their death.

Four options are put forward in the consultation paper to address the above issue. Taken separately, each option fails to adequately address the dilemma facing mesothelioma sufferers. However, a combination of option one and option four would remove the current inequities in settling claims in life and after death. Option one, a statutory amendment similar to the Rights of Relatives to Damages (Mesothelioma) Act 2007, would allow dependants to claim bereavement damages and funeral expenses after death where a claim has been settled in life. Option four, legislative removal of the different methods of calculating damages for lost years and dependency claims, would allow a mesothelioma sufferer to settle a claim in life using the calculation currently in place for dependency claims.

¹ Barrow in Furness; Bradford; Derbyshire; Cheshire; Greater Manchester; Merseyside; North East; Ridings; Sheffield & Rotherham

In this way, a fairer outcome is achieved for a sufferer in life, and at the appropriate time eligible dependants may properly claim bereavement damages for the grief they have suffered.

The above options are put forward to address a dilemma faced uniquely by mesothelioma sufferers. In fact, asbestos-related lung cancer sufferers face a similar dilemma and the diseases share similar characteristics. Asbestos-related lung cancer is associated with a very poor prognosis: survival rate is only about 5%. Like mesothelioma, asbestos-related lung cancer is an 'indivisible' disease, an 'all or nothing' disease, which differentiates these cancers from asbestosis and pleural thickening, which very gradually worsen over time and are rarely life-threatening. Asbestos-related lung cancer is treated in an identical way to mesothelioma by the Department for Works and Pensions (DWP) for benefits purposes. Both diseases attract an automatic 100% benefit award and are fast-tracked without reference to a Medical Adviser.

We see no reason why asbestos-related lung cancer should not be treated in the same way as mesothelioma. Stringent rules on the attribution of asbestos-related lung cancer, for benefit and common law claims, result in very few successful asbestos-related lung cancer claims. There are no financial or policy reasons why these similar diseases, with a similar outcome should not be treated in the same way.

ADDITIONAL COMMENTS

We are also particularly concerned to make additional comments on issues which are not covered in the Consultation Paper, but which we believe are very relevant to this consultation.

Apportionment of Damages: Collateral Benefits and the Pneumoconiosis etc. (Workers Compensation) Act 1979

Apportionment of damages is applied in law to 'divisible' asbestos diseases. This means that where a guilty employer is no longer trading and the insurer cannot be traced, a claimant's damages are proportionately reduced. It is through no fault of the claimant that full payment of damages cannot be achieved. However, full recovery of collateral state benefits is made, and full credit is given for a payment made under the Pneumoconiosis etc. (Workers Compensation) Act 1979 (the 1979 Act).

This is clearly unjust. In such circumstances it would be just to reduce the recovery of benefits, and any recovery/credit of payments made under the 1979 Act, in proportion to the reduction of damages. Rules relating to recovery of collateral benefits and recovery/credit of payments under the 1979 Act are designed to prevent 'over compensation'. In this situation the opposite occurs - 'under compensation'.

Contributory Negligence: Collateral Benefits

In cases where damages are reduced due to contributory negligence, eligible state benefits are recovered in full by the Compensation Recovery Unit. In such circumstances, claimants may find themselves without payment, either from the state, or from damages, e.g. for their disability, for a period of time. State benefits are paid

irrespective of fault. This is especially true of Industrial Injuries Disablement Benefit payments which are paid under the no-fault Industrial Injuries Scheme.

Recovery of benefits should be adjusted to take account of the reduction in damages due to contributory negligence.

Pneumoconiosis etc. (Workers Compensation) Act 1979: Dependency Claims

It has for long been a source of grievance that payments made under the 1979 Act to eligible dependants who claim after the death of a sufferer are a fraction of payments made in life. The justification for this discrepancy in payments given to us by ministers and their officials in the DWP is that the 1979 Act mirrors common law, in which dependency claims are worth less than in-life claims. Were bereavement damages under the Fatal Accidents Act 1976 (FAA) the only damages available to dependants this would be the case, but this is not so.

The Consultation Paper cites the reasons (para. 28) why, in mesothelioma cases, damages in dependency claims, in total, are higher than damages paid in-life.

