

General Liability Insurance After The EL Trigger Litigation.

What Is The Current State of Policy Attachment in Injury Cases?

On 28 March 2012, the UK Supreme Court handed down its eagerly anticipated judgment in *Durham v BAI*, otherwise known as the “EL Trigger Litigation”. Much has already been written about the decision itself. In this bulletin we look at the decision in its wider context of injury cases generally, and attempt to look into the future.

The facts are by now familiar: personal representatives of employees who contracted mesothelioma after being exposed to asbestos, sought compensation from their former employers. The dispute pitted the existing Employers’ Liability (EL) insurance market against the run off market, which deviated from the historic assumption that EL policies would be triggered by reference to the dates of exposure. The Supreme Court restored the traditional position and held that “*sustained*” and “*contracted*” is synonymous with “*caused*”, i.e. liability would attach under the EL policies at the date when the illness was caused, upon exposure to asbestos fibres, not the subsequent date on which the disease had manifested itself.

However, the Supreme Court did not interfere with the Public Liability (PL) trigger test, whereby attachment is determined by reference to the date of tangible injury (i.e. development of the tumour), and insurers are now left with two parallel tests for attachment of mesothelioma claims under EL and PL policies. But what are the far reaching implications of the judgment, and has the Supreme Court taken a policy driven decision which will open the floodgates to other categories of occupational disease loss? Below we consider the background to the litigation, the Supreme Court’s judgment and the potential ramifications for both the EL and PL market.

Liability In Mesothelioma Cases

Until the late 1990s, if an employee had been exposed to asbestos by more than one employer, liability would be apportioned between their employers (and insurers) by reference to the length of each period of employment and the degree of exposure. However, by the end of the 20th century, the medical profession had come to the view that the mutation of a cell into mesothelioma could be attributed to a single asbestos fibre. Consequently, not all negligent exposure would necessarily contribute to development of the disease, yet it was impossible to pinpoint which negligent exposure initiated the mesothelioma where multiple employers were involved. This could have left mesothelioma victims potentially without recourse from any former employer in circumstances where it was very likely one of them had caused the illness.

As a result, the House of Lords in *Fairchild v Glenhaven Funeral Services* [2002], established a “*special rule*” for mesothelioma cases, whereby all persons who “*materially contributed to the risk of contracting mesothelioma*” will be held liable to the victim. A second House of Lords case, *Barker v Corus* [2006], modified this rule so that employers would only be liable for their proportion of the damage suffered, by reference to the period of employment. This was unsatisfactory as it left victims partially indem-

nified or in some cases without recourse, if an employer (and their insurer) had since been dissolved. Consequently, the Compensation Act 2006 clarified that any person who had materially increased the risk of contracting the disease would be held jointly and severally liable, allowing claimants to seek all of their compensation from one party (who would then have to seek a contribution from other former employers it could trace).

The decision in *Fairchild* and the subsequent Compensation Act 2006 apply to PL exposures as well as EL exposures, and so the same rule for attributing liability in mesothelioma cases now applies to both.

2006 – The PL Trigger Litigation (*Bolton*)

Prior to 2006, there had been an assumption in the market that, due to their similar wording structures, both EL and PL policies were triggered on an exposure basis. Consequently, insurers had paid out on this basis and apportionment was dealt with accordingly. *Bolton Borough Council v Municipal Mutual Insurance Ltd* [2006] 1 WLR 1492 concerned PL policies which contained the following language:

“...[the Insurer] agrees to indemnify the insured in respect of all sums which the insured shall become legally liable to pay as compensation arising out of... *bodily injury*

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or illness... to any person... when such injury, illness... occurs during the currency of the policy"

Two insurers disputed coverage under their PL policies and debated whether attachment should be determined by reference to the date of exposure, or at angiogenesis, the point at which the tumour develops its own blood supply (some 20 years later). The Court of Appeal held that the victim suffered no tangible injury at exposure and, therefore, the action only accrued at malignancy. Consequently, the insurers with an "injury occurring" wording who were on risk at the time of development of the tumour (some 20 years after exposure) would be liable.

The net result of this decision was that medical evidence would determine the attachment date for PL "injury occurring" wordings, focusing on the date of angiogenesis made the attachment to multiple policy periods unlikely. Further, attachment would be likely to be many years after exposure.

