Case No: A2/2009/0005
A2/2009/0006
A2/2009/0007
A2/2009/0008
A2/2009/0009
A2/2009/0014

Neutral Citation Number: [2010] EWCA Civ 1096

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION
MR JUSTICE BURTON
HQ06X02919, HQ07X01388, HQ07X03187
HQ07X00744, HQ07X010800, HQ07X02055

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/10/2010

Before :

LORD JUSTICE RIX
LADY JUSTICE SMITH
and
LORD JUSTICE STANLEY BURNTON

- -

Employers' Liability Insurance "Trigger" Litigation

Durham V Bai (Run Off) Limited (In Scheme Of Arrangement) (Lead Case 1)

Fleming & Eddleston V Independent Insurance Company Limited (In Provisional Liquidation) (Lead Case 2)

Edwards V Excess Insurance Company Limited (Lead Case 3)

Thomas Bates And Son Limited V Bai (Run Off) Limited (In Scheme Of Arrangement) (Lead Case 4)

Akzo Nobel Uk Limited & Amec Plc V Excess Insurance Company Limited (Lead Case 5)

Municipal Mutual Insurance Limited V Zurich Insurance Company And Others (Lead Case 6)

Secretary Of State For Work And Pensions	**Interested Party**

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7404 1424

Official Shorthand Writers to the Court)

- -

Mr Colin Wynter QC & Ms Alison McCormick (instructed by **Irwin Mitchell Solicitors**) for the Claimant in **Lead Case 1**
Mr Colin Wynter QC & Mr Timothy Smith (instructed by **John Pickering & Partners Solicitors**) for the Claimants in **Lead Case 2**
Mr Colin Wynter QC & Mr Andrew Burns (instructed by **Thompsons Solicitors**) for the Claimant in **Lead Case 3**
Mr Edward Bartley Jones QC & Dr Digby Jess (instructed by **Burd Ward Solicitors**) for the Claimant in **Lead Case 4**
Mr Roger Stewart QC & Mr Stephen Robins (instructed by **DLA Piper UK LLP**) for the Defendant in **Lead Cases 1,2 & 4**
Mr Colin Wynter QC & Mr Richard Harrison (instructed by **Berrymans Lace Mawer Solicitors**) for the Co-Claimants in **Lead Case 5**
Mr Colin Edelman QC & Mr David Platt & Mr Peter Houghton (instructed by **Plexus Law**) for the Defendant in **Lead Cases 3 & 5**
Mr Howard Palmer QC & Mr Andrew Miller & Ms Sonia Nolten (instructed by **Watmores Solicitors**) for the Claimant in **Lead Case 6**
Mr Jeremy Stuart-Smith QC & Ms Leigh-Ann Mulcahy QC & Ms Clare Dixon (instructed by **Buller Jeffries Solicitors**) for the First Defendant in **Lead Case 6**
Mr Lawrence West QC & Mr John Williams (instructed by **Plexus Law**) for the Second Defendant (instructed by **Kennedys**) for the Third Defendant (instructed by **Barlow Lyde Gilbert**) for the Fourth Defendant (instructed by **Kennedys**) for the Fifth Defendant (instructed by **Milton Keynes City Council**) for the Sixth Defendant (instructed by **Sparling Benham & Brough**) for the Seventh Defendant (instructed by **Berrymans Lace Mawer**) for the Eighth and Eleventh Defendants (instructed by **Morgan Cole**) for the Ninth Defendant (instructed by **DWF**) for the Tenth Defendant in **Lead Case 6**
Mr Jeremy Johnson (instructed by **The Solicitor for the Department for Work and Pensions**) for **The Secretary of State for Work and Pensions**

- -

Hearing dates : Wednesday 11th November, Thursday 12th November, Friday 13th November, Monday 16th November, Tuesday 17th November, Wednesday 18th November, Thursday 19th November, Friday 20th November, Monday 23rd November & Tuesday 24th November 2009

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Judgment

Lord Justice Rix :

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Introduction

1. Mesothelioma is a tragic and fatal disease, so far as is known (but the unknown is never far away in this context) always caused by exposure to asbestos. It manifests itself as a cancer of the mesothelium, a protective lining that covers most of the body's internal organs, but most commonly as a cancer of the pleura, that is to say the linings of the lung. It is unusual in having an extremely long period of gestation, which can be in excess of forty years between exposure to asbestos and manifestation. By the time it has become symptomatic, generally through shortness of breath, the patient does not have long to live, an average of some fourteen months.

2. This appeal concerns the liability, under contract, of insurers who have promised to indemnify employers against their liability to their employees. The specific context is the employer's liability for mesothelioma. In other words this appeal is about the nature and extent of the cover granted by employers' liability insurance so far as the employer insured is responsible for his employee's mesothelioma. In particular, this appeal asks the question as to what has to happen in any particular policy year to make the insurer on risk during that year liable to respond and so to indemnify the employer insured. Is it the tortious exposure to asbestos which has caused the mesothelioma that must occur in that policy year? Or is it the onset of mesothelioma itself which must occur in that policy year? Thus this appeal is principally about issues of construction of insurance policies, but, as will be seen, it requires an understanding of the employer's liability in tort for injury caused to his employee.

3. It is important to emphasise that on the current understanding of the disease, it is not present during most of that period of up to four decades. The body's defence mechanisms are extremely efficient in protecting us, and even those who have been most exposed by reason of their occupations, from the potentially harmful effects of the inhalation of asbestos fibres. Only when all those defences have failed may a mutated cell become and remain cancerous and then proceed by exponential growth into the disease called mesothelioma. Even a cancerous mutation may remain dormant for years before it develops into the disease. Or the mutation may actually be reversed by the body's defences, so that the disease never develops. Only a few years ago, the court's view of the expert medical evidence about the onset of mesothelioma was that the disease probably did not occur until approximately ten years before diagnosability (no practical distinction being drawn between diagnosability and manifestation): see *Bolton Metropolitan Borough Council v. Municipal Mutual Insurance Ltd* [2006] EWCA Civ 50, [2006] 1 WLR 1492 ("*Bolton*"). In the present case, the judge's view of the more developed expert evidence before him was that that period was closer to only five years before diagnosability. If that is right, then a person exposed to asbestos may live for thirty-five years or thereabouts without passing to a stage at which the court would say that mesothelioma had begun.

4. Moreover, despite a clear causal connection between the occupational exposure to asbestos and the onset of mesothelioma, it is not possible to say that all those who have been so exposed to asbestos will develop mesothelioma. The overall figure is that only some 3% of such people will go on to develop the disease. That is the figure which the judge below repeatedly cited. To some extent it may mask higher percentages among those most seriously exposed, and it may also fail to take into account the fact that among the cohort of such workers who have been occupationally exposed to asbestos, many who might have gone on to develop mesothelioma died at an earlier time from the effects of the more common disease of asbestosis, that is a fibrosis of the lungs. Nevertheless, it remains the fact that only a small percentage of exposed workmen go on to suffer from mesothelioma.

5. Unlike asbestosis, mesothelioma is not a dose-related disease. Increased exposure to asbestos does not make the disease worse, it only increases the risk of developing it. However, asbestosis shares with mesothelioma a latency period during which the disease's onset is delayed, and thereafter remains latent.

6. The danger of inhaling dust at work has been known about for a considerable time. The classic work on asbestosis in this country lies in the 1930 *Report on Effects of Asbestos Dust on the Lungs* by *Merewether and Price*, respectively a medical and engineering inspector of factories. The almost immediate results were the *Workmen's Compensation (Silicosis and Asbestosis) Act 1930* and the *Asbestos Industry (Asbestosis) Scheme 1931*. Mesothelioma was not then known about, but in 1965 came the leading publication by *Newhouse and Thompson* entitled *Mesothelioma of pleura and peritoneum following exposure to asbestos in the London area*, shortly followed by an exposé in the Sunday Times entitled "*Scientists track down killer dust disease*". In the following year, 1966, mesothelioma became a prescribed disease (see the *National Insurance (Industrial Injuries) (Prescribed Diseases) Amendment Regulations 1966)*. However, cases of mesothelioma were then exceptional. The earliest claim known about made on any insurer before the court was in 1967 (that was in respect of a man who had died of mesothelioma in 1966 after working for the insured employer from 1936 to 1962). On the whole, however, claims under employers' liability policies were not reaching insurers in any quantity until the 1980s. By the late 1990s, however, it had become impossible to obtain employee insurance for historical liability for mesothelioma.

7. Over the course of the twentieth century successive enactments regulating the conduct of industry in general and the asbestos manufacturing or using industries in particular had gone far to making employment in an environment where exposure to asbestos took place much safer than it had previously been. Thus the historical timeline during which employers may have acted negligently in causing their employees to suffer asbestos exposure which has led or may yet still lead on to mesothelioma is generally in the past, and perhaps many decades in the past. However, because of the long time-lag between exposure and the onset of the disease, the incidence of mesothelioma is still increasing and is expected to go on increasing for a few years yet, before reaching its peak and then declining. If therefore an employer has obtained insurance which covers his historical liability for causing mesothelioma, then, subject to the solvency of his insurer, he is covered for claims yet to be made. If, however, his cover has been not on a causation basis, but only on a disease occurring basis, then, even if the employer is still in business, which in many cases he is not, he would be unable, and for some years past has been unable, to obtain current insurance on a disease occurring basis to cover him now for his historical negligence.

8. Moreover, the health difficulties which working with asbestos has caused and the huge liabilities which asbestos-using industry has over the last half century or so incurred have meant that many firms, even once great companies, are no longer in business, or survive only in a state of insolvency. This has meant that there are,

unfortunately, mesothelioma claimants and their dependants who are unable to obtain compensation for injury and damage which their employment has brought upon them. In such circumstances, the existence of employers' liability insurance may be of great importance, since, unless the insurer has also gone out of business or become insolvent, it may provide security for a claim against the defunct or bankrupt employer. Indeed, it has been compulsory for employers to insure against their liability for personal injury to their employees since 1 January 1972, pursuant to the *Employers' Liability (Compulsory Insurance) Act 1969*.

9. In the general disaster which asbestos related disease has brought for all involved, and of course most of all for those who suffer from that disease and their families, an additional misfortune has arisen out of the possibility that the security which employers' liability insurance was thought to provide might not respond on its own wording if, as the appellant insurers involved in these proceedings submit, they are only responsible to indemnify their employer insureds where mesothelioma has been sustained (in the sense of occurring or being suffered in fact) during the policy years in question. Since those policy years end, so far as concerns any of those insurers, at the latest in 1992, all those mesothelioma sufferers the onset of whose disease has occurred after 1992, or may still lie in the future, and whose employers have been insured with one or other of the appellant insurers who dispute liability in these proceedings, may, if those insurers are correct in their submissions, find that they (or their dependants) lack the security of their employers' insurance. The judge described this as a "black hole". It arises if (1) the employer is or would be liable to compensate the mesothelioma victim or his or her family; (2) the employer no longer exists or is no longer solvent; and (3) there is no historic employers' liability insurance which would respond to indemnify the employer in question.

The critical issue of construction

10. The critical issue in this appeal is one of construction of the employer's liability ("EL") insurance policies concerned. Those policies are not all in the same wording, and ultimately each will have to be considered separately. However they all share, at any rate arguably, a similar feature in that they are expressed to operate only where injury or disease is "sustained" (and sometimes the policies speak separately of "injury sustained" and "disease contracted") during the policy year in question. Such policy wording can be contrasted with a commoner form of wording (the so-called "tariff" wording) which plainly makes the *causation* of the injury or disease, rather than its *occurrence*, the matter which, if it falls within the policy period, triggers, where an employer is legally liable to the employee for the injury or disease in question, a response under the policy. The tariff wording can be described as a *causation* wording, while the policy wording in issue in the present litigation can be described as a *sustained* wording.

11. The matter can be illustrated by taking the earliest of the nine wordings in issue in this appeal (dating from the late 1940s) and contrasting it with the tariff wording. That wording (issued by Excess Insurance Company Limited or "Excess") provides:

> "If at any time during the said period, any employee in the Employer's immediate service shall *sustain* any personal injury by accident or disease…the Company will indemnify the Employer" (emphasis added).

The 1948-1969 tariff wording, on the other hand, provided for an indemnity –

> "if any person under a contract of service…with the Insured shall sustain bodily injury or disease *caused* during the period of insurance" (emphasis added).

12. It will be observed that both wordings use sustained language (in the one case "sustain any personal injury by accident or disease", and in the other case "sustain bodily injury or disease"), but that in the Excess wording that sustained wording is linked with the temporal phrase "at any time during the said period", whereas in the tariff wording the temporal phrase "during the period of insurance" is linked with the word "caused", thus "injury or disease caused during the period of insurance". That is the essence of what the appellant insurers submit is the difference between the sustained wording and the causation wording.

13. Thus, to put the matter in terms of mesothelioma, the essential question which arises on this appeal is whether it is the time or occurrence of the *cause* of that disease, in the form of the inhalation of asbestos dust, which serves to identify a particular policy year and thus the policy in question; or whether it is the time or occurrence of the *onset* of the disease, which performs that function. The appellant insurers say that to speak of *sustaining* or *contracting* a disease is to refer to the time of its onset or occurrence, when the employee suffers it or an injury inherent in it. The respondents say, on the contrary, that to speak of the time of sustaining or contracting a disease is to refer to the time of its cause. The judge, Burton J, agreed with the latter submission, and gave judgment in favour of the respondents. The judge usefully described the competing views as to the time of the relevant event as an argument between *date of inhalation* and *date of tumour*. On his understanding of the sustained wording, however, it had the same effect as the causation wording, and equally looked to the date of inhalation. Since the issue in the case is whether the sustained wording has the same effect as the causation wording, it is helpful to have a means of describing the sustained wording by a phrase which clarifies rather than obscures the issue: and so I will also adopt the expedient of describing a policy wording which has the effect which the insurers would give to the sustained wording as wording on a date of tumour basis, even if that over-emphasises the present context of mesothelioma.

14. It may be useful for the sake of clarity to give an immediate demonstration of the consequences which flow from either answer to this issue. Let it be assumed that a workman W had worked for an employer E in 1950 at which time he had inhaled asbestos dust in the course of his employment in breach of E's duty to him, and that it was that inhalation at that time which caused him forty years later, in 1990, to suffer from mesothelioma. On the appellant insurers' construction of their wording, the policy, if any, which would answer to indemnify E against his liability to W or his dependants would be the 1990 policy. On the respondents' construction, and in the judge's view, the relevant policy would be the 1950 policy.

15. EL policies are taken out by employers from year to year. Provided the wording remains the same, there should be no gap in cover, even if the insurers change over the years. So, where E employs W throughout W's working life, and was employing him in 1950 and still in 1990, and was insured throughout with one insurer and the same wording, it would not matter which policy was the effective one. If, however, E had ceased business, whether through insolvency or otherwise, and therefore no longer had a policy in 1990, or had changed insurers and thus insurance wording between 1950 and 1990, or even if E had stayed with the same insurer but the policy language had changed from a causation wording to a sustained wording, then there would be room for a gap in cover on the appellant insurers' construction, albeit not on the respondents' construction. Moreover, where the insurers had changed even if the wording had not, there would still be a need to identify the relevant policy year and thus the relevant insurer, and there could be room for dispute.

16. The respondents observe that the virtue of a causation wording (or its equivalent which they say is to be found in the policies here in issue with their sustained wording) is that once an employer is insured in year 1 (1950 in my example), he always remains insured in respect of any legal liability which in that year or at any time subsequently he incurs to any of his employees arising out of his activities in that year. Since he can only be liable on a causation basis, so, whenever his negligence or breach of statutory duty in year 1 has given rise to loss or damage so as to complete a valid cause of action against him by an employee, he can obtain indemnity from his EL insurer under the policy of the year when his activities put in train the liability in issue. Nothing (except the failure of the insurer itself) can take that security away from him (or his employees). If, however, the year 1 policy is taken out on a basis that only indemnifies an employer if there is an onset of disease in that year, he and if his business fails his employees are prejudiced in the context of a disease with a long period of latency unless in every succeeding year he continues to insure, if he can, on the same basis. The passing of the years has shown that it is no longer possible to insure on a sustained wording basis.

17. The insurers however submit that the virtue of any particular wording depends on the circumstances. Causation wording in a current policy will not cover an employer for his historic negligence, whereas wording on a date of tumour basis will. If therefore in my example the 1950 policy was not a year 1 policy but, say, a year 40 policy (where

E was in his fortieth year in business), then a 1950 policy on a causation basis would not cover him for a workman who had inhaled asbestos in 1911 and had developed a tumour in 1950, but a 1950 policy on a date of tumour basis (which the insurers say is provided by the sustained wording) would. To bring the point up to date: a causation wording in the policy year 2000, by which date such are the precautions now taken in working with asbestos that liability for causing injury by way of asbestos disease in breach of duty is comparatively rare, will not give an employer nearly as much protection as 2000 year wording on a date of tumour basis. The counter-observation might be made, however, that in 2000 the causation wording retains all of its essential virtue so far as breach of duty in the employer's current operations are concerned, while insurance on a date of tumour basis is unobtainable. No doubt, depending on the particular state either of knowledge of the dangers of mesothelioma, or of the EL insurance market, at any one time, some variation of these submissions could be made.

18. So the critical issue is one of construction: in the context of these policies, what does it mean to speak of "sustain injury" or "contract disease"? Does this happen at the date of inhalation, or at the date of tumour?

The question of "injury"

19. I have described the critical issue in this appeal as one of construction, and so it is. There is, however, another critical issue or congeries of issues which is partly a question of fact and partly one of legal evaluation or law. What is "injury" (and what is "disease")?

20. Thus even if mesothelioma can be said to be sustained or contracted only at the date of tumour, is it possible to say that at any rate some injury or disease (even if not at that time identifiable as mesothelioma) was sustained or contracted at the date of inhalation (or soon thereafter)? Even though, *looking forwards*, it may not be possible to speak of injury or disease until mesothelioma has developed, so that the employee cannot be described as injured or unwell until the mesothelioma tumour has occurred, nevertheless, *looking backwards* from the diagnosis of mesothelioma and an established case of employer liability, is it possible to say that the inhalation which ultimately led to that tumour albeit so many years later involved at least some form of injury, or that the long process which began at that time can properly be called disease? And if there was injury at that time, did it have to be actionable injury?

21. In this connection, what is the teaching of *Bolton*, which decided in the context of a public liability policy whose wording spoke of "when such injury or illness occurs

during the currency of the policy" (*injury occurring* wording) that injury or illness did not occur until the onset of mesothelioma, and is it a binding precedent in the current litigation? Is any light thrown on these questions by three recent House of Lords cases dealing with the effects of asbestos inhalation, namely *Fairchild v. Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32 ("*Fairchild*"), *Barker v. Corus UK Ltd* [2006] UKHL 20, [2006] 2 AC 572 ("*Barker*"), and *Rothwell v. Chemical & Insulating Co Ltd* [2007] UKHL 39, [2008] 1 AC 281 ("*Rothwell*")?

22. The judge resolved these questions on the footing that there was no injury or disease until the onset of mesothelioma *(Bolton, Rothwell)*, that in any event any injury had to be actionable injury and again there was none until the onset of mesothelioma *(Bolton)*, and that the special rules of causation for the proof of an employer's responsibility for mesothelioma introduced by *Fairchild* and *Barker* did not affect these conclusions. These questions, which, unlike the issue of construction, were decided in favour of the insurers, are raised again by the respondents.

The insurers' practice

23. Until the decision in *Bolton*, it had been the insurers' practice to meet all mesothelioma claims arising under their EL insurance policies on the basis that the policy in force at the date of inhalation or exposure was the relevant policy. The judge found that the reasons for that practice embraced both a belief that sustained wording had the same effect as causation wording and a belief that in any event there was injury or disease from the date of inhalation. Either belief by itself would explain the insurers' willingness to indemnify the relevant liabilities. That practice stopped with the decision in *Bolton*. The respondents rely on that practice as, perhaps controversially, informing the issue of construction, or at any rate as demonstrating a factual matrix relevant to that issue, or as confirming a commercial purpose to the effect that the essence of EL insurance is to indemnify employers against liabilities consequent on their activities within any policy period.

24. To some extent the breadth and detail of the evidence at trial relating to the way in which EL policies with sustained wording were regarded within the insurance industry may have reflected two additional issues which the judge had to determine. One was the submission that there was a universal custom or usage binding on the parties to the policies to the effect that sustained wording had the same meaning as causation wording. The other was that there was an estoppel by convention to that effect. However, these submissions were relied on by only some of the parties at trial in relation to only one of the appellant insurers, namely MMI (Municipal Mutual Insurance Limited). Both issues failed before the judge. On appeal the issue of estoppel by convention has not been pursued. The issue of a universal custom has been pursued (by respondents' notice), but only by one of the respondents, Zurich (Zurich Insurance Company).

25. Zurich is an insurer, but is not one of the appellant insurers. On the contrary, it is one of the respondents. It took over the goodwill of MMI's business in 1992/3 and started issuing policies in its own name thereafter in continuation of the previous MMI policies. For five years, between 1993 and 1998, its policies continued with the sustained wording which MMI had used. Thereafter it adopted causation wording. Zurich is anxious in these proceedings to establish that for the five policy years 1993-1998 in which it issued policies with sustained wording, those policies should be given the same effect as policies with causation wording. The driving force of that submission is the fact that as of that late date Zurich's potential liability as an insurer on a causation wording basis would be far less than its potential liability as an insurer on a date of tumour basis. In 1993-1998 the incidence of mesothelioma was starting to build towards its present peak years, but arising out of exposure and inhalation many decades before, when Zurich was not involved in the issue of such policies. Correspondingly, in 1993-1998 the negligent exposure of employees to asbestos dust in breach of duty is likely to have been far less than in earlier years. Hence Zurich's interest in joining force with the ranks of the claimants in these proceedings rather than with the ranks of the defendant and now appellant insurers.

26. The judge, in dismissing Zurich's universal custom argument, remarked on the forensic difficulty of such an argument being advanced by only one party. As it is, on this appeal, while maintaining its point, Zurich has understandably not put it in the forefront of its oral submissions, but, if only for want of time, has left it to its written skeleton.

The parties and the proceedings

27. The special case of Zurich is a convenient prelude to the introduction of the parties and a brief description of the nature of these proceedings.

28. The proceedings, which have been called the Employers' Liability Policy Trigger Litigation, comprise six actions. "Trigger" is a reference to the issue of what it is that triggers the potential liability to indemnify an insured employer within any policy year, viz the exposure to inhalation which represents the causal origin of the mesothelioma, or alternatively the onset of the mesothelioma in the form of a tumour, or what has also been dubbed *injury in fact*. That expression is satisfactory enough as a synonym for the mesothelioma tumour, but is dangerous if used by itself to answer the question whether there can be any injury at a time before the growth of the tumour. "Trigger" itself is a somewhat unsatisfactory word, because, as the judge observed, the primary trigger of EL insurance is the employer's liability. What is being referred to as a trigger is therefore that element (within the total history of events which must take place in order to render an employer ultimately liable) which

has to occur in a policy year in order to trigger the insurer's potential liability to indemnify its insured *of that year*. Perhaps this is not so much a trigger as a temporal ingredient which attaches the ultimate liability to the policy year in question. It is a form of temporal hook.

29. The six actions have been consolidated as specimen proceedings to enable the issues which arise to be litigated on behalf of what is said to be (a disputed figure of) some six thousand mesothelioma victims and their families, their employers and their employers' insurers. The six actions embrace a consideration of nine specimen policy wordings emerging from four insurers over a period from the late 1940s to 1992. Those specimen wordings were collected by the judge in an Annex to his judgment, which I gratefully reproduce as part of Annex I to this judgment, although I have somewhat reset the order in which I present those wordings. It will also be convenient to set out the terms of the relevant policies in the body of this judgment.

30. The parties to the six actions involve four insurers who are now appellants in this court. Those four insurers are, in alphabetical order, *BAI* (BAI (Run Off) Limited) which is in a scheme of arrangement; *Excess* (Excess Insurance Company Limited); *Independent* (Independent Insurance Company Limited) which is in provisional liquidation, and until 1982 used to be called Federated (Federated Employers' Insurance Association Ltd), and from then until 1987 Allstate; and *MMI* (Municipal Mutual Insurance Limited). I have already briefly introduced Excess and MMI in the previous section. The judge defined these four insurers as the "defendants" on the basis that they were united in resisting claims made against them by mesothelioma claimants and their employers, and in asserting the date of tumour as the relevant trigger date. In fact one of them, MMI, was formally the claimant in its action ("Lead Case 6") whereby it sought relief by way of declarations against both Zurich and ten representative insureds, all local authorities. I will refer to the four appellant insurers collectively as the "appellant insurers" or the "insurers".

31. BAI (formerly The Builders Accident Insurance Ltd) had as its former name suggests specialised in insuring builders, but in 1998 it went into provisional liquidation and in July 2002 entered a scheme of arrangement, paying out 5p in the £1. Excess ceased to write EL insurance in 1991, and in 1994 entered into run-off of its insurance business under the management of Downlands Liability Management Ltd ("Downlands"). Independent is an EL insurer in run-off and entered provisional liquidation in 2001.

32. MMI was, as its name suggests, a mutual insurer dedicated to the provision of insurance to local authorities and similar bodies. By the late 1980s it provided all the EL and public liability (PL) insurance of 86% of local authorities. In 1992, however, it ceased to underwrite new insurance business or to renew business already written (as from 30 September 1992) and by an agreement dated 9 March 1993 transferred its assets and ongoing business, but not its existing liabilities, to Zurich for a sum which

included a commission on business renewed by Zurich up to a maximum of £60 million. MMI and Zurich also agreed that Zurich would manage the run-off of MMI's existing business for a fee of £16 million (netted against the £60 million). Zurich thus inherited the goodwill of MMI's erstwhile business, but not its existing liabilities. The great majority of MMI's previous insureds transferred their future insurance business to Zurich, which, as I have mentioned above, retained for itself MMI's current 1992 sustained wording until 1998, when it adopted causation wording. In January 1994 MMI entered a scheme of arrangement. In May 2005 at trial and in February 2006 in this court MMI lost the PL insurance case of *Bolton*. Bolton Metropolitan Borough Council had been one of its insureds. It was as a result of *Bolton* that MMI and the other appellant insurers for the first time began to decline mesothelioma claims on the basis of their policies' sustained wording.

33. Zurich, as explained above, although an insurer and the successor to MMI's ongoing business, is in the opposite camp to the four appellant insurers.

34. The "claimants" below, as the judge defined that term, thus embraced (a) employees and their dependants, seeking to recover directly from insurers under the Third Party (Rights Against Insurers) Act 1930 (the "1930 Act") in cases where their former employers are no longer in business; (b) still solvent employers, including the ten local authorities previously mentioned (formally defendants), who have paid out claims to employees, seek an indemnity under their policies, and wish to establish the position in relation to future claims; and (c) Zurich, which also seeks to establish that, in relation to the five years in which it insured on a sustained wording, it did not pick up liability going back through all the years of prior exposure but was limited only to cases of exposure liability during those five years. I shall call these parties collectively "claimants", even though they embrace both Zurich and the local authorities who are formally defendants.

35. The judge set out details of the six actions at paras 10-15 of his judgment. It will be sufficient for me to reproduce the following details.

36. *Action 1, the Durham/Fern action.* The claimant, Mrs Durham formerly Fern, is the daughter of Mr Screach, who was employed by G&C Whittle Ltd ("Whittle") from 1963 to 1968 and was exposed to asbestos in that period. He was diagnosed with mesothelioma in April 2003 and died in November 2003. Whittle was insured by BAI from 1957 to 1975, a period which embraced the exposure period. Whittle was wound up and dissolved but restored to the register for the purposes of the 1930 Act. There is no policy which responds at date of tumour. The unpaid judgment against Whittle is in the sum of £92,500.

37. *Action 2, the Fleming action.* The claimants are the personal representative (Mrs Fleming) and widow (Mrs Eddleston) of Mr Eddleston, who was employed by Premier Construction Co Ltd ("Premier") from 1974 to 1994 and was exposed to asbestos from 1974 to 1982. He was diagnosed with mesothelioma in March 1996 and died in July 1996. Premier was insured by Independent from 1978 to 1983, years which embraced part of the exposure period. Premier was dissolved in 2005. There is no policy which responds at the date of tumour. The unpaid judgment is £105,827.93.

38. *Action 3, the Edwards action.* The claimant, Mrs Edwards, is the daughter of Mr O'Farrell, who was employed by Humphreys & Glasgow Ltd ("HG") from about 1964 to 1967, which is when he was exposed to asbestos. His mesothelioma was diagnosed not long before his death in October 2003. HG was insured by Excess during the period of his exposure: indeed HG was insured by Excess from 1922 until HG's liquidation in 1988. There is no policy which responds at the date of tumour. The unsatisfied judgment is approximately £152,000.

39. *Action 4, the Bates action.* The claimant, Thomas Bates & Son Limited ("Bates"), carried on business as a construction company from 1927 to 1993. In 1973 it employed 1250 employees. In 1993 it closed down its construction business and turned exclusively to property development and management. Therefore, it did not maintain EL insurance covering its ex-employee construction workers. Unlike the previous employers mentioned, Bates is still solvent and in business. In September 2006 judgment was entered against Bates in favour of an ex-employee, Mr Dahele, in the sum of £543,900.50, which has been satisfied by Bates in full. Mr Dahele was employed by Bates and exposed to asbestos between 1975 and 1977, was diagnosed with mesothelioma in November 2005 and died in about May 2007, following judgment. BAI insured Bates for 50 years, from 1944 to 1984 on its sustained wording, which covered the period of Mr Dahele's employment and exposure, and then until 1994 on causation wording. Bates seeks not only an indemnity in respect of what it has paid under the Dahele judgment, but protection against its ongoing concern about other potential liabilities to ex-employees.

