RESPONSE TO SCOTTISH CIVIL JUSTICE COUNCIL'S INFORMATION GATHERING EXERCISE ON PRE- ACTION PROTOCOLS ON BEHALF OF THOMPSONS SOLICITORS

This response is specifically and only in relation to question 5 of the Information Gathering Exercise and in particular the issue of mesothelioma.

INTRODUCTION

Thompsons Solicitors and Solicitor Advocates presently handle between 85 and 90% of all Scottish asbestos-related disease claims. At any one time, we have between 60 and 100 cases for individuals suffering from mesothelioma and a further 200-300 cases for the families of those who have died from mesothelioma. It is important to understand that the number of asbestos-related lung cancer claims (as distinct from mesothelioma) is also on the increase and the numbers of these claims seems set to exceed the mesothelioma figures within the next year or two. These additional lung cancer claims bring with them all the difficulties of mesothelioma claims in terms of the Pursuer's health and life expectancy. Indeed, it might be argued that all those suffering from asbestos-related disease demand as quick and efficient resolution to their claim as possible given that the majority are elderly, suffering from other co-morbid conditions, and that their disease, by its very nature, tends to be progressive.

GENERAL DISEASE CLAIMS – THE PROBLEMS

Tracing an employer/ insurer

The nature of asbestos disease is that it has a long latency period. The exposure to asbestos generally took place many decades previously. The employer is often no longer in business and it is becoming increasingly difficult to trace employers' liability insurers from the relevant time. The nature of exposure to asbestos is changing and it is no longer the major industries such as shipbuilding which are the source of the claims. The majority of those suffering tend to have worked in the construction industry for smaller employers who often did not have insurance, even post 1972 when it became compulsory. Tracing employers and insurers has become an increasingly onerous task for case handlers dealing with these cases.

Quality of evidence after the passage of time

The majority of claimants in these cases are elderly and are being asked to think back many decades to recall their employment history and likely exposure to asbestos. Many are shocked at their diagnosis and it can take weeks of questioning before evidence begins to come to light. Witnesses are difficult to trace and their memories too are faded.

Identifying limitation

Limitation is a significant issue in disease claims as the date of diagnosis can be very difficult to pin down. The problem has been exacerbated over recent years following the decision in Aitchison –v- Glasgow City Council whereby those previously diagnosed with pleural plaques who may not have taken Court action at that time have gone on to develop more significant asbestos-related disease and are now considered to be time-barred from progressing those claims. There may still be discretionary arguments to be had, however, all of this requires to be gone over in great detail with the Pursuer and the risks of continuing assessed. Diagnosis can be difficult particularly in asbestosis and mesothelioma

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claims and often there may be little time left before the expiry of the triennium or the individual's health may have deteriorated to such an extent that he or she is not able to give instructions.

Multi- defenders / Divisible diseases / Apportionment

In all of the asbestos related disease claims bar mesothelioma it is essential that as many Defenders are identified as possible in order to minimise the effect of any discount for unsued exposure. This in itself takes a degree of time. There is then often lengthy delay as the representatives of those Defenders agree apportionment between them. In a mesothelioma claim, it is generally only necessary to identify one Defender, however, there may be reasons why that Defender is unable to pay the full amount of compensation (depending on the insurance situation) and therefore time does have to be taken to identify others to make up the shortfall. Even with a single Defender, there may be multiple insurance interests which again require to be resolved by those representing the insurers.

Restoration of dissolved companies

Where companies have been dissolved or struck-off the Companies House Register, however, insurance has been traced, these companies frequently require to be restored to the Register before proceedings can be raised against them. This process takes several weeks, is costly and in fact nothing more than a paperwork exercise. It is, however, often necessary in order that insurance companies then have valid decrees which they can enforce against others for a right of relief.

Liability - rarely, if ever, conceded

Liability in these claims is rarely, if ever, conceded. The notion that a protocol will change this is ridiculous. We have had several cases where insurers have paid out full compensation to an individual whose family will then have a right to claim on his or her death from mesothelioma. Even in attempting to draft an appropriate Joint Minute in these circumstances, we have had difficulties in having insurers admit liability despite the fact that they have paid over the full amount in compensation.

As can be seen from the above, these cases are exceptionally complex and can be subject to unavoidable delays. A protocol will do nothing to mitigate any of these issues. It will put the Pursuer under enormous pressure to front-load a claim before it is intimated. It will impose unilateral and unfair obligations on a Pursuer to disclose information which may well provide a tactical advantage to the defender. It will add another layer of delay and bureaucracy to the process. It will lead to the under-settling of claims as the Pursuer is worn down by further delay and uncertainty.

A protocol is unnecessary: the current system works. The majority of delays in asbestos cases over recent years have arisen from the persistent efforts of the insurance industry to avoid liability.

It is, however, often necessary in order that insurance companies then have valid decrees which they can enforce against others for a right of relief.

Over half the cases in our current case-holding are in relation to asbestos related pleural plaques. There is a framework agreement in place which provides for a 'Pursuer's Pack' to be made available to all Defenders – this includes the statement of evidence and medical reports. This has generated settlement in hundreds of cases without the need for litigation.

Current experience shows that :

Insurers cannot keep to time-frames – much litigation is necessitated because no offer despite all information having been provided

Insurers will make low offers in unlitigated cases

Delay over inter – insurer disputes on apportionment

There is rarely, if ever, an admission of liability.

There are also practical problems in progressing these cases. It takes 6-7 months for an Inland Revenue schedule to be issued. Some hospitals take the same time to produce records. There are a limited number of experts available to produce reports either on liability or on the medical position.

LIVE MESOTHELIOMA CLAIMS

What is the perceived mischief which a protocol would aim to resolve? At Thompsons, we operate an informal arrangement with the main insurers which has seen the speed of settlement dramatically improve over the last couple of years. Once a Defender has been identified, we can generally settle the case within 3-4 months.

(Hospitals and Inland Revenue prioritise the information they send us in live mesothelioma cases.)

Specific problems:-

- Life expectancy of around 8 months
- Shock at diagnosis can initially slow down the appetite to engage with solicitors
- Too unwell to give statements
- Desperation to settle before death a disincentive to litigate and low offers accepted

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A compulsory protocol will only exacerbate these difficulties. Pursuers need the flexibility to react in these cases as they develop and not be hidebound by an unrealistic timetable. We operate in a small jurisdiction where the numbers of cases, although tragic, are not huge and in most cases we work well with Insurers/ Defender solicitors to resolve these cases.

Litigation is mostly necessitated where low offers are put forward by claims handlers. Litigation inevitably results in increased settlement sums. Liability is rarely a difficulty in mesothelioma cases as we are able to sue only one of several possible defenders (Compensation Act 2006) and the levels of exposure we require to establish are relatively low. Dispute this, liability is seldom explicitly admitted and a requirement to do that in a protocol may force many more cases into Court. Disputes are generally about quantum and much of that because we are dealing with English case handlers at the pre-litigation stage who are not necessarily aware of the Scottish position. Once Scottish solicitors are instructed, the claims tend to be resolved quickly and at the correct level.

CONCLUSION

If the real concern here is that disease cases settle more quickly and at the right level of compensation, a compulsory protocol will not achieve that and there is no evidence of which we are aware that suggests otherwise.