The EL Trigger Litigation - The Debate

Interpretation of "Sustained" and "Contracted"

Following *Bolton*, four (in run-off) EL insurers started to decline mesothelioma claims on the basis that "injury sustained" or "injury sustained or disease contracted" should signify the date on which angiogenesis occurred, and not the date of exposure. The EL policies involved contained various language, including:

- "... if at any time during the period of the indemnity... any person... shall sustain personal injury by accident or disease"
- "if any person... shall sustain any per-

sonal injury by accident or disease caused during the period of insurance"

- "bodily injury or disease... suffered by any person... when such injury or disease arises out of and in the course of employment... and is sustained or contracted during the currency of this Policy"

On the basis that the victim did not sustain an actionable injury at exposure, they argued that liability would only attach if the mesothelioma developed as a disease during the relevant policy period. However, consistent with the pre-*Bolton* position, the former employees/ employers contended that the EL insurers would be on risk if the exposure to asbestos took place during the relevant period of insurance.

The meaning of "sustained" was particularly troublesome, but the Supreme Court agreed with the High Court that "sustained" or "contracted" wordings in EL policies referred to "exposure", as this begins the process leading to contraction of mesothelioma and, ultimately, death. Therefore, insurers who were on risk at the time of exposure would be liable. The court considered that "the negligent exposure of an employee to asbestos during the policy (insurance) period has a sufficient causal link with subsequently arising mesothelioma to trigger the insurer's obligation".

The court was influenced in its interpretation of the word "sustained" by the provisions of the Employers' Liability (Compulsory Insurance) Act 1969 (EL-CIA) which requires that an employer must insure "against liability for bodily injury or disease sustained by his employees, and arising out of and in the course of their employment". The court held that the legislation required insurance on a causation (exposure) basis because

each year an employer had to take out EL insurance for its workforce at that time. Moreover, the premium paid by the employers was rated by reference to their existing activities the number of employees and their wages during the relevant policy period.

As a result the court found that the language required the course of employment to be contemporaneous with the sustaining of the injury. The court found that as a matter of common sense, "sustained" could not require exposure and the manifestation of a tumour during the same period, as this would restrict the amount of coverage to a very limited class of claimants (given that mesothelioma can take decades to develop). Whilst the words used were by no means perfect and the analysis was strained, the court felt that a literal interpretation of the words would not do justice to the context of the cover procured. Consequently, the court deferred to an analysis of the "policy as a whole" and the commercial intent behind it.

Causation - Application of *Fairchild* "Special Rule"

The *Fairchild* "special rule" allowed claimants to recover against any employer that had negligently exposed a claimant to asbestos dust, regardless of any proof that that employer had caused any damage. It was therefore argued by the run-off insurers that, logically, if there was no damage during the exposure period the insurance could not respond. Although the Supreme Court accepted that liability policies do not insure the risks of physical injury or disease but only actual injury or disease, it recognised that if the underlying liability was not back-to-back with the EL policy(ies), there would be a disconnect between the employers' liability and the cover taken out to insure against it. Therefore, provided the claimant can es-

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establish that the employer “*materially contributed to the risk*” of mesothelioma during the policy period, the EL Policy should respond. In this way, the court aligned the coverage with the *Fairchild* “*special rule*”, although this was not a unanimous finding (Lord Phillips dissenting).

Distinguishing *Bolton*

Although it was anticipated that the Supreme Court would overturn *Bolton*, it sought to distinguish the cover provided under EL and PL policies. It differentiated the duties of care between an employer and an employee in an EL scenario to that of an insured to a third party in a PL claim. The court held that the considerations relevant to EL policies are not “*necessarily applicable*” in a PL context, and the two types of cover operate differently, owing to “*their different backgrounds, terms and purposes*”. Certainly not all of the considerations the court thought relevant to its decision as to EL insurance would apply in a PL context (for instance the application of the EL-CIA). Consequently, until the Supreme Court reviews the trigger position under PL policies, *Bolton* remains good law.

The Aftermath

Stepping back, there are some far reaching consequences and unanswered questions.

Apportionment Between Insurers

The High Court in *Phillips v Gunner* [2003] EWHC 1084 (QB) held that if an employer is held liable to an employee for materially increasing the risk of mesothelioma, an EL insurer that was on risk for any part of the employee’s exposure period with that employer will be bound to indemnify the employer for the full liability, with no apportionment for the part the insurer was not on risk. There were particular facts of that case

which may have contributed to that outcome, and the question of whether the insurer could have claimed a contribution from the insurers on risk for other periods of exposure, was not addressed. The court considered that principles of double insurance could not be applied between successive policy periods, and nor could an apparent insurer to insurer arrangement regarding apportionment on an exposure basis, be imposed on the insurer/ insured relationship. This is obviously an area of law ripe for further debate, particularly now that the basis of attachment for mesothelioma claims under both EL and PL has been clarified.

