

Employers Liability Trigger Point Litigation

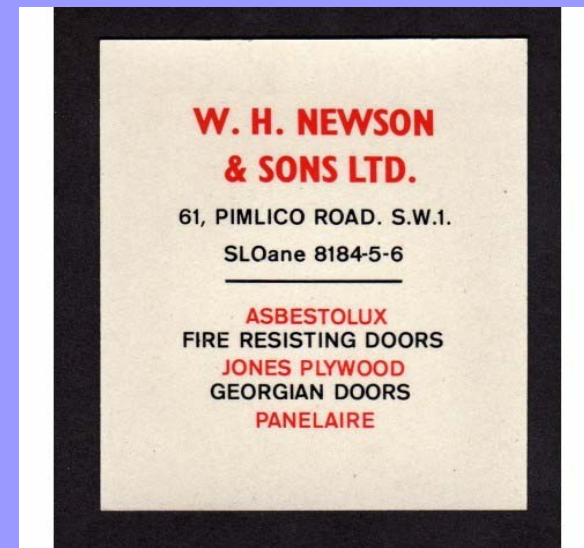
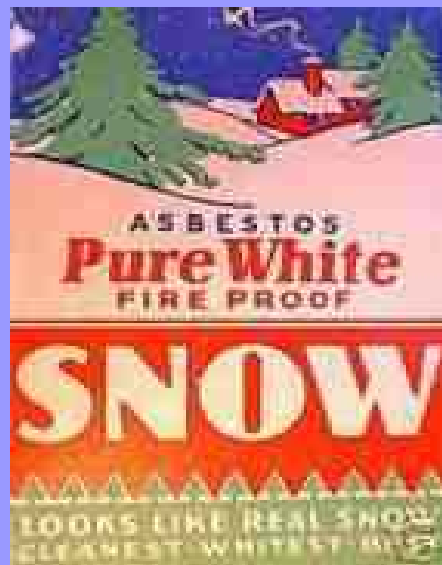


Peter Bennett
Partner
Employers Liability Team
Dolmans Solicitors

www.dolmans.co.uk
peterb@dolmans.co.uk

A. Introduction

“The Way We Were....”



Mesothelioma

- Fatal Cancer of the Pleura/Peritoneum
- Death Arises within 18-24 months of symptoms
- Condition arises 20-50 years post asbestos exposure
- Mesothelioma Deaths will not peak until 2014 to 2020 (Peto and Others)

Mesothelioma Claims Handling - Historical

- Insurer on risk during exposure pays the claim
- Insurers (if more than one) apportion the claim on a “time on risk basis”
- Insolvent Insurers
- Insolvent Defendants
- Policyholders Protection Board/Financial Services Compensation Scheme

B. Bolton-v-MMI

“Someone looked at the Policy wording.....”

Bolton-v-MMI and CU: Facts

- Public Liability Claim
- Meso. Victim exposed whilst employed by another at MBC site.
- CU PL Insurers at time of exposure
- MMI Insurers at the time of manifestation of disease (10 years before symptoms)

Bolton-v-MMI: Arguments

- PL Policies – policy wording (for both MMI and CU) was a “claims arising” wording – i.e. claims arising during the policy period – standard PL policy wording
- CU argued that they were not the relevant Insurer – Claim did not arise during their policy period. Whilst exposure took place in their period of cover, the condition was not manifested until many years later, during the MMI policy period.
- Moreover, condition not “manifest” until 10 years before symptoms arise (Aetiology of the disease)
- MMI argued that exposure lead to the condition – thus, CU should indemnify Bolton MBC
- Bolton MBC just wanted to be indemnified!

Bolton-v-MMI: Result

- Commercial/Chancery Judge
- Policy Wording is key
- Relevant PL Policy is MMI Policy/Policy on risk 10 years before symptoms arise – point where condition becomes “manifest”
- This is the material policy on a “claims arising” policy wording.

Immediate Effects of Bolton-v-MMI

- PL Meso. Claims – numerically miniscule proportion of overall claims burden
- However, means that in a PL case – “relevant” Insurer is the Insurer on risk 10 years before symptoms.
- Symptoms 2008 – “relevant insurer” = PL Insurer in 1998 (but, see later....)

C. Expansion of Bolton to Employers Liability Claims

“What if the EL Policy Wording is the same as the PL Policy Wording....?”

