Ministry of Justice

A consultation on proposals to speed up the settlement of mesothelioma claims in England and Wales

A response by the Association of Personal Injury Lawyers
October 2013

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. The association is dedicated to campaigning for improvements in the law to enable injured people to gain full access to justice, and promote their interests in all relevant political issues. Our members comprise principally practitioners who specialise in personal injury litigation and whose interests are predominantly on behalf of injured claimants. APIL currently has over 4,000 members in the UK and abroad who represent hundreds of thousands of injured people a year.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- to promote full and just compensation for all types of personal injury;
- to promote and develop expertise in the practice of personal injury law;
- to promote wider redress for personal injury in the legal system;
- to campaign for improvements in personal injury law;
- to promote safety and alert the public to hazards wherever they arise; and
- to provide a communication network for members.

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Introduction

Many of APIL's members of its occupational health special interest group are specialist practitioners who deal with mesothelioma claims on a daily basis. In order to respond to this consultation paper APIL has drawn on the wealth of practical and theoretical expertise of those members, along with its own in depth knowledge of the workings of the current pre-action protocol for disease and illness claims (the DPAP) and the claims process in general. In context, according to the compensation recovery unit (CRU), there were 2,274 mesothelioma claims in Great Britain in 2012/13. Those APIL members who responded to our survey outlined in this response deal with approximately 1,200 claims a year: their views offer a representative sample of those dealing with over half of all mesothelioma claims each year.

We agree that there are improvements which can be made to the way in which mesothelioma claims are conducted and in this response, we set out some new and innovative ways in which this could be achieved.

There are two key messages which have come from all of those members we have consulted in order to respond to this paper.

- The first is that a drive towards settling all mesothelioma claims in the claimant's lifetime is not always in the best interests of either the claimant or his/her family and that those who are suffering from this terrible disease should retain the right to elect how and when their claim is resolved.
- The second is that defendants (and their insurers) routinely ignore the provisions of existing DPAP: they habitually fail to make any early admissions of liability or realistic offers to settle, delaying settlement and running up unnecessary costs.

We have conducted research which backs up both of these points, details of which are set out in this consultation response. We see nothing in the proposals set out in this consultation which would address either issue and in our view, resolving both is essential to ensuring the claim is dealt with in as fair and efficient a way as possible.

Any pre-action protocol which bars access to the Court's supervisory powers and functions by a terminally ill claimant is vulnerable to challenge on Article 6(1) Human Rights Act 1998 (HRA) grounds.

There are not many lawyers who can say that on a daily basis they have to deal with clients facing a lingering death sentence simply because they went to work. For catastrophically

injured clients, lawyers hope that with sufficient funds, rehabilitation and care, their clients' lives can be greatly improved and even prolonged. But for the mesothelioma practitioner, the imperatives are different: to obtain sufficient funds to pay for the client's care which is urgently required in the last stages of their lives and to ensure that their loved ones are provided for after their death. In order to do this, two things are necessary: an early admission of liability on the part of the defendants, so that an interim payment can be made for the urgent care costs, and the ability to elect when the claim is settled.

Neither of these issues are addressed in this consultation. Both are critical. If they were, the claimant's experience would be transformed, the claimant lawyer could settle the claim quickly and efficiently and the defendant would inevitably save time and costs. We expand on both issues in our responses below.

We are concerned about the Government's intentions with this consultation. The Government is a stakeholder in these claims: in many shipyard claims, for example, the government is the organisation liable for the negligent exposure to asbestos.

Executive summary - our suggestions

- There are many misconceptions about mesothelioma claims, which we seek to dispel. We say that:
    - mesothelioma claims are not a straightforward process; *(pg 7)*
    - not all insurers look to make early admissions of breach of duty or make good early offers to settle; *(pg 7)*
    - it is not always in the claimant's best interests for the claim to be settled in his or her lifetime. *(pg 9)*
- Lifetime and post death settlements: the claimant should be able to elect, while still alive, whether his claim is calculated as a live or post death settlement in order to ensure his or her dependents are adequately compensated. *(pg 10)*
- We have doubts as to whether a pre-action protocol which bars access to the Courts for specific periods would be upheld as compliant with the duty under Article 6(1) Human Rights Act 1998 (HRA) grounds. *(pg 11)*

- If a claimant can establish causative exposure, then there should be no arguments on liability. Strict liability would a better way to ensure the efficient settlement of these claims. *(pg 12)*

- Proof of diagnosis and causation by means of a medical certificate from a specialist lung cancer nurse or pathology report ought to suffice to prove diagnosis and causation. *(pg 12)*

- Interim payments should be increased. *(pg 12)*

- The class of persons who are entitled to claim bereavement damages could be more flexible. *(pg 13)*

- Claimants able to elect to have a periodical payments order for all relevant heads of loss would be better compensated, and defendant insurers would benefit from this arrangement. *(pg 13)*

- The frequent disputes over donations for hospice care or payments for private medical expenses are unnecessary: these are already recognized heads of claim. *(pg 14)*

- Faster access to medical records is a vital way of improving the speed with which these claims are currently progressed. *(pg 14)*

Executive summary - consultation questions

- One of the main benefits of the DPAP is that for mesothelioma claims, there is the flexibility to allow claimants to start proceedings quickly if necessary. Therefore, the DPAP informs behaviour in a positive way: claimant solicitors abide by the spirit of the protocol by having open and frank exchanges with the client and the other side, even if it proves difficult to follow it to its conclusion, when the need to start proceedings mid-protocol occurs. *(pg 15)*

- A problem with the current DPAP's suitability for mesothelioma claims is that it ignores the way in which defendants deal with these claims. Insurers and defendants frequently ignore the pre-action protocol, leaving claimants with no choice but to start proceedings in court in order to progress the claim in a timely manner. *(pg 16)*

- There must be a drive, within any MPAP, towards encouraging early binding defendant admissions, to facilitate earlier settlement of the claim. *(pg 18)*

- We believe the mesothelioma protocol (MPAP) in the form set out in this consultation would delay, rather than speed up, the claims process. We suggest that an MPAP should be developed around the existing DPAP procedures, and not around the brand new protocol annexed to the consultation. *(pg 18)*

- The unexpected consequence of requiring disclosure of a signed witness statement at a very early stage would be to delay notification of the claim to the insurer: lawyers would wait until they had all of the required information before issuing such a crucial document. At present, lawyers are quite happy to pass on information required by the defendant as and when it is available, provided that it is on a without prejudice basis. *(pg 19)*

- We do not believe that the proposed MPAP will result in reduced legal costs in mesothelioma claims. Additional delay built into the proposed MPAP will add additional layers of work and cost. *(pg 24)*

- A protocol which provides automatic interim payments, early admissions of liability from defendants and easier access to medical and HMRC work/pension records would be a step in the right direction. These changes *would* speed things up and reduce costs incurred. *(pg 24)*

- If evidence is required to demonstrate that mesothelioma claims are unsuitable for a portal/gateway style process, then the current exclusion of *all disease claims* from the new pre-action protocol for low value personal injury (employers' liability and public liability) claims (the EL/PL Protocol) is, in our view, conclusive. *(pg 25)*

- A fixed recoverable costs regime should not be introduced. *(pg 26)*

- When Professor Fenn carried out research on fixed fees for EL and PL claims, he came to the conclusion that disease cases should be excluded from the EL/PL protocol, because fixed fees are not suitable for complex disease cases. *(pg 26)*

- Key drivers of costs are listed in detail on page 26.

Misconceptions about mesothelioma claims

This consultation paper is based on a number of misconceptions about how mesothelioma claims are carried out in practice.

Mesothelioma claims are not a straightforward process

The main misconception in the consultation paper is that claims are always straightforward and their investigation and presentation follows the same pattern in most cases. Whilst there are, of course, required and necessary steps in all mesothelioma claims, the amount of time and work that is required to complete each step of the process varies greatly from one case to another, and the number and nature of the steps taken varies greatly.

For example, the defendant insurer may be known and the claimant solicitor may be able to contact them immediately. (See for example case study 3 on page 19 of this response). In other cases, the defendant employer may have been a small business, such as a hair salon operating in the 1960s, whose insurers may be very hard to trace, and the solicitor may need to conduct extensive research and even contact an insurance archaeologist before the claim can proceed any further.

A graphic depiction of the likely basic steps which need to be taken in order to run a claim for a living mesothelioma claim can be found at APPENDIX A**.** This flow chart shows the progress of a claim and identifies the points at which delays are likely to occur, expending additional time and costs to progress the claim further. What is clear from the flow chart is that even the basic steps in such claims are not straightforward and there are may variables along the way to concluding a mesothelioma claim.

Early admissions of liability and offers

There is a further misconception that all or most insurers are looking to make early admissions of breach of duty, and once they are in a position to value the claim, make early offers at the level that the court would award.

This is simply not the case and that more often than not it is necessary to start court proceedings against the defendant in order to secure an admission and to ensure that the claimant obtains the appropriate level of damages, as we explain in the following paragraphs.

Even the commentary to the Civil Procedure Rules (CPR) in the 'white book' (the official publication of the CPR) acknowledges this: *"Experience in the RCJ* [Royal Courts of Justice] *list has shown that frequently (notwithstanding the terms of the pre-action protocol) little or no investigation of liability has been carried out by defendants before the issue of proceedings and in cases where the alleged victim is still alive and has an uncertain prognosis, urgent case management is not only beneficial but also necessary if the aim of bringing living claims to either a trial an assessment of damages or a trial of liability as a preliminary issue, followed by the standard interim payment, can be achieved within 16 weeks of service of proceedings."*[1]

Starting court proceedings for these types of claim enables the claimant to use Senior Master Whitaker's practice direction and 'show cause' procedures in court.

Around ten years ago, Senior Master Whitaker realised that the issue of liability needed to be dealt with quickly in mesothelioma claims. He recognised that in the majority of claims there was no real defence to the claim even though he observed that "it was commonplace for every issue to be defended". Precious time was being wasted on cases which would eventually settle. Many victims were dying before their claims were resolved.

So, Senior Master Whitaker introduced court procedures for mesothelioma claims to ensure that the question of liability would be dealt with as soon as possible after proceedings had been started.

He holds a 'show cause hearing' at court very early on in the proceedings by which time a defence must have been lodged at court: this encourages defendants to confirm whether they admit or deny liability and enables the court to examine whether they have a real prospect of mounting a successful defence of the claim. This excellent approach concentrates the minds of those who may wish to delay resolving the claim: they risk escalating court costs if they continue to do so. It is impossible to apply similar levels of persuasion if court proceedings have not been started.

APIL's research for this response paper verifies what our members have told us[2]. According to our research, nearly half of respondents (46 per cent) indicated that liability is only admitted within the protocol period under the current disease and illness pre-action protocol (DPAP) in one to ten per cent of their cases. A further quarter (23 per cent) of respondents indicated that liability is never admitted within the DPAP protocol period in their cases.

