Weightmans

Disease-i

Welcome to April 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.

The market place

Exploring…

- Civil Liability Bill published
- Change to court fees
- Google AI successfully predicts heart disease risk
- Fine for unlicensed asbestos removal
- Government's plans to ban cold calling face criticism
- Pollution levels since the London congestion charge.

Case law update

Covering…

- **Supreme Court hands down landmark decision on symptomless condition**
  Dryden and others v Johnson Matthey Plc [2018] UKSC 18
- **Duty to protect employees from asbestos dust exposure survived Asbestos Regulations 1969**
  Heynike (executor of the estate of Hill, deceased) v 00222648 Ltd (formerly Birlec Ltd) [2018] EWHC 303 (QB)
- **Actionable damage caused by 2% respiratory disability**
  Jackson v Durham City Council County Court 20/12/2017
- **Second Part 36 offer still relevant for costs purposes**
  Ballard v Sussex Partnership NHS Foundation Trust [2018] EWHC 370 (QB)
- **Supreme Court asks for clarification on a law firm acting for itself**
  Halborg v EMW Law LLP [2017] EWCA Civ 793
- **QOCS and Part 20 defendants**
  Jacob Corstorphone (A child by his mother and litigation friend Laura Ellis) v Liverpool City Council [2018] EWCA Civ 270
- **Claimant not entitled to full QOCS protection**
  Siddiqui v University of Oxford [2018] EWHC 536 (QB)
- **Defendant's solicitors under duty to inform claimants of service mistake**
  Woodward & Anor v Phoenix Healthcare Distribution Ltd [2018] EWHC 334 (Ch).

On the horizon

Looking at…

- Firefighters face heightened cancer risk
- Father blames 3G pitches for son's cancer
- Study finds cleaning products can cause as much harm to lungs as smoking
- Standing desks may not be the answer.

The market place

Civil Liability Bill published

The personal injury sector has been waiting with baited breath for progress in respect of personal injury reforms proposed by George Osborne back in 2016 as a way of tackling the rising cost of motor insurance. We saw the introduction of the Prisons and Courts Bill in 2016, which was then killed off by the announcement of a general election. The Queen's Speech in June 2017 then announced that the Government would be tabling the Civil Liability Bill ("the Bill"), which it was quickly established would be the new vehicle for whiplash tariffs and the sector has been waiting for the Bill to land ever since.

The Civil Liability Bill has now been published and introduced to the House of Lords in a move that finally advances the long awaited reforms. The Bill will also bring about the legislative change necessary to tackle much publicised issues surrounding reform of how the personal injury discount rate is set going forward, issues referenced in our legal update on the Bill.

Changes to court fees

A revised fees policy has been introduced with immediate effect following a review of the fees charged for court proceedings in certain low value personal injury claims. The revised fees apply to personal injury claims which have commenced under the low value portals but have fallen out at the end of Stage 2 when quantum is not agreed and so require a stage 3 hearing or where claims have been commenced under Part 8 due to limitation concerns.

Previously, these claims were considered to be proceedings 'for any other remedy' for the purpose of calculating the court fee. However, the change will see the fees align with those for commencing proceedings for the recovery of money on the sliding scale under Fee 1.1 of schedule 1 to the Civil Proceedings Fees Order 2008.

Google AI successfully predicts heart disease risk

Artificial intelligence (AI) developed by Google has successfully analysed eye scans to predict patients' risk of developing heart disease. Scientists from Google and sister company Verily Life Sciences trained a deep-learning algorithm to analyse photographs of individual retinas in order analyse each retina to determine the status of its blood vessels which proved to be an accurate indicator of several risk factors such as smoking, blood pressure, age, ethnicity and cardiovascular history.

The AI was trained on data from almost 300,000 patients and went on to predict the risk of cardiovascular disease in over 13,000 patients with a 70% accuracy rate. The team hope that the algorithm could present a less invasive alternative to current risk calculators which achieve the same accuracy levels but require blood samples. However, Verily's head of cardiovascular health innovations, Michael McConnell, stressed that more work was needed *"to develop and validate these findings on larger patient cohorts before this can arrive in a clinical setting"*. The research was published in *Nature Biomedical Engineering*.