40. *Action 5, the Akzo/Amec action.* Akzo Nobel UK Limited ("Akzo") and Amec plc ("Amec") are the claimants in action 5, both previous employers in businesses which used to expose their employees to asbestos, but now no longer operating such businesses. Akzo used to be known as Courtaulds, a once great UK manufacturing company, and Amec was formerly Matthew Hall, a construction company. Both remain solvent. Both companies were insured by Excess, in the case of Courtaulds/Akzo from 1937 to 1972, and in the case of Matthew Hall/Amec from 1939 to 1972. There are currently 22 mesothelioma claims by Akzo and 33 more by Amec under their EL policies dating from such periods, all of which claims have been declined since *Bolton*. Previously Excess had paid out on more than 100 similar claims. Thus Akzo and Amec have the same interest in this litigation as Bates.

41. *Action 6, the MMI-Zurich-local authorities action.* I have already described the background to this. The ten local authorities which have been joined in this action are representative of others whose mesothelioma claims have been declined by MMI. Each of the ten local authorities has submitted to judgment or compromised ex-employee claims exceeding £1 million in total.

Bolton

42. This litigation has been triggered by the decision in *Bolton,* to which I have already made reference. Before *Bolton* the appellant insurers had settled mesothelioma claims arising from exposure to asbestos which had taken place during the years in which their insureds, which had included Bates, Akzo, Amec and the local authorities, had held EL policies from them. Following *Bolton,* the insurers have declined to pay any further indemnity. They submit that in critical respects *Bolton* is binding on this court and determinative of the current litigation. It is therefore important to see exactly what it decided.

43. *Bolton* concerned PL, not EL, insurance. Bolton MBC, the insured claimant, had the misfortune of being involved in litigation as to which of two insurers had covered it for the relevant liability. The case concerned Bolton's liability to a worker, not an employee, whom the council had exposed to asbestos at a building site which the council occupied between 1960 and 1963. Following chest symptoms in 1990, the worker was diagnosed with mesothelioma in January 1991, and died in November 1991. The council settled with the worker's widow for £80,000 and sought to recover an indemnity from MMI. On the medical evidence, the first malignant cell had developed, as a result of the presence of asbestos fibre in the lungs, in 1980 (applying a ten-year rule for the development of the mesothelioma from its first malignancy to diagnosability). From 1980 MMI had insured the council on the basis of *injury or illness occurring* wording ("accidental bodily injury or illness…when such injury illness loss or damage occurs during the currency of the policy"). During the period of exposure (1960-1963), however, the council had had PL cover from another insurer, Commercial Union.

44. MMI's defence was that the mesothelioma had occurred *not* during its policy years (and for this purpose there was no need to identify any particular policy year), *but* during the earlier period of exposure and that as a result it was Commercial Union whose 1960-1963 policies had to provide the indemnity, and not it. Commercial Union's policy wording was similar to MMI's, viz "bodily injury…occurring…during the period of indemnity".

45. At trial HHJ Michael Kershaw QC held that MMI was solely liable, in part on the basis that there had been no injury at the time of exposure, but only during the period when MMI had been on risk. This court, in a judgment given by Longmore LJ with which Auld and Hallett LJJ agreed, upheld the trial judge in this respect.

46. There are two aspects of the judgment which are of particular relevance to the current litigation, one in which Longmore LJ describes the aetiology of mesothelioma, and the other in which he deals with certain arguments of construction on the policies before the court in that case. While it is necessary to bear in mind that to some extent the expert evidence heard by Burton J in this case went beyond the evidence in *Bolton*, in particular in that the judge here heard from biochemistry experts whom Judge Kershaw did not hear, and that the PL policy in that case was not an EL policy and was based on "injury occurring" wording, nevertheless it remains inevitable that much of what Longmore LJ there decided is of continuing resonance here. It is the origin of this litigation. I therefore make no apology in quoting extensively from the judgment of Longmore LJ.

47. First, subject to the need to take into account Burton J's departure from the "ten-year rule" to a "five-year rule", what Longmore LJ had to say about the aetiology of mesothelioma is an extremely clear and helpful statement of the subject. He explained it as follows:

> "7 There are three forms of asbestos: brown (amosite), blue (crocidolite) and white (chrysotile). Their fibres have different bio-persistence: 20 years after exposure to fibres about half the inhaled amosite fibres remain in the body, a smaller proportion of the crocidolite fibres remains and, relatively, few chrysotile fibres remain.
>
> 8 The human body is composed of cells of various types. Of the fibres which reach the lungs many are engulfed by macrophages (scavenger cells). The macrophages may then be expelled by the mucosiliary process or may die within the lungs. All cells can and do die for various reasons, but cells are in communication with each other and the death of one can cause another to divide so, with some exceptions such as men losing their hair with age, the number of cells remains approximately the same throughout a person's life. When macrophages die in the lungs they release various chemicals, some of which attract neutrophils, another type of cell, which can engulf fibres. A different mechanism which destroys fibres in the lungs is that they are dissolved in tissue fluids. Another mechanism, by which the body protects itself, is that some fibres become coated by proteinaceous material containing iron which, it is believed, renders them less likely to produce fibrosis.
>
> 9 The division of cells in human tissue is important for understanding how mesothelioma occurs. Each cell in the body contains all the genetic information necessary for the construction and functioning of the entire body. This information is contained in the form of DNA, a molecule consisting of two

intertwining strands. The different structure and function of the various types of cell in the body occurs because in each cell only some of the genes contained in the DNA are active and in different cells different genes are active. The coded information in a DNA molecule is in the form of about 3,000,000,000 "base pairs". Each pair consists of two collections of atoms called nucleotides. There is one half of each pair in each of the two intertwining strands. When cell division occurs the strands unravel and two "daughter" double helices are created. Normally the daughters are identical with each other but sometimes they are not. Dr Rudd uses the word "mutation" for an imperfect copy. This word "mutation" thus means a thing - a cell - and not a process, and is not a synonym of "change"; for change Dr Rudd uses the term "generic alteration". I shall adopt this usage. The word "mutation" does not have any derogatory connotations. A mutation is different from, but not necessarily worse than, the cell from which it is derived or otherwise undesirable. The body contains what can be described as a "repair mechanism" which sometimes corrects the discrepancy between a daughter and its parent. This repair mechanism is vital to normal health, and people whose repair system lacks some components (a very rare condition) will die early, often of cancer. Sometimes, however, a perfectly normal repair and correction mechanism fails to correct a mutation. Such failure can lead to any of three possibilities. First, the mutation may be unable to survive and die. Secondly it may be better fitted for its purpose than the cell from which it is derived, and this is the cause of evolution. As Dr Moore-Gillon put it "Without the normal process of imperfect copying, mankind (and indeed all other species) would not have emerged".

10 It is the third possibility with which this case is concerned. A mutation which does not die, which is not repaired and which does not perform its purpose better than the cell from which it was derived may itself divide, and the "daughter" cells or (to continue the parental analogy) the grand-daughter or more distant descendants may in turn die, be repaired or be mutations from the cell from which they are derived. Eventually there may be a mutation which is malignant, i e a cell which divides in an uncontrolled manner, as opposed to maintaining the normal balance between cells dying and cells dividing. It normally takes a "heredity" of six or seven genetic alterations before a malignant cell occurs. The body has "natural killer" cells which, as their name indicates, can target and destroy mutations, possibly even after they have become malignant. A tumour is a growth consisting of a number of cells dividing in that uncontrolled manner. Mesothelioma is a tumour in the pleura.

11 Asbestos fibres in the pleura increase the likelihood of genetic mutation. It is now thought likely that, if there is a series of genetic alterations which ends with a malignant cell in the pleura, fibres will have acted in causing several of those genetic alterations, rather than just one genetic alteration. However the final genetic alteration which results in a malignant cell is not necessarily caused by fibres directly. Fibres may also inhibit the activity of natural killer cells. Pre-cancerous genetic alterations in cells do not give rise to any symptoms or signs. They cannot be detected by any routine clinical or radiological examination. It would be possible to detect them by examining in a laboratory tissue taken from a part of the body containing cells which have become genetically modified, but the

exercise would be pointless because pre-cancerous genetic alterations do not necessarily or even usually lead to mesothelioma.

12 It is furthermore important to note that there may be a long time lapse not only between exposure and the first formation of a malignant cell but that there may be a similarly lengthy lapse of time between first malignancy and the onset of noticeable symptoms such as breathlessness. In the present case it is thought that malignancy did not occur until 1980 and a further ten years elapsed before Mr Green became symptomatic. Since MMI were on cover after 1979, there is no distinction for the purposes of this appeal between the onset of malignancy and the onset of symptoms or, indeed, between the onset of symptoms and diagnosis of the disease."

48. Turning to the argument developed on behalf of MMI, Longmore LJ reasoned as follows:

"*MMI's liability (2): "accidental injury"*

" 14 MMI's second argument focused on the words "accidental injury"; Mr Palmer submitted, in reliance on the judge's findings in relation to the aetiology of mesothelioma, that accidental injury occurred either on inhalation of asbestos fibres or, perhaps, on the first bodily reaction to such inhalation, not at the unascertainable moment when a malignant tumour first appeared, still less when Mr Green first felt symptoms of breathlessness and chest pain and less still when mesothelioma was itself diagnosed. Mr Palmer categorised "accidental injury", for the purposes of the policy, as the "insult" to a person's bodily integrity which occurred, effectively on first being exposed to asbestos fibres. In the course of oral submissions Mr Palmer made clear that, although he presented theoretically separate arguments as to exposure itself and early bodily reactions, he did not draw any substantial chronological difference between them. He relied on the miniscule changes which, as described above, preceded the genetic changes which gave rise, at a later date, to the existence of cancerous cells; in other words injury occurred at the point when the body's natural defence mechanisms were operating to destroy or neutralise the fibres as soon as they were inhaled. This was the time when, according to MMI, accidental injury occurred.

15 This argument is, in my judgment, inconsistent both with principle and authority. It is inconsistent with principle because the contract between the parties is an agreement to indemnify against liability. It cannot be right that, at the stage of initial exposure or initial bodily reaction to such exposure, there could be a liability on the part of Bolton in respect of which they could require to be indemnified under any public liability insurance policy. Mr Green could not have sued for personal injury at that stage because he had suffered no injury at that stage. The indemnity which Bolton are seeking is an indemnity against their liability for their share in the sum of £160,000 which was ultimately paid to Mrs

Green. Mr Green could not conceivably have recovered £160,000 (or £80,000 as Bolton's portion was ultimately agreed to be) in the early 1960s when he was first exposed to asbestos and his body was, at that time, successfully dealing with the fibres which he was inhaling. He was at that stage a well man, not suffering from any injury at all.

16 As far as authority is concerned it is well accepted in the general law that words such as “injury” or “damage” in indemnity agreements do not include injury or damage which will happen in the future, see *Promet Engineering (Singapore) Pte Ltd v Sturge (The Nukila)* [1997] 2 Lloyd's Rep 146 , 157 per Hobhouse LJ. Following the decision of the House of Lords in *Arnold v Central Electricity Generating Board* [1988] AC 228 , which decided that the beneficial limitation provisions enacted after *Cartledge v E Jopling & Sons Ltd* [1963] AC 758 did not apply to causes of action which had already accrued by 4 June 1954, there were a number of cases which had to consider whether a claimant had suffered damage from asbestos-related diseases before that date. In *Keenen v Miller Insulation and Engineering Ltd* (unreported) 8 December 1987 Mr Piers Ashworth QC, sitting as a deputy judge of the High Court, held that a claimant's cause of action for lung fibrosis did not arise at the time he was exposed to asbestos between August 1952 and May 1953 because at that stage he had not suffered physical injury by May 1953. Basing himself on the evidence of Dr Rudd he held that for a long time after exposure the defence mechanisms of the body held their own and only became exhausted after a period of equilibrium which lasted well after 4 June 1954, the relevant date for limitation. Likewise McCullough J in *Guidera v NEI Projects (India) Ltd* (unreported) 17 November 1988 held that a claimant who was exposed to asbestos in 1952 and 1953 and was later diagnosed with asbestosis had suffered no injury by 4 June 1954 because physical injury would not occur for at least five (and more likely 10 to 20) years after exposure. He said that destruction of cells by macrophages or neurophils was not damage or injury for the purpose of creating a cause of action since destruction of cells in this way was a natural incident of daily life. He held that this was so even on the basis that the claimant would, inevitably, suffer from asbestosis once exposure had begun. Similarly McNeill J held in *McCaul v Elias Wild* (unreported) 14 September 1989 that a claimant who suffered pleural thickening from inhalation of asbestos fibres in 1943–1950 suffered no actionable injury until about 1985, when he first experienced breathlessness. He expressly followed Keenen's case, acknowledging the wide and well-recognised experience of the deputy judge in that case in the field of industrial disease.

17 A similar question arose in *Jameson v Central Electricity Generation Board* (unreported) 10 March 1995 which was actually a mesothelioma case. CEGB had provided a contractual indemnity in respect of damage or injury occurring before building works were taken over by a client in 1960. The question was whether a workman who died from mesothelioma well after 1960 but was exposed during the building work before 1960 had suffered damage or injury before 1960. Sir Haydn Tudor Evans held that the evidence did not establish even that minimal microscopic changes had occurred before 1960 and that the damage or injury occurred many years after the deceased had finished working.

> 18 Although it can be said that all these cases depended on the medical evidence given to the court, the evidence (often given by Dr Rudd) was to much the same effect as that summarised in this judgment. These cases have established a pattern at first instance to the effect that actionable injury does not occur on exposure or on initial bodily changes happening at that time but only at a much later date; whether that is when a malignant tumour is first created or when identifiable symptoms first occur does not matter for the purposes of this case. I would hold that these earlier cases were correctly decided and that injury cannot be equated to the "insult" received by the body when exposure first occurs.
>
> 19 Lastly under this head, Mr Palmer relied on the word "accidental"; he accepted that asbestos related disease could be said to be accidental but submitted that the phrase "accidental bodily injury" meant that the bodily injury had to occur at the same time as the "accident" which was the exposure; the bodily injury must thus be what happened at the time of exposure. But the proximity of the word "accidental" to "bodily injury" does not mean that both the accident and the injury have to be within the currency of the policy. It is enough if the injury (properly understood) occurs within the currency of the policy and that it be caused accidentally, as, from the point of view of both Mr Green and Bolton, it undoubtedly was".

49. On the basis of these holdings, the appellant insurers submit that it is impossible to say that the mesothelioma victims "sustained injury or disease", or "contracted disease", within the periods of the policies with which this litigation is concerned, which at latest extend to 1992. Even applying *Bolton's* 10 year rule, the earliest year in which any of the mesothelioma victims mentioned above would have suffered the onset of a mesothelioma tumour would have been 1994 or thereabouts.

The pathogenesis of mesothelioma, updated by the judge's 5 year rule

50. The judge heard evidence from five internationally recognised experts in the field: Dr Rudd and Dr Moore-Gillon, who have between them given evidence in most if not all of the cases involving mesothelioma in recent years including *Fairchild* and *Bolton* itself; Professor Geddes, on whose pioneering work the first two experts have based their own theories (see his crucial 1979 paper concerning the rate of tumour growth, published in volume 73 of the British Journal of Diseases of the Chest, *The Natural History of Lung Cancer: a Review based on Rates of Tumour Growth* (the "Geddes article")); and Professor Phillips of the Institute of Cancer Research and Professor Heintz of the Vermont Cancer Centre. The last two are biochemists, the first three are respiratory consultants. The judge observed that the evidence of the biochemistry experts is a new feature of such litigation.

51. On the basis of this expert evidence, the judge remarked on two matters which were common ground between the parties. One is that it is the exposure to quantities of fibres which is causative of mesothelioma, and the risk increases with the dosage. This was recognised already in *Fairchild* (see Lord Bingham at para 7; and Lord Rodger at para 122, where the latter observed: "the greater the number of asbestos fibres taken into the body, the greater are the chances that one of them will trigger a malignant transformation"). The second matter is that once the mesothelioma tumour is present and assured of growth (ie has passed the stage where a malignant mutation may die off), further asbestos exposure and indeed further asbestos fibres in the body can make no difference and are not causative.

52. Burton J also described "the unknowability and indescribability of much of the pathogenesis of mesothelioma" as being common ground (at para 30). Subject to that caution, the judge made the following findings about the disease. He described asbestos fibre as a "complete carcinogen", ie no other agent or co-agent is required to cause the ultimate malignancy (at para 130). Unlike a normal cancer of spherical or similar shape which sooner or later can be seen on a scan or x-ray, the mesothelioma tumour grows along the surface of the lungs rather like a fungus and is thus practically undetectable, and only becomes diagnosable when the symptoms of impaired breathing bring it to the patient's and his doctor's attention. As the details of actions 1-3 illustrate, that is only shortly before death. The average time between manifestation/diagnosis and death is some fourteen months.

53. The judge described the normal process of cell mutations in healthy bodies and lungs. Even in a person who has not been exposed to asbestos as part of his occupation, the lungs will typically contain millions of asbestos fibres, albeit not the hundreds of millions to be found in the occupationally exposed and with far less proportionately of the more dangerous blue and brown asbestos varieties. He said:

> "108…The mesothelial cells, like all cells in the body, are constantly dividing: Dr Rudd told us that there are 10 trillion cells in the body and 50 billion are replicated every day. Cell division, or mitosis, by which the cell divides, duplicates its chromosomes and passes on a complete set to each of its "daughters", is the norm; but there can be mutations – again Dr Rudd told us that incorrect copying can take place in one in a million cell divisions and thus possibly 5,000 times per day in the human body, or every 17 seconds. The body's repair mechanisms are quick to correct and abort the mutations, but even if there are mutations there are four possible consequences. The incorrect copy may be unable to survive, and die; the mutation can make no difference; the mutation can positively improve the cell – hence evolution; or the mutated cell can survive and can itself divide, passing on the genetic alterations, eventually after many generations and with further mutations creating a malignant cell."

54. What then makes the difference between a normal and a diseased process? The judge continued:

> "109. There will or may be thousands of mutations, only one of which may have any deleterious effect on successive mitosis. But, the experts gave evidence that there are six or seven genetic alterations which are required, not necessarily occurring in the same or any particular order, which, when they are all in place, can lead to a malignant cell. The characteristics of a malignant cell are (i) self sufficiency of growth signals (ii) insensitivity to growth-inhibitory signals (iii) evasion of programmed cell death (apoptosis) (iv) limitless replicative potential (v) the ability to invade tissues and to metastasise ie to transfer to other parts of the body (vi) the availability of its own blood supply – obtained by a process which is called *angiogenesis*…
>
> 111. Once a cell has acquired what Dr Rudd calls a "*full house*" of the necessary 6/7 mutations, and has evaded all the bodily defences (described by Dr Rudd as "*full house plus*"), then it can be described as a malignant cell, and can and does begin a period of uncontrolled growth by multiplication. Notwithstanding what Dr Rudd has called evasion of the bodily defences, Professors Phillips and Heintz [the biochemists] conclude that many *full house* cells with malignant potential may fail to grow into tumours. It appears to be common ground, at any rate so far as the biochemists are concerned, that such cell or cells at this stage are still at risk from natural killer cells, although they apparently develop a method of switching off the signals which summon the natural killer cells or put them on notice. There is also, despite the characteristic of limitless replication, the possibility or probability, of periods of dormancy. Professor Phillips points out that the norm of forty years from exposure to diagnosability suggests either that the mutation period lasts a long time or that there are periods of tumour dormancy (or both)."

55. The judge then described the growth of a malignant cell towards the status of a mesothelioma tumour, premised on the figures to be derived from the *Geddes* article concerning the more normal type of spherical tumour. Professor Geddes found that the average rate of doubling of cells was 102 days (albeit that was a speculative average, which could vary between 45 and 130 days). It is only at a tumour size of 10^6 cells (1 million cells) that it becomes unlikely for the bodily defences, still until then available, to be able to neutralise it. Angiogenesis then occurs at somewhere between 10^6 and 10^9 (1 billion cells). Symptoms of breathlessness will begin to be experienced when the tumour is between 10^9 and 10^{12} (1 trillion cells). In the biochemists' view, angiogenesis occurred about 5 years or so before death.

56. In the event, because the judge construed all the policies in issue to be triggered at the date of inhalation and not at the date of tumour, it was unnecessary for him to determine precisely (ie to any policy year) the time at which injury or disease, or what the judge called *injury in fact*, occurred. Nevertheless, at section XIX of his judgment (paras 244ff) he offered his opinion that a date five years before diagnosability should

be adopted as a prima facie rule. His reasons were that (i) *Bolton's* ten year rule took matters back to the first malignant cell (the "full house plus"), but there was no injury or disease at that stage, for there was still the possibility of dormancy and reversal; (ii) the additional evidence of the biochemists emphasised the importance of angiogenesis, and it was this which made the continued growth of the tumour, and death, inevitable; (iii) although the incidence of angiogenesis was somewhat speculative, and could occur variously at times ranging between tumour sizes of 10^6 and 10^9 cells, nevertheless a date of injury/disease of five years before diagnosability should be adopted because by then the tumour would be of a size (of 10^6 cells) which would no longer be at risk (as long as angiogenesis occurred) of being reversed, and angiogenesis itself would be likely to occur at about the same time. If, however, there was evidence in any particular case that tumour growth was either slower or faster than the average, there was room for a different calculation.

57. The judge rejected the date of manifestation as the date of occurrence of injury, which Excess proposed, although it could always be identified.

The policy wordings

58. In this section of the judgment I set out the policy wordings which are under scrutiny in this litigation. The critical wording (also accumulated in Annex I to this judgment) is set out in italics of my own emphasis. However, certain other terms of the policies are also relevant to the question of construction, and are set out below. I have cited Independent's single wording last (of the appellant insurers' wordings), because it comes into effect as late as any.

59. ***BAI:***

First wording, 1953 to 1974

> "...the Company will…indemnify the Insured against all sums of money which the Insured may become liable to pay to any Employee engaged in the direct service of the insured or any dependent of such Employee *in respect of any claim for injury sustained or disease contracted by such Employee between…and…both inclusive…*
>
> Provided always that this Policy is subject to the following Conditions…
>
> 1. The amount of the premium has been fixed on the assumption that a sum not exceeding…will be paid as salaries, wages or earnings by the Insured to his Employees during the period covered by this Policy. The Insured shall permit the Company at all reasonable times to inspect his pay sheets and any books of account showing payments of salaries…

> 5. The Insured shall immediately and at latest within seven days after it shall have come to its knowledge, give notice of any accident…
>
> THIS POLICY DOES NOT COVER THE INSURED'S LIABILITY FOR ACCIDENTS TO WORKMEN ARISING OUTSIDE THE UNITED KINGDOM

60. *Second wording (1974 to 1983)*

> "…the Company will…indemnify the Insured against all sums of money which the Insured may become legally liable to pay *in respect of any claim for injury sustained or disease contracted by any person engaged in and upon the service of the Insured and being in the Insured's direct employment under a Contract of Service or Apprenticeship between the…day of…and the…day of…both inclusive…*"

61. The conditions were otherwise materially the same as under the first wording, but as this second wording arises in the era of the *Employers' Liability (Compulsory Insurance) Act 1969* ("ELCIA 1969", as to which see below) it also contained the following:

> "EMPLOYERS' LIABILITY (COMPULSORY INSURANCE) ACT 1969
>
> The indemnity granted by this Policy is deemed to be in accordance with the provisions of any law relating to compulsory insurance of liability to employees in Great Britain…
>
> But the Insured/Policyholder shall repay to the Company all sums paid by the Company which the Company would not have been liable to pay but for the provisions of such law…"

62. In 1984 BAI adopted causation wording, viz:

> "…the Company will…indemnify the Insured in respect of all sums which the Insured shall become legally liable to pay as compensation in respect of Bodily Injury caused during the Period of Insurance to an Employee within the Territorial Limits…"

63. ***Excess***

First wording (late 1940s):

> "That *if at any time during the period commencing on the…day of…19 , and ending on the…day of…19 (both days inclusive)* and for such further period or periods as may be mutually agreed upon, *any employee in the Employer's immediate service shall sustain any personal injury by accident or disease while engaged in the service of the Employer in Great Britain, Northern Ireland, the Isle of Man or the Channel Islands, in work forming part of the process in the business above mentioned, and in case the Employer shall be liable to damages for such injury, either under or by virtue of the Common Law, the Fatal Accidents Acts 1846 to 1908, or the Law Reform (Miscellaneous Provisions) Act 1934, the Company will indemnify the Employer…*
>
> The premium is to be regulated by the amount of wages, salaries and other earnings paid by the Employer during the above-mentioned period…
>
> Provided always that due compliance with the undermentioned Conditions shall be a condition precedent…
>
> 1. The Employer shall truly record in wages book the name of every employee and the amount of wages, salary and other earnings paid to him.
>
> 2. Notice of any injury or disease in respect of which the Company may be liable to indemnify the Employer under this Policy shall be given to the Company…as soon as possible after such injury or disease has been brought to the notice of the Employer…
>
> 6. The Company shall not be liable under this Policy…for *accidents occurring* elsewhere than in Great Britain, Northern Ireland, the Isle of Man or the Channel Islands.

64. *Second wording (late 1950s to 1960s):*

> "*that if at any time during the period of the indemnity as stated in the Schedule or during any subsequent period for which the Company may accept premium for the renewal of this Policy any person of a description mentioned in the Schedule who is under a contract of service or apprenticeship with the Employer shall sustain personal injury by accident or disease arising out of and in the course of employment by the Employer in work forming part of the process in the business mentioned in the Schedule, the Company will indemnify the Employer against liability at law for damages in respect of such injury or disease…*

65. Materially similar conditions applied with respect to premium, notice and the occurrence of the accident as are cited above in connection with Excess's first wording.

66. *Third wording (1970 to 1976)*

> *"that if at any time during the period of the indemnity as stated in the Schedule or during any subsequent period for which the Company may accept premium for the renewal of this Policy any person of a description mentioned in the Schedule who is under a contract of service or apprenticeship with the Employer shall sustain personal injury by accident or disease arising out of and in the course of employment by the Employer in the business mentioned in the Schedule, the Company will indemnify the Employer against liability at law for damages in respect of such injury or disease…"*

67. Again similar conditions as to premium, notice and the occurrence of the accident applied, save that the policy was in this case extended –

> "to indemnify the Employer in respect of liability which attached *by reason of personal injury sustained by accident or disease by persons under a contract of service or apprenticeship with the Employer while temporarily employed outside Great Britain, Northern Ireland, the Isle of Man or the Channel Islands* always provided the action for damages is brought against the Employer in a Court of Law in Great Britain, Northern Ireland, the Isle of Man or the Channel Islands."

68. In 1976 Excess changed to causation wording.

69. ***MMI:***

First wording (1949 to 1958):

> "…the Company hereby agrees that *if at any time during the period of insurance specified in the schedule* or thereafter during any subsequent period for which the Insured shall agree to pay and the Company shall agree to accept a renewal premium of the amount specified in the said schedule, or in such other amount as the Company shall from time to time require, *any person under a contract of service with the Insured shall sustain any personal injury by accident or disease arising out of and in the course of his employment by the Insured in their activities described in the schedule and if the Insured shall be liable to pay damages for such injury or disease then, subject to the terms and conditions contained herein or endorsed hereon, the Company shall indemnify the Insured against all sums for which the Insured shall be so liable…*"

70. A standard policy exception in respect of "liability in respect of silicosis, asbestosis or pneumoconiosis" was cancelled and MMI agreed (as evidenced by an endorsement which recorded that "No additional premium being charged for this extended cover") to "extend this insurance to include such liability". A further exception excluded –

> "liability in respect of any injury or disease *caused elsewhere* than in Great Britain, Northern Ireland, the Isle of Man, or the Channel Islands."

71. Conditions included the following:

> "1. The Insured shall notify the Company as soon as possible after the *occurrence* of any accident or disease to which this Policy relates and give the required Particulars thereof…
>
> 5. The first premium and all renewal premiums that may be accepted are to be regulated by the amount of salaries wages and other earnings or emoluments paid or allowed to non-manual staff and manual employees by the Insured during each period of insurance. The names of staff and employees and the amount of all such remuneration paid or allowed to them by the Insured shall be recorded in a proper salaries and wages book…"

72. A proposal form for such insurance survives, which asks for particulars of any construction work involved and for the "number of cases of injury to your employees by accident or disease during the past three years in respect of which claims for damages at Common Law were made against you…".

73. *Second wording (1958 to 1974):*

> "…the Company hereby agrees that *if at any time during the First Period of Insurance specified in the said Schedule* or during any subsequent period for which the Insured shall agree to pay and the Company shall agree to accept a renewal premium of the amount specified as the Renewal Premium in the said Schedule or of such other amount as the Company shall from time to time require, *any person under a contract of service with the Insured shall sustain any bodily injury or disease arising out of and in the course of his employment by the Insured in the Insured's activities described in the said Schedule and if the Insured shall be liable to pay damages for such injury or disease or for death resulting from such injury or disease then*, subject to the terms, exceptions and conditions contained herein or endorsed hereon or set out in the Schedule to this Policy…*the Company will indemnify the Insured against all sums for which the Insured shall be so liable...*

74. Condition 1 as to notice identical to that under the first wording was preserved. The condition as to premium did not in terms refer to the salaries and wages of employees, but the accompanying schedule did refer to "Estimates (if any) on which the premium is calculated…" and to "Annual amount of wages, salaries and emoluments and other considerations paid or allowed to (a) Clerical and Administrative Staff…(b) Manual Employees…". Exceptions for MMI's liability were made in respect of "any injury or disease *caused elsewhere* than in Great Britain, Northern Ireland, the Isle of Man, or the Channel Islands" and "injury or disease *sustained by* contractors to the Insured or such contractors' employees".