[1] Commentary to Practice Direction 3D PD 4.1
[2] See survey results, Appendix **B**.

As for the percentage of cases which leave the DPAP using the 'escape clause' at 2.7 of the existing DPAP and in order to issue court proceedings, a fifth of respondents (18 per cent) in our research indicated that in about forty to fifty per cent of cases they handle, they are forced to leave the DPAP using the 'escape clause' and issue proceedings. A further thirteen per cent indicated that this occurs in between ten to twenty per cent of their mesothelioma cases.

Case study 1*

"In a recent case I had a chap who only had a short time to live. I could not make any progress with the defendants and so I had to issue proceedings. When I did so, the insurers complained that I had issued proceedings too early but obviously, if insurers do not comply with the pre-action protocol in mesothelioma cases, there is no choice but to issue to make progress."

** Supplied by practitioner with over 35 years experience of mesothelioma claims.*

If the Government is serious about improving the mesothelioma claims process, there must be a drive towards encouraging defendants to make early admissions before court proceedings have to be issued.

Lifetime and post death settlements – and an alternative solution

It is a misconception that it is always in the claimant's interest for the claim to be settled early and in his lifetime. The reasons why are as follows:

For the single claimant, settlement whilst he/she is alive is essential, because the whole value of the claim is for the benefit of the claimant: there is no dependency claim for surviving spouses and children.

For a married couple, or an individual who is responsible for the wellbeing and financial needs of others, such as a spouse, or in the case of younger claimants, dependent children, it is often sensible for the claimant to accept an early interim payment to pay for the costs of his/her care in the last months of life, then decide to delay final settlement of the claim until after death to secure the financial needs of the family or other dependents. This is because the widow/er is entitled to a bereavement award of £12,980 under the Fatal Accidents Act 1976, and more importantly, dependency claims are calculated differently once the claimant

has died. This difference is particularly important in cases such as those where a wife is disabled and her husband, who has developed mesothelioma, has been her carer and always looked after her. The wife will need care for the rest of her life once her husband has died, and so in this situation, settling the claim after her husband's death would allow her to claim the costs necessary to pay for her ongoing care needs. Where the claimant is younger, there may be dependent children whose financial welfare should be secured for the future.

At present, the claimant retains the right to delay settlement of the claim until after his or her death because dependency claims are better calculated after the claimant's death in order to better reflect the true cost of the dependents' future financial needs. This is a growing issue: mesothelioma is killing younger men and women all the time: in 2009, a study commissioned by the HSE identified 81 mesothelioma sufferers who were born between 1950 and 1991, who had started work between 1965 and 1984: much later than the 'old style' ship-yard and heavy industry workers who were exposed to asbestos.[3]

There is an alternative. We say, why should the claimant have to make a decision to *delay* settlement until after his or her death in order to ensure his or her dependents are adequately compensated?

There should be no difference in the way claims are calculated before and after the claimant's death. The law as it stands forces the claimant to decide whether to settle the claim during their lifetime or to apply for interim payments and stay the claim until after they have died, so that their surviving spouse or other dependents can continue the claim and be fully compensated for their loss.

This is a dreadful decision to have to make, and one that should be unnecessary. It causes delay, adds to complexity and costs and is a considerable burden for the individual being forced to make this decision at such a traumatic time. We believe that it is a legal nonsense to treat lost years claims (where a living adult with dependents may make a claim for loss of life expectancy, including lost earnings in the 'lost' years) and dependency claims differently.

If lifetime and deceased claims cannot be treated the same, we believe that claimants should be able to elect whether their case is to be settled as a lifetime or deceased claim, *while still alive*, rather than leaving the decision to chance.[4] If the claimant elects the latter, the claim would then proceed on the premise that the claimant has died, and funds would be

[3] See extract at Appendix **C** - Appendix table 3.4.4, *Occupational, domestic and environmental mesothelioma risks in Britain: A case-control study.* Julian Peto DSc FMedSci, Christine Rake BSc MSc, Clare Gilham BSc MSc, Jane Hatch BSc, pub: Health and Safety Executive 2009.

[4] It is already possible to claim for the costs of one's own funeral while still alive, the High Court ruled in *Bateman v Hydro Agri (UK) Ltd 15/9/96 QBD* (a mesothelioma action).

received by the family at an earlier stage in the claim. The claimant would then die knowing that the claim has settled, that his family has been adequately provided for and all his affairs are in order.

Maintaining flexibility within the protocol period

We have grave doubts whether a pre-action process which bars access to the courts for specific periods would be upheld as compliant with the duty under Article 6(1) HRA "to act with the exceptional diligence" in this class of case.

It is important that throughout the pre-action protocol period, there remains the flexibility to issue proceedings if it becomes clear that negotiations have broken down, or the client's health deteriorates, for example. The current 'escape clause' in the DPAP allows the claimant to take the case to court at any stage if the claim is not progressing. In our view, if claimants are denied the freedom to issue court proceedings during the pre-action protocol period, they risk being undercompensated or remaining uncompensated during their lifetime.

Measures which would restrict or impede a mesothelioma victim's access to the court pending the completion of a pre-action period for investigation are difficult to reconcile with the Strasbourg Court's jurisprudence under Article 6(1) Human Rights Act (HRA). The European Court has imposed a positive obligation in cases involving terminally ill claimants "to act with the exceptional diligence". It is difficult to see this requirement could be met in circumstances where the domestic rules of procedure bar even access to the court, and hence active case management, during a pre-action period.

The observations of Master Whittaker at paragraph 11 of *Spink v Shepherd Construction* [2007] set this out quite clearly:

> *"[T]here are a large number of cases... where defendants are still trading and they still have access to witnesses who can give relevant evidence. Yet there seems even today, to be a sort of accepted procedure that when defendants like Pullans, who are trading companies, receive the pre-action protocol letters, they do very little other than pass it to their insurance brokers or their insurers and those brokers and those insurers in turn do nothing to prompt the defendants to investigate and get their witness evidence and reply to the pre-action protocol letter."*

The potential prejudice to a claimant through delay on the part of a defendant is not limited merely to the increased prospect that the victim will not live to see his or her claim vindicated

and damages awarded. The victim is, as Master Whittaker, recognised, a valuable source of evidence and of comment upon potential defences.

In those circumstances, any rule which bars access to the Court's supervisory powers and functions by a terminally ill claimant is vulnerable to challenge on Article 6 HRA grounds.

Strict liability

If the claimant can establish causative exposure, then there should be no arguments on liability. Senior Master Whitaker, has repeatedly commented that introducing strict liability for mesothelioma claims would save significant costs for both sides of the claim, and speed up the resolution of mesothelioma claims. The claimant's representatives spend a significant amount of time ensuring the claimant has all the evidence necessary to satisfy the burden of proof. In effect, claims would be dealt with more efficiently, time and money would be saved and defendants would be discouraged from needlessly denying liability.

Proof of diagnosis and causation

A medical certificate from a specialist lung cancer nurse or pathology report should suffice to prove diagnosis of mesothelioma and that the mesothelioma has been caused by exposure to asbestos. Some defendant insurers already accept a certificate as evidence of diagnosis, rather than insisting on a detailed consultant physician report. There is no reason why causation should not also be resolved in this way: in fact the scheme being proposed by the Mesothelioma Bill 2013 will treat causation as being proved upon diagnosis – mirroring this suggestion. If a medical report has to be obtained by the claimant, it will be expensive (the cost of which will be met by the defendant if the claim is successful) and delays the possibility of an admission of liability.

Increased interim payments

Interim payments should increase significantly, to around £75,000. The average general damages award for mesothelioma is £77,000.[5]

[5] Judicial College Guidelines for the assessment of general damages in personal injury cases, 11th ed.

Bereavement damages

The class of persons who are entitled to claim bereavement damages should be more flexible. In Scotland, cases are taken on their merits, damages are generally higher, and the law is much more flexible about who can receive them.

At present in England and Wales, only the following individuals can claim £12,980 bereavement damages. :

(a) the wife or husband (or civil partner) of the deceased; and

(b) the parents of a legitimate deceased child who was never married and

(c) the mother of an illegitimate deceased child who was never married.

Cohabitees are not entitled to claim bereavement damages in the event of their partner's death.

In Scotland, however, the class of individuals is wider and includes:

> the deceased's immediate family: spouse, cohabitee, parent, child, and individuals who have been accepted by the deceased as a child of the family.

Cases are decided on their merits: damages are generally higher, and the law is much more flexible about who can receive them.

Under Scots Law, the equivalent bereavement award used to be known as "loss of society" but is now known as a "Section4 (3)(b) award" under the Damages (Scotland) Act 2011. The Scottish case of *McGhee* provides a recent example of the different levels of damages available for bereavement in Scotland. Mr McGee died in circumstances giving rise to a claim. Mrs McGee was awarded £80,000. Other awards were made to Mr McGee's three children and four grandchildren, varying from £35,000 to £12,000 each[6].

Periodical payments

Periodical payments orders (PPO) for all relevant heads of future loss, such as costs of care or loss of the deceased's services should be encouraged. PPOs offer the claimant and his or her family the stability of a regular income, linked to an earnings index. In claims where the deceased claimant was the carer for a dependent spouse for example, there can be

[6] Opinion of Lord Drummond Young in the cause *of McGhee and others v RJK Building Services Ltd* 18 January 2013, [2013] CSOH 10

significant sums claimed for future care costs, but the uncertainty as to life expectancy may complicate the calculation. Periodical payments would solve that uncertainty.

It can be a contentious issue as to whether a PPO should be made (many defendant insurers prefer the certainty of a lump sum award), but in our view, the claimant should be able to elect to have a PPO as of right: saving time, costs and ensuring that only the care costs necessary are paid for by the defendant.

Private health care and hospice costs

One of the consequences of mesothelioma is that hospice care is often required during the advanced stages of illness. The cost of hospice care is a recoverable head of damage, as an extension of a 'gratuitous care' award. While hospice or palliative care is free for patients and their carers, family members and friends, only part of its funding will be provided by the local authority. The rest has to be raised via donations and fundraising activities. Many claimant's families wish to help by including a claim for the hospice care in their claim. Some insurers willingly pay this sum directly to the hospice, but many others do not.

Unfortunately, not only is the recoverability of these costs frequently disputed by defendant insurers, but if it is to be paid, then the amount due is also the subject of further dispute. Hospices have to provide a detailed schedule of the actual or estimated cost of the care provided. This head of damage should be accepted by all and there should be no requirement for detailed analysis of the hospice's running costs for gratuitous care provided by a charitable body. It is right that the wrong-doer should pay rather than the public purse.

Recoverability of the costs of private health care is sometimes a contentious issue, giving rise to argument with defendant insurers and a resultant increase in costs. A certificate of private health care costs incurred by the private provider should be conclusive in relation to the issue as to the amount and recoverability of these items.

