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Disease-i

Welcome to November'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

Cancer awards against Johnson & Johnson overturned

The headline-grabbing $417 million award to an American woman who claimed she had developed ovarian cancer by using Johnson & Johnson baby powder has been overturned. Californian Eva Echeverria had claimed that the company's talc-based baby powder was responsible for her ovarian cancer and a jury awarded her $70 million for compensatory damages and $347 million for punitive damages in August. However, a Los Angeles County superior court judge has overturned the award and granted Johnson & Johnson's request for a new trial. In making his decision, Judge Maren Nelson found that there were errors and jury misconduct in the original trial, the award was excessive, and there had been no conclusive evidence that the company had acted with malice in supplying its talc-based baby powder. Johnson & Johnson continue to defend their product and a spokesman said: *"Ovarian cancer is a devastating disease but it is not caused by the cosmetic-grade talc we have used in Johnson's Baby Powder for decades. The science is clear and we will continue to defend the safety of Johnson's Baby Powder as we prepare for additional trials in the U.S."* The claimant's attorney said that, although Eva Echeverria has now died, he will appeal the decision.

A further award of $72 million made against Johnson & Johnson by a Missouri court has also been thrown out. The appellate court found that the state did not have jurisdiction to hear the claim following the US Supreme Court's ruling in June which placed limits on the filing of injury lawsuits. Courts are now unable to hear claims where neither party is considered to be a resident of the state. This ruling meant that the claim now fell outside of the Missouri courts' jurisdiction.

Failure to carry out asbestos survey leads to fines

Two North West-based companies have been fined by the Health and Safety Executive (HSE) for failing to carry out an asbestos survey before starting work on a basement conversion. Hatters Taverns Limited of Manchester had appointed sister company Hatters Hostel Limited of Liverpool as the main contractor for the project which sought to refurbish the basement into a bar venue. Both companies pleaded guilty to breaches of the Control of Asbestos Regulations 2012 following an unannounced visit by the HSE to inspect the refurbishment works. Hatters Taverns Limited received a £10,000 fine while Hatters Hostel Limited was fined £24,000.

HSE inspector Matt Greenly said: *"The requirement to have a suitable asbestos survey is clear and well known throughout the construction industry. Only by knowing is asbestos is present in any building before works commence can a contractor ensure that people working on their site are not exposed to these deadly fibres. The cost of an asbestos survey is not great but the potential legacy facing anyone who worked on this site is immeasurable"*.

Fine for exposing workers to asbestos

A Scottish utility services company, IQA Operations Group, has been fined for exposing its workers to asbestos. Four electricians were exposed to asbestos in 2014 when they were tasked with installing a new low voltage distribution system. In order to fit the electric cables, the electricians had to drill through door transom panels. The electricians did not know that the panels contained asbestos and drilled through the panels in each of the

44 flats without any measures to protect themselves from asbestos fibres. IQA Operations Group only tested the panels and identified the presence of asbestos when alerted by a resident who was concerned that asbestos was present. While an asbestos survey had been carried out for the project, it did not cover the transom panels involved. An investigation by HSE found that the company had failed to identify the presence of asbestos and failed to carry out a suitable risk assessment. The company pleaded guilty to breaching the Health and Safety at Work Act 1974 and was fined £6,000.

European Keytruda application withdrawn

Pharmaceutical company Merck has withdrawn its application with the European Medicines Agency (EMA) to allow Keytruda to be used in combination with chemotherapy. Keytruda is an immunotherapy drug which induces the body's own immune system to attack cancerous cells. Merck believe that combining Keytruda with chemotherapy would make the drug more effective and increase survival rates. The combination has already been approved by the US Food and Drug Administration for treatment for some lung cancer patients however the EMA's Committee for Medicinal Products for Human Use was reluctant to approve the application. Studies have so far shown that immunotherapies only work in a minority of patients and Merck's application was based on a small study of only 123 patients. The company has pushed back the completion date for its larger clinical trial which may provide more conclusive results.

Further legal action against government over air pollution levels

Environmental lawyers, ClientEarth, have begun legal action against the Government for the third time for failing to address the widespread illegal levels of air pollution in the UK. A previous defeat in the courts already forced ministers to launch a new pollution plan in July but ClientEarth say that the new plan does not meet the legal requirement set by the European Union to eliminate toxic air in the *"shortest possible time"*. Air pollution is responsible for 40,000 premature deaths every year; 23,500 of those caused by nitrogen dioxide which is emitted by diesel vehicles and is above legal limits in most UK cities. The judicial review brought by ClientEarth focuses on the Government's refusal to implement air pollution plans in cities such as Liverpool, Oxford and Leicester, which already have illegal levels of air pollution, as well as perceived "backtracking" in relation to earlier plans for "clean air zones" in Birmingham, Derby, Leeds, Nottingham and Southampton. The latest legal fight comes after a freedom of information request revealed that the Government had already spent £370,000 fighting the previous two legal claims.

