Weightmans

Disease-i

Welcome to September's 2017 edition of Disease-i; the publication for busy disease practitioners!

We always enjoy hearing from our readers, so if you have any suggestions for topics or experiences to share, please email us at jim.byard@weightmans.com.

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The market place

Government discount rate announcement has strategic implications for compensators

On 7 September 2017 the Government issued an early morning stock market announcement, outlining how it intends to approach the issue of the discount rate for the calculation of future damages in personal injury actions, going forward. That announcement was swiftly followed by the issue of the Government's response to the consultation that it issued on 30 March 2017 and a paper setting out its proposals for related draft legislation.

This development has been eagerly awaited by the insurance industry, following the former Lord Chancellor, Liz Truss, changing the discount rate to minus 0.75% in February of this year. That change has been viewed by many to have brought about an unjust and illogical windfall for claimants and to have caused significant financial prejudice to compensators, the public purse and the wider, premium paying public, without any good reason. **Read our evaluation**.

American ovarian cancer sufferer wins $417 million damages

A 63 year-old American woman has received a $417 million pay-out from Johnson & Johnson after she claimed that their talc-based products contributed to her terminal ovarian cancer. Eva Echeverria of California said that she had used products such as Johnson's Baby Powder for years for feminine hygiene and the company had failed to adequately warn consumers about the cancer risks of its products. She argued that the company actively encouraged women to use their products while knowing of studies which linked talcum powder to ovarian cancer. The company contested these claims and cited studies and reports by federal agencies which found that talc products are not carcinogenic. The Los Angeles superior court awarded $70 million in compensatory damages in addition to $347 million in punitive damages. A spokesman for Johnson & Johnson said*: "We will appeal today's verdict because we are guided by the science which supports the safety of Johnson's baby powder".* Johnson & Johnson currently faces 4,800 similar claims across the United States of America and has already been ordered to pay out $307 million after losing four previous trials in the Missouri state court.

NICE approves life-extending lung cancer drug

The National Institute for Health and Care Excellence (NICE) has approved the life-extending lung cancer drug nivolumab making it immediately available to NHS patients in England. Nivolumab has been approved through the fast-track Cancer Drugs Fund while more evidence can be gathered on its cost-effectiveness after NICE had originally labelled the drug as too expensive. Patients with non-small cell lung cancer will now be eligible for the immunotherapy drug which has been proven to increase the number of patients still alive after three years of treatment. Nivolumab first came to the public's attention last year when the late restaurant critic AA Gill said that he had been denied the drug which he described as *"more life spent on Earth – but only if you can pay".*

Professor Carole Longson from NICE said: *"We know that nivolumab is clinically effective for some people with lung cancer, but the full extent of its benefit is not clear. This new deal means that we can give patients access to what we know is a promising treatment whilst more evidence is gathered on its value".*

Commentary:

This decision has potential implications for the prescription of Keytruda, one of a number of drugs which can stimulate the body's immune system to fight cancer cells. A large clinical trial is ongoing at present and results here will be a significant factor in determining whether NICE will sanction the prescription of Keytruda for the treatment of mesothelioma. This is a rapidly evolving picture though it is likely that claims for private treatment costs will become an increasing feature of such claims.

New edition of Judicial College Guidelines released

The 14th edition of the Judicial College Guidelines has been published to update levels of damages for personal injury to reflect inflation. The new guidelines, which were published on 14 September 2017, do not bring any significant changes to the level of damages but have increased all brackets to account for the 4.8 per cent rise in inflation since the last edition. In the introduction to the new edition, Mr Justice Langstaff, the chairman of the JC Guidelines Committee, advises judges and legal representatives against taking a strict approach regarding the length of time a claimant has suffered with symptoms of minor injuries. He warned that this should not be the most critical factor when assessing damages as *"recovery may not occur at an even pace over time but may frequently be much more marked in the very early days of recuperation".*

Watchstone arms itself with £3.5 million to defend Slater & Gordon claim

Watchstone has more than trebled its legal budget as it faces a £600 million claim from Slater and Gordon. The claim stems from the Watchstone Group – formerly known as Quindell's – £637 million sale of its professional services division to Slater and Gordon in 2015. Slater and Gordon is now seeking damages for breach of warranty and fraudulent misrepresentation after it was forced to write down the value of its UK business by £216 million and claims that it was misled over the value of the personal injury cases on Quindell's books. Watchstone announced that it has increased its legal budget from £1 million to £3.5 million to defend the action and intends to file its defence imminently.

