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TOXIC TORTS – THE RISK FOR INSURERS

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INTRODUCTION

1.1 Baptism by fire

My introduction to the world of Toxic Tort litigation was on the 13 February 1989, in a remote area of mid-Wales in the freezing cold and with snow on the ground.

I had been asked to attend a meeting by Public Liability Insurers dealing with a "potential difficulty" (their words, not mine).

The insured supplied major tyre retailers with remould tyres. They took away those tyres the customers did not want and tipped, under licence, those tyres they themselves could not use. This had been going on for at least 25 years. The tipping was into a local ravine and required shredding of tyres, specialised back-filling with soil, and environmental back-filling.

Along the bottom of the ravine, covered over many years previously, ran a culvert through which flowed fresh water from the mountain. This water course fed the rivers Tame and Severn, from which the drinking water was extracted.

During the evening of Sunday, 29 October 1989, a fire was reported at the front of the ravine. The Fire Brigade was called, stayed on site for three days, by which time the fire on the tip was extinguished but the subterranean fire still burnt.

The initial fears were:–

- the air pollutants coming from the fire and their possible effect on neighbouring farmers, livestock and crop.

- water pollutants and the effect on the livestock who drank from the water downstream and any pollution into the rivers.

- the effect of any exposure to the fumes by company employees. Since the fire began the tip had to be monitored constantly to check for flare-ups, which were occurring on a regular basis.

Following a site visit (which included steam rising up from underneath the snow) a meeting followed with representatives from HM Inspectorate of Pollution, the Local Authority, the Fire Brigade, the National Rivers Authority, our experts together with insured and insurers. The claim file was open.

1.2 Increase in Claims

Toxic Tort and pollution claims are on the increase. From claims of water pollution by windsurfers to the clean-up and development of contaminated land the issues are broad in scope and the amounts of money at stake can be large. The legal issues are complex and the law is evolving, new liabilities and potential liabilities are constantly arising. It must be an area of concern for insurers.

There are a number of reasons for the increase including:

1.2.1 The relaxation by the Law Society of the Rules on advertising, thus allowing an environmental lawyer to contact individuals who may be affected by, for example, environmental pollution.

1.2.2 There are specialist lawyers who understand the potential difficulties and complexities but who, possibly working with self-help groups or victim groups, will be able to initiate the litigation.

1.2.3 The introduction of a special procedure by the Legal Aid Board for dealing with the multi-party personal injury. This has allowed multi-party litigation to become centralised with specialist firms fronting the litigations.

1.2.4 There may be legal insurance which could cover the claim as part of the household insurance of the individual.

1.3 Definition

Where an individual has suffered damage to person, property or quiet enjoyment or there has been damage to the local environment as a result of environmental pollution.

This covers therefore chemical and radioactive waste, nuisance from dust or noise, damage from the dumping of industrial waste.

OVERVIEW OF DECIDED CASES

2.1 Recent trends and developments

There have been a number of important toxic tort decisions recently which give an induction of the risk these claims pose to insurers.

2.1.1 Sellafield Leukaemia cases

Judgment in this case was given by Mr Justice French in October 1993. The case was based entirely on expert evidence, no client or witness gave evidence. It lasted a considerable period and a majority of that time was taken up with expert evidence on epidemiology and genetics. The judge decided that the Plaintiffs had not been able to prove their case "on the balance of probabilities". He accepted, having heard all the experts, that radiation remained a possible cause of the leukaemia but not a probable one.

Causation was the primary issue with 35 experts writing reports and giving evidence for each side. I have seen a precis of the Judgment and it is certainly a very impressive read.

2.1.2 Camelford Water Contamination cases

As a result of the mistaken tipping of aluminium in the water supply a large number of local residents in the Camelford area claimed varying levels of damage including small claims for short periods of sickness and other minor injuries that occurred immediately after the incident. There were also some claims in respect of longer term problems, including mental and cognitive impairment, allegedly caused by the aluminium.

A number of these cases were settled where the levels of compensation were at a figure somewhat above compensating only for the minor ailments but below a claim for mental difficulties. The causation argument may well have been the difficulty.

2.1.3 Croyde Bay Beach

Mr Saltmarsh, the owner of Croyde Bay claimed against South West Water alleging that they were trespassing and causing a nuisance to his property, by allowing sewage to emanate from two outlets near his beach, leading to raw sewage and other debris to flow back onto the beach. Settlement was reached with South West Water in May 1994. The terms of settlement were confidential but they did include, I believe, a term requiring South West Water to take a number of steps to ensure that the sewage system was dramatically improved and that there was therefore a large reduction in the pollution levels in the area.

