

Employers' Liability Insurance - when is a pay-out triggered?

Historically, Employers' Liability ("EL") claims have been paid by the insurer who is on risk at the date of the cause of the disease, for example the inhalation of asbestos fibres causing mesothelioma.

EL policies are generally drafted to cover injury "caused" or injury "sustained" for the period of the policy. This article looks at the Court of Appeal's recent shift in the interpretation of these phrases and, as a consequence, the interpretation of the 'trigger' date of EL policies.

The game changer

In 2006, the rules changed dramatically. In a mesothelioma case, it was held that the "trigger" event was not the date of inhalation but was the onset of the disease and so the traditional rule that the insurer on risk at the time of inhalation would have to pay did not apply. This has led to a general trend of insurers declining to cover claims where there is a long period of dormancy between exposure and the presentation of a disease, especially where the insurer is no longer on risk at the date of disease onset.

It is critical that the trigger date can be identified with certainty, both for the insurer and the employer, as the insurer at the time of exposure to a disease may well be different to the insurer at the date the disease manifests. In the case of mesothelioma, for example, it can take up to 40 years for a tumour to form after exposure to asbestos. Not only will this determine the relevant policy under which an employer should seek to recover, but in certain circumstances it can leave the employer having to meet the liability itself if there is a "black hole" between different insurance policies.

When is an injury an injury?

In *Durham v Bai (Run Off) Ltd*, which was determined in October this year, the Court of Appeal was asked to interpret some phrases which are commonly used in EL policies regarding the trigger date.

The insurers maintained that "sustaining" and "contracting" a disease were references to the onset of a disease. The claimants argued that these words related to the origin of the disease and thus exposure to a causative event.

The Court of Appeal gave a rather confusing judgment. They threw doubt on the proposition that a disease with a long dormancy period does not cause 'injury' until its onset, but nevertheless went on to hold that where a policy makes reference to 'sustaining injury' then, using the everyday interpretation of the words, this means when a disease manifests. It was acknowledged that this interpretation "flies in the face" of the commercial purpose of most EL policies but it was felt that the interpretation was a more rational one than its alternative.

Conversely, the Court held that the words “disease contracted” should be interpreted in a more causative manner to reflect the origin of the disease. Furthermore, in interpreting this phrase, the Court took account of the commercial purpose of EL policies (which are generally geared towards the trigger event being the causation of a disease) and held that the commercial purpose should prevail.

As matters stand, therefore, there is no uniformity in interpreting EL policies and the choice of wording, whether it be “cause” or “injury” based, will determine whether an insurer has to pay. Whether a word should be given a ‘causative’ interpretation will, under current case law, remain subjective and will be a matter for legal debate. Acknowledging that certainty is desirable for both employers and insurers, the Court of Appeal has recently given leave to appeal to the Supreme Court. This appeal is likely to be expedited.

What can I do in the interim?

There are many diseases that have a dormancy period after exposure to a disease-causing event. Similarly, chronic problems can manifest months or even years after an employee is injured at work. There may be many companies who could be facing significant claims as a result of an employee’s (or former employee’s) diagnosis with these diseases and possible problems if they have ‘black holes’ in their EL policies.

With the uncertainty as to when a policy is triggered, the most important step that a company can take is to ensure, to the best of its ability, that it has full and accurate records of all EL policies held, dating back as far as possible. Not only will this help a company establish whether it was covered at a given date, but it will also highlight whether the relevant insurance company is still in existence and hence the realistic chances of being able to recover under the policy. If the insurer no longer exists, or a potential ‘black hole’ exists, the company can take precautionary steps to account for potential claims in the future.



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