75. *Third wording (1974 to 1992):*

> "*The Company agrees to indemnify the Insured in respect of all sums without limit as to amount which the Insured shall be legally liable to pay as compensation for bodily injury or disease (including death resulting from such bodily injury or disease) suffered by any person under a contract of service or apprenticeship with the Insured when such injury or disease arises out of and in the course of employment by the Insured and is sustained or contracted during the currency of this Policy.*"

76. The exclusions of the second wording did not survive into the third wording. The promise of indemnity was also extended to "Additional Persons Indemnified", viz –

> "any person under a contract of service or apprenticeship with the Insured but only in respect of claims for which the Insured would be entitled to indemnity hereunder had such claims been made against the Insured. Provided always that any such person is at the time of the incident giving rise to the claim acting within the scope of his authority…

77. MMI also offered EL liability insurance to insureds other than local authorities. Whereas the employees of local authorities were outside the compulsory insurance protection of ELCIA 1969, which is why MMI could have excluded (but, as stated above, did not exclude) asbestos diseases from their local authority policies, MMI's non-local authority wording in the post ELCIA 1969 era contained a reference to the statute, thus:

> "The indemnity granted by this policy is deemed to be in accordance with the provisions of any law relating to compulsory insurance of liability to employees in Great Britain, Northern Ireland, the Isle of Man or the Channel Islands. But the Insured shall repay to the Company all sums paid by the Company which the Company would not have been liable to pay but for the provisions of such law."

78. MMI also offered local authorities PL insurance and other cover (such as fire insurance). It was its PL policy which had been in issue in *Bolton*. The PL indemnity (contemporaneous with its EL insurance third wording) was expressed as follows:

> "The Company agrees to indemnify the Insured in respect of all sums which the Insured shall become legally liable to pay as compensation arising out of
>
> (a) accidental bodily injury or illness (fatal or otherwise) to any person other than any person employed under a contract of service or apprenticeship with the Insured if such injury or illness arises out of and in the course of employment
>
> (b) accidental loss of or accidental damage caused to property
>
> *when such injury illness loss or damage occurs during the currency of the Policy* and arises out of the exercise of the functions of a Local Authority."

79. That is an example of "occurring wording". It is also found in MMI's contemporaneous fire policy, viz "*if it occurs during the currency of this Policy*". Another typical form of insurance wording is "claims made wording", as is commonly found in professional negligence insurance. An example of such claims made wording is also found in MMI's contemporaneous libel and slander policies, viz "but only in respect of *claims made against the Insured during the currency of this Policy or within twelve months after the Policy is cancelled or lapsed, and provided that the date of the Publication or utterance on which the claim is based occurs during the currency of the Policy*". Thus in that case cover during the policy period was based on a combination of occurrence and claims made wordings.

80. MMI's General Conditions provided that each of its policies was a separate contract.

81. As stated above, MMI ceased in 1992 to issue any policies. Thus it never changed to causation wording: but Zurich, the purchaser of the goodwill of its business, did, albeit not until 1998.

82. ***Independent***

Sole wording in issue (1972 to 1987)

Independent's policy was issued as a "Contractors' Combined Policy", ie combining both EL and PL (and other) insurance cover. In such circumstances the "Period of Insurance" was mentioned in an introductory paragraph, but not in the EL insurance clause, thus:

> "NOW THIS POLICY WITNESSETH that *during the Period of Insurance* or during any subsequent period for which the Company may accept payment for the continuance of this Policy and subject to the terms, exceptions and conditions herein and endorsed hereon, *the Company will indemnify the Insured as hereinafter specified.*
>
> **SECTION 1 – EMPLOYERS' LIABILITY**
>
> *If any person who is under a contract of service or apprenticeship with the Insured shall sustain bodily injury or disease arising out of and in the course of his employment by the Insured in connection with the Contract specified or type of work described in the Schedule the Company will indemnify the Insured against all sums for which the Insured shall be liable for damages for such injury or disease…*"

83. On the other hand "Section 2 – Public Liability", which contained alternative occurrence and causation wording, did relate such wording to the period of insurance, thus:

> "The Company will indemnify the Insured against all sums for which the Insured shall be legally liable to pay in respect of
>
> (a) Accidental bodily injury to or illness of any person
>
> (b) Accidental loss of or damage to property
>
> where such injury illness loss or damage *happens or is caused* in connection with the Contract specified or type of work described in the Schedule *during the Period of Insurance*…"

84. The PL cover contained an exclusion of "liability in respect of bodily injury to or illness of any person who is under a contract of service or apprenticeship with the Insured where such injury or illness arises out of and in the course of employment of such person by the Insured". That was to ensure (as in the case of MMI's EL and PL policies cited above) that PL cover was not available in respect of liability to the insured's own employees.

85. Occurrence wording linked expressly to the period of insurance ("*occurring during the Period of Insurance*") also appeared in "Section 3 – Loss of or damage to Contract Works".

86. Since this wording was used in the era of ELCIA 1969, the standard provision (cited above in the case of BAI's and MMI's ELCIA 1969 era wordings) was also contained in Section 1 of Independent's policy.

87. Among the "General Exceptions" was this:

> "The Company will not be liable under this Policy
> (1) for injury, illness, loss or damage *caused elsewhere* than in Great Britain, the Isle of Man or the Channel Islands."

88. ***Zurich***

The Municipal First Select wording (1993-1998)

Zurich's wording for the first five years of its continuation of MMI's business employed sustained wording, thus:

> "The INSURER will indemnify the INSURED in respect of all sums which the INSURED may become legally liable to pay as damages and claimants' costs and expenses *in respect of Injury sustained during the Period of Insurance* by *any EMPLOYEE* arising out of and in the course of employment by the INSURED in the BUSINESS within the Geographical Limits."

The policy elsewhere defined the terms "Injury", "Employee" and "Geographical Limits".

89. *The Municipal Second Select wording (1998 -)*

In 1998 Zurich altered its wording to causation wording, as follows:

> "The INSURER will indemnify the INSURED in respect of all sums which the INSURED may become legally liable to pay as damages and claimants' costs and expenses *in respect of Injury caused during the Period of Insurance to any EMPLOYEE* arising out of and in the course of employment by the INSURED in the BUSINESS within the Geographical Limits."

90. ***The tariff wording***

The tariff wording at all times after 1948 contained causation wording, thus:

> "…if any person under a contract of service or apprenticeship with the Insured shall sustain any personal injury by accident or disease caused during the period of insurance and arising out of and in the course of his employment by the Insured in the business above mentioned and if the Insured shall be liable to pay damages for such injury or disease the Association shall indemnify the Insured against all sums for which the Insured shall be so liable."

Some landmarks in the tort of negligence causing personal injury

91. It is necessary before going any further to review, as briefly as possible, and with an eye on the issues in the present case, the history of the tort of negligence as a means of compensating personal injury. This is because the subject matter of EL insurance is the promise of an indemnity for the employer's liability to his employees in the matter of personal injury. In earlier years, possibly because of the inadequacies of the common law (eg because of now defunct rules relating to common employment or contributory negligence), the dominant regime in the context of employer's liability was one of no-fault compensation to be found in the Workmen's Compensation Acts (the "WCA", as to which, see below). It is worth remembering that *Donoghue v. Stevenson* [1932] AC 562 was decided less than 80 years ago. In 1948, however, the WCA regime was swept away in favour of reliance on a combination of common law (and statutory duty) and of national insurance (see the National Insurance (Industrial Injuries) Act 1946). Moreover, the defences of common employment and contributory negligence were abolished by the *Law Reform (Contributory Negligence) Act 1945* and by the *Law Reform (Personal Injuries) Act 1948* respectively.

92. Essential features of the common law are that it requires not only (i) negligence on the part of a defendant, for present purposes an employer, but also (ii) damage suffered on the part of a claimant, for present purposes an employee, and (iii) the nexus of causation between negligence and damage. The negligence has to cause the damage. In most cases of employers' liability the negligence, which is the cause, and the damage, which is the effect, occur at almost the same time, in the form of personal injury arising out of what is commonly called an "accident". The employee suffers injury there and then. There was (some, albeit off-the cuff) evidence at trial that 99.9% of employer liability cases are of this kind. For these purposes a question might arise as to what amounts to "injury" causing compensable or actionable damage, but the problems are unlikely to be particularly difficult, at any rate where physical injury in a typical case of accident is concerned. The matter was considered in *Cartledge v. E Jopling & Sons Ltd* [1963] AC 758, where the House of Lords held that a physical condition caused by a negligent act or omission had to reach a certain threshold

"beyond the minimal" in order for it to constitute an injury for which damages in tort could be claimed. Lord Reid spoke of "personal injury beyond what can be regarded as negligible" (at 772), Lord Evershed spoke of "real damage as distinct from purely minimal damage" (at 774), and Lord Pearce (with whom the other members of the House agreed) referred to "material damage by any physical changes in his body" and said that "in borderline cases it is a question of degree" (at 779). Thus a trifling scratch, without any untoward consequences, will not be actionable.

93. In the case of disease, however, a concept which falls within injury, or in the case of psychiatric injury, it may be much harder to say if and when injury, that is to say compensable or actionable injury, has occurred, or at any rate first occurred. In *Bonnington Castings Ltd v. Wardlaw* [1956] AC 613 the plaintiff sued for breach of statutory duty causing pneumoconiosis, a progressive disease of the lungs caused by the inhalation of noxious dust. There was no doubt that the plaintiff suffered from pneumoconiosis, but the question was whether any breach of statutory duty by his employer had caused his disease. He worked at two stations in his employment, both of which produced the noxious dust but at only one of which was his employer in breach. Had that breach of duty, ie the dust inhalation which it had given rise to, caused his injury or disease? The House of Lords, making its own assessment of the facts, concluded that it had, because it had made a material contribution to the disease's development. Lord Reid said (at 621):

> "It appears to me that the source of his disease was the dust from both sources, and the real question is whether the dust from the swing grinders materially contributed to the disease. A contribution which comes within the exception de minimis non curat lex is not material, but I think that any contribution which does not fall within that exception must be material. I do not see how there can be something too large to come within the de minimis principle but yet too small to be material."

94. Lord Reid therefore concluded (at 623):

> "In my opinion, it is proved not only that the swing grinders may well have contributed but that they did in fact contribute a quota of silica dust which was not negligible to the pursuer's lungs and therefore did help to produce the disease."

95. Lord Keith of Avonholm said (at 626):

> "It was the atmosphere inhaled by the pursuer that caused his illness and it is impossible, in my opinion, to resolve the components of that atmosphere into particles caused by the fault of the offenders and particles not caused by the fault of the offenders, as if they were separate and independent factors in his illness.

> Prima facie the particles inhaled are acting cumulatively, and I think the natural inference is that had it not been for the cumulative effect the pursuer would not have developed pneumoconiosis when he did and might not have developed it at all."

96. That was a case on causation which did not expressly raise the issue of when injury was first caused to the sufferer of a disease so as to bring into existence a completed cause of action.

97. The subsequent case which did raise that issue was *Cartledge v. Jopling*. The disease considered was again pneumoconiosis. The issue there arose in the form of a question of limitation. The writ was issued on 1 October 1956, but it was clear that material damage must have occurred more than three years earlier. By that time the plaintiffs were already suffering from the disease, although they did not then know it. The House of Lords held that the plaintiffs were nevertheless time barred, even though the insidious onset of the disease, in the form of some material, ie more than negligible, damage was unknown and probably unknowable. Lord Reid highlighted the problem in this passage (at 772/3):

> "The earliest possible diagnosis is from X-ray photographs, but even if such photographs are taken at regular intervals it seems that early indications are not easy to read and it is not at all easy to say, after the first positive indication of the disease has been found, how much time has elapsed since the injury to the workman first became material. So we have the absurd result that, even if the workman is able to have X-ray photographs taken at regular intervals, a large part, or it might be the whole, of the three-year period of limitation would have elapsed before he could, even with the best possible advice, instruct the raising of an action. And if he were lucky enough to be able to raise an action at all it would be quite impossible at that stage to make any accurate assessment of the probable development of the disease."

98. The unsatisfactory state of the law almost immediately led to a change in the statutory limitation provisions. Thus the Limitation Act 1963 first introduced the possibility of postponing the running of time in cases of breach of duty involving personal injuries until after the claimant had or ought to have had knowledge of the facts which gave him his cause of action. When first introduced, this provision allowed the claimant one year from the date of knowledge. The current three-year rule was introduced by the Limitation Act 1975. The developed form of this change to the law is now to be found in sections 11 and 33 of the Limitation Act 1980. It was the relaxation of the law of limitation which opened the door to the prosecution of claims arising out of diseases with a long latency period.

99. The question might still arise: when did actionable injury in respect of the effects of dose-related diseases, such as pneumoconiosis, or asbestosis, or lead poisoning, or hearing loss, first arise? A dose-related disease is one to which each dose makes its contribution, even if, in the case of some such diseases, no harmful effect may be experienced until the dose has reached a certain level. The formal answer appears to be, it is when some more than negligible injury occurs. But when is this? The parties to this appeal, perhaps because they have had enough on their plate, have not investigated such matters; and it has not been made clear to us. The respondents have expressed concern that, if the insurance contracts in this appeal do not respond to the years of exposure, then similar reasoning would prevent coverage for other diseases, such as asbestosis, which, although dose-related, has its own latency period, as described above. The insurers have kept their cards close to their chests about such matters.

100. In practice, however, I believe that the law regarding dose-related diseases has advanced since the days of *Bonnington*, when liability on the part of any employer whose breach of duty made a material contribution was total. Thus where scientific knowledge has demonstrated that the condition complained of results from the cumulative effect of exposure, injury is said to be divisible, so that there may now be apportionment between the extent of injury caused by individual defendant employers, or between negligent and non-negligent exposure. This has been done in the case of loss of hearing in *Thompson v. Smiths Shiprepairers (North Shields) Ltd* [1984] QB 405 (Mustill J).

101. Some diseases or injuries may be indivisible, however. That is generally true of cancers such as mesothelioma itself. Moreover, it is of the nature of such cancers that they have a long latency period, even if mesothelioma in this respect appears to be exceptional in the length of its latency. An early industrial cancer of such a kind was scrotal cancer, which was caused by dye-stuffs in the textile industry. In such cases, each dose of exposure does not make a contribution to the development of the disease, but rather contributes to the risk of such disease occurring. It is therefore a factor in its causation.

102. The leading case in this respect is *McGhee v. National Coal Board* [1973] 1 WLR 1 (HL). This concerned a single defendant who had exposed his employee to brick dust. Some of the exposure was in breach of duty, but some of it was not. The pursuer there complained about dermatitis, which had been caused by his exposure to brick dust. The brick dust originated at his place of work, but that exposure was not due to his employer’s negligence. However, he had to cycle home with the dust still on him, and that was the fault of his employer. The aetiology of dermatitis was obscure, and the experts were unable to say whether the extended contact had materially contributed to the development of the disease. The pursuer’s dermatitis could have begun with a single abrasion, which might either have happened when the plaintiff was working in the brick kiln or could equally well have occurred during the bicycle ride home (see Lord Reid at 4). The experts could say, however, that the extra exposure had

increased the risk of the workman getting dermatitis. The House of Lords held that that was enough to meet the test of causation. A material increase in risk was the same as or a proxy for a material contribution to the disease itself. Proof of causation had therefore been satisfied. A gap in the evidence (which the experts had not been able to bridge) was closed by adapting the test for causation as a matter of law (what Lord Reid at 4 described as taking "a broader view of causation"). That was the explanation provided in *Fairchild v. Glenhaven*, where *McGhee* was carefully and fully considered, see for instance in the speech of Lord Bingham of Cornhill at paras 17/22. The ratio of *McGhee* was there accepted to be that in the circumstances no distinction was to be drawn between making a material contribution to causing the disease and materially increasing the risk of the pursuer contracting it (*per* Lord Bingham at 21). Or as Lord Hoffmann put it: a breach of duty which materially increased the risk should be treated *as if* it had materially contributed to the disease (at para 65). The adaptation in the law was fuelled in part by considerations of policy. Lord Bingham (at para 33) cited Lord Wilberforce's observation in *McGhee* (at 7) that:

> "the employers should be liable for an injury, squarely within the risk which they had created and that they, not the pursuer, should suffer the consequence of the impossibility, foreseeably inherent in the nature of his injury, of segregating the precise consequence of their default."

103. The scratch which causes or may cause dermatitis, or with which the dermatitis, once it is in existence, may be said to begin, raises a general problem in this area. If a mosquito bite turns into malaria, or a scratch is infected by a pathogen such as an anthrax bacillus, will the bite or scratch, which may be insignificant in itself if it does not lead on to disease, be capable, if disease does ensue, of being regarded as a material injury? If so, when does injury occur, or when is the disease sustained or contracted? These things are obscure to me.

104. In the case of mesothelioma, at any rate, recent jurisprudence has answered some of these questions. I refer to the decisions in chronological sequence.

105. *Fairchild* (2002) answers a problem on causation (as had *Bonnington* and *McGhee*), but the problem arose in a new form. If a plaintiff has been exposed to asbestos dust by several different employers, how is he able to show that any one or more of them has caused him his mesothelioma, when it is impossible to say which one or more fibres has caused his tumour? Mesothelioma is not a dose-related or progressive disease, as in *Bonnington*, although the greater the exposure, the greater the risk of developing it. Moreover, the condition once caused, is not aggravated by further exposure. The answer given, building on *McGhee*, was to say that in the current state of medical knowledge, proof that any defendant's breach of duty had materially increased the risk of contracting the disease was sufficient proof of causation. No argument on apportionment was addressed. The modified approach to proof of causation was hedged about by conditions: see Lord Bingham's six factors (at paras 2

and 21) or Lord Hoffmann's five (at paras 61 and 73). The modified rule was adopted after consideration of international jurisprudence, and with policy contributing to the resolution of what could be said to be a clash of principle. Thus Lord Bingham said (at para 33):

> "The crux of cases such as the present, if the appellants' argument is upheld, is that an employer may be held liable for damage he has not caused…On the other hand, there is a strong policy argument in favour of compensating those who have suffered grave harm, at the expense of their employers who owed them a duty to protect them against that very harm and failed to do so, when the harm can only have been caused by breach of that duty and when science does not permit the victim accurately to attribute, as between several employers, the precise responsibility for the harm he has suffered. I am of opinion that such injustice as may be involved in imposing liability on a duty-breaking employer in such circumstances is heavily outweighed by the injustice of denying redress to a victim."

106. *Bolton* (February 2006) was decided after *Fairchild* but before *Barker v. Corus* and subsequent cases to which I will refer below. I have already set out substantial citations from *Bolton*, from which it is clear that it decided (although there is a dispute as to what aspects of this amount to binding *ratio*) that the words "when such injury illness loss or damage occurs during the currency of the policy", found in a PL insurance policy, (i) require *actionable* injury to occur within the policy period (at para 15), and (ii) do not embrace mesothelioma until it has become (what has been called at trial below) "injury in fact", namely, broadly speaking, at the earliest at the time a malignant tumour is first created (paras 16/18). (It may be observed that in the course of his reasoning, Longmore LJ cited first instance decisions which appear not to have spoken with the same voice concerning the onset of lung fibrosis or asbestosis: see *Keenen v. Miller Insulation and Engineering Ltd* (unreported, 8 December 1987, Mr Piers Ashworth QC), where it was held that lung fibrosis did not arise at the time of exposure but at a later stage when physical injury had been suffered; and *Guidera v. NEI Projects (India) Ltd* (unreported, 17 November 1988, McCullough J), where the position in the case of mesothelioma was contrasted with asbestosis, on the basis that in the latter case of asbestosis it was accepted that the claimant would inevitably suffer from asbestosis once exposure had begun.)

107. There is no sign in the report of *Bolton* that *Fairchild* was cited in argument (see at 1494/5). It was not referred to in Longmore LJ's judgment. Nevertheless, we were informed that it was cited to this court in that case, possibly in skeleton arguments.

108. *Barker v. Corus* was decided in the House of Lords in May 2006. It raised the question of apportionment in a *Fairchild* situation, a question not reached in the earlier case. Where several employers are found liable in a mesothelioma case on the basis of what was there called the *Fairchild* exception, should that liability be both

joint and several, or should liability be apportioned? It was held that, as a matter of fairness, and in the light of the extended doctrine of causation applied in *Fairchild*, an employer should only be liable on some apportioned basis, probably to be measured by the duration and intensity of the exposure involved. Liability was therefore only several.

109. Lord Hoffmann gave the leading speech, with which Lord Scott of Foscote and Lord Walker of Gestingthorpe agreed (while writing their own speeches). Lord Rodger of Earlsferry dissented, and Baroness Hale of Richmond, although not dissenting in the result, agreed with Lord Rodger in one important respect, as will appear. It was accepted by all that mesothelioma is an indivisible injury, creating indivisible damage. However, Lord Hoffmann stressed that the effect of *Fairchild* was to render the risk of causing mesothelioma as the damage in question. Such damage was divisible. Thus he said:

> "35. Consistency of approach would suggest that if the basis of liability is the wrongful creation of a risk or chance of causing the disease, the damage which the defendant should be regarded as having caused is the creation of such a risk or chance. If that is the right way to characterise the damage, then it does not matter that the disease as such would be indivisible damage. Chances are infinitely divisible…
>
> 36. Treating the creation of the risk as the damage caused by the defendant would involve having to quantify the likelihood that the damage (which is known to have materialised) was caused by that particular defendant. It will then be possible to determine the share of the damage which should be attributable to him…Sometimes the law treats the loss of a chance of a favourable outcome as compensatable damage in itself…
>
> 40. So far I have been concerned to demonstrate that characterising the damage as the risk of contracting mesothelioma would be in accordance with the basis upon which liability is imposed and would not be inconsistent with the concept of damage in the law of torts. In the end, however, the important question is whether such a characterisation would be fair…
>
> 43. In my opinion, the attribution of liability to the relative degree of contribution to the chance of the disease being contracted would smooth the roughness of the justice which a rule of joint and several liability creates. The defendant was a wrongdoer, it is true, and should not be allowed to escape liability altogether, but he should not be liable for more than the damage which he caused…
>
> 48. Although the *Fairchild* exception treats the risk of contracting mesothelioma as the damage, it applies only when the disease has actually been contracted. Mr Stuart-Smith, who appeared for Corus, was reluctant to characterise the claim as being for causing a risk of the disease because he did not want to suggest that someone could sue for being exposed to a risk which had not materialised. But in cases which fall within the *Fairchild* exception, that possibility is precluded by

> the terms of the exception. It applies only when the claimant has contracted the disease against which he should have been protected. And in cases outside the exception, as in *Gregg v Scott* [2005] 2 AC 176, a risk of damage or loss of a chance is not damage upon which an action can be founded. But when the damage is apportioned among the persons responsible for the exposures to asbestos which created the risk, it is known that those exposures were together sufficient to cause the disease. The damages which would have been awarded against a defendant who had actually caused the disease must be apportioned to the defendants according to their contributions to the risk…"

110. *Rothwell* (2007) did not concern mesothelioma, but pleural plaques. Such plaques are caused by exposure to and thus the inhalation of asbestos dust, but are entirely benign. They are evidence of such exposure, and therefore their presence may be an indicator that the employee concerned may come to suffer from some serious asbestos-related disease, such as asbestosis or mesothelioma. However, an employee who has developed pleural plaques may well not go on to suffer from those diseases. The claimants in question had not done so, but they complained that they should be compensated for the negligent exposure by their employers to asbestos dust, not because the pleural plaques constituted actionable damage in themselves, but because the diagnosis of them had already led in one case to a depressive illness and, more generally, demonstrated to the claimants the risk of falling victim to fatal asbestos-related disease and caused them anxiety associated with knowledge of that risk. This was the "aggregation theory" of injury or damage.

111. The claims failed. It should be stressed that it was accepted by the claimants throughout the litigation that the plaques in themselves did not constitute actionable damage or injury. This was despite the fact that claims had been regularly settled in the past on the ground that such plaques were actionable. It appears that for about 20 years pleural plaques had been regarded as actionable. However, the employers' insurers had decided to challenge the practice (see at paras 6 and 79). Lord Hoffmann gave the leading speech. He stressed that damage in the sense of something without proof of which a claim in tort for negligence is incomplete is an "abstract concept of being worse off, physically or economically, so that compensation is an appropriate remedy" (at para 7). Thus an action for compensation "should not be set in motion on account of a trivial injury" (at para 8). He referred to *Cartledge v. Jopling*. He described the findings of the trial judge that the plaques were not actionable and did not constitute disease as unassailable. He said (at 11):

> "The important point was that, save in the most exceptional case, the plaques would never cause any symptoms, did not increase the susceptibility of the claimants to other diseases or shorten their expectation of life. They had no effect upon their health at all."

112. As for the aggregation theory, Lord Hoffmann stressed that in principle "neither the risk of future injury nor anxiety at the prospect of future injury is actionable" (at 12). In any event, it did not matter that the plaques were in some sense an injury or disease, what mattered was whether they were damage, which they were not (at para 19). The case of one claimant's psychiatric illness was different, and turned on whether such an illness was within the doctrine of *Page v. Smith* [1996] AC 155. However, it was not.

113. Lord Hope of Craighead thought that the plaques could be described as an injury, or even a disease, but he agreed with Lord Hoffmann that that did not suffice. There had to be "real damage, as distinct from damage which is merely minimal" (at para 39, relying on *Cartledge v. Jopling*). Mere injury or disease was not actionable. He rationalised the matter as follows (at para 47):

> "But the policy of the law is not to entertain a claim for damages where the physical effects of the injury are no more than negligible. Otherwise the smallest cut, or the lightest bruise, might give rise to litigation the costs of which were out of all proportion to what was in issue…Damages are given for injuries that cause harm, not for injuries that are harmless."

114. Lord Rodger commented (at para 84) that –

> "In theory, the law might have held that the claimants had suffered personal injury when there were sufficient irremovable fibres in their lungs to cause the heightened risk of asbestosis of mesothelioma. But the courts have not taken that line."

115. It appears, therefore, that where exposure has not progressed to a disease such as asbestosis or mesothelioma, then, even in the presence of pleural plaques, there will not be actionable injury or compensable damage. That would possibly or arguably suggest that even in the case of a dose-related disease such as asbestosis, there is no actionable damage until the disease can be said to have begun. If so, then the insurers' arguments in this appeal, if correct, might be said to apply to asbestosis as well as to mesothelioma.

116. On the other hand, *Rothwell* was a case where there was no asbestosis or mesothelioma, only exposure (and pleural plaques). In the present appeal, the claimants or those represented by the claimants have all developed mesothelioma. That was the position in *Fairchild* and *Barker*. Those cases argue, albeit for the exceptional purpose of bridging a problem of causation and then applying to that problem a fair doctrine of appropriation, that, *where mesothelioma has actually*

occurred, the damage may be regarded as being identified with the increased risk of suffering mesothelioma. As Lord Hoffmann said (*Barker* at para 48, cited above), "the *Fairchild* exception treats the risk of contracting mesothelioma as the damage". On that basis, the damage and injury might possibly be said to have commenced with the risk; and the claimants here so submit. Such cases, the argument goes, stand outside the rule in *Gregg v. Scott* which had been applied in *Rothwell*, because mesothelioma has in fact occurred. However, as the insurers have pointed out in this appeal, we are not here strictly concerned with the *Fairchild* exception, which was adopted to deal with the inability otherwise to prove causation against any one of several employers and which turns on the six or five factors listed by Lord Bingham and Lord Hoffmann. In the present cases, we are concerned with exposure by only one employer. However, *Barker* widened the *Fairchild* exception: see at para 122 below.

117. Although the outcome in *Barker* was determined as a matter of fairness, Parliament immediately took a different view of what was fair, and, by a late addition to what became the *Compensation Act 2006*, reversed the decision. The result was that, as in *Fairchild* itself where no argument of apportionment was presented, any employer who, by application of the *Fairchild* exception, had been found to have exposed an employee to asbestos and thus, by increasing the risk of its employee developing mesothelioma, could be found to have caused that mesothelioma by its breach of duty, was made liable in full for the employee's damage, jointly with any other employer similarly held liable.

118. Thus section 3 of the Act provides as follows:

> "(1) This section applies where
> (a) a person ("the responsible person") has negligently or in breach of statutory duty caused or permitted another person ("the victim") to be exposed to asbestos,
> (b) the victim has contracted mesothelioma as a result of exposure to asbestos,
> (c) because of the nature of mesothelioma and the state of medical science, it is not possible to determine with certainty whether it was the exposure mentioned in paragraph (a) or another exposure which caused the victim to become ill, and
> (d) the responsible person is liable in tort, by virtue of the exposure mentioned in paragraph (a), in connection with the damage caused to the victim by the disease (whether by reason of having materially increased the risk or for any other reason).
>
> (2) The responsible person shall be liable –
> (a) in respect of the whole of the damage caused to the victim by the disease (irrespective of whether the victim was also exposed to asbestos

(i) other than by the responsible person, whether or not in circumstances in which another person has liability in tort, or

(ii) by the responsible person in circumstances in which he has no liability in tort), and

(b) jointly and severally with any other responsible person.