Fine for unlicensed asbestos removal

A Gloucestershire construction company has been fined £28,000 after admitting carrying out unsafe and unlicensed asbestos removal in 2016. The company, R F Gardiner Limited, removed the asbestos while carrying out refurbishment works at a junior school despite not holding the appropriate licence to do so. An investigation by the Health and Safety Executive (HSE) into the removal found a number of breaches: workers did not wear fitted face masks; water suppression was not used to control the asbestos fibres; and a negative pressure enclosure was not set up meaning that the fibres spread to the surrounding areas.

As a result, the company's workers were exposed to high levels of airborne asbestos fibres and the worksite could not be decontaminated. R F Gardiner Limited pleaded guilty to breaching the Control of Asbestos Regulations and was ordered to pay £1,142 in costs in addition to the fine. HSE inspector James Lucas warned: *"Companies should be aware that HSE will not hesitate to take appropriate enforcement action against those that fall below the required standards"*.

Government's plans to ban cold calling face criticism

The government has come under fire over its latest proposals to introduce a cold calling ban with groups such as the Association of Personal Injury Lawyers (APIL) claiming that it doesn't go far enough to combat the issue. Last month, the government voted the ban into the Financial Guidance and Claims Bill during its committee stage in the House of Commons. The ban would prohibit live unsolicited direct marketing telephone calls in relation to claims management activities, unless express consent for the calls has been given.

The ban would be enforced by the Information Commissioner's Office (ICO). APIL, along with the Association of British Travel Agents (Abta), expressed concern that the ban did not go far enough and would do nothing to stop marketing using other popular methods such as texts. An alternative amendment proposed by Labour included a ban on text marketing and the use of any data acquired by cold calling while also making the Financial Conduct Authority (FCA) responsible for enforcing the ban. Mr John Glen, economic secretary to the Treasury, defended the ban's current form and insisted that the ICO *"would ensure that the ban was plugged into the existing framework"* and tackle cold-calling companies using its *"tough enforcement powers"*.

Pollution levels since the London congestion charge

Research presented at the Royal Economic Society's annual conference has found that the congestion charge in London has increased diesel pollution in the form of nitrogen dioxide emissions by 20%. Although levels of some other pollutants have decreased since the charge, the congestion charge resulted in more people using buses and taxis, which are usually diesel vehicles.

Case law

Supreme Court hands down landmark decision on symptomless condition

Dryden and others v Johnson Matthey Plc [2018] UKSC 18

Three employees have succeeded in their claims against their former employer after they developed a sensitivity to platinum salts. The three men worked for Johnson Matthey in factories making catalytic converters. The defendant company breached its obligations in failing to keep the factories clean and the claimants developed a sensitivity to platinum salts. The condition is symptomless and was only diagnosed after a routine skin test screening.

The defendant concluded that the claimants could no longer work with platinum salts as continued exposure would likely result in them developing an allergic reaction with physical symptoms. One of the employees was offered a different role at the company, although on lower pay, and the other two claimants had their employment terminated on medical grounds. The claimants therefore issued their claims for economic loss. The defendant argued that the symptomless condition did not give rise to an actionable personal injury. The claims were dismissed at first instance and again in the Court of Appeal on the basis that the claimants were not entitled to recover for pure economic loss.

The Supreme Court unanimously allowed the claimants' appeal and held that sensitisation to platinum salts

was an actionable personal injury in its own right. Although the condition was symptomless, the claimants had been negligently exposed to platinum salts and this exposure had impacted on their lives and caused them financial loss. The changes to the claimants' bodies caused by the exposure impaired their ability to work and, as a result, they were significantly worse off.

