DEVELOPMENTS IN PERSONAL INJURY LITIGATION

by

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1. TOXIC TORTS

Toxic (OED): of poisons. (Greek "toxikon": poison for arrows.)

Poison (OED): substance that when introduced into or absorbed by a living organism destroys life or injures health. One that destroys life by rapid action and when taken in small quantity.

(Not to be confused with Poissarde – a Parisian market woman (leading riots during the first revolution.)

1.1 Waste, rubbish and incinerators

Much modern waste contains very small quantities of chemicals which – in larger quantities – are poisonous to human kind.

In the manufacture of packaging (paper, cardboard, metal, plastics) very small quantities of these chemicals are used for stabilising the product, in printing the labels and covers, and in creating the colours. The quantities in each product are so infinitesimally small that individually there is no risk whatsoever to people or animals or the earth.

When large quantities are incinerated, three things can occur.

1.1.1 These products are rendered gaseous – they are emitted as particulates, and they fly away in the wind to land on people, their homes and their gardens, or elsewhere.

1.1.2 They sink to the bottom of the incinerator. There they gather, with all the other non-combustible residue. The amounts get larger and larger;

and they are all close together. Collectively, there is a dangerous accumulation.

1.1.3 The products are changed: by catalysis, by fusion (burning up) or by chemical reaction. What was not toxic becomes toxic because it has been changed.

1.1.4 Western society is aware of waste and the need for it to be managed effectively. Less sophisticated societies, in the developing world, do not have this awareness. Insurance liability risks there will be a difficult matter. The dangers will only become realities some years into the future. But this will be at a time when the victim and their relations have become far more sophisticated in terms of "who can we sue?"

What is to be done? Local authorities – who have the legal liability to deal with waste – have this responsibility. They must dispose of these accumulations of dangerous products in such a way that people are not in any way endangered.

Others who operate incinerators – in factories or elsewhere (e.g. construction sites) must take the same care.

Waste is sometimes used as a base for paths and tracks: "cinder track". Carcinogenic, or other toxic, waste so used is unwise.

1.2 **Avoiding liability in law**

The producer of waste products must do the following to avoid any legal liability.

1.2.1 He must establish what is within the waste which he is using or creating. That means assessing what either people (households) or others throw away. He can do it by finding out what is in the rubbish by sampling. A high standard is likely to be imposed.

1.2.2 He must establish what will be the effect of combustion on these products.

1.2.3 He must establish what will have a catalytic effect: what will these products do in the presence of other products, with or without combustion?

1.2.4 He must establish any agglomeration effects: what happens when these products mix with other products?

1.2.5 He must establish safe ways of disposing of these products of combustion. The nuclear industry use glass, lead and burial. But leeching out later must be guarded against.

Water in aquifers in Hampshire was tainted by kerosene. The only possible source of the kerosene was a WW2 RAF base, last used over 50 years ago. The spilled or waste kerosene from tanks on the base had taken 50 years to make its way through the clay rock soil etc.

1.3 **The Dome Syndrome: disasters waiting to happen**

The Greenwich site is underpinned by a concrete raft some 15 feet below the surface. Below that raft is a mass of toxic waste products deposited over decades, if not centuries. Breaching the concrete raft – to put down foundations for any larger structures would release these products. The result is that use of the Dome site is limited.

It is also limited by a government condition that the Dome must stay up for 15 years. But that has only a political significance.

It is likely that there are other such sites about the UK. Insurers would be wise to carry out a survey to establish where they are and what was dumped there. Release of that product – in the course of building or construction work, or due to some accidental damage later, will cause serious risks.

2. MEDICAL WASTE

2.1 Hospitals, GPs and dental surgeries have to dispose of human waste, discarded implants and other products of their work.

Hospitals are relatively easy to deal with. They are used to disposing of waste products of their work. Private hospitals – BUPA, PPP etc. – need insurance cover in respect of this risk. There are two aspects.

The first is that they may not have any adequate system for dealing with the waste.

The second is the person who, not knowing of the system, or disregarding it, decides to take a short cut. It is there that eternal discipline, enforced possibly by insurers, can be helpful.

