Living Mesothelioma Claims – Evidence on Commission

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The High Court Mesothelioma List provides for a swift appraisal of asbestos claims at the first Case Management Conference, where it adopts the "show cause" procedure set out in Practice Direction 49B at 49BPD.6. At this hearing, the court requires the Defendant to identify the evidence and legal argument which provides it with a real prospect of success on issues of liability. If a Defendant cannot show a proper and credible basis to its defence, judgment is entered with a direction for interim payments towards damages and costs.

The introduction of this procedure in 2002 at that time reflected the strength of the vast majority of asbestos cases brought and the courts' desire to ensure that a terminally ill Claimant should not be delayed, unnecessarily, in obtaining compensation. Those early cases frequently involved heavy exposures in the 1960s and 1970s where the evidence was clear and liability ever likely to be established.

There are still strong cases coming before the courts where the entry of judgment is appropriate. Nonetheless, the passage of time has begun to bring about a change in the nature of the claims which now reach the list. Whilst the incubation period for mesothelioma remains long, between 15 and 60 years, fewer cases now involve exposure in the 1950s, 1960s and 1970s, and there is an increasing incidence of claims which arise from alleged exposure in the 1980s and later. By the early 1980s, the risk posed by asbestos exposure was much better known and understood. Whilst, as late as 1984, there were still published control limits in the Health & Safety Executive's revision of EH10, "*Asbestos Hygiene Standards and Measurement of Airborne Dust Concentrations*", these had decreased markedly from earlier threshold limit values such as those published in 1970 in TDN13, "*Standards for Asbestos Use Concentration for use with the Asbestos Regulations 1969*". Furthermore, in 1976, the HSE had published guidance in terms that any such exposure should be reduced so far as reasonable practicable, detracting from the Threshold Limit Values and increasing the obligation to reduce exposure beyond them.

Furthermore, whilst there remain some cases based upon heavy exposures, a greater number of claims now coming before the court involve lower exposures than was previously the case. These claims place in sharper focus a Claimant's account of the circumstances of his exposure, the nature and extent of any concentrations of dust, which fall to be judged by the time of exposure and the contemporaneous standards which then applied. Closer scrutiny is necessary in order to assess whether or not the degree of exposure would be sufficient to give rise to liability at the time it occurred. Prior to 1965, the position is now governed by the Court of Appeal decision in *White v Secretary of State for Health and Social Care* [2024] EWCA Civ 244. Post-1965, the position is more complex, given the knowledge of serious risk which asbestos then posed, but the approach continues to be governed by the decisions in *Williams v University of Birmingham* [2012] PIQR P4 and *Bussey v Anglia Heating Limited* [2018] ICR 1242.

This makes scrutiny of a Claimant's evidence more important and adds greater force to the power set out in Practice Direction 49B to take evidence on deposition. The Practice Direction provides at 49BPD.8 that any party who, for good reason, wishes evidence to be taken by deposition, may apply to the court at any time for such an order. The time for the application is generally at the first Case Management Conference, so that Defendants need to think carefully, at an early stage, as to whether the Claimant's evidence needs testing or requires elaboration. The directions given will include a direction for the recording of evidence on DVD and the prescription of a transcript.

It is necessary, accordingly, for the party seeking evidence on deposition (usually, but not always, the Defendant) to make out good reason why that step should be taken. Since so many mesothelioma Claimants have a poor prognosis, a starting point is that the Claimant may well not be able to give evidence at trial. If a Claimant's evidence is to be tested, the step needs to be taken at an earlier stage, and ideally as soon as possible, given the rapidity with which the disease can progress.

If the Claimant's witness statement appears uncertain, or if there are contradictory aspects to it, there are good grounds to take evidence by deposition. One example might be a difference between the account of exposure in a witness statement and that given, for instance, to the Department of Work & Pensions on an application for Industrial Injuries Disablement Benefit or for a payment under the Pneumoconiosis Workers Compensation Act 1979. Of equal importance, however, is the extent to which a Claimant's statement indicates low levels of exposure. In such cases, a Defendant may want to obtain a preliminary assessment of the likely exposure described by the Claimant from an expert Occupational Hygienist, and would then wish to explore the nature and degree of such exposure in more depth. An order would then be justified since the issue would go squarely to liability and whether there had been a breach of duty.

It is appropriate in certain cases, where insurers are notified of a possible claim, to request a Claimant to give evidence on deposition voluntarily at an earlier stage, but there is no power to enforce the step, so that it is more commonly raised at the first CMC. Furthermore, since the taking of evidence on deposition will probably provide the only opportunity to a Defendant to explore a Claimant's evidence by way of cross-examination, it is important that full disclosure and exchange of witness statements has taken place before the deposition hearing. If it is otherwise, there is a risk that some matters may not be addressed, or that a case may not properly be put to the Claimant in a way which enables him to respond. The Court may well be reluctant to allow later evidence to be put in, if it contradicts aspects of the Claimant's evidence and he is unable to respond to it.

Of course, a further consideration is the state of the Claimant's health. It is intrinsically unfair to subject a Claimant to the ordeal of giving evidence when he or she is not fit to do so or is in the last stages of life. The matter requires sensitive consideration.

There is equal advantage to a Claimant's case, however, in evidence being taken by deposition. It provides an opportunity to the Claimant to clarify matters so that the evidential foundation for the claim is established or shored up. Whilst the parties may have different aims from a deposition hearing, the benefit which flows from it can attach to either side.

This is recognised by the Queen's Bench Masters in the Asbestos List. The taking of evidence of deposition enables both parties to assess their chances of success on liability and take an early decision. A Defendant who does not elicit concessions at a deposition hearing may well determine that it does not wish to fight on and make an early admission of liability or an offer. Equally, the nature of the evidence which emerges may cause a Claimant to consider whether, on the basis of the law as it stands, a case can still be maintained. A deposition hearing is a proportionate and efficient way of focussing upon issues at an early stage, potentially with the opportunity to resolve issues without proceeding to trial. From the Claimant's point of view, the opportunity to provide a primary source of evidence may be of huge importance, since the Defendant will not be putting forward its own witnesses until the trial.

Thus, if there is any likelihood that the Claimant might be lost as a source of evidence, the strong leaning should be to take that evidence as soon as possible to enable the Defendant to cross-examine on its case. Since the invariable practice in the RCJ is to direct the evidence to be recorded on a DVD, a subsequent trial judge will be well able to assess the weight to be attached to the evidence.

Defendants, but perhaps also Claimants, should thus think carefully about the nature of a Claimant's witness statement and case at an early stage with a view to seeking a direction for evidence to be taken on deposition where it is appropriate. Where that evidence is of importance to the issue of breach, in a low exposure case or where exposure comes later than the 1970s, such a direction may be vital to do justice between the parties. The application need not be made formally in advance of the CMC but it should be identified in Skeleton Arguments to alert the Master to the issue and the reasons why evidence on deposition is required should be set out in clear terms.