

SUMMARY OF THE JUDGMENT DATED 8 OCTOBER 2010 OF THE COURT OF APPEAL IN THE EL POLICY TRIGGER LITIGATION

On 8 October 2010 the Court of Appeal consisting of Lord Justice Rix, Lady Justice Smith and Lord Justice Stanley Burnton handed down their Judgment in the EL Policy Trigger litigation.

The Court of Appeal had heard six consolidated cases in November 2009 and Lord Justice Rix gave the lead Judgment in what was a complicated and detailed case.

This was an appeal of the Judgment of Mr Justice Burton in July 2008 when he held that the Insurers wording be read as a causation wording regardless of what the words actually said.

There were four appellant insurers involved in this case, BAI, Excess, Independent and MMI. Each of these insurers had issued a number of different insurance policies over the years in relation to Employer's Liability and in fact the wording of the policies for some of these Insurers had changed from "sustained" to "contracted". The major difference between the wording on these insurers policies and most of the rest of the insurance market was that they had used the words "sustained" and "contracted" whilst the majority of the other insurers used a causation wording.

It was argued by the Appellant Insurers that sustained and contracted meant the same thing and you can only sustain or contract an injury if you have actually "got it". The significance of this, in the case of Mesothelioma, is that exposure to asbestos can occur some 35-40 years before a person has got an injury, a state known as angiogenesis. If the four insurers were right, then the policy in force at the time of exposure would not be the policy that would cover the insured for their employee's injury. Employers would then look to the policy they had in force at the time of angiogenesis but if this policy had a causation wording it would not cover them as the injury was caused on exposure. This will inevitably lead to some Employers not being covered for Mesothelioma Claims where damages are often £100,000's. This is known as a black hole in their insurance coverage.

Lady Justice Smith refused the appeal in its entirety and largely agreed with Mr Justice Burton's decision at first instance. Lord Justice Rix and Lord Justice Stanley Burnton disagreed. They accepted the Appellant's argument that you sustained an injury when you suffered or got that injury which would not be until many years later, therefore it followed that in relation to the sustained wording the Appellant's appeals were successful. This was in line with the decision of The Court of Appeal in Bolton v MMI & CU. Lord Justice Rix was, however, troubled by this decision and may have come to a different conclusion on the sustained wording if he had not felt bound by the previous decision of The Court of Appeal in Bolton.

Lord Justice Rix and Lord Justice Stanley Burnton had more difficulty with the word contracted. They both concluded that contracted was more in line with the causation wording than that of the sustained wording, and so in relation to the policies which contained the contracted wording they found for the Respondents and upheld the original decision of Mr Justice Burton.

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As a result it is almost inevitable that the matter will be referred to and appealed to the Supreme Court and leave to appeal has been given on nearly all points to all of the parties. In the circumstances it is likely that most Mesothelioma cases where the sustained or contracted wording is in issue will be stayed until the outcome of the Appeal in the Supreme Court.

For more information on this case, or any other disease related matters please contact Ivan Moody on 01279 712532.