Expansion of Bolton

- Following Bolton-v-MMI, from Spring 2006, MMI began to decline cover in EL Mesothelioma Claims
- The rationale was that since their EL policy wording was also a “claims arising” wording, and since, per Bolton, the condition did not arise at the point of inhalation of the fibres, but rather, 10 years before symptoms – their policy was not the relevant policy unless they were on risk 10 years before symptoms arose (say 1996)
- MMI in solvent run off since 1993.....
- MMI major Public Sector Insurer until then – public sector to pay the claims....?

The Expansion of Bolton: Issues

1. EL Insurer on risk during exposure refuses to indemnify.
2. All subsequent EL Insurers similarly will refuse – no exposure during time on risk
3. Probably no cover for Insured
4. Specific Problem of Subsequent “Claims Caused” Wording(s)

The “Insurance Black Hole”

- Insurer at time of exposure – “claims arising” wording
- Insurer at time of manifestation – “claims caused” wording
- Mesothelioma does not “arise” at point of inhalation of asbestos; equally, is not “caused” at a specific determinative point in the future
- So Called Insurance “Black Hole”

Other Specific Problems of Bolton in EL Context

- What if (Private Sector) Employer ceased trading.....
- Insurer on cover during exposure period – but arguably not the relevant Insurer (“claims arising” wording)
- No Insurer at either (a) point of manifestation or (b) point of symptoms – because no Company to insure!
- PPB arguably not applicable because solvent insurers exist – just not insured for the relevant period...

The Employers Liability Asbestos Trigger Point Litigation

- Began life as a group of Local Authorities suing Zurich Municipal Insurance (successor to MMI) for a declaration as to the relevant insurer in an EL Mesothelioma situation
- ZMI joined in MMI, arguing that MMI was the relevant insurer, being the insurer on risk when inhalation took place
- BAI then also jumped in with a Claimant case.....

The ELTPL Result (November 2008) – Appeal Lodged

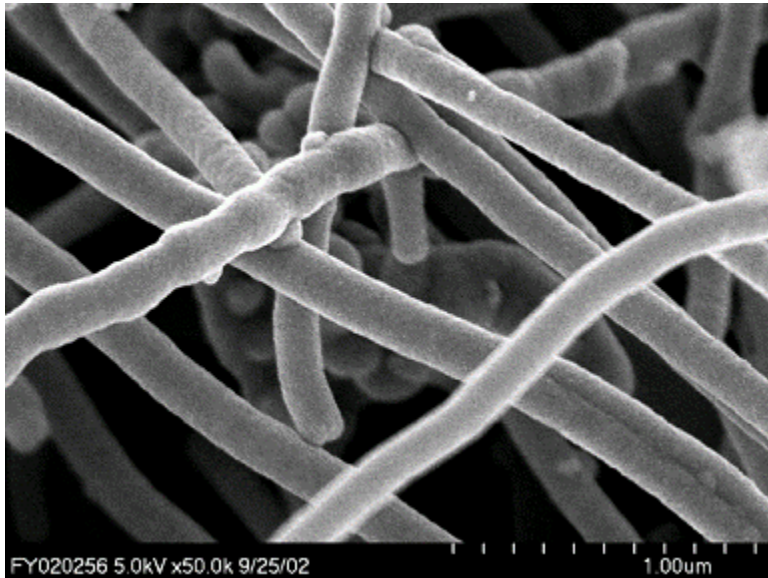
- Relevant Insurer for EL purposes is the insurer (or insurers) on risk when inhalation of asbestos fibres took place in culpable circumstances.
- Historical approach to EL Claims vitally important – change of wording by MMI without change of approach key issue
- Manifestation of Disease not 10 years before symptoms, but, **5 years** before symptoms.

The Effect of ELTPL Judgement

- In an EL Mesothelioma Claim, the relevant Insurer is the Insurer on risk at the point of inhalation of asbestos fibres
- In a PL Mesothelioma Claim....confusion reigns again.....!
- Either PL Insurer on risk 10 years before symptoms (Bolton-v-MMI, CA case), or
- PL Insurer on risk 5 years before symptoms (ELTPL, First Instance – but more detailed medical discussion)

Areas for the future.....

- Carbon Nanotubes



Areas for the future.....

- Electromagnetic Fields



Areas for the future.....

- ***Suntan Lotion.....!***
- ***Independent Newspaper, 25th August 2009, ‘Study into Sunscreen’s Link to Alzheimer’s’***
- ***Professor Vyvyan Howard and Dr Christian Holster have secured a substantial research grant from the EU to carry out a 3 year study***
- ***“The risk that engineered nanoparticles could introduce unforeseen hazards to human health is now also a matter of growing concern in many regulatory bodies” (Prof. Howard)***