



DOCHERTY V SECRETARY OF STATE FOR BUSINESS, INNOVATION AND SKILLS [2018] CSOH 25 – WHICH INSURER RESPONDS?

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Question

- If the Courts are going to concentrate on when symptoms emerge as being the time when symptoms are deemed to have been suffered, does this present an opportunity to Defendants to argue that the policy in place at the time of exposure is not “triggered”?

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- Is *Docherty* inconsistent with the Supreme Court’s approach in *Durham v BAI (Run Off) Ltd* [2012] UKSC 14 (the “Trigger” litigation).
- *Trigger* - inhalation of asbestos not an injury

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Lord Mance in *Trigger*



- The courts should: “avoid over-concentration on the meaning of single words and phrases viewed in isolation and look at the insurance contracts more broadly”

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5 features of the *Trigger* policies



1. They required injury to be sustained (or disease to be contracted) during a period of employment;
2. There was a very close link between the number of employees employed during each period of insurance and the level of premium payable. This suggested that the insurer’s risk was undertaken in respect of activities occurring during that period;
3. There was a potential gap in cover if an employee was exposed to a substance in year one, but by the time the effects became manifest he was no longer employed by the policyholder (the “black hole” argument);

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4. As a result, employers would be vulnerable to any decision by insurers not to renew following discovery of past instances of negligent exposure;
5. In some cases, the policies contained territorial exclusions which excluded employees who were working abroad when their injuries were “sustained” or “contracted”, creating another potential gap in cover.

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- Lord Mance - *“The natural inference to draw from the references to being engaged in the employer’s services and in work forming part of the employer’s business is that it was envisaged that the accident or disease would and should arise out of such service and work, rather than merely occurring during it”.*
- The effect of the decision is to reinstate the previous market practice of paying mesothelioma claims on the basis that EL policies respond to the culpable exposure of an employee to asbestos during the period of insurance.
- Policies are, therefore, triggered on ingestion

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BUT

- *Docherty* runs contrary to the prevailing insurance market practice of taking the relevant jurisdiction as the place of exposure rather than the place of manifestation of the disease

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Which policy triggers?

- If the Inner House were to uphold Lord Tyre the real concern arises that Defendants will seek to contend that the policy which should trigger is the policy in force at the time of the onset of symptoms.
- Argument may not assist insurers in mesothelioma or asbestosis cases.
- Position with diffuse pleural thickening “DPT” is far less clear
- No *Fairchild* exception extends to DPT

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DPT – Divisible or Indivisible?



- Conventionally seen as divisible
- Arguable, however, that the pathogenesis is so uncertain that insurers could properly argue that:
 - a. The responsive policy is that in place when the victim's symptoms materialise; or, alternatively,
 - b. It is wholly unknown which, if any, of the policies should respond to an historic DPT claim.

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Features of DPT and their relevance to the arguments – case for indivisibility



- Latency period 20-40 years
- Whether or to what extent there is a dose response relationship is unclear.
- Usually follows a benign pleural effusion
- Differential diagnoses are wide ranging
- Usually requires relatively high fibre counts

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Impact upon the “Bradford-Hill” criteria



If the pathogenesis of DPT is so uncertain, might it be argued by an insurer, as a primary position, that DPT cannot be safely attributed to asbestos in any given case ?

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Bradford-Hill Criteria



- (1) Strength: Size of effect in a study;
- (2) Consistency;
- (3) Specificity;
- (4) Temporality;
- (5) Biological Gradient;
- (6) Plausibility;
- (7) Coherence;
- (8) Experiment
- (9) Analogy

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Conclusions



- Still sufficient evidence of causal relationship between DPT and asbestos exposure.
- *Docherty* likely to concern the London Market
- Nevertheless, if *Docherty* can be distinguished, it may well be deployed by insurers in the future who wish to argue that:
 - a. Owing to the uncertainty surrounding the pathogenesis of DPT; and
 - b. Given that there is now authority for the proposition that the relevant jurisdiction is not, necessarily, where the exposure took place;
 - c. The policy that should respond to any historic DPT claim is that in force at the time of onset.

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