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The employers' liability trigger litigation

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Introduction

When asked to name the main causes of disease related death in the UK we are quick to point the finger at alcohol and tobacco. Current estimates indicate that 114,000 people die from tobacco related disease in the UK each year whilst between 5,000 and 40,000 die from alcohol or alcohol related causes.[2] But we are less likely to mention asbestos which the NHS estimates accounts for approximately 4,000 deaths in the UK every year[3] and which the World Health Organisation calculates accounts for 107,000 deaths per annum worldwide.[4] To put this into context the number of asbestos related deaths in the UK each year is more than double the number of people killed on our roads.[5]

This lack of general public interest in asbestos related disease may be driven by a perception that the risk is limited to occupational exposure to asbestos during the 1920s to 1970s. As a result the issue commonly only generates substantial media attention when issues concerning who should meet the increasing social and economic costs arise in the courts. An example of this is the recent Supreme Court decision of *Durham vBAI (Run off) Limited (in scheme of arrangement); Fleming and another v Independent Insurance Company Limited (in provisional liquidation)* – the so-called "EL Trigger Litigation".[6] That such litigation exists should, perhaps, not be surprising in view of the cost to the NHS of treating mesothelioma victims. It has been placed at £16,014,640 per annum.[7] Meanwhile, the overall future cost to UK industry of asbestos related claims is placed at between £4 billion and £10 billion.[8]

Background

Asbestos is a naturally occurring silicate which appears in six different forms. The three most common are chrysotile (white), amosite (brown) and crocidolite (blue). Their fibres have different bio-persistence. 20 years after exposure about half of inhaled amosite fibres remain in the body. A smaller proportion of crocidolite and an even smaller proportion of chrysotile remain.

Asbestos has been mined for over 4,000 years but became increasingly popular in the UK in the late 19th century for its resistance to fire and heat. This, combined with the fact that its abundant supply meant that it was available at low cost, made it the insulator of choice. It was extensively used on the railways and in the shipyards throughout the latter part of the 19th century and early part of the 20th century. However, the main use of asbestos was in manufacturing and construction during the 1940s to 1970s. During this period asbestos was commonly found in insulating materials used in factories, chemical plants, power plants, refineries, commercial buildings and even homes and schools.

The sequence of developing knowledge about asbestos and disease has generated historical controversy. The first medical paper on the subject appeared in the British Medical Journal in 1924 and dealt with the death from fibrosis of the lungs of Nellie Kershaw, who had worked in the spinning room of a Rochdale asbestos factory[9]. This paper led to a review by the UK factory inspectorate which resulted in the introduction of the Asbestos Industry Regulations 1931[10]. In the 1950s and 1960s the first clear epidemiological evidence revealed the strong link between asbestos exposure and cancer (specifically mesothelioma, a cancer of the mesothelial cells which form part of the protective lining covering the lungs, which is always fatal and usually within 15 to 18 months of diagnosis). This led to a reassessment of the hazards caused by asbestos exposure. It resulted in the introduction of the stricter Asbestos Regulations 1969[11] which provided the first quantitative control levels for exposure to asbestos in the workplace. The Asbestos (Prohibition) Regulations 1985[12] banned the import of the most dangerous types of asbestos. The Asbestos (Prohibitons) (Amendment) Regulations 1999[13] finally banned the import of all types of asbestos into the U.K.

In the latter half of the 20th century employees exposed to asbestos in the workplace started pursuing actions against their employers for both breach of the 1931 and 1969 regulations and for breach of duty (negligence). The introduction of compulsory employers' liability insurance following the Employers' Liability (Compulsory Insurance) Act 1969[14] meant that these claims were commonly dealt with by employers' liability ("EL") insurers. EL insurers "on risk" during the period of exposure commonly apportioned claims between them based on the proportion of the exposure period for which they were on risk.