Government crackdown on holiday sickness claims introduces fixed costs plans

The Ministry of Justice ("MOJ") has unveiled plans to introduce fixed costs to combat the recent surge in holiday sickness claims which has seen a rise in claims of around 500% since 2013 not reported in other European countries. Following a campaign by the Association of British Travel Agents ("ABTA") to introduce fixed costs, the Government has asked the Civil Procedure Rule Committee ("CPRC") to consider how to introduce rules to "…reduce cash incentives to bring spurious claims…" The Government has also published guidance urging holidaymakers to be aware that they could face up to three years in prison if found guilty of making a fraudulent claim. Justice Secretary, David Lidington said "Our message to those who make false holiday sickness claims is clear – your actions are damaging and will not be tolerated. We are addressing this issue, and will continue to explore further steps we can take. This government is absolutely determined to tackle the compensation culture which has penalised the honest majority for too long".

First stage of online pilot goes live

The first stage of the pilot scheme for the Online Solutions Court launched on 31 July and will run until 28 November 2019 for eligible money claims with a value up to £10,000. The pilot is intended to be the first in a series of stages which are planned for the next three years in a bid to transform the justice system. The pilot will start as an invitation only scheme and will only be available to non-personal injury claims involving a single claimant and a single defendant, both of whom are aged 18 or over. Lord Justice Briggs, the architect of the Online Solutions Court, has said that the court will provide access to justice for people who want to bring small to moderate sized claims but who have become "disenfranchised" with the current system. The pilot will be evaluated using Google analytics to track user engagement at each stage of the claim and users will also be asked to provide feedback throughout. If the court is deemed to be a success, the format could be extended beyond the current £25,000 limit in a bid to make the courts more accessible.

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Case law update

Employer liable for cardiac arrest death

Magill v Panel Systems (DB Ltd) **[2017] EWHC 1517 (QB)**

The claimant's husband, Mr Magill, died in July 2016 aged 60 from a cardiac arrest. Mr Magill was exposed to asbestos during his time working for the defendant as a saw man between 1975 and 1978 and contracted mesothelioma in June 2015. The defendant accepted that the claimant was exposed to asbestos dust and fibres during his employment but did not accept liability for damage not caused by mesothelioma. The claimant contended that, were it not for the mesothelioma, Mr Magill would have undergone a coronary artery bypass graft (CABG) which would have prevented his death. The CABG had been planned for March 2015 but had to be rearranged for April 2015 due to a chest infection. The scan carried out in preparation for the April procedure led to Mr Magill's mesothelioma diagnosis and the procedure was postponed while he underwent five cycles of chemotherapy. Both parties agreed that, were it not for Mr Magill's mesothelioma diagnosis, he would have undergone CABG surgery which would have substantially improved his condition. After hearing a wealth of medical evidence the judge concluded that Mr Magill's risk of death doubled in the absence of CABG surgery. Therefore, the defendant had contributed to an injury which caused Mr Magill's death and was liable for his death despite the presence of competing factors.

Commentary:
An unusual claim where competing conditions ostensibly complicated causation though these were ultimately resolved by the Court taking a conventional "doubles the risk" test.

Asbestos claim for exposure at sea succeeds

Oldman v DEFRA **County Court 20/04/2017**

The claimant brought proceedings for negligence and breach of statutory duty stemming from the deceased's exposure to asbestos. The deceased worked for the Ministry of Agriculture, Fisheries and Food (MAFF) from 1951 to 1983 as a sailor and marine engineer and then until 1991 as a night watchman. He was diagnosed with pleural thickening aged 84 and died aged 89. The deceased's medical expert stated that the deceased's symptoms pointed to asbestos rather than heart failure or heavy smoking and that pleural thickening could occur even at low levels of asbestos exposure. This medical evidence was not challenged by the defendant. There was no breach of statutory duty as the Shipbuilding and Ship-repairing Regulations 1960 only applied to work carried out in a harbor or wet dock and the deceased had been exposed to asbestos during his work at sea. However, the regulations were still relevant in determining liability at common law as they indicated good practice in relation to asbestos. The risk of exposure to asbestos was known from at least 1945 and so, at all material times, MAFF owed the deceased a duty to reduce his exposure to the greatest extent possible. The deceased had indicated that he was unaware that he had been working with asbestos, he did not know that asbestos was dangerous and he had not been provided with any form of protection. MAFF had therefore failed to take reasonable steps to reduce his exposure to asbestos and the claim succeeded.