It has been extremely difficult to satisfactorily pursue this argument within the DWP because DWP ministers and officials say that they have taken their advice from the DCA (now the Ministry of Justice). It is important to us to settle the question of discrepancy of payments in relation to the 1979 Act. We think it appropriate that this issue is addressed in this consultation by the Ministry of Justice and we would like a response to our question regarding dependency payments under the 1979 Act.

RESPONSE TO QUESTIONS

We have responded to questions in the Consultation Paper which relate to issues we are familiar with and we have omitted questions which we feel fall outside our areas of competence.

CHAPTER 1: CLAIMS FOR WRONGFUL DEATH

Question 1 (a)

Do you agree that a residual category should be added to the statutory list of those entitled to claim for financial loss?

We fully support the addition of a residual category to allow people who are actually dependant on the deceased, but not on the statutory list, to make a claim.

Question 1 (b)

Do you agree that this residual category should be limited to any person who has been wholly or partly maintained by the deceased immediately before a death?

No. We think it possible in some cases where it would be inappropriate to restrict this category to persons wholly or partly maintained before a death. It would be wrong to cut off the option of a deserving case being properly considered.

Question2 (a)

Do you agree that the fact of a person's re-marriage or entry into a civil partnership should be taken into account when assessing a claim for damages under the FAA?

No. We understand that the Fatal Accidents Act 1976 provides an existing right for a widow/er to be compensated irrespective of remarriage or entry into a civil partnership. Even if this were not the case there is no reason why a wrongful death should not be properly compensated by the wrongdoer. Furthermore, there may be a large disparity in income in a new relationship and if that relationship failed there would be a further loss to the claimant.

Question 2 (b)

Do you consider that the fact of a person's financially supportive co-habitation of at least 2 years following the death should be taken into account?

No. We disagree for the reasons given in 2(a).

Question 2 (c)

Do you agree that the prospects of a person's re-marriage or entry into a civil partnership or financially supportive co-habitation should not be taken into account in any circumstances (including where the person is engaged)? If not, in what circumstances will it be appropriate to do so?

Yes

Question 3 (a)

Do you agree that the fact of a person's re-marriage or entry into a civil partnership should be taken into account when assessing a claim for damages on the part of any eligible children?

Yes

Question 3 (b)

Do you consider the fact of a person's financially supportive co-habitation of at least 2 years following the death should be taken into account when assessing a claim for damages on the part of any eligible children?

No. For the reasons given in 2(a)

Question 4

Do you agree that the Courts should only take into account the prospect of divorce, dissolution or breakdown in the relationship between the deceased and his or her spouse or civil partner?

- (a) where the couple are no longer living together at the time of death,
- (b) where one has petitioned for divorce, judicial separation or nullity,
- (c) where one has begun the procedure for dissolution of the civil partnership.

No. The fact that a couple are not living together 4 (a) does not necessarily mean that the relationship is irretrievably damaged, there may merely be a trial separation. Similarly, 4(b) and (c) are not conclusive: the relationship may yet be salvaged.

Question 5

Do you agree that Section 3 (4) of the FAA should be repealed and replaced by a provision to the effect that the prospect of breakdown of a relationship between the deceased and his or her partner should not be taken into account when assessing damages under the FAA?

Yes

CHAPTER 2: BEREAVEMENT DAMAGES

Eligible Claimants: Scotland and England

We have responded to questions on bereavement damages below. However, there are categories of bereaved dependants who clearly suffer grief, but who are not included in the consultation paper. For example, grandchildren have very close bonds with their grandparents. In mesothelioma cases most sufferers are retired and many grandchildren witness the untimely death of their grandparents and experience distress and grief. In Scotland, Section 1(4) of the Damages (Scotland) Act 1976 provides that a claim for non-patrimonial loss may be brought by an immediate family member for grief and sorrow. The Schedule listing eligible family members has been extended to include grandchildren of the deceased. **We think grandchildren should be included in the list for persons eligible for bereavement damages.**

Level of bereavement damages: Scotland and England

In Scotland, bereavement damages (damages for non-patrimonial loss) are much higher than those proposed in the consultation paper. For policy and equity reasons such disparity in the levels of compensation between Scotland and England should be minimised. **We think bereavement damages should be brought up to the levels obtainable in Scotland.**

Question 6

Do you consider that bereavement damages should continue to be available?