Towards the end of the 20th century a number of things started to become clear. The latency period between the date of exposure to asbestos and the development of mesothelioma was far longer than previously suspected. Up to 40 to 50 years pass between exposure to asbestos and the manifestation of the disease. This, in turn, gave rise to an increasing awareness that the total number and cost of asbestos claims was going to be far greater than ever previously anticipated. Indeed asbestos claims are the longest and most expensive mass tort in English legal history resulting in the insolvency of manufacturers and insurers alike. This, coupled with an increasing understanding of the aetiology of mesothelioma, has led insurers to question the extent to which the traditional approach of apportioning claims based on time on risk remains appropriate. In addition, insurers have questioned, in some instances, whether the words of the insurance cover provided can be said to place insurers on risk for latent disease claims at all.

We should not, therefore, be surprised at the amount of court time devoted to the issue of who should meet the financial cost of asbestos related diseases, or that insurers continue to look to challenge how liability for claims is allocated and apportioned. This is especially true where those insurers are insolvent or in run off and owe fiduciary duties to their creditors concerning the administration of their remaining assets.

Fairchild

There have been a number of cases considering the apportionment and allocation of asbestos liabilities over the decades. The last 15 years, however, have seen a significant increase in the number of challenges which have been mounted to the traditional approach outlined above. The first of the recent cases is *Fairchild v Glenhaven Funeral Services Ltd and others*[15], decided in 2002. By this time mesothelioma was generally understood to be an indivisible disease triggered by a single, unidentifiable exposure to one or more fibres rather than being a result of cumulative exposure. This gave rise to uncertainty as to which period of exposure had actually *caused* the eventual development of mesothelioma. The *Fairchild* case considered the position where a mesothelioma sufferer had been exposed to asbestos, as a result of breach of duty, by more than one employer, but was unable to show which period of exposure had *caused* him to develop the disease.

The Court of Appeal in *Fairchild*[16] ruled that, applying the strict rules of causation, the claimant was unable to establish, on the balance of probabilities, which period of exposure had caused the disease. The court accordingly held that the claimant had failed to establish causation against any of the defendants.

On appeal to the House of Lords[17] the court overturned the decision of the Court of Appeal. The House of Lords determined that, where an employee had been exposed to asbestos during a number of different periods of employment, but where current medical knowledge did not enable the onset of the disease to be attributed to a particular employer, then a modified approach to causation was justified. In such circumstances the House of Lords ruled that it was sufficient for the claimant to show that each employer had "materially contributed" to the risk that he would contract mesothelioma in order for liability to be established. Whilst each of the Law Lords gave slightly different reasons for allowing the appeal, it was generally considered that there was "a strong policy argument in favour of compensating those who have suffered grave harm at the expense of their employers who owed them a duty to protect them against that very harm and failed to do so".[18] The House of Lords ruled that any injustice, involved in imposing liability on a duty breaking employer where it cannot be shown which period of employment gave rise to the mesothelioma, "is heavily outweighed by the injustice of denying redress to the victim".[19]

Barker

The issue next arose in the 2006 case of *Barker v Corus UK Ltd*[20]. This case again considered the position where a mesothelioma sufferer had been exposed to asbestos by more than one employer acting in breach of duty. This time the House of Lords considered whether liability on the part of the employers was joint and several or should be attributed according to each employer's relative degree of contribution to the risk.

A majority of the House of Lords considered that where liability was imposed on an employer on the basis that that employer had ***materially increased*** the risk that the employee would contract mesothelioma, then liability should be attributed in accordance with each defendant's relative contribution to the risk. Lord Rodger of Earlsferry dissented. Lord Hoffmann said:

> "[c]onsistency of approach would suggest that if the basis of liability is the wrongful creation of a risk or chance of causing the disease, the damage which the defendant should be regarded as having caused is the creation of such a risk or chance. If that is the right way to characterise the damage, then it does not matter that the disease as such would be indivisible damage"[21]

Barker created a gap in compensation in circumstances where one or more of a claimant's employers, or their insurers, was insolvent or could not be identified. This situation was addressed by The Compensation Act 2006.[22] Section 3 of the Act reversed the common law position under *Barker.* It made each employer, found to have acted in breach of duty, jointly and severally liable for the damage. This enabled a mesothelioma claimant to recover the totality of his damages from an individual employer without the need to identify each and every employer and/or their insurers. This left employers and/or their insurers to recover a contribution from any other employers/insurers involved. So the position following *Fairchild*, *Barker*, and *The Compensation Act* was, to all intents and purposes, the same as the pre-2002 position. However *Fairchild*, *Barker* and *The Compensation Act* did develop the legal basis by which liability was established in a manner which kept pace with changing medical evidence as to the contraction and development of the disease.

