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UK Employers' Liability Policy "Trigger" Litigation

Richard Hopley, Partner

The decision

On 21 November, Mr. Justice Burton handed down his long-awaited decision in the six test cases comprising the Employers' Liability Policy 'Trigger' Litigation[1]. The court was considering how employers' liability (EL) policies should respond to the claims of the victims of mesothelioma. In a judgment that has far-reaching consequences, the judge ruled that all EL policies, however they are worded, are triggered by exposure to asbestos and not when, many years later, the tumour develops (the date of the tumour). In other words, it is in every case the insurers whose policies are in force at the time the employees inhaled the asbestos fibres who must indemnify the employers. The ruling has upheld decades of market practice and has avoided a situation where many of the victims of mesothelioma (and their dependants) would have been unable to recover compensation.

EL insurance – the two forms

EL policies have for decades been issued on two slightly different forms of wording. These are:

- *caused* wording – expressed to indemnify the policyholder in respect of injury or disease caused during the policy period
- *sustained* wording – expressed to indemnify in respect of injury sustained or disease contracted during the policy period.

Until 2006, the insurance market and policyholders (and, it seems, those drafting the legislation that has governed EL insurance) had assumed that all EL cover – whether it contained 'caused' or 'sustained' wording – responded on an 'exposure basis'. Under this approach, the policy or policies in force at the time the employees were negligently exposed to asbestos indemnified the employers' liability, no matter which asbestos-related disease had been contracted by the employee. Indeed, the evidence was that before 2006, no claim had ever been made on any EL policy on anything other than this 'exposure' (date of inhalation) basis. It appeared that, with the exception of a few minor internal discussions, no insurer had contemplated, still less taken the position, that policies with 'sustained' wording might operate in a different way from those with 'caused' wording.

Bolton decision

The practice of the EL market was called into question by the Court of Appeal's decision in *Bolton MBC v Municipal Mutual Insurance*[2]. The *Bolton* case concerned public liability (PL) insurance. The Court of Appeal considered which of two PL insurers should indemnify Bolton MBC in respect of a mesothelioma claim. Both PL policies were expressed to indemnify in respect of injury *occurring* during the policy period. The court ruled, interpreting the medical evidence, that injury (the mesothelioma) did not occur during the inhalation of fibres (exposure), but *at the earliest* ten years before the disease manifested itself. As the same insurer was on risk throughout the period when it could be said that the mesothelioma occurred, the court did not have to identify a date or a particular policy year.

A number of EL insurers, influenced and/or forced to a greater or lesser degree by their reinsurers, took the position that 'sustained' wording in an EL policy should be construed to mean the same as the (typical) 'occurrence' wording in a PL policy. The EL trigger test cases were selected to resolve this important market issue.

Mesothelioma

Mesothelioma is a malignant tumour, typically affecting the pleura, the wall of the lung. To all intents and purposes, the only cause of this disease is inhalation of asbestos fibres (with blue asbestos being the most toxic). By 2003, there had been about 7,000 deaths from mesothelioma in the UK. It is estimated that 60,000 people will die from it in the future. The period between exposure and 'diagnosability' (the point at which the symptoms manifest themselves) is 40 to 50 years. It is almost invariably fatal, with an average of only 14 months between 'diagnosability' and death. Exposure to asbestos was at its highest level in the UK in the 1960s. While exposure receded sharply until the middle of the 1970s (as industrial use dwindled), people continue to be exposed in the UK even today, largely as a result of the presence of asbestos in buildings. In view of this exposure profile, deaths from mesothelioma are likely to peak in 2011 to 2015, but will continue for decades thereafter.

Historically, almost all asbestos exposure was in the workplace and consequently the vast majority (97%) of mesothelioma claims are indemnified by EL insurance. The future cost of these claims must on any sensible view be more than £10billion and could easily reach double that figure.

Judge's conclusion and reasoning

The judge decided that EL policies with 'sustained' and/or 'contracted' wording should be construed to have the same meaning as EL policies with 'caused' wording:

> "*I conclude, in relation to the policies in issue before me, that they respond, just as would policies with caused wording, to claims against insurers where employers are liable on the basis of inhalation by employees during the policy period. They respond, consistently with other EL policies, in respect of mesothelioma claims, on an 'exposure' basis. For the purposes of these policies, injury is sustained when it is caused and disease is contracted when it is caused, and the policies fall to be so construed.*"

The result is that all EL policies are triggered by exposure/date of inhalation and not by the development of the disease (date of tumour). The judge observed that for decades EL insurers had treated the terms as interchangeable. The court considered the question of ex-employees to be the central dispute. A mesothelioma is likely to manifest itself long after a person has left the employment during which the culpable exposure took place. The judge concluded that the only way in which to construe the 'sustained'/'contracted' wordings so as to provide cover for the claims of such ex-employees (which both sides conceded were intended to be covered) was to decide that 'sustained'/'contracted' meant 'caused'.

