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.

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The market place

Latest Keytruda trial delivers promising results

A trial studying the Merck immunotherapy drug Keytruda has produced promising results with the treatment appearing to double survival rates for those with the most common type of lung cancer. The Phase III clinical trial sought to identify whether combining Keytruda, also known as pembrolizumba, with chemotherapy would improve treatment of non-squamous non-small cell lung cancer (NSNSCLC). The study used data from 616 patients with untreated metastatic NSNSCLC who were split into two groups to receive treatment: one group received a combination of Keytruda and chemotherapy while the second group was treated with chemotherapy along with a placebo.

Introducing Keytruda alongside chemotherapy reduced the risk of death by 51 per cent and the chance of progression or death by 48 per cent. Side effects including nausea and fatigue were experienced at approximately the same rate in both groups. However, the combination trial group did experience an increased risk of acute kidney injury.

Merck's chief scientist, Roger Perlmutter, said: "As a first-line treatment this is better than anything we know about". The study was led by Dr Leena Gandhi, director of thoracic medical oncology at the Perlmutter Cancer Center at NYU Langone Health and was published in the New England Journal of Medicine.

Compulsory e-billing for multi track claims

New rules for e-billing applicable to multi track claims have become compulsory in the county court. Following Lord Justice Jackson's recommendations, any work must now be formatted as an electronic bill unless specific exceptions apply. Cases where the receiving party is unrepresented or the court has ordered otherwise are excluded, as are claims where fixed or scale costs apply.

Chairman of the Association of Costs Lawyers (ACL) and Partner at Weightmans, Iain Stark, said: "We are concerned that some judges have yet to receive training and/or the technology to view the bill from the bench, so this could initially be a popular course. The reality is that some firms of solicitors are ready for "E-Day" and have adopted the J-Codes model of recording work by phase, task and activity. Others still work from paper files. It will be a bumpy ride for them at first".

Housing association fined £30,000 for exposure to Hand Arm Vibration Syndrome

A Welsh community housing association has been fined for failing to protect its employees adequately from the risk of Hand Arm Vibration Syndrome (HAVS). Tai Calon Community Housing Limited was found guilty of breaching the Health and Safety at Work etc. Act 1974 following an investigation by the Health and Safety Executive (HSE). In 2015, a number of employees were diagnosed with HAVS after Tai Calon introduced health checks.

The HSE found that the company had failed to carry out an adequate risk assessment, failed to implement measures to reduce exposure, failed to provide suitable health checks, and failed to provide suitable training which led to employees routinely being exposed to vibration in their day-to-day work.

HSE inspector Paul Newton said: "This prosecution highlights the health risks from using vibratory tools and the importance of employers having a health surveillance programme in place. Where vibratory tools are used, employers should monitor the health of employees using them and ensure appropriate systems are in place to manage and control the risk from vibration". Tai Calon was fined £30,000 in addition to being ordered to pay close to £2,800 in costs.

American couple win multi-million pound damages in talc case

An American jury has ordered two companies to pay $117 million in damages after a man alleged that he developed mesothelioma after years of using talcum powder. The action, which was brought against Johnson & Johnson and Imerys SA, follows a number of related cases which are making their way through the United States' courts which claim that there is a link between talc and ovarian cancer.

The jury ordered the two companies to pay $80 million in punitive damages, as well as $30 million and $7 million in compensatory damages to Mr. and Mrs. Lanzo respectively. Johnson & Johnson continue to assert that their products do not include asbestos and that extensive testing ensures that there is no contamination from the mining process. The company also sought to make it clear that it was prevented from presenting vital evidence and that multiple independent tests had found no presence of asbestos.

A spokesperson for Johnson & Johnson said: "We will continue to defend the safety of Johnson's Baby Powder and immediately begin our appeal, and we believe that once the full evidence is reviewed, this decision will be reversed". Talc supplier Imerys SA contended that Mr. Lanzo's mesothelioma was caused by childhood asbestos exposure.