2.2 It is the GPs' surgeries and the dentists' surgeries which can cause problems. They are in both urban and rural areas, but often surrounded by communities. Costs may be causing a problem to the practice. Alternatively inefficiency or casual disregard can be a problem. (One dentist threw his plastic bags of waste into skips at the local tips on the way home.)

2.3 Local authorities will collect such clinical waste which is separately bagged. But the prospect of bags breaking, being inadequately sealed, or just leaking must be guarded against.

The risk of a widespread infection would be costly: as the Scottish butcher found when he caused food poisoning.

3. ASBESTOS SYNDROME

The Court of Appeal have accepted that asbestos from the Defendants' factory falling onto the members of the employees' family and other nearby occupiers of premises would found liability on the factory.

By the same reasoning: any toxic substance emitted by a factory, or from other premises, can cause injury to people locally. So the occupier of the premises and the person producing the toxic substance will be liable. That much is obvious to most of us.

It is the knowledge that the product was toxic which will cause the problems. In view of recent decisions, it is going to be necessary for factory owners to prove that they could not possibly have known that the product was potentially toxic.

4. FOOT AND MOUTH DISEASE

4.1 Some waste has been burned. Some has been buried.

What has been buried has been leaking out at some places. If the water table rises, the problem of further leaks occurs: what will be leaking is rotting infected animal material. The infection may not be only related to foot and mouth disease, but to other diseases harboured by the animals and lying unidentified.

Risks to be guarded against are losses to contiguous land owners, and to occupiers of local premises.

4.2 "Q fever" is caught from carcasses handled during the foot and mouth outbreak. Three soldiers have this. The US army keeps a supply of the vaccine against this in Maryland for use in such an emergency: but the British army did not use this. There are about 200 cases of Q fever each year. The organism is Coxiella Burnetii. It is like ricketts, flourishes in animal faeces and urine and also in milk. It can be carried by sheep cattle and goats: anything which can get foot and mouth disease. It is spread to humans by inhalation of droplets of animal waste. Q fever is also known as "Balkan Grippe", or "query" fever. It is easily confused with flue complicated by Pneumonitis. It comes on about three weeks to a month after inhalation of the droplets. Anti-biotics work. The death rate in Q fever is less than 1%: even if untreated.

Insurers would be wise to ensure that areas around the burial sites are protected from this problem. Occupiers of land containing the burial sites have a special liability. It may be relevant to proposals for insurance cover.

5. RADIATION

5.1 Phone masts

No evidence as yet of any danger from the masts. Modern masts emit a good deal less radiation than the older styles.

5.2 There is evidence of danger from continued use of handsets: mobile phones. Warnings? Coverings?

5.3 X-rays and other medical machinery

Wrongly set machines: hospitals, dental surgeries, airports etc.

M.R.I. scanners. No evidence as yet of any risk.

C.D., or C.A.T. scanners: no evidence as yet of risk. These machines involved a high radiation dose especially to the human brain as well as to the chest and abdomen. Although there is no evidence yet of any risk, that was what was thought about ordinary x-rays. The machines were used in children's shoe shops, until the danger was identified. The machines disappeared overnight.

Spiral C.D. scan: an x-ray tube which rotates around the patient. It deals with a specified volume of tissue. It is digitally acquired, so it can be viewed in numerous plains.

Scintigraphy: a distribution of radio active tracer within the body. No dangers known: but something to be guarded against.

5.4 **Air travel**

5.4.1 Concorde cabin staff have to wear radiation badges. This is because the plane flies so much higher than ordinary planes and the staff are exposed to greater amounts of the sun's radiation.

Any "hotol" type aircraft will produce greater problems. Such planes, capable of making substantial journeys in a short time, fly outside the earth's atmosphere. The earth's atmosphere protects against the sun's radiation. It follows that, if you are outside that protective layer, the radiation is dangerous. The planes will have to have appropriate protection. It may not be sufficient to protect passengers, and regular flyers will need to take extra precautions.

