NEWSSTAND

Court of Appeal Overturns EL Insurance "Trigger" Decision

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The Court of Appeal has handed down its long-awaited decision in the appeal of the Employers' Liability Insurance "Trigger" Litigation. In a long and complex judgment, the Court of Appeal has overturned the main finding of the first instance decision (the judgment of Mr Justice Burton in November 2008). At the heart of the Court of Appeal's ruling is the view that employers' liability (EL) policies are relatively straightforward contracts sold in a number of standard forms. The vast majority of claims to which the policies have for decades responded (over 99%) arise out of accidents causing immediate injury. The latency of industrial diseases is not a reason to depart from the ordinary meaning of the words used by the contracting parties.

Background

The Court of Appeal was considering, by reference to six lead cases, how EL policies should respond to the claims of UK mesothelioma victims. The cost to insurers of the UK's mesothelioma liability problem has been estimated to be at least £10 billion. As much as 90% of the cost is in the future. Mesothelioma is an invariably fatal cancer. For all practical purposes, its only known cause is exposure to asbestos. Although caused during exposure, the onset of mesothelioma (a point called the date of the tumour by the Court) is not until decades later. It is this latency that gives rise to the dispute. The most recent period of severe occupational exposure in the UK was during the 1960s. The latency of the disease means that we are still several years from the peak fatality rate of around 2,000 deaths per year.

The Issue

The Court was construing EL policies to determine what "triggers" an EL insurer's liability to indemnify an insured employer; or, as one appeal judge preferred to characterise it, what is the "temporal hook" that attaches the ultimate liability to the policy year in question.

The Various Forms of EL Wording

It is accepted that mesothelioma is caused by the inhalation of asbestos fibres during exposure. EL wordings that are expressed to indemnify for injury or disease "caused" during the period of cover (causation wording) have presented no difficulty and it has not been disputed that such policies respond (are "triggered") on an exposure (also called date of inhalation) basis. In other words, where EL policies contain causation wording, it is the policy (or, more likely, policies) in force during the period of occupational exposure that should respond to the claim.

As well as causation wording, two other forms of wording have appeared in EL policies issued over the last few decades. The EL trigger litigation focuses on these other forms. A significant proportion of policies were expressed to indemnify in respect of injury or disease "sustained" during the period of cover, while others were expressed to indemnify where disease was "contracted" during the period. In some policies, both expressions appeared. For decades, EL insurers responded to mesothelioma claims consistently on an exposure basis, no matter which of the forms of wording was in the policy. This changed with the Court of Appeal's decision in Bolton *MBC v Municipal Mutual Insurance* [2006] 1 WLR 1492. In that case, which concerned public liability (PL) insurance, the Court ruled that injury (for the purposes of construing the PL policy) does not "occur"

during exposure; it first occurs at the earliest when a victim's tumour develops; and that this point is about 10 years before the onset of symptoms, usually decades after the exposure. A number of insurers decided that "sustained" or "contracted" wording in EL policies should be construed in the same way and the EL trigger lead cases were selected to resolve this market issue. The judge at first instance ruled that EL policies containing "sustained" or "contracted" wording should be interpreted to mean the same as those containing causation wording.

Court of Appeal's Decision

The Court of Appeal overturned Burton J's judgment in relation to the construction of "sustained", but upheld the construction of "contracted" (but by different reasoning).

There was almost no unanimity among the three Court of Appeal judges. The main questions were decided by a majority (Lord Justices Rix and Burnton), but largely on different grounds and for different reasons. The leading judgment was given by Lord Justice Rix, but he was in a minority on several of the issues. The three judges each had a different view on the commercial purpose of EL insurance. In approaching the questions of construction, the majority emphasised that EL policies were insurance contracts issued on a variety of standard forms entered into year after year. Rix LJ said the Court was concerned with *"... the most basic question of the period for which cover is granted and the loss which must occur during that period for the cover to be effective and…different triggers or temporal hooks are well recognised, that is to say, causation wording, sustained wording, and occurring wording…*". There were no grounds to believe that something has "gone wrong" with the wording and therefore no justification for manipulating the terms. The words should be given their ordinary meaning. The Court made clear that the evidence that insurers had for decades paid claims exclusively on an exposure basis, without regard to the differences in wording, was irrelevant to the interpretation of the policies. The "factual matrix" of knowledge within which the parties entered into these contracts, notably the lack of understanding of the aetiology of mesothelioma (and, indeed, of other industrial diseases with periods of latency) until the latter part of the twentieth century (long after the policies in issue had been entered into) was also irrelevant.

The Court of Appeal ruled that mesothelioma is not "sustained" during exposure; it is "sustained" when the injury occurs (otherwise described as "suffered", "incurred" or "inflicted") decades after exposure. The decision of the Court of Appeal in *Bolton* was binding in relation to this issue. In *Bolton*, the Court of Appeal had ruled that injury occurred *at the earliest* 10 years before symptoms. In the first instance decision of the EL trigger litigation, Burton J had concluded (although it is technically not part of his ruling) that, in light of the more advanced medical evidence he had heard, mesothelioma starts to occur five years before the point of "diagnosability" (the disease being diagnosable when symptoms manifest themselves). The Court of Appeal acknowledged the different views (the "10-year rule" and the "five year rule"), but was not asked to choose between them. The effect of this judgment is that an EL policy containing "sustained" wording, in force during the period of exposure, does not provide cover for any resulting mesothelioma claim.

The Court of Appeal found that "contracted" (usually appearing in the expression "disease contracted") could bear a variety of ordinary meanings; it is capable of referring to disease either in its origin or its onset or even its progress. As a matter of construction, therefore, it could refer to the time of exposure or the disease's "causal origins". On this basis, a policy expressed to indemnify in respect "disease contracted" (including where this appears alongside "injury sustained" wording) during the period of insurance will respond on the same basis as causation wording.

The three judges each came to different conclusions as to the effect of the Employers' Liability (Compulsory Insurance) Act 1969. It is arguable (but with considerable doubt) that the view of the majority was that "sustained" wording in EL policies issued after 1972 (when EL insurance became compulsory pursuant to this Act) should be construed as responding on a caused basis. This issue probably requires clarification by a further ruling; in any event, it would be relevant only in relatively unusual circumstances.

The Consequences

As a result of the Court of Appeal's ruling, the precise terms of the EL cover in force when the tumour develops as well as that in force during the period of exposure will have to be identified to establish which (if any) policy or policies should respond. A victim will be able to obtain compensation from the culpable employer where that employer remains in existence and solvent. Where that is not the case, the victim is reliant upon finding an EL policy that will indemnify his employer's liability. Whether that policy is liable to respond will have to be determined by applying the various principles (many of which are contradictory or unclear) set out by the Court of Appeal.

As for the past, EL insurers who underwrote policies on a sustained basis have for decades indemnified mesothelioma claims on an exposure basis when they were under no liability; their policy was not triggered. Given the sums involved, that is an issue that may well be investigated among insurers and their reinsurers.

The parties have been given permission to appeal to the Supreme Court on all the main issues and therefore a final determination of these issues is still some way off.