Bolton

The position changed again following the 2006 Court of Appeal decision in *Bolton Metropolitan Borough Council v Municipal Mutual Insurance Limited*[23]. By the time of *Bolton* there had been further developments in the understanding of the aetiology of mesothelioma. By 2006 it was known that mesothelioma was caused by a mutation in one of the cells in the pleural lining of the lung. This might be repaired by the body's own repair mechanism. Or the body might fail to repair itself, thus allowing the mutation to continue until the point at which it became a malignant tumour. Only if the mutated cell developed into a malignant tumour would mesothelioma result and death become inevitable[24]. This was considered to take place around 10 years before diagnosis.

Bolton concerned an individual who was employed to work on a building site occupied by the local authority in the early 1960s. He went on to develop mesothelioma in the 1990s. The local authority concerned brought a claim under its public liability insurance. The question arose whether the relevant policy was the policy in place at the time of exposure to asbestos in the 1960s (which was with one insurer) or the policy in place from 1980 onwards (which was with another insurer). The medical evidence suggested the

malignant tumour was formed and the victim went on to develop symptoms during the latter period.

The argument proceeded on the basis that public liability policies commonly provide cover for "injuries occurring during the period of insurance". No injury was sustained in this instance at the time of exposure and was not sustained until 1980 at the earliest, when the tumour became irreversible and there was no longer the possibility that any cell mutation would simply be repaired by the body's own defence mechanism.

The Court of Appeal accepted this argument and ruled that the public liability policy in place in 1980 was the relevant policy for coverage purposes. Lord Justice Longmore stated that:

> "[t]hese cases have established a pattern at first instance to the effect that an actionable injury does not occur on exposure or on initial bodily changes happening at that time but only at a much later date; whether that is when a malignant tumour is first created or when identifiable symptoms first occur does not matter for the purposes of this case".[25]

EL Trigger

Following *Bolton* four EL insurers in run-off started to decline liability under EL policies. They argued that it was the date at which mesothelioma became irreversible which determined which policy year should respond and not the date of exposure. This formed the basis of the EL Trigger litigation. By the time of the EL Trigger litigation the medical evidence had moved on still further. The point at which mesothelioma was considered to become irreversible was now considered to be the point at which a malignant tumour developed its own blood supply (known as the date of "angiogenesis")[26]. By this point the medical evidence suggested that angiogenesis took place around 5 years before diagnosis.

The policies contested in the EL Trigger litigation contained historical wording not used in EL policies underwritten today. The wording provided cover for "injuries sustained" and/or "disease contracted" during the relevant policy period. The insurers contended that the aetiology of mesothelioma (as now understood) meant that no injury could be said to have been sustained, and no disease contracted, at the time of the exposure itself. Instead, the disease could not be said to have been contracted (or injury sustained) until the moment of angiogenesis decades later.

Mr. Justice Burton[27] agreed with the decision in *Bolton* that the injury of mesothelioma was not sustained at the date of exposure, but was sustained at the point that the sufferer went on to develop mesothelioma. Despite this, he was prepared to construe the "injury sustained" and "disease contracted" wordings as meaning "injury/disease *caused*". This meant that, in keeping with market practice to date, it was the EL policy/policies in place at the time of exposure which were the relevant policies.

The Court of Appeal[28], in turn, did *not* agree with the decision in *Bolton*. It considered itself bound, however, by precedent to follow it, such that injury was again said to have occurred at the date of angiogenesis. But, as with Burton J, the Court of Appeal was prepared to interpret "disease contracted" as meaning "disease caused". So the policies in place during the period of exposure remained the relevant policies for compensatory purposes. However, the Court of Appeal was only prepared to interpret "injury sustained" as meaning "injury caused" in those EL policies which post-dated the Employers' Liability (Compulsory Insurance) Act 1969. Where an EL policy pre-dated the Act, and contained "injury sustained" wording, then that policy did not respond and the relevant policy became the policy in place at the date of angiogenesis.