Better access to medical records

More resources should be made available to improve procedures for storing, retrieving and supplying medical records to the mesothelioma sufferer's legal representatives.

The Data Protection Act 1998 provides that requests for access to records should be met within 40 days. However, government guidance for healthcare organisations suggests that

they should aim to respond within 21 days[7]. In reality, the time taken by NHS bodies to supply medical records varies, is nearly always nearer 40 days than 21 and if there is a failure to supply the records, the only remedy is to go to court – a time consuming process which for these particular claimants, is another unnecessary delay.

Consultation questions

1) **What in your view are the benefits and disadvantages of the current DPAP for resolving mesothelioma claims quickly and fairly**

Benefits

Flexible regime

One of the main benefits of the DPAP is that for mesothelioma claims, there is the flexibility to allow claimants to start proceedings quickly if necessary. Therefore, the DPAP informs behaviour in a positive way: claimant solicitors abide by the spirit of the protocol by having open and frank exchanges with the client and the other side, even if it proves difficult to follow it to its conclusion, when the need to start proceedings mid-protocol occurs.

Information in these types of claims tends to be disclosed by claimant lawyers to the defendants as it comes to hand, such is the nature of the fact-finding which is conducted in the early stages of a mesothelioma claim. Similarly, as matters tend to come to a head quickly when the client is terminally ill, following the full protocol to its conclusion is not always in the client's best interests. This is acknowledged in the consultation document at paragraph 27:

"In a terminal disease claim with short life expectancy, for instance where a claimant has a disease such as mesothelioma, the time scale of the protocol is likely to be too long. In such a claim the claimant may not be able to follow the protocol and the defendant would be expected to treat the claim with urgency, including any request for an interim payment".

The consultation document correctly states that the majority of mesothelioma claims either drop out of the DPAP procedure or by-pass it and proceed straight to litigation via the Royal Courts of Justice specialist mesothelioma procedure (set out in Practice Direction 3D), under the management of Senior Master Whitaker.

[7] See for example the guidance published by Salisbury NHS Foundation trust here: *http://www.salisbury.nhs.uk/AboutUs/OurPoliciesAndProcudures/Pages/AccesstoHealthRecordsPolicy.aspx*

In mesothelioma cases, typically there is a struggle to locate evidence after the lapse of time usually involved and the biggest delay throughout is the difficulty in identifying employers' insurers. Members report that more and more clients are coming to them, who have been exposed to asbestos through non-traditional routes such as by working as a hairdresser using fixed dryers (which contain asbestos) or teachers[8], rather than the older construction, or lagging industries for example. These new, non-traditional cases can take longer to investigate and it can be a considerable length of time until it is possible to make a claim against a viable defendant[9]. Unfortunately, the DPAP does not recognise the considerable amount of work which must be done at this early stage before the DPAP process can begin.

Disadvantages

Insurer behavior

A problem with the current DPAP's suitability for mesothelioma claims is that it ignores the way in which defendants deal with these claims. Insurers and defendants frequently ignore the pre-action protocol, leaving claimants with no choice but to start proceedings in court in order to progress the claim in a timely manner. Insurers prefer to keep as many issues as possible unresolved, as it assists with their negotiations on the value of the claim if uncertainties on liability remain in issue.

If a defendant does not respond quickly, it is common practice to sue in order to secure an interim payment. This interim payment is extremely important to the claimant, who will have urgent financial needs as his or her health deteriorates. Additionally, in cases where the dying claimant is a carer for his or her spouse, payments will be sought to support the spouse to make life easier, as well as to help the claimant through his or her last months. In situations such as these, where Master Whittaker is confident that liability is not an issue, he will order an automatic £50,000 interim payment.

It is vital that court proceedings can be started promptly so that liability can be resolved in this way, providing comfort to the claimant and ensuring that an interim payment is made.

Case study 2*

"I have recently acted for a gentleman in a claim against the Swindon Local Authority where

[8] http://www.hse.gov.uk/statistics/causdis/mesothelioma/mortality-by-occupation-2002-2010.pdf

[9] One of our executive committee members is instructed by a ballet shoe-maker who was exposed to asbestos during his work. This is an example of a rare, non-traditional occupation where tracing the relevant insurer will prove difficult.

he had worked and been exposed to asbestos. I sent a letter of claim but could get no response whatsoever. I kept on chasing but in the meantime, the poor man died. There was non-compliance by the defendants here. It was not until after he died that they finally raised a defence in which they contended that the dates in his statement were incorrect and tried to set up a defence based on that. Obviously if I had had the defence during his lifetime, I could have taken detailed instructions from him. It was a very difficult case because I could no longer obtain instructions following his death. Fortunately with much difficulty, I eventually managed to find some old work colleagues who could deal with the points raised. But potentially this case could have collapsed because of the way in which the defendants dealt with the matter."

Case study 3: MOD secondary exposure

"Instructions received July 2011. Letter of claim sent to AWE immediately. At this point Mrs A was seriously ill. After three weeks a response was chased: the person dealing was on extended leave and nobody else could deal in her absence. Mrs A died in October 2011. Medical evidence and evidence re consequential losses was served and the defendants chased numerous times for an admission and an interim payment to fund care for Mr A (dependent spouse). No response is received, save for a bland acknowledgment. Proceedings were issued in the name of widower's representatives (he lacked capacity) and just before service the defendants finally admitted breach of duty.

Then, at every stage the defendant Treasury Solicitors (TSol) did nothing until the very last possible moment. As well as these delays, matters were further delayed by the solicitor dealing being absent from work for many weeks on 'Olympic leave.' Despite Olympic leave being foreseeable, her TSol colleagues could not access her emails, take calls, pick up messages or deal with correspondence. They were weeks late posing their P35 questions and did not even instruct their nursing care expert until two weeks before the report was due.

Throughout this time the family were struggling to provide adequate care for the widower, whose health was very precarious. The care and case management regime was very expensive and after the daughters own health began to suffer, a live in carer was appointed. TSol ignored our P36 offer in the Autumn of 2012 and eventually served their counter-schedule and made an offer in January 2013, barely a month before the assessment of damages hearing, and a year after the admission of liability. The defendants had been

aware for many months that the CFA involved a staged success fee and insurance premium, with stage three triggered 45 days before trial.

There was no reason at all why the defendants could not have settled this claim within a year of the claimant's death. Instead, it went to within a month of trial, and also gave the family an anxious Christmas with no offers on the table, and a trial looming in the new year. The delays, the need to repeatedly chase, and the difficulty in obtaining decisions on anything meant that the costs were far higher than they should have been."

Admissions

There must be a drive, within any MPAP, towards encouraging early binding defendant admissions, to facilitate earlier settlement of the claim. As our research shows, nearly half of all respondents indicated that early admission of liability within the DPAP protocol period under the current disease and illness pre-action protocol (DPAP) only occurs in one to ten per cent of their cases. A further quarter (23 per cent) of respondents indicated that liability is never admitted within the DPAP protocol period in their cases. Use of the 'escape clause' to start proceedings is very common.

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

We believe the mesothelioma protocol (MPAP) in the form set out in this consultation would delay, rather than speed up, the claims process. Insurers will complain if the claimant fails to fully comply with the proposed MPAP and it would be extremely difficult in each case to comply by the letter to the protocol, as the MPAP steps are far too prescriptive. Each mesothelioma case may take a very different course on the way to settlement, as our flowchart shows. Claimants should not be compelled to disclose signed witness statements prior to issue, as discussed below. Further, the proposed MPAP would remove the flexibility to litigate early, which is essential as already discussed above.

The reality is that many cases take a long time to complete, because they involve complex evidence and fact finding. The changes proposed are all process-based and will not assist in speeding up the time it takes to conclude a mesothelioma claim.

- More resources must be put into making it quicker and easier to trace employers and

- there must be provision in any MPAP to encourage earlier admissions of liability by defendants, with penalties for delayed admissions which could have been made earlier in the claims process.

These are the two key aspects of most claims which cause delay and prevent earlier settlement.

Cases can be made more complex by factors such as a non-cooperative employer; intervening medical conditions; the claimant may be self-employed, with all the attendant problems of evidencing financial losses or there may be TUPE complications if the employer company has been sold or merged since the exposure to asbestos took place.

There are no sanctions (both in current DPAP and in the proposed MPAP) for those defendants who fail to respond in a timely manner. Nothing will change and these issues will remain unresolved.

Any dedicated MPAP, should contain:

- an "escape clause", such as can be found in clause 2.7 of the current DPAP, so that cases can be issued without following the protocol to its conclusion. Time is of the essence in these cases, and it is necessary to ensure early interim payment.
- a provision for a binding signed admission of liability from the defendant within a short time-frame, absent which, liability should be presumed.
- automatic interim payment, on receipt of medical evidence.

We also suggest that an MPAP should be developed around the existing DPAP procedures, and not around the brand new protocol annexed to the consultation.

Early exchange of signed witness statements

A contentious issue for claimants in the proposed MPAP is the defendant's need for a signed witness statement from the claimant.

The unexpected consequence of requiring disclosure of a signed witness statement at a very early stage would be to delay notification of the claim to the insurer: lawyers would wait until they had all of the required information before issuing such a crucial document. At present, lawyers are quite happy to pass on information required by the defendant as and when it is available, provided that it is on a without prejudice basis.

While early exchange of information between the defendant and claimant is necessary, and it is not in the claimant's interest to delay contacting the defendant as soon as they have been identified; in our view, there does not need to be early disclosure of the claimant's signed witness statement. This document contains a statement of truth, upon which the formal claim is founded. It is the equivalent of evidence given in court on oath.

If the claim goes to trial, then witnesses give evidence and are cross-examined on that evidence. The procedure now is that there is mutual exchange of witness statements, but only after there has already been exchanges of the statement of case and relevant documents (and then the witness statements can be finalised once all the evidence is available).

By requiring the disclosure of the signed witness statement earlier in the process, is that it may containerrors and the claim could be compromised or undermined by the discovery of further evidence or detail at a later date. Cases are won or lost on the facts: the importance of only disclosing the signed witness statement once all available evidence has been checked and received cannot be over-stated.

Our members know that time takes its toll on the memory: statements taken early on from the claimant invariably contain errors of dates/company names, which only become apparent once the claimant's HMRC schedule has been received, and the there has been an exchange of statements of case and documents with the defendant.

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 wording in the proposed MPAP is strikingly similar to that which was produced, by the ABI, in 2004-2006 when it first proposed a dedicated pre-action protocol for mesothelioma claims. It was correctly rejected in favour of the introduction of a mesothelioma practice direction (PD 3D) in 2008, which was designed to ensure a common approach to the judicial case management of mesothelioma claims throughout England and Wales. It harmonised approaches to these claims across the regional court centres, based upon that adopted by Senior Master Whitaker at the Royal Courts of Justice in London.