Modernisation programme will improve access to justice for working people

The Ministry of Justice and HM Courts and Tribunals Service have announced details of its plans for a £1 billion modernisation programme which will include the opening of the country's first Courts and Tribunals Service Centres. The centres will open in Birmingham and Stoke-on-Trent to provide support to court users and to make the justice system more convenient for working people. The centres have been planned based on feedback from judges, legal professionals and the public and will employ staff to process cases, issue court orders and hearing notices in addition to answering enquiries. The Government expects to open more centres in the future. Justice Minister Dominic Raab said that the opening of these service centres would *"deliver better services for those using the courts system, whilst delivering better bang for the taxpayers' buck"*.

Government withdraws opposition to cold-calling ban

Although it appeared that the Government had withdrawn its previous opposition to imposing a cold-calling ban on claims management companies (CMCs), the power is contained in Part 1 of the Financial Guidance and Claims Bill and the power is given to the new advisory body proposed in the Bill, rather than the FCA. It does not appear to apply to CMCs. The Bill also looks like the CMC regulatory scope will be extended to Scotland, closing a potential loophole.

Case Law

High Court rejects firm's attempts to join group litigation order

Hutson v Tata Steel UK Ltd **[2017] EWHC 2647 (QB)**

A firm of solicitors applied to join a group litigation order against Tata Steel at a case management conference. The firm, Watford-based Collins Solicitors, claimed to have 300 claimants eligible to join the group and wanted to join as lead solicitors along with the two firms who had already been identified. The litigation relates to a number of claims brought by steelworkers who claim that they have developed a variety of occupational diseases due to exposure to harmful dust and fumes during their employment with the defendant. Collins' application to join as lead firm was strongly resisted by the existing solicitors. As there was no leading authority on the issue of lead solicitors in group action, the court had to decide whether granting the application would further the overriding objective. The court found that adding another lead firm would not satisfy the overriding objective as it could only increase the claimants costs and delay the process. There was also already evidence that the three firms would not be able to work together harmoniously to manage the claims effectively as disagreements over case management had already developed into *"personal animosity"*. While Collins claimed to have 300 claimants who could benefit from the group litigation, it was apparent that it had applied a significantly less stringent test of eligibility than was already used by the existing lead firms. Mr Justice Turner insisted that, while it would be unfair to prevent claimants with high prospects from joining the litigation, *"it would be no fairer to meritorious claimants to have their cases prejudiced by the inclusion of a disproportionate number of poor claims"*. The application was refused.

Damages assessed for long battle with mesothelioma

Jones v Robert McBride Homecare Ltd **QBD 12/10/2017**

The claimant was diagnosed with mesothelioma in 2011. She had been exposed to asbestos between the ages of 30 and 40 while working for the defendant when she came into contact with asbestos roofing and wall panels which were poorly maintained. She underwent five courses of chemotherapy followed by drug trials which aimed to slow the progress of the disease. On assessment in 2013 it was decided that, although she had so far survived six years with the disease, her condition would eventually deteriorate leading to severe pain and that her life expectancy had been reduced by 18 years. Judgment in default was entered in the absence of a defence in July 2017. Due to the unusually long period of the disease, the award for pain, suffering and loss of amenity was made at the top end of the JC Guidelines. The claimant was awarded general damages of £100,000, £60,000 for her lost years' claim, £21,336 for future travel and care, £86,764 for past loss of earnings, £40,284 for past care and £2,307 for other past expenses.

Date of knowledge assessed in NIHL claim

Smith v Brentford Nylon limited, Shegl Realisations Limited & Dunlop Rubber Company Limited **County Court (Newcastle) 20/09/2017**

The court had to determine a preliminary issue in a claim for damages for noise-induced hearing loss. The court agreed with the defendants that the present case followed the 2013 court of Appeal case of *Johnson v Ministry of Defence*. In that case, the Court of Appeal established that it was reasonable that an older claimant, who had left noisy employment decades earlier, may take some thinking time to seek expert advice for his hearing loss and therefore, take longer to realise the link between his hearing loss and previous employment. The allowed 'thinking time' was set at a year. Therefore, the claimant's date of knowledge had to be within one year after the date on which he realised that he was suffering from hearing loss.

The claimant received a leaflet in August 2014 which invited those who were suffering from hearing loss to make a telephone enquiry if they had previously worked in noisy industries. Shortly after receiving the leaflet, he understood the link between his hearing loss and previous employment. He then used this date as his date of knowledge for the purposes of limitation. He alleged that he first noticed that he was suffering from hearing loss shortly before receiving the leaflet, therefore within the one year limit. However, the court found that it was likely that the claimant had been aware that he was suffering from hearing loss years before receiving the leaflet. The claim was therefore statute-barred.

