

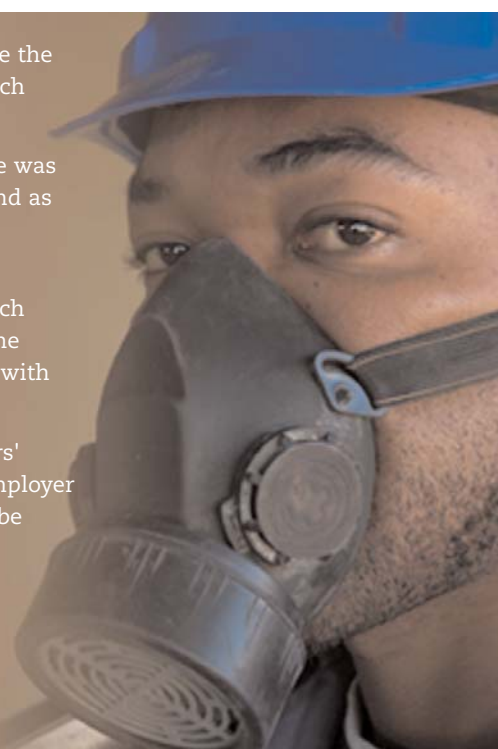


Adviser

Employers' Liability and Latent Disease Claims

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- The High Court has reached a decision on Employers' Liability policies where the Operative Clauses of the policies were not clear as regards the period in which claims can be brought.
- The case arose when the liquidators of insurers in run off realised that there was doubt regarding the policy period under which claims were being brought and as they are obliged to deal with claims strictly in accordance with the legal interpretation of the insurance contract, challenged their obligation to pay.
- The High Court decided that the terminology used in these old policies (which used 'injury sustained' or 'injury contracted' during the policy period) had the same meaning as a modern 'causation' wording and claims should be dealt with on an exposure basis.
- Had the decision applied a different meaning to these words, later Employers' Liability policies could be forced to deal with these claims and where the employer is no longer in business there could be circumstances where claimants will be uncompensated.
- Leave has been given to appeal the decision.
- The observations made in respect of the medical opinions regarding the latency of mesothelioma during the decision could create some doubt as to the period under which any Public Liability mesothelioma claims will fall.



Introduction

A dispute on a public liability claim (Bolton Metropolitan Borough Council vs. Municipal Mutual Insurance Ltd. and Commercial Union Assurance Co. Ltd) arose when a third party suffered an asbestos related disease. Asbestos diseases generally have a long period of latency between being exposed to asbestos and the disease first starting to manifest.

The relevant insurers could not agree if the policy that was to respond to provide indemnity was the one on risk when the claimant would likely have inhaled the asbestos fibre or the policy on risk when the resultant injury happened. Both policies provided an indemnity on an occurrence basis - injury occurring during the policy period.

The court decided that the terms of the 'occurrence' wording meant that the relevant policy period is the one where the injury happened NOT when the cause of the injury (inhalation of the asbestos fibres) happened. The period that the injury happened was 10 years prior to diagnosis.

Although this decision was of no surprise, it did raise questions regarding latent disease claims under Employers' Liability policies in circumstances where it was not totally clear under the terms of the insurance contract that the policy applied to claims where the injury was caused during the policy period. Liquidators and reinsurers of insurers that are in run off are obligated to settle claims strictly in accordance with the insurance contract terms and some of the older policies under which latent disease claims were being brought used different terminology to the 'causation' wordings usually used in modern insurance contracts. The terminology used included 'injury sustained' and 'injury contracted' during the period.

This meant that claim payments under these old policies were suspended subject to judgment in the High Court. Although the cases under review only applied to mesothelioma disease, it does have bearing on other latent disease claims.

The judgment considered six cases and was held over the summer period with the decision published 21 November 2008.

Mesothelioma and EL Claims Overview

Generally, industrial diseases, including all the other various forms of asbestos diseases, are accumulative, and are, therefore, split against the policy years which covered exposure. For example, if exposure was 1960-1969 inclusive then, in general terms, a claim would be split at 10% to each year.

Mesothelioma is caused by one fibre that may have been ingested many decades previously and was floating around the lungs harmlessly since that time. It causes no harm unless it attaches itself to the lung and starts to metastasise into a cancer. It is accepted that the incubation period from that first creation of cancerous cells to diagnosis is around 10 years, and as such the judgment in Bolton has been seen as accepting that the trigger point for the disease under the Public Liability policy was at this point being the date that the injury occurred.

EL insurers will usually deal with mesothelioma claims on an exposure basis (the period during which the employee was exposed to asbestos) although this practice has been challenged and modified.

The 'Fairchild' case stated that an employee did not need to prove when the exposure to the fatal disease mesothelioma was contracted. Only the exposure during employment with a single employer had to be proven and that one employer was liable. The subsequent Barker v Corus ruling states that such claims must be apportioned over the exposure period against all of the potentially culpable employers (responsible persons).