Commentary:
The Court was clearly unimpressed with the defendant's "technical" defence that The Ship Building Regulations had no applicability given the circumstances of exposure, though the decision raises concern that duties owed by occupiers under other Acts, for example The Factories Act 1961, may be conversely deemed to apply as a yardstick of common law duty.

Asbestos claim involving council-owned accommodation dismissed

Lugay v Hammersmith and Fulham LBC **[2017] EWHC 1823 (QB)**

The tenant of a local authority's flat died as a result of malignant mesothelioma. The deceased's widow claimed for damages from the local authority claiming that his death was accelerated due to his exposure to asbestos while a tenant in the defendant's flat. The claimant contended that her husband had been exposed to asbestos fibres while carrying out cleaning and decorating as well as installing a central heating system which had disturbed the asbestos. The defendant accepted that the claimant had developed mesothelioma which had accelerated his death but denied breach of duty and causation. The deceased died before proceedings began and did not provide any witness statements.

The court found that the deceased was exposed to a very low level of asbestos fibres which did not exceed background levels. The defendant owed the deceased a duty of care to take reasonable steps to reduce his exposure to as low as reasonably practicable. This was not a duty to remove all trace of asbestos fibres. The defendant had warned tenants of the risk of disturbing asbestos material if they carried out any works by issuing a warning in 2005 which fulfilled its statutory duty. The court also found that the deceased had not been exposed to asbestos during his cleaning and decorating activities and any disturbance would have been minimal. The defendant had not breached its duty of care towards the deceased and the claim failed.

Liability apportioned for heavy smoker exposed to asbestos

Blackmore v Department for Communities and Local Government **[2017] EWCA Civ 1136**

The defendant appealed against the assessment of contributory negligence in a claim for damages made on behalf of the deceased's estate. The deceased, a 74 year-old male, died in 2010 after a short battle with lung cancer. He had worked as a general decorator at a dockyard for 20 years where he had been exposed to significant contact with asbestos fibres. He had also smoked 20 cigarettes a day from the age of 14 until the age of 69 when he cut down to 12 cigarettes a day until his death. The defendant conceded causation on the basis that the deceased's exposure to asbestos had more than doubled his risk of cancer but argued that smoking had a greater causative role and liability should be apportioned for contributory negligence.

At first instance, the County Court made a finding of 30 per cent contributory negligence on the part of the deceased. The defendant appealed to the Court of Appeal seeking to increase the reduction arguing that the finding for contributory negligence should reflect the greater causative impact of smoking compared to asbestos exposure. However, the Court of Appeal held that contributory negligence should reflect the degree of fault of the parties as well as causation. While it was agreed that smoking had a greater causative impact on the deceased's lung cancer, the defendant had breached its statutory duty to protect the deceased from asbestos exposure meaning that considerable weight had to be apportioned to such a breach. While the deceased had been a heavy smoker, he had twice tried to give up smoking and had started smoking before the associated health risks were generally known. The court held that the finding of 30 per cent was within the trial judge's discretion.

Commentary:
This is a decision which reaffirms the view that the Courts will not take a linear approach in apportioning contributory negligence for smoking, suggesting that a 30 per cent reduction is likely to be the maximum achievable in such cases?

Rights against Insurers Act not retrospective

Redman v Zurich Insurance PLC **[2017] EWHC 1919 (QB)**

The Third Parties (Rights against Insurers) Act 2010 ('the 2010 Act') came into force on 1 August 2016 and was enacted to rectify perceived defects in the Third Parties (Rights Against Insurers) Act 1930 ('the 1930 Act'). The 2010 Act preserves the fundamental rule that allows a statutory transfer of the insured's rights arising under a policy of insurance to a third party. The 2010 Act applies to anyone with a claim against an insolvent person or more normally an offending dissolved Company.