Currently, a mesothelioma victim may claim all of his loss from any employer during his working life that materially increased the risk of him contracting mesothelioma, and in turn, that employer can claim from any of its insurers on risk during the period of employment. The ultimate effect is that an insurer that wrote one policy year of one employer may be liable for all the loss caused during multiple years of exposure by multiple employers. It would be understandable if an insurer (or even reinsurer) contested the fairness of such an outcome either by challenging or distinguishing Phillips, or seeking a contribution from other insurers.

Other Occupational Diseases?

It is important to note that the special rule in *Fairchild* is only to be applied to mesothelioma cases, due to the unique aetiology of mesothelioma. However, it seems likely that the courts would adopt a similar test of causation for other “*indivisible*” illnesses such as lung cancer, where it is impossible to pin point which employer exposed the employee to the occupational hazard that actually caused the illness. It would not be applied to diseases whose development and

severity relate directly to the length of time the victim was exposed. Chronic illnesses such as pneumoconiosis and silicosis would be in this category. The courts would be more likely to apportion liability based on periods of exposure to the occupational hazard concerned. Therefore, the position regarding apportionment between insurers would be more straightforward.

In terms of insurance attachment, the courts will be bound by *Durham* and *Bolton* in all future mesothelioma cases, and potentially other cases involving indivisible illnesses. However, in subsequent cases involving diseases whose development/ severity are dependent on the length of time the victim was exposed, such as the chronic diseases mentioned above, it is probable *Durham* will be applied to EL wordings, given attachment is on an exposure basis. This would be consistent with the underlying liability. However, there are likely to be objections to applying *Bolton* to PL wordings, given the difficulty in pinpointing a precise date of injury for such diseases for which the symptoms worsen gradually the longer the victim is exposed. This could lead to a restriction of the application of *Bolton* to PL for indivisible illnesses only.

CGL Policies

Many modern CGL policies contain specific clauses that assist in determining when the injury occurred (“*manifestation clauses*”) and attach on that basis. Where policies do not contain such clauses, the attachment of mesothelioma claims will be on the two different bases outlined in *Durham* and *Bolton*. This could get particularly complicated where insurers face claims under both the EL and PL sections of the policy (i.e. direct employer claims and third party liability claims) arising from the same circum-

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stances, or where, due to the nature of the allegations, it is unclear which section of the policy has been triggered by the claims. Such a situation could arise following the Court of Appeal’s recent decision in *Chandler v Cape PLC*, which confirmed that it will be possible for employees of subsidiary companies to “pierce the corporate veil” and recover from parent companies, where it can be established that the parent had sufficient influence over health and safety policy of subsidiaries. It is open to debate whether such claims could be EL or PL in nature.

In such cases it is conceivable that insurers could face claims against the same insured group of companies for the same period of exposure, but until the nature of the insured’s liability is determined, they would have to deal with those claims on alternate EL and PL trigger bases over multiple periods of account.

Is it Possible to Contract Out of the EL Trigger Attachment?

On Lord Mance’s assessment, the ELCIA requires EL insurance to be procured on a causation, i.e. exposure basis. On that interpretation, all EL policies placed since its enactment in 1972 will operate on that basis, and if insurers in-

clude manifestation clauses which specify the date for attachment on another basis, they would be in breach of the legislation. This is no doubt something the market and parliament will have to consider in due course. Of course, this rule would not apply in jurisdictions which are not subject to the ELCIA (e.g. the Channel Islands, other Commonwealth countries). There should be no objection to the use of manifestation clauses in the PL context.

At the end of the day, the court decided that the risks to claimants of facing uninsured non-existent employers by attaching EL policies on the date of tangible injury basis (under *Bolton*) were greater than the risks of there being no past insurer who can pick up the loss on an exposure basis. The rule in *Phillips v Gunner* had reduced the latter risk considerably. However, if companies were required to pay for EL run-off cover, there would be less objection to EL policies attaching on the date of tangible injury, or manifestation basis. Given the decision in *Durham*, what seems more likely now is that in the future *Bolton* will be overturned and PL policies will return to attachment on an exposure basis, aligning them with the EL basis.

Conclusions

- EL policies from 1972 onwards respond on a causation basis and subsequent risks must be written accordingly (unless outside Great Britain).
- EL policies with “sustained”, “caused” and “contracted” language respond to mesothelioma claims on an exposure basis.
- *Bolton* test of “injury” at development of tumour still applies to PL policies, but may be restricted to mesothelioma and lung cancer cases only.
- Two different tests for attachment of mesothelioma claims will apply under EL and PL sections of CGL policies, but which will actually apply?
- Insureds found liable for years of negligent exposure are able to claim the whole loss under just one policy year, potentially compounding the effects of *Durham* for EL insurers. Expect further debate about double insurance/contribution between insurers on concurrent years.
- Care needs to be maintained to ensure EL policies continue to comply with the ELCIA.

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