AN INSURANCE CONTRACTS ACT FOR A NEW CENTURY?

by Sir Andrew Longmore

The Pat Saxton Memorial Lecture

I need hardly say what a great honour it is to be invited to give this lecture to you this evening in honour of Pat Saxton.

I regret that I did not know him personally. By all accounts he was a remarkable and much loved man. His insurance career began, I think, with the Caledonian Insurance Company; he later joined Willis Faber and broked French Marine Hull risks, in particular. He thus had experience on both sides of the insurance fence, both broking and underwriting. He joined the Chartered Insurance Institute as a Careers Advisory Officer and became its Director-General. He was a tireless and humorous organiser of the British Insurance Law Association and was also chairman of the BILA Charitable Trust meetings under whose auspices I am lecturing this evening. In 1974 he published "Allured to Adventure" a book which explained to young people how alluring an adventure the insurance world could be. He had a strong religious faith and, I understand, compared service in the Merchant Navy to the service Jesus required of his disciples who were, after all, themselves fishermen.

With all the burdens that he willingly undertook I doubt if he would have altogether approved of the Aesop fable which I would like to take as a slight theme running through this lecture, the fable about one master being as good as another. It is well-known.

A timid old farmer was grazing his ass in a meadow when all of a sudden he was alarmed by the shouting of some enemy soldiers. "Run for it" he cried "so they cannot catch us". But the ass was in no hurry and said slowly to his master "Tell me, if I fell into the enemy's hands, do you think they will make me carry a double load?" "I should not think so" replied the old farmer. To which the ass replied

"Well then, what does it matter to me what master I serve as long as I only have to bear my usual burden."

It is thought by scholars that the fable dates from the time of the death of Tiberius whose back everyone was glad to see, until they realised that in his successor, Caligula, they had an even more capricious tyrant. Be that as it may, my theme will be that, whatever government is in power, the ass (or as I shall now call him - the insured) has had to bear the same burden for too long. The time has come when, whatever master he has, the burden should be a lighter one.

There are numerous areas where reform would be useful and some where it is essential. Piecemeal proposals for reform have not worked well in the past; reform elsewhere in the world is made more difficult by the fact that the City of London remains the leading insurance and reinsurance centre of the world. Other countries are somewhat reluctant to adopt reforms if the risk is likely to be reinsured by a significantly different law. The time has come when, in my view, both the law and the market should adopt sensible reform across the board. There has been some reform in the area of what I may call insurance by consumers as a result of the Unfair Terms in Consumer Contracts Regulations 1994/9 but it does not extend to business insurance or to the general law of avoidance for non-disclosure or misrepresentation; proposals for reform of business insurance have fought shy of reforming marine and aviation insurance as well. Part of the problem in England has been the fact that marine insurance is codified. As everybody knows, three important things happened in 1906, the first of which was the return of a reforming Liberal Government after many years in opposition, and the second being the enactment of the Marine Insurance Act 1906. In its time, the Act was never intended to reform the law but was a brilliant synthesis of a maze of common law decisions; the Bill was first introduced in 1894 and was thus as well considered as any Act of Parliament, despite one MP saying rather oddly that the Bill was 20 times more complicated than Arnould. Now, a century later, it is operating as too tight a straitjacket. The best way of celebrating Sir Mackenzie Chalmers' considerable achievement would be to have an Insurance Contracts Act of say 2002 or even, if necessary, 2006 to mark the centenary of the 1906 Act so that it might be possible to enact sensible reform for insurance law as a whole.

One of the milestones in the twentieth-century development of the law of insurance was the publication of the Law Commission's Report 1980 entitled "Insurance Law: Non-disclosure and Breach of Warranty", much of the work on which must have been done personally by the Chairman Mr Justice Kerr, himself one of the leading practitioners in the law of insurance. The last Labour Lord Chancellor before the present one (and those words show how long ago it must have been) had asked the Law Commission "to consider the effect on the liability of an insurer, and on the rights of an insured, of

(a) non-disclosure by, or on behalf of, the insured;

(b) misrepresentation by or on behalf of the insured;

(c) breach of warranty by the insured;

(d) special conditions, exceptions and terms;

(e) increase and decrease of risk covered"

all particularly in the light of a proposed EEC insurance Directive which, in fact, never materialised. The eventual report confined itself mainly to considerations of non-disclosure and breach of warranty and to castigating the proposed Directive as unworkable in England and Wales largely because it thought the proportionality principle espoused by the Directive was impractical. The Law Commission stated that the law of non-disclosure and breach of warranty was undoubtedly in need of reform and that such reform had been too long delayed. As far as any competing reform of the law along the lines contained in the proposed Directive they stated: -

> "It is highly desirable, in our view, that an early decision be taken as to whether the proposed Directive is likely to prove satisfactory and whether it is worth holding up much needed law reform here for what may be a remote prospect of agreement on a satisfactory Community instrument. On no view, we suggest, should reform of our law be delayed indefinitely."