Failure to detect asbestos leads to £6,700 fine

The Health and Safety Executive (HSE) has fined a specialist asbestos company for its failure to detect asbestos. EAS Asbestos Limited of Sutton in Ashfield was responsible for carrying out refurbishment and demolition surveys on behalf of construction company Mercer Brother Limited who were carrying out the demolition of a block of garages.

According to EAS, asbestos was only present in the cement roof sheets and there was no asbestos insulation board in the garages. However, immediately after starting the work, Mercer Brother were forced to stop demolition when large amounts of asbestos insulation board were discovered. Following an HSE investigation, EAS pleaded guilty to breaching the Health and Safety at Work etc. Act 1974 in carrying out an incorrect and misleading survey. The company was fined £6,700 and ordered to pay £1,000 in costs and a victim surcharge of £170.

Case law

Forum shopping in asbestos claims

George Doherty & Ors v Secretary of State for Business, Innovation and Skills [2018] CSOH 25

Over twenty relatives of the late Mr. James Docherty raised a claim for damages following his death in September 2011 as a result of asbestos exposure. The claim was brought in Scotland as the Damages (Scotland) Act 2011 was more favourable to pursuers and allowed more claims than English law. It was alleged that the deceased was exposed to asbestos dust whilst employed by Scotts Shipbuilding and Engineering Company ("the Company") as a mechanical fitter in Greenock, Scotland from 1941 to 1947. The action was raised against the Secretary of State as the person responsible for the liabilities of the Company. Liability was disputed. At the date of diagnosis, and immediately prior to his death, the deceased had been resident in England. The matter was called before the court for a legal debate on the applicable law for the dispute. The defenders argued that English law was the governing law, while the pursuers contended that it should be the law of Scotland. It was held that, although the alleged breach of duty had occurred in Scotland, the deceased's injury had developed while he was resident in England and, as such, any claims arising for loss and damage fell to be determined under English Law. The action based on the Damages (Scotland) Act 2011 was dismissed along with all but one of the pursuers' claims. The remaining claim continued on behalf of the executors of the late wife of the deceased.

Court considers dis-applying limitation in asbestos claim brought seven years out of time

Fudge v Hawkins and Holmes Ltd [2018] EWHC 453 (QB)

The claimant issued proceedings against his former employers for damages for pleural thickening and asbestosis. He alleged that he had been exposed to asbestos between 1972 and 1978 when he worked as a subcontractor fitting asbestos sheeting in homes. The claimant was aware of the potential claim by summer 2008 meaning that limitation expired in summer 2011. The claimant had instructed solicitors in 2011 but alleged that they had advised him that they could not trace the defendant's insurers and so the claim was not worth pursuing. The claimant instructed separate solicitors again in 2015 and issued the present claim in February 2017. The claimant applied to the court to exercise its discretion under s.33 of the Limitation Act 1980 to allow the claim to proceed out of time.

The claimant had to persuade the court that it should exercise its discretion to exempt the claim from the usual rules on limitation, having regard to all the circumstances. The court had to assess the claimant's delay in issuing proceedings to ascertain whether this had caused "any evidential or forensic prejudice" to the defendant. After seeking advice from his first solicitors, the claimant destroyed his work records in 2012. The first solicitors had advised him to seek a second opinion as a matter of urgency and he had not done so.

In speaking to both sets of solicitors, the claimant had given a confusing and incoherent account of his previous employment and his difficulty remembering past events was worsened by the destruction of his records. The lack of documentary evidence and the claimant's loss of cogency would cause significant prejudice to the defendant if the claim were to proceed. The court therefore dismissed the application to dis-apply limitation.

Violist wins claim for acoustic shock

Goldscheider v Royal Opera House Covent Garden Foundation [2018] EWHC 687 (QB)

The claimant, a former orchestral violist, issued proceedings against The Royal Opera House alleging that he had suffered from acoustic shock during rehearsals for Wagner's Ring Cycle. The claimant claimed that the defendant had breached its duty under the Control of Noise at Work Regulations [2005] in failing to carry out an adequate risk assessment, failing to take all reasonable measures to eliminate the risk of noise exposure, failing to designate the orchestra pit as a mandatory hearing protection zone, and failing to provide training to the musicians about the risks of noise exposure.

