

SUPREME COURT MAKES LANDMARK RULING ON INSURERS' LIABILITY FOR MESOTHELIOMA: *ZURICH INSURANCE PLC UK BRANCH V INTERNATIONAL ENERGY GROUP LIMITED*¹

In this landmark case, a seven-strong Supreme Court considered fundamental issues concerning the way in which the insurance industry is obliged to meet mesothelioma claims. In particular, the Supreme Court considered the following questions:

- Has the passing of the UK Compensation Act 2006 consigned to history the common law rules as to proportionate recovery in respect of mesothelioma?
- Where an employer is found liable for the whole of a mesothelioma victim's loss but has the benefit of employers' liability insurance covering only part of the asbestos exposure period, must the insurer bear the whole of the liability?

The case will be of significant interest to employers' liability insurers and reinsurers with potential involvement in mesothelioma claims.

The facts

IEG (a Guernsey company) employed the underlying claimant (C) for a period of approximately 27 years, during which time IEG exposed C to asbestos dust. C subsequently contracted and died of mesothelioma.

C brought proceedings against IEG, which were settled by way of a payment of compensation, plus interest and costs. IEG incurred its own costs in the proceedings.

IEG looked to its employers' liability insurers under policies in force during the 27 year period of exposure. IEG was able to identify two such policies: a policy with Zurich covering a six year period and a policy with a second insurer covering a two year period. In respect of the remaining 19 years, IEG was unable to identify an employers' liability policy with a solvent insurer.

A dispute arose between IEG and Zurich as to the correct measure of Zurich's liability to IEG under Zurich's policies. IEG argued that Zurich should be liable to indemnify it in full in respect of both its liability to C and the associated defence costs. Zurich argued that it should be liable to pay only 22.08% of the respective totals, this being 6/27 i.e. the proportion of the exposure period during which it was on risk. Zurich succeeded at the first instance in respect of the compensation element only, but this was overturned by the Court of Appeal, which ordered Zurich to pay 100% of IEG's claim in

¹ [2015] UKSC 33



respect of both elements. Zurich appealed to the Supreme Court, the appeal failing to be determined by reference to the issues identified above.

Background

According to the special rule recognised by the House of Lords in *Fairchild v Glenhaven Funeral Services Ltd*², a person contracting mesothelioma after being exposed to asbestos dust by different employers over the same or different periods can sue any employer who was responsible for such exposure, even though it cannot be shown which exposure was causative.

In *Barker v Corus UK Ltd*³, the House of Lords held that a responsible employer was not liable for the whole of the damage attributable to the mesothelioma, but was only liable in proportion to his own contribution to the overall exposure.

Parliament reacted to the decision in *Barker* by passing the Compensation Act 2006. Under the 2006 Act, every responsible employer is liable for the whole of the damage, jointly and severally with any other responsible employer. A mesothelioma victim can therefore recover the whole of their damages from any one responsible employer, who may then seek a contribution from others.

In *Durham v BAI (Run-Off) Ltd*⁴ (known as the “*Trigger*” litigation), the Supreme Court held that where an employer is insured against liability for a disease suffered by an employee which has been caused during the insurance period, the necessary causal requirement or link is satisfied in the case of mesothelioma by the employer’s negligent exposure of the victim during such period to asbestos, with the result that the insurer must indemnify the employer against the liability incurred.

The two issues set out above arose in this case because:

- Guernsey has not passed an equivalent of the Compensation Act 2006, meaning that it was necessary to decide whether or not the common law position as set out in *Barker* survived the passing of that Act (it being taken for these purposes that Guernsey common law follows English common law).
- The *Trigger* litigation did not examine the situation or the consequences where (as in this case) a employer responsible for asbestos exposure has employers’ liability insurance covering only part of the relevant period.

The decision

As to the first issue, the Supreme Court held that the common law position as set out in *Barker* had survived the passing of the 2006 Act. Equally, nothing in the *Trigger* litigation had the effect of consigning to history the rule in *Barker*. Accordingly, because the *Barker* principle of apportionment of liability between periods applied even where there was only one employer involved, Zurich was only obliged to indemnify IEG in respect of the 22.08% of IEG’s overall liability which was referable to the period during which Zurich had insured IEG.

As to the second issue, the Supreme Court held (obiter dicta) by a 4:3 majority that it was bound by the decision in *Trigger* and that mesothelioma is caused in each and every period of any overall period of exposure. Therefore, an insurer, whether for the whole or only part of the period for which the insured employer has negligently exposed the victim to asbestos is, on the face of it, liable for the victim’s full loss.

The majority went on to say however that a principled solution had to be found to avoid an employer responsible for asbestos exposure being able simply to select any year during which he could show that he carried employers’ liability insurance and thereby passing the whole of his liability to the insurer on risk in that year, without regard to the remainder of the overall period of exposure.

The majority of the court said that an insurer held liable in such circumstances may have recourse for a proportionate share against:

- Other insurers who have provided cover to the insured during the overall period of exposure.
- The insured as a self-insurer in respect of periods of exposure for which the insured could not identify a policy with a solvent insurer.

The Supreme Court confirmed that Zurich was liable to IEG for 100% of the costs element of the claim. There was nothing to suggest that those costs would have been less if the claim had been confined to the period covered by Zurich’s policies and the costs had been incurred by IEG with Zurich’s consent. The special issues of causation which applied to the compensation element of the claim had no application to these costs.

Comment

The case provides clarity on a crucial point of potentially wide application and is likely to be welcomed by insurers with exposure to historical risks of this kind. Indeed, the Association of British Insurers (ABI) intervened in the proceedings in support of the solution adopted by the majority of the Court. Such insurers now have the comfort of knowing that they will only ultimately be liable for mesothelioma compensation which is

2 [2002] UKHL 22

3 [2006] UKHL 20

4 [2012] UKSC 14



attributable to the period during which they were on risk (albeit that they may in certain circumstances have to pay the whole of the insured part of the loss in the first instance and recoup against co-insurers by way of contribution). In fact, the practice of seeking recoupment by way of contribution has to some extent already been accepted in the insurance market pursuant to (voluntary) ABI Guidelines issued in 2003 in the aftermath of *Fairchild*. However, the Supreme Court's judgment provides a powerful legal basis for the universal application of this approach.

The judgment also provides a useful summary of the now extensive case law to date in this area and in particular provides useful clarification that the special rule established in *Fairchild* and *Barker* is based upon a "weak" or "broad" view of the causal requirements or link, which is satisfied in the case of mesothelioma by proof of exposure to asbestos dust.

It remains to be seen whether the judgment in this case will have any impact upon the practice of reinsurance "spiking", by which a cedant chooses to present the whole of an indivisible loss spanning several years such as a mesothelioma claim to a single year of his reinsurance programme. It may be that reinsurers will have recourse to an equivalent right of equitable recoupment which would alleviate to some extent the impact of this practice, but could also raise further issues amongst reinsurers, as well as between cedants and reinsurers. These issues have yet to be determined and are likely to give rise to further disputes and consequent jurisprudence in this area.

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