The 2010 Act is generally perceived to be more beneficial for a claimant. Under the 1930 Act, a claimant would first have to restore the Company to the Register, then establish the liability of the insured/Company by securing a judgment and then issue proceedings against the insurers. The situation is streamlined under the 2010 Act, as the claimant can skip the restoration of the Company and the need to bring separate proceedings against it.

In Redman, the Court considered whether the 2010 Act applied retrospectively to claims where otherwise the remedy would have been under the less attractive 1930 Act. The transitional provisions make it clear, that where, before the 1 August 2016, the following two conditions apply, the 1930 Act applies:

i. *'The relevant person has incurred a liability against which that person is insured under a contract; and*
ii. *The person subject to such a liability has become a 'relevant person'.*

The Defendants' insurers' argument prevailed in that the 1930 Act applied in this case as the Court held that before the coming into force of the 2010 Act, the Company was already a 'relevant person' within the meaning of the 2010 Act and it had already incurred its liability to the claimant. The Company was wound up voluntarily in 2008 and was dissolved on the 30 June 2016. The liability arose when the claimant sustained an actionable injury – this was before the date the 2010 Act came into force.

The date when the liability arose was not (as was argued by the claimant) the date of the Judgment or compromise settlement (which in Redman would inevitably have been after the 2010 Act had been enacted), but the date when the claimant had an actionable claim i.e. when he suffered harm. This was clearly before 1st August 2016. As such, on these facts, the claim based upon the 2010 Act was struck out and the claimant will now have to proceed under the 1930 Act.

The Judgment also confirms that only the 1930 Act or the 2010 Act can apply at any one time. Additionally, the 2010 Act does not apply retrospectively; the Judge making it plain that if retrospective application had been Parliament's intention then it would have been a straightforward matter to draft the 2010 Act differently. It had not. **Read our commentary.**

No obligation to serve earlier medical evidence

Vilca and Others v Xstrata Ltd and Others **[2017] EWHC 1582 (QB)**

The claimants' claims arose as a result of injuries sustained during a protest at a copper mine in Peru. The trial was set for October 2017 and the parties were ordered to serve evidence from experts in Peruvian law by 24 May 2017. When the defendants became aware that the case would not settle before trial, they decided to replace their initial expert with a more experienced expert. Unfortunately the latter expert suffered ill health and was forced to withdraw from the case in May 2017, leading to an application by the defendants for an extension of time to instruct a new expert. The claimants defended the application on the basis that the court should only grant the application if the defendants disclosed the reports of their first and second experts. The court held that it was not obliged to impose such a condition of disclosure

of previous experts reports if there was no concern about undesirable expert shopping or abuse of process by the party, and if there was no other good reason to impose the condition.

What is a 'good reason' to depart from a costs budget?

RNB v London Borough of Newham 04/08/2017

A costs judge in the Senior Courts Costs Office has found a 'good reason' to depart from a claimant's costs budget. Master Campbell allowed a reduction in the hourly rates charged after the defendant applied for a detailed assessment taking issue with proportionality. The claimant sought costs of £121,000 after settling the claim for £250,000. On assessment, the claimant's approved hourly rates were reduced and the defendant submitted that such an adjustment qualified as a 'good reason' to depart from the budget. The claimant argued that the court's role was merely to approve a budget for the parties to spend on the work and that it was not for the court to specify how the parties should spend that money. Deputy Master Campbell said that the costs figure would be disproportionate if not amended as the case had been settled without trial.

However, in another detailed assessment, District Judge Lumb expressly disagreed with the decision. He commented that to reduce hourly rates and depart from the budgeted costs was to second guess the thought process of the costs managing judge who had initially approved the budget. He explained that the costs managing judge could have had regard to the hourly rates when setting the budget and this did not qualify as a 'good reason' to depart from budgeted costs. He asserted that the 'good reason' bar was a high bar to pass.

Commentary:
What constitutes a 'good reason' to depart from a budget is likely to give rise to an increase in satellite litigation given the two conflicting decisions here.

On the horizon

Jackson review recommends extension of fixed recoverable costs

Lord Justice Jackson has completed his review into costs in English civil courts. The previous Lord Chancellor had indicated that Lord Justice Jackson's proposals would be subject to further consultation but the key recommendations are:

- FRC to be extended to all fast track claims.
- Amendment of the *Broadhurst* point.
- Introduction of a new 'intermediate track' for money claims £25,000 – £100,000 with a FRC regime (excluding mesothelioma or other asbestos related lung disease).
- A working party to consider FRC and a bespoke process for clinical negligence cases up to £25,000.
- Pilot of capped recoverable costs for business and property cases with a value up to £250,000.
- Costs budgeting introduced, at the discretion of the judge in 'heavy' judicial review claims.
- Further amendments should be considered once the new reform has bedded in.