(3) Subsection (2) does not prevent –

(a) one responsible person from claiming a contribution from another, or

(b) a finding of contributory negligence."

119. In effect, the employer who in breach of duty exposes its employee to the dangers of asbestos and is found to have caused its employee's mesothelioma, albeit by a special, exceptional, rule of causation when otherwise a claimant would not have been able to prove causation, is treated just like any other employer who has been found to have materially contributed to its employee's disease and is made jointly and severally liable for the whole of the employee's loss. The employer, and not the victim or his family, takes the risk of the insolvency of any other responsible employer.

120. The insurers have submitted that because the effect of *Barker v. Corus* has been undone by this Act, therefore the jurisprudence of that decision has equally been undone and can be ignored. The claimants submit otherwise.

121. There was a second aspect to *Barker*, not concerned with apportionment, but with the width of the *Fairchild* exception. *Barker* widened that exception considerably (see para 11). Thus, for instance, it would cover the *McGhee* situation of tortious and non-tortious exposure. Indeed, Lord Hoffmann said that in *Fairchild* the House had treated *McGhee* as an application "avant la lettre" of the *Fairchild* exception (at para 13). He concluded (at para 17):

> "It should not therefore matter whether the person who has caused the non-tortious exposure happened also to have caused a tortious exposure. The purpose of the *Fairchild* exception is to provide a cause of action against a defendant who has materially increased the risk that the claimant will suffer damage and may have caused that damage, but cannot be proved to have done so because it is impossible to show, on the balance of probability, that some other exposure to the same risk may not have caused it instead. For this purpose, it should be irrelevant whether the other exposure was tortious or non-tortious, by natural causes or human agency or by the claimant himself. These distinctions may be relevant to whether and to whom responsibility can also be attributed, but from the point of view of satisfying the requirement of a sufficient causal link between the defendant's conduct and the claimant's injury, they should not matter."

122. Most recently, the *Fairchild/Barker* exception and section 3 of the Compensation Act 2006 have been considered by this court in *Sienkiewicz (Administratrix of the Estate of Enid Costello deceased) v. Greif (UK) Ltd* [2009] EWCA Civ 1159, [2010] QB 370. Mrs Costello had worked for the defendant from 1966 to 1984 and died of mesothelioma in 2006. Her occupational exposure to asbestos during her employment had been only modest, and the employer argued that the claimant could not show on the balance of probabilities that it, rather than the low level of environmental exposure unavoidably faced by a resident of Ellesmere Port, was the cause of her illness. To do so, argued the employer, the claimant would have to show that the occupational exposure had at least doubled the risk of contracting mesothelioma which Mrs Costello faced as a mere resident. This court, however, held that there was no such requirement under the common law, provided that the occupational exposure had materially increased the risk. It regarded the *Fairchild/Barker* cases as having recognised a new tort, that of negligently increasing the risk of injury (para 27, *per* Lady Justice Smith, and para 55 *per* Lord Clarke of Stone-cum-Ebony). It held that section 3(1)(d) of the Compensation Act 2006 was not intended to widen the circumstances in which a defendant might be found liable in tort, but to reflect the common law (at paras 33/34).

123. It follows that the Compensation Act 2006 was only concerned to reverse the rule of apportionment in *Barker*, but not otherwise to interfere with common law doctrine, as advanced in *Fairchild* and *Barker*.

124. One question which may need consideration is whether the doctrine of a new cause of action for materially increasing the risk of contracting mesothelioma has an effect on the application of the insuring clauses in the wordings under consideration in these appeals.

125. In this connection, it may be noted that there is an analogous case from the context of negligence causing economic loss. In *Shore v. Sedgwick* [2008] EWCA 863, [2009] Bus LR 42, this court held that, even though measurable actual financial loss may only have occurred at a later stage, the claimant was already suffering loss so as to complete his cause of action at the time when he entered, on the advice of the defendant, into a pension scheme which was inferior to his previous pension: in that the new scheme was riskier than the old scheme, when what the claimant wanted was a secure scheme.

The Workmen's Compensation Acts

126. It is next necessary to relate a brief history of the *Workmen's Compensation Acts* ("WCA"). This is for two reasons. The first is that it seems reasonably clear that some at least of the language of the insurance wordings in issue goes back to the era of the WCA. Indeed, it would seem that EL insurance is in large part a response to those Acts. It is submitted on behalf of the insurers (or at any rate some of them) that the factual matrix and commercial purpose of their wording can be understood only in terms of the WCA and the cases decided under them. Secondly, there is an issue between those insurers who rely on the WCA and the claimants as to what the WCA and the decisions under them teach about the essence of EL insurance. The insurers submit that the WCA regime did not depend in any way upon the doctrine of causation, but was a no-fault compensation scheme based upon manifestation (of injury) and disability or death: it would therefore be a fundamental mistake to interpret insurance wording which originates from the era of that regime as responding to exposure as a cause of injury, rather than to the injury itself. The claimants, however, or some of them, submit that support for their submissions as to the construction of the wordings (as being given a causation meaning) can be derived from the period of the WCA, even though, as they accept, the WCA decisions do not decisively cover the issue in the present appeals.

127. The history begins with the *Employers' Liability Act 1880* (the "ELA 1880") which placed limits on the doctrine of common employment by providing that where personal injury was "caused to a workman" by negligence in matters, broadly speaking, for which the employer bore responsibility, the workman should have the same right of compensation as if he had not been in the employ of his employer at all (section 1). Compensation under the ELA 1880 was limited to three years' wages (section 3), and notice "that injury has been sustained" had to be given within six weeks, and an action commenced within six months, "of the accident causing the injury" or, in the case of death, within twelve months of death (section 4). The notice had to state in ordinary language "the cause of the injury and the date at which it was sustained" (section 7).

128. Thus the language of "injury caused to a workman" and of injury "sustained" goes back to this Act, as does the concept of an "accident" as the cause of the injury. The expression "caused to" is not a mere synonym for "sustained by", because the essence of section 1 is that the Act operates in that area where injury has been caused (to a workman) *by* the failures in matters of employer's responsibility listed in section 1.

129. The *Workmen's Compensation Act 1897* (the "WCA 1897") introduced a novel compensation scheme "for accidental Injuries suffered in the course of their Employment", as the Act's title put it. This did not depend on negligence, but was a statutory scheme covering "personal injury by accident arising out of and in the course of the employment…caused to a workman" (section 1(1)). The scheme was in addition to the common law upon which a workman could rely by commencing an action, but the workman could not proceed under both the scheme and by way of action, but had to choose between them "at his option" (section 1(2)(b)). The scale

and conditions of compensation were contained in the First Schedule to the Act. Death as well as injury was encompassed by the scheme, but, subject to the case of death where provision was made for the claim to be in the hands of legal representatives or dependants, a "Workman" was defined as including "any person who is engaged in an employment to which this Act applies" (section 7(2)). Death apart, the scheme covered the situation only "where total or partial incapacity for work results from the injury", in which case the scheme awarded up to 50% of weekly earnings for the period of incapacity after an initial period of two weeks of incapacity (para (1)(b) of the First Schedule). Notice "of the accident" had to be given as soon as practicable after its happening and in any event "before the workman has voluntarily left the employment", and the claim for compensation under the scheme had to be made within six months of the occurrence of the accident, or, in the case of death, within six months of that (section 2(1)). The notice had to state "the cause of the injury and the date at which it was sustained". The employer liable was the employer in whose employment the worker was working at the date of the injury or accident. Any dispute which could not be settled by agreement went to arbitration under the Act.

130. Thus there was no need to show that the injury was caused by any negligence or other fault, but only that there had been "personal injury by accident" caused to the workman arising out of and in the course of his employment. Thus the injury by accident merely had to be in a loose sense causally and temporally related to the workman's employment. As in the case of the ELA 1880, the phrase "injury sustained" was found, but not in section 1, only in the notice clause. There was no separate provision for disease.

131. The 1897 Act was followed in 1906 by the *Workmen's Compensation Act 1906* (the "WCA 1906"). The major change was the introduction of a scheme for scheduled diseases, pursuant to section 8.

132. Section 1 of the WCA 1906 continued the scheme of the WCA 1897, albeit in a slightly amended form. The section 1 scheme again covered "personal injury by accident arising out of and in the course of the employment…caused to a workman", provided that the workman was disabled for at least one week (previously two). The notice clause (section 2) now required the notice to state "the cause of the injury and the date at which the accident happened": so that the phrase "injury sustained" dropped out of use.

133. Section 8 was an important change, and introduced new and complex provisions related to disease, but only scheduled diseases. The diseases scheduled in the Third Schedule were limited in number and range, and did not include any asbestos-related disease. The only disease based on a mining process was ankylostomiasis (or hookworm). Anthrax was also scheduled, but in the main the diseases listed were

poisoning diseases, such as lead or mercury poisoning. The scheme depended on either (1) certification of disability, or (2) suspension from work pursuant to rules or regulations made under the Factory and Workshop Act 1901, or (3) death (section 8(1)(i), (ii) and (iii)). Therefore, in one way or another, the disease had to have become manifest before the scheme would avail the workman; but there also had to be the necessary certification or suspension (or death).

134. There were other conditions and limitations. The disease had to be "due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement or suspension" (section 8(1)). Thus the scheme operated on a short-tail basis, working backwards from manifestation. Jurisprudence was to show that the section 8(1) language was not a strict requirement of causation: rather that it was necessary to prove only that the nature of the employment within the last twelve months was of the same nature as the work to which the disease was due, ie could have caused the disease in theory: see *Blatchford v. Staddon & Founds* [1927] AC 461 (HL), overruling *Dean v. Rubian Art Pottery Co Ltd* [1914] 2 KB 213 (CA). A statutory presumption assisted in that regard, for the Third Schedule listed, against each scheduled disease, the "process" which could give rise to each disease, and section 8(2) provided that the disease "shall be deemed to have been due to the nature of that employment" *unless* either the certifying surgeon certified, or the employer proved, the contrary.

135. How was the section 8 scheme linked into the financial provisions of the section 1 scheme? This was done by a statutory fiction by which the workman would be entitled to compensation

> "*as if* the disease or such suspension as aforesaid were a personal injury by accident arising out of and in the course of that employment" (emphasis added)

but subject to certain modifications, listed in section 8(1) as (a) to (f). Thus "(a) The disablement or suspension shall be treated as the happening of the accident". (The date of disablement was the date certified as such, or, if the surgeon was unable to certify a date, the date of the certificate: section 8(4). It may be noted, however, that the deeming provisions did not embrace the case where death occurred in the absence of a certificate.) The leading treatise on the WCA was in due course to comment on the difficulties of making sense of these statutory formulae and fictions: see, *Bevan, The Law of Employers' Liability and Workmen's Compensation,* 4th ed, 1909, at 355, note (d):

> "The elaborate set of substitutions by means of which the draughtsman conjures 'death', 'disease' and 'accident', involves an amazing series of logical absurdities. Having begun with disablement as effect of disease, the section makes disease the equivalent of injury by accident, so that disablement becomes the equivalent of an effect of which accident is the cause, and then by

> modification enacts that effect 'shall be treated' as cause. Similarly it will be found that 'disablement', 'suspension', death', 'disease', 'accident' and 'injury' become each the equivalent, the cause and effect of each the others."

136. Who was to be liable for paying the statutory compensation? That was "the employer who last employed the workman during the said twelve months in the employment to the nature of which the disease was due", hereafter "last employer" (section 8(1), modification (c)). It is clear from what I have stated above that although such employment had to be capable of giving rise to the workman's disease, it did not have to be the cause of it. Indeed, the "last employer" may have been entirely innocent of causing the workman's condition: see *Blatchford* at 467/8, 480/3. The statute, however, identified and fixed upon the "last employer" as –

> "a person certain and designated, upon whom the workman may claim without being sent from pillar to post" (*per* Viscount Sumner at 469).

137. However, there were circumstances in which the "last employer" could obtain a defence against or relief from his liability. He was entitled to shift his liability to another previous employer (*sc* within the relevant twelve months, as confirmed by Lord Wrenbury in *Blatchford* at 479) by proving that that employer, and not he, was the employer of the workman at the time the workman's disease "was in fact contracted"; alternatively, where the disease was "contracted by a gradual process", he could obtain a contribution from any other previous employer who, during the relevant twelve months, had similarly employed the workman "in the employment to the nature of which the disease was due" (section 8(1)(c)(ii) and (iii)). Moreover, to assist the "last employer" to make his case in these respects, the workman would lose his claim against his "last employer" if (a) he or his dependants failed to provide the "last employer", if so required, with details of his previous employers during the relevant twelve months and (b) the "last employer" was able to prove that "the disease was not contracted" whilst the workman was in his employment (section 8(1)(c)(i)).

138. In these circumstances, and only in these circumstances, was it relevant to ask whether an employer had caused the disease in question. Thus a question of causation *could* arise, either where a claimant failed to provide the required information about his previous employment (section 8(1)(c)(i)), or where the "last employer" sought to shift responsibility entirely onto a previous employer (section 8(1)(c)(ii)). It would not, however, arise in the case of section 8(1)(c)(iii), because there the only question was whether previous employers within the twelve months had also employed the workman "in the employment to the nature of which the disease was due".

139. Even so, these limited opportunities for a "last employer" to raise an issue of causation did not fault the generality of the scheme for compensation, whether under section 1 or section 8, whereby the claimant did not have to prove that his employer had caused his injury or disease.

140. It is to be observed that it is pursuant to section 8 of the WCA 1906 that the concept of "contracting disease" first occurs. It does so in the following contexts. In section 8(1)(ii) there is reference to suspension from employment "on account of having contracted any such disease". In section 8(1)(c)(i) the "last employer" may, if the workman fails to provide the required information about his previous employers, seek to prove that "the disease was not contracted whilst the workman was in his employment". In section 8(1)(c)(ii), the "last employer" may seek to prove that "the disease was in fact contracted whilst the workman was in the employment of some other employer, and not whilst in his employment". And in section 8(1)(c)(iii) there is reference to a disease being "of such a nature as to be contracted by a gradual process". In the second and third cases, the concept would appear to be linked to a question of causation. In the fourth case, the concept would appear to be linked to a question of multiple exposures. In the first case, the expression of the concept appears to be neutral.

141. In 1925 Parliament enacted the *Workmen's Compensation Act 1925* (the "WCA 1925") to consolidate the law in this area. Section 1 remained essentially the same, save that a mere three days disability now sufficed. Scheduled diseases were now dealt with in section 43 (and section 44), in essentially the same way as before. The Third Schedule, which again listed the scheduled diseases, remained as limited as before.

142. Section 47 re-enacted a new concept, first introduced by the *Workmen's Compensation (Silicosis) Act 1918* (the "WC(S)A 1918") of *scheme* (not *scheduled*) diseases, albeit it focussed only on silicosis arising out of "exposure to silica dust". Section 47 gave the Secretary of State the power by scheme to provide for the payment of compensation by employers of workmen "in any specified industry or process…involving exposure to silica dust". Such a scheme could require employers to subscribe to a general compensation fund and could provide for the settlement of claims, the setting up of medical boards, and otherwise. Between 1927 and 1931 various such silicosis schemes were set up, beginning with the Metal Grinding Industries (Silicosis) Scheme 1927. In 1930 section 47 of the WCA 1925 was amended to extend its empowering provisions to industries and processes "involving exposure to asbestos dust": see the *Workmen's Compensation (Silicosis and Asbestosis) Act 1930* (the "WC(SA)A 1930").

143. The WC(SA)A 1930 led to the setting up of the *Asbestos Industry (Asbestosis) Scheme 1930.* Thus asbestosis was never a scheduled disease, but a scheme disease.

However, the asbestos scheme brought asbestosis within the provisions of the WCA 1925 by use of the (originally section 8) fiction that where asbestosis was due to employment in the scheme processes, the workman or his dependants should be entitled to claim compensation "as if the disease as aforesaid were a personal injury by accident arising out of and in the course of employment", but subject to the scheme's own modifications. Thus the medical board could certify that asbestosis "cannot have been contracted in the processes owing to the shortness of the time during which the workman has been employed therein". (Moreover, no compensation was payable where the workman had not been employed within the three years previous to the date of injury.) In the absence of such a certificate, however, where the workman had been employed in the processes for an accumulated period of less than five years, the disease was deemed to be due to employment in the processes but (see the language "unless the employer proves the contrary") the employer had the opportunity of seeking to prove that it was not. The date of the "injury" –

> "shall be deemed to be the date on or from which the workman is certified to be totally disabled, or, while not totally disabled, is suspended from employment or, in cases where the workman dies without having been certified to be totally disabled or suspended, the date of death."

Thus, once again, "injury" was postponed until manifestation and/or certification.

144. The employer liable to make the payment of compensation was "the employer who last employed the workman in the processes": but he was entitled to obtain "such contributions as, in default of agreement, may be determined by arbitration" from other employers "who employed the workman in the processes during the five years preceding the date of the injury", unless any of those employers had ceased to carry on the processes by the commencement of the scheme. It would seem that under this scheme the only opportunity for an employer to seek to say that his employment had not caused the workman's disease was where the workman had worked in the processes for less than five years. Otherwise, causation was not relevant. It was employment in the processes, plus certification, suspension or death, which rendered the last employer liable.

145. The parties have debated the learning to be derived from a number of authorities decided under the WCA. I refer to them because the parties have done so. It seems to me that those most likely to be, if indeed at all, relevant are those in which WCA liability led to a dispute between the employer and his EL insurer.

146. *Brintons v. Turvey* [1906] AC 230 (HL) was not a case between employer and insurer, but between a workman's dependant and the workman's employer. The workman had been employed sorting wool and he became infected in his eye by an anthrax bacillus and died. The issue was whether there had been "injury by accident" within the

meaning of the WCA 1897. The employer's argument was that the workman had suffered from disease, not injury, and that disease was not an accident. The House of Lords held that there had been both an accident and an injury. It is not entirely clear whether the development of the disease was the injury, or whether the injury occurred prior to the disease and at the same time as the accidental infection. It appears, however, that it was the accidental entry of the bacillus into the eye which was regarded as the injury, and the disease was the effect: for Lord Macnaghten said (at 234/5):

> "The accidental character of the injury is not, I think, removed or displaced by the fact that, like many other accidental injuries, it set up a well-known disease, which was immediately the cause of death…"

147. Moreover, the Earl of Halsbury LC seems to have generalised the same point when he said (at 234):

> "Many illustrations of what I am insisting on might be given. A workman in the course of his employment spills some corrosive acid on his hands; the injury caused thereby sets up erysipelas – a definite disease; some trifling injury by a needle sets up tetanus. Are these not within the Act because the immediate injury is not perceptible until it shews itself in some morbid change in the structure of the human body, and which when shewn we call a disease? I cannot think so."

148. Thus a trifling injury may, when it causes a serious or fatal disease, amount to an "injury by accident" for the purpose of the WCA.

149. *Blatchford* was another case between workman and employer. The workman was disabled by lead poisoning, and his disablement under the WCA 1906 dated from the date of certification, in July 1925. ("The certifying surgeon, not being able to certify a date on which the disablement commenced, duly deleted the words in the form of certificate which fix the date of commencement, and under the Act the commencement is deemed to have been the date of the certificate…" *per* Viscount Sumner at 465/6.) His last employment within the relevant twelve months of that date had been from October to December 1924, with the respondent employer. The arbitrator to whom the dispute was referred found that the workman's disease was not caused or contributed to by his employment with that employer, but had originated and been contracted back in 1918, when he was employed in the navy (see at 465, 479). The question was whether in these circumstances the respondent employer was liable, and the arbitrator found that he was not, and the county court and in turn the court of appeal had upheld that decision. The House of Lords reversed, and found the employer liable. The essence of its decision was simply that section 8 of the WCA 1906 made "the last employer" within the previous twelve months (as I have defined

him) liable, "as if the disease…were a personal injury by accident arising out of and in the course of that employment". In the course of their speeches, however, their Lordships made some relevant observations on the nature of the legislation: to the effect that section 8 was unlike section 1 (*per* Lord Blanesburgh at 481), and driven by statutory fictions (*per* Lord Wrenbury at 477). Moreover, a contrast was drawn between injury under section 1 (where, "if one has injured another he is to compensate him for the injury", at 477) and disease (with its fiction as an injury by accident) under section 8, where "Means had to be found for enabling the workman to recover compensation from an employer even though he could not prove the precise time when the disease was contracted" (*per* Viscount Sumner at 467/8). And Lord Blanesburgh (at 483) distinguished between two classes of disease, "first of all, diseases which are definite in origin…secondly, diseases which are described as being "contracted by a gradual process", adding –

> "There is no limitation of time in respect of the date at which a disease of the first class originated or at which the gradual process in a disease of the second class commenced. The date in each case may have been years before the consequential disablement, suspension or death."

However, all these difficulties were resolved by the statutory fiction that the certified disability took effect as a source of the liability of the "last employer" as if the disease was an injury by accident arising out of employment with that employer.

150. *Ellerbeck Collieries Limited v. Cornhill Insurance Company Limited* [1932] 1 KB 401 (CA) extended the rationale of *Blatchford* to a case between employer and insurer. The employer's workmen had been certified to be suffering from miners' nystagmus. The certificates stated that in one case the disablement commenced on 11 March, and in the other case on 12 March 1929. On appeal, the medical referee further found that the two workmen had already been suffering from nystagmus *before* 1 January 1929. The workmen were still employed by the employer, but were not actually working, at the time of their disablement. The employer was liable to pay compensation, did so, and was seeking an indemnity from its insurers. The (provisional) policy ran from 8 to 18 March 1929, which covered the dates of disablement. The policy provided an indemnity "if at any time during the said period [viz 8 to 18 March 1929] any employee in the employers' immediate service shall sustain any personal injury by accident or disease…while engaged in the service of the employer…" The insurer submitted (i) that the workmen had not sustained injury during the policy period, but before it commenced; and (ii) that the workmen were not engaged in the employer's service at either the time they had sustained injury or even at the time of their certified disablement, because they were not then earning wages. This court rejected both submissions.

151. Scrutton LJ explained the scheme of the WCA as laid out in *Blatchford* and observed that the "date of the injury or disablement is by statute and certificate fixed as happening between the dates" of the provisional policy (at 411). Thus the fiction of

the WCA was carried over into the relationship between employer and insurer. As Scrutton LJ observed: "I approach the construction of the policy from the point of view that it is intended to protect the employers against their liability to their workmen under the Workmen's Compensation Acts" (at 408). Greer LJ made a similar observation at 417. As for the second point, the two men were either "admittedly in the service of the [employer] at the dates stated in the certificate" (*per* Greer LJ at 417) or to be "treated…as employed at the time of the certified disablement by the last relevant employer previous to that date" (*per* Scrutton LJ at 414), and it was irrelevant that they were not earning wages at that time. Slesser LJ agreed with the reasons of both Scrutton and Greer LJJ (at 422).

152. *Smith & Son v. Eagle, Star & British Dominions Insurance Company Ltd* (1934) 48 Ll Law Rep 67 (CA) was another case between employer and insurer. The policy covered the period between 30 June 1927 and 17 June 1930, and promised an indemnity against liability for "any personal injury or disease…which, at any time or times during the continuance of this policy, shall be sustained or contracted by any workman". The employer compensated a workman whom it had employed as a file cutter between 31 March 1928 and 16 June 1930, during the period of cover. The compensation was for the scheme disease of silicosis. The workman was put on other work until he left the employer's employment on 31 October 1931. The WCA certificate was not issued until December 1932 and dated the disablement (by silicosis) to 18 July 1932. The arbitrator, presumably following *Ellerbeck*, declined recovery by the employer from the insurer on the ground that the certified date of disablement was outside the period of the cover. This court however upheld Roche J in granting an indemnity. Scrutton LJ first of all decided the appeal on the limited point that, under an extension to the policy, the insurer had promised to cover "any liability which may rest upon you, in connection with any claim made by your employees in respect of silicosis". Scrutton LJ clearly considered that the workman's claim fell within the words of that extension (at 69). He gives no reason, but it may simply be because under the silicosis scheme, liability fell on the employer by reason of his employment of the workman in the silicosis scheme processes during the period of the cover (see Slesser LJ at 72 and Maugham LJ at 73). That was the basis of the court's decision.

153. However, Scrutton LJ also went on to consider, obiter, the more difficult question of whether liability to indemnify would have been found under the basic terms of the underlying policy. He opined that it would have been, because of the language "or disease…contracted". He said (at 70):

> "You do not contract an accident; you do contract a disease; and it so happens there has been a good deal of discussion in the Courts about a disease which is gradually contracted commencing at some stage and through the process going on increasing the disease until at last it results in total disablement…
>
> …and I do not myself read "contracted" as "first contracted"; I read it in the sense of "influenced" or "increased" until it finally comes to total disablement – and in

> my view this policy would cover the liability of a man who is held liable because during the five years preceding the accident he was a person who employed the workman who gradually contracted a disease which is a gradual disease, owing to continuous working in the processes…"

Slesser and Maugham LJJ, however, preferred to express no opinion on the underlying policy.

154. Although the parties locked horns about this authority, it is not clear what, if any, light it throws on the effect of policy wordings in the WCA era. At most Scrutton LJ seems to be suggesting that the words "disease contracted" are not necessarily in pari materia with "injury sustained"; that a disease may possibly be said to be contracted both when "first contracted" and, in the case of a disease which develops gradually, when influenced or increased; and that such policy language might respond during a period of cover when the workman is working in processes which are likely to exacerbate his disease, even if it originated in times past, and even though his final disability is only certified at a time after cover has come to an end. At the same time, it has to be remembered that silicosis is a scheme disease, not a scheduled disease, so that certification operates so as to render liable the last employer for whom the workman had worked in the relevant processes over the previous five years. It does so, as under sections 8 and 43, by reference to a fictional "injury by accident". It appears that Scrutton LJ was willing to ascribe to the alternative basis of the insurer's liability to indemnify ("or disease…contracted") a wider scope than under the fictional workings of the WCA. At any rate, I believe that it is possible to see here, not for the first time, the benevolence with which the courts were prepared to safeguard the interests of both the workman and the insured employer who was rendered liable to the workman.

155. *Mayer and Sherratt v. Co-operative Insurance Society Limited* [1939] 2 KB 627 (CA) also concerned an employer's claim against his EL insurer. In this case the employer's policy expired before its employee's death from lead poisoning, a scheduled disease. There had been no certificate of disability or suspension, so that the employer's liability to compensate the workman's dependant only arose on his death (after the policy's expiry). Could the employer recover an indemnity for its liability? This court said it could. The worker was employed by the employer from 1929 until November 1936 and for much of that time he was employed in processes relevant to lead poisoning. He was already ill when he commenced that employment, but his disease was aggravated during it. From the time he left his employment in November 1936 until his death on 10 March 1937 he was too ill to work. The policy covered liability in respect of "any personal injury by disease as described in the Workmen's Compensation Acts sustained whilst engaged in the service of the insured".

156. This court held that on the plain words of the policy "injury" (ie the lead poisoning) had been "sustained" during the currency of both the employment and the policy and the insurer was therefore liable. The insurer had argued below that the date of death marked the fictional injury by accident under section 43, but the point was abandoned in the light of the realisation that the statute applied the dating of its fiction ("The disablement or suspension shall be treated as the happening of the accident") to certified disability or suspension, but not to death in the absence of a certificate.

157. Mackinnon LJ said:

> "The sole question is whether that was a liability in respect of a personal injury by disease sustained by a workman which accrued to the employers during the period of the currency of the policy…Merely upon that statement of facts, inasmuch as they had to pay compensation because the man died through lead poisoning sustained while in their employment…well within the period covered by the policy, I should have thought there was no doubt that the employers were entitled to the indemnity promised by the policy.
>
> If we were concerned solely with the construction of those few words in the policy, the question would appear to be quite simple, but the liability referred to against which the indemnity is promised is a liability in respect of personal injury or disease as described in the Workmen's Compensation Acts, 1906 to 1923 [sic]. That being so, the opportunity has been afforded for that sort of investigation into the provisions of the Workmen's Compensation Acts which always involves me, at any rate, in a feeling of despair as to forming any intelligible view of what some of those provisions mean…(at 632/3)
>
> Mr Flint tried to assist us by citing separate expressions of opinion by various Lords in the House of Lords as to s. 43 in its various applications. I am bound to confess that I have not followed all of them very intelligently, but I think it is possible to collect, culled out of different judgments and dealing with different subject-matters, a great number of separate sentences which darken the meaning of this part of the Act and which in themselves are inconsistent with one another. We are set a much simpler task, which is simply to construe these few words in this policy – namely a promise by the society to indemnify the insured against all sums for which they shall be liable in respect of any personal injury by disease sustained by a workman whilst engaged in the service of the insured, that liability of course being incurred during the currency of the policy. I think that the liability to the widow of Sutton established by the award of the county court judge did arise during the currency of the policy – namely in respect of a personal injury by disease which was sustained by Sutton during the period from May, 1932, to April, 1936, while working with lead in that service. That clearly was during the period of the policy…" (at 635/6).

158. Du Parcq and Atkinson J reasoned to similar effect. Thus Du Parcq LJ said (at 638):

> "If one treats disease as a personal injury by accident, then the question is: When was that personal injury sustained? It really is verging on the absurd, I think, to suggest that any one could say that it was sustained some time after the workman was removed from all dangers of working as a lead worker. It was sustained, according to the finding of the learned arbitrator, during the time he was working for these employers. That injury having been sustained during the currency of the policy and being one in respect of which, though at some later date, the employers were bound to pay compensation, I think it is plain that the insurers cannot escape their liability under the words of the policy."