5.4.2 Larger planes. There will be even more "infected" passengers who are emitting organisms which are infected. These will pass through the air conditioning system. If the system is not working properly, or is defective in some other way, all passengers are liable to be infected. It will be necessary to ensure that the air conditioning system is effective.

5.4.3 The same may be said of rail operators with air conditioned carriages. The difficulty for any claimant will be to prove that he got it in that train. If, however, there is a sufficient number who can say "we were all on that train", a judge will have no difficulty in finding liability.

6. LIABILITY RISKS: 2000-2001

6.1 Tampon toxic shock.

Are the warnings on the tampon packets sufficient?

6.2 Prolonged dependency stasis ("Economy Class Syndrome").

(1) Aircraft;

(2) Others.

6.2.1 Aircraft

Liability under the Warsaw Convention: automatic, no negligence required.

But liability is only imposed for an "accident".

The complaint here is that the passengers on planes stay sitting for a long time, and that they develop deep vein thromboses (DVT) as a result. It is not limited to economy class: first class and business class passengers stay seated also.

The airlines' current defence is that development of DVT is not "an accident". This defence has been sufficient to frighten off most claimants.

Accident (OED): "event without apparent cause, unexpected, unforeseen course of events, unintentional act, chance, fortune, mishap: irregularity and structure; a property not essential to our

conception of a substance (so of material qualities of bread and wine after transubstantiation); a mere accessory".

Airlines may have difficulty in establishing that DVT falls outside this definition. It may be however that the judges' definition of what an accident is will be of assistance to them.

The modern judicial attitude is to give words a "purposive" construction. This means that the words are meant to have a purpose. It will be said that, if the Warsaw Convention was drafted now, it would plainly include "just this sort of thing".

6.2.2 **Defences**

Would have happened in any event: especially true for older persons.

Airlines have done all that could reasonably be required.

(i) Exercise instruction – not once at the start of the flight, but every two hours.

(ii) Stockings – to be issued? No: could be bought, or could be requested by those who want them.

(iii) Instructions with tickets.

The simplest and cheapest is to put it up on the screen every two hours.

6.2.3 **Others**

Trains. Buses. Cars. Prolonged dependency stasis causing DVT: emphasis on the "prolonged" – it depends upon the duration of the immobility. How long are you sitting there? Very few journeys in trains and buses can last that long.

But train operators and bus operators should consider delays in their journeys caused by traffic jams, breakdowns or other commercial practicalities.

6.2.4 **Sun beds**

Sun beds cause cancer.

Dermatologists have said that putting a sun bed in a health club is the same as putting cigarettes machines in a health club. The source of light which alters the pigmentation of the human skin (turns you brown) is the of the same quality and wave length as the sun. There are likely to be significant numbers of "sun bed cancer" cases.

Liability cannot be excluded by contractual terms because it is a personal injury risk (The Unfair Contract Terms Act 1977).

6.3 **Transporting of nuclear waste materials**

6.3.1 This is usually by train and in protected flasks in respect of power generation. Danger is a potential if there is a breach of the flask and/or it occurs in an urban area.

Injury is:

(i) Later onset of cancers; and

(ii) Immediate fear of cancer; see the pleural plaques cases Church v MOD, Sykes v MOD.

The court will award damages for the continuing fear that "I am going to get cancer because of this". Provisional damages can be awarded if there has only been some modest injury (i.e. the pleural plaque) with a view to coming back for more.

6.3.2 Nuclear power stations on the western French coast allow any wind to blow to the U.K. Anything going wrong there: and we get it.

6.4 **Oil and chips**

Frying in beef oil is not acceptable to Hindus. Frying in vegetable oil is acceptable. When McDonalds found out that they were using beef oil, and not vegetable oil, Hindus were understandably angered.

There is more to cooking food than merely health. Religious sensibilities must be provided for. Mass producers of food must, in particular, be careful properly to label food stuffs and food products.

6.5 **Effect of U.K. aid on other peoples**

6.5.1 The U.K. Government is potentially liable before the English courts if they help to flood people out of their houses when a damn is built. Costs can be provided for this litigation by "Public Funding": the new name for "legal aid"."