The Court of Appeal ruling created uncertainty. The question whether insurance cover was available often turned on the precise wording of policies purchased 40 or 50 years ago when mesothelioma was not fully understood. These uncertainties led to an appeal to the Supreme Court.

The Supreme Court considered both (a) the construction of the various EL policies in issue; and (b) the reduced test of causation developed by *Fairchild*, *Barker* and *The Compensation Act* (namely, to enable employees suffering from mesothelioma to recover from those employers who increased the risk of them contracting the disease by exposing them to asbestos). Should this be extended to enable employers to also recover from their EL insurers using the same test of causation? This second issue was not considered by Burton J or the Court of Appeal, nor did it form part of the parties' agreed statement of fact or list of issues before the Supreme Court.

As regards the issue of construction, the Supreme Court took a different view to that expressed by the Court of Appeal in *Bolton*. It was unanimous in construing the words "injury sustained" and "disease contracted" in the policy period as meaning injury and/or disease *caused* during the policy period. The Supreme Court did not overturn *Bolton* (or express a view as to whether it considered the decision in *Bolton* to be correct). It simply distinguished the decision from that in *Bolton*, on the basis that *Bolton* was concerned with public liability insurance, whilst the EL Trigger litigation was concerned with EL insurance[29].

Lord Mance's judgment

In the leading judgment Lord Mance indicated that the court had taken into account a number of considerations:-

1. The Supreme Court referred to the previous House of Lords decision of *Charter Reinsurance Company Limited v Fagan*[30], which is one of the key cases on construction of contracts. In particular, Lord Mance referred to the judgment of Lord Mustill in that case, who said that single words or phrases in a contract

should not be viewed in isolation. They "must be set in the landscape of the instrument as a whole"[31] and any "instinctive response" to their meaning "must be verified by studying the other terms of the contract, placed in the context of the factual and commercial background of the transaction".[32] Applying this to the present case, Lord Mance considered that it was important that the EL policies in question should be viewed more broadly than the interpretation argued for by the insurers allowed. In particular, Lord Mance held that it was important to bear in mind that the policies involved a close link between the actual employment undertaken during each policy period and the premium agreed for the risks undertaken by the insurers. Premium was clearly linked to actual wages paid to employees during the policy period. In Lord Mance's view this made it improbable that the policies in issue were intended to pick up liabilities which could be attributed to activities undertaken in employment decades before[33].

2. The second factor considered by the Supreme Court was the potential gap in cover which would exist if the construction argued for by EL insurers was correct. Employers' breaches of duty towards employees in one period might lead to injury or disease in a later (uninsured) period.[34] Similarly, employers would be vulnerable to any decision by EL insurers not to renew; and such decision might arise from disclosure by employers of past negligence on renewal.[35] Lord Mance dismissed the argument advanced by insurers that this issue would not arise in the overwhelming majority of EL cases, since most cases involve short-tail claims: typically an accident involving injury. Referring to the earlier Supreme Court decision of *Rainy Sky SA v Kookmin Bank*[36], Lord Mance stated that the position contended for by insurers "gives too little weight to the implications of the rival interpretations" and that whilst the insurance could "operate entirely successfully in some 99% of cases", the "1% of cases in which there might be no cover could not be regarded as insignificant".[37]

3. The way in which the EL policies in issue dealt with other matters, in particular extra-territorial matters, suggested that the wording of the policies had not been carefully considered at the relevant time. As a result the Supreme Court felt that there was no requirement for the court to stick literally to what might be perceived as the natural meaning of the words contained in the policy[38].

4. Evidence as to the previous application of the policies did not demonstrate a binding usage, and evidence as to the general purpose of EL cover was largely inadmissible. Lord Mance considered, however, that there were still some useful conclusions which could be drawn about the commercial purpose of EL insurance as part of the background. He felt that relevant conclusions could be drawn about the general nature and purpose of the individual policies[39]. Lord

Mance felt that, given the protective purpose of the Employers' Liability (Compulsory Insurance) Act 1969, insurance on a causation basis was required to give proper effect to the legislation.[40] This suggested that the correct interpretation of the "sustained" and "contracted" wording was "caused" as contended for by the claimants.