159. From this case there can I suppose, be derived first and foremost the proposition that the difficult workings of the WCA and the equally difficult jurisprudence which it generated are unsafe guides to any problems now raised by policies which are instead concerned with the common law of negligence or breach of statutory duty. Secondly, that where there was a finding that the disease had been aggravated during the employment and the currency of the policy, the court was no longer concerned with the fictions of the WCA which were designed to make an employer who was in truth not responsible for causing injury or disease nevertheless liable to pay compensation for them: it could simply go directly to the injury by disease found to have been both caused, in the sense of aggravated, and for the same reason sustained, while working for the employer. It may be that in this respect the court was assisted by the fact that section 43 did not appear on its face to date the deemed "injury by accident" to the time of a certificate or a date of disability stated in a certificate or to a suspension: for there was no certificate or suspension. In this respect there was simply a void in section 43 as to "the happening of the accident", other than the provision that it was to be treated as one arising out of and in the course of the employment.

160. Alternatively, it is possible, especially given the breadth of some of the dicta deployed by the judges in *Mayer*, that they regarded language of the kind found in the EL policies of that era as covering the sustaining of any injury, whether the *deemed* injury by accident of the statute, or injury or disease *in fact* caused by an employer to his employee, as long as it occurred in one or other form during the period of the cover. Of course, the facts had to generate a liability to compensate under the WCA. But it seems to have been irrelevant to the court in *Mayer* that the cause of action for WCA compensation only accrued on death and that that was at a time when the workman was no longer an employee and the insurance was no longer in effect.

161. In *Fife Coal Company Limited v. Young* [1940] AC 479 the House of Lords reviewed the meaning of "injury by accident" under section 1 of the WCA. It was held to apply in that case to a mineworker who developed a muscle paralysis which prevented him using his foot. The condition was brought on by having to crouch in his work. The test applied was that of sustaining a physiological injury as a result of the work engaged in (Lord M'Laren's test from *Stewart v. Wilsons and Clyde Coal Co Ltd* (1902) 5 F 120, cited by Viscount Caldecote LC at 483). As such, the test in practice collapsed the

meaning of accident into that of injury. The word "accident" had however caused difficulties in the case of progressive diseases where it was impossible to show a definite physiological change at a particular time. It was this difficulty which had led to the introduction of first scheduled and then scheme diseases into the legislation. However, even before that the accidental injury caused by infection had been solved by the anthrax case in *Brintons*. In this context, Lord Atkin made observations about the difference between accident and injury. He pointed out that in the case of what he called an "internal accident" (such as a rupture), it is hardly possible to distinguish the time between accident and injury. But in principle the distinction between them must be observed. Thus –

> "The incidence of a bacillus may be an accident, and an accident arising out of the employment, as in the anthrax…cases. In such cases the employment gives rise to the bacillus, the fact that it finds a suitable entrance in an existing wound, scratch or orifice which are themselves not due to the employment is irrelevant…On the other hand, the employment may give rise to the wound or scratch through which a non-employment bacillus enters. In such cases the accident has caused the wound or scratch which is the injury. Without the bacillus the injury is trifling, with the bacillus the injury becomes so aggravated that it causes incapacity or death. Compensation is awarded because the incapacity so caused is the direct result of the accident, just as if negligence causes a wound the party negligent has to pay in full whether the wound heals or becomes infected from outside, except possibly where it could be said that a new agency intervened" (at 489).

162. Finally, what does one obtain from this consideration of the statutes and policies and jurisprudence of this era as a whole? In my judgment, not a lot. First, I accept that a certain amount of policy language derives from this period, for instance the phrase "personal injury by accident or disease"; also talk of "injury sustained" (the 1880 Act) and "disease contracted" (the 1906 Act) There is a natural contrast between the cause and the incidence (sustaining) of injury in section 2(1) of the 1897 Act (see para 129 above). However, statutory talk of "injury sustained" has gone by 1906 (see para 132 above). In this connection I acknowledge, and it is in any event common ground, that the phrase "personal injury by accident or disease" refers to injury by accident and to injury by disease. However, ultimately these are all ordinary words and expressions, which come readily to hand to describe the suffering of the incidence of injury or disease. There is no definitive treatment, however, of the phrase "injury sustained".

163. Secondly, the complex schemes of the WCA in the case of disease and the tortured jurisprudence to which those statutes gave rise are of no particular relevance to the post WCA era of the common law of negligence or breach of statutory duty. The WCA regime depended in large part on fictions or presumptions based on manifestation of injury (by way of disablement, certification, suspension or death), whereas in the modern era there can be no liability without causation of injury or damage to the employee on the part of the employer.

164. Thirdly, I accept neither the submission of the insurers, that causation was irrelevant to the WCA, nor the submission of the claimants, that it was all-important. Questions

of causation could arise, particularly under section 1 of the Acts, but in essence the WCA format provided for no fault compensation, not damages for breach of duty; and, in the case of disease, questions of causation only arose at the margins, for instance where a "last employer" was seeking to pass on liability to another (albeit it is to be noted that this is the context for finding the concept of a disease being "contracted" (see para 140 above); or where, as in *Mayer*, a question might arise as to whether an injury or disease sustained or contracted during a policy period had only subsequently to the expiry of the policy given rise to WCA compensation liability in a case where the employer had died without earlier certification or suspension. Moreover, in the case of section 1's "injury by accident", there only had to be a loose causal connection between the accident/injury and the employment in which the workman was engaged. The cases I have been asked to consider demonstrate, to my mind, how rarely any question of causation arose. As the parties accept, none of the jurisprudence directly answers the essential issue of construction which arises on these appeals. In its essence, WCA compensation was not causation based, but manifestation based.

165. Fourthly, however, there are observations in the jurisprudence which suggest that the phrase "disease contracted" may be capable of reflecting a number of different situations. It may refer to diseases in their origins as when they begin in something like an infection, or it may possibly refer to the development of a dose-related disease where successive exposures aggravate the workman's condition. A question which then arises in these appeals is whether the phrase refers to the disease of mesothelioma only at the end of the process, when the disease has emerged in an injury in fact (or perhaps one should say, when the injury in fact has become a disease), or whether it can also refer to the origins of the disease, at the start of the lengthy process which can, but need not, lead but has in fact led to the growth of a cancerous tumour. And fifthly, there are indications, for instance in the observations of the Earl of Halsbury in *Brintons v. Turvey* or of Lord Atkin in *Fife Coal*, that an accidental injury in the course of employment which provides the hook on which liability depends may be trivial in itself, but may lead because of infection to incapacity and thus liability.

Employers' Liability (Compulsory Insurance) Act 1969

166. I pass next to comparatively modern times, beyond the era of the WCA, to refer to the *Employers' Liability (Compulsory Insurance) Act 1969* ("ELCIA 1969"). This was enacted in 1969, with a delayed date for coming into force of 1 January 1972. BAI's second wording (1974 to 1983), Excess's third wording (1970 to 1976), MMI's third wording (1974 to 1992) and Independent's wording (1972 to 1987) were adopted in the ELCIA era.

167. The claimants submit that only causation wording in an EL policy adequately protects both employer and employee. Once wording covers a liability arising out of the activities of an employer in any year, then the employer always remains protected, however far distant in the future his negligence or breach of duty may ultimately result in a liability brought home to him for which he needs the protection of his EL insurance. The employer's protection is also the employee's protection: for ever since the *Third Parties (Rights Against Insurers) Act 1930* (the "TPRAIA 1930") the employee or his dependant can sue the insurer of an insolvent employer directly. Thus the employer's EL insurance is a form of security for the employee. Only the failure of the insurer destroys that security. Policy wording on a sustained injury basis however does not provide the same protection, unless the employer both remains in existence and retains insurance long into the future. For these purposes, the insurers' submission that causation wording in modern times is less useful, where mesothelioma is concerned, than sustained wording, on the ground that the former does not pick up liability which goes back into earlier times in the way that the latter does, misses the point: which is that, looking forward, only causation wording in any given year provides complete protection for the liability which emerges out of that year. Sustained wording only provides that same protection as long as it is renewed each year. History has shown that such renewals may not happen, and indeed, the insurance market has dictated that they are no longer available, at any rate to cover mesothelioma.

168. The claimants submit that this fact about the nature of causation wording, this utility of causation wording, has always been the essential and underlying truth of EL insurance; and that this was both the commercial purpose of EL insurance and that the recognition of this truth is underlined in the provisions and policy of ELCIA 1969. The question arises whether ELCIA 1969 does in fact impose upon employers the requirement of causation wording.

169. ELCIA 1969 ("An Act to require employers to insure against their liability for personal injury to their employees") provides in its essentials as follows:

> "1.- (1) Except as otherwise provided by this Act, every employer carrying on any business in Great Britain shall insure, and maintain insurance, under one or more approved policies with an authorised insurer or insurers against liability for bodily injury or disease sustained by his employees, and arising out of and in the course of their employment in Great Britain in that business, but except in so far as regulations otherwise provide not including injury or disease suffered or contracted outside Great Britain…
>
> (3) For the purposes of this Act –
>
> (a) "approved policy" means a policy of insurance not subject to any conditions or exceptions prohibited for these purposes by regulations…

170. Certain employers were however exempted from the provisions of ELCIA 1969, including local authorities. Thus MMI was not required in the era of ELCIA 1969 to provide its local authority clients with EL insurance which covered asbestosis or mesothelioma; but it nevertheless did. ELCIA 1969 sanctioned a failure by an employer who was required to insure but failed to do so by providing that such failure was a criminal offence carrying a fine upon summary conviction of up to £200; and a director, manager, secretary or other officer of a company which had been guilty of an offence who connived at or facilitated such offence would also be guilty of that offence (section 5). The Secretary of State was authorised to make regulations covering supplementary provisions (section 6), including regulations for securing the display by the employer of certificates of insurance "for the information of his employees" (section 4).

171. Regulations were made (the *Employers' Liability (Compulsory Insurance) General Regulations 1971*) which contained supplementary provisions prohibiting certain policy conditions and requiring the display of certificates of insurance "until the expiration of the period of insurance stated in the certificate". Nevertheless, as the appellant insurers point out, the regulatory machinery is by no means extensive (cf the regime of the Road Traffic Act 1988). Thus it does nothing to prevent an insurer's reliance on an employer's misrepresentation or non-disclosure or breach of warranty. This is despite the fact that the immediate historical impetus for the passing of the Act was a disastrous fire at a small employer whose insurance was avoided by its insurer and who failed as a result, leaving the families of the victims of the fire without remedy for the employer's negligence or breach of statutory duty. The insurers describe the ELCIA 1969 as a "toothless beast".

172. It will have been observed that section 1 of ELCIA 1969 uses the language of "bodily injury or disease sustained" and "injury or disease suffered or contracted outside Great Britain". It could be said that if Parliament had wanted to insist that its requirement of compulsory insurance had to be taken out on the causation wording which lay readily to hand in the tariff wording which had been widely in use since 1948, it could readily have so insisted. As it is, Parliament could be said to have left it to employers to choose what wording to adopt, as long as they maintained their insurance. Thus although section 1(1) and (3)(a) limited insurance to "approved policies", the only steps taken by the statute or regulations under it to limit what that meant were concerned with outlawing certain exemptions.

173. On the other hand, the obligation to insure only rests on an employer as long as he is "carrying on any business in Great Britain". Thus an employer who ceases all business, or who carries on business but only outside Great Britain, is under no obligation to insure or to maintain any EL insurance. Therefore an employer who insured on sustained wording, then ceased business, might appear to have no continuing duty to insure. It might be said that these considerations support the thesis that only causation wording could fulfil the statutory purpose, which is clearly to

protect current employees who are injured by their employer's negligence or breach of statutory duty.

174. The exception at the end of section 1(1) to exempt employers from the requirement to insure employees who suffer injury or contract disease outside Great Britain also suggests the need for causation wording, at any rate so far as a disease like mesothelioma is concerned. It will be recalled that mesothelioma had become a prescribed disease already in 1966, even if instances of it were at that time rare. On the basis of the rulings in *Bolton*, the injury or disease of mesothelioma is only suffered as an injury or disease in fact long after the time of exposure. Thus the exception would leave employees who retire abroad (or even employees who move abroad to work, possibly for the same employer who had exposed them to asbestos), and who develop mesothelioma outside Great Britain, unprotected by the statute. The same might be true of other diseases, such as other industrial cancers or even asbestosis. The case was put of infections such as malaria, which might take six months to develop. The claimants submitted that surely such cases are intended to be dealt with, and covered by insurance, depending on the place where the employee was negligently exposed to the cause of infection, and not where the disease developed. It was submitted that only causation wording, which looks to the circumstances of the employment and its activities and to the risks to which employees are in each year currently exposed by their employer, can properly deal with such cases. That is why, it was submitted, the regulations required the displaying of each year's certificate of insurance to current employees.

175. In this connection, the claimants also submitted that in any event, whether on causation or sustained wording, the concept of "disease…contracted" in this exception has to refer to where a disease originated as a matter of causation, and not where it occurred as a matter of physiological change. The former answers the purpose of the statute and the exception, the latter is simply serendipitous.

176. In these circumstances, it is possible to consider a number of alternative scenarios. It may be supposed that the statute is not retrospective, so that there appears to have been no requirement to insure employees in previous years. If, however, an employer insured on sustained wording, his insurance would protect employees who had been exposed to asbestos in previous years, at any rate on the insurers' construction (although not on the claimants' or the judge's construction). As for the future, insurance on the basis of either construction would protect employees, but, on the insurers' construction of sustained wording would only do so if continued from year to year. Moreover, if at some time after the statute took effect an employer changed from sustained wording to causation wording, he would, on the insurers' construction, appear to be in breach of ELCIA 1969 and guilty of a criminal offence unless he also maintained run-off insurance for employees whose injuries or diseases might only come to be sustained in future years, albeit they had been caused by activities in earlier years within ELCIA 1969. There was no evidence as to whether such run-off insurance was in general obtainable or in fact obtained on the hypothesis in question.

It would not be obtainable now. If there was no obligation on that hypothesis to maintain run-off insurance, then the insurance cover of previous years under the sustained wording would not have been maintained.

177. For reasons such as these, it was common ground on this appeal that the judge was right to conclude that the requirement of compulsory insurance under ELCIA 1969 was *best* achieved by causation wording (see Burton J at paras 233 and 240), but it was also all but common ground that the statute did not go so far as to *require* causation wording, ie wording which triggered the response of insurers in any year to injury or disease whose cause originated in the employer's negligent activities of that year. That was also the judge's conclusion (at para 232). The exception (see para 230 of the judgment below) was Mr Wynter QC (who in this respect was representing the lead action 2 claimants) but he was joined by the Secretary of State for Work and Pensions, who was permitted to join this appeal as an interested party, and to make written submissions. Their submissions emphasised those considerations above which point to the need for causation wording, and also those textual matters which suggested that the statute looked to the protection of *current* employees rather than employees of past years who might develop injuries or diseases or establish claims in policy years covered by the Act.

178. Mr Wynter also relied on the statute's legislative history. He pointed to the explanatory memorandum to the bill, which set out its objects as being –

> "to ensure that any person employed under a contract of employment shall not be prejudiced in the recovery of monies or damages for personal injuries to which he may be entitled on account of negligence or breach of statutory duty by his employer or other person occurring during the course of his employment because the person liable has inadequate financial resources. The Bill requires insurance against such claims…"

He relied on the fact that the original wording of the bill (which began life as a private member's bill and was only latterly adopted by government) provided by clause 1 that –

> "Every employer shall insure and maintain insurance against liability to meet any claim by any of his employees in respect of physical or mental injury wholly or partly *caused* by or due to employment conditions, or by any employee in his employment" (emphasis added).

179. On 7 May 1969, the under-secretary of state for the Department of Health and Social Security, Mr Norman Pentland MP, proposed the amendments which led to the enacted form of section 1. The proponent of a rival amendment was Mr John Ellis

MP. His amendment was to add, after the original form of section 1 quoted above, the following:

> "For the purposes of this section injury *caused* by or due to employment conditions shall be deemed to include any injury *suffered* by reason of the action or negligence of other parties not necessarily employees of the above-mentioned employer" (emphasis added).

180. That amendment had nothing to do with the issues in these appeals. However, when he abandoned his amendment, Mr Ellis commented that the government amendment "seems to achieve the same object much better and with greater economy of words". Mr Wynter relied on this (as did other claimants) as indicating, if I understand their submissions correctly, that the words "suffered" and "sustained" (which are to be found in the final form of section 1) were to be regarded as having the same meaning as "caused". The judge was himself attracted by this submission (see para 234 of his judgment), albeit not to the extent of concluding that ELCIA 1969 mandated causation wording.

181. In my judgment, however, this is an impossible and inadmissible use of legislative material. Mr Ellis and his proposed amendment were concerned with a different point entirely. His comment about the government's language seeming to achieve the same object is very obscure: it is not at all clear what precise object he had in mind when making that comment. In any event, his language is not that form of deliberate statement from a government minister proposing legislation, as to its intended effect, which is the legitimate subject matter of the admissibility of *travaux préparatoires*. I do not find this submission at all helpful.

182. In the final analysis, the dispute over the requirements of section 1 of ELCIA 1969 can probably only be resolved, if at all, by asking a question which no one posed at these appeals, and which is: to what extent, if any, the requirement of compulsory insurance was intended to (or permitted to) respond retrospectively. Thus: (i) if the requirement of compulsory insurance was above all to ensure that the employer had the means, by way of an *indemnity* from an insurer, to meet any liability for bodily injury caused to an employee, then the insurance might have to operate to provide an indemnity as of any moment (after ELCIA 1969 took effect) when an indemnity might be required. That moment however operates at a late stage (*Post Office v. Norwich Union Fire Insurance Society Ltd* [1967] 2 QB 363 (CA)). That would certainly answer one aspect of the purpose of the statute. In that case, however, there would be a large element of retrospectivity involved: for negligence and injury and even claim might all be well in the past. And it may be thought difficult to obtain insurance for a claim which had already been made. (ii) Alternatively, the statute might be concerned to ensure that any future *injury* sustained by an employee was covered by insurance: in such a case the negligence might be in the past, although in the great majority of cases injury and negligence would probably be essentially

contemporaneous. This alternative would operate retrospectively to some extent, but not as much as under alternative (i). (iii) Alternatively, the statute might only be concerned to provide insurance for future *negligence* (and breach of statutory duty): in which case the obvious way to do that would be to provide insurance to cover the future activities of the employer. Such a requirement would not involve any aspect of retrospectivity.

183. The language of the statute focuses on "bodily injury or disease sustained", which could be thought of as fitting best with alternative (ii). On the other hand, the purpose of the statute in its purest form fits best with alternative (i), although there is not much about the language of section 1 to favour this alternative. However it is alternative (iii) which involves the least retrospectivity, indeed no retrospectivity at all, and that, in a criminal statute albeit one principally driven by social welfare policy, may be of particular importance. Moreover, the statute is ultimately concerned with insuring against "*liability* for bodily injury…" and not simply with obtaining cover for an employee's "bodily injury or disease sustained".

184. For these reasons, as well as the other considerations invoked by Mr Wynter, if I had to decide the issue posed as to the form of policy required by ELCIA 1969, I would be inclined to say that it was a policy with causation wording. That is not to say that a policy on sustained wording might not in the great majority of cases suffice, as long as it was maintained. If, however, an employer *ceased* business in Great Britain and therefore stopped insuring, as it seems to me it would be permitted by the statute to do, could it defend itself against a failure to insure against its liability for mesothelioma (or other diseases with a long-tail gestation period) caused by exposure or other activities for which it was responsible in years beginning in and following 1972 during which it *was* in business within Great Britain, if it turned out that it was not insured against its liability to its former 1972 and post-1972 employees because, during the years in which it had been in business, it had chosen sustained and not causation wording? It seems to me that in theory it could not. It is not clear to me, however, how the issue would arise. Although there is in general no statute of limitation against criminal liability, there is a six months limitation "from the time the offence was committed" in the case of summary offences (*Magistrates' Courts Act 1980, section 127*). Therefore the issue is unlikely to arise as between the prosecution and employer.

185. The truth of the matter no doubt is that no one anticipated such questions. In 1969 mesothelioma, although known about, was not perceived as a particular problem or at any rate as a problem which gave rise to unusual questions. To the extent that it was in anyone's mind, it was treated, like asbestosis and other similar diseases with a latency period, as causing injury which originated with exposure. It was, as the judge found, the universal practice of insurers to treat causation and sustained wording as all one: either because they were all considered as taking effect as causation wording, or because in any event the insurers considered that injury or disease was sustained at the time of exposure. Moreover, as I have already observed, the immediate impetus of

ELCIA 1969 was a disastrous fire; and it is common ground that (as it were) 99.9% of employer liability cases have at all times involved injuries of the kind where negligence or breach of duty, accident and injury all come together at (more or less) one and the same time. The issue has never been decided, nor, it seems, needed to be decided (until this litigation).

186. In the circumstances, it seems to me that, for the purpose of construing those wordings which post-date the enactment of ELCIA 1969, it is necessary at the very least to bear in mind that the statute expresses a general policy in favour of insurance to provide security for an employee for whose injury or disease an employer is liable, and that it is common ground that such a policy is best met by causation wording. The evidence is, moreover, that at the time of the enactment of ELCIA 1969 all insurers treated causation and sustained wording as effectively the same; and that since then the respondent insurers (and Zurich) have, to the extent that they have stayed in business, gradually moved from their sustained wording to causation wording. Ultimately, therefore, I do not think I would be defeating any expectations if I were to hold, as I do, that the statute requires employers carrying on business in Great Britain to insure on a causation basis. (That is not to say that those employers who have insured and maintained insurance on a sustained basis would, even on the insurers' construction of that wording, necessarily have been in breach of their statutory obligations.) It follows that under the deeming provisions of policies in the ELCIA 1969 era, those policies should be treated as providing cover on a causation basis, although as between any employer insured and its insurer, the employer would be liable to repay to the insurer any liability of the latter which goes beyond the cover of the policy.

The judgment

187. In a rich and detailed judgment responding to the multitudinous submissions of the parties the judge addressed the matters raised before him in the order indicated by his "Contents" page. With some exceptions (such as Zurich's case as to custom and usage), his findings are not controversial. His preference for a five year rule (prior to diagnosability), as distinct from *Bolton's* ten year rule, to determine the onset of the disease of mesothelioma may not be uncontroversial, but that issue has not been actively pursued before us. Cases of estoppel by representation or convention are not pursued.

188. The essence of his judgment for present purposes is contained in the following passages.

189. In sections XII/XIII (at paras 138/166) he rejected the submission that there was either injury or disease at the time of inhalation. He did so on the basis of *Bolton*, as in his view subsequently supported by *Rothwell*. But he also stated that the medical evidence that he had personally heard supported or was consistent with that conclusion. He rejected what he described as the "attractive submissions" to the effect that at any rate those, even if only 3%, who are exposed to asbestos and go on to suffer and die from mesothelioma, were appreciably worse off from the moment of exposure. The evidence was that whereas nearly everyone has some millions of asbestos fibres in their lungs (say 40 millions mainly of the less dangerous white fibres), those who are occupationally exposed to asbestos have hundreds of times as many fibres in their lungs, as well as vastly more numbers of the much more dangerous brown and blue fibres. He referred in the context of these submissions to Professor Geddes' report (at para 16) where the following is found:

> "a mutation that is irrelevant in healthy people may be highly relevant in those who go on to develop cancer…I agree that prospectively the mutation cannot be defined as relevant or not but retrospectively it seems to me as a physician to be a relevant injury. Here I am using the word to mean a detrimental change that is part of a continuous process leading to the diagnosis of mesothelioma and eventual death."

190. The judge nevertheless rejected this argument based on retrospective consideration (I shall call it the "retrospective argument") on the ground that "it is quite plain that all of [such submissions] are simply another way of putting the (admitted) causation" (at para 160). A distinction had to be made between the exposure and inhalation which heighten the risk and the incidence of injury. "Risk is damage, but it is not *injury*; and certainly not *bodily injury*." Even if, in the light of *Fairchild* and *Barker*, risk were actionable, that would not turn risk into injury, bodily injury or personal injury. Even if a risk does eventuate in a subsequent injury, that does not somehow backdate the injury to the date of risk. As for disease, even if there was a continuum from inhalation to manifestation of tumour and death, that did not mean that there was any disease present at the time of inhalation, let alone the disease of mesothelioma.

191. At that point in his judgment, it might have been thought that he would conclude that the sustained wording would require the same answer as *Bolton* determined for injury occurring wording. As the judge said: "I am satisfied that neither the 3% nor the 97% suffer any injury at the *date of inhalation"* (at para 160)…I am satisfied that no injury is suffered at the *date of inhalation"* (at para 163). He said the same for disease. Neither injury nor disease were in fact present until 5 years before diagnosability. What is the difference between injury sustained and injury suffered? Between injury sustained, injury present, or injury occurring? At this point the judge suggests none.

192. In section XV under the heading of "Custom/usage" the judge considered evidence as to how the insurance industry in fact regarded and dealt, in the claims context, with

sustained wording. He rejected Zurich's submission (it was the only party to make this case) that there was a binding custom to the effect that sustained wording was to be given the same effect as causation wording, but he nevertheless found that –

> "The overwhelming evidence before me, by reference to witnesses called and the voluminous documentary evidence, was that disease claims, and in particular mesothelioma claims, were always paid out by reference to the *date of inhalation/exposure*. Such is indeed admitted by Excess, so far as their payment of mesothelioma claims since 1982 is concerned" (at para 183).

That finding had already been anticipated by what the judge had earlier in his judgment introduced as common ground:

> "71. It is common ground, by reference to substantial evidence and documentation from many different insurance sources, that there is no evidence of any claim ever having been made upon, or claims paid out under, any EL policy relating to asbestosis or mesothelioma or any similar claim, on any other basis than by reference to the *date of inhalation*, until *Bolton*. This practice, as disclosed by the evidence, relates to claims under any EL policy, whatever the wording."

193. When the judge there spoke of "many different insurance sources", he intended to refer to those concerned with EL insurance on both sides of the contractual divide, for he said:

> "186. I have heard or read evidence or documents emanating from many senior people involved in the insurance industry, underwriters, claims managers, brokers, reinsurers, employers, Industry groups, Government. All have accepted that EL policies were treated the same, without distinction of wording."

194. However the judge also accepted that "behind this united front of practical reality lay a variety of different positions". Some adhered to the practice because they believed that all EL policies were to be interpreted on a causation/exposure basis. Some believed that injury (but not disease) was indeed sustained at the date of inhalation. Some, at a later stage, when policies had adopted the causation wording, failed to appreciate that in the past there had been a historically different wording. Some never turned their minds at all to the question of the ultimate basis of liability, since there was always cover for what was usually a longstanding repeat client (at para 198).

195. For these reasons, the "universal practice" (prior to *Bolton)* which the judge acknowledged did not amount to a legally binding usage. This conclusion was also

supported by inter-insurer liability sharing agreements, which were the antithesis of a binding usage. The judge said (at 201):

> "It is plainly not certain, not least by virtue of the multiplicity of approaches to or bases for the practice, and, above all, it is not binding: it bound neither insurer nor insured. It was not a usage incorporated into the contracts between EL insurer and insured."

196. It was against the background of these findings that the judge approached the task of construction of the policy wordings at section XVI of his judgment (paras 202/213). As he reminded himself, the issue of construction arose "in the light of, or notwithstanding, my conclusion that, as at *date of inhalation*, there was in fact no injury and no disease" (at para 202).

197. He then identified the principal submissions of the parties:

> "209. The [insurers] submit simply that injury or personal injury or bodily injury or personal injury by disease is sustained when it is suffered: and that disease is contracted or sustained when the sufferer is inflicted with it or catches it, ie when the disease starts.
>
> 210. The Claimants effectively construe "*sustained injury*" as meaning "*be caused injury*"…

198. The judge commented in this connection that, although to an extent different wording was to be found across the policies in dispute, he was under no doubt that "one way or another the same answer will apply to all" (at para 208).

199. He then identified a "fundamental problem" which applied to all the wordings in dispute, which was the issue of whether they applied to ex-employees (the "ex-employee problem"). He considered that this problem rendered the wordings ambiguous. The policy wordings appeared to apply only to employees in the course of their employment (eg Excess's first wording: "If…any employee in the Employer's immediate service shall sustain any personal injury…while engaged in the service of the Employer"). On the insurers' construction, therefore, the sustained wording gave the employer a limited cover only: for it applied only to employees who sustained injury or disease during their employment, and did not apply to ex-employees whose injury or disease became "injury in fact" for the first time after they had left their employment. Therefore it was very unlikely indeed to cover an employer's liability for mesothelioma. On the claimants' construction, however, the injury or disease was sustained in the sense of caused to the employee at the time of inhalation or exposure

at a time when the employee was in his employer's service: and the cover therefore always sufficed to meet the employer's liability.

200. The judge then considered the alternative constructions from the point of view of the ex-employee problem. He considered the WCA background to some at least of the wording, and concluded that the "fundamental principle of dealing with diseases under the WCA was by reference to <u>exposure</u> in the relevant employment" (at para 217) and that WCA era policies answered to "injury, resulting from exposure during the policy, to an employee while he is an employee" (at para 226). However, the insurers' construction would not accord with that premise, unless "sustained" was given a causation interpretation.