6.5.2 Postulate large U.K. companies undertaking similar work, of providing aircraft or military hardware and weaponry to be used against civilians.

The argument is there. It would probably be defeated. But it needs to be guarded against.

6.6 **Protestors**

6.6.1 Those who disagree with the established order adopt ever more dangerous and determined ways to express, impose or enforce their views.

Green Peace members are often prepared to risk their lives – as well as those with whom they disagree – in pursuit of their ends. "Brent Spar" lost them some respect, and that has to be regained. Nevertheless, it put some people's lives at risk just to make the protest.

"Animal Rights" activists have shown a propensity to risk lives: and get themselves and others killed.

Huntingdon Life Sciences Plc have lost all their possible bankers, and have had to rely on the Bank of England to provide banking services. Their staff, and the staff of the banks that help them, have been attacked.

It is unlikely that these protests organisations have insurance. But each one would say that any of its people was acting outside the course of its membership: and so, even if they had any assets, they could not be enforced against. Whether successful or not, there will be claimants who have justifiable claims. Their lawyers will look to other organisations to protect them. Employers, occupiers and the police, it will be said, have failed to provide adequate protection.

6.6.2 In one case decided a few years ago the Welsh Secretary of State was in a car driven by a government driver. Students attacked the car, and one sat on its bonnet. The driver accelerated away, fearing danger to himself and to his minister. The protestor fell off and was injured.

The protestor sued the U.K. Government. A judge – who will remain nameless in this printed form – appeared to have no difficulty in finding that the driver was guilty of negligence.

6.6.3 The liability of employers for the safety of their employees will be extended to this situation. There must be physical protection of premises. Protective equipment must be supplied. Consideration of the risk at home, and at work, must be made.

6.6.4 Criminal Injuries Compensation Authority awards are wholly inadequate. Common Law damages are so much greater that injured employees will not be deterred from suing.

7. **MODERN DECISION**

7.1 A & Others v National Blood Authority & Others 2001 LLR (Medical) 186 (Pt. 5).

Hepatitis victims sued the Defendants because they got hepatitis through defective blood products. The claims were made under the Consumer Protection Act 1987 and the relevant EU Directive; but not in negligence at common law. Burton J. made three important decisions on the Consumer Protection Act 1987 and the Directive.

(1) Article 6: "a product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including (a) the presentation of the product; (b) the use to which it could reasonably be expected that the product would be put; (c) the time when the product was put into circulation."

The judge held that the actual consumer had an expectation that blood was 100% clean. It was not known nor accepted by society that there was a risk of infection of blood by hepatitis C. The expectation of the public at large was not limited to the fact that legitimately expectable tests would have been carried out or precautions adopted: it was impossible to inject into the consumer's legitimate expectation matters which would not by any stretch of the imagination be in his actual expectation.

(2) Article 7(e): The developer risks/discoverability defence. The Defendants contended that if a producer could prove that the existence of the defect had not been and could not be discovered in the product in question (that bag of blood), then

Article 7(e) gave a defence. The Claimant's argument was that the scientific and technical knowledge referred to in Article 7(e) related to the population of products in general, not the individual product in question.

The judge held that the defence in Article 7(e) did not refer to the defect in the individual product. The existence of the defect was clearly generic. Once the existence of the defect was known, then there was the risk of that defect materialising in any particular product. It was the knowledge of the defect in the product, not the knowledge of the precautions which could have been taken to eliminate the defect, which was relevant for the purpose of Article 7(e).

(3) Causation

The Defendant said that even with reasonable screening there might still have been infection from hepatitis C; so the damages would be on the basis of loss of a chance.

The judge held that the structure of the Directive and of the Act supported the Claimant's argument that once a causal connection is established between defect and injury, he was entitled to recover. The judge held that "loss of a chance" had no application in respect of causation of their injury. Issues of fairness for the Defendants were not within the Directive.

7.2 **Significant points**

(1) As a matter of law, it will be necessary to consider the Directive in preference to the Act.