2.1.4 Cambridge Water Company v Eastern Counties Leather Limited (1994)

For a number of years prior to 1976 there had been spillages of a chemical at Sawston Mill operated by Eastern Counties Leather as a tannery. The chemical percolated through the ground layers finding its way into ground waters. In 1976 the Cambridge Water Company acquired the site for the extraction of water and it commenced pumping water in 1979. This water contained high levels of PCE (which was the chemical spilled at Sawston Mill). In 1983 as a result of the raising of EC standards, Cambridge Water was required to stop extracting the contaminated water. They claimed damages as a result of the contamination.

Their action for negligence and nuisance failed at first instance. I have no doubt that the House of Lords judgment has been considered by most present in detail. It is generally thought that the decision both narrowed the future use of the *Ryland v Fletcher* argument and at the same time confirmed it as a respectable element of the law of nuisance, thus increasing its potential in a larger number of cases.

In my view the "revitalised" principle has a future in environmental litigation. It should apply to isolated pollution incidents.

Polluters who kept material on their land which would not naturally be there, which material it was foreseeable might do damage on its escape, and which material did escape are liable for the damage which was the foreseeable consequence of such escape. The polluters are not at fault.

The circumstances therefore must be of interest to insurers who have confined their exposure to specific instances of pollution. There are other cases to be considered including the William Gaskill case.

DEFENDING THE CLAIM

3.1 Initial Response

The initial response to the claim by the Defendants, and consequently by the insured, will usually be a vigorous denial of all allegations. This has been the line taken by both London Docklands Development Corporation, the Docklands Regulatory Body and Olympia and York in the claims against them by the Docklands residents and by ICI and British Steel in the claims of the Grangetown Families alleging the link between childhood asthma and proximity to their plants.

The reasons could be:–

- In multi-party toxic tort litigation defeat for the Defendants can be extremely damaging, not least because of the prospect of the company having a whole series of further actions from people living near to their various plants.

- The public image could be irretrievably damaged if they lose. What does the "ordinary man on the Clapham Omnibus" recall of the Bhopal Company?

- The Defendants are entitled to make representations to the Legal Aid Board. This was used by British Nuclear Fuels plc in the Sellafield claims

and by solicitors for the tobacco industry when dealing with the passive smoking litigation.

- In many cases there will be many other factors that will come into the decision of the Company whether to fight or settle. There may be tactical reasons connected with the original problem which lead to a particular course being taken.

Given the need to understand the industrial process, the composition of, for example, the waste and the need for experts, this denial of liability initiates the "clock running" on costs – a concern for insurers.

3.2 Causation

As has been shown from the decided cases this can be a large hurdle for the Plaintiff to overcome. There have been a number of important decisions.

3.2.1 *McGhee v National Coal Board (1973)*

The House of Lords held that it was sufficient for the Plaintiff to show that the Defendants' activities had *materially increased* the risk of the Plaintiff's injuries, even though it remained uncertain whether the Defendants' activities were the actual cause or not.

Although this does appear at first sight a good decision for the Plaintiff the facts are far removed from those of many toxic tort cases. It is an EL case.

In this case the Plaintiff worked in a brick kiln where he was continually covered in brick dust. The Defendant had failed to provide washing facilities for the Plaintiff, who developed dermatitis. Medical evidence could not establish whether the Plaintiff had been able to wash he would not have contacted the disease.

3.2.2 *Hotson v East Berkshire Area Health Authority 1987*

In this case the House of Lords held that the burden still lay upon the Plaintiff to prove that the negligence more probably than not caused

the injury. It was accepted however that causation would be proved if it were shown that the negligent act "was at least a material contributory cause" of the injury.

3.2.3 *Wilsher v Essex Area Health Authority 1988*

In this case the Plaintiff's blindness could have been caused by any one of the four possible conditions. The Plaintiff was unable to show that the cause complained of was any more likely than the competing causes. The House of Lords held therefore that the Plaintiff failed because he had not established, on a balance of probabilities, that the injuries were caused by the Defendant's breach.

Consequently the *initial* aim on arguing causation must be to adduce some evidence that there are other competing possible causes of the Plaintiff's condition.

