Willis

INTERNATIONAL
ALERT

March 2011 – Issue 49

www.willis.com

EMPLOYERS' LIABILITY "TRIGGER" LITIGATION RELATIVE TO MESOTHELIOMA CLAIMS

On October 8, 2010 the English Court of Appeal handed down its long awaited judgment in the test case known as the *Employers' Liability (EL) Trigger Litigation*. This litigation was instigated as a consequence of four insurers (in run-off) ceasing to pay mesothelioma claims under their U.K. EL policies in light of an earlier judgment involving an indemnity being sought by a policyholder from a Public Liability (PL) policy for a mesothelioma claim.

At issue is construction of and the different language used in EL policies and the correct interpretation of each policy form that provides either an indemnity against liability for injury or disease "sustained" or injury "sustained," disease "contracted," as opposed to the more common policy form of injury "caused," with the aim of determining which insurers, if any, are liable to provide an indemnity.

This judgment vindicates those insurers with an injury (or disease) "sustained" wording but found against those insurers with an injury "sustained," disease "contracted" wording, specifically and insofar as the policyholder (employer) is responsible for an employee's mesothelioma injury.

Because of the magnitude of this latest judgment it is likely that an appeal will be made to the Supreme Court of the United Kingdom. Unless the Supreme Court agrees with the judgment of the original trial judge, there will be inconsistencies in how mesothelioma (and potentially other latent injury) claims are handled in future.

BACKGROUND

Historically, the insurance industry has paid EL claims on a Time Exposed basis, not when the injury manifests. This way the insurer (or insurers) on risk for the period of the exposure pays the claim (or a rateable part thereof).

The starting point for this "Trigger Litigation" is *Bolton Metropolitan Borough Council –v– Municipal Mutual Insurance (MMI) and Commercial Union (CU), 2006*, which concerned a PL policy with an "injury occurring" wording. MMI argued (among other things) that the injury "occurred" at the time asbestos fibers were inhaled by the claimant; therefore, the previous insurer (CU) was to pay the mesothelioma claim as that policy was in force at the time of the exposure.

The Court of Appeal in *Bolton* disagreed with MMI and upheld the earlier judgment that the ("actionable") injury did not "occur" at the time of exposure, rather at a date in the future, which is considered in earlier judgments to be 10 years prior to diagnosis. As a result, a PL insurer with an "injury occurring" wording on risk at the time of exposure is not liable for a mesothelioma claim because the tumor (injury) develops (occurs) many years later.

THE EL TRIGGER LITIGATION

The four insurers in run-off, Excess, Independent, MMI and Builders Accident Insurance (BAI) (collectively known as the (insurers), used the *Bolton* judgment to argue that the "injury sustained" or "injury sustained or disease contracted" wording of their EL policies should be interpreted in the same way as the "injury occurring" wording of PL policies, in that neither was the injury "sustained," nor was the disease "contracted" until the tumor developed. The "claimants" in this case (collectively, mesothelioma claimants, insured employers and Zurich Insurance Company) argued that all such worded policies should be interpreted the same way as the traditionally worded "caused" policies, it being universally accepted that the insurer with a "caused" wording at the time of exposure is the insurer who is liable to provide an indemnity.

Justice Burton found in favor of the "claimants." His judgment was that in the context of EL policies, the words "sustained" and "contracted" are synonymous with "caused;" therefore, the insurers whose policies were in force at the time of exposure must provide an indemnity. To conclude otherwise would not make commercial sense in that the purpose of the policies is to provide an indemnity to the employer against any liability it may incur to those persons employed during the period of the insurance and arising in the course of the employer's business during that same period. In arriving at his judgment, Justice Burton was cognizant of the inconsistency whereby the person had to be in the employ of the employer at the time the injury was "sustained" for the policy to respond, which, if he agreed with the "insurers," would rarely be the case for mesothelioma sufferers.

Justice Burton concluded that if he was wrong about the interpretation of the variously worded EL policies or the relevance *Bolton* has to this case, it was still necessary to consider when the "actionable injury" occurred. In essence Justice Burton agreed with *Bolton* but having more medical evidence available than at the time of *Bolton*, he concluded that the "injury" occurred five years prior to diagnosis, a timeline that can be extended or shortened based on individual medical evidence about the speed of the tumor's development.

The "insurers" appealed this judgment. The Court of Appeal comprised Lord Justices Rix and Burton and Lady Justice Smith.

THE COURT OF APPEAL JUDGMENT

Without reaching unanimity, the Court of Appeal decided that Justice Burton's decision about the word "sustained" being synonymous with "caused" was wrong, so it would not be for the insurer with "sustained" wording at the time of exposure to provide an indemnity, though it was held that "(disease) contracted" is synonymous with "(disease) caused" and was therefore agreed that an insurer with this wording at the time of exposure is liable. Accordingly, whether an insurer is liable depends on the exact wording of each policy.

THE EFFECT OF THE APPEAL JUDGMENT

As the situation currently stands:

- Policyholders with old policies written on "sustained" basis may now find that they have gaps in their EL cover; these employers could be left with having to pay future mesothelioma claims themselves.

- Those insurers with "(injury) caused" or "(disease) contracted" wordings may be burdened with increased claim costs by virtue of the Compensation Act 2006 which requires that any liable employer (and its insurer) pays the claim, either in whole or in greater proportion, if a co-defendant employer is not able to pay and its insurer is not liable to pay on its behalf.[1]

- Some claimants may not receive compensation if the defendant employer is now insolvent or does not exist. Claimants will have no recourse against any of the "insurers" (who were the defendants in this litigation and whose wording is on a "sustained" basis) under the Third Parties (Rights Against Insurers) Act if the insurer refuses the claim as not being covered.

CONCLUSION

This litigation is limited to just one type of cancer; however, if the Supreme Court agrees in whole or part with the Court of Appeal judgment, it could bring into doubt the validity of cover for other industrial diseases (for example, other forms of cancer, chronic obstructive pulmonary diseases [the most common being emphysema, pneumoconiosis and silicosis], deafness and Hand-Arm Vibration Syndrome [better known as HAVS or vibration white finger], where the exposure takes many years to develop into a recognizable [and actionable] injury).

An appeal to the Supreme Court is pending. As the case develops, Willis will issue further advice. In the meantime, any company that has or had operations in the U.K. (certainly before 1985) should check the operative clauses of their old EL policies in order to evaluate how claims might be dealt with in the future and which insurer could be held liable.

Further bulletins will be issued as matters develop.

FURTHER READING

Employers' Liability Insurance "Trigger" Litigation, Re [2010] EWCA Civ 1096 (08 October, 2010).

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[1] Section 3 of the Compensation Act reverses the common law principle, and a House of Lords decision on allocation of damages in mesothelioma claims arising from unlawful exposure to asbestos held that the defendants who contributed to the risk were severally but not jointly liable. The Act now makes all defendants jointly and severally liable for the damage so that a claimant can now collect the entire judgment from any one of the defendants or from any and all of the defendants in various amounts until the judgment is paid in full. In other words, if any of the defendants do not have the money or assets to pay an equal share of the award, the other defendant(s) must make up the shortfall.