For a consideration of the proposals, please read **our full analysis**.

MOJ publish the Civil Justice Council's Report on Noise Induced Hearing Loss Claims

On the 6 September 2017, the Ministry of Justice published the Civil Justice Council's Report on Noise Induced Hearing Loss Claims (NIHL). This is the body of work behind the proposals headlined in Lord Justice Jackson's Supplementary Report on Fixed Recoverable Costs for Civil Litigation, published on the 31 July 2017. For a consideration of the proposals, please read our report.

New study links prolonged standing to heart disease

Recent studies have seen sitting branded as "the new smoking" with claims that sedentary lifestyles and workplaces could be linked to health risks such as cancer, heart disease and depression. However, a new study published in the *American Journal of Epidemiology* has contributed to the discussion. Researchers from the Canadian Institute for Work and Health and the Institute for Clinical Evaluative Sciences tracked 7,300 worker over the course of 12 years to assess their risk of heart disease. Nine per cent of the workers stated that their job primarily required them to stand compared to 37 per cent who said they mostly worked while sitting. None of the participants suffered from heart disease when the study began. At the end of the 12 year study, 3.4 per cent of the participants were diagnosed with heart disease with the risk higher among the workers who had been required to stand at work (6.6 per cent risk) compared to the workers whose jobs involved sitting (2.8 per cent). The researchers were satisfied that the levels of risk remained after they had adjusted the numbers to account for variables such as age and lifestyle. Senior Scientist for the Institute of Work and Health Peter Smith, who led the study, commented on the study: *"Workplaces have been hearing a lot lately about the health effects of prolonged sitting on the job. Our results suggest that workplaces also need to pay attention to the health effects of prolonged standing and target their prevention programs accordingly"*. Smith said that he recommended a combination of sitting, standing and moving while at work to provide the greatest heart health benefits.

Aerotoxic syndrome

A new study published in the World Health Organisation journal *Public Health Panorama* has claimed that there is a clear link between exposure to contaminated air on planes and health risks. The study has been welcomed by groups who have been campaigning to have aerotoxic syndrome formally recognised. The study assessed over 200 pilots and cabin crew and found a pattern of both acute and chronic symptoms such as headaches, dizziness, respiratory problems and vision problems. Long-term health issues also claimed to be present are neurological and cognitive problems and heart arrhythmias. Dr Susan Michaelis of the University of Stirling who led the study said that there was a *"clear cause-and-effect relationship linking health effects to a design feature that allows the aircraft air supply to become contaminated by engine oils and other fluids in normal flight."* Dr Michaelis calls for this to be recognised as a new occupational disorder and for a clear medical protocol to be established. "There is a clear occupational and public health issue with direct flight-safety consequences".

Commentary:

Aircrafts have used a "bleed air" system since the 1950s to filter air through the cabins. The system means that air is pulled through the engine compressor before it mixes with the recirculated cabin air when it moves through the air-conditioning system. If chemicals from the combustion oil leak into the compressor through damaged seals, they can at least in theory then spread through the cabin air when it is mixed with the recirculated air, though concentrations are generally regarded to be low.

Aerotoxic syndrome has been used to describe symptoms caused by contaminated air since it was coined in a 1999 report on exposure to jet oil mist during commercial flights. However, airlines and manufacturers insist that their cabin air quality complies with strict guidelines and aerotoxicity is not an issue.

Claims have been brought in the United States of America as well as the United Kingdom against airlines for aerotoxic syndrome. Dr Michaelis, along with other researchers and current and former flight crew, has called for a study to be commissioned, independent from the airlines and the Civil Aviation Authority, and Unite has demanded an inquiry into complaints. There have also been calls for airlines to adopt a "clear air" system such as the one used in the Boeing 787 Dreamliner. The Boeing 787 Dreamliner is the first – and only – aircraft to use new "clean air" technology which replaces the "bleed air" system by pumping air through the cabins away from the engines.

