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Disease-i

Welcome to December'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

£500,000 settlement for hospital asbestos claim

The deceased brought a compensation claim after being diagnosed with mesothelioma in 2011. He died a few months after his diagnosis and his claim was continued on behalf of his estate. The deceased had claimed that he had been exposed to asbestos while studying medicine in the 1980s as he frequently used an underground shortcut to go between the University of Birmingham and Queen Elizabeth Hospital where he had seen asbestos-lagged pipework. The full value of the claim was considered to be around £1 million, largely based on the fact that the deceased was a doctor who held various patents which would have had a high value if he had survived. The university and the Secretary of State for Health denied liability but agreed a settlement which was approved by the High Court on 11 December in which the deceased's estate will receive £500,000.

Housing association handed £100,000 HAVS fine

The Health and Safety Executive (HSE) has fined a Welsh housing association for exposing its workers to Hand-Arm Vibration Syndrome (HAVS). Charter Housing Association Ltd found that six members of its maintenance team were suffering from HAVS after it launched a health surveillance programme in June 2015. An HSE investigation found that all six cases were likely to have been caused or made worse by the maintenance team's significant exposure to hand arm vibration and regular use of power tools. HSE concluded that Charter Housing had failed to adequately plan its working methods or offer information and training to employees on the potential risks to their health. The company was fined £100,000 after pleading guilty to breaching the Control of Vibration at Work Regulations 2005. HSE inspector Joanne Carter warned that the case *"serves as an important reminder of the necessity of task based risk assessments to establish the level of exposure, control measures to reduce that exposure to as low as is reasonably practicable and effective health surveillance systems. In the case of Charter Housing this realisation came too late".*

Contractor fails to protect workers from silica dust

The HSE has fined a London-based building contractor £40,000 for a series of failures which led to workers being exposed to Respirable Crystalline Silica (RCS). MY Construction & Carpentry Limited (MY) failed to plan, manage and monitor work done under its control while carrying out the refurbishment of a London building. A site inspection found that workers were dry cutting bricks and had not been informed of the potential health risks of inhaling the dust or of the correct controls to reduce this risk. MY pleaded guilty to breaching the Construction (Design and Management) Regulations 2015 and was handed a £40,000 fine along with an order to pay over £2,300 in costs. HSE inspector Prentiss Clarke-Jones commented: *"Over 500 construction workers are believed to die from exposure to silica dust every year. It is the biggest risk to construction workers after asbestos. This number can be reduced by those in control of the work through adequate planning, managing and monitoring of the work on site".*

Government urged to limit fixed costs reform to fast-track

Costs lawyers have urged the government to limit any expansion of the fixed recoverable costs (FRC) regime to fast-track cases. The government has yet to take action on the recommendations made in Lord Justice Jackson's report which was published in July this year. The Association of Costs Lawyers (ACL) sent out a

survey to members asking their thoughts on civil litigation costs which drew 155 responses, with over half of respondents (52 per cent) sharing the view that, while it would be fair for the FRC scheme to extend to fast-track cases, it should not reach any further. Over half of respondents (57 per cent) believe that the costs budgeting process has improved significantly over the past 18 months. However, the responses also showed that lawyers are still getting accustomed to costs budgeting with only 5 per cent of costs lawyers indicating that their clients always stuck to their budgets compared to the 29 per cent whose clients always exceeded theirs. Chairman of the ACL and Partner at Weightmans, Iain Stark, said: *"It is true that many solicitors still need guidance [on budgeting] but, with judges now far more confident in exercising their costs management powers, we are positive that it will make a real difference in controlling costs. That being the case, do we really need the upheaval and satellite litigation that fixed costs would cause as lawyers push for the highest fee available? They work on the fast-track because solicitors can cope with the 'swings and roundabouts'…however, that calculation does not work with more complex cases".*

New rules give judges flexibility on expert hot-tubbing

The Civil Procedure Rule Committee has introduced a new practice direction which acts on recommendations made by the Civil Justice Council (CJC) on the issue of expert evidence. CPR PD 35.11, which came into force on 22 November, has handed judges more flexibility in how they choose to deal with expert witnesses, giving them wider powers to allow concurrent evidence, commonly known as hot-tubbing. The CJC report found that concurrent evidence saved court time and improved the quality of evidence available to judges. The new practice direction allows judges to direct evidence *"in any appropriate manner"* which may include hybrid techniques which would allow evidence to be given on an issue-by-issue basis or for some evidence to be dealt with concurrently.