3.2.4 The distinction must be drawn between generic and specific causation.

a) Generic Causation
This is the proof that the substance or activity to which the Plaintiff is exposed is or was capable of causing the harm he actually suffered.

b) Specific Causation
This is the proof that the actual injury or damage suffered was caused by this particular Defendant's activities or products.

When dealing with a general public health or occupational health case, generic causation will need to be proved.

An example of this is the EMF Debate – are low level EMFs capable of causing childhood cancers? (see below).

Specific causation presents a number of problems for the Plaintiff. Many harmful substances can be found in background levels and the Plaintiff must prove that the injuries are not caused by these background levels. There may be more than one producer of the toxic

substance and more than one potential Defendant. The Plaintiff must prove that his injuries were caused by the *particular Defendant* in the action.

It may well be that the Plaintiff is able to adduce sufficient evidence of generic causation. It might be more important for the Defendant to attack the specific causation argument.

Both of these are branches of causation which will have to be attacked.

3.3 Cause of Action

It will be important for the Defendant insured to look carefully at the cause of action and the remedies available. It will have an effect on the attitude of the Defendants to the litigation.

3.3.1 Negligence

An action for negligence has certain advantages for the Defendants. No injunctions will be available. Pure economic loss is not recoverable. Exemplary or aggravated damages are rarely recoverable. The Plaintiff will have to establish fault.

3.2.2 Private Nuisance

This is the "unlawful interference of the persons use or enjoyment of land, or of some right over or in connection with it".

An injunction may well be an available remedy, as well as exemplary and/or aggravated damages. The fact that the Defendant has used "the best practical means" is not an absolute Defence.

The Plaintiff must have an interest in land.

There will usually be an element of either physical injury or sensibility (complaints of discomfort and inconvenience caused by noise, smell, dust).

A distinction must be drawn in that in negligence a finding of fault is required. In nuisance the Defendant may be found to have taken all reasonable care to eliminate or abate the nuisance but still be found liable in nuisance.

It should be pointed out that the use of "the best practical means" can be conclusive in a statutory nuisance claim but not in a private nuisance claim.

The Defence of statutory authority will need to be considered. In practice, once nuisance has been established the burden is effectively transferred to the Defendant to show that it has excercised all reasonable care to minimise the nuisance to the extent that it is able to do so, so immunity has been given. (*Tate and Lyall Industries Limited v GLC* [1983], *Department of Transport v North West Water Authority* [1984]).

There is a comprehensive system of licensing introduced under the Environmental Protection Act 1990.

Following the case of *Gillingham v CV Medway (Chatham) Dock Company* [1991] the existence of an operating licence or permit granted by a statutory authority may well be a good defence against a nuisance action.

Coming to a nuisance is not, in itself, a sufficient defence.

3.3.3 Public Nuisance

In principle a public nuisance is a criminal offence. In the Camelford Water contamination cases South West Water Authority were prosecuted for public nuisance.

The essential ingredients are an actionable wrong and a material effect on a large number of people.

At all times now, proceedings to be brought under the Environmental Protection Act 1990 are to be brought by the local authority.

The remedies available for the Plaintiff where public nuisance can be used, are wide including economic loss, personal injury and injunctions.

3.4 Evidence

3.4.1 The Burden of Proof

The legal burden is on the Plaintiff who must proof causation on the balance of probabilities. The evidential burden is with the Plaintiff but can change if the Plaintiff is able to show some credible evidence of causation.

3.4.2 Convictions

A Summons should at all times be notified to Insurers. A conviction for a criminal offence, where material to the accident or incident, can be pleaded in civil proceedings. This will most often be used in a public nuisance action.

3.4.3 Res ipsa loquitur

This is often pleaded. It can however only be used effectively against the Defendants:–

3.4.4 When the event does not usually occur without negligence;

3.4.5 When there is no evidence as to why or how the event occurred;

3.4.6 When the activity inflicting the harm was under the sole management or control of the Defendants.

From Insurers' point of view some comfort may be gained from the pleading of res ipsa loquitur as it may show that they have no other evidence to establish negligence.

3.5 Expert Evidence

In toxic tort cases negligence is often decided by reference to experts who give their views on whether or not the Defendant has exercised reasonable care to avoid the Plaintiffs injury. It is of vital importance that such experts are the correct experts who have been properly briefed and who understand the issues. Clearly in the larger toxic tort cases there will be world authorities giving evidence. Note the number of experts used in the Sellafield case.

