

T&Lbulletin

GLOBAL RISK SOLUTIONS TECHNICAL AND LEGAL BULLETIN

OCTOBER 2010

EL Trigger Litigation – Court of Appeal Decision

After a year of deliberation, the Court of Appeal has finally handed down their long-awaited decision in the ongoing Employers' Liability (EL) Trigger Litigation. The sensible and practical decision originally reached by the Court of First Instance has, unfortunately, been overturned and the situation regarding insurance coverage for long-tail disease claims is now uncertain for Insurers and certain Policyholders alike.

The Court was asked to decide whether EL policies with an "injury sustained" or "injury contracted" wording responded on exposure to asbestos.

Background

The current EL litigation was actually the result of a Public Liability (PL) case heard back in 2006 in the Court of Appeal, Bolton MBC -v- Municipal Mutual Insurance. The case revolved around a mesothelioma claim, and a dispute between the PL Insurers at the time of exposure to asbestos (1950's) and those at the time of the disease first causing physical change to the claimant's body (1990's), as to which policy should trigger to cover the matter. Both policies were written, as is

standard with PL policies, on an "injury occurring" basis. The court held that for PL policies with this wording the policy which would cover the claim was that in force at the time of initial physical change i.e. 1990's.

In "Bolton", it was ruled that the date of Injury "sustained", should in respect of mesothelioma, be the date at which the first cells in the claimant's lung mutated – this has generally been held by medical experts to be ten years prior to date of diagnosis, although there is increasing specialist micro-biological opinion that in fact the period is closer to five years.

The above case of course only applied to PL policies, and has to be compared with the historic market interpretation



for EL coverage trigger, which has always been on an "injury caused" or "exposure" basis for asbestos claims, including mesothelioma, with the result that it is the EL policy in force at the time of a negligent exposure to asbestos that should apply.

However following the "Bolton" decision, four run-off EL Insurers (BAI, Excess, Independent and MMI) brought a case contending that as their EL policies were written on an "injury sustained" or "disease contracted" basis, then they should operate like "injury occurring" PL policies.

At the Court of First Instance in 2008, the run-off Insurers lost their case. The judge held that both Insurer and Insured had entered into the contract of insurance at the time

believing that injuries/disease to employees resulting from negligent acts on the part of the Insured during the life of the policy would be covered – this also reflected what had been accepted market practice for years. Therefore, all the historic EL policies regardless of Operative Clause wording should continue to cover mesothelioma claims resulting from negligent exposure to asbestos during the time on risk, even though the disease/injury itself might not be "sustained" (to the extent that a physical change actually occurred) until many years after the policy period ended. The run-off Insurers appealed.

Court of Appeal Decision

The ruling is immensely complicated and long, running to some 160 pages in all, and none of the three judges could actually agree entirely with one another. Apart from the principle arguments over the meaning of "injury sustained" and "injury contracted" they also had to consider what bearing the Employers' Liability (Compulsory Insurance) Act 1969 (ELCIA), passed in January 1972 could have, as well as other arguments over whether "employees" include former employees.

With diverging opinions and a variety of different wordings considered by the COA it is difficult to provide a single summary of the outcome, but what is clear is that Insurers and Policyholders face a further period of uncertainty.

In a nutshell, the Court of Appeal

has ruled by a majority of 2-1 that they are bound by the decision in "Bolton" and have as a result overturned the positive decision reached by the Court of First Instance.

Therefore those Policies written, prior to the ELCIA becoming effective in 1972 and, on an "injury sustained" basis will not provide cover in respect of mesothelioma claims caused by negligent exposure to asbestos during their time on risk, as the injury was "sustained" at a later date (i.e. in the 1990's).

Interestingly, Lord Justice Rix also considered that a policy written after the 1969 Act became effective

would, even if written on an "injury sustained" basis still be able to provide compensation to a claimant by virtue of the deeming* provision in the wording, albeit the Policyholder would be obliged to repay the Insurer in these circumstances. This is due to the view that the ELCIA required Employers to insure on an "exposure" or "causation" basis.

The (faint) silver lining is that the Court did confirm that policies written on both an "injury caused" and importantly an "injury contracted" wording would continue to provide cover in accord with market practice.

The Court of Appeal has granted leave for the case to be appealed to the Supreme Court (House of Lords as was).

What now

The immediate practical implications for Policyholders are potentially severe, particularly with regard to those with a history of manufacturing, heavy engineering and construction or who have over the years acquired companies with such a history. Essentially, the ruling will leave clients with pre-1972 EL Insurances written on an "injury sustained" basis with no Insurance cover for mesothelioma claims caused by exposure to asbestos during that pre-1972 period.

Local Authorities too will be heavily affected, as a significant proportion would have had insurance with MMI and this Insurer wrote EL business with an "injury sustained" trigger right up until 1974. Equally, claimants who were employed by now-insolvent businesses may have no recourse at all.