Aerotoxity is a contentious area both in respect of defining the "condition" which frequently presents with myriad symptoms, most of which cannot be objectively verified but also whether the "condition" arises as a consequence of either cumulative exposure or "one off" fume events. The issue has been comprehensively investigated by The European Aviation Safety Agency whose reports have pointed to the broad range of compounds in cabin air, the absence of systematic mapping to other "stressors" which *"make it difficult to draw conclusions on the contributions of inter-individual genetic differences in metabolism and detoxification on the variety in reported systems*". Whilst accepting that the reported symptoms are quite common in the general population, given the range of symptoms and lack of specificity "it cannot be ruled out that part of symptoms cannot be explained by actual exposure levels".

What is clear however, is that these issues are unlikely to be resolved in the short or medium term.

Study finds link between e-cigarettes and increased risk of heart attacks and stroke

A new study carried out by researchers from the Karolinska Institute, a medical university in Stockholm, has found a link between e-cigarettes which contain nicotine and an increase in heart rate and blood pressure. E-cigarettes are considered a safer stepping stone for people who are trying to give up smoking and vaping is now a £1 billion industry in the United Kingdom. The study involved 15 healthy volunteers who had never smoked e-cigarettes. Participants who smoked e-cigarettes containing nicotine experienced a significant increase in blood pressure, heart rate and arterial stiffness just 30 minutes after vaping; side effects which were not found in the participants who smoked e-cigarettes which did not contain nicotine.

While the reported side effects were temporary and the research only studied a small sample group, the researchers believe that repeated vaping could have permanent effects on a smoker's health. Lead researcher Dr Magnus Lundback said*: "The industry makes their product as a way to reduce harm and to help young people to stop smoking tobacco cigarettes. However, the safety of e-cigarettes is debated, and a growing body of evidence is suggesting several adverse health effects".* However, consultant cardiologist Dr Tim Chico warned *that "although it is important to understand the effects of electronic cigarettes, this should not detract from the fact that smoking conventional cigarettes reduces life expectancy by ten years and causes chronic diseases that devastate quality of life".*

Public Health England describe e-cigarettes as "95 % safer" than conventional cigarettes and their effectiveness in reducing smoking rates will be used in its forthcoming "Stoptober" campaign.

Use of disinfectant and chronic obstructive pulmonary disease

A study by Harvard University and the French National Institute of Health and Medical Research over a 30 year period has found that people who use bleach and other disinfectants just once a week have an increased chance (up to 32%) of developing chronic obstructive pulmonary disease (COPD). The study analysed data from female nurses and tracked COPD diagnoses and exposure to disinfectants. The research makes a link between COPD and specific cleaning chemicals known as quaternary ammonium compounds (quats).

Increase in claims for exposure to toxic diesel fumes at work

It has been reported that the volume of claims is beginning to increase against employers for their failure to protect employees from the health risks of diesel pollution as unions warn that more cases are imminent. Existing claims include an employee who worked at a major depot and was exposed to diesel fumes for eight hours a day. He claims that he has now developed asthma as a result of his employer's failure to provide ventilation or protective equipment, advise him of the risks of exposure to diesel fumes, carry out an appropriate risk assessment or monitor the air quality within his workplace. Employers have a legal duty under the Control of Substances Hazardous to Health Regulations 2002 (COSHH) to prevent exposure to substances which can risk health problems.

The International Agency for Research in Cancer (IARC) classified diesel engine exhaust emissions as carcinogenic five years ago which has, along with a growing awareness of the harmful effects of air pollution, has encouraged employees to explore their legal options. Workers exposed to diesel fumes have reported experiencing respiratory problems, eye irritation, nausea and headache in the short-term with the additional risk of long-term effects such as reduced lung capacity, breathlessness and asthma.

Dan Shears, health and safety director for the GMB union said: "We strongly believe it is a major problem. It needs a test case and then there will be an increase in claims. It's almost like the early days of asbestos. There are potentially lots of people who have unnecessarily suffered premature death who may have been affected by industrial exposure. We are now with diesel in the same place we were with asbestos in the 1930s". Britain's largest trade union, Unite, has also said that it expects a surge in claims and has set up a diesel emissions register for members to record their exposure to toxic fumes.

For further information about Weightmans LLP or to discuss any of the issues in this newsletter, please contact:

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