201. The judge considered that ELCIA 1969, by looking to causation wording as the best, albeit not mandatory, means of promoting its policy of protecting employees by requiring compulsory EL insurance was later confirmation of the same traditional principle: that EL insurance answered to injury or disease, whenever it was suffered, provided it had been "caused" to employees during and as a result of their employment. That principle reflected the factual matrix of such insurance going back to the days of the WCA regime and also the commercial purpose of EL insurance as a means of protecting current employees from the consequences of the activities of their employers. In this way he sought to synthesise factual matrix, the history of EL insurance, its commercial purpose, the public policy expressed by ELCIA 1969, and the claims' practice of the industry with his construction of the policy wordings itself.

202. Thus in section XVIII ("Conclusion", at paras 239ff) the judge expressed his views on the construction of the policies in issue as follows:

> "239…Both words, *sustained* and *contracted*, require to be construed in their context and within the factual matrix, set out above, and I am satisfied that they are to be construed as meaning the same as a causation test, ie as *caused*, or, where the context requires, *be caused*…
>
> 240. I am satisfied that in this way the construction of the policies is consistent with the factual matrix and the *commercial purpose* of EL insurance, and the ambiguity and uncertainty…are laid to rest. The result is consistent with the public policy which plainly underlay both the WCA…and ELCIA, namely facilitating, against the background that employers might change insurers, continuity of cover for employees of a given year. I find it powerfully persuasive that to have a *caused* wording (or to have a *sustained* wording construed as meaning *be caused*) is the only way consistent with that public policy, and with the intent of the ELCIA…to ensure that the employee injured as a result of his tortious exposure is covered, <u>irrespective</u> of what may happen thereafter."

203. Finally, the judge returned to *Bolton* to explain why he was able to come to a different result from that case:

> "242. I return to *Bolton*. There is no doubt that, in ordinary language, if I were to ask someone when their injury *occurred* and when their injury was *sustained*, those questions would be treated as duplicative, and the same answer would be given to each. However, *Bolton* was a Court of Appeal decision construing a PL policy incorporating, in the context of the relevant factual matrix, the word *occur*. I am construing an EL policy, as *Bolton* was not. *Bolton* of course did not consider *Fairchild*, nor *Barker* in the Court of Appeal (the House of Lords decision came afterwards, as did *Rothwell*.) Indeed *Bolton* did not consider any of the vital aspects which it is necessary to address in relation to EL and the factual matrix of EL insurance, nor was the Court of Appeal considering any EL wordings, nor the differences between PL and EL, though Longmore LJ recognised that there were or might be such differences…Nothing in this judgment can be taken nor is intended to cast any doubt – save by reference to the updating and expansion of the medical evidence – upon, nor differ from, the decision in *Bolton*. Apart from the issue of actionability, which I have already resolved in accordance with *Bolton*, there is nothing in *Bolton* which binds my decision-making or would require me to decide other than the way I have."

204. Of course, if the sustained wording has the same meaning as causation wording, then that must follow. If, however, "sustained" means "sustained", and not "caused", then it is harder to see how *Bolton* might be distinguished.

The parties' submissions

205. For the appellant insurers, it was submitted that the judge was right to have followed *Bolton* in his understanding of the need for actionable injury and his finding that there had been no injury or disease until the onset of mesothelioma and injury in fact, whether that was ten years before diagnosability, as in *Bolton*, or five years, as the judge had found. On that basis, there was no reason to construe the sustained wording found in the policies in issue in this case differently from the occurring wording found in *Bolton*. However, the judge had erred in thinking that the ex-employee problem required the reformulation with which he had concluded. He had produced an ambiguity where there was none. The references in the wordings to employees and employment were merely there to stress that the injury had to be suffered by someone who had the status of an employee and had to have arisen in the context of his employment. It was no part of the insurers' case to suggest that a mesothelioma claimant had still to be in his employer's employment at the time he sustained his injury or contracted his disease. Thus all references to employees covered ex-employees as well. If, however, the wording could not be construed in this way, and only covered injuries and diseases sustained while employees were still in their

employment, then so be it. The ex-employee problem was no reason, however, to misconstrue injury "sustained" as meaning injury "caused", as the judge had done.

206. In any event, the judge's gloss did not work, or rather he had not even produced a gloss of the contractual wording. He had said (at para 243): "injury is *sustained* when it is *caused* and disease is *contracted* when it is *caused*, and the policies fall to be so construed". However, the judge had not explained how this construction was to be reflected in the policy wordings. Even in his orders he had merely declared the wordings' effect, rather than to restate its meaning. Thus, in his order in action 6 between MMI and Zurich and the ten local authorities, he had merely declared that MMI "is obliged to its insureds to indemnify them…in respect of any liability for injury or disease resulting from exposure to asbestos to an employee of those insureds during the period of insurance for which [MMI] was on risk". However, if, as the respondents suggested, the judge was saying that "sustained" and "caused" could simply be substituted, that would achieve nothing. Thus, for example, in the case of Excess's first wording: "If at any time during the said period, any employee…shall sustain any personal injury…" might be reproduced as "If at any time during the said period, any employee…shall be caused any personal injury…". However, that would still leave the injury having to occur, be sustained or caused during the policy period, rather than the cause of the injury having to occur in that period.

207. On behalf of Excess in particular, Mr Colin Edelman QC submitted that its wordings' language, eg "If at any time during the said period, any employee…shall sustain personal injury by accident or disease…and in case the Employer shall be liable for such injury", made the judge's gloss impermissible. For the disease would have to precede the injury and the liability would have to be for "such injury", viz mesothelioma: in circumstances where there was no mesothelioma until ten or five years' before diagnosability.

208. On behalf of the claimants, on the other hand, the essential submission was that the judge was right for the reasons which he gave. The wordings were clearly intended to operate while the victim was still in employment: while that might work for common and garden accidents, it could not work, on the appellant insurers' construction, in the case of latent disease and particularly death. If, however, the wordings were construed to operate on exposure, then, of course, the employee would be in employment. Only a construction which looked to the time of exposure, of causation, could justify the matrix and commercial purpose of such insurance, and, when it came, the ELCIA.

The jurisprudence of construction

209. The parties paraded a good array of the well known cases of recent years on the construction of contracts. There was no disagreement as to the principles to be applied. However, the claimants stressed those authorities in recent years which have been willing to underline the importance of factual matrix and commercial purpose, and to acknowledge that "something has gone wrong" with the language and to do something about it.

210. Thus at para 202 of his judgment the judge referred to *Prenn v. Simmonds* [1971] 1 WLR 1381 at 912, *Reardon Smith Line v. Hanson-Tangen* [1976] 1 WLR 989 at 996, *Mannai Investments Co Ltd v. Eagle Star Insurance Co Ltd* [1997] AC 749 at 778, and *ICSL v. West Bromwich Building Society* [1998] 1 WLR 896 at 912/3.

211. The claimants naturally referred to cases in which the courts have manipulated language in order to make sense of a contract or unilateral notice, on the basis that such manipulated language would reflect the reasonable understanding of the parties, readers or addressees. On the other hand the insurers referred to cases and dicta where the courts have stressed the primacy of the language used.

212. Thus in *Charter Reinsurance Co Ltd v. Fagan* [1995] AC 313 words in a reinsurance contract, "the sum actually paid", were construed to mean the sum payable as finally ascertained (see at 386F), and not to contain a condition precedent of payment, for only the former meaning could make sense of the complex terms and definitions provided for. Lord Mustill cited (at 388B) the famous dictum of Lord Reid from *Wickman Machine Tool Sales Ltd v. Schuler AG* [1974] AC 235 at 251, that –

> "The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear."

Lord Mustill then continued:

> "This practical rule of thumb (if I may so describe it without disrespect) must however have its limits. There comes a point at which the court should remind itself that the task is to discover what the parties meant from what they have said, and that to force upon the words a meaning which they cannot fairly bear is to substitute for the bargain actually made one which the court believes could better have been made. This is an illegitimate role for the court. Particularly in the field of commerce, where the parties need to know what they must do and what they can insist on not doing, it is essential for them to be confident that they can rely on the court to enforce their contract according to its terms" (at 388C).

213. Lord Mustill also said (at 384C):

> "Subject to this, however, the inquiry will start, and usually finish, by asking what is the ordinary meaning of the words used",

a dictum picked up and repeated in other cases.

214. Another case in which contractual words were manipulated in order to make sense of the parties' intentions, *Chartbrook Ltd v. Persimmon Homes Ltd* [2009] UKHL 38, [2009] 3 WLR 267, was decided after the judgment below. That was a property development contract, and the phrase in question related to the calculation of an additional payment due in certain conditions. The amount of the payment was defined in the contract, but, in a complex setting, the definition stated lacked rationality. It was a rare case in which the court accepted that a linguistic mistake had been made. Lord Hoffmann said (at para 22) that the principle applicable was that stated by Brightman LJ for what the latter called "correction of mistakes by construction" in *East v. Pantiles (Plant Hire) Ltd* (1981) 263 EG 61:

> "Two conditions must be satisfied: first, there must be a clear mistake on the face of the instrument; secondly, it must be clear what correction ought to be made in order to cure the mistake. If those conditions are satisfied, then the correction is made as a matter of construction."

Lord Hoffmann added:

> "24…in deciding whether there is a clear mistake, the court is not confined to reading the document without regard to its background or context. As the exercise is part of the single task of interpretation, the background and context must always be taken into consideration.
>
> 25. What is clear from these cases is that there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant."

215. On the other hand, Lord Hoffmann also spoke (at para 23) of "the common sense view that we do not readily accept that people have made mistakes in formal documents".

216. Another case decided after the judgment below, *Wasa International Insurance Co Ltd v. Lexington Insurance Co* [2009] UKHL 40, [2010] 1 AC 180 was concerned with the identification of the period of cover under a reinsurance contract. There was much to be said for the proposition that the parties intended both insurance and reinsurance contracts to cover the same risks. But the two contracts were governed by different laws in circumstances where the particular system of law under which the insurance contract fell to be construed could not be predicted. In those circumstances the House of Lords held that the reinsurance contract's period of cover should be given its ordinary meaning in the London market. Lord Collins of Mapesbury said:

> "116. I would also accept that it would almost invariably be the case that losses for which the insurer has indemnified the original insured would be within the reinsurance even if the losses are payable under a foreign law or a foreign judicial decision which takes a view different from English law of what losses are recoverable. The presumption that the liability under a proportional facultative reinsurance is co-extensive with the insurance should be a strong one because (as I have said) the essence of the bargain is that the reinsurer takes a proportion of the premium in return for a share of the risk. But this is an unusual case in which the express (and entirely usual) terms of the reinsurance are clear. This is not a case where the reinsurers are relying on a technicality to avoid payment. At the beginning and end of these appeals remains the question whether the provision for the policy period in the reinsurance is to be given the effect it has under English law, or whether the parties must be taken to have meant that the reinsurance was to respond to all claims irrespective of the period to which the losses related. There is, in my judgment, no principled basis for a conclusion in the latter sense."

That was therefore a case in which the language of the contract prevailed over the presumption, created by the commercial purpose of the transactions, that insurance and reinsurance should provide the same cover.

217. In the course of his judgment, Lord Collins had occasion to refer to *Bolton*, in the following passage:

> "74. In English law, where an insurance or reinsurance contract provides cover for loss or damage to property on an occurrence basis, the insurer (or reinsurer) is liable to indemnify the insured (or reinsured) in respect of loss and damage which occurs within the period of cover but will not be liable to indemnify the insured (or reinsured) in respect of loss and damage which occurs either before inception or after expiry of the risk…I accept that there may be scope for considerable argument as to what would constitute loss or damage within the policy period: cf *Bolton*…(mesothelioma in the context of "loss or damage [which] occurs during the currency of the policy").

218. In the present case, I bear in mind these authorities and observations. However, where we are concerned with insurance policies in standard form, entered into year after year, and in particular with the most basic question of the period for which cover is granted and the loss which must occur during that period for the cover to be effective, and where different triggers or temporal hooks are well recognised, that is to say, causation wording, sustained wording, and occurring wording, it would seem to me to be particularly difficult to conclude either that something has gone wrong with the wording, ie that there is here a clear mistake, or that it is clear what ought to be substituted for what is found.

Factual matrix and commercial purpose

219. I have little doubt that the commercial purpose of EL insurance has been to provide employers with insurance to meet the liability which their activities as employers in each period of insurance engendered.

220. I consider that such a commercial purpose can be derived from the very nature of employers' liability. It follows, in general, from the considerations which I have discussed above in the context of ELCIA 1969. It follows from the origin of EL insurance in language which talks of injury by accident or disease, or of contracting disease. In practice, some 99% of incidents of such liability have historically arisen from accidents which immediately there and then create the injury and liability for which the insurer wishes to be insured. As industrial disease became a more important element in such liability, the general understanding of such diseases was that, even where there was a latency period to be experienced or the disease was not diagnosed until much later, the disease was contracted and the relevant injury was, at any rate in its origins, suffered in the period of the activity from which the disease arose. As the terms of insurance which I have set out above reveal, the premium was calculated by reference to the numbers of employees working in relevant areas of employment. There is no evidence that premium was calculated by reference to the past history of employment, a basis on which an employer who had ceased to work in malign industrial processes would have been charged heavily even though his current employment was, in terms of employer liability, relatively benign. On the contrary, the logic of the uniform evidence that sustained wording was regarded for all settlement purposes pre *Bolton* as providing the same cover as causation wording must have produced premium ratings which depended upon the activities of each policy year. There could hardly have been a gross disjunction between premium rating and claims settlement.

221. Moreover, there was at any rate one striking piece of evidence as to the way in which the sustained wording was broked between parties to the insurance. MMI's 1974 Guide to Insurance Officers in Local Government was a document produced by MMI for its insureds. Its preface said "we would like to see it on the desk of every

insurance officer for ready reference at any time”. Under the EL insurance section of the Guide the following is found:

> “7. Premiums are usually based on wages and salaries – this is not only a convenient yardstick but is logical since loss of earnings represents a substantial part of claims. Rates of premiums vary according to the nature of the work of the labour force, and the claims experience…
>
> 8. A feature of employers’ liability claims is the length of time which often elapses between the date of the accident and the final settlement, and the cost of servicing claims tends to be high. Injury caused at work during the period of insurance even though it may not be diagnosed till years afterwards can be a liability under the policy.”

222. The prevalence of the causation wording is, in my judgment, symptomatic of the commercial purpose of EL insurance.

223. The evidence heard by the judge at the trial below was strongly in favour of this general purpose extending to sustained wording as well as causation wording. Thus Dr Frank Eaglestone, the deputy general manager of Federated (which became Independent), who retired in 1976 and gave evidence with remarkable esprit in his 90s, the doyen of the respondent insurers’ witnesses, who impressed the judge with his evidence, said that there was never any doubt that the purpose of EL insurance, whether on the sustained or the causation wording, was to provide the insured with cover for liability as a result of activities of the insured during the period the policy. He had not dealt with mesothelioma claims, but he had dealt with asbestosis. His view was that “the seed was sown…when the noxious [dust] was inhaled…therefore we should pay”. He said it would be “wrong, would it not?” for the insured not to get cover for the mistakes he made during the policy year. Mr Jason Summers (a witness on behalf of Independent) said that he agreed with Dr Eaglestone’s evidence. Mr Peter Moore (formerly of BAI) agreed that the policy responded to the insured’s activities in a particular policy year. Mr David Herriott (also formerly of BAI) said the same, agreeing that that was what BAI understood it was offering and what the employers understood they were getting. He agreed with Dr Eaglestone’s metaphor about the sowing of the seed. Mr John Goodwin (also of BAI) gave evidence to similar effect: what mattered was the negligence in the policy year; that was the cover that BAI was selling and employers were buying. Witnesses for Excess (Mr Stewart Gunn, Mr Neville Dare and Mr Alan Chipperfield) said much the same. Mr Chipperfield said that it was common knowledge that there could be a long gap between exposure and the onset of the disease which caused the disability, but maintained that it was the object of EL insurance to cover the liability arising out of the employer insured’s activities in any policy year. MMI was represented as witnesses by Mr John Payne, and Zurich by Mr Alan Woof and Mr John Murray, who also agreed. Mr Woof said: “I think it is not so much about the belief of a particular disease…but you are trying to cover all eventualities arising out of that particular period’s activities. That is the principle…” Evidence was also given on behalf of Zurich by Ms Isobel Woods, and

on behalf of the local authorities by Mr Robert Chamberlin and Mr Nigel Mills, to similar effect. Mr Chamberlin said: "The primary concern was to cover the liabilities of the employer. Asbestos was one of the risks which could give rise to liabilities."

224. This evidence went beyond, ie was more fundamental than, evidence as to what was thought to be the meaning of particular wordings, or evidence as to how and why settlements of asbestosis or mesothelioma or other long-tail disease claims were in fact effected. The judge accepted this evidence. I repeat the finding to which I have referred (at para 193) above:

> "186. I have heard or read evidence or documents from many senior people involved in the insurance industry, underwriters, claims managers, brokers, reinsurers, employers, Industry groups, Government. All have accepted that EL policies were treated the same, without distinction of wording."

225. I have no wish here to construe contractual language by reference to post-contractual conduct, even when that is mutual and consensual. English law has set itself against such considerations, just as it has set its face against admitting evidence of pre-contractual negotiations. However, the existence in this litigation of issues of estoppel by convention and of binding usage or custom has led to an almost limitless array of evidence. Much of such evidence has also been relied on for the purposes of factual matrix and commercial purpose. I have a sceptical view of the usefulness, whatever the admissibility, of much of such evidence. It might be questioned, however, whether, in the case of a contract such as the annual policy of EL insurance, the constant round of negotiation of premium and settlement of claims could have an influence upon the mutual understanding of the function of such policies. I do not know whether this aspect of the matter has ever been considered. There is therefore room of course for estoppels of various kinds to arise, but all such claims have here failed and are not appealed. In general I am disposed to believe that the same language repeated from year to year will not change its meaning, even though the parties may have dealt with one another on a certain basis which, as in this case, has ceased following the decision in *Bolton*, and even though there is room for the creation of an estoppel. However, as found by the judge and referred to above, the pre *Bolton* view of the purpose of EL insurance, of whatever particular wording, was uniform.

226. It is true that PL insurance is insured on the basis of injuries occurring. The historical reasons for this are explored by the judge at paras 87 ff of his judgment. On one view, sustained wording is identical to occurring wording. On the other view, there is a fundamental distinction. In *Bolton* Longmore LJ was cautious about the possibility that EL and PL insurance were to be regarded as close analogies. At para 3 of his judgment, he referred to the information that he had been given to the effect that EL insurance was usually offered on a causation basis. Counsel for the Commercial Union in that case therefore submitted that the position may be different in EL

insurance, but the point was put as a matter solely of wording, not of any fundamental considerations about the commercial purpose of the insurance in question. The evidence in this case confirms that information: EL insurance usually is conducted on causation wording, which was always the tariff wording, and the trend has accelerated, but the evidence in this case goes well beyond that to which this court was treated in *Bolton*. At para 24, moreover, Longmore LJ appears to have accepted the possibility that a different approach may be "appropriate for employers' liability policies in general, depending on the precise words used".

227. Is there a principled distinction between EL and PL insurance, apart from stating the obvious? I would have wished to understand more about the basis of PL insurance. Injury occurring wording is closer to, but not of course identical to a manifestation basis. I see that the connection between an employer and his work force is closer than between an undertaking and the public at large. Statutory duties are also likely to operate on a greater scale as between employer and employee than with respect to the public: however, that might depend on the undertaking involved, for instance a local authority in particular may have all kinds of public responsibilities. However, I have little if any insight as to how PL insurance is rated.

Binding custom

228. As stated above, Zurich was the only party to rely on binding custom. It addressed detailed submissions on this issue in its skeleton, which I have considered, but Mr Jeremy Stuart-Smith QC chose to devote his time for making oral submissions elsewhere. I would be content to dismiss Zurich's cross-appeal on this issue for the reasons given by the judge (see at paras 180/201).

"Sustain injury"

229. Against the background of these many considerations, it is necessary finally to turn to a construction of the wordings in issue. I begin with the concept of *sustaining injury* which is at the heart of all the wordings (viz BAI's "injury sustained", Excess's "sustain [any] personal injury by accident or disease", MMI's "injury sustained" and "sustain any injury or disease" and "bodily injury…sustained", and Independent's "sustain bodily injury or disease").

230. In my judgment, the concept of sustaining injury in its normal sense refers to the suffering of injury. Injury is sustained when it is suffered, or is incurred, or when it occurs, or is inflicted upon one. The relevant Oxford English Dictionary entry is: "To

undergo, experience, have to submit to (evil, hardship, or damage; now chiefly with *injury*, *loss* as obj, formerly also *sorrow*, *death*); to have inflicted upon one, suffer the infliction of". The concept also carries with it an element of suffering the consequences of injury over time. It may be that with a chronic, as distinct from an acute injury, or with a disease, it could be said that the person who suffers it, sustains it over a period. In general, however, if the question is asked, "*When* was an injury sustained?", I think the answer that would be expected would be: at that time when it was first suffered or inflicted. In that context it is sustained when it occurs. This was the view of the judge when he was considering mesothelioma as an injury or disease in the light of the teaching of *Bolton* and in the light of the evidence that he himself heard at trial.

231. On that basis, sustained wording would render the same result as this court arrived at in the case of occurring wording in *Bolton*.

232. The judge felt driven to his ultimate conclusion that "sustained" meant "caused" only because of what he described as the ex-employee problem. He appears to have considered that this created an ambiguity which allowed him to reach the result that the parties had made a mistake about language. He was comforted that such a result accorded with factual matrix and commercial purpose. There is, however, an ambiguity about his substitution of the word "caused" for "sustained". Is one looking at what the actor (the employer) is doing or causing to be done, or is one looking at what the passive party, the sufferer (the employee), is experiencing? The former may cause injury to the latter, but when the latter suffers or sustains injury, he may also be said to be caused injury. If the focus is on the cause and causation of the injury, that is one thing; but if the focus is on the experience of the injury, that is another. Thus, take BAI's first wording which speaks of "any claim for injury sustained or disease contracted by such Employee" within the policy period. If, in accordance with the judge's teaching, one reads that language as the equivalent of "any claim for injury caused to…such Employee" during the policy period, one would still have to ask whether the trigger or time hook for the application of the policy cover depended on the occurrence of what caused the injury (exposure, inhalation) or on the occurrence of the injury that had been caused to the employee. I will consider below what impact on that question might be afforded by the concept of "disease contracted".

233. In other words, the question remains: is one looking to the injury or to the cause of the injury? In my judgment, the concept of sustaining injury prima facie looks to the injury rather than its cause. Of course, as in all questions of interpretation, no word or phrase is an island, entire of itself, it has to be seen as part of the whole.

234. The judge considered that the wordings could be manipulated, because something had gone wrong with the language. In my judgment, however, it is extremely difficult to think that a reasonable reader would conclude that something has gone wrong with

language when what is being considered is standard wording in a contract which is renewed year after year, and when there are other standard wordings, such as the extremely well known tariff wording, which plainly adopt a causation wording. It is to be noted again that such causation wording is achieved in the tariff wording by starting with the concept of sustaining injury and then continuing by making it clear that what has to occur in the policy year is not so much the injury itself, but the cause of that injury: “if any person under a contract of service…shall sustain bodily injury or disease caused during the period of insurance” (see paras 11/12 above).

235. It is true that such a prima facie meaning of “sustain injury” would be in conflict with the commercial purpose of EL insurance. That is undoubtedly a powerful consideration. Nevertheless, it is not an absurd or meaningless or irrational interpretation. It can operate entirely successfully in some 99% of cases. It accords with this court’s construction of similar “injury occurring” wording in PL insurance. Historically, it is only mesothelioma, with its extraordinary circumstances, a disease which was unknown when these wordings were first brought into being, which has tested the rule (albeit I bear fully in mind that it is possible that other cancers, and asbestosis, may hereafter equally test the rule).

“Disease contracted”

236. “Disease contracted” is another important phrase in the policy wordings, although not as constant as the “sustain injury” phrase. Thus it is found in BAI’s two wordings as “any claim for injury sustained or disease contracted”, and in MMI’s third wording as “injury or disease…sustained or contracted”. It is more of a chameleon-like phrase. The relevant entry in the Oxford English Dictionary is “To enter into, bring upon oneself (involuntarily), incur, catch, acquire, become infected with (something noxious, as disease, mischief; bad habits or condition; danger, risk, blame, guilt)”.

237. It is common ground that it is capable of referring to disease either in its origin or in its onset, and even in its progress.

238. Instances may be given. Thus in *Blatchford* Viscount Sumner seems to have spoken, in the context of the WCA, of contracting a disease in the sense of its causative origin, in this passage at 467/8:

> “In the case of such diseases an applicant, who had not been long in the employment of the respondent, would naturally be met by the suggestion that his disease had been previously contracted and therefore did not arise out of it…If there was to be an effective remedy, much more had to be done than simply to

declare the disease to be an accident. Means had to be found for enabling the workman to recover compensation from an employer even though he could not prove the precise time the disease was contracted."

239. In the same case Lord Blanesburgh said this (at 483):

> "There are, first of all, diseases which are definite in origin. There are, secondly, diseases which are described as being "contracted by a gradual process". Lead poisoning is in the second class…There is no limitation of time in respect of the date at which a disease of the first class originated or at which the gradual process in a disease of the second class commenced. That date may in each case have been years before the consequential disablement or suspension or death."

And see also Lord Blanesburgh at 480 and 485, as well as Scrutton LJ's discussion in *Smith & Son v. Eagle Star* at 70 (cited above at para 153).

240. Thus *MacGillivray on Insurance Law* (5th ed, 1961) said (at para 734):

> "In an employers' liability policy the insurance is normally against "bodily injury or disease caused during the period of insurance"; thus, in the event of death or disability arising from scheduled industrial disease, the insured is covered if the disease was contracted within the period covered by the policy, although the disablement or death on which the workman's claim was founded occurred after its expiration" –

a clear use of the expression "disease contracted" to refer to its causative origin.

241. A vernacular example was also presented: a newspaper cutting about a footballer who was afflicted with a bout of malaria when playing in England, but who was said to have "contracted" it in Nigeria, where he had no doubt been bitten by the offending mosquito (*The Daily Telegraph*, 17 July 2008).

242. On the other hand, there are also examples where the expression has been used to refer to the onset of disease, and not to its causative origins. Thus in *Fairchild* Lord Hoffmann, when discussing *McGhee*, distinguished between the exposure to the dust particles which caused the disease of dermatitis, in the sense of adding materially to the risk that the plaintiff would contract the disease, and the contracting of the disease (at para 64). To perhaps similar effect is Lord Hoffmann's analysis in *Barker v. Corus*:

> “48. Although the *Fairchild* exception treats the risk of contracting mesothelioma as the damage, it applies only when the disease has actually been contracted.”

So also, Lord Scott in *Rothwell*, in relating the employer’s submission, at para 64:

> “It is accepted that if and when an appellant contracts an asbestos-related disease, when, that is to say, the risk under which he is living actually materialises, his employers will be liable to him in damages. But that point has not yet been reached.”

243. These examples show that “contract disease” is equally useful to point up the distinction between cause and effect (and the time of each), whether one uses the phrase to refer to cause, or to effect.

244. What does the phrase mean in the present context? There is a pull in two directions. The combination of the phrase with “injury sustained” would suggest that it is concerned with the onset of disease, not with its origins. That of course assumes a certain meaning for “injury”, namely injury in the *Bolton* sense, but that is my present assumption. On the other hand, the commercial purpose of the EL insurance contract pulls in another direction, towards the causal origins of disease in the employee’s exposure to the noxious activities of his employment. This is a difficult choice, but in the end, after something of a struggle, I have concluded that the commercial purpose should prevail. Authority strongly suggests that where language permits the vindication of the contract’s commercial purpose, that is the better choice. We are at this point primarily concerned with disease, in a contract wording which distinguishes between disease and injury (of course other wordings make “injury” do service for disease as well, or else, while distinguishing between injury and disease, speak of both in terms of the verb “sustain”). In such a contract, the injury which is sustained, since it is not concerned with disease, will almost invariably be of the kind where cause and effect is practically instantaneous. In such circumstances, the pull of the phrase “injury sustained” is much weakened. If an insurer provides cover in potentially ambiguous terms, then he cannot complain that his cover is construed more widely against him, rather than more narrowly in his favour, particularly where such wider construction better achieves the commercial purpose of the contract.

245. I would therefore conclude that prima facie the phrase “disease contracted” as a time hook for the application of the policy’s cover refers to the time of the disease’s causal origins.

The “employee” or “ex-employee” point

246. To recapitulate, the argument on the claimants' side is that the insurance wordings only operate where the employee is an employee in service at the relevant time of the policy's application. Therefore, that points towards a construction of the wordings which gives effect to them as covering the time of the current exposure of the employee to the employer's activities, rather than some later time of "injury in fact" (if the two times diverge) when the employee of yesteryear may no longer be an employee, whether he has moved to some fresh employment, or has retired, or is disabled, or is dying. The argument on the insurers' side is that the wordings do not confine cover to the time of employment and exposure, but refer to the employee and to his employment as a matter of status and circumstance, even if that conclusion requires a certain amount of linguistic manipulation. The claimants' response is to refer mordantly to the biter bit. The insurers' response is to shrug and say that if linguistic manipulation does not appeal, so be it: the cover is then even narrower than they contend for. The claimants' riposte is that in that case the insurance is so narrow as to require the judge's solution in order to prevent an unreasonable and absurd result.

247. The arguments have to be tested on the wordings.

248. BAI's first wording reads:

> "…the Company will…indemnify the Insured against all sums of money which the Insured may become liable to pay to any Employee engaged in the direct service of the Insured or any dependant of such Employee in respect of any claim for injury sustained or disease contracted by such Employee between [the policy dates]".