County Courts appear to feel the strain amid surge in cases

County courts have seen their second highest quarterly claims figures since 2006 amid a series of court closures. The Ministry of Justice (MOJ) reported that 560,000 claims were issued in the county court between July and September this year with the number of money claims rising by 15 per cent on the same quarter last year. The number of claims being defended also rose by 5 per cent to 76,000. 14,000 trials also took place, representing an increase of 11 per cent, while close to 20 courts were closed in the last two years as part of the MOJ's closure programme. As the number of claims has risen, as has the average length of time taken for a claim to go to trial with small claims taking a week longer with 31.9 weeks now the average time between issue and trial. The average time for a multi or fast track claim also increased by three weeks to 56.5 weeks.

Case Law

Unmarried partner wins legal battle for bereavement damages

Smith v Lancashire Teaching Hospitals NHS Foundation Trust [2017] EWCA Civ 1916

The appellant made a dependency claim under the Fatal Accidents Act 1976 ("the Act") after her partner of 16 years died as a result of the defendant's negligence. She had been cohabiting with her partner for over two years prior to his death. The Act provided for bereavement damages to be paid in negligence cases but was only available to spouses or civil partners. The appellant claimed that the Act was incompatible with the European Convention on Human Rights as it interfered with her right to enjoy freedoms without

discrimination under Article 14 when read with her Article 8 right to respect for her family life. The High Court dismissed her claim, finding that there was no direct infringement of her rights as bereavement damages did not fall within her right to a family life. Her appeal was allowed by the Court of Appeal which held that the Act was incompatible with her ECHR rights. The claim fell within the ambit of Article 8 as bereavement damages were a measure by which the state showed respect for family life. As her claim was caught by Article 8, this engaged her Article 14 right to be protected against discrimination. The appellant was in a long-term relationship which was equal to a marriage. Section 1 of the Act had been specifically amended to provide cohabitees of over two years with the same rights as married couples and so there was no justification for s.1A treating cohabitees differently. It was impossible for the court to interpret s.1A as being compatible with the ECHR and the Court of Appeal made a declaration of incompatibility regarding its exclusion of cohabitees of over two years.

High Court rules asbestos documents must be disclosed to public

Dring v Cape Distribution Ltd [2017] EWHC 3154 (QB)

The High Court has granted an application for the disclosure of documents filed in asbestos litigation despite a private agreement between the parties which ordered for the documents to be destroyed. However, Cape has secured an expedited appeal to the Court of Appeal. None of the documents will be disclosed until the appeal has been determined.

For a full analysis, please refer to our previous legal update.

Indemnity costs for late acceptance of Part 36 offer

Lokhova v Longmuir **[2017] EWHC 3152 (QB)**

The claimant brought a defamation claim against the defendant. Throughout proceedings, the defendant made a series of Part 36 offers to settle which were not accepted. The claimant sought to amend her claim to add further causes of action. In response to the application, the defendant made a further Part 36 offer in November 2015. Again, this offer was not accepted and the claimant's application to amend was also refused. The court made a costs order against the claimant following her failed application. When she did not comply with the order, the defendant sought an unless order striking out the claim unless the claimant paid. Before the application was heard, the claimant accepted the November Part 36 offer. The defendant sought indemnity costs for the period between the expiry of the offer and acceptance. Mr Justice Warby, sitting in the High Court, found it appropriate to order indemnity costs for the stated period. The claimant's conduct had been highly unreasonable. She had repeatedly rejected the defendant's offers and the court found that her main reason for continuing the claim was in an attempt to avoid the negative costs consequences of failing to accept the previous offers.

Supreme Court to hear Raleys negligence appeal

Perry v Raleys Solicitors **[2017] EWCA Civ 314**

The Supreme Court has given permission to appeal on two grounds a claim of professional negligence made by the claimant against his former solicitors. Raleys Solicitors had represented Mr Perry in a vibration white fingers (VWF) claim which settled for £11,660 in 1999. However, the figure did not include a claim for services and the claimant sought £17,300 in damages from Raleys for not pursuing the potential claim.