Indemnity costs awarded despite withdrawal of Part 36 offer

Bottrill v Thompson (t/a WS Bottrills) **QBD 27/10/2017**

The claimant made a Part 36 offer to both defendants to settle the claim for £50,000, silent as to costs. The defendants did not accept within the relevant period and the offer was subsequently withdrawn. A trial in 2012 made a series of determinations which ultimately meant that the second defendant was no longer involved with the proceedings. The claimant and first defendant then settled during the trial. The first defendant agreed to pay the claimant £44,000 plus interest, making a total of £90,000. The court then had to determine the issue of costs. The claimant argued that, as he had recovered a sum more advantageous than the Part 36 offer he had made, he was entitled to indemnity costs. The first defendant claimed that, as the offer had not made a provision as to costs, it was ineffective. The court found that there was no requirement for a Part 36 offer to deal with costs. However, the rule concerning costs no longer applied as the offer had been withdrawn and so the claimant was not entitled to indemnity costs. Further, no order had been made against the second defendant and so the claimant could not recover indemnity costs against her. However, the court noted that it still had ultimate discretion regarding costs and the 2010 offer should be considered when coming to a decision. The appropriate order was to grant the claimant indemnity costs for the period covering the trial in 2012 in relation to the first defendant. While the offer was subsequently withdrawn, it had been open for the duration of the trial and, had the first defendant accepted the generous offer, the trial could have been avoided. Instead, she had proceeded with arguments which could not be maintained. Both defendants were jointly and severally liable for the claimant's standard costs and interest. However, as the second defendant had not had judgment entered against her, the claimant could only recover 75 per cent of his costs plus interest from her.

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On the horizon

Study explores firefighters' exposure to carcinogens

Firefighters are exposed to toxic chemicals which can increase their risk of developing cancer. A recent study by researchers at the University of Ottawa which was published in Environmental Science and Technology has assessed the effects that exposure to carcinogenic chemical exposure can have in firefighters. Previous studies have found a greater risk of cancer in firefighters due to the inhalation of toxic chemicals found in smoke, but this study focused on airborne aromatic hydrocarbon metabolites (PAHs) which can penetrate through protective clothing and through skin. 27 male firefighters were observed as part of the study and tested before and after responding to emergency callouts over two years. Levels of PAHs in their urine rose by between three and five times after fighting a fire and, by studying the levels of PAHs found on the firefighters' clothing and skin, researchers were able to determine that exposure to the harmful chemicals occurred through contact with their skin rather than inhalation. The presence of PAHs has been found to increase the risk of DNA mutation, which can cause cancer, by up to four times. Therefore, the study concludes that measures such as skin decontamination after returning from an emergency could reduce the risk to health.

Specialist NHS clinic opens for air passengers

A specialist NHS clinic has been set up in London with the help of the Civil Aviation Authority (CAA) which will treat flight passengers and crew who suffer from sort or long term respiratory, neurological or gastrointestinal symptoms during or after a flight. The clinic, based at St Thomas' Hospital in London, will treat UK-based passengers and crew who can be referred there by their GP. The opening of the clinic has further fuelled claims of the existence of aerotoxic syndrome, a collection of neurological and respiratory symptoms which some claim are caused by toxic air on board aircraft. Nicola Barrell of the Aerotoxic Association said: *"The opening of this clinic acknowledges the game is finally up by recognising at last long and short term medical symptoms are linked with toxic cabin air"*. However, the CAA and airlines continue to dispute the syndrome's existence and claim that cabin air is perfectly safe for both passengers and crew. A spokesman for the CAA said that the organisation would *"take seriously any suggestions that people have suffered ill health from flying"*.

E-cigarettes subject to Government inquiry

The Government has launched an inquiry into e-cigarettes to address the mixed messages surrounding vaping. E-cigarettes have become increasingly popular and around 2.9 million people in Britain now vape regularly; half of those being ex-smokers who have used vaping as quitting aid. The inquiry will seek to determine whether e-cigarettes are re-normalising smoking for young people, whether people are becoming addicted to vaping, safety concerns, and the possibility of using NHS funding to provide them as a quitting aid. Chair of the Science and Technology Committee, Norman Lamb MP, said: *"Almost three million people in the UK now use e-cigarettes, but there are still significant gaps in the research guiding their regulation and sale. We want to understand where the gaps are in the evidence base, the impact of the regulations, and the implications of this growing industry on NHS costs and the UK's public finances"*. The inquiry comes amidst a series of studies which have investigated a number of possible health risks associate with e-cigarettes such as an increased risk of heart attack and stroke when compared with non-smokers. The World Health Organisation has also requested further research so that the long-term effects of vaping can be ascertained.