Our comments on the content of the MPAP are as follows:

3. Intimation letter

3.1 The requirement that a letter of intimation should be sent directly to all identified insurers would automatically mean that early notification of claims would be delayed: if the employer can be traced, but the insurer cannot, it is best practice to send an early letter of claim to the employer, asking it to notify its insurers. Quite often, if an employer has been reluctant to respond to early attempts at contact by the claimant's lawyer, then the letter of claim will encourage the organisation to notify its insurers of the claim. "...the intimation should provide..." the list of information to be included in the letter of intimation is of course best practice, but in our experience, an early letter of claim containing the available information (even if incomplete) is sufficient to provide early notification to the defendant and it's insurers. If the letter should contain *all* the information listed before it can be sent, lawyers will wait to obtain it all before contacting the employer: early notification of the claim thereby being delayed.

"3.1.2 'name and address of each employer/third party who is alleged to have exposed'...."

It is best practice that once one employer/third party has been identified, an early letter of claim is sent immediately. This ensures early notification to what usually becomes the lead insurer, rather than waiting until all possible employers / insurers have been traced which may take months to accomplish. This is codified in the ABI's "Guidelines for apportioning and handling employers' liability mesothelioma claims"[10] which make it quite clear that the lead insurer "is to pay the claimant's damages and the claimant's costs in full as soon as possible and without first being put in funds by other participants." The ABI's guidelines also clearly state that the lead insurer must "actively contact every other known participant to identify the coordinator, using not only employment history and insurance history obtained from the claimant but also using information from the lead insurer/handler's own records, knowledge and experience of handling mesothelioma claims (iii) liaise with other participants in the claim against that employer."[11]

"31.3 'details of the circumstances of exposure to include the claimant's/deceased's occupation and periods of exposure..."

[10] See Appendix **D** - ABI's '*Guidelines For Apportioning and Handling Employers Liability Mesothelioma Claims Contents'* 28 October 2003,

[11] See Appendix D - ABI's '*Guidelines For Apportioning and Handling Employers Liability Mesothelioma Claims Contents'* 28 October 2003, paragraph 5.

The information contained in this paragraph is usually subject to change as witnesses are traced and interviewed, and upon receipt of the HMRC schedule which will usually correct dates/employer names.

4. Letter of claim

"4.1.1 'chronology of all lifetime exposure... details of all employers/other third parties'..."

It is unlikely, at the time of sending an early letter of claim that a full chronology and all employment details will be available to the claimant's solicitor. Witness evidence yet to be obtained and the HMRC schedule will all add to this information. Best practice provides that as and when such information is available, it is passed on to the defendants, rather than holding that information back until a full chronology is feasible.

"4.1.3 '... claimant's present condition and prognosis."

This information is not particularly useful to the defendant and is likely to have changed within a short time after the letter of claim has been sent.

4.2 A signed statement of exposure containing all the information itemised in this clause is extremely likely to cause significant delays to the claim: claimants will not have all of the information to hand early on and it would be better for all parties if the information on exposure which is available is passed on as soon as possible, rather than waiting for a comprehensively itemised and binding document. Such a document would not be available until far into the claims process. See our flow chart, which illustrates the many steps which are usually taken before that information will be available in its entirety.

"4.4 'the letter of claim should be accompanied by the following documentation'..."

By the time the information required in this section is all available to the claimant's solicitor, months will have elapsed since the claimant first instructed his solicitor. It is too late to wait for all of these documents before sending a letter of claim, Specifically:

- 4.4.1: It is currently taking up to six months to obtain HMRC schedules. It is unreasonable to expect the claimant to wait this long in order to send the letter of claim or delay the claimant's ability to issue court proceedings if necessary.

- 4.4.2: The schedule of loss is an accumulation of a number of different steps which will all take a considerable time to complete. See our flowchart: tax returns, accounts, statements, investment schedules and so on must all be

obtained, accountants instructed and a detailed, accurate, schedule completed. It is unnecessary to delay the letter of claim or delay the claimant's ability to issue court proceedings until after all this information has been obtained.

- 4.4.6: in deceased claims, obtaining the grant probate or letters of administration will be a necessary delay in the process: they can be provided to the defendant at a later date and should not delay the claimant's ability to send the letter before claim or issue, if necessary.

All of the above sections, must not to delay the letter of claim or delay the claimant's ability to issue court proceedings if necessary.

5.1 The letter of claim would be sent too late to allow the defendants a further 21 days in which to respond as set out in this clause.

5.3 A period of two months from the date of the letter of acknowledgement is an unacceptable delay for the clamant at this stage of the claim.

If, at this stage of the process the defendant is to be allowed to resile from an admission of liability, the claimant may die or have died before liability can be resolved, leaving the claimant's estate unable to verify evidence which has been lost with the death of the claimant.

5.5 The claimant should be free to issue proceedings as soon as it becomes apparent that the parties are unable to reach agreement on all elements of the claim. There is little time in mesothelioma claims to revolve issues by other means.

5.6 Again, two months is too long a period in which the claimant has to wait for the defendant to decide whether it can complete it's enquiries as indicated by this clause. The claimant should be free to issue proceedings here.6. It is an unnecessary step to require claimants to send copies of medical reports to all defendants. It is usual in these claims to have a 'lead' insurer who co-ordinates the defence:[12] similarly, we reiterate our contention here that a certificate of diagnosis would be a quicker and more efficient way of dealing with confirmation of diagnosis. This section indicates that claimants would have to request permission to instruct an expert. Absent a change of

[12] See Appendix **D**, section 5: "Duties of the lead insurer / handler"

procedure to accept certificates of diagnosis, it is inappropriate to preclude the claimant from instructing a medical expert as early as possible. As can be seen from our flow chart, it can take several months from date of instruction to receipt of an medical report – time which can be maximised by instructing the expert as early as possible to avoid any delay to the progress of the claim.

Case study 3*

A lagger, exposed to asbestos in 1946 instructed his solicitor to make a claim when he was diagnosed with mesothelioma. The solicitor was in possession of the employer's insurance details (they were in his firm's database of insurance records from past claims).The solicitor wrote to the insurers, supplied the insurers with the DWP accepted diagnosis of mesothelioma: no medical report was requested by insurers and a very good settlement was obtained within seven weeks.

** supplied by APIL member with 21 years' experience of conducting mesothelioma claims.*

The outcome described in the above case study would be impossible under the proposed MPAP. In the proposed MPAP, there would be a considerable delay before the claimant solicitor would be in a position to send a letter of claim, because he would have to fulfill the "checklist", first. The defendant would then be able to ignore this letter of claim (as is often the case, see our answer to question 1), and only once a reply was finally received would the 'clock' on the claim process start to run.

Time is very much of the essence in these cases, and a protocol which builds in additional delay is extremely unsuitable for mesothelioma victims.

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

We do not believe that the proposed MPAP will result in reduced legal costs in mesothelioma claims. Additional delay built into the proposed MPAP will add additional layers of work and cost.

While for the above reasons we believe that a protocol would not reduce costs in a mesothelioma case, a protocol which provides automatic interim payments, early admissions of liability from defendants and easier access to medical and HMRC work/pension records

would be a step in the right direction. These changes *would* speed things up and reduce costs incurred.

Secure mesothelioma claims gateway

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

If evidence is required to demonstrate that mesothelioma claims are unsuitable for a portal/gateway style process, then the current exclusion of *all disease claims* from the new pre-action protocol for low value personal injury (employers' liability and public liability) claims (the EL/PL Protocol) is, in our view, conclusive. These claims do not fall within the definition of claims covered by the EL/PL Protocol because the Government recognises "the additional complexity of ELD [employers' liability disease] claims."[13] They inevitably contain issues relating to multiple defendants and evidential complexity.

Our flow-chart demonstrates the complexity of mesothelioma claims. Claimant and defendant lawyers dealing with these claims already communicate with each other electronically – exchanging evidence by email – loading larger document files onto their file servers for remote access. There is no evidence in the consultation that these procedures are not working well, as we believe they are, and in our view, the electronic gateway would add an additional layer of work which will inevitably lead to additional costs being incurred on both sides of the claims process.

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?**

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

We believe that the SMCG is not the best way to improve the mesothelioma claims process.

We have concerns about Data Protection Act issues: and the end use of the information contained within such a gateway. Our main concern is that personal information provided by

[13] See paragraph 95: Extension of the Road Traffic Accident Personal Injury Scheme: proposals on fixed recoverable costs. Ministry of Justice Consultation response 27 February 2013.

the claimant's lawyer which is saved onto an electronic 'gateway' as described, will leave the lawyer liable to committing offences under the Data Protection Act. The main issue relates to how the information may be used once the claim has been settled by the main insurer. We would see firm assurances that such personal information would not be passed to subsidiary insurers in CPR Part 20 proceedings which the lead insurer may commence in order to recoup outlays made when the claim was settled.

Fixed costs

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?

No. A fixed recoverable costs regime should not be introduced.

When Professor Fenn carried out research on fixed fees for EL and PL claims, he came to the conclusion that disease cases should be excluded from the EL/PL protocol, because fixed fees are not suitable for complex disease cases, where there is a huge divergence of cost in the relevant category of claims.

For this reason, mesothelioma claimants would be in worse financial position than other claimants suffering from other work related diseases: their claims would be subject to a fixed recoverable costs regime while others, suffering other occupational diseases (such as, for example, chronic obstructive pulmonary disease) would be able to recover their damages and costs from the losing party in full.

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

The key drivers of legal costs are:

- Defendant behaviour. See case study 4 – an example of excellent behaviour and studies 1, 2 and 3 as examples of unhelpful defendant behaviour;
- tracing insurers;
- investigating causation;

- tracing witnesses;
- Unraveling the employer's corporate history/tracing directors;
- the number of witnesses (especially where there is a need for corroborative evidence);
- the state of the claimant's health and/or mental acuity;
- obtaining medical reports on diagnosis and causation;
- Obtaining financial information to create schedule of loss;
- Whether claimant was self employed or has complex work history or pension arrangements;
- Engineering evidence – difficulty and time to obtain;
- Obtaining HMRC schedule;
- Restoring companies to the roll in the event that they are no longer registered (in order to issue proceedings);
- Dependents' circumstances (particularly a surviving spouse who may need future care which may lead claimants to elect to delay final settlement until death);
- Early admissions of liability;
- Early interim payments.

All but the last two in the above list are necessary in every case in order to properly investigate the claim, prove exposure, liability and loss.

The final two are key drivers towards early and efficient settlement of the claim.

Q11 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

No.

Q12 Do you agree that the fixed recoverable costs regime should apply only to cases which fall under the MPAP?

No. There are sufficient safeguards in the existing DPAP and the mesothelioma practice direction to control costs in these types of claim.

