



Asbestos disease claims on employers liability policies

Problems facing insurers and solicitors

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Does *Bolton MBC v MMI* apply to EL policies

1. *Bolton Metropolitan Borough Council v Municipal Mutual Insurance Ltd and Commercial Union Assurance Company Ltd*¹ decided that public liability policies which afforded indemnity against injury *occurring* during the period of insurance (a) did not respond where all that occurred during the period of the policy was culpable exposure to asbestos, but (b) did respond where the "injury"² occurred during the policy period, although the defendant's negligence occurred years earlier.
2. In the context of public liability insurance the decision is unremarkable, albeit it appears to be the first known disease case in this country in which the point has been tested. It has, however, been quite extensively litigated in the United States. There the approach adopted in most States has been to treat injury as having occurred at the time of initial exposure and to hold liable in respect of all asbestos related diseases any insurer whose policy was in force (a) at the time of initial exposure, or (b) during continued exposure, or (c) at the time of

¹ [2006] EWCA Civ 50

² Which might have been the creation of the malignant tumour, or the occurrence of identifiable symptoms (the Court of Appeal did not decide which, since both events occurred during the period of MMI cover)

manifestation of the disease.³

3. In *Bolton MBC* CU's counsel understandably emphasised that the case was concerned with PL and not EL policies. In the case of the latter the Court of Appeal was evidently told that employers' liability insurers

usually offered cover in respect of "injuries caused during the period of insurance"

so that it would be the policy in force at the time of the culpable exposure that would respond to the claim, albeit the injury did not occur until many years later.

4. This is not entirely correct. It is true that one typical form of EL tariff wording provides for indemnity against legal liability for

bodily injury illness or disease caused during the period of insurance to any person under a contract of service or apprenticeship with the insured if such injury or illness or disease arises out of and in the course of his employment by the insured⁴.

5. However an alternative, not uncommon, form of wording provides for indemnity

³ *Keene v Insurance Company of North America* (1981) 667 F 3d 1034 - the so-called "triple trigger".

⁴ Madge: *Liability Policy Wordings and Cover* Appendix 6, Combined Liability Policy

If at any time during the Period of this Policy any person described in the Schedule who is under a contract of service or apprenticeship with the Assured shall, while employed...sustain bodily injury or disease or death resulting therefrom (hereinafter called "bodily injury") arising out of and in the course of his employment by the Assured in the business described in the Schedule herein⁵

(The essential difference between these two wordings is that the former requires that the injury etc. be "caused" during the period of insurance, while the latter requires that it be sustained during that period).

6. It will be immediately obvious that if the policy in force at the time of culpable exposure contained the latter form of wording, and the inhalation of asbestos is not an "injury" the employer will have been uninsured against his liability for mesothelioma occurring in the future, but caused during the currency of the policy.
7. This is such an implausible result that it is anticipated that the courts will not be able to impose it, though no doubt it is only a matter of time before they are told that they have no choice but to do so, in the light of the *Bolton* decision. But how can the courts get round it?
8. In the case of a post 1972 policy the argument will no doubt be that, having regard to the Employers' Liability (Compulsory Insurance) Act 1969, the parties must be taken to have intended the policy to extend to liability to employees "arising out of and in the course of their employment" during the policy period, albeit the injury or disease was sustained subsequently. But this argument would not apply to earlier policies. In such a case the courts will have either to apply *Bolton* (with suitable expressions of regret) or decide that, in the case of EL

⁵ Lloyd's Employer's Liability Policy

policies, "injury" does not mean what it means in PL policies.

9. In *Bolton*, Longmore LJ, obviously recognising that the point might arise in future, said (paragraph 24)

I am far from saying that what has been called this multiple trigger or, sometimes, triple trigger theory (exposure, development of disease, and diagnosis) might not be held, on some future occasion, to be appropriate for employers' liability policies in general, depending on the precise words used. But, as far as public liability policies are concerned with the specific wording used in the present cases, I see no need for the English courts to adopt the multiple trigger theory.

We shall see.

Do insurers for part of the period of exposure have to pay the whole claim?

10. As the law presently stands the answer must be yes (subject to unusual policy wording providing for the contrary).
11. This issue only arises in the case of "indivisible" diseases (mesothelioma and other forms of cancer). In the case of "divisible" diseases (asbestosis, pleural plaques, pleural effusion and diffuse pleural thickening) the disease will be treated as having been caused partly by each period of exposure, so that the insurer will not be liable in respect of periods of exposure for which that insurer was not on risk. In the latter category of cases, therefore, there can I think be no criticism of a practice which apportions the claim between insurers and insured on a pro rata basis.
12. In indivisible disease cases (which I will refer to hereafter as mesothelioma

claims, although they could of course relate to other cancers) the law, as stated in *Fairchild v Glenhaven Funeral Services Ltd*,⁶ is that all exposures are to be regarded as having caused the disease.