The defendant, despite taking a raft of impressive measures which included the provision of two types of custom made ear plugs, training and instruction to the claimant on noise issues, was nonetheless held to be in breach of the Regulations. This was despite the seemingly unchallenged evidence from witnesses that it was not practical to wear hearing protection at all times as some musicians felt that the quality of their playing was compromised when protection was worn.

On the issue of medical causation, the defendant's contention that the claimant had developed Ménière's disease as opposed to acoustic shock was not accepted. The trial judge preferred the claimant's expert's diagnosis of "acoustic shock" which included hyperacusis which had compromised the claimant's employment.

Comment

The judgment appears to be a rigid and unbending application of the Noise at Work Regulations [2005] which had at their heart, not an intention to protect against "acoustic shock", but to remove the risk of high frequency loss occurring – which commonly presents only after several years unprotected exposure to high intensity noise.

No distinction has been made in this case between noise being the product of musical endeavours and where it presents more commonly – as an unwanted by-product of an industrial process.

Fixed costs for NIHL claim settled outside Portal

Williams v The Secretary of State for Business, Energy & Industrial Strategy [2018] EWCA Civ 852

The Court of Appeal had to determine the appropriate costs order to be made when a claimant had brought a claim outside of the EL/PL Claims Portal. The claimant brought a claim for noise-induced hearing loss (NIHL) against two former employers. He subsequently dropped the claim against one of the defendants following its response to his Letter of Claim. The claim continued against the sole remaining defendant and was settled by way of a Part 36 offer made by the defendant before the commencement of proceedings. A NIHL claim valued at under £25,000 is usually dealt with in the claims portal under the Pre-Action Protocol for Low Value Personal Injury (Employer's Liability and Public Liability) Claims ("the Protocol"). However, claims against multiple defendants are exempt from the Protocol.

On the issue of costs, the defendant contended that the claimant should be limited to the costs he would have received if he had brought his claim under the Protocol. Under the fixed costs regime, the claimant would have been restricted to fixed costs and disbursements totalling £1,970 rather than the costs of close to £5,000 which he now claimed. The defendant submitted that the claimant should have realised that his claim against the other defendant was weak from the outset and that he had been unreasonable in failing to follow the Protocol against the one remaining defendant. The defendant asked the court to restrict the claimant to fixed costs using the discretion in CPR 45.24(2)(c) which allows a court to order fixed costs where a claimant has judgment awarded in their favour but has failed to follow the correct Protocol. Alternatively, the defendant submitted that the court also had discretion to make the order under the conduct provisions of CPR 44 which allow the court to penalise a successful claimant by way of costs if they have acted unreasonably.

The Court of Appeal held that the claimant should be limited to fixed costs and disbursements as under the Protocol. While CPR 45.24 did not apply to the present case as there had been no Part 7 proceedings or judgment, the court did have discretion to make the order by way of CPR 44. The claimant had unreasonably failed to start the claim under the Protocol and had incurred a higher level of costs as a result.

Solicitors who were bypassed during settlement entitled to costs

Gavin Edmondson Solicitors Ltd v Haven Insurance Co Ltd [2018] UKSC 21

The Supreme Court has handed down judgment in a case concerning claimant solicitors' entitlement to costs for claims which were settled directly between claimants and an insurer. Haven Insurance settled three road traffic accident claims directly with claimants after being notified that the claims had entered the Ministry of Justice Claims Portal. Gavin Edmondson Solicitors were acting under Conditional Fee Agreements which the claimant then cancelled following settlement. The firm therefore did not receive its fixed costs. Haven argued that the right to settle is a personal freedom and that the firm had left itself vulnerable through the wording of its funding arrangements.