Q15 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?

The ten per cent uplift derived from s.48 LASPO Act 2012 is illusory. Unless a judge indicates that he or she has added the additional percentage on to the award, the claimant cannot be sure that it has been included in any event. If mesothelioma claims were subject to s.48, the cost of the non-recoverable ATE premium and the deduction of success fees would outweigh the benefit of an additional ten per cent in damages.

In the original debate in the House of Commons[14] where the exemption for mesothelioma claims was discussed, Mr Djanogly MP assured the Commons that "…the amendment commits the Lord Chancellor to carrying out a review of the likely effect of the clauses in relation to mesothelioma proceedings and to publish a report before those clauses are implemented."

This consultation question, does not, in our view, satisfy the assurances of a review of the likely effect of the LASPO clauses on mesothelioma claims. More work should be done, before consideration about whether the exemption for these claims should be revoked.

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[14] Hansard, 24 April 2012, column 831

APPENDIX A

Flowchart showing the basics of a ‘live’ mesothelioma claim

Mesothelioma claim - flow chart showing the basics of a 'live' claim

= process 'pinch point' or cause of delay

Initial contact

Is meso sufferer alive?

Yes

No

Different chart. Acting for estate.

Note that at any time during the life of a 'living' mesothelioma claim, the claimant may die: the process would then halt to allow the legal steps to continue the claim, by the executor (if there is a will) or trustees to proceed.

Visit client to take instructions on:
Full employment history
Full asbestos exposure history
Full medical history
Financial details
Funding
Witness details
Forms of authority - get them signed

Send FOAs to GP and hospital(s)

Received medical records?

No

Chase GP and hospitals repeatedly until received

Yes

Instruct medical expert

Receive medical report and report to client and take instructions

Take instructions on medical and care reports.
Draft statements on evidence and quantum.

Send medical report to defendant

Send medical report to care expert to assess future care needs

Send FOAs for pension forecast and other financial information and records

Received financial information?

No

Chase providers of financial information

Yes

Is client self employed?

Yes

Obtain client's accounts

Obtain client's tax returns etc

Instruct accountant

Obtain customer statements

Research business and relevant industry

No

Prepare detailed schedule of loss with supporting documents from employers

Take client's instructions on schedule of loss, including lifetime vs posthumous valuation of claim

Send schedule of loss to defendant

Draft and send intimation letter to identified defendants/insurers. Include name, address, NI no, brief work history, occupation

If causation is in issue, for each identified employer....

Obtain engineering evidence re: negligence & liability

Obtain witness statements

Obtain documentation / other evidence re state of employer's knowledge together with other liability related documentation

Trace & contact witnesses

Take instructions from client on witness information

Draft witness statements and send to client for approval

Send FOAs to HMRC

Receive HMRC schedule and check details with claimant - revise witness statement

Is employer and / or insurer known & identified?

Yes

Get evidence of cover

No

Is employer solvent with assets?

Yes

Trace assets of employer or parent company/subsidiary company/group of companies

No

Trace assets of parent company/ subsidiary company/group of companies

Is there a 3rd Party (Rights Against Insurers) Act claim?

No

Companies House searches
ELTO search
Search APIL online dtb & forum
Contact trade assocs
Trace co. directors
Conduct Internet searches for co. info

Restore dissolved company (takes around 3 months) in case need to issue proceedings

Untraced claim ends here.
Client is uncompensated.
Client dies of mesothelioma.

Send detailed letter(s) of claim to viable likely defendants

Yes

Defendant identifies other insurers?

No

Defendant admits liability?

Yes

Mutual disclosure of witness statements

Offers made?

No

Yes

Offer accepted?

No

Yes

Claim settles

No

Issue Proceedings:
Draft statement of claim
Update witness statement
Update medial evidence
File at court
Serve defendant(s)

APPENDIX B

APIL survey results

APPENDIX B

Survey results: How mesothelioma claims are currently dealt with under the current disease and illness pre-action protocol.

As part of APIL's response to the Ministry of Justice's (MOJ) consultation on 'reforming mesothelioma claims' (https://consult.justice.gov.uk/digital-communications/mesothelioma-claims), and the proposal to introduce a dedicated mesothelioma pre-action protocol (MPAP), an online survey was sent to all members of APIL's Occupational Health special interest group (SIG) - comprising approximately 640 members - on Friday 23rd August 2013. The survey was also promoted via APIL's Weekly News. The deadline for the survey was 5pm on Friday 6th September 2013. The survey asked about members' experiences of using the current disease and illness pre-action protocol (DPAP) for mesothelioma claims.

In total, 39 full responses were received. Overall the average annual number of claims handled by those members responding was 30 (mean = 32; median = 30; mode = 30), with the highest being 180 claims a year and the lowest being only 2 claims a year. In context, according to the compensation recovery unit (CRU), there were 2,274 mesothelioma claims in Great Britain in 2012/13; those members who responded to the survey handle approximately 1,200 claims a year, therefore the results would seem to be relatively robust and comprehensive.

In terms of the percentage of successful mesothelioma claims where liability is admitted within the protocol period under the current disease and illness pre-action protocol (DPAP), nearly half of respondents (46%) indicated that this happened in only one to ten per cent of cases they handle. A further quarter (23%) of respondents indicates that it never happens!

As for what percentage of cases exit the DPAP using the escape clause and issue court proceedings, a fifth of respondents (18%) indicated that this happens in about forty to fifty per cent of cases they handle, whilst thirteen per cent indicate that it happen in about ten to twenty per cent of cases.

Table 1: Responses to the question *"Under the current disease and illness pre-action protocol (DPAP), in approximately what percentage (%) of successful mesothelioma claims you deal with is liability admitted WITHIN the protocol period?"* (*n* = 39)

Response	Number	Percentage
None of them	9	23%
1 to 10%	18	46%
11 to 20%	4	10%
21 to 30%	4	10%
31 to 40%	2	5%
41 to 50%	1	3%
51 to 60%	1	3%
61 to 70%	0	0%
71 to 80%	0	0%
81 to 90%	0	0%
91 to 99%	0	0%
All of them	0	0%

APPENDIX B

Table 2: Responses to the question *"In approximately how many cases - as a percentage (%) of all the mesothelioma cases you deal with under the disease and illness pre-action protocol (DPAP) - do you have to use the DPAP escape clause in order to issue court proceedings?"* (*n* = 39)

Response	Number	Percentage
None of them	4	10%
1 to 10%	2	5%
11 to 20%	5	13%
21 to 30%	0	0%
31 to 40%	2	5%
41 to 50%	7	18%
51 to 60%	4	10%
61 to 70%	1	3%
71 to 80%	3	8%
81 to 90%	3	8%
91 to 99%	4	10%
All of them	4	10%

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APPENDIX C

Appendix table 3.4.4, Occupational, domestic and environmental mesothelioma risks in Britain: A case-control study.

Julian Peto DSc FMedSci, Christine Rake BSc MSc, Clare Gilham BSc MSc,Jane Hatch BSc, pub: Health and Safety Executive 2009.

Appendix table 3.4.4 Year in which the youngest cases (born 1950-1971) started work, by highest job category

Highest job category	*Males - year started work*					*All males*	*All females*
	1965-69	*1970-74*	*1975-79*	*1980-84*	*≥1985*		
Occupational exposure							
Non-construction high risk	4	2	2	0	0	8	0
Carpenters	10	8	1	0	1	20	0
Plumbers, electricians & painters	7	2	0	0	0	9	0
Other construction	3	3	1	2	0	9	0
Medium risk industrial	8	3	1	0	0	12	5
Non-occupational exposure							
Domestic exposure < age 30	0	0	0	1	0	1	3
None of the above	1	0	1	1	1	4	10
TOTAL	33	18	6	4	2	63	18

APPENDIX D

ABI *Guidelines For Apportioning and Handling Employers Liability Mesothelioma Claims Contents*
28 October 2003

Guidelines For Apportioning and Handling Employers' Liability Mesothelioma Claims

Contents

Overriding Principles

(I) Joint & Several Liability

The decision of the House of Lords in *Fairchild v Glenhaven & others* imposes joint and several liability on employers and by analogy their insurers in employers' liability mesothelioma claims. Notwithstanding a claimant's inability to identify the employer whose breach of duty gave rise to the exposure which induced mesothelioma, the House of Lords held that a mesothelioma claimant was entitled to be compensated in full by any single employer responsible for a period of culpable exposure. The House of Lords decided that the need for redress to employees outweighs any unfairness that joint and several liability for the full claim might give rise to as between employers.

(II) Time-based Apportionment

Fairchild did not give guidance on how this joint and several liability to pay compensation in full should be apportioned among employers (and their insurers). It is considered that the most equitable and pragmatic way to do so is first in proportion to the Periods of Culpable Exposure to asbestos by employers (this reflects insurance claims handling practice in long tail disease claims generally) and then in proportion to the periods of insurance coverage, subject always to the claim being met in full.[1]

(III) Prompt Settlement followed by Contribution

It is in all parties' interests that apportionment be agreed quickly by employers and their insurers. This will avoid the need for further costly litigation which not only risks keeping claimants out of the full compensation to which they are entitled under *Fairchild*, but also adversely impacts on the image of employers and their insurers generally. These Guidelines on apportionment set out clearly who pays the claim to the employee and how they calculate and collect contributions from others involved. They also provide a mechanism for doing this when there are insolvent insurers involved in the claim, and as far as possible seek to do the same where solvent employers are involved who are uninsured, self-insured or unable to trace their insurers. In so doing it is intended that the Guidelines will avoid disputes and litigation between employers and insurers responsible for different Periods of Culpable Exposure and hence reduce overall handling costs.

[1] Where FSCS is the sole participant and there is an FSCS Shortfall payment may not be "in full".

Guidelines For Apportioning and Handling Employers' Liability Mesothelioma Claims

1. Context

1.1 Fundamental Aspects of Joint & Several Liability

(i) There are three fundamental aspects to the joint and several liability on which these Guidelines are based. They are set out below and are the consequences of applying the joint and several liability resulting from *Fairchild* as between liable employer(s) and their insurer(s). These Guidelines cannot operate effectively unless Participants accept these fundamentals:

- *First, that unless the law as set out in* Fairchild *is modified, in mesothelioma claims each employer is legally liable to pay all of the claimant's damages, regardless of the period over which he exposed the claimant to asbestos.*

- *Second, legal liability to pay all of the damages requires payment in full by traced employers for periods of culpable exposure to asbestos for which no employer can be traced. In* Fairchild*, Lord Bingham recognised this was inequitable, but clearly stated (below) that this inequity was outweighed by the public policy requirement for full compensation.*

- *Third, the legal liability of employers' liability insurers in these claims reflects the employers' legal liability. Therefore each insurer is legally liable for the totality of the claim, regardless of the period over which cover was actually provided.*

(ii) These Guidelines will apply where there are insolvent employers and/or insolvent insurers involved. These Guidelines provide for those insolvent insurers' estates to participate in the apportionment of mesothelioma claims on almost exactly the same basis as solvent insurers (although the insolvent insurers will not fund payment of the claims themselves). In such circumstances claimants or employers may be entitled to protection from Financial Services Compensation Scheme (FSCS). A summary of FSCS's position is set out at Appendix 1.

