

EL TRIGGER IN THE SUPREME COURT:

WHAT HAPPENED AND WHAT'S NEXT?

1. The Supreme Court's decision in the *EL Trigger* test cases (*BAI (Run Off) v Durham* [2012]UKSC14) reinstates the practice of employers' liability ("EL") insurers indemnifying mesothelioma claims on the basis that it is the wrongful exposure of employees to asbestos during the period of insurance which triggers the insurer's liability, and not the later occurrence of an "injury".
2. The decision has been welcomed for its clarity and, to an extent, it is back to "business as usual" for claims handlers and litigators. However, the litigation also provides an indication of where future disputes are likely to arise in the handling employers' and public liability claims. It also provides a valuable insight into the approach of the Courts to policy construction more generally.

THE ISSUE FOR THE SUPREME COURT

3. Most EL policies issued since 1948 provide cover against liabilities for injuries sustained by employees which are "caused" during the period of insurance. However, a significant proportion of EL policies, particularly in the period up to the 1980s, did not include an express causation trigger. Various different EL policy wordings were considered by the Supreme Court, but the policies were generally expressed to provide an indemnity if:
 - (i) injury or disease was "sustained" during the policy period; or (in some forms)
 - (ii) a disease was "contracted" during the policy period.

4. In most cases, an injury or disease is sustained or contracted at the same time as it is caused. However, advances in medical science have established that in the case of diseases such as mesothelioma, exposure to the substance that causes the disease creates a risk of injury. That risk may develop into a disease many years or decades after exposure. However, it may not. In such cases it can be argued with some force that no injury is “sustained” (or no disease is “contracted”) until the risk is realised and a disease develops.
5. This line of argument was considered by the Court of Appeal in the context of public liability policies expressed to provide an indemnity in respect of “injuries occurring” during the policy period: *Bolton v MMI* [2006] EWCA Civ 50. The Court of Appeal held that in the case of mesothelioma claims “injury” did not occur until long after exposure. The Court did not decide precisely when injury did occur, though at the time the public liability market operated on the basis of a “10 year rule”, namely that injury occurred approximately 10 years before it was diagnosable.
6. The decision in *Bolton v MMI* provided the impetus for MMI (and a number of other insurers no longer writing business – Builders Accident, Excess and Independent) to apply the same line of argument to EL policies expressed to provide an indemnity if injury was “sustained” or if disease was “contracted” during the policy period. Indemnities for mesothelioma claims were declined on this basis and the *EL Trigger* litigation was born. Some insurers extended the denial of liability to indemnify to other latent diseases such as asbestosis.
7. We refer those seeking to establish coverage as the “claimants” as those denying it as “defendants”.

1. HOW AND WHY THE CLAIMANTS WON

8. The Supreme Court considered two main issues – one of construction and one of causation. A third issue - whether the *Employers' Liability (Compulsory Insurance) Act 1969* requires EL policies to respond on a causation basis - was also considered.

The issue of construction

9. The Supreme Court held that inhalation of asbestos was not an injury. However, the Court held that the words construed in context meant that an injury was **sustained** when it was **caused** during the policy period. The decision is a reminder of the potential power of context and commercial purpose to modify the effect of words used in a contract.
10. Lord Mance gave the leading judgment. The rest of the Court agreed with his judgment on the issue of construction. He accepted the claimants' submission that the courts should "*avoid over-concentration on the meaning of single words and phrases viewed in isolation and look at the insurance contracts more broadly*" to find that the EL policies responded on a causation basis (i.e. if there was culpable exposure during the policy period).
11. Lord Mance justified his conclusion by reference to five features of the policies:
 - (1) they required injury be sustained (or disease to be contracted) during a period of employment;
 - (2) there was a very close link between the number of employees employed during each period of insurance and the level of premium payable. This suggested that the insurer's risk was undertaken in respect of activities occurring during that period;

- (3) there was a potential gap in cover if an employee was exposed to a substance in year one, but by the time the effects became manifest he was no longer employed by the policyholder (the “black hole” argument);
- (4) as a result employers would be vulnerable to any decision by insurers not to renew following discovery of past instances of negligent exposure;
- (5) in some cases the policies contained territorial exclusions which excluded employees who were working abroad when their injuries were “sustained” or “contracted”, creating another potential gap in cover.