13. It therefore follows that an insurer whose policy responds to the insured's culpable exposure in any period is liable to indemnify in respect of the whole of the claim.
14. As the law presently stands there is not, in my view, any basis⁷ upon which either (a) the insurer's liability could be for a lesser sum; or (b) the insurer could recover any contribution from the insured who was uninsured for part of the period of culpable exposure. Although that insurer could, I firmly believe,⁸ recover a contribution from another insurer who was on risk for a separate period of culpable exposure (by means of the equitable doctrine of contribution) that concept cannot apply where there was no insurer for that period, the concept of "self insurance" not being one known to English law.
15. Although the result may appear to insurers unfair (for example in a case in which the insured paid for insurance for only one year out of many during which he exposed the claimant) I fear that, in the absence of an express policy provision limiting insurers' liability to a proportion of the insured's overall liability, in the present state of the law the consequence is unavoidable. The only attempt to avoid this result of which I am aware is the case of *Phillips v Syndicate 992 Gunner*.⁹ In that case insurers, in seeking to confine their liability to indemnify in

⁶ [2003] 1 AC 32

⁷ Absent some very unusual provision in the policy

⁸ Although there is no English authority directly supporting this

⁹ [2003] EWHC 1084 (QB)

respect of a mesothelioma claim to the proportion of the exposure period during which they were on risk, implausibly invoked a rateable proportion clause in the policy, viz

If at the time any claim arises under this policy there be any other insurance covering the same liability, the Underwriters shall not be liable to pay or contribute more than their due proportion of any such claim and costs and expenses in connection therewith

This argument was doomed to failure because rateable proportion clauses only apply to double insurance (i.e. two or more concurrent policies). This left only an allegation that there was an implied term in the contract of insurance limiting their liability. This argument was unsurprisingly no more successful.

16. I have no doubt but that, as the law presently stands, *Phillips* was correctly decided. No doubt in future the courts might develop some principle of proportionate liability as between insurer and insured, but they have not yet done so.

17. There have of course been recent attempts to confine the defendant's liability in mesothelioma cases to a proportion of the claim, based on the ratio of the defendant's culpable exposure to the victim's total exposure. The leading case is *Barker v Saint Gobain Pipelines plc*¹⁰ which has been argued in the House of Lords.¹¹ The result is awaited with great interest.

¹⁰ [2004] EWCA Civ 545

¹¹ Together with two other cases on the same point, *Patterson v Smiths Dock Ltd* and *Murray v British Shipbuilders (Hydrodynamics) Ltd*

18. Should these defendants' appeals succeed, there may (depending on how the House of Lords puts it) be room for an argument, by analogy, that the liability of an insurer to his insured may be similarly apportionable.

What are the obligations to the insured of solicitors appointed by the insurers (in the context of conflict of interests)?

19. This can be a ticklish question. A solicitor appointed by insurers to defend a claim also acts on behalf of the insured and, in principle, owes the same duties as if he were acting exclusively for the insured. In acting for insurer and insured there will not necessarily, or even usually, be any conflict of interest. However there might be (for example where insurers are minded to avoid the policy and there is a possibility of the insured revealing some matter which would be adverse to his position *qua* his insurers) in which case it may be necessary for solicitors appointed by insurers to refuse to act, or to continue to act, for both parties. In my experience such cases are rare, but each case must be looked at on its own particular facts.
20. However if the only issue is one of law, involving the construction of the policy, I do not see that any conflict of interest arises in relation to the defence of the claimant's claim. Nor do I see why a solicitor should not advise his insurer clients on policy issues, albeit he will have to make it clear to the insured that the latter should take independent advice and the solicitor must explain why.
21. There is, in mesothelioma cases, a problem which has thus far attracted little attention, but which is I believe due to surface. It arises where there is a solvent employer who was insured for part of the period of culpable exposure by one insurer, but for another part of the period was either uninsured or

insured with an insurer who is now defunct (generally Iron Trades Employers Insurance Association Limited or the Builders Accident Insurance Company Limited).

22. In principle the solvent insurer is liable to meet the whole claim (cf *Phillips v Syndicate 992 Gunner* above). In practice, however, insurers accept liability only for the proportion of the time on which they were on risk, and require the insured to pay the balance. My understanding is that the line that insurers take is that *Phillips* only applies where the insured is insolvent, and the solvent insured is required to contribute his proportionate share.

23. This is the approach adopted in the ABI Guidelines for Apportioning and Handling Employers' Liability Mesothelioma Claims (2003). However, insureds are of course not parties to the ABI protocol to which the Guidelines give effect.

