

Employers Liability “Trigger” Litigation

This Bulletin reviews the issues arising from an important judgment made by Mr Justice Burton at the High Court in November 2008 in the trial known as the "Employers Liability Policy "Trigger" Litigation"(2008) EWHC 2692 (QB)¹.

The trial consisted of six test cases involving mesothelioma, a malignant and ultimately fatal cancer of the lining of the lung caused by the inhalation of Asbestos fibre. The trial arose because the defendants, a number of Employers Liability (EL) insurers in run off, refused to pay damages on claims arising out of mesothelioma. The basis of their defence was the terminology used to describe the claims trigger in their wordings.

Background

Before discussing the outcome of the case and its implications it is important to understand how a policy trigger operates. The trigger is the event giving rise to the claim. Employers Liability and Public Liability (PL) policies have different triggers. EL Policies are governed by a causation trigger, where the insurer

on cover during the period the injury/disease is caused is responsible for the claim. EL insurance practice in relation to mesothelioma claims has traditionally been to accept that the injury/disease is caused when the employee is exposed to asbestos. It follows then that the insurer on cover during the time of exposure must indemnify the employer concerned.

In contrast, PL Insurance is governed by an occurrence trigger, where the insurer on cover during the period the injury /disease occurs is responsible for the claim. For mesothelioma claims, the disease is thought to occur when the tumour actually begins to grow, usually many years after the initial exposure to asbestos. It is therefore the policy in place when the disease manifests itself and not when the victim is exposed, that responds in PL Insurance.



Key facts

Important Judgement

Mesothelioma claims continue to be dealt with on a 'time of exposure' basis.

Bolton MBC -v- MMI

Insurers try to use a PL judgement to swing an EL case.

Delay in Appeal

Victims and their employers remain in limbo until the appeal is heard.

Implications of the Appeal

If the appeal is upheld many employers will find themselves in a black hole.

The Defence

This principle was acknowledged in the important PL appeal case, Bolton MBC v MMI & Commercial Union (2006) and it was this case that the defendants in the EL trigger litigation cited in their defence.

They argued that the language used in their EL wordings was essentially the same as that used in the PL wording in the Bolton case. Instead of the term 'injury/disease caused', their EL policies contained the terms 'injury sustained' and 'disease contracted', which they felt were synonymous with injury /disease occurring in a PL policy. This would mean that their policies covered occurrence of disease during the period and not exposure to asbestos during the period and that therefore they were not responsible for the claims.

If the Judge accepted their argument he would not only allow these insurers to escape responsibility, he would open the floodgates for other Insurers with similar wordings, to cite this case in the avoidance of their claims.

What effect would this have on employers?

If an employee develops mesothelioma and makes a claim against the employer he had when he was exposed to asbestos, his employer would need to rely on the wording he had purchased at the time. If it was a causation wording, his Insurers would indemnify him. If the wording was a sustained or contracted wording, they would not.

Consequently, if the employee makes the claim against the employer he has when he develops the mesothelioma, his employer will only be covered if his policy is written on a contracted or sustained basis.

If the employee no longer works for the employer, again the employer is left without indemnity because his policy will only cover current employees. Even if, as feebly suggested by the defendants, the definition of employee could be construed to imply the inclusion of ex-employees, there is still the question of claimants whose employers have ceased trading and therefore have no EL insurance in place.

Mr Justice Burton realised that if he found for the defence he would create a 'black hole' for ex-employees. He also acknowledged the fundamental issue surrounding the interpretation of wordings, namely, what do the parties intend the policies to cover in the first place? Surely employer's legal liability for injuries or diseases caused to their employees. This led him to conclude that the defendant's wordings should respond in the same way as causation wordings, i.e. on an exposure basis. In his summing up he stated that "For the purpose of these policies injury is sustained when it is caused and disease is contracted when it is caused and not when it occurs". In doing so he upheld the conventional time of exposure basis for handling mesothelioma claims in the EL insurance market.

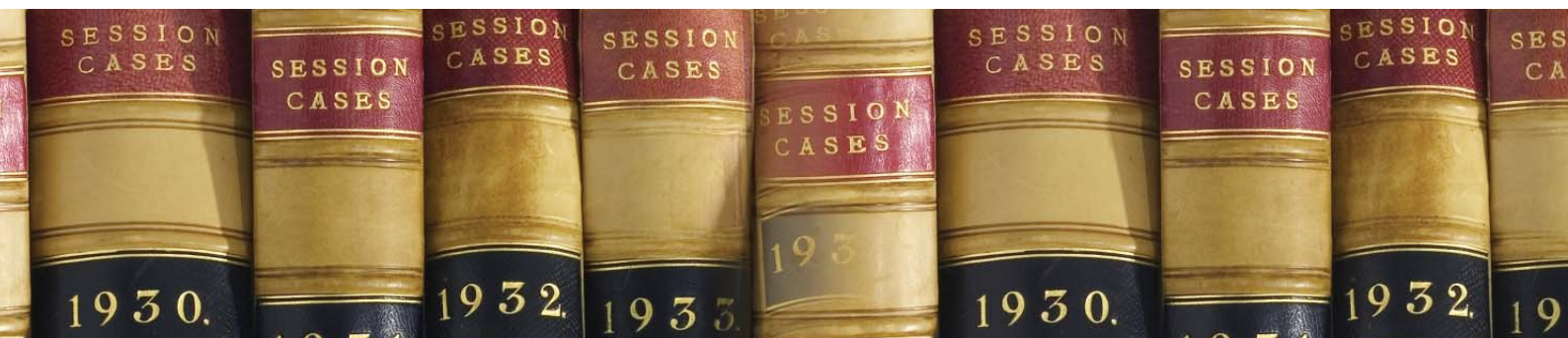
Mr Justice Burton's judgement would not only apply to asbestos related diseases, it could also apply to other occupational diseases where there is a latency period between exposure and injury.