249. On behalf of BAI, Mr Roger Stewart QC submits that this wording means and should be construed as though it read, in relevant part:

> "…to pay to any *person who is or was an* Employee engaged in the direct service of the Insured *at the time of the breach of duty*" etc.

250. There is no definition of the term "Employee" in the policy. Condition 1 (see para 59 above) speaks of the premium being fixed with reference to the salaries, wages or earnings paid by the insured "to his Employees during the period covered by this Policy". Those are plainly current employees. There is a symmetry between the "injury sustained or disease contracted by such Employee" during the policy period

and the wages paid to employees during the same period. It is possible, nevertheless, to see that there is a certain force in the submission that in this wording the term "Employee" includes an ex-employee, if only because the liability to pay may well be confirmed by agreement or adjudication at a time when the employee has ceased to be in the employer's employment. However, it is not submitted that the phrase "any dependant of such Employee" should be construed to mean "any dependant of such *person*", nor that the phrase "injury sustained or disease contracted by such Employee" should be construed to mean "injury sustained or disease contracted by such *person*". Whether or not that is merely an oversight, nevertheless, given the construction which I would prima facie give to the expressions "injury sustained" and "disease contracted", it is very hard to escape the conclusion, not only of course that the injury must be sustained and the disease contracted during the period of the policy (which is common ground), but that the injury or disease in question must be sustained or contracted at that time by an employee. That is what the contract says. Nor do I see why the interpolation should be "at the time of the breach of duty", as distinct from "at the time of the injury or disease", since it is the timing of the injury or disease which is the focus of the wording. I would therefore conclude that on this wording the injury or disease must be sustained or contracted by an employee and any gloss is unnecessary. Liability to the employee, injury or the contraction (but not necessarily the onset) of disease will all occur at the same time, when the employee is an employee. Liability for injury sustained by an ex-employee is not within the cover just because the ex-employee had been an employee at the time of breach of duty.

251. That would exclude a case where the onset of the disease occurred during a policy year forty years after exposure, when the employee was no longer an employee. It is not entirely clear why an insurer should be reasonably thought of as intending to insure liability to an ex-employee of decades before. It supports the prima facie view I have taken of the meaning of "disease contracted".

252. BAI's second wording provides:

> "…money which the Insured may become legally liable to pay in respect of any claim for injury sustained or disease contracted by any person engaged in and upon the service of the Insured and being in the Insured's direct employment under a Contract of Service or Apprenticeship between [the policy dates]".

It is to be recalled that this second wording fell into the era of ELCIA 1969. The word "employee" is now eschewed.

253. Mr Stewart submits that this wording should be glossed as follows:

> "… for injury sustained or disease contracted*,* *by* any person *who is or was* engaged in and upon the service of the Insured and ~~being~~ in the Insured's direct service…*at the time of the breach of duty,* between [the policy dates]".

254. It seems to me that this gloss is very difficult. The word "being" is a strong pointer to current employees as the subject-matter of the insurance. That would fit with my preferred analysis of the requirements of ELCIA 1969. It is hard to see how it is permissible simply to delete the word "being". The effect of the wording is to require the employee to be a current employee during the policy period and to sustain his injury or contract his disease during that period. Again, the interpolation of "at the time of the breach of duty" seems an intrusion, especially coming at the crucial place immediately before the word "between", albeit the whole phrase "by a person…at the time of breach of duty" is now to be closed off by a pair of commas.

255. I conclude that BAI's second wording does not apply to ex-employees who sustain an injury or contract a disease.

256. Excess's first wording reads:

> "…if at any time during the said period, any employee in the Employer's immediate service shall sustain any personal injury by accident or disease…while engaged in the service of the Employer in Great Britain…in work forming part of or process in the business above mentioned…"

Its second wording reads:

> "…if at any time during the period of indemnity…any person of a description mentioned in the Schedule who is under a contract of service or apprenticeship with the Employer shall sustain personal injury by accident or disease arising out of and in the course of employment by the Employer in work forming part of or process in the business mentioned in the Schedule…"

Its third wording (in the ELCIA 1969 period) reads essentially in the same terms as the second wording, save that "in work forming part of" etc has become "in the business mentioned in the Schedule".

257. Excess also had a condition providing for premium to be regulated by the amount of wages paid during the policy period.

258. On behalf of Excess, Mr Colin Edelman QC did not submit an alternative form of wording. In truth, it is not possible. The wording is from beginning to end redolent of the current employee who sustains injury during the policy period. Even if it is assumed that, in the first wording, "any employee" should be read as "any person who is or was an employee", nevertheless the sustaining of the injury has to be not only during the period of the policy but also "while engaged in the service of the Employer…" etc. On Excess's primary submission, however, the sustaining of injury by the disease of mesothelioma during a policy period some forty years after exposure is covered, even though that injury is not sustained "while engaged in the service of the Employer". In the second and third wordings, a similar difficulty is caused by the word "is" in the phrase "who is under a contract of service…".

259. I therefore conclude that Excess's three wordings do not apply to ex-employees. The personal injury by accident or disease must have been sustained by a current employee.

260. MMI's first wording reads:

> "…if at any time during the period of insurance…any person under a contract of service with the Insured shall sustain any personal injury by accident or disease arising out of and in the course of his employment by the Insured in their activities described in the schedule"

MMI's second wording was in almost identical form.

261. On behalf of MMI, Mr Howard Palmer QC submitted that these wordings should be understood as follows:

> "…any person ~~under a contract of service with the Insured~~ shall sustain any personal injury…arising out of and in the course of his employment by the Insured *under a contract of service with the Insured*…" etc.

262. There were again conditions as to premium being regulated by the amount of wages or salaries paid to staff and employees during the policy period.

263. Again, it seems to me impossible to escape the conclusion that the time hook applies to all the matters which follow within the hypothesis "if at any time during the period of insurance". That is to say that the personal injury by accident or disease must be sustained within that period, by a person then "under a contract of service with the

Insured", and that injury must not only arise out of the employee's employment in the insured's activities described in the schedule but be sustained in the course of that employment. That course of employment must be contemporaneous with the sustaining of injury. The activities concerned are scheduled, together with the applicable remuneration. It cannot make sense that those activities and remuneration could apply to a previous period of employment rather than to the period of the policy year in question. Mr Palmer's solution, by a transposition of the words "under a contract of service with the Insured", is merely an attempt to lose the temporal emphasis of that phrase in among the later wording which it is submitted relates only to the status of the injured person's employment. However, in my judgment, neither part of that attempt works. "Any person under a contract of service with the Insured" cannot become simply "any person" whether under a contract with the insured or not; and the following language, with its reference to the course of employment in the insured's scheduled activities, cannot be divorced from the policy year in question.

264. MMI's third wording (within the ELCIA 1969 era) has been recast and provides:

> "…to indemnify…compensation for bodily injury or disease (including death resulting from such bodily injury or disease) suffered by any person under a contract of service or apprenticeship with the Insured when such injury or disease arises out of and in the course of employment by the Insured and is sustained or contracted during the currency of this Policy."

265. Mr Palmer's version of this wording is as follows:

> "…suffered by any person ~~under a contract or service of apprenticeship with the Insured~~, when such injury or disease arises out of and in the course of employment by the Insured *of that person under a contract of service or apprenticeship* and is sustained or contracted during the currency of this Policy."

266. In my judgment, this reformulation does not fare any better.

267. Independent's only (post ELCIA 1969) wording is as follows:

> "…during the Period of Insurance…the Company will indemnify the Insured as hereinafter specified:
>
> …If any person who is under a contract of service or apprenticeship with the Insured shall sustain bodily injury or disease arising out and in the course of his

employment by the Insured in connection with the Contract specified or type of work described in the Schedule the Company will indemnify…"

268. On behalf of Independent, Mr Stewart's wording adds the words "or was" immediately before the phrase "under a contract of service or apprenticeship".

269. The oddity of the Independent wording is that the only express temporal limitation to the period of the policy is contained in the introductory paragraph, and there the limitation is to indemnification, which it is common ground does not have to occur within the policy period. The question arises as to whether the EL insurance section of this "Contractors' Combined Policy" (see para 82 above) is limited, and if so, how, to the policy year in question. The PL insurance section contains an express limitation to injury which "happens or is caused in connection with the Contract specified or type of work described in the Schedule".

270. I shall leave that question over until later. I will assume for present purposes that cover only exists for injury sustained within the policy year. I am concerned at the moment with the "ex-employee" issue. In my judgment, the answer I give to that is the same as before with respect to the other wordings. The language "who is under a contract of employment" is a strong pointer to cover existing only for current employees. So is the reference to the "course of his employment" and to contracts specified or work described in the policy schedule. The policy has effect in relation to work currently being performed, not to the insured's historic activities.

271. In sum, therefore, I accept the claimants' submission that the policy wordings relate to the misfortunes of current employees and not to ex-employees. Death is another question. If the death is due to a relevant injury or disease, then it will be covered, just as any deterioration of a condition short of death will be covered.

272. What follows from that? Certainly, that the policy wordings, if they are to be construed as the insurers would wish them to be construed, will provide inadequate cover to the insureds, and inadequate security for their employees. However, this must not be exaggerated. For the most part, cover for injury as distinct from disease would not be affected: and that covers some 99% of cases. However, cover for mesothelioma would be non-existent. The insurers, nevertheless, concede, I think, cover for mesothelioma as it occurs, if an insured is insured by a policy with sustained wording in a year in which an employee or ex-employee – it would nearly always be an ex-employee – suffers the onset of that disease in terms of "injury in fact". But they would do so on what, as it seems to me, would be an unprincipled, basis: on a basis which nevertheless continues, even into this era of post *Bolton* litigation, the insurers'

instinctive feeling, which perhaps should even so be called principled, that their wording was not intended to render them immune from liability for this disease.

273. What it would mean for other diseases, such as other cancers or asbestosis, might remain to be seen. But I would have forebodings about that.

274. Does this mean that the judge was right, having refused to manipulate the wording to take account of the insurers' concession, to manipulate it in a different way in favour of the claimants?

275. I am most doubtful about that. Although the wordings under consideration would in practice exclude liability for mesothelioma, and perhaps other diseases too, they would respond as they were intended to respond, on the basis of a sustained wording according to the insurers' current submissions, to injuries suffered in the policy year in question arising out of work performed by the employees in that year. In many cases of disease, where it could be said that the disease's onset took place in that same year, there would be cover for disease too. Where the policy wording referred to "disease contracted", cover would, for the reasons I have sought to explain above, extend to disease which could trace its origins to the year in question, even if not its onset.

276. Nevertheless, there would remain a gap which the passing of time has shown to be significant, and therefore potentially a black hole, for diseases such as mesothelioma where it might be said that the onset of injury or disease did not occur until later. Indeed, on my understanding of these policies, the gap would be larger than the insurers themselves would really seek to allow, given the need for the injury to be sustained by an employee. Given the importance of industrial diseases for what is now the best part of a century, this would indeed, as it seems to me, be an unfortunate conclusion at which to arrive.

"Injury"

277. I turn to another aspect of the argument. I consider that this court is bound by *Bolton's* conclusion (see at para 21 and paras 42ff) that mesothelioma is not "injury" until its onset (whether that is approximately ten or five years before diagnosability), but I confess to serious doubts about its correctness.

278. In legal discourse, the word or concept "injury" is not an everyday matter like a garden or a house. Of course, there may be legal disputes of line-drawing as to whether even such things as houses and gardens are houses rather than mansions, or

gardens rather than patios. In the law, however, it seems that "injury" is very much a term of art. A trivial injury is not an injury for the purpose of the law of tort. *De minimis non curat lex*. The law does not care about trivial things. However, if a trivial injury, such as a scratch or an insect bite leads on to more serious consequences, then the law does care about it. What is trivial? Not something which has material consequences.

279. The cases are sufficiently full of examples of such matters. Each amount of noxious dust inhaled in *Bonningtons* was regarded as material. It was not possible to regard any particles as less material than any other (see paras 93/95 above). Even the unknowable may be regarded as material (as in *Cartledge,* see para 97 above). In *McGhee* the pursuer's dermatitis could have begun with a single abrasion (see para 102 above). As Lord Halsbury said in *Brintons v. Turvey*, a trifling injury by a needle sets up tetanus (see paras 147/8 above). In *Fife Coal* Lord Atkin considered that a trifling injury may lead to death, as where a scratch is infected (see para 161 above). In *Smith v. Leech Brain & Co Ltd* [1961] 2 QB 405 a small burn to the lip, of which the sufferer "thought nothing" (*per* Lord Parker CJ at 411), was an injury which led to cancer and death. Was that an injury sustained at the time of the accident? I do not see why not, and the liability follows from that injury, even if it had unexpected consequences.

280. We now know that the greater the exposure to asbestos fibres, the greater the risk of mesothelioma. The aetiology of the disease, however, may proceed by way of a mutation which is triggered by the fibres. Or mesothelioma may never develop, for the body's defences may prevail. Where, however, it does develop, it proceeds from the noxious fibres which have been inhaled, and no one can say from which fibre or fibres, or from which day of inhalation, it proceeds. It may be true that until mesothelioma develops, the patient does not suffer from it. But has he not sustained an injury in the form of the assault of the fibres which he has inhaled, when mesothelioma has developed from that assault? He is worse off because of his exposure to the most noxious forms of asbestos, and his lungs contain hugely more numerous fibres, and of the more dangerous kinds, than the lungs of ordinary people. Being worse off, he has suffered damage.

281. I do not see why, in the light of *Fairchild*, *Barker*, and *Rothwell*, it is not possible to conclude that that is so, where mesothelioma develops. That, it seems to me, is the overall learning of those cases. Where there is exposure, but as yet no onset of disease, there is at most trivial injury or damage but nothing that could at that stage create actionable liability. Where, however, mesothelioma develops, as in all our cases, it is the risk of mesothelioma created by the exposure which is the damage (see the citations of *Barker* at para 109 above). Lord Hope considered (in *Rothwell*, see para 113 above) that even in the absence of mesothelioma or some other disease, there was damage or injury at the time of exposure, but merely minimal damage or injury, such as did not create actionable liability. Where, however, mesothelioma does develop, it is the exposure, and the risk of mesothelioma, that is the damage. It is that

for which the employer is liable. In other words, as it seems to me, the trivial injury or damage which is caused by each exposure in breach of duty, is likened to the scratch or bite or other trivial injury which, however, as time goes by, leads on to serious, or at any rate more than trivial, consequences. That is why in *Barker* Lord Hoffmann said that the underlying purpose of the *Fairchild* exception "is to provide a cause of action against a defendant who has materially increased the risk that the claimant will suffer damage". Of course, it only applies where the risk has materialised.

282. I think that such a conclusion would also fairly represent the medical opinions heard by the judge and the common sense of the matter. It may be true that someone does not have the disease called mesothelioma until its cancerous onset. However, when it comes, it has been coming for a long time, even if not in a straight line, and even if not inevitably. As Dr Rudd said in his report (at para 28):

> "It would seem more useful and intuitively appropriate to define the contraction of the disease as the whole process up to the point at which the emergence of the disease actually occurred or became inevitable".

283. I acknowledge that *Fairchild* was concerned with causation and *Barker* with the apportionment of the resulting liability between more than one tortfeasor. Nevertheless, the result of the analysis, as it seems to me, is in favour of an understanding whereby the law takes back to the time of the creation of the risk the creation also of the cause of action, including material damage, where that risk and the injury or damage inherent in it lead on to mesothelioma. Or, which is perhaps putting it another way, as this court held in *Sienkiewicz*, the *Fairchild* and *Barker* cases had, in such circumstances, recognised a new tort of negligently increasing the risk of injury (see at para 122 above).

284. Nevertheless, in *Bolton* this court held that there was no actionable injury at the time of exposure, and did so in a case where mesothelioma had developed. It did so after *Fairchild*, and, it is said, with *Fairchild* cited to it. It is not suggested that *Bolton* was decided *per incuriam*. It is not submitted that *Fairchild* and *Barker* necessitate the solution that I would personally be inclined to favour, only that a development of the analysis would permit such a solution. In the circumstances, where there is a clash of powerful arguments dealing with fundamental issues, I do not think that it would be right, in accordance with my duty to follow precedent, to depart from the solution in *Bolton*. But I should express my preference to do so.

285. Such a conclusion would also, in my judgment, do proper justice to the idea inherent in the sustained wording, which is that employers should be covered for liability arising out of injuries sustained by their employees in employment in any given policy year where such injuries arise out of the employee's exposure to the insured

employers' activities in that year. It would also escape the essentially unknowable and serendipitous mystery of when mesothelioma actually onsets, which in certain circumstances would make it impossible to say whether the EL liability fell on one insurer rather than another, or fell within one wording or another, or was not covered at all. A legal understanding of the concept of "injury" which would compel such a profitless and ultimately unfathomable investigation is essentially anomalous. The anomaly increases when one considers that for all one knows (or could ever know) the inhalation of particular fibres in year x is the very thing which sets the disease in train. Dr Eaglestone spoke of the "seed" and that it seems to me is a useful metaphor.

286. Such a conclusion would also avoid extending the precedent of *Bolton* to other diseases as well. In this connection, I note that at para 18 of his judgment Longmore LJ approved first instance decisions concerned not only with mesothelioma but also with fibrosis (*Keenen*) and asbestosis (*Guidera*), even though such diseases differ from mesothelioma in being dose-related.

287. Such a conclusion would also enable this jurisdiction to arrive at a result which has been reached by other jurisdictions, even if at times by way of a different or pragmatic process of reasoning. In the United States, the "triple trigger" theory allows exposure as one of the matters which puts all EL insurers at risk even where the policy wording requires "injury" to fall within the policy period: see *Bolton* at para 24, citing *Keene Corpn v. Insurance Co of North America* (1981) 667 F 2d 1034 (see in particular at paras 14ff). Bazelon SCJ, in giving the majority judgment of the Circuit Court said:

> "22. The policy language does not direct us unambiguously to either the "exposure" or "manifestation" interpretation. In the context of asbestos-related disease, the terms "bodily injury", "sickness" and "disease", standing alone, simply lack the precision necessary to identify a point in the development of the disease at which coverage is triggered. The fact that a doctor would characterize cellular damage as a discrete injury does not necessarily imply that the damage is an "injury" for the purpose of construing the policies. At the same time, the fact that an ordinary person would characterize a fully developed disease as an "injury" does not necessarily imply that the manifestation of the disease is the point of "injury" for purposes of construing the policies. In interpreting a contract, a term's ordinary definition should be given weight, but the definition is only useful when viewed in the context of the contract as a whole…
>
> 29…To accept the argument that only manifestation triggers coverage – and allow insurers to terminate coverage prior to the manifestation of many cases of disease – would deprive Keene of the protection it purchased when it entered into the insurance contracts…
>
> 30. Thus, in order for Keene's rights under the policies to be secure, both inhalation exposure and exposure in residence must also trigger coverage. Regardless of whether exposure to asbestos causes an immediate and discrete

> injury, the fact that it is part of an injurious process is enough for it to constitute "injury" under the policies."

288. In Australia, in *Orica Ltd v. CGU Insurance Ltd* [2003] NSWCA 331, Spigelman CJ said (at para 28) that he accepted for present purposes that there may be "injury" within the policy at the time of inhalation, and Santow JA, with whom Mason P agreed (at para 63: "I agree with Santow JA that the inhalation of asbestos fibres was an "injury"), said this (at para 161):

> "the ingested fibre had here started upon its slow but inevitable physiological process of malignant transformation of the pleura of the employee's lung, doing so sometime during the course of employment and thus during the period of insurance: that meant 'injury' occurred during the period of insurance."

On current understanding, it would not be correct to call that process inevitable, but, when it has occurred, it goes back to the initial inhalation. Santow JA also drew inspiration from the American "triple trigger" jurisprudence (at paras 165ff) and reasoned that "injury" might occur at exposure even where "damage" crystallised much later.

289. In sum, I would consider that if I were permitted to depart from precedent, I could avoid the worse argument defeating the better.

Individual wordings

290. Finally, in the light of all the considerations above, I revert to the individual wordings. What do they require?

291. *BAI's first wording:* In my judgment the disease of mesothelioma, where it develops, was contracted at the time of causative exposure. I see no reason to depart from my prima facie view that that wider reading of the possibilities of the phrase "disease contracted" is the correct interpretation of this wording. In the circumstances, it is unnecessary to found the relevant claimants' claims upon the expression "injury sustained", but my opinion is that it means what it says and should not be glossed as "caused" or by some other wording to provide cover for an injury which was sustained at some later time but not in the policy year, although caused in it. It seems

to me that the policy's exclusion for "accidents to workmen arising outside the United Kingdom" is consistent with those conclusions.

292. *BAI's second wording:* In my judgment, the same holds good for BAI's second wording, and at least for the same reasons. It is even possible that this wording, which it will be recalled falls within the era of ELCIA 1969, and appears to have been recast with at least that in mind, albeit a few years after its entry into effect, goes further. At any rate linguistically, there is a reasonable case for saying that the words which apply to the phrase connoting the policy period are the words "engaged in and upon the service of the Insured and being in the Insured's direct employment" etc, and do not include the phrase "injury sustained or disease contracted". The difficulty with that interpretation is that it would lack a critical component for the trigger or time hook, other than the mere fact of employment within the relevant period. That, and the existence of a claim for injury or disease, would provide an enormously wide cover, beyond reasonable expectations. On that basis, it would be necessary to find an additional link, which could be either the sustaining of injury or contracting of disease, or could be the happening of the event which led to the liability for injury sustained or disease contracted. There is no express reference at all in the wording to the concept of causation, but it is inherent in the requirement of the employer's liability. The point is a nice one. Commercial purpose supports the causative approach. So, for the reasons I have expressed above, does ELCIA 1969. In 1984 BAI expressly adopted causation wording ("in respect of Bodily Injury caused during the Period of Insurance to an Employee"). This wording was not in play on either action 1 (the Durham/Fern action) or on action 4 (the Bates action). However, an analogous issue arose on Independent's wording, where it was called the "timelessness" point. In the circumstances, given my construction of "disease contracted", the issue does not matter. On balance, however, I prefer the view that the injury or disease must have been sustained or contracted during the policy period. However, it is my opinion that in any event ELCIA 1969 required causation wording, and therefore, although that would not in itself assist the insured employer, it would give cover to a claimant seeking direct enforcement, by reason of the standard clause that "The indemnity granted by this Policy is deemed to be in accordance with the provisions of any law relating to compulsory insurance of liability to employees in Great Britain…" (see at para 61 above).

293. *Excess's first wording:* This does not refer to contracting disease, but to sustaining "any personal injury by accident or disease". Injury must therefore be sustained, whether by accident or by disease, within the policy period. Despite the pressure produced by the policy's commercial purpose, I do not feel able to say that something has gone wrong with the wording, so as to gloss the contractual language. I would have preferred to solve the problem by reference to the concept of "injury", as above, but I am unable to do so. As it is, this example of wording is rather like *Wasa International v. Lexington* (see para 214 above). There, in the context of insurance and reinsurance contracts there was a presumption, born of the commercial purpose of the reinsurance contract in its context, that the terms and period of the insurance and reinsurance should be back to back. However, the language of the period term of the reinsurance contract was too strong to permit the presumption to take effect. Similarly

here, the language of sustaining injury is in my judgment too strong to be able to give effect to the underlying commercial purpose. That is consistent with Excess's exclusion in terms of "accidents occurring" outside Great Britain etc.

294. There is an additional argument which arises on this wording (and Excess's second and third wordings as well) to the effect that the indemnity promised is only to meet the employer's liability "to damages for *such injury*" (emphasis added). "Such injury" submits Mr Edelman, is only that "personal injury by accident or disease" sustained within the policy period. I grant that, and where no actionable injury at all has been suffered during the policy period (*Bolton*), there can be no indemnity. However, I would add the comment that, if it had been otherwise, and if, as I would prefer in the absence of *Bolton* to say, an incipient injury, however insignificant at that time, amounted to actionable injury in the light of the later onset of mesothelioma, the indemnity would, I consider, cover in the ordinary way all the damages flowing therefrom.

295. *Excess's second wording:* The same conclusions apply.

296. *Excess's third wording:* This is essentially in the same form as earlier wordings, but falls into the era of ELCIA 1969. Despite the still greater pressure produced by the purposes of that statute, I do not consider that I can produce a different construction from that of the materially identical previous wordings. Therefore, the insured will be required to repay to the insurer whatever the insurer pays to any employee claimant. However, the employee claimant would be entitled to recover under the special deeming clause of the policies of this era. It was not many years, however, until in 1976 Excess changed to causation wording. As it is, lead actions 3 and 5 which involve Excess in these proceedings concern policies which precede the coming into force of ELCIA 1969.

297. *MMI's first wording:* Here again there is no reference to the contracting of disease, and the critical words are "if at any time during the period of the insurance…any person under a contract of service with the Insured shall sustain any personal injury by accident or disease". This wording, like that of Excess, also contains a reference to the indemnity being for the insured's liability to pay damages "for such injury". There is, however, an exclusion of "liability in respect of injury or disease *caused elsewhere* than in Great Britain" etc (emphasis added). That exclusion, it seems to me cuts both ways. The reference to causation raises the question whether the underlying concept is that of causation. On the other hand, the adoption of the different expression "caused" is to be contrasted with the previous "sustain". The contrast is again maintained in the exclusion for "injury or disease *sustained* by contractors to the Insured or such contractors' employees" (emphasis added). Moreover, there is of course an inherent element of causation in the whole concept of EL insurance: to be liable, and to be entitled to an indemnity for such liability, the employer has to have caused the injury.

In *Bolton* Longmore LJ did not consider that a similar point on an exclusion there assisted to introduce the concept of causation to the insuring clause (at para 21). I adopt the same conclusions as in the case of Excess's first wording, above.

298. *MMI's second wording:* The wording remains essentially the same, and I draw the same conclusions.

299. *MMI's third wording:* The critical wording here introduces the concept of contracting disease: "when such [bodily] injury or disease arises out of and in the course of employment by the Insured and is sustained *or contracted* during the currency of this Policy" (emphasis added). Thus liability to an employee who contracts mesothelioma at the time of his exposure to asbestos as an employee will be within the cover. I regard the expression earlier in the wording "injury or disease… suffered" as a gloss for "injury sustained or disease contracted". My conclusions in this case therefore mirror those with respect to BAI's similar wording. "Such" disease contracted during the currency of the policy is a fair reference to mesothelioma.

300. *Independent's sole wording:* As has been observed above, the time hook is applied, incorrectly, to the payment of indemnity, and the insuring clause itself contains no provision stating what has to happen within the policy period for the insurance to operate. I do not think that the cover is therefore timeless, but a choice has to be made out of the wording of the clause as to the so-called trigger of Independent's liability to indemnify. An obvious such candidate is the sustaining of injury or disease: "If any person who is under a contract of service…shall sustain bodily injury or disease". However, this is the period of ELCIA 1969, and it is quite likely that it was for this reason that the matter was left deliberately vague. The EL insuring clause is to be contrasted with the PL insurance clause in Independent's "Contractors' Combined Policy". The PL insurance clause states plainly that the trigger is "where such injury…happens *or* is caused…during the period of insurance" (emphasis added). That wording strongly suggests that the ambiguous wording of the EL insuring clause is not simply a matter of oversight. On balance, and in the light of the PL insuring clause, and the commercial purpose of EL insurance, and the purpose of ELCIA 1969, I consider that the trigger is better expressed in the following formula, viz:

> "If any person who is under a contract of service or apprenticeship with the Insured shall *[at any time]* sustain bodily injury or disease arising out of and in the course of his employment by the Insured *[during the policy period]* in connection with the Contract specified or type of work described in the Schedule the Company will indemnify…"

The interpolation "at any time" is unnecessary, but I have inserted it for clarity. The critical matter is that the injury or disease should arise out of and in the course of employment during the policy period. In any event, for ELCIA 1969 reasons already

canvassed, this wording will provide security for employee claimants, even if not for the insured itself.

301. *Zurich:* The Municipal First Select wording (1993-1998) requires that injury be sustained during the period of insurance by an employee in the course of his employment. Therefore it is essentially like Excess's first wording. The Municipal Second Select wording (1998-) is by common accord causation wording.

Conclusion

302. In sum, the appellant insurers have had in my judgment a measure of success on their appeal. "Sustain" means sustain. But "disease contracted" looks back to causative origins. The ELCIA 1969 policies, by reason of their deeming clause, provide security for employee claimants, but not for the insureds. But I would have preferred, had precedent allowed me, to respect the commercial purpose of EL insurance, a fortiori during the ELCIA 1969 era, and to vindicate the industry's attitude to such insurance over so many decades, up to *Bolton*, by acknowledging that, when mesothelioma develops, the "injury" of mesothelioma is sustained, in its origins, at the time when the insult of exposure, which materially increases the risk of developing mesothelioma, occurs.

Postscript

303. I have read and carefully considered the judgments of Lady Justice Smith and Lord Justice Burnton, and I am most grateful to them for their insights. I do not think I can leave this judgment without briefly referring to the essential points they make, and I have concluded that I can best do that in a postscript which also seeks to draw together our common conclusions.

