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Disease-i

Welcome to January 2018's 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

David Gauke named new justice secretary

David Gauke has been named as the first solicitor Justice Secretary in Theresa May's latest cabinet reshuffle, making him the sixth Justice Secretary in six years. Gauke read law at St Edmund Hall, Oxford University and worked in the City as a solicitor until he entered Parliament in 2005. His appointment comes after four consecutive non-lawyers have held the post since the 2012 reshuffle which saw Kenneth Clarke QC replaced by Chris Grayling.

Gauke has already been urged to deliver on the court modernisation programme and a review of the impact of legal aid cuts on access to justice. Speaking after his appointment, Gauke said: "Justice is the cornerstone of our democracy and a key part of a fairer society. I am looking forward to meeting experts and front-line staff to drive the crucial work started by my predecessors, to reform our prisons and courts, uphold the rule of law, and promote our world-leading legal services".

Claire's Accessories recalls products over asbestos scare

American retailer Claire's was forced to recall a range of products before Christmas over fears that they contained asbestos. A mother in America, Kristi Warner, raised the alarm with the company after she grew concerned about her six-year-old's glitter makeup kit. Ms. Warner claimed that she had sent the product for testing after noticing that the kit's ingredients were not listed and it instead merely stated that it was made in China. The results of the test allegedly showed that the kit had tested positive for asbestos. Ms. Warner then sent a further 17 Claire's products for testing, all of which also tested positive.

Claire's, which has over 400 stores in the UK and Ireland, responded by withdrawing all of the concerned products and conducted an immediate investigation. However, subsequent testing by two independent labs commissioned by Claire's found no traces of asbestos in any of the products. A statement released by Claire's said: "We also confirmed that the talc ingredient that is used in the cosmetics was sourced from Merck KGaA and is asbestos free. Any report that suggests that the products are not safe is totally false… Our paramount concern is the safety of our customers and we apologise for any distress these false reports may have caused".

Fine for exposure to asbestos fibres

The Health and Safety Executive (HSE) has handed out a £300,000 fine to an East Yorkshire company after 13 of its workers and contractors were exposed to asbestos fibres. An employee of SSE Hornsea Ltd, a gas storage company, became concerned when his team was instructed to remove a valve from a compressed air distribution system. In order to remove the valve, the team used a wire brush attached to an electric drill to remove the sealing material which spread dust around the maintenance workshop.

Upon investigation, the dust was found to contain asbestos fibres, leading to an HSE investigation. An HSE inspector said that the company had "substantially failed to manage the risks associated with asbestos within their process plant and [had] needlessly risked the future health of 13 people". The company pleaded guilty to breaching the Health and Safety at Work etc. Act 1974 and was also ordered to pay £1,731 in costs.

Nuisance calls hit 6 million a day in 2017

Close to 2.2 billion nuisance calls and texts were made over the course of 2017 with almost 900 million relating to personal injury or other insurance claims. The data, which was collected by Ofcom on behalf of Aviva, also showed that claims management companies (CMCs) appeared to target those aged 65 or older with that age group receiving 30 per cent of all calls and texts.

The research also revealed that those aged over 55 have been specifically targeted by fraudsters since the government introduced new pension freedoms with scams taking more than £43 million from pension pots since 2014. Rob Townend, now Managing Director at Aviva UK GI, called for the government to use the Financial Guidance and Claims Bill to ban cold

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calls where there is no existing relationship with the customer. The bill, which is set to be debated in the House of Commons after being introduced in the House of Lords, proposes the creation of a single financial guidance body which would regulate CMCs. Amid high numbers of nuisance calls equaling 6 million a day, 85 per cent of those responding to an Aviva survey indicated that they support a ban on all nuisance calls. "If the Government is serious about protecting all members of our society, including the most vulnerable, then it should take decisive action and ban them," Townend said.

Slater and Gordon completes split from Australian business

National law firm Slater and Gordon has finalised its separation from its Australian parent company to become the first law firm to be owned by a hedge fund. After a period of restructuring which has involved a recapitalisation plan and a number of office closures, the firm has now split from the Australian listed company and appointed David Whitmore as chief executive. Faced with insolvency, the UK firm ratified a plan which has seen its senior lenders, led by New York hedge fund Anchorage Capital Group, take control.

The new chief executive believes that the firm can return to profit: "I'm confident that, in this challenging environment, and with the clear support shown by its new owners, Slater and Gordon is very well equipped to become the leading provider of consumer legal services in the UK".

