

POLICY TRIGGERS, APPORTIONMENT AND ALLOCATION

Leigh-Ann Mulcahy QC



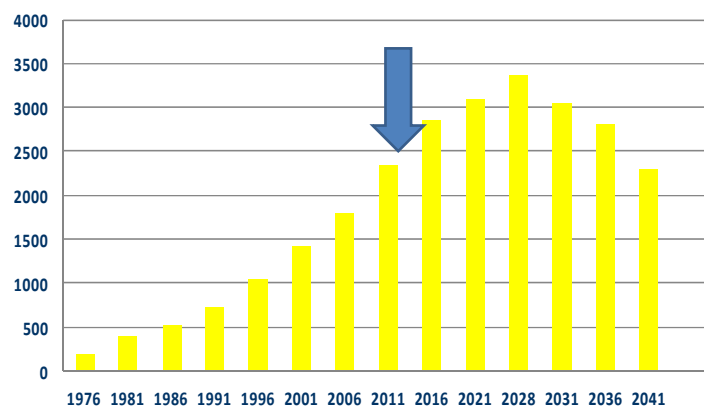
Introduction

- The *EL Policy Trigger Litigation* (*Durham v BAI* (2012))
- EL Apportionment
- Uninsured periods and solvent employers
- Allocation
- Public Liability Insurance
- Recent developments in law of causation in tort

The Trigger Litigation

- Part of the ‘asbestos litigation’
- Contract, not tort
- Position as between insureds and insurers
- Mesothelioma - latency period circa 40 years
- “*Injury*” or “*disease*” - can cover other diseases

Mesothelioma



Annual Male Deaths from Mesothelioma in UK
Actual Figures to 1996 and Projected beyond 2000

The Issue

- Primary trigger - establishment of the liability *Post Office v Norwich Union* (1967)
- What is the secondary trigger which identifies which policy responds?
- Typical policy wording - cover in respect of injuries “*caused during the period of insurance*”
- Other policies refer instead to the date on which injury was “*sustained*” or disease was “*contracted*”
- Issue in the Trigger Litigation: what is the relevant date? Mesothelioma: is it the “date of inhalation” or the “date of tumour”?

The Outcome

- Majority of Supreme Court Justices: 4 to 1
- Dismissed insurers’ appeal on “disease contracted”
- Allowed claimants’ appeal on “sustaining injury”
- Unanimous on construction of policies: respond to the initiation or causation of the disease
- Note Lord Phillips - different interpretation of *Fairchild* exception - not deemed causation

Construction of the wordings

Disease contracted

No difficulty about treating the word “contracted” as looking to the initiating or causative factor of a disease rather than merely to its development or manifestation.

Injury sustained

Although the word “sustained” may initially appear to refer to the development or manifestation of such an injury or disease as it impacts employees, the only approach, consistent with the nature and underlying purpose of these insurances both before and after the ELCIA, is one which looks to the initiation or causation of the accident or disease. The disease may properly be said to have been “sustained” by an employee in the period when it was caused or initiated, even though it only developed or manifested itself subsequently .

Principles of Construction

Generally:

- The meaning of the words at issue
- The words in the context of the policy as a whole
- The policy in the legal, academic and industrial context in which it operated

In Trigger:

- Policies to be looked at as a whole
- Reliance on features that showed policies intended to cover employees who were in employment at time of sustaining injury
- Close link between actual employment and premium
- MMI Guide to Local Insurance Officers
- Gaps in cover which would otherwise exist
- Extra-territorial provisions
- General awareness of long-tail diseases well before 1948
- The Employers’ Liability Compulsory Insurance Act 1969

Apportionment

- Basis of insurer's liability to the insured:
*"If the pure Fairchild basis of liability applied, whether by virtue of the Compensation Act or otherwise, without reference to Barker, the Insurer would be liable for the totality of the damages suffered by Mr Carré because, in any policy year, the Insured's liability would be for the totality of that damage. If liability devolved upon the Insured in any one year for the totality of Mr Carré's damages, that is a liability for which the Insured is entitled to indemnity from the Insurer in respect of that policy period, though the Insurer would have a right of contribution from Excess." **IEGL v Zurich** (2012) para. 43*

Apportionment contd.