304. Lady Justice Smith has endorsed in full the judgment of the judge, but has done so, not so much on his ex-employee point which drove him to his conclusion that the parties had made a mistake about language but, on the principal ground that the sustained wording should be given the meaning which the users of it at the time of the policies in question and in the factual matrix of those policies understood it to mean, viz as the same as causation wording. She accepts that nowadays, with the advance of modern medical knowledge, the position would be different. In my respectful judgment, however, subject to estoppel or binding custom, which does not arise, the evidence to which she refers does not support her conclusion. There was no reasonable understanding that sustained meant caused, or that sustained wording had the same effect as caused wording. It was rather that, in a period when the case of mesothelioma was less well known, and in the light of the fact that some 99% of

injuries were caused and sustained at the same time, there was a mixture of reasons which led the parties to conclude that the effect of one wording gave the same result as the other. The fact that policies with different wordings were treated the same, does not I fear mean that they had the same meaning. The difference between them has been exposed by the case of mesothelioma (on the *Bolton* analysis).

305. Lord Justice Burnton is, I think, in general but not complete agreement with my analysis of the wordings. He disagrees, however, about the Independent wording (see my para 300 above and his para [350] below). He also disagrees (as does Lady Justice Smith, for she agrees with the judge) with my conclusion that ELCIA 1969 requires causation wording. However, he would extend section 1(1) of ELCIA 1969 to ex-employees (see his para [342] below). Thus where section 1(1) states –

> "every employer carrying on business in Great Britain shall insure…against liability for bodily injury or disease sustained by his *employees*, and arising out of and in the course of their employment in Great Britain in that business" (emphasis added)

he would read "employees" as including "ex-employees".

306. This is a tempting and generous interpretation, but I fear, with respect, that I am unable to agree with it. I do not think that the point was expressly argued by any of the claimants, or conceded by the insurers. But in the written submissions of the Secretary of State, as an interested party, the observation is made that a construction of the section which does not call for wording on a causation basis may have the result that "ex-employees may not be covered at all".

307. In my judgment, it is difficult to give to "employees" a meaning which includes "ex-employees". If that meaning was adopted, then the compulsory insurance would necessarily be retrospective in a most serious way, for if in 1972 an ex-employee who had not been employed by an employer for decades were to "sustain" mesothelioma, the employer's liability to him would need to be covered: if it were not, the employer would be in breach of his obligations. It seems odd to think that the statute requires an employer to insure against liability for a breach of duty which had taken place decades ago. Moreover, none of the wordings considered in this appeal would extend to ex-employees, so that such an interpretation would, it seems, be foreign to the industry practice. This retrospective element would be removed if the statute only applied to "employees" within the period of the statute's application, whom I might describe as "current employees": and who it might be supposed, on Lord Justice Burnton's view, ought to remain covered (that is to say the employer's liability to them ought to remain covered) after they had ceased to be employed (in or after 1972). However, it is just as or even more difficult to get this half-way house extension of the word "employees" to cover ex-employees. The injuries or disease of

some ex-employees' injuries or disease would be within the scope of the cover, but those of other ex-employees would not be. Again, this would be against the background of an industry whose wordings, on the evidence in this case and their construction on the ex-employee point, did not grant cover against liability to ex-employees. And yet the construction to cover ex-employees would need to be derived implicitly, rather than from the express language of the statute. I think this is too difficult, and I respectfully prefer to regard the statute as requiring causation wording, for the reasons which I have expressed above.

308. Finally, I wish to essay a résumé of where our three judgments have arrived at, although I would also much appreciate counsel's assistance in this and in drafting our order. Although our reasoning may differ, it seems to me that for one reason or another, the claimants have retained much, but not all, of their initial success. Where they have succeeded in terms of my judgment, they have succeeded in this court, because Lady Justice Smith would dismiss the appeal and uphold the judge in total. Where, however, they have failed in terms of my judgment, and on the other hand the insurers have succeeded, they have failed in this court and the insurers have succeeded, because Lord Justice Burnton's judgment goes at least as far as I do (and in fact further) in allowing the insurers' appeals.

309. I am sure I speak for the court as a whole in thanking counsel and those instructing them for making a complex and difficult appeal ultimately digestible. The preparations of the papers were all that they could and should have been, and every request or suggestion from the court was responded to with alacrity. I am grateful for the assistance we have received.

Employers Liability Insurance Trigger Litigation

Annex I

The policy wordings (dates are approximate)

BAI

1. *First Wording (1953 to 1974)*

> ...the Company will…indemnify the Insured against all sums of money which the Insured may become liable to pay to any Employee engaged in the direct service of the insured or any dependent of such Employee in respect of any claim for injury sustained or disease contracted by such Employee between…and…both inclusive…

2. *Second Wording (1974 to 1983)*

> …the Company will…indemnify the Insured against all sums of money which the Insured may become legally liable to pay in respect of any claim for injury sustained or disease contracted by any person engaged in and upon the service of

the Insured and being in the Insured's direct employment under a Contract of Service or Apprenticeship between the…day of…and the…day of…both inclusive…

Excess

3. *First Wording (late 1940s)*

That if at any time during the period commencing on the…day of…19 , and ending on the…day of…19 (both days inclusive) and for such further period or periods as may be mutually agreed upon, any employee in the Employer's immediate service shall sustain any personal injury by accident or disease while engaged in the service of the Employer in Great Britain, Northern Ireland, the Isle of Man or the Channel Islands, in work forming part of the process in the business above mentioned, and in case the Employer shall be liable to damages for such injury, either under or by virtue of the Common Law, the Fatal Accidents Acts 1846 to 1908, or the Law Reform (Miscellaneous Provisions) Act 1934, the Company will indemnify the Employer…

4. *Second Wording (late 1950s to 1960s)*

that if at any time during the period of the indemnity as stated in the Schedule or during any subsequent period for which the Company may accept premium for the renewal of this Policy any person of a description mentioned in the Schedule who is under a contract of service or apprenticeship with the Employer shall sustain personal injury by accident or disease arising out of and in the course of employment by the Employer in work forming part of the process in the business mentioned in the Schedule, the Company will indemnify the Employer against liability at law for damages in respect of such injury or disease…

5. *Third Wording (1970 to 1976)*

that if at any time during the period of the indemnity as stated in the Schedule or during any subsequent period for which the Company may accept premium for the renewal of this Policy any person of a description mentioned in the Schedule who is under a contract of service or apprenticeship with the Employer shall sustain personal injury by accident or disease arising out of and in the course of employment by the Employer in the business mentioned in the Schedule, the Company will indemnify the Employer against liability at law for damages in respect of such injury or disease…

MMI

6. *First Wording (1949 to 1958)*

…the Company hereby agrees that if at any time during the period of insurance specified in the schedule or thereafter during any subsequent period for which the Insured shall agree to pay and the Company shall agree to accept a renewal

premium of the amount specified in the said schedule, or in such other amount as the Company shall from time to time require, any person under a contract of service with the Insured shall sustain any personal injury by accident or disease arising out of and in the course of his employment by the Insured in their activities described in the schedule and if the Insured shall be liable to pay damages for such injury or disease then, subject to the terms and conditions contained herein or endorsed hereon, the Company shall indemnify the Insured against all sums for which the Insured shall be so liable…

7. *Second Wording (1958 to 1974)*

> …the Company hereby agrees that if at any time during the First Period of Insurance specified in the said Schedule or during any subsequent period for which the Insured shall agree to pay and the Company shall agree to accept a renewal premium of the amount specified as the Renewal Premium in the said Schedule or of such other amount as the Company shall from time to time require, any person under a contract of service with the Insured shall sustain any bodily injury or disease arising out of and in the course of his employment by the Insured in the Insured's activities described in the said Schedule and if the Insured shall be liable to pay damages for such injury or disease or for death resulting from such injury or disease then, subject to the terms, exceptions and conditions contained herein or endorsed hereon or set out in the Schedule to this Policy…the Company will indemnity the Insured against all sums for which the Insured shall be so liable...

8. *Third Wording (1974 to 1992)*

> The Company agrees to indemnify the Insured in respect of all sums without limit as to amount which the Insured shall be legally liable to pay as compensation for bodily injury or disease (including death resulting from such bodily injury or disease) suffered by any person under a contract of service or apprenticeship with the Insured when such injury or disease arises out of and in the course of employment by the Insured and is sustained or contracted during the currency of this Policy.

Independent

9. *Sole wording in Issue (1972 to 1987)*

> NOW THIS POLICY WITNESSETH that during the Period of Insurance or during any subsequent period for which the Company may accept payment for the continuance of this Policy and subject to the terms, exceptions and conditions herein and endorsed hereon, the Company will indemnify the Insured as hereinafter specified.
>
> **SECTION 1 – EMPLOYERS' LIABILITY**
>
> If any person who is under a contract of service or apprenticeship with the Insured shall sustain bodily injury or disease arising out of and in the course of

his employment by the Insured in connection with the Contract specified or type of work described in the Schedule the Company will indemnify the Insured against all sums for which the Insured shall be liable for damages for such injury or disease…

Zurich

10. The Municipal First Select wording (1993 to 1998)

The INSURER will indemnify the INSURED in respect of all sums which the INSURED may become legally liable to pay as damages and claimants' costs and expenses in respect of Injury sustained during the Period of Insurance by any EMPLOYEE arising out of and in the course of employment by the INSURED in the BUSINESS within the Geographical Limits.

11. The Municipal Second Select wording (1998 -)

The INSURER will indemnify the INSURED in respect of all sums which the INSURED may become legally liable to pay as damages and claimants' costs and expenses in respect of Injury caused during the Period of Insurance to any EMPLOYEE arising out of and in the course of employment by the INSURED in the BUSINESS within the Geographical Limits.

The tariff wording (1948 -)

12. …if any person under a contract of service or apprenticeship with the Insured shall sustain any personal injury by accident or disease caused during the period of insurance and arising out of and in the course of his employment by the Insured in the business above mentioned and if the Insured shall be liable to pay damages for such injury or disease the Association shall indemnify the Insured against all sums for which the Insured shall be so liable.

Lady Justice Smith :

310. I have read the draft judgments of Rix LJ and Stanley Burnton LJ. I am grateful to Rix LJ for his detailed exposition of the facts, the judgment below and the arguments advanced before this court. I shall assume that readers of this judgment have read his judgment and are familiar with the issues. I shall also assume that readers have available to them the judgment of Burton J. For reasons which I shall explain quite briefly, I find myself in agreement with Burton J and would dismiss all aspects of this appeal.

311. The task of the court below and of this court is to construe a number of policies of insurance by which employers sought to cover themselves for their liabilities for personal injury claims brought by their former employees and their dependents. Most of the contracts of insurance with which we are concerned were entered into between the late 1940s and 1983, although the MMI contracts continued until 1992 and the Zurich First Select contracts until about 1998. All the contracts of insurance provided cover against the employers' liability to meet employees' claims ranging over a wide variety of injuries and diseases but the particular context in which they must be construed is that relating to claims for mesothelioma.

312. The wordings of the various policies to be construed are all slightly different although, as Rix LJ has explained, the main issue to be determined is what was meant by a policy which provided an indemnity in respect of liability for injuries sustained during the period of the policy. This, say the appellant insurers, is materially different from the meaning of wording which provided an indemnity in respect of injuries caused during the policy period. The appellant insurers contend that 'causation wording' provides an indemnity in respect of liability arising from exposure to asbestos during the policy period whereas 'sustained wording' provides cover in respect of an injury which actually materialises during the policy period. The respondents to the appeal, (mainly claimants in the actions) contend that, at the time when the contracts were entered into, the sustained and causation wordings were understood to mean the same thing.

313. Because of the appellants' contention, the focus of much of the evidence below was to establish when mesothelioma actually materialises. The disease has been fully described by Rix LJ and Burton J as well as by Longmore LJ in *Bolton Metropolitan Borough Council v Municipal Mutual Insurance Ltd* [2006] EWCA Civ 50 (*Bolton*). This disease was not recognised medically until about the mid-1950s. From that time it was known to be causally associated with exposure to asbestos. It was also known that it did not usually manifest itself for many years after the exposure, often many years after all asbestos exposure had ceased. The disease was more generally recognised as the result of publications in 1965. But at that time, very little was known about the aetiology and pathogenesis of the disease and in particular about the physical changes which occurred between the inhalation of the asbestos and the manifestation of the disease. In the years between 1965 and 2008 when Burton J heard medical evidence, a great deal of research has been done into the aetiology of mesothelioma. Medical knowledge and understanding have advanced. The medical evidence put before Burton J (and indeed the slightly different evidence which was put before the court in *Bolton*) was based upon the medical knowledge and understanding of the late 20th and 21st century. The disease is still not completely understood but much more is known than was known, say, fifty years ago. It is now known that the disease does not occur until many years after exposure. For many years after exposure the exposed person's bodily defence mechanisms either expel or at least cope with the asbestos fibres. In many cases, the defence mechanisms will cope for the whole of the exposed persons' lives and the disease will not occur. But for the unfortunate few, the time comes when the defence mechanisms fail and the asbestos in the body triggers the onset of the disease. Burton J estimated that, in most

cases, that occurs about five years before the disease manifests itself in symptoms, usually of breathlessness and, later, pain. In *Bolton* Longmore LJ estimated period at about ten years.

314. Thus, in my view, the judge was entirely justified in holding that, viewed through 21st century eyes, mesothelioma comes into existence approximately 5 years before the patient experiences symptoms. I would accept that, if a policy with sustained wording was entered into in the 21st century, it would be construed so as to cover liability for disease which manifested itself about 5 years after the policy period. The lack of precision as to the exact time when the disease came into existence might cause some difficulty but it would be a difficulty which had to be lived with.

315. However, none of these policies was taken out in the 21st century. They were taken out before that. Some of them were taken out before mesothelioma was recognised as a disease, let alone at a time when its pathogenesis was understood. Others were taken out at a time when the disease was recognised and acknowledged to be caused by asbestos but when its pathogenesis was not understood and the modern medical understanding had not been reached.

316. What is the test which must be applied when construing these policies? Burton J discussed the authorities at some length in his paragraphs 202 to 204, an analysis with which I respectfully agree and adopt. The authorities show that the meaning to be given to contractual words is that which the parties to the contract must be taken to have intended them to have. That meaning is to be ascertained objectively from consideration of the meaning of the words themselves, in the context of the contract and set in the factual matrix which must be taken to have been available to the parties.

317. It seems to me that the test required the judge (and now requires this court) to construe each policy in the light of the factual matrix as it existed at the time the contract was entered into. If that is different from a factual matrix which came into being at a later date, the meaning of the same policy wording may well be different as between those two dates. Thus, as I have said, if the sustained wording was used in a policy taken out in the 21st century, the current medical understanding of the aetiology of mesothelioma would be a relevant and important part of the factual matrix of the contract. Because the factual matrix would have included an understanding that the injury of mesothelioma (and possibly many other occupational cancers) does not occur (or is not suffered or sustained) until many years after exposure, the use of the sustained wording would indicate that the parties intended that cover should be provided in respect of the policy year in which the injury actually developed which might be many years after exposure. But if the policy was taken out in the middle years of the 20th century, that modern medical understanding is irrelevant. None of the businessmen, whether insurers or employers who used asbestos products, could

possibly be taken to have had in mind the kind of knowledge which the medical experts provided in this case and in *Bolton*.

318. What knowledge and information was current in the insurance and industrial worlds at the various material dates when these policies were taken out? Much evidence was given of this. Some of it was treated as being given more in support of an attempt to establish a universal custom or usage than as evidence of the factual matrix against which the various policies were entered into. However, much of the evidence is relevant to both issues. Burton J discussed this evidence at his paragraphs 180 to 201. Rix LJ summarises the evidence starting at his paragraph 192. I do not intend to repeat all this evidence. It included evidence of the practice by which insurers paid out for mesothelioma claims. The evidence was that, whether the policy wording was 'injury sustained' or 'injury caused', insurers paid out on policies which were in force at the time of exposure. However, there were hardly any claims at all until the early 1980s and even then there was only a trickle. Accordingly, I do not think it could be said that the practice of paying out by reference to time of exposure could be said to be part of the factual matrix for policies which were taken out before about 1990 and we are concerned mainly with a period well before that.

319. However, I do consider that there is relevance in the evidence recorded in Rix LJ's paragraph 193 quoting part of Burton J's paragraph 186, which describes the universal understanding on both sides of the contractual divide that all EL policies were regarded in the same way regardless of whether the policy wording used 'injury sustained' or 'injury caused'. This universal understanding did not relate specifically to cases of mesothelioma, of which there were very few if any in the early days; it related to disease cases generally.

320. Burton J recorded that there were many differing reasons or understandings for this universal understanding. But whatever the varied reasoning, the position taken was common to all. That position was that the differences of wording did not matter. As Dr Frank Eaglestone, the retired deputy general manager of Federated (later Independent) whose evidence the judge accepted, explained, there was never any doubt that the purpose of EL insurance was to provide the insured with cover for the liability it incurred as the result of its activities during the period of the policy. So far as dust diseases were concerned, he said that the understanding was that the seed of the disease was sown when the noxious dust was inhaled. Therefore there was liability under the EL policy in force at the time of inhalation, whichever wording was used. It would be wrong, he said, for the insured not be covered for the mistakes he made during the period of cover. Several other insurance witnesses gave evidence to similar effect. Other witnesses stressed that this understanding did not relate to any particular disease; what mattered was that the policy should cover all eventualities arising out of the activities in the policy period. This understanding was not limited to the insurers' side of the contractual divide. Witnesses called by the claimants reported a similar understanding. The evidence also showed that it was well recognised that cover was to be provided for torts committed during the policy period

even though the disease might not manifest itself for years after the exposure had ceased.

321. The judge held that the payment practices of the various insurers did not amount to a legally binding usage and that is now accepted on both sides. However, the fact that the practice was not a legally binding usage does not mean that the attitudes and common understanding which underlay the practice were not part of the factual matrix against which the contracts were entered into. In my view, they were.

322. It seems to me not surprising that this common understanding existed. Medical understanding about the aetiology of occupational diseases was limited and there seems to have been very little if any discussion or argument in the world of insurers and their EL customers about when particular forms of industrial disease occurred or were sustained. In the context of limitation, there was some discussion about when actionable injury occurred in disease cases (*Cartledge v Jopling* [1963] AC 758) and it was recognised that, in the stone dust pneumoconiosis under consideration in that case (the aetiology of which does not seem to have been well understood at the time) actionable injury was suffered at some indeterminable date between the date of exposure and the date at which symptoms manifested themselves. All the court could say in that case was that the more than minimal damage required for actionable injury had occurred more than three years before issue of the writ. It was not until *Bryce v Swan Hunter* [1987] 2 Lloyd's Rep 426 that people in the industry began to think about what exposure was potentially causative of the disease of mesothelioma. It was not until *Jameson* in the 1990s that people began to think about when injury was suffered or sustained in a mesothelioma case and no authoritative decision was promulgated until the *Bolton* case was begun at about the turn of the century. In short, in the years with which we are concerned in this case, there was nothing to disturb the assumption or understanding held by many people on both sides of the EL insurance industry that lung diseases were suffered or sustained at the time of exposure, at least in the sense that, although the disease was not yet actionable, the seed had been sown and its development had become inevitable. The fact that that understanding was not universally held does not matter. It was commonly held and can therefore be taken as part of the factual matrix of the time.

323. Against the background of the evidence which Burton J accepted and which formed the factual matrix of the contracts with which we are concerned, it seems to me that he was right to hold that there was no difference in meaning between a policy which used 'sustained' wording and one which used 'causation' wording. Looked at through the eyes of an objective and contemporaneous observer of the contractual arrangements made between the 1940s and, say, the mid-1990s, the meaning of a policy using the 'sustained' wording would be understood to be the same as a policy using 'causation' wording.

324. I respectfully agree with Burton J's analysis of the purpose, meaning and effect of the Employers Liability (Compulsory Insurance) Act 1969 as set out in his paragraphs 233 to 238.

325. As for the 'ex-employee' problem which Burton J discusses at his paragraphs 210 to 226, I agree with his conclusion at paragraph 226 although I consider that the conclusion might well have been arrived at rather more simply and directly by consideration of the meaning of the words of the policies against the factual matrix of the time. I agree that the policies must be taken to provide cover for the employer's liability to a person (or his representatives) who was an employee and was tortiously exposed during the policy period.

326. My conclusion is therefore that, at least so far as the policies with which we are concerned in the individual cases considered in the first four actions and in the Excess policies covered by the fifth action, the policies with 'sustained wordings' must be construed so as to provide cover for employers liable in respect of tortious exposure of an employee during the policy period.

327. In parenthesis I should mention that I have some reservation about the position of policies issued by Zurich in the period 1992 to 1998, where sustained wording was used. It is possible that the common understanding which formed part of the factual matrix during the previous fifty years was beginning to change towards the end of this period. There was before the court no evidence, so far as I can discern, from which one could determine exactly when the two sides of the insurance industry should be considered to have appreciated that some diseases, including mesothelioma, do not occur until many years after exposure to the causative agent. When that was appreciated, parties signing an insurance contract using the sustained wording must have been taken to have intended that cover should be provided for those liabilities arising as the result of injuries actually occurring during the policy period. My inclination would be to hold that that change did not occur until the case of *Bolton* after the turn of the century. However, it is possible that that change occurred a little earlier.

328. I recognise that my conclusion, in agreement with Burton J, could be seen as being in conflict with the conclusion of Longmore LJ in *Bolton*. It is plainly binding in respect of PL policies. However, I feel justified in distinguishing it, as did Burton J, because we are here dealing with EL insurance rather that PL policies and because the evidence of factual matrix upon which I have relied relates solely to EL insurance.

The results

329. I do not propose to burden this judgment with consideration of the individual actions. I do not do so because I agree with the detailed conclusions expressed by the judge which follow inevitably from the conclusions of principle which he reached and with which, for the reasons I have given, I am in agreement.

Lord Justice Stanley Burnton **:**

General observations

330. I have read the judgments of Rix and Smith LJJ in draft. I express my gratitude to Rix LJ for his careful exposition of the issues in this litigation, the relevant facts, authorities, history of employer liability insurance, and to Smith LJ for her exposition, born out of her wide experience of personal injury claims. I shall adopt their abbreviations. I also pay tribute to the judge for his careful description of the aetiology of mesothelioma.

331. As I think I made clear during the hearing of these appeals, in my judgment both at first instance and before us the parties adduced much in the way of irrelevant evidence and presented legally unsustainable arguments. We are concerned with the interpretation and effect of relatively straightforward contracts of insurance in a number of standard forms. The difficulties of application arise because these forms were in general designed to address what has always been the most common cause of employee claims against employers, namely accidents causing immediate injury. The difficulties have been increased by changes in the understanding of the aetiology of disease and to some extent by developments in the law of tort made by the House of Lords in *Fairchild*, *Barker v. Corus* and *Rothwell*. However, I think that in *Fairchild* the House of Lords did no more than apply the common law as explained in *Bonningtons* and *McGhee.*

332. The Court was treated to a fascinating but I think essentially irrelevant study of the WCA and the numerous authorities wrestling with their application. While it is theoretically possible for the provisions of repealed legislation to affect the meaning of a contract of insurance entered into some time after its repeal, the possibility is remote. It would require a course of dealing between insurer and insured reaching back to the currency of those enactments giving rise to an estoppel by convention. There was no trace of anything like this in the pleadings or in the evidence. In my judgment, there was nothing in the material before the Court to suggest that the meaning of any of the policies in question as between the particular insurers and insureds in question differed in any way whatsoever from their meaning as between those insurers and other insureds. I protested during the hearing, and I protest now, at the suggestion, implicit in the submissions referring to and relying upon the terms of the WCA and the citation of authorities on the application of that legislation, that Bob the Builder, when he took out an EL policy years after the repeal of the Acts, either knew or could or should be taken to have known of the history of that legislation and the numerous authorities relating to it.

333. Furthermore, and in this I reluctantly differ from Rix LJ, in my judgment little if any assistance is to be gained by reference to the commercial purpose of EL insurance. The commercial purpose was to provide the cover defined in the policy. The cover provided by every policy was defined by the terms of the policy. The policies included express conditions and exclusions and in some cases extensions that make it impossible to maintain that the insurers gave, or that the employers contracted for, cover more comprehensive than those terms conferred.

334. When interpreting the policies, it must be remembered that they were in general annual (and always time-limited) policies. It was always theoretically possible for an employer to change his EL insurer. Hence the inclusion of time restrictions in policies. In theory at least, the identification of a particular year of cover as that conferring indemnity might affect reinsurance liabilities, which too could vary from year to year.

335. It is now agreed that the practice of insurers of accepting liability before the decision of this Court in *Bolton* is irrelevant to the interpretation of the policies. Their practice was entirely explicable by their and their claimants' understanding of the aetiology of mesothelioma before the analysis of its implications in that case.

336. The last of my general observations is that it seems to me that there is not as strong a moral imperative to find the insurers liable as there rightly is to hold the employers liable. It was the employers' activities that caused their former employees' mesothelioma. If their employees' exposure to asbestos fibres could and should have been prevented or reduced, that was the fault of their employers, not the insurers. The insurers, if liable, undertook in their contracts liabilities generally that were not predicted or foreseen by either employers or insurers. As between insurer and insured, I do not see any moral imperative. The moral imperative in favour of the employees and their dependants is that in the absence of insurance liability many of them will not be compensated for their suffering, early death and loss.

337. For these reasons, I am unable to agree with the judge's interpretation of the policies in question. He departed from their express provisions in my judgment without any justification in law.

338. We are agreed that in any year in which there was substantial exposure to asbestos, mesothelioma was "caused" by that exposure during that year. The fact that the disease did not develop for some years does not break the chain of causation.

339. However, in my judgment, employees did not suffer or sustain an injury within the meaning of the policies when they were exposed to asbestos. We are bound by the decision of this Court in *Bolton*, but I find the logic of the judgment of Longmore LJ convincing. It follows that if the only relevant cover was for injury sustained during a period of insurance by a person who was an employee during that period, the policy would not provide indemnity. In my judgment, injury was not suffered until at the earliest the onset of malignancy. The fact that the malignancy is unknown and presently unknowable is irrelevant.

340. More difficult is the question whether an employee "contracted" the disease whenever he was exposed. If an employer changed his insurer after year 1, and both insurers undertook cover for diseases contracted during the policy year, did the employee exposed to asbestos in years 1 and 2 contract mesothelioma in both years? The Oxford English Dictionary gives as a meaning of the verb contract "to become infected with". Employees were not infected with mesothelioma when they were exposed to asbestos. However, it may be that the OED definition reflects now obsolete understanding of the aetiology or pathogenesis of disease. "Contract" connotes a link, a drawing together (its etymology is from *con* and *trahere*), and there is a link between exposure and disease. So, not without hesitation, I would hold that mesothelioma may be contracted when exposure occurs.

341. I can now turn to the interpretation of the policies in question. In view of Rix LJ's detailed analysis and discussion, I propose to set out my conclusions in summary form.

The policies and their interpretation

ELCIA 1969 wording

342. A policy with this wording (i.e., the wording of section 1 (1)) provides cover to an employer, and a policy with the ELCIA 1969 endorsement provides security to an employee, in the case of employees or former employees who, during the period of insurance, develops a malignancy resulting from previous exposure while he was an employee. I have on balance concluded that "employees" includes former employees who claim against their former employer for "bodily injury or disease sustained by [them during the period of insurance], and arising out of and in the course of their employment in Great Britain in that business". However, I regret that I cannot agree with Rix LJ that the statute is to be interpreted as requiring causation wording. Section 1(1) requires the employer to have cover in respect of "bodily injury or disease *sustained*" not "*caused"*.

BAI first and second wording

343. These policies respond to mesothelioma resulting from exposure during the period of cover by reason of the words "*or disease contracted by such Employee between …and … both inclusive*". Like Rix LJ, I find myself driven to conclude that under the first wording the employee must be such at the date of the sustaining of the injury or contracting of the disease, which must also be in the period of insurance. It is difficult to read the words "engaged in the direct service of the Insured" as meaning "who is or was in the direct service of the Insured". I agree for the reason given by Rix LJ that it is impossible to read the insuring clause as:

> "to pay to any *person who is or was an* Employee engaged in the direct service of the Insured *at the time of the breach of duty* …"

344. I also agree that the second wording, apart from the ELCIA 1969 endorsement, does not apply to former employees who sustain an injury or contract a disease. However, that endorsement extends security for employees to the extent I have mentioned above.

345. BAI's 1984 causation wording responded to claims resulting from exposure in that and subsequent years covered by that wording.

Excess

346. Excess's wording prior to its change to causation wording required that injury or disease be sustained during the policy year. It does not respond to a mesothelioma claim resulting from the subsequent development of the disease.

MMI

347. For the same reasons, in my judgment the MMI EL policies with their first and second wording do not respond to claims for mesothelioma developing after the period of insurance.

348. The third wording is however substantially different. It clearly provides cover for mesothelioma if contracted during the currency of the policy, by exposure to asbestos. In such a case, no question as to whether that person is at that time an employee or apprentice is likely to arise. It also provides cover in respect of injury sustained (which has the meaning to which I have referred above) during the currency of the policy, but again requires that that person should be an employee or apprentice when he sustains that injury.

349. MMI policies bearing the ELCIA 1969 endorsement would provide security as described above.

Independent

350. I am compelled to conclude that Independent's wording required that the employee be such when he sustained bodily injury or disease during the period of the insurance. The words "who is under a contract of service or apprenticeship" drive me to this conclusion. I do not think it right to interpolate "at any time" as found by Rix LJ. However, security for employees and ex-employees was extended by the ELCIA 1969 endorsement.

Zurich

351. The Municipal First Select wording requires that the employee be such when during the period of insurance he sustains injury. The Second Select Wording is equally clearly causation wording, which responds to exposure to asbestos during the period of insurance leading to mesothelioma.

Tariff wording

352. This too is clear causation wording, which does not require the person suffering from mesothelioma to be an employee at any time other than when he was exposed to asbestos.