The Appeal

In view of the importance of the outcome of this litigation the Defendants have been given permission to appeal and the appeal will be held in the summer or autumn of 2009. Pending the result of the appeal some insurers are still refusing to pay mesothelioma claims and until the matter is finally resolved the employers are without indemnity.

Further Implications

Lastly, it should be noted that more advanced medical evidence was presented in the Durham v BAI case than had been presented in the Bolton MBC v MMI case. This led Mr Justice Burton to conclude that in mesothelioma cases, the latency period between sub-clinical injury and manifestation should be 5 years and not 10 years, as previously thought. Although not relevant to this particular judgement the discovery will have a bearing on future PL insurance cases. Liability insurers may need to reconsider when mesothelioma actually occurs. Many PL insurers could take advantage of this ruling and attempt to use it in future cases to transfer the responsibility on to subsequent insurers. There is no doubt that further test litigation will be required in this area.



Stop Press

The Damages (Asbestos-related Conditions) Bill Passed

The Scottish Parliament has passed a law to allow Scottish workers to sue for the presence of pleural plaques, a benign scarring of the lungs caused by exposure to asbestos.

The new law overturns the House of Lords ruling which stated damages could not be claimed for a condition that in itself causes no harm nor displays any symptoms.

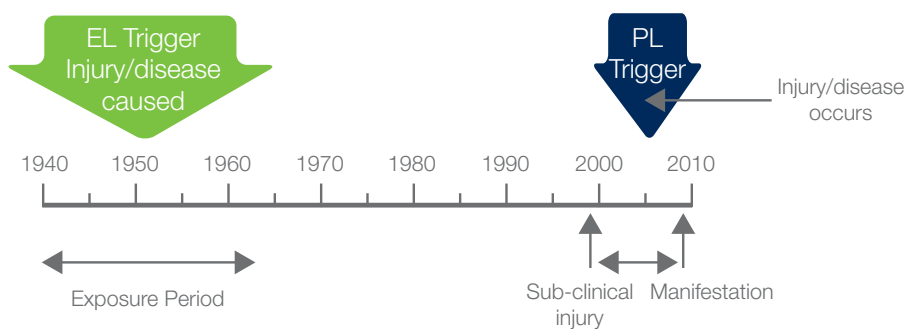
Although pleural plaques do not in themselves cause asbestos related diseases they do indicate an increased risk of developing mesothelioma due to exposure to asbestos and as a result can cause stress and psychological fear.

The ABI claimed that passing the bill would send out the wrong message about the seriousness of pleural plaques² and a group of Insurers have officially launched a judicial review against the Scottish Government in their battle against the Bill³.

The House of Lords ruling will still apply in England and Wales.

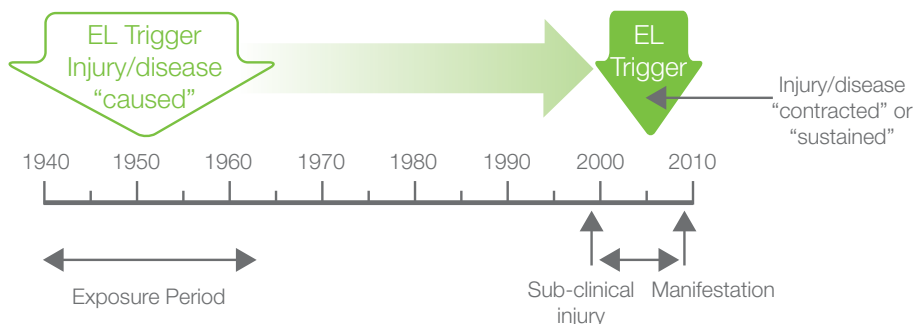
Current practice - EL trigger dealt with on "time of exposure" basis

Policy Triggers



If Appeal upheld - EL trigger moves to the PL position

Policy Triggers



1. Employers Liability Policy "Trigger" Litigation(2008) EWHC 2692 (QB)
BAI (Run Off) Ltd (In Scheme of Arrangement) Independent Insurance Company Ltd (In Provisional Liquidation), Excess Insurance Company Ltd, Municipal Mutual Insurance Ltd, Zurich Insurance Company and Others
2. BBC News 02.04.2009.
3. Insurance Times 21.04.2009