

The EL Policy Trigger Litigation

Mark Burton & Kieron West
14 September 2011

Background to the trigger litigation

Kieron West

Mesothelioma

- Malignant cancer
- Latent
- Incurable
- Aetiology
- No minimum dose
- Individual susceptibility

Kennedys
Legal advice in black and white

Various stages

- Inhalation
- Mutation of mesothelial cell
- Angiogenesis
- First physical symptoms

Kennedys
Legal advice in black and white

History

- Early claims
- Statutory regulation
- Newhouse & Thompson

Kennedys
Legal advice in black and white

Bolton MBC -v- CU & MMI (1996)

- PL policy
- 'Injury occurring' wording
- Deemed date of injury = mutation of the mesothelial cell 10 years before first physical symptoms

Kennedys
Legal advice in black and white

EL policy triggers (first instance)

- EL policies to be interpreted as having causation wording
- Deemed date of injury = angiogenesis not mutation of the mesothelial cell

Kennedys
Legal advice in black and white

Kennedys
Legal advice in black and white

Court of Appeal & beyond

Mark Burton

Market disruption

- 1st black hole: different triggers
 - Mostly “injury caused” but some “injury sustained or disease contracted” triggers
 - Injury caused at date of inhalation of asbestos
 - If “sustained or contracted” means same as “occurring” then trigger is date of injury
 - No cover if injury trigger at date of inhalation and vice versa

Kennedys
Legal advice in black and white

Market disruption

- 2nd black hole: ex-employees
 - *“If any person who is under a contract of service or apprenticeship with the Insured shall sustain bodily injury or disease arising out of and in the course of employment by the Insured” (Independent)*

Kennedys
Legal advice in black and white

Market disruption

- Run-off insurers refuse to cover claims
- Solvent policyholders self-funding claims and some face insolvency
- Insolvent policyholders unable to fund claims and asbestos victims bring third party claims

Kennedys
Legal advice in black and white

Court of Appeal - sustained

- Rix
 - When injury is first suffered or inflicted
 - When it occurs: same as Bolton
 - Should not substitute caused for sustained
 - Sustained relates to injury/effect not cause
 - Nothing gone wrong with wording: works in 99% of cases just not mesothelioma
 - Can achieve exposure trigger using sustained wording, e.g. sustain injury caused during period

Kennedys
Legal advice in black and white

Court of Appeal - sustained

- Smith
 - Different wordings did not matter
 - Sustained meant caused for policies in question, but changed after Bolton
- Burnton
 - Per Bolton, onset of malignancy

Kennedys
Legal advice in black and white

Court of Appeal - contracted

- Rix
 - “Chameleon-like phrase”: difficult choice between cause or effect of disease
 - Commercial purpose of EL to meet liabilities from employer activity during policy period: favours cause/exposure
- Smith
 - Impliedly meant caused

Kennedys
Legal advice in black and white

Court of Appeal - contracted

- Burnton
 - Refers to link between exposure & disease: therefore exposure trigger

Court of appeal - Bolton

- Rix
 - Binding precedent that injury is onset of mesothelioma
 - Otherwise preferred solution that injury is risk of disease from asbestos exposure:
 - Avoids arguments about date of onset
 - Avoids Bolton applying to other latent diseases
 - Follows other jurisdictions, including US triple trigger

Court of appeal - Bolton

- Smith
 - Bolton distinguished because PL not EL
 - Injury is manifestation of disease, currently understood as 5 years before symptoms
- Burnton
 - Binding precedent
 - “Convincing” logic that no injury at inhalation

Kennedys
Legal advice in black and white

Court of Appeal - ELCIA

- Rix
 - Act requires causation wording to “maintain insurance”, e.g. if ceased trading
 - EL certificate or deeming provision means policy treated as providing causation cover
 - But insurer can recover from employer
- Smith
 - Per High Court, Act did not dictate wording but causation is best for continuous cover

Kennedys
Legal advice in black and white

Court of Appeal - ELCIA

- Burnton
 - Does not require causation wording
 - Security for employees and ex employees who sustain injury during policy period

Kennedys
Legal advice in black and white

Court of Appeal - ex employees

- Rix
 - From testing wordings, only injury sustained or disease contracted by current employees
 - 99% of cases covered
 - All accidents
 - All disease claims by current employees
 - Disease claims by ex employees under contracted/caused wordings
 - Black hole for disease claims by ex employees under sustained wordings

Kennedys
Legal advice in black and white

Court of Appeal - ex employees

- Smith
 - Per High Court, cover for current employees exposed during policy period
- Burnton
 - Agrees Rix, i.e. only current employees

Kennedys
Legal advice in black and white



Kennedys
Legal advice in black and white

Court of Appeal - final scores

- Sustained means injury not exposure (Rix/Burnton)
- No injury at inhalation (Smith/Rix)
- Bolton binding (Rix/Burnton)
- Contracted means exposure (unanimous)
- Indemnity limited to current employees (Rix/Burnton)

Kennedys
Legal advice in black and white

Court of Appeal - final scores

- ELCIA does not dictate wording (Smith/Burnton)
- EL certificate or deeming provision protects victims after 1.1.72 (Rix/Burnton)

Kennedys
Legal advice in black and white

The winners

- Victims/employers claiming under contracted wording
 - Durham (v BAI)
 - Thomas Bates & Sons Ltd (v BAI)
 - 7 out of the 10 local authorities (v MMI)
- Victims under sustained wording if exposed post-ELCIA
 - Fleming & Eddleston (v Independent)

Kennedys
Legal advice in black and white

The losers

- Employers claiming under sustained wording
 - Akzo & Amec (v Excess)
 - 3 out of the 10 local authorities (v MMI)
- Victims under sustained wording if exposed pre-ELCIA & employer insolvent
 - Edwards (v Excess)

Kennedys
Legal advice in black and white

Market implications

- Challenge succeeds
 - Some asbestos victims left uncompensated
 - Solvent policyholders must self-fund black hole or buy top-up cover (if available)
 - Risk of policyholder insolvency
 - Co-defendants of insolvent policyholder may pay greater share
 - Claims liability shifted to live market, i.e. run-off windfall
 - Run-off insurers re-enter market?

Kennedys
Legal advice in black and white

Market implications

- Challenge succeeds
 - Brokers must audit historic wordings on renewal to minimise black hole risk
 - Underwriters providing injury trigger must rate premium on business 30-40 years ago
 - Claims handlers likely to dispute date of injury
 - Possible similar challenges in relation to other latent diseases
 - Possible Government intervention

Kennedys
Legal advice in black and white

Market implications

- Challenge fails
 - Initial flood of stayed recovery claims
 - Otherwise, calm restored to market
 - Unblock claims payments
 - Reinstate established claims handling protocols, e.g. time on risk
 - Inhalation trigger relatively easy to identify and avoids medical disputes about injury
 - Other latent diseases treated same
 - 10 year rule still applicable to PL

Kennedys
Legal advice in black and white

Questions

Kennedys
Legal advice in black and white

