INSURANCE

EL Trigger: the aftermath

The implications of the EL Trigger decision go beyond a mere return to the previous market practice of liability insurers

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The Supreme Court's decision in the 'EL Trigger' test case (*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 that triggers the insurer's liability, not the later occurrence of an 'injury'. Although the decision has been welcomed for its clarity, the aftermath provides several areas of potential dispute.

Although most EL policies issued since 1948 provide cover against liabilities for injuries sustained by employees that are 'caused' during the period of insurance, a significant proportion are expressed to provide an indemnity if injury or disease is 'sustained' or, sometimes, if it is 'contracted' during the policy period. The problem is that medical science has not unravelled the way that asbestos causes mesothelioma. It is not possible to identify any physical injury at the time asbestos enters the lungs. At that stage there is only a risk of a tumour developing. Thus, certain insurers argued, no injury is 'sustained' unless and until a tumour develops.

This argument was given credibility by the decision in *Bolton v MMI* [2006] EWCACiv50 involving public liability (PL) policies. This established that injury does not 'occur' in the case of mesothelioma until many years after exposure.

The Supreme Court decision

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.

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. Lord Mance cited dicta of Eady J in *Phillips v Syndicate 992 Gunner* [2003]EWHC1084, to the effect that EL insurers accept the risk of the common law developing new forms of liabilities. The message is clear – in the absence of clear wording to the contrary, EL policies (and possibly reinsurance) will be construed so as to provide back-to-back cover against liabilities.

Public liability triggers

This decision was specific to EL policies. The court did not overrule the decision in *Bolton*, which remains applicable to PL policies triggered by 'injuries occurring' during the policy period. However, the decision in *Bolton* may yet be challenged using the same principles. 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. Several of the contextual factors relied upon by Lord Mance apply equally in the PL context, but he emphasised connections between the cover provided and employment activities during the EL policy period. The connections in PL policies are more limited.

Unless a successful challenge to *Bolton* is mounted, cover under most PL policies will depend on when actionable injury occurred. This is a question of fact dependent on medical evidence in a state of flux. The starting point is likely to be the best guess arrived at by Burton J at first instance – that actionable injury occurs around five years before mesothelioma was diagnosable. 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, triggering cover only under a single PL policy.

Contributions

The relative lengths of periods of exposure will remain the touchstone for contributions between wrongdoers. However, attempts may be made to recover larger contributions from employers that exposed victims to greater volumes of asbestos dust.

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 or 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.

Compulsory EL insurance

Finally, Lords Mance and Kerr found that the Employers' Liability (Compulsory Insurance) Act 1969 requires policies to respond on a causation basis. Although wordings in the form considered by the Supreme Court comply with the Act, this throws into doubt whether EL policies responding to 'claims made' during the policy period are sufficient.

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