Well, the Directive has not been enacted; I do not know what the Law Commission had in mind by their firm view that reform of the law should not be delayed "indefinitely". So far it has been 21 years.

The main proposals of the Law Commission report are well-enough known and it is not possible for me to do them proper justice in a talk of this kind; for present purposes I will summarise them in six propositions by saying:

1. The duty of disclosure should remain but a fact should only have to be disclosed if:

   (a) it is material in the sense it would influence a prudent insurer in deciding whether to accept the risk and, if he accepts it, on what terms;

   (b) it is known to the insured or would be ascertained by a reasonable person applying for the insurance;

   (c) it is something which a reasonable person in the position of the applicant would disclose to his insurers.

One might call this the reasonable insured test.

2. The standard required for answers by an applicant for insurance to questions in proposal forms should also be that of a reasonable insured on the above basis; explicit warnings should be given of that standard and also in relation to the duty

of disclosure, apart from the proposal form, a copy of which should always be left with the insured.

3. A provision whereby answers in a proposal form become an agreed basis of the contract, thus allowing the insurers to escape liability for any minor departure from that basis, should be ineffective, so far as it related to past or present fact.

4. Only terms material to the risk should be capable of being warranties in the technical sense in which that word is used in insurance policies; and insurers should not be able to rely on a breach of warranty when the breach of warranty would not have increased the risk that the loss would occur in the way in which it did occur.

5. Voluntary measures of self-regulation such as the Statements of Insurance Practice whereby insurers volunteer not to rely on their strict entitlement under the law are no substitute for proper law reform.

6. The recommendations would not apply to marine, aviation and transport insurance, save to the extent that the Secretary of State might make special provision for private consumers such as yacht-owners. This was because the Law Commission thought the law worked satisfactorily in that area since MAT contracts were generally effected by professionals operating "*in a market governed by long-standing and well-known rules of law and practice who would reasonably be expected to be aware of the niceties of insurance law*" (para. 2.8). For much the same reason reinsurance was also exempted save that insurers would be bound by any new law as to non-disclosure and breach of warranty in the same way as it applied to their reinsured.

It is instructive to ask what has happened to this comparatively modest, though very well thought through, proposal for reform by the Law Commission. The answer seems to be nothing at all. With what might seem commendable speed, the Department of Trade on 31 October 1980 circulated a consultation paper seeking views on the recommendations of the Law Commission but poured a substantial douche of cold water on them by stating that it would "seem better" (note the weasel word "seem") not to introduce domestic legislation in advance of any decision by the Council of Ministers on the adoption of the proposed Euro-directive "*until the results of substantial discussions by the Council of Ministers and its supporting bodies can be judged*".

A short debate took place between 10.48 and 11.50 at night on 3rd June 1981 in the House of Commons when Mr Reginald Eyre, the Under-Secretary of State for Trade, invited the House to take note of both the current draft of the European Directive and the Law Commission report. Members on both sides of the House complimented the Commission on its work but Mr Eyre would not be drawn by opposition members to state when he would conclude the consultations apparently begun by his Department in October 1980.

In November 1981 the Department reported to the Law Commission as recorded in the Law Commission's 16th Annual Report p.17: -

> "consultations have . . . confirmed the wide divergence of opinion between consumers and others who want legislative reform, and insurers who see no call for radical or urgent change in the present law and practice of insurance. We have been informed that further discussions will probably be needed before the Government can reach firm conclusions on our report."

I think the "we" in that sentence must refer to the Law Commission itself.

The result of those discussions was that the Department did, three years later, promote a bill, in 1984 based on the Law Commission's recommendations save that the insurance industry persuaded the Department that it should not merely be marine, aviation and transport insurance that should be excluded from its scope. Also excluded were all forms of business insurance, leaving only private consumer contracts to be covered by the bill.