The Compensation Act 2006 then reversed the Barker v Corus ruling to allow for Joint and Several Liability in respect of mesothelioma claims. The claimant can seek 100% compensation from a single defendant although the Act specifically allows for the finding of contributory negligence and also allows for the one defendant (a responsible person) to recover from other 'responsible persons' on an exposure basis or other mutually agreed basis of apportionment.

The Legal Review and Issues Arising

The High Court decision on this review was highly complex and involved detailed medical opinion regarding the cause and latency of mesothelioma as well as considering the intent of the compulsory Employers' Liability legislation and relevant legal cases that have taken place since 1972.

One of the areas under consideration was 'public policy' which included the danger of leaving some victims uncompensated. Previous Case Law has suggested that everything possible should be done to ensure that mesothelioma victims are compensated.

The 1969 Employers' Liability legislation does not define a particular 'trigger' (being the date that the policy must apply) but the intent is to ensure that there is an insurance policy available to compensate employees injured in course of the business. Where there is a delay between the injury being caused in course of employment and the injury occurring (as happens with asbestos exposure disease) there will be no insurance and no compensation should the employer have ceased trading during this latency period if the Employers' Liability trigger is defined as being when the injury actually occurs.

If the decision had confirmed that the old policies did not apply on a 'causation' basis, there would have been serious complications as to which, if any, later policies will apply bearing in mind that the employer has a legal obligation to carry relevant Employers' Liability insurance post 1972 (1975 for Northern Ireland). Although the Bolton case defined the 'injury' occurrence on a Public Liability policy, could the same definition apply on a modern Employer' Liability policy where different terminology is used? Where the employer is still in business and still has Employers' Liability insurance in force, further litigation will be required to decide the policy period that must apply.

This further litigation could decide that insurers are obliged to deal with and pay the claims in circumstances where the losses are neither expected nor charged for in the premiums. Also the claims could fall into a single policy period rather than be spread over the exposure period. Together with the additional Case Law (or even legislation) that will be required to decide the policy period under which the claim can be brought, further delays will be created as well as creating uncertainty and lack of stability in the liability insurance market. Uncertainties will also arise for those employers carrying elements of self insurance or insure via a Captive insurer.

The Decision

The ruling is: Employers' Liability policies using injury 'sustained', 'contracted', or similar wordings should be interpreted to mean the same as an injury "caused" during the policy period. The 'caused' date is the date or period of inhalation of asbestos i.e. the exposure. The decision is exactly what the insurance market and claimants and their representatives want.

However, the liquidators of the 'run off' insurers involved in bringing this case are obliged to seek an appeal and this request has been granted.

Because of the uncertainty that this case has created and the delay in claimants and their dependants receiving compensation, it is hoped that, should the appeal go ahead, it is heard as quickly as possible.

Full details of this Employers' Liability 'Trigger' Litigation can be found at <http://www.bailii.org/> . The case citation reference is [2008] EWHC 2692 (QB).

The Implications for Mesothelioma Claims under Public Liability Policies

Mesothelioma claims under Public Liability policies are generally accepted as being under the policy that was current 10 years prior to the date of the condition being diagnosed (or should have been diagnosed). However, the detailed medical opinion provided under this High Court ruling indicated that this period could be much shorter - 5 years or even, potentially, a shorter period - should medical opinion indicate that the nature of the illness was particularly virulent for that patient.

The Bolton ruling confirmed the '10 year prior to diagnosis' ruling for Public Liability policies but the observations forming part of the detailed medical views undertaken as part of the Employers' Liability Trigger litigation indicates that the 'injury' could first occur at a much shorter period prior to diagnosis.

Potential Repercussions for Businesses

With regard to mesothelioma claims falling under Employers' Liability policies, there is no change. There will be complications for employers who are still in business should this High Court judgment be overturned as there may be further litigation needed to decide what policy will respond. Although it is hoped that any appeal will happen as quickly as is possible, this will unlikely be considered until much later in 2009.

Claims falling under Public Liability policies have more of an immediate and serious impact. The observation that the disease could have first caused the actual injury during the policy period 5 years prior to diagnosis (and this was an observation and not a ruling) could cause further litigation and delays as insurers (if any) argue as to who is liable.

Most modern Public Liability policies have total asbestos exposure exclusions and there is a possibility that the coverage dispute could be between an insurer on risk 10 years ago, at which time not all insurers were imposing asbestos exclusions, and the Insured who may have asbestos exclusions on later policies. Although only about 2% of UK mesothelioma claims currently arise under Public Liability policies, the volume of such claims may increase in the future.

It is, therefore, important that businesses have extensive records of Public Liability policies as well as Employers' Liability policies for all operations, including those subsidiaries or operations that have been purchased over the years. If necessary, an insurance archaeology consultant can be hired to help trace missing information.

Marsh can offer an insurance archaeology service that may be able to assist with this exercise. In addition, Marsh can assist businesses identify the potential impact of uninsured losses in the event that policy records are missing or where there are exclusions under the policy. For further information please refer to your usual Marsh contact.

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