Little Mix promoter is sued by a deaf mum over a row about sign language provision

Sally Reynolds, a deaf mum, has launched legal action following her attendance with her family at a Little Mix concert. It is reported that Sally Reynolds was told she could bring her own interpreter but that she did not feel that amounted to full access. She then decided to apply for an injunction to force the organisers, LHG Live, to provide a British Sign Language interpreter but ultimately, LHG Live agreed to provide an interpreter.

However, this was only for Little Mix and not for the warm up acts. As a result, Sally Reynolds is now bringing legal proceedings for an alleged failure to make reasonable adjustments by supplying an interpreter for the whole concert.

Case Law

NIHL causation: hearing loss when measured at over 2, 3 and 4 kHz was "both significant and appreciable".

David Evans v Secretary of State for the Department of Energy and Climate Change (1) JJ Maintenance Limited (2)

The claimant alleged that he had developed Noise Induced Hearing Loss (NIHL) as a consequence of his employment with both defendants. Breach of duty was admitted and it was also "agreed" that the claimant's cumulative Noise Immission Level was in the region of 104 dB. The case turned on a dispute between the medical experts as to whether the claimant's hearing loss was "significant" or whether it should be treated as "de minimis" and not compensatable.

For a full analysis, please contact Stacey Damigos on stacey.damigos@weightmans.com, and request our legal update on the topic.

Final orders in County Court proceedings can be set aside for fraud

Salekipour and another v Parmar [2017] EWCA Civ 2141

The claimants, Mrs Salekipour and Mr Saleem, sought to set aside the original trial after they obtained a statement from a main witness stating that he had given perjured evidence. In the original trial, the claimants' claim had failed and the defendant's counterclaim succeeded. The trial had hinged on credibility and the judge highlighted the contributions of defendant witness, Mr Fiszer, as independent and sincere. Following the trial, the claimants obtained a statement from Mr Fiszer in which he claimed that the defendant had instructed him to provide a witness statement, told him what to write, and, along with her husband, had told him that he would lose his shop if she lost the case and he had not gone to court for her.

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The claimants issued proceedings for rescission of the original judgment and a new trial. The defendants successfully sought to strike out the claim for having no reasonable grounds.

The claimants appealed the decision to both the County Court and the High Court but were unsuccessful on both appeals. They then appealed to the Court of Appeal. The Court of Appeal had to determine whether section 23(g) of the County Courts Act 1984 gave the County Court equitable jurisdiction to set aside an order made in a prior County Court case in circumstances of perjury or fraud. The court decided that, although section 23(g) had not previously been used in this way, this did not mean that the County Court did not have jurisdiction. There was no interpretation of the Act that would deny jurisdiction and so, the Court of Appeal allowed the claimants' appeal and rejected the defendants' application to strike out the new claim.

An exercise in discretion

Robert Carroll v Chief Constable of Greater Manchester [2017] EWCA Civ 1992

An undercover police officer alleged that he was negligently exposed to drugs in 2009. He became a regular user leading to depressive disorder. He consulted his GP in 2009 but did not inform him of his drug use. The GP made a diagnosis of depressive disorder in February 2012. Proceedings were issued in November 2013, outside the primary limitation period under section 33 of the Limitation Act 1980.

The court exercised its discretion to extend the limitation period, firstly because it had been reasonable for the claimant to withhold from his GP the fact that he was a drug user because this could have led to his dismissal, and secondly as there was no compelling evidence that the delay had prejudiced the defendant. For a full analysis, please see our legal update here.

Late application to strike out claim not treated as application for summary judgment

Saeed & Anor v Ibrahim & Ors [2018] EWHC 3 (Ch)

The first claimant brought proceedings against the defendants in relation to a scheme they had entered into together so that the first claimant could hide assets for the duration of his divorce proceedings. The first claimant's wife was joined to the action as second claimant. The pre-trial review was set for 17 January 2018 with the trial window around 12 February 2018. On 28 November 2017, the defendants sought an order to strike out most of the particulars of claim in line with the court's case management powers under CPR 3.4(2).

The defendants sought the strike out on the basis that the statement of case disclosed no reasonable grounds for bringing the claim. At the hearing, counsel for the defendants also submitted that the defendants were relying on the provisions of summary judgment contained in CPR 24. However, there was no mention of CPR 24 in the application or supporting witness statement and so the application did not comply with the requirements and safeguards set out in the accompanying practice direction.