However, it will be important to address to the experts those issues that they will need to concentrate on given that the probability of the accident or event complained of will occur, the gravity of the resulting injury if the accident or event does occur and the costs of the Defendant avoiding the accident.

The type of evidence that you may well be faced with are:–

3.5.1 Evidence of direct effects and genetic effects;
3.5.2 Toxicological evidence;
3.5.3 Biological evidence;
3.5.4 Epidemiological evidence.

CURRENT ISSUES

4.1 Electro Magnetic Fields ("EMF")

It would be impossible to do a talk on toxic tort without reference to electro magnetic fields.

Often described as the "next asbestos", liability for injuries allegedly caused by exposure to electro magnetic fields is ever increasing in attention from the news media, the utility companies, the manufacturers and their insurers.

The possibility that an electro magnetic field may pose a human health hazard has generated a great deal of controversy in the scientific community as well as widespread opposition to power line construction.

EMFs are generated by electrical transmission and distribution systems, home wiring, electrical lighting and appliances such as microwaves, electric blankets, computer terminals, cellular phones. They are a form of radiation which can be measured in a number of different ways and by using a variety of different

units. An electric field is a description of the electric force in an electrically charged object. The strength of the field generated depends on both the nature of the source and the distance the person or object is from the source. The litigation began in the United States.

Whilst there is a vast amount of data available the conclusion appears to be that there is some indication that exposure to the EMFs may have biological effects. From the United States the following cases are of interest:–

4.1.1 *Criscuola v Power Authority of the State of New York.* The Court ruled that landowners whose property is taken for the construction of high voltage power lines can collect damages of the value of the remainder of their property to increases due to public fear regarding the safety of the power line. Previously Courts had held that the fear alone was not compensationable.

4.1.2 *Bendure v Kustom Signals Inc.* The Plaintiff, a highway patrol officer who used a radar gun daily, alleged that he had contracted cancer from the leaking radiation. The case was successfully defended.

4.1.3 *Zuidema v San Diego Gas & Electric.* Mallory Zuidama, a young child, had developed a Wilms' tumour (a rare form of kidney cancer) as a result of her exposure (allegedly) to EMF emitted from a distribution line which ran down an easement between the Plaintiff's property and the neighbours' home. The judgment was in favour of the Defendants after only four hours of jury deliberation.

4.14 In this country there is the case being brought by Martyn Day of Leigh Day & Co. concerning Mr and Mrs Studhome who are suing Norweb. They argue that their son's death of leukaemia at the age of 13 and his sister's epilepsy were caused by EMFs generated by a sub-station three yards away from their house.

I do not believe that any Court in Europe or the United Kingdom has considered suggestions that EMF can cause leukaemia, tumours or other forms of cancer. I understand that there are currently 318 EMF research projects underway in 21 countries. Of these, 134 are in the United States.

In the Occupational Health Review from March/April 1995, a study just published in the United States has revealed a slightly greater risk of brain cancer in electricity power workers, when compared with similar workers not exposed to electro magnetic fields. However high exposure to EMF did not increase, the study says, the risk of leukaemia. The jury is still out as to whether there is true causal link. Scientific proof has not yet been reached. The debate continues.

4.2 Dioxin Claims

One of the greatest potential environmental concerns from the legal press and the media is the increasing number of dioxins emanating from incinerators. A dioxin is usually formed by the incineration of toxic substances at temperatures which are not sufficient to enable the substance completely to vaporise. Dioxins can also occur as a by-product of certain pesticides. Depending on which papers you read there is evidence that dioxins are tetetragenic (i.e. caused birth deformity), fetotoxic (i.e. cause abortions) and that the may cause certain types of cancer.

There have been a number of Coalite dioxin claims where, in out of Court settlements, three farmers have been compensated by the Coalite company for damages to their farming livelihoods caused by dioxins from their plants.

There is litigation going on at present where local residents are claiming for damage caused to the property, particularly in relation to the property blight, as a result of the dioxin levels in the vicinity of the plant.

There is an action by a farmer who lived and worked next to the RECHEM-owned waste incinerator in Bonnybridge, Scotland. The Plaintiff alleges that the dioxins emanating from the plant damaged his herd resulting in his sustaining a serious loss. The case has now concluded, having run for over a year, and judgment is to be given in early April. Watch this space.

4.3 London Docklands

I mention these two separate actions running which will no doubt take the toxic tort litigation arguments forward.