The court decided that its construction was consistent with:

- the factual matrix – in essence, the background knowledge available to the parties at the time of the contract which would have affected a reasonable person's understanding of the contract language
- the commercial purpose of EL insurance
- the public policy that underlay the various legislation that has over the years governed EL cover – in essence, that employees should be able to look to insured employers; and that an employee injured as a result of tortious exposure is covered, irrespective of what may happen afterwards – what the judge called "once and for all insurance of the employee"

The judge noted that the approach reflected in his construction had historically been followed as a matter of market practice (although this did not amount to a 'usage' so as to be legally binding) and that, operating contracts in this way, the EL insurers had, without apparent difficulty, paid claims on this basis for 50 years.

Effect on PL insurance

It was common ground that PL insurance has a quite different history and origin from EL insurance. An essential difference is that, unlike EL cover, PL policies do not operate in the context of an employment relationship, or indeed any long term relationship, between the claimant and the insured. The judge found that he was not bound by the *Bolton* judgment. In that case, the Court of Appeal was dealing exclusively with PL wordings: it had not considered EL wordings; nor had it addressed the factual matrix and other aspects relevant to EL cover.

When injury is sustained

The judge ruled that mesothelioma victims do not have mesothelioma nor any form of injury at the date of inhalation. The court's construction of the EL wordings had made this point irrelevant. Acknowledging, however, that his ruling might be overturned on appeal (and that a higher court might construe "sustained" wording as meaning *injury in fact*), the judge felt obliged to decide when, in the case of a mesothelioma victim, injury was sustained. In this context, the judge regarded *sustaining* as synonymous with *occurring* (the term typically found in a PL policy). The judge found, on the basis of medical evidence not available to the Court of Appeal in *Bolton*, that the 'starting point' (ie the date when injury/disease 'takes place') is five years prior to diagnosability. This ruling will, it is assumed, affect mesothelioma claims made on PL policies.

Comment

The judge observed that:

> "*…there is no doubt that the courts have particularly strained to do justice in mesothelioma claims, where those who have suffered what is accepted to be a particularly nasty death have faced the prospect of no, or inadequate, compensation, either for themselves or their dependants…*"

The judgment contains a comprehensive review of what was called 'almost

a special mesothelioma jurisprudence', notably the House of Lords' decisions in *Fairchild v Glenhaven Funeral Services*[3] and *Barker v Corus*[4], the Compensation Act 2006 (which restored joint and several liability, overturning *Barker*) and the 'fast track' procedure (set out in the Civil Procedure Rules) for mesothelioma claims. Burton J's decision is an addition to that body of jurisprudence.

The ruling has avoided what the judge called a 'black hole' for the victims of mesothelioma. By the time a mesothelioma victim develops a tumour, decades after exposure, he or she will almost inevitably have left the employment which caused the disease; and that employer is likely either to have gone out of business or, if still in existence, to have EL insurance that would not respond on a 'sustained' basis. This is a prospect that clearly troubled the court. No one has any real idea how many EL policies contain 'sustained' wording, not least because many wordings, especially policies issued in the 1940s to the 1970s, are missing. The evidence from the EL insurers before the court was that from the mid-1970s they had gradually changed their policies from 'sustained' to 'caused' wording. If that were the case across the market, that would create the worst circumstances for a 'back hole': no indemnity under a 'sustained' wording at the date of inhalation; and no indemnity under a 'caused' wording at the date of the tumour.

An appeal is by no means certain. From a legal perspective, a finding based upon a pure issue of contract construction is much less susceptible to an appeal than a pure finding of law. From a practical, insurance industry and indeed political perspective, there is no doubt that the judge's ruling is convenient – and, to some extent, a relief. It upholds a market practice that has worked for decades and will therefore be welcomed by most EL insurers (as well as, of course, claimants), who would be very reluctant to see mesothelioma victims left uncompensated. What is not clear is the extent to which reinsurers will influence the decision about an appeal. The trigger litigation has produced several years of uncertainty, which has hampered the compensation of victims. In the next few weeks it will become clear whether an appeal will extend that period of uncertainty.

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[1] [2008] EWHC (QB) [2692]
[2] [2006] 1 WLR 1492
[3] [2003] 1 AC 32
[4] [2006] 2 AC 572

Boston ma | Ft. Lauderdale fl | Hartford ct | Madison nj | New York ny | Providence ri | Stamford ct
Washington dc | West Palm Beach fl | Wilmington de | London uk | Hong Kong (associated office)

Richard Hopley, Partner +44.207.556.4532 rhopley@eapdlaw.com

Edwards Angell Palmer & Dodge

111 Huntington Avenue
Boston, MA 02199
Tel 617.239.0100
Fax 617.227.4420
eapdlaw.com