12. Lord Mance acknowledged that at the time the policies were written they would have worked perfectly well for 99% of claims, whichever construction was adopted. However, “long tail” diseases were known to have delayed effects long before 1948, when the earliest of the policies in question were taken out. It followed that the parties would have known of the risk of gaps in cover being created in 1% of long tail claims. This could not be dismissed as insignificant. Business common sense suggested that the parties would not have intended to create a gap in cover. Applying the Supreme Court’s decision in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 the interpretation which was most consistent with business common sense was therefore to be preferred.

13. Lord Mance concluded: '*The natural inference to draw from the references to being engaged in the employer's service and in work forming part of the employer's business is that it was envisaged that the accident or disease would and should arise out of such service and work, rather than merely occurring during it*'. This supported his conclusion that the policies responded to injuries caused during the policy period.

Causation Issue

14. The majority (Lord Phillips dissenting) rejected an argument that the policies did not respond to liabilities for increasing the **risk** of injury of the kind explained in *Barker v Corus UK* [2006] UKHL 20. To overcome this argument, *Barker* was reinterpreted as a relaxation of the requirement to prove causation in tort, which the Court found was sufficient causation for the purpose of policy response.
15. Resolution of this issue gave rise to judicial gymnastics of Olympian proportions, the need for which arose because of the way the “special rule” for imposing liability for mesothelioma had been explained by the House of Lords in *Barker v Corus UK*. The special rule was originally formulated by the Courts because it is impossible to prove whether mesothelioma is caused by any particular exposure to asbestos.
16. For those with a limited interest in the intricacies of judicial reasoning the answer is simple: negligent exposure to significant quantities of asbestos will be held to have caused mesothelioma for the purposes of liability policies (for the foreseeable future at least).
17. Those with the necessary appetite can read on. The majority of the judgments in *Barker* had held that the liability for mesothelioma developed in *Fairchild v Glenhaven Funeral Services* [2002] UKHL 22 was a liability for materially increasing the risk of mesothelioma and not a liability for causing the disease. This provided the rationale for apportioning liability according to the share of the risk (roughly equating to the share of the total period of exposure) for which each wrongdoer was liable. The decision in *Barker* limited each wrongdoer’s liability to the extent of its contribution to the risk of mesothelioma.

18. This apportioning effect of *Barker* was overridden by the Compensation Act 2006, which made all defendants jointly and severally liable for mesothelioma claims. However, the judgments of the Supreme Court in *Sienkiewicz v Greif (UK) Ltd* [2011] UKSC 10 suggested that the rationale for imposing liability explained in *Barker* was unaffected by the 2006 Act.
19. In *EL Trigger*, the Supreme Court (largely of its own motion, since the defendants were reluctant to press the argument) considered whether the effect of *Barker* was that the claimants' cases failed, even if the construction issue was decided in their favour. The argument was that the EL policies responded to injuries which the insured could prove were caused by exposure during the policy period. The policies did not respond to liabilities for increasing the risk of injury of the kind explained in *Barker*.
20. Such an argument had far reaching implications, since it undermined the basis of policy coverage for mesothelioma claims of all EL and PL policies, including those EL policies with the more common "causation" trigger.
21. The majority of the Court (Lords Mance, Kerr, Clarke and Dyson) found in the claimants' favour. Lord Mance held that it was "*over simple*" to regard the special rule as imposing liability for the creation of the risk of mesothelioma. The risk of injury "*is no more than an element or condition necessary to establish liability for the mesothelioma*". The special rule is properly viewed as a relaxation of the rule of causation, allowing the court to accept a "*weak or broad view of the causal requirements*" of the law of tort. This was "*sufficient for it to be said that the mesothelioma was 'the result' of each (and every) exposure*" (per Lord Mance). In effect, the special rule deemed there to be causation for the purpose of the law of tort. This was directly contrary to the analysis of the majority in *Barker*.