Duty to protect employees from asbestos dust exposure survived Asbestos Regulations 1969

Heynike (executor of the estate of Hill, deceased) v 00222648 Ltd (formerly Birlec Ltd) [2018] EWHC 303 (QB)

The claimant died of mesothelioma in 2012 and the action was continued on behalf of his estate. The claimant claimed that he had developed mesothelioma due to exposure to asbestos in the course of his employment with the defendant in the early 1970s. His work involved exposure to large quantities of asbestos dust in factories. Quantum and causation were agreed but liability was in issue. One of the key issues was whether the obligations in the Factories Act 1961 ("the Act") survived or were replaced by the Asbestos Regulations 1969 ("the Regulations").

The Act imposed two obligations through s.63: to protect workers from any foreseeably injurious dust; and to protect them from substantial quantities of any kind of dust. The Regulations had replaced the first obligation with an obligation to take measures against "asbestos dust" which was defined as being dust which contained asbestos which might foreseeably have caused danger to health.

However, the second obligation, to protect from substantial quantities of any dust, had not been replaced and so survived the introduction of the Regulations. The work carried out by the claimant fell within s.63 of the Act and the factories were found to be unsafe. He had worked long shifts and had been exposed to large quantities of dust during his employment due to poorly maintained equipment. The claim therefore succeeded.

Actionable damage caused by 2% respiratory disability

Jackson v Durham City Council County Court 20/12/2017

The claimant brought a claim for damages for personal injury and provisional damages against his previous employers after developing asbestosis. The claimant alleged that he developed the condition after being exposed to asbestos during the course of his employment.

The claimant suffered from 60% respiratory disability caused by various factors, of which 2% was caused by his asbestosis. He also had a 2% risk of developing mesothelioma. The defendants admitted breach of duty but argued that the claimant had not suffered actionable damage which had made him materially worse off and so the claim should fail. The defendant's expert gave evidence that the claimant would not notice a 2% respiratory disability.

The key issue for the court was whether the claimant was materially worse off due to his exposure to asbestos. The claim would succeed if the court found that the claimant could perceive symptoms beyond those which were *de minimis*. The court allowed the claim. Previous case law had found that respiratory disabilities of between 1% and 2% gave rise to noticeable symptoms.

The 2% disability caused by the asbestosis was not so limited that it should be considered *de minimis* and so the claimant had suffered actionable damage. The claimant was therefore entitled to damages including provisional damages to reflect the 2% risk of developing mesothelioma.

Second Part 36 offer still relevant for costs purposes

Ballard v Sussex Partnership NHS Foundation Trust [2018] EWHC 370 (QB)

The appellant appealed against a costs order made in her claim for damages for personal injuries against the respondent. The respondent had made two Part 36 offers. The appellant rejected the first offer which was withdrawn and did not accept the second offer. Her claim was successful at trial but she did not beat either of the respondent's offers.

The appellant accepted that she would have to bear the respondent's costs of the trial but the court had to determine which party should be liable for costs between the expiry of the first offer and the trial. At first instance, the judge found that the second offer was irrelevant and that the appellant should pay the costs from the withdrawal of the respondent's first offer.

On appeal, the High Court found that it was evident that the judge had been strongly influenced by the first offer. Had the appellant accepted that first offer, then the subsequent expense of the claim could have been avoided entirely. However, the second offer was an unwithdrawn Part 36 offer which bore the consequences of CPR 36.17. The first offer had been withdrawn and so, while it could still be relevant to the issue of costs, it did not carry the same consequences.

The second offer could not be considered to be irrelevant. The terms of the second offer were precise and stated that *"for the avoidance of doubt, if the claimant fails to obtain a judgment more advantageous than the offer made in this letter then the defendant will seek an order that the claimant should pay both parties' costs from [the expiry date of the second offer]"*. The High Court found that the judge had misdirected himself in finding the second offer to be irrelevant. The appeal was allowed and the appellant was entitled to her costs up to the expiry of the second offer.