- As between tortfeasors - s.3(3) Compensation Act 2006
- As between insurers - right to contribution?
- Double insurance? Apparently not - **Phillips v Syndicate 992 GUNNER** (2003) (Eady J); **IEGL v Zurich** (2012) (Cooke J)
- Basis for statement in para 43 **IEGL**?
- 'Time on risk' or equal pro-rating?

Uninsured periods

- ABI Mesothelioma Guidelines 2003
- Solvent employers - treatment of “Gaps”
- *IEGL v Zurich* (2012) - is there a legal right of contribution from insured for periods where no insurance or self insurance or inability to trace insurance?
- Proposed legal basis:
 - equitable right of contribution on basis that employer is effectively ‘self-insured’ for relevant period;
 - unjust enrichment by reason of legal compulsion;
 - inherent equitable jurisdiction where coordinate liability

Allocation

- Trigger - exposure - under causation, ‘contracted’ and ‘sustained’ policies (arguably also date of injury with a ‘contracted’ policy wording? see Trigger in CA [paras. 243-244, 275])
- ELCIA Regulations 1971 provided for a £2M minimum limit of cover, though policies appear to have generally been unlimited until early 1990s. The limit now stands at £5M.
- Is employer free to allocate losses amongst policy years so as to maximise recovery? e.g. where there are many claims which in the aggregate exceed limit of liability for any one year or where aggregate coverage in any one year has been exhausted by other claims

Public Liability Insurance Trigger and Allocation Issues

- Date of injury - injury in fact or manifestation?
- 5 or 10 years?
 - *Bolton v MMI* (2006)- at the earliest, first malignant cell - 10 years plus or minus 1 year prior to diagnosability (potentially 3 policy periods - so allocation issue)
 - *Trigger* (Burton J - 2008)- angiogenesis - 5 yrs prior to diagnosability subject to evidence of faster/slower tumour growth (single year)

Causation: Material increase in risk

- *Fairchild v Glenhaven* (2002), *Barker v Corus* (2006), *Sienkiewicz v Greif* (2011), *Atomic Veterans Litigation* (2012)
- L. Phillips suggests that *Trigger* majority re-interpreted *Barker*
- Blurring of distinction between “risk” and “cause”?
- Liability for mesothelioma - appears a lost cause
- Limits of *Fairchild*
 - Not just mesothelioma, but what else?
 - Single agent, multiple sources
 - Proof that agent can and did cause the disease still necessary
 - No general extension likely
 - Exception could be dismantled with new science
- Apportionment: mesothelioma (s.3 Compensation Act 2006); other diseases (still *Barker*)

Causation: Material contribution to injury

- *Bonnington Castings v Wardlaw* (1956) (silicosis)
- Causes of part of injury or part causes of injury? (i.e. only re: divisible injury (L Brown *Sienkiewicz*) or also indivisible injury (L Phillips *Sienkiewicz*?)
- Necessary vs. unnecessary causes?
- Apportionment:
 - *Bonnington, Nicholson v Atlas* - not argued
 - *Thompson v Smiths* (deafness) *Holtby v Brigham Cowan* (2000) (asbestosis), *Allen v British Rail* (VWF) - apportionment
 - *Sienkiewicz* - L Phillips [90] - not if indivisible injury
 - *Trigger* - L Mance [56] - doubt re apportionment
 - Dependent upon difficult divisible and indivisible distinction
 - Confusion over meaning of “cumulative” causes
- Australian developments: *Amaca v Booth* (2011) (mesothelioma) cf. *Amaca v Ellis* (2009) (lung cancer)

Future issues

- EL
 - Application of *Trigger* to other long tail diseases
 - Contribution between insurers - basis in law and the extent of contribution?
 - Position of solvent insureds in relation to periods where there is no insurance?
 - How will allocation between policy years work?
- PL
 - what is the relevant date of injury?
- Liability of insured in tort
 - Limits of *Fairchild*?
 - *Bonnington* - can an insufficient and unnecessary cause generate liability for 100% damages?

Questions?