Raleys admitted negligence before the claim was first heard in the High Court, however, the judge ruled that the claimant had not proved causation as he was not convinced that the claimant would have satisfied the requirements for a claim for services. The Court of Appeal overturned the first instance decision and awarded the claimant £14,556 plus interest and ruled that the trial judge had been wrong to engage in a factual determination of the merits of the claimant's potential claim. The arguments will now go to the Supreme Court which will focus on two issues: firstly, whether the claimant must prove, on the balance of probabilities, that his claim for services would have been an honest claim; and secondly, the circumstances in which an appellate court should interfere with findings of fact. The hearing is yet to be listed.

On the horizon

Diesel fumes study highlights health risks

A recent study has indicated that the health benefits of walking are nearly erased for over-60s when they choose to walk in urban areas due to the high levels of air pollution experienced in UK cities. Medical professionals often encourage over-60s to increase their physical activity, usually by walking, in order to combat common health issues such as heart and lung disease.

However, the study, carried out by Imperial College London and Duke University in the USA, has suggested that pollution from diesel fumes is so severe that it can effectively cancel out any benefits gained through the exercise. The study observed 119 people and asked them to walk in one of two London areas: Oxford Street or Hyde Park. Oxford Street has much higher levels of pollution than the traffic-free Hyde Parks and has breached WHO's air quality limits. The participants had a range of heart and pulmonary health: some were healthy, some with stable heart disease, and others who were suffering from chronic obstructive pulmonary disease (COPD).

The difference in pollution levels was evident: while all participants' lung capacity improved within an hour of walking in Hyde Park, walking up and down Oxford Street only led to a small increase. Healthy volunteers experienced a maximum change in arterial stiffness of 24 per cent in Hyde Park compared to only 4.6 per cent on Oxford Street. Kian Fan Chung, lead author of the study, suggested that older adults should be advised to *"walk in green spaces, away from built-up areas and pollution from traffic"* and called for a study into the effect of pollution on young people.

Further study finds link between hearing loss and dementia

Researchers at Trinity College Dublin have re-analysed previous studies to try to understand the apparent connection between hearing loss and an increased chance of developing dementia. Researchers assessed 36 previous studies from around the world which had considered the relationship between the two conditions and involved 20,000 people. The study authors commented that, while the group still represented a small sample size, the results showed that hearing loss was associated with a 28 per cent increased risk of developing dementia. Dr Clare Walton, Research Communications Manager at the Alzheimer's Society, commented that the study has added weight to the potential relationship between hearing loss and cognitive decline but highlighted that the studies have yet to find any causative link. *"Researchers have a few theories*

as to how hearing loss could feed into dementia risk. This includes the theory that the brain is diverting important resources from other areas in order to fully understand and process sounds, or that hearing loss can lead to increased social isolation. Further work is needed to find out whether any of these theories are true," she continued.

Warning issued over 'heat-not-burn' cigarettes

UK experts have warned the government that "heat-not-burn" tobacco products still represent a danger to health despite being considered safer than traditional tobacco products. "Heat-not-burn" devices heat the tobacco at a lower temperature so that it produces a vapour rather than smoke. Manufacturers say that their products are designed for *"people that wish to eliminate many of the [health] risks yet would still like to enjoy the taste of traditional smoking"*. The Committee on Toxicity (COT) voiced its concerns as two products – IQOS and iFuse – launched in the UK. COT analysed evidence which found that people who chose to use "heat-not-burn" cigarettes were exposed to between 50 and 90 per cent fewer "harmful and potentially harmful compounds" than those who smoked regular cigarettes. However, the full extent of any health risks could not be determined and COT expressed concern that the claims made by manufacturers could lead to young non-smokers trying their products in the belief that they are safe. While current smokers would see a benefit from switching to "heat-not-burn" products, the committee chairman, Professor Alan Boobis, advised that quitting altogether was still the best option. If quitting was not achievable, he recommended the use of e-cigarettes which have been the subject of a series of studies which have indicated that they are at least 95 per cent less harmful than tobacco cigarettes.