1.2 Legal Background

(i) It was the clear intention of the House of Lords in *Fairchild* that in employers' liability mesothelioma claims in which the traditional test of causation applied by the courts (i.e. on the balance of probability X caused Y's loss) cannot be satisfied in respect of any one of several employers, the balance of natural justice and public policy weighs in favour of compensating the claimant in full and lies against the duty-breaking employers, and by inference their insurers. Giving the leading opinion, Lord Bingham said (emphasis added):

"It can properly be said to be unjust to impose liability on a party who has not been shown, even on a balance of probabilities, to have caused the damage complained of.

On the other hand, there is a strong policy argument in favour of compensating those who have suffered grave harm, at the expense of their employers who owed them a duty to protect them against that very harm and failed to do so, when the harm can only have been caused by breach of that duty and when science does not permit the victim accurately to attribute, as between several employers, the precise responsibility for the harm he has suffered.

I am of opinion that such injustice as may be involved in imposing liability on a duty-breaking employer in these circumstances is heavily outweighed by the injustice of denying redress to a victim. Were the law otherwise, an employer exposing his employee to asbestos dust could obtain complete immunity against mesothelioma (but not asbestosis) claims by employing only those who had previously been exposed to excessive quantities of asbestos dust. Such a result would reflect no credit on the law."

(ii) The House of Lords also found that multiple employers in mesothelioma claims were jointly and severally liable for the full amount of the damages. Lord Bingham stated:

"C [the claimant] *is entitled to recover against both A and B* [the employers] *… Policy considerations weigh in favour of such a conclusion. It is a conclusion which follows even if either A or B is not before the court.*

It was not suggested in argument that C's entitlement against either A or B should be for any sum less than the full compensation to which C is entitled, although A and B could of course seek contribution against each other or any other employer liable in respect of the same damage in the ordinary way. No argument on apportionment was addressed to the House."

(iii) These Guidelines set out how apportionment is to be dealt with as between employers and employers' liability insurers and FSCS, when involved in these claims. The Guidelines seek to establish "best practice" for the handling of these claims in order to control the process of settlement, minimise costs and facilitate prompt payment of claims.

1.3 Definitions

Participant	Any person, company or body that is under an obligation to settle or make a contribution to or handle a mesothelioma claim brought by a claimant, e.g. an employer (whether public or private sector), an insurer (whether solvent or otherwise) or FSCS.
Period of Culpable Exposure	The period (or periods) during which a claimant was exposed to asbestos by a single employer for which that employer is liable.
Gap	Any part of a Period of Culpable Exposure for which the employer is self-insured, uninsured or unable to trace insurance.
Total Culpable Exposure	The total of the Periods of Culpable Exposure, ignoring Void Periods.
Void Period	A Period of Culpable Exposure for which no solvent employer can be identified and for which no insurer can be traced.
Lead Insurer / Handler	The Participant who has the largest proportion of a Period of Culpable Exposure for a single employer.
Co-ordinator	The Lead Insurer / Handler of the employer with the longest Period of Culpable Exposure, or if there is a Participant with a greater financial interest, that Participant may elect to be the Co-ordinator.
ABI	The Association of British Insurers.
FSCS	The Financial Services Compensation Scheme Limited, established under section 213 of the Financial Services & Markets Act 2000.
FSCS Shortfall	The unprotected portion, amounting to 10% of a claim or part of a claim, where that claim, or that part of the claim, is protected by FSCS to the extent of 90% only.
Pay and Be Paid	The process by which: (i) the Co-ordinator is to pay the claimant's damages and

the claimant's costs in full as soon as possible and without first being put in funds by other Participants, and

(ii) the Lead Insurer/Handler is to pay to the Co-ordinator upon its request, the proportion of the claimant's damages and the claimant's costs attributable to the employer with whose liability that Lead Insurer/Handler is dealing, without first being put in funds by the other Participants for that employer.

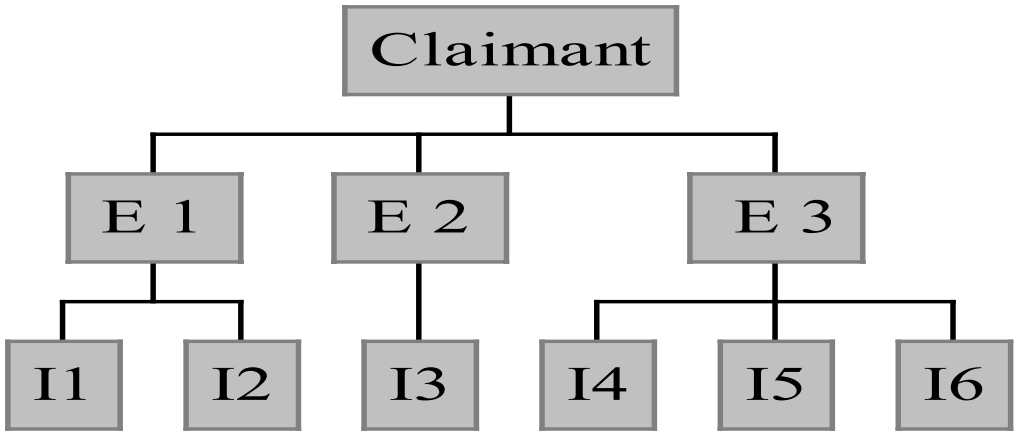
In either case this process is subject to Parallel Payment.

Parallel Payment Where there is any part of a Period of Culpable Exposure with an insolvent insurer which has subsequently become insolvent, contributions for this Period of Culpable Exposure may be due from the employer (if solvent), the insolvent insurer and the FSCS. Parallel Payment is the process by which these contributions are paid separately.

Dispute Any dispute or difference which arises or occurs between Participants in relation to any thing or matter arising out of or in connection with a claim being handled under these Guidelines.

1.4 Framework for Apportionment

(i) A multiple employer mesothelioma claim may be represented in the diagram below, where E1 is the first employer, E2 the second etc. The insurers of the employers are shown as I1, I2 etc.



(ii) The process set out in these Guidelines involves the early identification of a Lead Insurer / Handler for each employer.

(iii) Under these Guidelines, as quickly as possible, the Lead Insurer / Handler of each employer establishes contact with the Lead Insurer /

Handler of the other employers and they identify the Co-ordinator who will be responsible for the overall management of the claim.

(iv) The aim of these Guidelines is to apportion, as equitably as possible, the financial liability for the claim as between the employers, their insurers and the FSCS. An agreed mechanism for apportionment will allow for early payment of compensation to claimants and subsequent collection of contributions. A Co-ordinator will be identified and will (unless insolvent) Pay and Be Paid - settling the claim first and using all available information to recover contributions from the Lead Insurer(s) / Handler(s), who will themselves (unless insolvent) Pay and Be Paid in the same way, subject to Parallel Payment.

(v) The starting point for apportionment is to do so in proportion to the Period(s) of Culpable Exposure to asbestos. This will achieve the fairest horizontal spreading of the liability over time. It seeks to avoid a vertical stacking of all the liability on any one employer or insurer.

2 Objectives

2.1 The overall aim of these Guidelines is to establish an agreed process such that Participants can be satisfied that best practice standards have been adopted and that these claims have been settled and apportioned on a fair and equitable basis.

2.2 The objectives are to achieve early settlement and payment in full of the claimant's damages and the claimant's costs and a quick and effective means of calculating and collecting contributions from Participants by:

(i) establishing quickly the identity of the Co-ordinator

(ii) establishing quickly an apportionment schedule of Participants

(iii) establishing a common "best practice" investigation standard for validating the claim and for using all available information about employment history and insurance history to identify as many Participants as possible

(iv) maximising the recovery of contributions to the claimant's damages and claimant's costs from Participants

(v) facilitating effective communication between Participants

(vi) maximising the damages payable to the claimant as a proportion of the total cost of a claim.

3 Scope

3.1 The scope of the Guidelines covers employers' liability mesothelioma claims involving more than one Participant. The scope is wider than the decision in *Fairchild*. The intention of the Guidelines is to control the conduct of claims that have not been settled before 1 November 2003. The Guidelines are intended to establish an agreed mechanism for sharing such claims pragmatically and equitably between Participants.

3.2 The table below illustrates the scope of these guidelines.

Employers	**Insurers**	**included in *Fairchild*?**	**included in guidelines?**
Single	None	No	No
Single	Single	No	Yes
Single	Multiple	No	Yes
Multiple	None	Yes	Yes
Multiple	Single	Yes	Yes
Multiple	Multiple	Yes	Yes

3.3 These Guidelines acknowledge that the consequence of the House of Lords decision in *Fairchild* is joint and several liability for claims of this nature and that there will be many instances where a single employer and/or insurer is presented with a claim which may not have been brought against any or all other Participants.

3.4 These Guidelines apply only to claims for mesothelioma made and pursued in respect of employment and employers' liability insurance. Claims made under other policies such as public liability insurance policies are excluded.

3.5 These Guidelines set out recommended best practice and as such are voluntary and non-binding, so Participants could agree to handle a claim on a different basis where to do so would be more appropriate.

3.6 It is not intended that, in agreeing to handle a claim in accordance with these Guidelines, insurers will be increasing their legal obligations to their policyholders.

3.7 Nothing in these Guidelines is intended to impose, extend or increase any duty or obligation which FSCS does not otherwise owe to policyholders, claimants or third parties.

3.8 These guidelines apply to claims subject to the jurisdiction of England and Wales.

4 Basis of apportionment / contribution

4.1 The Co-ordinator shall, as quickly as possible, establish an apportionment schedule (see Appendix II). The following principles will be adopted.

(i) The claimant's damages and claimant's costs shall be paid in full[2].

(ii) As much information as possible about employment history and insurance history shall be obtained from the claimant or his advisers and others (e.g. ABI) so that, where possible, all Participants are identified and contributions can be maximised.

(iii) The claim shall first be apportioned between traced employers in the proportion that their respective Periods of Culpable Exposure bear to the Total Culpable Exposure.

(iv) The proportion of the claim which is thereby attributable to an employer shall then be apportioned between that employer and its insurers (if any) for the relevant Period of Culpable Exposure. This apportionment shall be in the proportions that periods of insurance and/or Gaps bear to the relevant Period of Culpable Exposure. Gaps (if any) will be attributed either:
(a) if the employer is solvent, to the employer, or
(b) if the employer is insolvent, to its insurers (whether solvent or insolvent).