Even this modest proposal never got very far. On 20th December 1984 the Parliamentary Under-Secretary in what was now the Department of Trade and Industry informed the House of Commons (and wrote to the Law Commission to explain) that he was embarking on discussions within the insurance industry and that a review had been put in place to see whether legislation would be appropriate and feasible in the light of discussions with the insurance industry. A decision had apparently been made to wait to see whether changes could be made to the Statements of Insurance Practice to deal with the problems in the areas of non-disclosure and breach of warranty. This provoked Mr Peter North (as he then was), one of the Law Commissioners who signed the 1980 report, to ask in Volume 101 of the Law Quarterly Review what on earth the Under-Secretary thought his Department had been doing for the last four years; he added

"The suspicious observer might conclude that the insurance industry lobby has been active behind closed doors and has in fact won."

This cynical observation derives considerable support from the Under-Secretary's statement that the discussions at that stage were with the "insurance industry" and thus not, presumably, with any bodies outside that industry.

More than a year then elapsed before Mr Channon, now the Secretary of State for Trade and Industry, gave a written answer in the House of Commons on 21st February 1986 to a question asking what progress he had made in his review of the position on non-disclosure and breaches of warranty in contracts of insurance. That answer is worth quoting from Hansard for that day columns 356-357: -

"The insurers have informed me that they are willing to strengthen the non-life and long-term statements of insurance practice on certain aspects proposed by the Department. These concern the limitation of the duty of disclosure, warranties, disputes procedures and, in the case of the long-term statements, the payment of interest on life insurance claims. The statements apply to insurance taken out by private consumers. Copies of the texts of the revised statements have been placed in the Library.

These changes are in the right direction. I am well aware of the arguments, advanced amongst others by the representatives of consumers, in favour of legislation on non-disclosure and breach of warranty. But I consider that on balance the case for legislation is out-weighed by the advantages of self-regulation so long as this is effective. I look to all insurers, whether or not they belong to the Association of British Insurers which has promulgated the statements, to observe both their spirit and their letter.

In the light of the insurers' undertakings I do not consider there is any need for the moment to proceed with earlier proposals for a change in the law. My Department will however keep the situation under review in order to ensure that self-regulation is working adequately and will reconsider the question of legislation if problems continue to arise."

So what had the report of the Law Commission achieved? A report which the Labour opposition spokesman on Trade and Industry, Mr Clinton Davis, had described in 1981 as "a work of great skill and scholarship which deserves consideration", the Under Secretary of State himself agreeing with Mr Clinton Davis entirely as to the great value of the report and being grateful to him for his tribute (see columns 1031

and 1041 of Hansard for 3 June 1981). The answer seems to be very little. Some fairly minor amendments to the voluntary Statements of Practice had been made. That is all that Mr Channon thought it worthwhile mentioning five years after publication of the report. He might, I suppose, have added, though he did not apparently think it worthwhile to do so, that the insurance industry had agreed to set up and finance an Insurance Ombudsman Bureau in 1981, subsequent to the Law Commission report. Of course he would have to add if he were a fair-minded man (and no one suggests Mr Channon was not fair-minded) that even an Ombudsman has to operate within the confines of the existing law.

There, subject to the matters dealt with in the recent Consumer Regulations, matters have effectively remained ever since. In my view this is not just good enough.

Developments subsequent to 1980

(a) Non-Disclosure

Pan Atlantic v. Pine Top [1995] 1 AC 501 settled two points which were up to then controversial. It confirmed the nature of the objective test of materiality by stating the test to be whether the non-disclosed matter would have been taken into account by a prudent insurer when assessing the risk; the House of Lords also declared, however, that there was also a subjective part of the test viz. that the particular insurer would have taken the matter into account, if it had been disclosed, when he assessed the risk. The same is true of misrepresentation where it has always been the law, outside insurance, that a misrepresentation will not avoid a contract unless it has been acted on by the person to whom the representation was made.

Actual inducement of the actual insurer was a new departure and could be said to have been something of a gloss upon the 1906 Marine Insurance Act which mentions nothing about actual inducement on the part of the insurer at all. But in principle there can be nothing objectionable about it, since, as I have said, it has long been the law in relation to misrepresentation outside insurance. The fact, however, that it is not mentioned in the Act at all does show that even in this fairly minor respect there is room for new legislation.