Supreme Court asks for clarification on a law firm acting for itself

Halborg v EMW Law LLP [2017] EWCA Civ 793

The Supreme Court has asked the Civil Procedure Rule Committee for clarification on whether a law firm LLP which acts for itself in proceedings should be classed as a litigant in person under the CPR. The Supreme Court panel refused permission to appeal the decision of the Court of Appeal which found that the LLP was not a litigant in person and so was not limited in its recovery of costs. Under the CPR, litigants in person can only recover a limited amount of costs for their time spent working on their case.

The Court of Appeal held that limiting a law firm acting on its own behalf would produce an absurd and unintended result which would ignore the application of professional legal skills involved. In refusing permission to appeal against the decision, the panel commented that they considered the issue to be *"an important point of principle which would be better considered by the Civil Procedure Rule Committee"*. The refusal of permission to appeal along with the request indicates that the Supreme Court believes that this current practice should be codified.

QOCS and Part 20 defendants

Jacob Corstorphone (A child by his mother and litigation friend Laura Ellis) v Liverpool City Council [2018] EWCA Civ 270

The Court of Appeal held that a judge had been wrong to make a costs order against the unsuccessful claimant in a personal injury claim on the basis that the qualified one way costs shifting (QOCS) regime did not apply to Part 20 defendants added to the proceedings after the QOCS regime came into effect.

If the QOCS regime did not apply, the claimant would not have had any protection against an adverse cost order in respect of those claims.

Claimant not entitled to full QOCS protection

Siddiqui v University of Oxford [2018] EWHC 536 (QB)

Where a claimant sought damages which included a free standing claim for economic loss unrelated to psychiatric injury, the evidential overlap did not preclude the operation of CPR 44.16(2)(b) – a qualified one way costs shifting exception.

The personal injury and financial loss claims did not have to be 'divisible'. To ensure that legitimate costs protection was not lost, although the court thought the claimant should be liable for 33% of the defendant's costs, this was reduced to 25% of the defendant's costs, subject to assessment in default of an agreement.

Defendant's solicitors under duty to inform claimants of service mistake

Woodward & Anor v Phoenix Healthcare Distribution Ltd [2018] EWHC 334 (Ch)

The claimants' solicitors served a claim form on the defendant's solicitor two days before the time for service expired. Service was in good time, however, the defendant's solicitors had not been nominated to accept service on behalf of their client.

After expiry of the time for service, by which time any new claim would also be time-barred, the defendant's solicitors wrote to the claimants' solicitors to inform them that service had been defective and they were now out of time. The claimants' solicitors then sought to serve the claim form on the defendant directly. The defendant's solicitors applied to the court for a declaration that the court did not have jurisdiction to hear the claim due to the defective service.

The claimants applied to the court on a number of points including an application for the court to retrospectively validate service under CPR 6.15.

The court found that at no point during correspondence between the two parties had the defendant's solicitors stated that they would accept service. However, the defendant had learnt of the existence and the contents of the claim form. While this was not the only critical factor to consider in an application under CPR 6.15, it was relevant and the claimants' solicitors had taken steps to bring the claim form to the defendant's attention.

The purpose of service was to bring the claim to the attention of the defendant and was not *"about playing technical games"*. The defendant's solicitor had deliberately failed to inform the claimants of their mistake until the period for service had expired. The claimants submitted that this conduct amounted to *"games playing"* and went against the solicitors' professional obligations and duty to the overriding objective.

The court found that the defendant's solicitors were under no professional duty to draw the claimants' attention to their own mistakes; this did not go as far as to constitute gaining an unfair advantage in litigation.

However, the solicitors also had a duty to the court to further the overriding objective under CPR 1.3 and to cooperate in procedural matters to avoid unnecessary, expensive and time consuming satellite litigation. In failing to bring the mistake in service to the claimants' attention, the solicitors had breached that duty and given the court good reason to validate service.