(v) Any part of a period of employment falling within a ten-year period prior to the date of clinical diagnosis of mesothelioma (or the date of death if no diagnosis was made in the claimant's lifetime) shall not count as a Period of Culpable Exposure for the purposes of applying these Guidelines.

(vi) There shall be no "weighting" of the apportionment to reflect the "dose" of asbestos received during any Period of Culpable Exposure.

(vii) There shall be no "weighting" of the apportionment to reflect the type of asbestos to which the claimant was exposed during any Period of Culpable Exposure.

(viii) Unless otherwise agreed, there shall be no apportionment of defence costs other than common disbursements.

(ix) FSCS does not currently meet defence costs. Therefore the portion of defence costs relating to the insolvent insurer's portion

[2] Where FSCS is the sole participant and there is an FSCS Shortfall payment may not be "in full".

of the Period of Culpable Exposure shall be met by the insolvent insurer in accordance with the arrangements or other procedures governing the payment of defence costs in respect of that insolvent insurer.

4.2 The FSCS Shortfall shall be apportioned as follows.

(i) Same Employer - If there is an FSCS Shortfall, the FSCS Shortfall will be re-apportioned amongst the other solvent insurers for that insolvent employer in proportion to their already determined contributions.

(ii) Other Employer - If there are no solvent insurers for that employer, the FSCS Shortfall will be re-apportioned amongst other employers in proportion to their already determined contributions.

(iii) General Approach - FSCS shall not be required to contribute to the FSCS Shortfall in relation to a particular employer pursuant to either (i) or (ii) unless and to the extent that part or all of the already-determined contribution due from another insolvent insurer for another employer is fully protected by FSCS.

5 Duties of the Lead Insurer / Handler

5.1 It shall be the responsibility of the Lead Insurer / Handler for each employer to:

(i) confirm to the claimant that it is the Lead Insurer/Handler for an employer and that it will assume the duties of Co-ordinator until the Co-ordinator is identified

(ii) actively contact every other known Participant to identify the Co-ordinator, using not only employment history and insurance history obtained from the claimant but also using information from the Lead Insurer/Handler's own records, knowledge and experience of handling mesothelioma claims

(iii) liaise with other Participants in the claim against that employer

(iv) respond within 21 days to the Co-ordinator to its requests for instructions and, in default of a response, the Co-ordinator shall be entitled to assume that any recommendations made by it are accepted

(v) provide all necessary and available information to the Co-ordinator relating to periods of employment or periods of insurance and

respond to the Co-ordinator's requests for information within 21 days

(vi) subject to Parallel Payment, pay, upon the Co-ordinator's request, the proportion of the claimant's damages and the claimant's costs attributable to the employer, with whose liability that Lead Insurer / Handler is dealing

(vii) where Pay and be Paid applies, recover contributions from other Participants associated with the employer with whose liability that Lead Insurer / Handler is dealing, including recovering from a solvent employer any contribution to Gaps.

(viii) provide appropriate proof of payment where Pay and be Paid applies and a Lead Insurer / Handler seeks recovery of a Participant's contribution

5.2 These duties apply regardless of whether the Lead Insurer / Handler is a solvent employer, a solvent insurer or an insolvent insurer subject to section 7.

6 Duties of the Co-ordinator

6.1 The over-riding duties of the Co-ordinator are to:

(i) use its best endeavours to obtain written confirmation from the Participants and claimant that the Guidelines will apply to the claim unless the Co-ordinator's view is that the claim should not be dealt with under the Guidelines

(ii) use its best endeavours to assess the claim and achieve best available settlement

(iii) minimise the claimant's and Participants' costs by settling the claim quickly and efficiently

(iv) ascertain and implement the fair and equitable "horizontal spread" of the liability between Participants.

6.2 Specifically, the Co-ordinator will:

(i) act as Lead Insurer / Handler for the employer with whose liability it is dealing

(ii) if a Lead Insurer / Handler has notified a claimant in accordance with clause 5.1(i) above, advise the claimant that it is taking over the role of Co-ordinator

(iii) confirm to the claimant that it will Pay, without deduction for Void Periods, the claimant's damages in full[3], and be Paid contributions from other Participants, subject to Parallel Payment

(iv) explain to the claimant that the Co-ordinator's handling of the claim under these Guidelines is conditional on the claimant providing all necessary and available evidence both for valuing the claim and for identifying employers for all Periods of Culpable Exposure

(v) comply with such obligations under the Civil Procedure Rules (CPR) as it is able to on behalf of all Participants, including handling the claim in accordance with any relevant pre-action protocol

(vi) investigate the claimant's employment history in full by way of CPR Part 18 request, Contributions Agency employment history, claimant's statements, medical records, and all other appropriate investigations

(vii) investigate fully the insurance history of each employer (where not represented by a Lead Insurer / Handler) allegedly or potentially responsible for culpable exposure by way of such investigations as may be appropriate for example with other Participants, brokers or other sources including the ABI Code of Practice for Tracing Employers' Liability Insurance Policies

(viii) produce Co-ordinator's notes (see Appendix II) outlining employment history, insurance history and the proposed apportionment schedule

- the Co-ordinator will prepare a preliminary Co-ordinator's note to be sent to Participants within 28 days of receipt of the letter of claim

- further Co-ordinator's notes will be circulated quarterly thereafter or as required in the event of significant developments

(ix) pay (subject to any Parallel Payment) on final settlement of the claimant's damages and the claimant's costs, such damages and costs in full promptly and then request from other Lead Insurers / Handlers or Participants payment of their contributions to the claimant's damages and the claimant's costs

[3] See footnotes 1& 2 and the FSCS Shortfall as defined in section 1.3 above.

(x) provide appropriate proof of payment where Pay and be Paid applies and the Co-ordinator seeks recovery of a Lead Insurer / Handler's contribution

(xi) comply promptly with any reasonable request for further documentation or evidence, in addition to the Co-ordinator's notes, made by another Participant involved in the claim.

(xii) make the Claim file available for inspection or audit on 7 days notice, for the purpose of verifying apportionment and the handling of the Claim, by another Participant involved in the claim if reasonably requested to do so.

6.3 These duties apply regardless of whether the Co-ordinator is a solvent employer, a solvent insurer or an insolvent insurer. In the latter case, see section 7 below.

7 Payments

7.1 General Approach

(i) Subject to the Co-ordinator or Lead Handler/Insurer (as appropriate) providing the information referred to in sections 5 and 6, contributions by Participants are to be paid promptly and, at the latest, within 21 days from the date of request for payment by the Co-ordinator or Lead Insurer / Handler as appropriate. These Guidelines encourage early settlement of claims and hence by analogy depend upon early payment of contributions. Therefore Participants shall Pay and Be Paid (subject to Parallel Payment), paying contributions promptly as requested and resolving any disputes about amounts afterwards.

(ii) Where a request for contribution is not paid by a Participant within 60 days, the Co-ordinator or the Lead Insurer / Handler making the request shall be entitled to simple interest on the amount requested, calculated daily, at the prevailing Bank of England base rate from the date of the request made in accordance with either of sections 5 and 6 above (as appropriate) to the date of payment.

7.2 Payments by Insolvent Insurers

(i) Where an insolvent insurer is a Participant any payment will be by Parallel Payment**.** The insolvent insurer will:

- obtain appropriate payment from its insured employer, if solvent, for any Period of Culpable Exposure not protected by FSCS.

- if the claim is fully or partly protected by FSCS, before making any payment on behalf of FSCS, obtain a signed acceptance form and/or deed of assignment (or such other documentation as FSCS may require) from the claimant (or the claimant's representatives) or the insured employer and then obtain appropriate payment from FSCS

- in all cases, except those involving FSCS, secure cheque(s) payable only to the claimant (or the claimant's representatives) and, if possible, payment on behalf of the insolvent insurer should be made at the same time as payment is made in respect of solvent Participants for that employer. Any payment by FSCS may be made either directly to the insolvent insurer or to the claimant or his representatives.

7.3 Insolvent Insurers As Co-ordinator and/or Lead Insurer/Handler

(i) Insolvent insurers can still act as Co-ordinator and/or Lead Insurer/Handler. However, Parallel Payment will apply instead of Pay and be Paid, so that:

- An insolvent insurer acting as Co-ordinator will collect payments from the other Lead Insurers/Handlers (who are still expected to Pay and be Paid in respect of the Participants associated with the employer with whose liability it is dealing, unless they are also insolvent in which case the following paragraph applies) and these payments will be forwarded to the claimant.

- An insolvent insurer acting as Lead Insurer/Handler will collect payments from other Participants associated with the employer with whose liability it is dealing (other than FSCS and/or the solvent employer) and these payments will be forwarded to the Co-ordinator.

8 Dispute resolution

8.1 Any Dispute between Participants shall be resolved by the dispute resolution process set out in Appendix IV.

9 Date of Introduction of The Guidelines

9.1 Participants shall as far as possible apply these Guidelines to all claims within the scope (see section 3 above) that have not been settled by 1 November 2003.

9.2 The operation of the Guidelines shall be reviewed from time to time in light of legal developments and with experience of the Participants. ABI

shall co-ordinate with bodies representing Participants to review these Guidelines not more than 12 months after the date of introduction of the Guidelines and/or as the ABI and Participants agree.

APPENDIX I

Financial Services Compensation Scheme

1. This Appendix is by way of guidance only. It summarises the scope of protection under the Policyholders Protection Act 1975, and pursuant to the Financial Services and Markets Act 2000, provided by FSCS in respect of insurers who are insolvent, and become insolvent before 1 December 2001, the date the 2000 Act came into force. These insurers include Chester Street Holdings Limited, BAI (Run Off) Limited and Independent Insurance Company Limited.

2. Accordingly, this guidance will not apply to any insurer which becomes insolvent in the future, claims against which will be subject to the FSCS Compensation Rules.

3. Under the 1975 Act, to be eligible to receive protection (meaning in order for FSCS to meet a claim for which an insolvent insurer is liable), a policyholder must be a "private policyholder" (e.g. an individual, or partnership of persons all of whom are individuals). However, by way of exception, "corporate" policyholders are protected under the 1975 Act to the full amount of any liability of an insolvent insurer[4] only where the liability is subject to compulsory insurance.

4. Accordingly, corporate policyholders are protected for employers' liability insurance claims subject to the Employers' Liability (Compulsory Insurance) Act 1969. Employers' liability insurance became compulsory in the UK from 1972 and from 1975 in Northern Ireland.

5. In addition to the protection to corporate employers provided under the 1975 Act, the FSCS also protects claims against certain corporate employers which pre-date compulsory insurance (pursuant to its Compensation Rules, and the transitional arrangements made with effect from 1 December 2001).