22. The majority in *EL Trigger* went on to find that the same rule of causation applied to the EL policies. Lord Mance held that “*The intention under the present insurances must be taken to have been that they would respond to whatever liability the insured employers might be held to incur within the scope of the risks insured and within the period in respect of which they were insured.*” Lord Mance approved dicta of Eady J in *Phillips v Syndicate 992 Gunner* [2003] EWHC 1084, to the effect that insurers must accept that they take the risk of the common law developing in a manner which increases employers’ liability beyond the limits understood at the time the policies were made. The message is clear – in the absence of very clear wording to the contrary the Courts will strive to ensure that employers’ liability insurance provided back-to-back cover against the employers’ liabilities. The same may be true of the reinsurance of employers’ liability risks’
23. Lord Phillips, the retiring president of the Supreme Court, disagreed with the majority. He said that it was wrong in principle for the Court to depart from the reasoning of the majority in *Barker* for the sole purpose of imposing liability on EL insurers. In view of the reasoning in *Barker* he held that the special rule could not be applied to contracts of insurance. In his view, the remedy lay in the hands of Parliament and not the Courts.

Employers' Liability (Compulsory Insurance) Act 1969

24. Lord Mance (with whom Lord Kerr agreed) held that the protective purpose of the Employers' Liability (Compulsory Insurance) Act 1969 ("ELCIA 1969") requires employers' liability insurance to be on a causation basis. This applies to all EL policies in effect since the ELICIA1969 came into force (1 January 1972). It is not beyond doubt from the judgments whether the rest of the court agreed in relation to this requirement of the ELICIA1969 (which is a question of statutory interpretation and not contractual construction), but Lord Mance's judgment on this issue reflect views intimated by most of the Supreme Court during the hearing of the oral argument.

2. THE IMPACT ON EL POLICIES

Business as usual ?

25. The effect of the decision is to reinstate the previous market practice of paying mesothelioma claims on the basis that EL policies respond to the culpable exposure of an employee to asbestos during the period of insurance.

Accordingly:

- (1) an EL Policy with no relevant exclusions will generally be expected to respond to liabilities for mesothelioma provided the culpable exposure during the policy period was “*not insignificant*” (i.e. not *de minimis* when compared to the overall exposure of the victim: *Sienkiewicz v Greif (UK) Ltd*). In practice, truly *de minimis* exposure is not likely to give rise to liability on the part of the employer: *Williams v University of Birmingham* [2011] EWCA Civ 1242;
- (2) contributions can be sought from other parties responsible for culpable exposure and, as between insurers, from other insurers (on the basis of there being double insurance – as to which see *Cooke J Energy Group Limited v Zurich Insurance PLC UK* [2012] EWHC 69, paragraph 37). A single rule of causation applies to the employers’ liabilities and to EL insurers’ liabilities. Contribution according to the period of exposure will remain the touchstone for contributions between wrongdoers (as provided by s.3(4) of the Compensation Act 2006), subject to evidence establishing that exposure was more or less intense during a particular period.

(3) A single period of unexhausted cover is sufficient to trigger an EL insurer's liability for the whole claim. As a result, the respective contributions of insurers may not depend on time on risk.

Depending on the application of principles of equitable contribution or, possibly, section 2(1) Civil Liability (Contribution) Act 1978, it may be that the division should be according to the number of solvent/paying insurers liable for the claim.

26. A backlog of claims has built up over a period of over 6 years. One consequence of this is that the Financial Services Compensation Scheme is predicting that it will raise its levy on insurers by 5% in 2012/13 to fund claims against insolvent EL insurers.

Limitation

27. Some policyholders or claimants awaiting the outcome of *EL Trigger* before pursuing EL insurers may be caught by the expiry of limitation. Unpaid indemnities in respect of liabilities ascertained more than 6 years ago will now be barred by limitation unless suitable standstill agreements are in place.

Apportionment for Partial Cover ?

28. An EL insurer will be liable to indemnify its insured in full for liability for a mesothelioma claim attributable to a period of exposure to asbestos during its policy period.