The test of causation

The Supreme Court considered what constitutes the correct test of causation, when determining the liability of EL insurers to indemnify employers for their liabilities to mesothelioma sufferers exposed to asbestos whilst in their employ. It was divided, with Lords Kerr, Clarke and Dyson agreeing with the judgment of Lord Mance and Lord Phillips dissenting.

Lord Phillips considered the reduced test for causation developed in *Fairchild*, *Barker* and *The Compensation Act*, in order to establish a causal link between the negligent exposure to asbestos by an employer and the subsequent development of mesothelioma by an employee in his employ. He expressed the view that it should not be extended to encompass the relationship between that employer and its employer's liability insurers. Put simply, Lord Phillips considered that the looser test for causation developed by *Fairchild* was one of liability for the ***risk*** of mesothelioma created by the exposure and that this test was required "to ensure that those who had breached the duties that they owed to their employees did not escape liability because of scientific uncertainty".[41] But Lord Phillips did not believe that it was the position of the judiciary to extend this test to make EL insurers liable in respect of policy years where it could not otherwise be shown that mesothelioma had been initiated during that policy period.

Lord Mance, by contrast, considered that the test for causation developed in *Fairchild*, *Barker* and *The Compensation Act* was one of ***deemed causation***. An employer was deemed to have ***caused*** an employee's mesothelioma (assuming that he went on to develop mesothelioma) by virtue of having exposed him to asbestos. Having determined that the EL insurance policies should be construed as operating on a causation basis, then the policies must therefore respond to liabilities caused (or deemed to be caused) during the relevant policy period.[42] In adopting this approach, and in holding the EL insurers liable, Lord Mance stated that "if the common law during or even after the currency of an insurance develops in a manner which increases employers' liability … that is a risk which the insurers must accept".[43] To do otherwise would be to create an inconsistency in approach which would result in a gap in coverage.

Asbestos litigation and employers' liability trigger litigation – a lesson for the future?

The result of the Supreme Court's ruling is that negligent exposure of an employee to asbestos during a policy period is sufficient to trigger the EL insurer's obligation to indemnify the employer. This was the practice universally adopted prior to the EL Trigger Litigation and so the Supreme Court's judgment effectively confirms the historical practices of the insurance industry.

So what lessons can be drawn? There are perhaps three main observations.

1. Some sectors of the insurance market maintain that the costs of asbestos liabilities have taken too great a toll on both insurance and industry. They contend that what is now needed is a publicly funded no-fault compensation scheme which compensates victims of asbestos related diseases. The introduction of such a scheme is unlikely to have political support. The overwhelming likelihood is that the government will continue to look to the private sector to meet the costs of asbestos related claims. In April 2012 an Employers Liability Tracing Office was launched to upload and manage a central database containing EL policies. In February 2011, the Financial Services Authority (FSA) published new rules requiring policies entered into, renewed or for which claims are made from April 2011 to be entered onto a register[44]. Then, in July 2012, the FSA issued a consultation paper in relation to the tracing of historical EL policies[45]. This coincided with the announcement by the Department of Work and Pensions, on 25th July 2012, of a new scheme (similar to the Motor Insurers Bureau). Under the scheme the EL insurance industry will meet the cost of mesothelioma claims where the relevant EL insurer cannot be traced. The intention is to extend the scheme to other asbestos related diseases in due course. The scheme is estimated to cost the insurance industry a further £30m a year in the first ten years on top of the £200 million a year already paid out. These initiatives make it clear that the private sector will be asked to pick up the costs of asbestos claims for the foreseeable future.[46]
2. *Bolton* remains good law in relation to pubic liability claims. So the relevant policy will be the one in place at the time of manifestation of the disease and not the one in place at the time of exposure. It seems inevitable that this will be subject to judicial challenge. What will be the impact on public liability premiums in the meantime and to what extent will public liability insurers be able to force the removal of asbestos from properties that they insure? The Department of Education estimates that asbestos is present in more that three quarters of UK schools, from hard plastics used in toilet cisterns and floor tiles to walls and ceilings made of asbestos insulating board[47]. Whilst generally seen

as safe unless undisturbed, to what extent might we see claims from maintenance contractors, supply staff and pupils in the next 30 to 40 years, if this asbestos remains where it is?