24. Thus far, solvent insureds have, I believe, meekly accepted the correctness of this approach and paid up their share of the claims. However, I am aware that at least one insured has now challenged this and required from its insurers a full indemnity. In my view, as the law presently stands¹² that claim is indefensible.

25. This raises the question of whether solicitors who have acted for both insurers and insured in mesothelioma claims, and who have collected the settlement monies from both (on the insurer's direction) have been in breach of duty to their insured clients.

¹² Unless the House of Lords in *Barker* changes the law

26. Prior to *Fairchild*, the question of whether solicitors who collected part of the settlement monies from the insured were in breach of duty to their insured clients is a difficult one. There was some evidence in *Phillips* to support the proposition that this was the market practice, albeit the evidence was exiguous. My own recollection is that insurers always paid the claim in full, but I have heard anecdotally of cases in which solvent insureds were invited to and did contribute. Moreover it must be borne in mind that insurers called upon to meet a mesothelioma claim had available to them an argument that, if they were only on risk for part of the period of culpable exposure, it could not be demonstrated that the negligence causing the mesothelioma occurred during their period of cover, so that they were not liable at all. This argument was, of course, fortified by the Court of Appeal decision in *Fairchild*.
27. My instinctive reaction is that, in those circumstances, prior to *Fairchild*, solicitors were not negligent, but I can well envisage a court (with the wisdom of hindsight) opining that as soon as insurers refused to indemnify in full there was a conflict of interest and it was the duty of solicitors to advise the insured to seek independent advice before agreeing to accept only a partial indemnity.
28. The House of Lords decision in *Fairchild* was given on 20 June 2002. *Phillips* was decided on 14 May 2003. The ABI Guidelines for Apportioning and Handling Employers' Liability Mesothelioma Claims were published on 28 October 2003.
29. Certainly after the decision in *Phillips* my view is that any solicitor practising in this area ought to have appreciated that (subject of course to the terms of the policy) the insured was probably not liable to contribute to the judgment in or

settlement of a mesothelioma claim. Between June 2002 and May 2003 the position is less clear, but I believe it likely that a court would hold that a solicitor specialising in this area of litigation ought at least to have considered whether, in circumstances where the insurer was only offering a partial indemnity, the insured might be entitled to a full indemnity and accordingly should be advised to seek independent advice

30. Of course the premise that the solicitors might be liable at all depends upon their having been in breach of some identifiable duty. Typically they will have been instructed to deal with the claimant's claim against the insured. In those circumstances they will not have been under a duty to advise on policy cover. However, in circumstances where an insurer was only offering a partial indemnity it seems to me that a conflict then arose.

31. Moreover, a request to an insured to contribute to a settlement must have carried with it the implicit advice that the insured was liable so to do. I can see the force of the argument that, since after October 2003 this accorded with the ABI Guidelines, solicitors ought not to be criticised for following this practice. Nevertheless my view is that it is likely to be held that a solicitor acting for both insurer and insured, in circumstances where the insurer was only offering a partial indemnity, was under a duty to advise the insured to seek independent advice as to whether they were under any liability to contribute to a settlement.

What is the duty of solicitors now?

32. The extent of a solicitor's duty to his former client after termination of the retainer is a grey area. At one end of the spectrum is the principle that the solicitor is under no duty to re-open closed files and, for no fee, reconsider advices that he has previously given.

33. The authorities show that a solicitor, or other professional, who is retained to advise (or otherwise act) on a specific occasion is not under a further or continuing duty to reconsider that advice, or other earlier actions. Thus in *Midland Bank Trust Co Ltd v Hett Stubbs & Kemp*¹³ Oliver J stated that

It is not seriously arguable that a solicitor who or whose firm has acted negligently comes under a continuing duty to take care to remind himself of the negligence of which, ex hypothesi, he is unaware

The above passage was cited in *Gold v Mincoff Science & Gold*¹⁴ by Neuberger J, who continued

It is also true, in my opinion, that the mere fact that, following his negligence and within the limitation period, the solicitor is instructed in the same matter by the same client does not of itself put the solicitor under a duty to discover, or advise as to, his negligence on the earlier occasion. As was said by Oliver J in *Midland* at 403A, the court must be careful of imposing a duty on a solicitor which involves going beyond his specific instruction.

34. However, a duty of care in tort arises when the court considers that it is fair, just and reasonable to impose such a duty. In *New Islington Health Authority v Pollard Thomas & Edwards*¹⁵ Dyson J, in considering the continuing design obligations of an architect, concluded that the architect was under no duty to review his design unless something occurred to make it necessary, or at least prudent, for a reasonably competent architect to do so or unless he knew, or ought to have known, of his earlier negligence. He said (para.16)

¹³ [1979] Ch 384, at 403

¹⁴ [2001] Lloyd's LR PN 423, at 439

¹⁵ [2001] Lloyd's LR PN 243

In my view, in the absence of an express term or express instructions, he is not under a duty specifically to review the design of the foundations, unless something occurs to make it necessary, or at least prudent for a reasonably competent architect to do so.