The Supreme Court unanimously dismissed Haven's appeal and held that Gavin Edmondson Solicitors was entitled to its costs. Lord Briggs, giving the sole judgment, stated that the protocol was designed to fix costs and provide security for the solicitors' charges. Haven had become aware of the claims through their entry to the Portal and had acquired the claimant's details. While the claimants had no personal liability to pay the solicitors' fees, Haven had been on notice of the firm's interest and equitable intervention required the insurer to pay the fees.

Settlement in asbestosis claim made decades out of time

The claimant, Mr. R, died in February 2017. He alleged that he had been exposed to asbestos while working at Hams Hall Power Station in Warwickshire. Mr. R had started work at the power station in 1941 at the age of 14 and worked there for most of his working life. Mr. R was first diagnosed with an asbestos-related lung condition more than 40 years ago and was diagnosed with asbestosis more than 30 years ago. In 2016, doctors told him that they believed that he had developed mesothelioma, but Mr. R was not well enough to undergo a biopsy. He then instructed solicitors to bring a claim against his former employer. His claim was therefore out of time and required the court to exercise its s.33 discretion to dis-apply limitation and allow the claim to proceed.

A post mortem concluded that, while there was no evidence of mesothelioma, there was clear evidence of asbestosis and the presence of asbestos fibres. Mr. R's solicitors concluded that the claim was worth around £98,000. The claim was eventually settled for £57,000 with the reduction allowing for the possibility that the court could have refused to exercise its s.33 discretion to allow the claim to proceed.

On the horizon

Scottish consultation on recovery of NHS costs for industrial disease

Stuart McMillan, MSP has lodged a consultation ("the consultation") on the proposed recovery of medical costs from the compensator in industrial disease cases. The Proposed Recovery of Medical Costs for Industrial Disease (Scotland) Bill ("the Bill") is intended to follow the consultation. The consultation seeks views on the proposed Bill which would impose an obligation on the negligent party to pay the NHS treatment costs for the injured party, similar to road traffic accident claims.

It is proposed that the Compensation Recovery Unit ("CRU") would administer the scheme if implemented. Stuart McMillan has brought forward the consultation for a number of reasons, to include his belief that a financial penalty on negligent employers who cause industrial diseases may be a sufficient incentive to improve health and safety practices and reduce the incidence of industrial disease. The proposed Bill (not currently drafted) will include a list of industrial diseases captured by the proposals, to include asbestos related conditions and industrial diseases. Only diseases developed after the commencement date of the proposed Bill would be captured by the legislation. The consultation closes on 22 June 2018.

Drug reduces size of lung cancer tumours

A new study has published promising results which show major tumour responses to pre-surgery doses of a cancer-blocking immunotherapy drug. Nivolumab, also know as Opdivo, is designed to stimulate anti-tumour immunity in patients with non-small cell lung cancer (NSCLC). As part of the study, conducted by the research team at the johns-Hopkins Bloomberg-Kimmel Institute for Cancer Immunotherapy and published in the New England Journal of Medicine, 20 patients received two doses of nivolumab prior to surgery. A major pathologic response was seen in 45 per cent of cases. Of the 20 patients who received two doses, 16 were alive and recurrence-free at a follow-up appointment. One patient died of an unrelated injury and three patients experienced tumour relapse; two of which received further treatment and have since been recurrence-free. Relapse rates among patients with NSCLC have historically been around 50 per cent. Follow-up clinical studies are now planned to investigate the potential benefits for a larger number of patients.

Hearing aids could reduce risk of dementia

Hearing aids could slow cognitive decline and reduce the risk of dementia, according to a recent study published in the Journal of the American Geriatrics Society. The study, led by Asri Maharani Ph.D. of the University of Manchester, examined the effects of wearing a hearing aid on the cognitive function of over 2,000 adults aged over 50. The data was taken from the Health and Retirement Study which measured

cognitive performance every two years between 1996 and 2014. Overall, participants' episodic memory scores declined more slowly after they started to use hearing aids. The study authors concluded that "Providing hearing aids or other rehabilitative services for hearing impairment much earlier in the course of hearing impairment may stem the worldwide rise of dementia". These latest results add further evidence to the suggestion of a possible link between hearing loss and dementia.

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

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