Yes

Question 7 (a)

Do you think it would be appropriate to provide clarification of the explanatory notes accompanying any legislation for the purpose of bereavement damages is no more than a token payment in acknowledgement of grief?

Yes. It is important that bereaved people should not feel that the amount of bereavement damages is in any way equated with the loss they have suffered. However, any explanation should not refer to the payment as a 'token' payment.

Question 7 (b)

Are there any other ways in which the purpose of bereavement damages could be explained to the public?

We do not have a proposal additional to the above proposed explanatory note.

Question 8 (a)

Do you agree that a parent should only be able to claim bereavement damages for the loss of her child when the child is under 18 and unmarried?

No. The fact that a child is under 18 or married does not diminish the grief of a parent at the loss of a child such that bereavement damages are inappropriate. Grief of a parent at the loss of a child cannot be measured out in such a way and to do so suggests a lack of understanding of the effect of the death of a child on a parent, who always sees their son or daughter as a 'child', no matter their age or status.

In Scotland, there is no age limit for a deceased child. For equity and policy reasons the law in England should reflect that in Scotland for the loss of a child.

Question 8 (b)

Do you agree that unmarried fathers with parental responsibility should be able to claim bereavement damages for the loss of a child under the age of 18?

We think that unmarried fathers should be able to claim bereavement damages for children regardless of age or status of the deceased child.

Question 8 (c)

What is your view on whether stepparents who were living with and had caring responsibility for a child under 18 should be able to claim bereavement damages?

We think that stepparents per se should be able to claim bereavement damages for children regardless of age or status. Clearly this could add to the list of eligible parents, but it would not have serious financial consequences.

Question 9

Do you agree that children of the deceased (including adoptive children) who are under 18 should be added to the statutory list, and that eligibility should not be extended to adult children of the deceased?

Yes. Children (including adoptive children), regardless of age should be added to the list. Again, for policy and equity reasons differences between Scottish law and English law should be minimised.

Question 10

Do you agree that brothers and sisters of the deceased should not be eligible to recover bereavement damages?

No. We agree with the Commission; siblings may feel as much grief as a parent because of their own particular relationship.

Question 11

Do you agree that the statutory list should be extended to include people who, although not married to the deceased, have lived with the deceased as husband

and wife (or if of the same sex in an equivalent relationship) for not less than two years immediately prior to the accident?

Yes.

Question 12

Do you agree that engaged couples should not be added to the statutory list of those who can claim bereavement damages?

No. We agree with the Commissions view that engaged couples should be added to the list.

Question 13 (a)

Do you agree that the current award of £10,000 should be available to the deceased's spouse, civil partner or cohabitant without dilution (subject to (b)), and that additional sums should be available to any other eligible claimants?

Yes. We agree that the award (please see our earlier comments about the amount of the awards generally) should be available to all without dilution.

Question 13 (b)

Do you agree that where a spouse or civil partners and a cohabitant are both eligible to claim, the sum of £10,000 should be divided between the two?

No. Apportionment would disadvantage English claimants compared to Scottish claimants, and it is desirable for policy reasons as well as equity that such disparities should be minimised.

Question 13 (c)

Do you agree that the sum of £10,000 should continue to be available to the parents of an unmarried child under 18, to be divided between them if appropriate?

We believe that the full and un-apportioned amount should be available to parents of a child irrespective of the age and status of the child.

Question 13 (d)

Do you agree that an award of £5,000 should be made to each eligible child under 18 in respect of the death of a parent?

We believe that a full bereavement award should be made to each child regardless of the age of that child.

Question 14

Do you agree that contributory negligence on the part of the claimant should reduce the award of bereavement damages?

No. Bereavement damages are a small payment referred to in this Paper as a "*token payment in acknowledgement of that grief...*" . As such, the fact that the deceased may have contributed to their injury does not lessen the grief felt by the bereaved.

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