29. Does this apply to an employer liable for 20 years exposure but which has only 5 years of EL cover ? The application of the deemed causation principles applied by the Supreme Court suggest that it will – the policy provides cover for the claim and there is no exclusion to bite on the employer’s uninsured liabilities. Cooke J has recently rejected (obiter) Zurich’s attempt to rely on principles of equitable contribution in such a case: *International Energy Group Limited v Zurich Insurance PLC UK* [2012] EWHC 69. It is clear that adoption of a *Barker* style solution to such cases is now precluded.

Allocation to Policy Years

30. Since each culpable exposure gives rise to full liability on the part of both the employer and its insurers, difficult questions may remain as to the rights of the insured to allocate a claim to a particular policy year. The tendency for vintage EL policies to provide unlimited cover with no excess may render this academic in most cases for insurance purposes. However, allocation is of important for reinsurances triggered by aggregate excesses. In principle, an insurer will be exposed for the full value of claims provided there is a single period unexhausted cover. The dicta of Cooke J In *International Energy Group Limited v Zurich Insurance PLC UK* [2012] EWHC 69 provide support for the view that the insured (or reinsured) is entitled to allocate the claim to any period of cover in which the culpable exposure took place, subject to the policy/reinsurance wording in question.

Reinsurance

31. Reinsurers will now be in a position to assess and allocate claims presented to them and to consider how issues such as the exhaustion of excesses, limits and aggregation should be resolved in light of the underlying basis of employers' and EL insurers' liabilities. Reinsurers may play a part in determining whether contribution between insurers will revert to time on risk.
32. The decision is unlikely to affect the construction of reinsurance policies and treaties unless these follow the form of underlying EL policies. Reinsurance policies will be interpreted in the light of their own wording, commercial purpose and context. The factors relied upon by Mance LJ as determinative of the construction of EL policies are unlikely to have any direct relevance to reinsurance contracts with different triggers of the reinsurer's liability. However, clear wording will probably be required for reinsurance to be construed other than back-to-back with the underlying liabilities.

Compliance with the Employers' Liability (Compulsory Insurance) Act 1969

33. The safest course is to assume that the ELCIA 1969 requires causation wording, unless there is a very compelling reason to argue otherwise.
34. The Supreme Court found that the “sustained” and “contracted” forms of EL insurance respond on a causation basis. This form of insurance complies with the requirement of the ELCIA 1969.
35. However, if the ELCIA 1969 requires employers’ liability insurance to be on a causation basis (as Lords Mance and Kerr held), this may create a problem for employers with a period of historic or current “claims made” EL cover. Although such policies are relatively rare, they are sometimes encountered when captive insurers are used to provide EL insurance. Employers relying on “claims made” EL cover for any period of insurance since 1972 will need to review their policies with their brokers and legal advisers. It may be necessary to put retrospective EL cover in place, responding on a causation basis. Some ingenuity may be required to provide workable solutions (e.g. premium adjustment clauses and annual reinsurance to close policy years).

3. IMPACT ON LATENT DISEASE CLAIMS

Employers' Liability

36. The Court's conclusions as to coverage apply to employers' liability in relation to other long tail diseases such as asbestosis, as Lord Phillips emphasised. Both the employers' liabilities and the EL insurers' liabilities will turn on identical questions of causation, including any attempts to extend the application of the special rule of *Fairchild/Barker* to other diseases.

Public Liability

37. The Supreme Court did not overrule the decision in *Bolton v MMI* [2006] EWCA Civ 50, which remains good law for public liability policies in similar form (i.e. triggered by an "*injury occurring during the policy period*"). The decision in *Bolton* may yet be challenged using a similar approach. The semantic difference between '*occur*' and '*sustain*' is negligible. However, the context of PL policies may provide a weaker basis for modifying the effect of PL wordings. Whilst several of the contextual factors relied upon by Lord Mance apply equally in the PL context, he emphasised numerous connections between the cover provided and the employment activities during the EL policy period. The connections in PL policies are more limited.