On the horizon

Firefighters face heightened cancer risk

New research has backed up the theory that firefighters face a greater risk of developing cancer due to their frequent exposure to toxic fumes. The latest study, carried out by the University of Central Lancashire, found that firefighters aged under 75 are three times more likely to die from cancer than the general population. Polycyclic aromatic hydrocarbons (PAHs) are a group of more than 100 different chemicals which are released through burning and have been found to penetrate through clothing and even through skin cells, leading to mutations in DNA. Deaths from cancer among firefighters have steadily risen since the 1970s and the study, led by Professor of fire toxicity Anna Stec, found that firefighters were particularly at risk of developing cancers of the skin, mouth, throat, liver and kidneys.

The study suggests that this heightened risk is due to frequent exposure to PAHs in toxic fumes and soot which can be inhaled but are more likely to be absorbed through the skin after becoming attached to clothing. Stec's study saw 650 samples taken from 140 firefighters' skin, clothing, fire engines and offices and *"in almost all cases, high or very high quantities of carcinogenic PAHs were identified"*. The National Fire Chief's Council has raised concerns about the health of firefighters following reports that some of those who tackled the Grenfell Tower fire did so without using breathing equipment.

Father blames 3G pitches for son's cancer

A father whose son died at the age of 20 following several battles with cancer has spoken out against the use of artificial sports pitches. Lewis Maguire died after contracting a deadly superbug shortly after winning his battle against Hodgkin's lymphoma after four years of treatment including two relapses and a bone marrow transplant. His father, Nigel Maguire, believes that Lewis' cancer was caused by playing on 3G pitches and has called on the government, Football Association and Rugby Football Union to ban their further construction.

Lewis had trained and played on 3G pitches for years and was on trial at Leeds United when he fell ill. Concerns have been raised by campaigners over the use of 3G pitches in the United Kingdom as well as the United States and the Netherlands. 3G pitches use rubber crumb, a recycled by-product of rubber tyres, as a loose infill to give the pitches a slight bounce. Used rubber tyres have been found to contain mercury, lead, benzene and arsenic. Mr Maguire believes that this rubber crumb caused Lewis' cancer as he frequently swallowed the small pellets when diving for the ball. In the Netherlands, football academies such as Ajax have closed their 3G pitches to children.

In response, sports minister Tracey Crouch stated that studies have found no evidence that artificial surfaces are unsafe. A report published last year by the European Chemicals Agency found *"no reason to advise people against playing sports on synthetic turf containing recycled rubber granules as infill material"*. However, Mr Maguire has urged the government to collect more evidence including the effects of swallowing rubber crumb and contact with broken skin.

Study finds cleaning products can cause as much harm to lungs as smoking

New research has raised concerns over the health implications of regularly using cleaning products with a claim that the harm could be comparable to smoking 20 cigarettes a day. The research, published in the American *Journal of Respiratory and Critical Care Medicine*, assessed the lung function of more than 6,000 people over the course of 20 years by testing the amount of air breathed out by each participant.

The study found that lung function decreased more over the years in women who cleaned with the end lung function comparable to that of a long-term smoker. However, the effects seemed to be generally limited to women with the same harmful effects not replicated in the male group in the study, although the researchers

highlighted that the number of men in the study who regularly used cleaning products was relatively low. The study suggested that the chemicals in cleaning products irritate the fragile lining in the lungs, leading to lasting damage over time.

Standing desks may not be the answer

Standing desks are seen by many as a positive tool in the fight against sedentary living after various studies declared sitting to be the new smoking with negative health repercussions. However, experts have now warned against the move to standing desks amid concerns that they could cause bodily pain and impair cognitive function.

A study, carried out by researchers at Curtin University in Australia and published in *Ergonomics*, observed 20 participants using a standing desk for two hours. The results mirrored that of previous research which found that standing desks significantly increased lower back and lower limb discomfort. Mental reactiveness also slowed, however, creativity was still shown to have improved at a standing desk. Professor Alan Taylor of the University of Nottingham commented that, instead of investing in standing desks, employers should encourage employees to go for regular walks while at work.

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

- Jim Byard, Partner, Head of Disease, email jim.byard@weightmans.com or call on 0116 253 9747.

Weightmans LLP
April 2018