A large number of residents are suing the London Docklands Development Corporation for the dust nuisance caused by the continuous building works over a number of years during the development of the dockland area and Canary Wharf.

Further, in a second claim they claim for the disruption to their television reception, claiming that the Canary Wharf building blocks out the TV signals from Crystal Palace. Judgment on a preliminary point has already been given confirming that interference with TV reception is an actionable tort and that the statutory authority to build Canary Wharf did not defeat that. In favour of the Defendants the Judge held that the Claimant had to have a proprietary interest in the property (owner or tenant). The decision is being appealed. No doubt this litigation will continue for a while – a concern for insurers.

FUTURE TRENDS

As if this is not sufficient, there are a number of "noises" coming across the sea indicating other claims are on their way:–

5.1 Stray voltage claims

Utility companies are faced with an increasing number of claims for the physical damage caused by electricity that leaks from power lines in the form of "stray voltage". These claims at present are localised to the area where farming is prominent. Animals have a lower tolerance to stray voltage than humans. Detection of the problem often comes after the damage is done. Stray voltage refers to the phenomenon where electrical current flows through the earth's searching for a conductor. They have generated a great deal of publicity in the United States. A number of actions have settled with confidentiality clauses but some have been thwarted as settling for six-figure numbers.

5.2 Liability for Lead Paint Poisoning

These are childhood lead poisoning campaigns against landlords and property owners. These are complex in that the alleged damage caused is difficult to measure. They often involve any variables, other than the possible lead exposure which may be the approximate cause of the

problems, i.e. parental drug or alcohol abuse, absence of a parent in the home. A jury has awarded a figure of $10m.

5.3 Work Place Diseases

Although these strictly may be covered by an Employers Liability policy, there are a number of problems which may be covered by both losses including:–

- sick building syndrome
- passive smoking

The size of the potential is best illustrated by the topics completely untouched by this "whistlestop tour".

1. Pollution Claims

   1.1 Is there cover or not

   1.2 The triggers of coverage

   What are "events", occurrences" or "loss or damage" for the purpose of this insurance against Toxic Tort.

   1.3 Is historic pollution covered by old Public Liability policies

   1.4 Will pre-1990 policies prove to be a Claims timebomb (following the 1992 ABI Circular)

2. The growing need for Environmental Improvement Liability (E12) cover as environmental legislation in the statute book is enforced and further legislation is enacted in the UK and in the EU.

3. Lender Liability

   - Will the court impose lender liability for historic contamination

   - The lender, as "owner or occupier", shadow director, causing or

knowingly permitting a contamination.

4. For the future – How to best assess or manage environmental risk.

BROKERS DUTIES AND DILEMMAS
by Julian Flaux Q.C.

1. The received wisdom as a matter of English law is that an insurance broker is the agent only of the assured or of the reinsured who employs him to place or administer a contract of insurance or reinsurance and owes duties exclusively to that principal and not to the insurer or reinsurer with whom he is placing the relevant contract. As a matter of general principle, this is undoubtedly correct, save in special cases.

   (a) Where by his words or conduct the broker assumes a duty to the insurer. Examples of these may be found where (a) the broker undertakes to do something which imposes a personal responsibility owed to insurers such as in *The Zephyr* [1984] 1 Lloyd's Reps. 58, [1985] 2 Lloyd's Reps. 529 where the broker who gave a signing indication was held to owe a duty of care to the reinsurers or *Pryke v. Gibbs Hartley Cooper* [1991] 1 Lloyd's Reps. 602 where a broker who was an intermediary undertook a specific responsibility to the insurer where the broker would not otherwise have owed a duty. The decision in *Pryke* reaches a contrary conclusion to that reached by Mr. Justice Hirst in *IGI v. Kirkland Timms* (1985) unreported that where a broker is an "intermediary" he owes a duty to both insured and insurer. The conclusion in *Pryke* is to be preferred.

   (b) Where the broker is also a coverholder pursuant to a binding authority or brokers' cover granted by insurers to the broker. In such cases the broker acts as an underwriting agent for the insurers in accepting business to be bound under the cover, and owes the insurers, both in contract and in tort to take reasonable skill and care in and about the selection and acceptance of business and the communication of relevant information to the insurers – see for example *Woolcott v. Excess Insurance Co.* [1979] 1 Lloyd's Reps. 231 [1979] 2 Lloyd's Reps. 210.