(2) Before Burton J.'s decision many common lawyers, proud of its evolving tradition, consider that the Directive, and the Act, added nothing to liability in negligence. That is wrong. The Directive provides consumers with substantially enhanced rights and they go substantially beyond common law liability.

The expression on a package that says "this does not affect your statutory rights" refers, of course, to the Act – as well as to the Directive. The Directive is as much a statute as an Act of Parliament.

(3) One of the issues is whether the product is "a standard product" or a "non-standard product". This will be a question of fact for the tribunal to decide.

(4) It will be easier for the Claimant to succeed if what he has been provided with is a non-standard product.

(5) The manufacturer's warnings will be important when considering the harmful characteristics.

(6) The "development risks/discoverability" defence will be difficult to establish.

(7) The knowledge is:

"Not knowledge of the precautions required to eliminate the defect from an individual product, but knowledge that the defect exists in the class of product as a whole". (See p.295-Commentary"

(8) “The Manchuria exception” (“It is so obscure that we could not know”) is limited to unpublished material retained within a particular laboratory or company.

It is likely that this case will be considered by the Court of Appeal. I think it unlikely that the Court of Appeal will interfere with what Burton J. has decided.

8. **DAMAGES**

8.1.1 Multipliers: now 2.5% discount rate: see L.C. decision of July 2001.

The difference between 2.5% and 3% is illustrated below.

8.2 **Employment to 65: Table 25 Loss of earnings male to 65**

Age	2.5%	3%	Difference	£10k p.a.
20	26.50	24.31	2.19	£21,900
30	22.80	21.24	1.56	£15,600
40	18.03	17.10	0.93	£ 9,300
50	12.06	11.67	0.39	£ 3,900
60	4.57	4.52	0.05	£ 500

8.3 **Loss of Life: Table 19 male**

Age	2.5%	3%	Difference	£10k p.a.
20	30.74	27.55	2.89	£28,900
30	28.22	25.60	2.62	£26,200
40	24.93	22.92	2.01	£20,100
40	20.83	19.44	1.39	£13,900
60	16.11	15.16	0.84	£ 8,400

8.4 **Pension at 65: Table 15 male**

Age	2.5%	3%	Difference	£10k p.a.
20	3.04	2.35	0.69	£6,900
30	3.93	3.19	4.74	£7,400
40	5.09	4.33	0.76	£7,600
50	6.70	5.98	0.72	£7,200
60	9.28	8.71	0.56	£5,700

Note the anomalous figures in respect of pension at the ages 30, 40 and 50.

8.5 **Comment**

The big differences are going to occur in respect of loss of earnings claims for younger men and women; and in respect of care claims (life multipliers) in respect of younger people.

It used to be said, by experienced practitioners, that "the pension claim is £5,000". It is significant that that attitude has so changed that the increase in pension, because of the increase in multipliers, is substantially in excess of £5,000 for everyone.

The decision is susceptible to judicial review (at the time of writing: July 2001) by Claimants. The Lord Chancellor's reasoning appears to be substantially defective. By the time that this lecture is delivered, it is possible that any Judicial Review will have been dealt with.

8.6 **General damages**

Top of the range is £200,000: see Heil v Rankin.

But (i) Combination of blindness and irreducible pain.

(ii) Combination of tetraplegia and blindness.

(iii) (i) and (ii) above combined.

There is a figure in excess of £200,000 for very serious injuries which are above the range that the Court of Appeal were considering.

(The ability to hasten death in these circumstances seems unreasonably to have been withdrawn.)

8.7 **Housing**

8.7.1 The Claimant's tactic is to seek an interim payment to pay for the house. The award of damages will not pay for the house: it will provide funding for the purchase of the house, the capital value of that house being left at the end of the Claimant's life.

Once the house is purchased, and equipped, it is hard for insurers to say "this house is not reasonably required". ("Reasonably required" is the test in law).

So: avoid an interim payment situation. Do this:

(i) by getting to trial quickly.

(ii) by making global, or particular, Part 36 offers.