38. Some PL policies may follow the form of EL insuring clauses more closely than those considered in *Bolton*. Some may be worded in explicit causation form. The latter will respond on a causation basis similar to EL policies. As a general rule, the potential for a PL policy to be construed as providing cover on a causation basis will be greater if the wording of the insuring clause is close to the wording used in EL policies. However, it does not follow from the decision in *EL Trigger* that a PL policy will respond on a causation basis merely because it is expressed to respond to an “*injury sustained*” or “*disease contracted*” during the policy period (though a “*disease contracted*” wording might provide a strong basis for such an argument).
39. For PL policies in comparable form to those considered in *Bolton* (as many will be), it will remain necessary to determine when the disease of mesothelioma first developed into an actionable injury. This is a question of fact and will depend on medical evidence adduced before the Court. However, the starting point is likely to be the “best guess” developed by Burton J – namely that actionable injury generally occurs around 5 years prior to the occurrence of diagnosable symptoms. Burton J’s findings as to the 5 year rule are not binding, but they will be of significant persuasive value.
40. It will be open to either party to call medical evidence to establish that the true date of occurrence was before or after the date suggested by the 5 year rule or to challenge the validity of relying on the 5 year rule at all. For practical purposes the 5 year rule is likely to operate as a default option, the burden of proof shifting, in effect, to the party alleging a different date of occurrence. Developments in medical research could undermine the basis for the rule.

41. The concept of the “occurrence” of injury and the application of the 5 year rule are liable to give rise to disputes. Burton J isolated “angiogenesis” (when the tumour establishes its own blood supply) as the relevant event. This may encourage arguments that injury “occurs” at a single point in time - taken to its logical conclusion, it can be argued from this that only one PL policy (in the form of the policies considered in *Bolton v MMI*) will respond to a mesothelioma claim, irrespective of the periods of exposure for which the insured is liable. This analysis would raise the stakes for PL claims. Even if this approach is not adopted, the uncertainty and further refinement of medical understanding may give rise to coverage arguments, particularly arguments turning on the burden of proof in relation to the policy years which should respond to PL claims.

4. APPLICATION OF PRINCIPLES OF CONTRACTUAL CONSTRUCTION - NEW LAW OR CLASSIC

APPLICATION OF EXISTING PRINCIPLES?

42. The Supreme Court's decision should not be regarded as heralding a new trend in contractual construction. It has always been the case that construing a policy term in isolation without regard to its wider context is liable to result in error. Lord Mance's judgment was an application of the approach of Lord Mustill in *Charter Re v Fagan* [1997] AC 313: construing the words of the policies '*in the context of the factual and commercial background of the transaction*'. Lord Hoffmann's longstanding entreaty that contracts must be construed in light of their "*factual matrix*" is to the same effect. It is notable that Lord Mance applied orthodox principles to rule that much of the evidence of industry practice adduced at trial was inadmissible for the purposes of construction.
43. However, the decision serves as a reminder of the power which context can yield to inform the construction of a policy term. There is no doubt that, viewed in isolation, the defendants' argument that no injury was sustained during the policy periods was compelling in light of the medical evidence before the Court. It was only by reference to the surrounding context provided by the policy terms, and by gaining an understanding of the commercial purpose and wider context of the policies, that the Court was able to modify the apparent effect of the words used in the insuring clauses.

44. The Court concluded that this was a case of ambiguity rather than a mistaken choice of words. This stretches the boundaries of what can legitimately be regarded as ambiguity when applying the decision in *Rainy Sky SA v Kookmin Bank*. Ambiguity was found by reference to surrounding context which revealed that the plain meaning of the words would have odd effects, rather than by reference to a truly ambiguous meaning of particular words. This might be termed “contextual ambiguity”.

45. However, the decision in *EL Trigger* is unlikely to unleash a Salem-like frenzy, with trial judges finding contextual ambiguity in every other policy term. The decision can be regarded as a case where “gut instinct” pointed strongly in favour of the Claimants’ case and context was found to justify that instinctive response. However, the varying (and contradictory) judgments of the nine judges reveal that the surrounding context needs to be extremely compelling before it can be relied upon to overcome the apparent effect of a policy term.

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