He then quoted the passage from the judgment of Oliver J in *Midland Bank* (quoted above), of which he said

In my view, that observation is as apt to apply to an architect as it is to a solicitor. The position is quite different where the architect (or solicitor) knows, or ought to know, of his earlier negligence. When that occurs, then he may well be under a contractual obligation to review his earlier performance, and advise his client honestly and competently of his opinion...

If the contract has been discharged (for whatever reason), then the professional person may be under a duty in tort to advise his client of his earlier breach of contract

(my emphasis)

35. In my opinion any solicitor who is on notice that he have at least arguably given incorrect advice to, or failed properly to advise, his insured clients is under a duty at least to advise those insureds that they should take advice on their position.

36. This duty obviously extends to all insureds who may still be in time to claim further indemnity from insurers (i.e. settlements within the last six years) While solicitors may or may not have been in breach of duty to a client prior to the decisions in *Fairchild* or *Phillips*, the relevant question is not whether they were, but rather whether that client may have been given the wrong advice (albeit inadvertently) and accepted a limited indemnity which he was not obliged to accept - in circumstances where corrected advice will or might still enable him to

achieve a full indemnity.

37. Should notification be extended to insureds who are now out of time for advancing claims against insurers, but who may have a claim against their solicitors? In my judgment it should - on the basis of the principle set out in the emphasised citation from the *New Islington Health Authority* case above.
38. The advice that should be given to those insureds is that when the claims against them were settled, and they were required to and did contribute to the settlement, in fact recent case law suggests that they may in fact not have been under any obligation so to do and that, while because they were also acting for insurers, it would not be appropriate for the solicitors to advise them whether this is correct, or on any issue relating to policy cover, the insured ought to seek independent advice as a matter of urgency.
39. Nor do I see that notifying insureds in those terms will constitute any breach of duty to the solicitor's insurance clients. The insurers invariably did not retain the solicitor to advise on the extent of policy cover. By instructing the solicitor to act on behalf of both insurer and insured (in defence of the claimant's action) they must in my view have impliedly consented to the solicitor adopting the correct professional stance in the event of a dispute over policy cover, i.e. advising the insured to seek independent advice if they so wished.

The position of the Financial Services Compensation Scheme Limited (FSCS)

40. The Financial Services Compensation Scheme is a complex one, and it is not proposed to discuss the many difficulties to which its provisions may give rise.

41. For present purposes it is sufficient to note that the FSCS will meet a claim for which an insolvent insurer would be liable only if the policyholder is a "private" policyholder, or a "corporate" policyholder where the liability is subject to compulsory insurance. Thus corporate policyholders are protected for employers' liability claims subject to the Employers' Liability (Compulsory Insurance) Act 1969.¹⁶
42. Insofar as the claim pre-dates compulsory insurance, where the corporate employer is insolvent, an employee claimant, having established or agreed a claim against the insolvent employer, may make a claim to that employer's insurer under the Third Party (Rights Against Insurers) Act 1930. If that insurer is also insolvent, FSCS will pay 90% of the amount of the claim.¹⁷
43. Where a corporate employer policyholder has a claim, the FSCS is content to abide by the ABI Guidelines and to pay the insolvent insurers' share on a time exposed basis.
44. A problem arises, where there is a corporate policyholder who was insured both before and after 1 January 1972 with a now insolvent insurer, and has no other insurance. Can that policyholder call upon the FSCS to indemnify in respect of the whole of a mesothelioma claim.

¹⁶ Which came into force on 1st January 1972

¹⁷ The remaining 10% is known as the "FSCS Shortfall" and the ABI Guidelines contain provisions for allocating this between both insurers and solvent employers (albeit the latter are, of course, not bound by this protocol)

45. In my view the logical answer to this must be yes. Assuming that the post 1972 policy responds, the insured company's entitlement (applying *Fairchild* and *Phillips*) must be to the whole sum that would have been payable by the insurer.
46. However, in practice, FSCS will only pay a pro rata share of the claim. I can see no basis either in law, or in the FSCS Rules, for this approach.

How might *Barker v St Gobain* change things?

47. If the appeals are dismissed (as they should be) the position will remain as above stated and the various problems to which I have adverted will no doubt be resolved sooner or later.
48. If, on the other hand a "Fairchild" defendant is treated in law as if mesothelioma were a divisible disease, then the insurance problems to which I have referred will all fall away.
49. If the House of Lords reaches some intermediate position based on public policy (rather than by application of legal principle) then the insurance position will no doubt require careful analysis. We shall see.

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