If not already evaluated, Policyholders would be prudent to research their EL Insurance history now so that any potential gaps in cover thrown up by this latest ruling can be identified, and for any new

The deeming provision states that "*the indemnity granted by this policy is deemed to be in accordance with the provisions of any law relating to compulsory insurance of liability to employees in Great Britain . . .*"

claims assess if they have any "retro" cover (not subject to asbestos exclusions) under their current policies, but with the conventional insurance market's lack of appetite for asbestos related risks Policyholders will really have two choices:

- 1) to wait and see if claims that are not covered by an insurance policy are lodged and then deal with them in their Profit and Loss as and when they can be recognised
- 2) or make some provision for such losses in an existing captive or by using a Cell in a Rent A Captive. This latter option would require an assessment to the potential for losses and the transfer of the risk to a Captive or Cell by way of a premium payment. That premium payment could be spread over time and the captive will establish Incurred but Not Reported reserves so as to hold reserves on its balance sheet to be released when claims are lodged in the future for the exposures incurred in the past. A policy will be written specifically to capture these potential losses and this will be done in such a way that the Court of Appeal ruling will not be applicable to this cover.

A final consideration, is that even if the Policyholder was insured with one of the four run-off insurers, they should not assume that their wording was on exactly the same basis as the wording examined in the trial, due to the practice in the London Insurance market for non-standard wordings to be negotiated by their insurance broker.

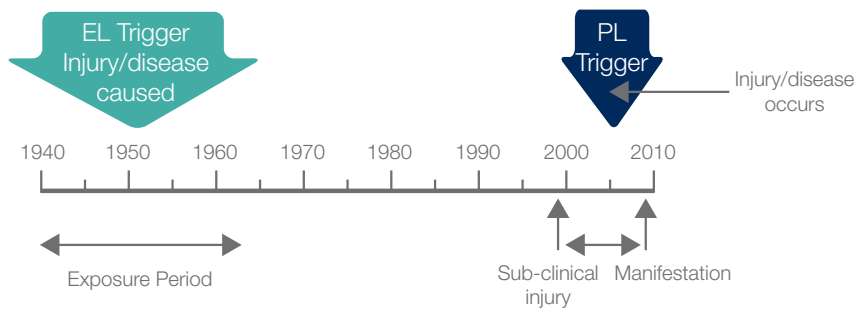
*The deeming provision states that *"the indemnity granted by this policy is deemed to be in accordance with the provisions of any law relating to compulsory insurance of liability to employees in Great Britain. . ."*

**Graham Terrell – Technical Advisor,
JLT's Global Risk Solutions division**

Graham is a graduate of law from City University Business School , Graham has 13 years Casualty experience, specialising in the review of complex programmes and the management and advocacy of high-profile, contentious liability claims, principally Product, Environmental and Group Actions in UK and North America. Graham has also acted as an asbestos claims auditor for the British Government. He is also an associate of the Chartered Insurance Institute.
graham_terrell@jltgroup.com

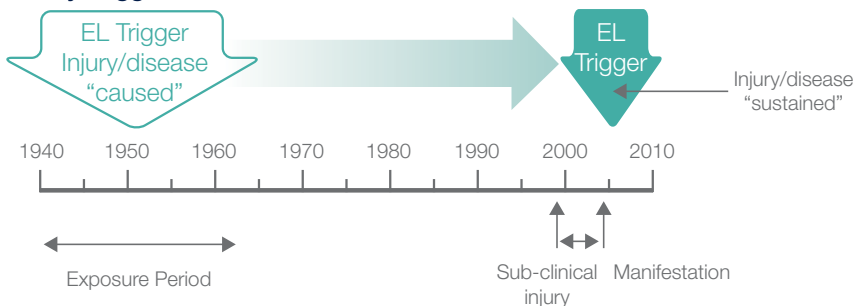
Current practice – EL trigger dealt with on “time of exposure” basis

Policy Triggers



Court of Appeal Result – EL trigger for injury/disease sustained moves to PL basis

Policy Triggers



About JLT

JLT Specialty Limited (JLT) is the largest member of Jardine Lloyd Thompson Group plc, a company listed on the FTSE 250 index of the London Stock Exchange. The Jardine Lloyd Thompson Group is a risk management adviser, insurance and reinsurance broker and provider of employee benefit administration services and consultancy advice.

JLT provide market leading industry knowledge and expertise in specialist fields to some of the world's largest companies. What sets us apart is the quality of our people and the environment we have created. It allows individuals to work together as a cohesive and focused team without internal boundaries, promoting personal accountability and responsibility for the benefit of our clients and other stakeholders.

For more information about the issues raised in this bulletin, please contact your account manager, or alternatively:

Birmingham

Adrian Lamasz

Tel: +44 (0)121 626 7813

Email: adrian_lamasz@jltgroup.com

Leeds

Charlie Wenborn

Tel: +44 (0)113 203 5836

Email: charles_wenborn@jltgroup.com

Manchester

Ged Smith

Tel: +44 (0)161 957 8015

Email: ged_smith@jltgroup.com

Southampton

Tom Cowdrill

Tel: +44 (0)23 8037 4848

Email: tim_cowdrill@jltgroup.com

London

Graham Terrell

Tel: +44 (0)20 7528 4089

Email: graham_terrell@jltgroup.com

JLT Specialty Limited

6 Crutched Friars London EC3N 2PH

Tel +44 (0)20 7528 4000

Fax +44 (0)20 7528 4500

www.jltgroup.com

Lloyd's Broker. Authorised and Regulated by the Financial Services Authority. A member of the Jardine Lloyd Thompson Group. Registered Office: 6 Crutched Friars, London EC3N 2PH. Registered in England No. 01536540. VAT No. 244 2321 96

© January 2011 263028