8.7.2 **The through floor lift**

(i) It fails safe to descend. If the power goes off, the man in the wheelchair is not stuck upstairs, but the lift will descend, at a safe speed, unpowered by electricity, to the ground floor.

(ii) A generator can be fitted to cut in automatically if power to the lift fails.

(iii) A good part of the "extra" costs of a bungalow are saved. Evidence will be needed from the housing expert.

(iv) Worked example

(a) Through floor lift.

Cost of fitting through floor lift:	£5,000
Annual maintenance:	£250 x 10: £2,500
Total:	£7,500

(b) Extra accommodation costs.

Cost of bungalow:	£225,000
Less of cost of house:	£140,000
Extra cost:	£ 85,000

Roberts v Johnstone	2%:	£1,700 x 10:	£1,700 x 10: £17,000
(a)£7,500:	(b)£17,000:	Saving £9,500	

8.7.3 An interim payment provided for the purchase of a house, but not used for the purchase of a suitable house, is clear evidence that the house claimed is "not reasonably required". It is not often that a claimant falls into this trap.

8.8 **Care**

8.8.1 An interim payment is often provided for care – but not used for this. This remains good evidence that the care claim is not reasonably assessed.

8.8.2 Care by family members

It is subject to the deduction for notional tax and national insurance: what the carer would receive in his/her hands, not the gross payment.

If there are two defendants, and one is also the carer (i.e. a husband or wife) then there is no care claim at all. This is because the tort feasor (one of them) is in fact providing the care and thus satisfying the claim. (see Hunt v Severs.)

This point is emphasised because some insurers seem unaware of this problem.

8.9 **Expectation of life**

Severely disabled people do not live for the same length of time as the fit. Evidence is however needed. Experience suggests that one or two should be taken off the standard (2.5%) multiplier.

8.10 **THE SCHEDULES**

8.10.1 The Claimant's Schedule

This is often produced far too late; or it is insufficiently quantified; or there are large areas of "to be advised" etc.

Get the court's order for a fully quantified schedule to be provided – including general damages.

Get an order that, if the schedule is not provided by a particular date, the proceeds are to be stayed.

The court will make such orders: because it enables claimants to get their money, as well as enabling the court to manage the cases.

Do not shrink from a Request for Further Information: plus an order for the Claimants to pay the Defendant's costs. Putting the pressure on the Claimant gets the claim quantified at an early stage, and at a reduced level.

8.10.2 The Defendant's Schedule

It must be realistic: not bottom of every available scale.

It can be used as a negotiating tool: "we want to provide a counter-schedule and to make an offer". Put a summary at the beginning: so the judge will see what the total figure is going to be.

This is a vital document: and has the force of a pleading. "Ha'parth of tar" point: insurers are wise to get counsel or (QC) to do this in large cases. I have too often seen points conceded in a defendants' schedule due to inadequate drafting.

9. PART 36 OFFER

9.1 Form of offer must fully comply with Part 36 of CPR to get the full benefit.

9.2 It must be realistic and not the bottom of every available scale.

9.3 It can be a shopping list: "Pik n' Mix". But: insurers must give detailed consideration to "if they accept items 1 and 3, but not 4 and 5, what arguments have we left?" Proper drafting of the Part 36 offer can save substantial costs.

9.4 To be made early. The Claimant's complaint is often "the defendant insurance company is delaying". But actually it is always the Claimant's solicitors who are dilatory. Once the Part 36 offer has been made all the members of the Claimant's legal team are at risk: the Claimant himself, his solicitor and counsel. Conditional fees mean that no risks are going to be taken once an offer is made. A Part 36 offer has even greater force.

10. UNDER SETTLEMENTS

10.1 Due to the eagerness of many solicitors just to get the case settled, the first offer is taken. There is likely to be a substantial market in "under settlement claims". These will be hard to establish, particularly if liability was an issue. They were however raised by trade union clients in deafness claims. At least one District Judge has refused to approve settlements in respect of children because too little has been proposed. But at that stage a barrister must have written an Opinion to say that the offer is sufficient. Insurers of defendants for the original proceedings are not at risk. If you make a good bargain, and the Claimant accepts too little, you are safe. The claim cannot be reopened.