The question of inducement is worth pausing over. The concept is not free from difficulty in two respects. Lord Mustill said, if the matter not disclosed was objectively material, there would be a presumption of inducement. If that is to be regarded as a convenient excuse entitling the insurer in the event of a trial, not to go into the witness box to say he was induced and to be cross-examined on that assertion

but instead permitting the insurer to rely on the presumption, then much of the benefit of the requirement of inducement from the point of view of the insured will be lost. It was for that reason that in *Marc Rich v. Portman* [1996] 1 Lloyds Rep. 430 I ventured to suggest that, unless there was a good reason for the insurer who wrote the risk not to be called to give evidence (e.g. that he was dead), the presumption would be unlikely to apply, since the court would decide the point on the evidence that was before it rather than on the basis of any presumption.

Secondly, there is the difficulty that the requirement of inducement can be a little inconvenient if there is a long list of insurers on, for example, the slip. The reality is that later subscribers to the slip will have been induced not so much by the non-disclosure or misrepresentation as such but by the fact that one or more leading underwriters have written the risk, themselves no doubt induced by the non-disclosure or misrepresentation as the case may be. Here there may well be scope for a useful reform of the law to say that a following underwriter will be presumed to be induced by any non-disclosure or misrepresentation made by a leading underwriter.

(b) Utmost Good Faith

In the years since the Law Commission report in 1980, this concept, sanctified by its statement in general terms in section 17 of the Marine Insurance Act, has been relied on more and more by insurers who have sought to say that the need for good faith applies not only before the contract is made but also while the contract lasts. While it has always been accepted that the obligation to disclose and not to misrepresent material facts before the contract was made entitled an insurer to avoid the contract and that such obligations are also part of the wider principle of good faith that attaches to insurance contracts, the ambit of good faith during the contract has recently attracted the attention of the courts. This obligation can, of course, be spelt out specifically, especially in the context of making a false or fraudulent claim and it is by no means uncommon to find express clauses purporting to avoid the contract if a false or fraudulent claim is made. But, it is sometimes urged:

(1) that such clauses exemplify the application of a general principle of good faith assumed by both parties to the contract;

(2) that that obligation means that neither party should act unconscionably towards the other during the performance of the contract; and

(3) that, if they do, the contract can be avoided.

Here also the House of Lords has recently clarified the law in *The Star Sea* (2001) which has held that whatever the precise extent of a post-contract good faith duty, it does not apply once litigation has begun, when the duties imposed on the parties by the Rules of Court (now the Civil Procedure Rules) take over. Of course negotiations about a claim may occur over a long period before litigation begins or without any litigation at all. Here, I think, the House of Lords has decided that the duty of an insured is limited to a duty of honesty - certainly that was the view of Lord Scott of Foscote.

One of the difficulties about relying on the doctrine of good faith is that the remedy for breach is avoidance of the entire contract; there is no claim for damages. A reading of the speeches in *The Star Sea* makes one feel that there is now in process something of a retreat from the widest assertions of an expansive doctrine of the utmost good faith and this is an area which, in my view, calls for attention from law reformers. Lord Hobhouse's conclusion is worth emphasising. He said this (para. 79):

> "It is a striking feature of this branch of the law that other legal systems are increasingly discarding the more extreme features of English law which allow an insurer to avoid liability on grounds which do not relate to the occurrence of the loss. The most outspoken criticism of the English law of non-disclosure is to be found in the judgment in the South African case, of the *Mutual and Federal Insurance* [1985 (1) SA 419] to which I have already referred. There is also evidence that it does not always command complete confidence even in this country: CTI v *Oceanus* [1984] 1 Lloyd's Rep 476, *Pan Atlantic v. Pine Top* [1995] 1 AC 501. Such authorities show that suitable caution should be exercised in making any extensions to the existing law of non-disclosure and that the courts should be on their guard against the use of the principle of good faith to achieve results which are only questionably capable of being reconciled with the mutual character of the obligation to observe good faith."

The majority of the judges in the South African case referred to even committed themselves to the proposition that the concept of utmost good faith should be abolished. It is perhaps easier for this criticism to come from the South African bench in a country which is used to the Roman idea that contracts should be performed in good faith and which anyway has a requirement of disclosure in contracts of insurance quite apart from the doctrine of the utmost good faith. Even the single judge who favoured retention of uberrima fides thought it an odd expression. How he

asked can an insured be more honest than honest? The idea of levels of honesty is absurd.