3. Finally, innovation in manufacturing is necessarily a balancing act between product development and risk. Are we applying the lessons of the past to the products of the future? Nanofibres used in the nanotechnology industry are amongst the strongest and stiffest materials known to man with impressive electrical and thermal properties. They are used in manufacturing in a wide range of goods from aeroplane wings to tennis rackets, from self-cleaning windows to computer parts and from medicines to cosmetics. However, they are similar in shape and size to asbestos fibres. They have been shown to cause tumours in mice although the long term impact to those who work in manufacturing and to the general public is not yet clear. Could and should we be doing more to investigate the possible long term impact (if any) of new technologies or, as with asbestos, will we only really become fully aware of the risks once the damage has been done. Will today's innovations become tomorrow's headlines for very different reasons?

Endnotes

[1] Natasha Gunney is a senior associate in the commercial litigation, product liability and insurance team at Hogan Lovells. She has 15 years experience of litigation and arbitration dealing with complex commercial disputes.

[2] www.drugscope.org.uk/resources/faqs/faqpages/how-many-people-die-from-drugs

[3] www.nhs.uk/Livewell/lungcancer/pages/asbestosandlungcancer.aspx

[4] www.who.int/mediacentre/factsheets/fs343/en/index.html

[5] Statistics published by the Department of Transport show 1,901 casualties of road accidents in the UK in 2011 – www.dft.gov.uk/statistics/releases/reported-road-casualties-gb-main-results-2011

[6] [2012] UKSC14; [2012] 1 WLR 867

[7] The Economic Costs of Health Service Treatments for Asbestos Related Mesothelioma Deaths, Occupational and Environmental Health Research Group, University of Stirling, Watterson A, Gorman T, Malcolm C, Robinson M, Beck M, Ann NY Acad Sci 2006 Sept 1076:871-881

[8] UK Asbestos – The Definitive Guide – www.actuaries.org.uk/system/files/documents/pdf/Lowe_0.pdf

[9] http:/pmj.bmj.com/content/80/940/72.full

[10] SI1931/1140

[11] SI1969/690

[12] SI1985/910

[13] SI1999/2373

[14] 1969 c.57

[15] [2002] UKHL 22; [2003] 1 AC 32

[16] [2002] 1WLR 1052

[17] [2002] UKHL 22; [2003] 1 AC 32

[18] [2003] 1 AC 32, 67

[19] [2003] 1 AC 32, 67

[20] [2006] UKHL 20; [2006] 2 AC 572

[21] [2006] 2 AC 572, 588

[22] 2006 c.29

[23] [2006] EWCA Civ 50; [2006] 1 WLR 1492

[24] [2006] 1 WLR 1492, 1499-1500

[25] [2006] 1 WLR 1492, 1502

[26] [2012] 1 WLR 867, 873-874

[27] [2008] EWHC 2692 (QB); [2009] 2 All ER 26

[28] [2010] EWCA Civ 1096; [2011] 1 All ER 605

[29] [2012] 1 WLR 867, 889

[30] [1977] AC 313

[31] ibid, 384

[32] ibid, 381

[33] [2012] 1 WLR 867, 878-879

[34] ibid, 879

[35] ibid, 880

[36] [2011] 1 WLR 2900

[37] [2012] 1 WLR, 867, 880

[38] ibid, 881

[39] ibid, 885-886

[40] ibid, 889

[41] ibid, 918

[42] ibid, 899

[43] ibid, 898

[44] PS11/4 Tracing Enployers' Liability Insurers – February 2011. www.fsa.gov.uk/pubs/policy/PS11_04.pdf

[45] CP12/14 – Tracing Employers' Liability Insurers – Historical Policies – July 2012. www.fsa.gov.uk/static/pubs/cp/cp12-14.pdf

[46] www.dwp.gov.uk/newsroom/press-releases/2012/jul-2012/dwp085-12.shtml

[47] www.education.gov.uk/schools/adminandfinance/schoolscapital/buildingsanddesign/a00203143/managingasbestos