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Court of Appeal rules in Mesothelioma Trigger Litigation

The Court of Appeal has handed down its long-awaited and uncertain decision in the Employer's Liability 'Trigger' Litigation. Lawrence West QC appeared for ten local authority employers.

Two principles emerge:

1. *Where the insurance policy uses the phrase* 'disease contracted'*, then the policy triggered is the one in place when the asbestos was inhaled;*

2. *Where the policy uses the phrase* 'injury sustained' *then the policy triggered is the one in place when the mesothelioma tumour starts to develop.*

BACKGROUND

As is well known, mesothelioma is a fatal cancer caused by asbestos inhalation which does not show symptoms for many years and often decades after inhalation. The central issue in this appeal was: where an employer is liable in tort to the sufferer of mesothelioma and is insured in respect thereof, when is the employers' liability insurance policy 'triggered' - at the date of inhalation or at the date at which the mesothelioma tumour develops? This is of considerable importance to:

- sufferers of mesothelioma and their families whose former employers are no longer in business and whose only remedy will be against the relevant insurers;
- those insurers who insured those employers, particularly given the 6,000 similar claims which this case may effectively determine; and
- employers, such as the 10 local authorities in these proceedings, represented by Lawrence West QC, who may find that they are not insured when they previously believed themselves to be and who may therefore have to find considerable sums from elsewhere.

Until the decision of the Court of Appeal in *Bolton v MMI* [2006] EWCA Civ 50, both public liability and employers' liability insurers had assumed that their liability was triggered on a causation basis, that is, they were liable if the policy was in place when the asbestos was inhaled. *Bolton* was a case of public liability insurance in which the Court of Appeal held that mesothelioma is 'sustained' when the tumour starts to develop, years after the inhalation. As many insurance policies in respect of employers' liability are similarly worded in terms of injury or disease 'sustained', the Appellant insurers (BAI, Excess, Independent and MMI) declined to pay out on the policies where they were not on risk at the point of tumour growth.

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THE COURT OF APPEAL DECISION

The judgment of the Court of Appeal extends to 352 paragraphs, covering 166 pages. Each Lord Justice of Appeal delivered a separate judgment and each took a different approach. Such is the extent of the divergence between their Lordships that Rix LJ, who gave the leading speech, included seven paragraphs at the end of his speech in order to explain the differences between their Lordships. It is therefore unsurprising that permission to appeal to the Supreme Court has been granted and the case has been recommended for expedition.

Nevertheless, two common principles can be discerned from the majority (Smith LJ dissenting):

1. Where the policy uses the phrase 'disease contracted', then the policy that is triggered is that in place when the asbestos was inhaled;
2. Where the policy uses the phrase 'injury sustained' then the policy is triggered when the mesothelioma tumour starts to develop.

Rix LJ gave the fullest judgment. Despite recognising that the commercial purpose of these insurance policies was "to provide employers with insurance to meet liabilities which their activities as employers in each period of insurance engendered" ([219]) and that a construction of 'sustain injury' which is not based on the year of inhalation would be in conflict with this purpose ([235]), he held that it was not absurd, meaningless or irrational and therefore interpreted it accordingly. In any event, he considered *Bolton* to be binding on him in respect of "sustain injury" wording. His Lordship further held that the policies "relate to the misfortunes of current employees". In other words, he held that not only must the injury be sustained or the disease contracted during the policy year but the victim must at that time still be an employee. When coupled with the decision as to the meaning of 'injury sustained' this leaves a larger 'black hole' in the insurance cover than even the insurers had argued for. However, in respect of all policies commencing after January 1972, Rix LJ held that the Employers' Liability (Compulsory Insurance) Act 1969 requires insurance to be on a causation basis and are therefore deemed to be so.

In respect of policies containing "disease contracted" language, Rix, LJ held that these and similar words referred to the time of exposure rather than the time of the development of the tumour. Therefore, in respect of any employer insured by MMI after the introduction in 1974 of "disease contracted" language in their policies, those employers were covered by that insurance in respect of liabilities engendered by the exposure of employees to and inhalation of asbestos during the policy year.

Smith LJ's approach was markedly different. She approached the whole question as one of construing the understanding of the parties at the time of entering into the insurance contracts. Her Ladyship approved of the reasoning of Burton J at first instance and would have held, that, not feeling constrained by *Bolton* (it not concerning employers' liability), 'sustained' and 'contracted' bore the same meaning, namely that the policy is triggered in the year of inhalation.

By contract, Stanley Burnton LJ also felt constrained by *Bolton* and agreed that policies for 'injuries sustained' were triggered on the development of the tumour. Indeed, it was with certain misgivings that he followed Rix LJ, holding that mesothelioma is a disease 'contracted' when exposure occurs. However, he disagreed with Rix LJ in part, holding that the Employers' Liability (Compulsory Insurance) Act 1969 did not require a causation based interpretation.

Given this ambivalence towards the *Bolton* case, the complicated nature of many of the issues going to the heart of insurance and tort law and the disagreement between their Lordships in this case, and the divided result in respect of the triggers in various employers' liability insurance policies on narrow wording differences the expedited appeal to the Supreme Court is to be much welcomed.

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