6. Insofar as the claim pre-dates compulsory insurance and the corporate employer is insolvent, an employee claimant, having established or agreed a claim against the insolvent employer, may make a claim to that employer's insurer under the Third Parties (Rights Against Insurers) Act 1930.

7. In these circumstances, protection is available from the FSCS to that employee claimant if the employer's insurer is also insolvent. Because the claim is not in respect of compulsory insurance, protection is limited to 90%. Accordingly, there is a 10% "FSCS Shortfall" (as defined in these guidelines) in the funding of these employees' claims.

[4] At present defence costs are not met by FSCS.

8. As a general rule, FSCS cannot contribute to the payment of the FSCS Shortfall.

9. For claims in respect of pre-compulsory employer liability insurance, only a third party individual claimant is entitled to protection. The FSCS is not able to make payment to a solvent employer in respect of such claims nor is FSCS able to make payment to any other entity, such as solvent insurers (who may have settled the employee's claim in full and be seeking a contribution in respect of the insolvent insurer's "time on risk"). A solvent employer will be required to meet the costs of the claim itself (in the absence of a solvent insurer).

APPENDIX II

Template For Co-ordinator's Notes

Co-ordinators Note No

1. CLAIM DETAILS	
Employee / Claimant name	
Co-ordinator	
Co-ordinator's reference	
Dates of previous Co-ordinator's notes	
Fatal Accidents Act 1976 claim	Yes / No

2. APPORTIONMENT SCHEDULE						
Employer	**Period of Employment (dates)**	**Period of Culpable Exposure (dates)**	**Insurer / Participant and Reference**	**Contribution Period (months)**	**Contribution (%)**	

3. STATEMENT BY CO-ORDINATOR ABOUT ENQUIRIES MADE		
Type	**Yes / No**	**Comment** **(date enquiry made, result etc)**
Standard Employment Enquiries		
ABI EL Code of Practice		
Witness Statements		
Contributions Agency		
Medical Report (include name of reporting doctor)		
Medical Records		
Inquest Report		
Earnings information		
Other		

4. DAMAGES		
Head of damage	**Amount recommended or paid**	**comment**
General damages (PSLA)		
Loss of earnings		
Care		
Funeral expenses (Fatal Accidents Act 1976 only)		
Bereavement (Fatal Accidents Act 1976 only)		
Future loss of earnings		
Services dependency		
Earnings dependency		
Other		
TOTAL DAMAGES		**agreed / settled / awarded**

5. CLAIMANT'S COSTS & DISBURSEMENTS	
Profit costs (base costs)	
Success Fee	
ATE premium	
Medical evidence	
Counsel	
Other disbursements	
VAT	
TOTAL CLAIMANT COSTS	

6. DEFENCE COMMON DISBURSEMENTS	
Medical evidence	
Counsel	
Other disbursements	
VAT	
TOTAL DISBURSEMENTS	

7. SUMMARY		
Cheques are requested payable to insert name of Co-ordinator / Insurer / claimant / claimant's solicitor	**From (name of participant)**	**For (amount)**
Plus Co-ordinator's apportioned share (insert)		
TOTAL CLAIM APPORTIONED		

APPENDIX III – Basic Worked Examples Of Apportionment Under These Guidelines

BASIC FACTS

periods of culpable exposure – months

40	25	25	10
Employer A	Employer B		Employer C
X Insurance Co	Y insurance Co	Z insurance Co	(none)

- Ten-year disregard has already been applied.
- Amount to be apportioned for mesothelioma claim agreed at £100,000 (covering the claimant's damages and the claimant's costs.
- Assume all exposure post 1972 so that no FSCS Shortfall arises.

APPORTIONMENT SCENARIOS

1 All insurers and employers solvent. Apportionment.

X (coordinator) pays in full				£100,000.00
X's apportioned share	100,000 x 40/100		£40,000.00	
Y contributes	100000 x 25/100		£25,000.00	
Z contributes	100000 x 25/100		£25,000.00	
C contributes	100000 x 10/100		£10,000.00	
		TOTAL		£100,000.00

2 **All insurers solvent. Employer C insolvent. Apportionment ignoring C's exposure which is a Void Period.**

X (coordinator) pays in full				£100,000.00
X's apportioned share	100,000 x40/90		£44,444.00	
Y contributes	100,000 x 25/90		£27,778.00	
Z contributes	100,000 x 25/90		£27,778.00	
				£100,000.00

3 **All employers solvent. Insurer Z is untraced and this gives rise to a Gap. Other insurers solvent.**

X (coordinator) pays in full				£100,000.00
X's apportioned share	100,000 x 40/100		£40,000.00	
Y contributes	100,000 x 25/100		£25,000.00	
B contributes	100,000 x 25/100	contribution to Gap	£25,000.00	
C contributes	100,000 x 10/100		£10,000.00	
		TOTAL		£100,000.00

4 **All employers solvent. Insurer Z is insolvent (and FSCS protected) so Parallel Payment applies. Other insurers solvent.**

Apportionment				
X (coordinator) pays	100,000 x 40/100		£40,000.00	
Y contributes	100,000 x 25/100		£25,000.00	
FSCS contributes	100,000 x 25/100		£25,000.00	
C contributes	100,000 x 10/100		£10,000.00	
		TOTAL		£100,000.00

5 **All employers solvent. Insurer Z is insolvent (and FSCS protected) so Parallel Payment applies. Insurer Y is untraced and this gives rise to a Gap. Other insurers solvent.**

X (coordinator) pays	100,000 x 40/100		£40,000.00	
B contributes	100,000 x 25/100	(contribution to Gap)	£25,000.00	
FSCS contributes	100,000 x 25/100		£25,000.00	
C contributes	100,000 x 10/100		£10,000.00	
		TOTAL		£100,000.00

6 **Employer A is untraced, so X cannot be found. This is a Void Period. All other Participants solvent. Y or Z should agree who is the Coordinator.**

Y pays/contributes	100,000 x 25/60	£41,667.00	
Z pays/contributes	100,000 x 25/60	£41,667.00	
C contributes	100,000 x 10/60	£16,666.00	
			£100,000.00

APPENDIX IV

Dispute Resolution

For the purposes of Appendix IV, only, Participants (unless otherwise stated) means the parties to the Dispute

1. Overriding objective

- Disputes shall be resolved in accordance with the provisions set out in this appendix.

- The overriding objective is to resolve Disputes as quickly and as cheaply as is reasonably practicable in order to achieve the overall aims and objectives of these Guidelines as set out in section 2 of the Guidelines.

- Participants shall co-operate and act in good faith in order to achieve this overriding objective.

- *Participants may agree any form of dispute resolution at any time which they consider has reasonable prospects of achieving this overriding objective.*

2. Direct negotiations in good faith by Participants

2.1 Invoking the dispute resolution procedure is to be a procedure of last resort. Accordingly, Participants will use their best endeavours to resolve disputes before invoking any of the dispute resolution procedures referred to below.

2.2 Before invoking these dispute resolution procedures the Participants should have set out in writing the issues in dispute together with copies of any relevant documents and the Participants should have taken steps to agree any facts which can be agreed and otherwise to narrow the issues in dispute. The whole package of facts and arguments relied upon by each Participant should have been advanced and the Participants attempted to resolve their differences by an open exchange of views.

3. Unresolved Issues

3.1 If issues remain in dispute there are two stages to the resolution of the Dispute:

- **Stage 1 - Direct negotiation**

Each Participant will appoint a senior person with authority to settle the Dispute on their behalf who will have 28 days in which to seek the resolve the dispute by negotiation (see section 4 below).

- **Stage 2 - Determination by arbitration or litigation**

  If resolution of a Dispute is unsuccessful after invoking the procedures in Stage 1, the Participants may seek a final determination of the Dispute by arbitration or litigation, in accordance with one of the procedures set out in Stage 2 (see section 5 below). Participants should be mindful that determination by these procedures may substantially increase the costs and time involved and that all reasonable steps should have been taken to resolve the Dispute before commencing Stage 2.

4. Stage 1 - Direct negotiation by persons with authority to settle

4.1 If, and only if, matters cannot be resolved by the Lead Insurers / Handlers, the existence of a Dispute shall be notified in writing to the Participants (and the Co-ordinator) by a Notice of Dispute. The Notice of Dispute shall set out with precision:

- the issues remaining in dispute;
- the facts or matters relied upon by the Participant notifying the Dispute;
- the name of a person with authority to settle the Dispute on its behalf (that person having sufficient seniority to understand the complexities of the claim, as well as the objectives of these Guidelines

and shall attach the supporting documents which the Participant notifying the Dispute intends to rely on, unless the Participants to whom the Dispute is being notified have copies of those documents already, in which case this must be stated. If they do not have copies of those documents already, they must be provided promptly by the Participant notifying the Dispute, at its own cost (subject to any right to recover costs if arbitration/litigation is commenced).

4.2 Within 7 days of receipt of the Notice of Dispute (and accompanying documents) the receiving Participant will respond in writing to each point made in it, setting out any positive case which the receiving Participant may have and setting out any reasons why points in the Notice of Dispute are rejected. At the same time, the receiving Participant will nominate a person with authority to settle the dispute on its behalf and will inform the other Participants.

4.3 The persons with authority to settle shall act in good faith to seek to settle the Dispute within 28 days of receipt of the Notice of Dispute

(which may be extended by unanimous agreement). Communications to settle the Dispute shall be privileged and confidential.

4.4 Where the Dispute is resolved at this stage, any Participants in the claim who were not Participants to the Dispute should be informed in writing of the resolution, if the Dispute has affected them.

5 Stage 2: Determination by arbitration or litigation

5.1 Arbitration

- Subject to there being agreement to arbitrate by the Participants, by an exchange of correspondence, any Dispute between the Participants with a monetary value of or exceeding £5,000 may be finally settled by arbitration by a sole arbitrator, appointed in default of agreement between the parties by the President of the Chartered Insurance Institute.

- The arbitration will take place in London, England (or such other place agreed between the Participants) and be governed by the law of England & Wales. Multi-party arbitration proceedings are permitted. The arbitration shall be governed by the Arbitration Act 1996.

  - Under the Arbitration Act 1996 an arbitrator has duties

  (a) to act fairly and impartially between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent and

  (b) to adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

  - Without requesting the arbitrator to depart or derogate from those duties, the Participants will take all reasonable steps to ensure that, if possible, the arbitration can be undertaken as a “documents only” exercise, without the need for attendances other than by telephone or by correspondence.

6.2 Litigation

- If the Dispute is not resolved by any of the above means, the Participants may seek a final determination by the court.

- As regards costs, any Participant may bring to the attention of the court the refusal of any other Participant to agree to seek resolution of the Dispute by any of the above means.

This dispute resolution process in this appendix will not apply if the Dispute involves a party that has not agreed to adopt these Guidelines unless that party agrees otherwise, or if a Participant's rules of business operation do not permit it to agree to this dispute resolution process.