



IMC Liability Insurance Conference
5-7 Sept 2022
Queen's College

Dr Andrew Auty

andrew@reliabilityoxford.co.uk

Presentation plan

- Bodily Injury
- Injury-in-fact

Some examples

- Physical change
 - Broken bones, burns, scrapes, - tissue is changed.
 - Cancer – tissue is changed.

Significant change of form with necessary change of function and with pain and suffering.

- What about addiction?

Adaptive reversible change of function, no change of form. Plenty of suffering. Exactly what function is necessarily changed? The functions that maintain addiction.

Some examples

- What about brain damage?
 - Loss of form, but no change in function if below threshold.
- Transient concussion?
 - No change of form or function either side.
 - Temporary function change
- Being offended?
 - Pure suffering with some constructive losses.
 - Necessary? Assessed by convention
 - Do you want to cover constructive injury?

So for liability

- Necessary relationship between change of function and significant detriment.
- ...an objective adverse disturbance of the structure or function of all or any part of the natural person's body, caused by an external agent.
- Six explicit conditions can be recovered from case law.

E.G. If this Claimant was never different from the peer group norm, then it is very unlikely they can prove they were ever injured.

Grey areas

- Is anxiety an injury?
 - No.
 - So do you want to cover illness, anxiety is a form of illness?
- Is disability an injury?
 - No. (it is almost always conditional constructive)
 - Do you really mean impairment? What about insignificant impairment?
- Is every biological change an injury?
 - No.
- Is being upset an injury?
 - Being upset is a perfectly healthy response of the cognitive emotional interface.

Injury-in-fact

- Mesothelioma is indivisible.
 - It can only become indivisible once.
 - All but-for steps must be in starting it off.
- If you already have it, IIF was when it became indivisible.
- If you haven't then IIF is when it becomes inevitable.
- Is a currently harmless change (single meso cell) an injury?
- *Dryden* says yes it is.
 - Provided the harm was necessary.
 - For the person with mesothelioma it was merely a matter of time between single cell and their current state.

Is angiogenesis a but-for step in mesothelioma?

- Angiogenesis (AG) is an innate capacity of all tissues in complex organisms. There is no but-for change in any cell. It is not a result of mutation.
- AG is NOT a but-for step in cancer growth or cancer perpetuation. Thin sheet cancers grow well without it. Cancers with AG do stop and do die.
- Angiogenesis can be developed before the lesion has any fully malignant cells.
- If I transplant a single cancer cell, without any blood supply apparatus, into a mouse, the cell generates a cancerous lesion.

Not necessary

so

- Angiogenesis is not a but-for step in cancer formation.
- It is not a characteristic of a malignant cell.
- Cancers become indivisible without it and cancers are not inevitable with it.

- 5 years before diagnosis for the date an indivisible injury became indivisible is a non-starter.

- 10 years would be agreed by experts.

EL vs PL

Can cancers read policy documents?

- For EL it is the date after which further exposure to hazard cannot be causal (or contribute to risk in case of mesothelioma), for PL it is the date which identifies the one policy which responds.
- It has to be the same date for each.
- The cancer cannot be changed by the choice of policy trigger, either it is effectively in its final indivisible form by a certain date, or it isn't.
- Probable IIF for mesothelioma is between 10 and 25 years before diagnosis. 5 years is an unjustifiable remote outlier.