The court had to decide whether it could and should treat the application as one made under CPR 24. The judge held that, although there was some overlap between CPR 3.4 and CPR 24, the courts should be slow to waive the requirements and safeguards put in place by the rules on summary judgment. In this case, it would not be appropriate for the court to allow the application to be read as an application for summary judgment. The application had been made at a late stage in proceedings and lacked clarity. The defendants had had ample opportunity to strike out the particulars when they were amended in April 2016 and March 2017. The application to strike out was therefore dismissed.

Indemnity costs following a Part 36 do not displace the provisional assessment costs cap

W Portsmouth & Co Ltd v Christine Linda Lowin (Daughter and Executrix of the Estate of Adelaide Lowin, Deceased) [2017] EWCA Civ 2172

In Lowin, the Court of Appeal had to consider the interaction of Part 36 with the provisional assessment costs cap in 47.15(5). The Court of Appeal held that in circumstances where a party was awarded their costs of the provisional

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assessment on an indemnity basis under 36.17(4) following a 'winning' Part 36 offer, the costs were still subject to the overall provisional assessment costs cap.

Proportionality

May v Wavell Group Plc County Court 22/12/2017

The claimants in a private nuisance case appealed against a detailed assessment of costs following their acceptance of the defendants' Part 36 offer where their costs had been reduced on detailed assessment from £208,000 to £35,000 plus VAT.

The appeal before HHJ Dight and Master Whalan held that the costs judge, Master Rowley, had misinterpreted and misapplied the proportionality test in 44.3(5), giving too little weight to the complexity of the legislation and undervaluing the sums in dispute. When assessing costs on the standard basis, the judge had to apply a test of reasonableness when undertaking an item by item assessment. This was before consideration of whether the total figure was proportionate. The costs were re-assessed at £75,000 plus VAT.

On the horizon

Mesothelioma drug given 'Promising Innovative Medicine' status

The UK Medicine and Healthcare Products Regulatory Agency has defined the targeted cancer drug nintedanib, otherwise known by its branded name Vargatef, as a Promising Innovative Medicine (PIM) in the treatment of malignant pleural mesothelioma.

The drug has completed a successful Phase II trial which saw progression-free survival of 9.4 months in patients who received the drug alongside chemotherapy compared to 4.7 months for those who only received chemotherapy. The Phase III trial is now being carried out at several sites worldwide. Nintedanib's PIM status means that it can be considered for the Early Access to Medicines Scheme which makes promising new medicines available to patients with life threatening or seriously debilitating conditions before they receive marketing authorisation.

Rehab recommendation for COPD patients

Doctors are being encouraged to refer patients with chronic obstructive pulmonary disease (COPD) for rehabilitation after a report found that the treatment can reduce mortality rates. COPD refers to a range of lung conditions and affects around 1.2 million people living in the United Kingdom. It is estimated that approximately 4,000 people die each year from COPD which had an occupational element to exposure.

The report by the Royal College of Physicians and the British Thoracic Society found that, while rehabilitation treatment cannot reverse the damage caused by COPD, it can reduce the need for hospital admissions by improving patients' breathing. The treatment consists of a 6 to 8 week physical exercise programme and 76 per cent of those who completed the course avoided a hospital admission in the following 6 months compared to 62 per cent of those who did not. The treatment even improved the health of those who were still admitted to hospital, with their hospital stays lasting half as long as those who did not complete the course.

Irish coal ban aims to reduce hospital overcrowding

An Irish minister has called for a ban on smoky coal across Ireland to help ease the pressures on overcrowded hospitals. Minister for Communications, Climate Change and the Environment Denis Naughten has called for a focus on preventing illness and reducing the number of people who need hospital treatment, rather than increasing resources so that hospitals can treat more people.

One in eight hospital beds in Ireland are currently used by patients with respiratory conditions. Naughten suggested that the ban on smoky coal, which will be phased in from September, will improve public health and aim to free up those hospital beds. "It is the health of the most vulnerable groups in society that is jeopardised the most by poor air quality: the sick, toddlers and children; older people and those with disabilities," he said.

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Serious injury surge on the horizon as a result of lazy lifestyles

Research by Professor Jagger, professor of epidemiology of ageing at Newcastle University, and published in Age and Ageing has found that the increase in lazy lifestyles and obesity will mean that within 20 years, more than 2 million older people will have at least four serious illnesses. This will have a knock on impact on the NHS and the type of service provision required for future generations. As The Times summarises, by 2035 there will be:

- 179% increase in number of over 65s with cancer.
- 3.1m over 65s with diabetes.
- 9.8m over 65s with at least two illnesses.
- 1.2 m over 65s with dementia.
- 0.9% over 85s with no long-term illness (down from 8.8 per cent).
- 40% over 85s with at least four illnesses.

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