10.2 Those insuring other advisers, such as solicitors, counsel, and claims handling agents are at risk of such claims.

10.3 Get counsel (or even QC) on your side early on. The marginal extra costs will be saved by the advice on settlement, on available evidence, and on how to get out of this case most economically. (This is the experience of Norwich Union – and others.)

11. **Costs; Conditional Fee Agreements and Legal Aid**

11.1 QC's fees

The test in law for the recoverability of a QC's fees was dealt with in Juby v London Fire & Civil Defence Authority 1990:

> "The nature of the case, including in accident cases, the nature and severity of the plaintiff's injury, the likely duration of the trial, difficult questions regarding quantum of damages including medical evidence and questions of facts, difficult questions of a fact, including expert engineering evidence, or issues as to causation, its importance for the client, the amount of damages likely to be recovered, the general importance of the case, e.g. as affecting other cases, any particular requirements of the case, e.g. the need for legal advice or for special expertise, e.g. examining or cross-examining witnesses, and other reasons why a senior and experienced advocate may be required".

In R v Dudley Magistrates' Court ex parte Power City Stores 1992 the court said that the correct question is not "whether the case is within the capabilities of junior counsel" but rather "whether or not it is unreasonable to instruct leading counsel".

When challenging the instruction of a QC the foregoing is appropriately used.

11.2 Equally, look for counsel's "Note for Detailed Assessment". If this is not produced, counsel will have nothing with which to justify the fee. See Lloyd J. in Armitage v Nurse at 2000.

The difference between a QC's fee and the amount of damages saved will be substantial: to insurers' advantage. When acting for claimants I have been well aware that I can get a good deal more by way of damages for my client because insurers have not instructed a QC. Put

differently, with a QC against me, insurers would have achieved settlement at a good deal less.

11.3 **Conditional fees**

Once there is an offer, the Claimant's lawyers become at risk for their own fees: the risk is between "fees plus uplift": versus "nothing at all". The result is that they take very low offers.

Insurers are well advised to deal with settlements as follows:

Make offers early.

Make modest offers.

Claimants are likely to accept these, before the claim has been properly quantified.

11.4 **Larger cases**

The old tactic is to obscure the full value of the claim until the maximum amount of costs have been expended. Insurers can defeat this by:

(i) getting the schedule properly quantified (including general damages); and

(ii) getting the action stayed if the Claimant's schedule is not produced.

The problem facing solicitors is that they sign up claimants on conditional fee agreements before they know enough about the case.

The only evidence they have, when the claimant is signed up, is what the Claimant says. They are therefore at all times consistently concerned by what they could lose because "something may go wrong". All of us have been surprised by an event, a piece of evidence, or a statement which is revealed only very late on in the litigation.

- The Claimant is exaggerating.

- A document revealed on disclosure defeats the claim.

- Pre-existing medical conditions defeat the claim.

- The video evidence helps.

11.5 **Legal Aid: public funding**

The Legal Aid Certificate is replaced by the "Certificate of Public Funding".

The funding represented by "Legal Aid" has not wholly disappeared, but it has been substantially emasculated by rules for public funding. In particular there remain "High Cost Cases"; and cases with a public interest.

High Costs cases: the high cost is the cost of investigation, not what the solicitor would like to incur.

Most severe injury cases will be in this category. This is because the quantification of these claims is expensive. All the people who provide evidence about care, housing, loss of earnings and the medical evidence turn out to be quite expensive.

Much clinical negligence work is in "High Cost Cases".

Examples where Certificate of Public Funding given

(i) Woman whose Legal Fees Insurance ran out at £25,000. Inadequate offer made. Certificate of public funding given. Defendants allege that she deliberately simulated her psychiatric condition. Was it worth £500,000, or £5,000?

(ii) Brain damaged woman who believed that she had been sexually assaulted by carer's employee. Not necessarily high value: but very complex; and important on duty of care and breach of duty.

(iii) Duty of bailiffs to those whose debts they collect: certificate of public funding for House of Lords sought.