In this context it is also interesting to note that there is developing a reluctance, at any rate among judges at first instance, to extend the concept of good faith outside a contract of insurance. Thus it has been held that the duty of disclosure does not apply to contracts of indemnity in general, nor to a contract for insurance such as a line slip or the granting to an underwriting agent of a binding authority.

So, in the light of the way the law has developed in the last 20 years, can one say that Mr Channon's view of 1986, that the case for legislative reform was out-weighed by the advantage of self-regulation so that there was no need to proceed with what he called the earlier proposals for a change in the law, has been justified? My answer to that is a resounding No. I am glad to see that I am not alone.

Australia has enacted an Insurance Contract Act 1984, which brought into the law the proposal of their own Law Reform Committee that the duty of disclosure should extend only to facts which the insured actually knew or which a reasonable insurer would have known would be relevant to the insurer's assessment of the risk. It has also made other useful reforms such as reduction of liability on the part of the insurer commensurate to what his position would have been if there had been proper disclosure. These reforms do not apply to marine insurance and the Law Commission there is currently considering whether they should.

The City of London Law Society on 12 December 2000 published a compelling paper supporting reform to the test of materiality and the current law about the consequences of both non-disclosure and misrepresentation. It also suggests that basis of contract clauses should be abolished.

It is, I think, fair to say that consumer associations have never been satisfied with the Government's reluctance to promote law reform in this area. Many insurance practitioners are becoming increasingly concerned at the current state of insurance law and this applies even to those whose instinctive loyalties and insurance experience incline to the insurer side of the divide between insurer and insured. In a short but perceptive article on 21st February 2001 in the journal Insurance Day, Mr Hanson of Barlow Lyde and Gilbert says rather charmingly that it is time that some of the burden of balancing the need to enforce clear contractual language and, at the same time, providing a fair result should be taken away from the judges. Your own association is in the vanguard of activity on this front having your own forum

reviewing the present state of the law. Mr Cole in his article in Legal Week in September of last year has pertinently asked whether it is not time that the Law Commission reconsidered the whole question of the reform of insurance law building on the experience of other countries and offering a lead, as the insurance industry itself has done in the marketing and innovation of insurance for the last three centuries. I can only say I profoundly agree.

Codification or Piecemeal Reform?

There is an argument for codification of insurance law in general just as Chalmers codified the law of marine insurance in 1906. I would have no principled objection to such a proposal but it would be an enormous task and invite yet further delay. In this context, Sir Mackenzie Chalmers' own thoughts are worth reading. The Marine Insurance Bill was first introduced to Parliament in the early 1890's. It took 12 years to reach the statute book. He published the originally proposed Bill as a Digest of the law relating to marine insurance. In 1901 he said this: -

> "The future which awaits the Bill is uncertain. Mercantile opinion is in favour of codification, but probably the balance of legal opinion is against it. As long as freedom of contract is preserved, it suits the man of business to have the law stated in black and white. The certainty of the rule is more important than its nicety. It is cheaper to legislate than to litigate; moreover, while a moot point is being litigated and appealed, pending business is embarrassed. The lawyer, on the other hand, feels cramped by codification . . . No code can provide for every case that may arise, or always use language which is absolutely accurate. The cases which are before lawyers are the cases in which the code is defective. Insofar as it works well it does not come before them. Every man's view of a question is naturally coloured by his own experience, and a lawyer's view of insurance is perhaps affected by the fact that he sees mainly the pathology of business. He does not often see its healthy physiological action."

I would prefer the Law Commission to consider what reform is really necessary and attempt to re-engage Government to enact those reforms. I suggest 6 topics in particular: -

1. Whether a doctrine of the utmost good faith should be retained and, if so, what its content should be?

2. The appropriate test for an insurer or reinsurer who wishes to defend a claim on the basis of non-disclosure and misrepresentation before formation of the contract;

3. The remedies which should be open to an insurer or reinsurer if he wishes to defend a claim on the ground of non-disclosure or misrepresentation;

4. The right approach to breach of warranty by the insured;

5. The right approach to proposal forms and answers given being declared to be the basis of the contract;

6. The question whether damages should be payable for insurers' refusal to pay a valid claim.

I have said enough already on the first topic of the utmost good faith. But I would like to say something more about the appropriate test for evidence of non-disclosure and misrepresentation.

Test for Avoidance

The current law in relation to the objective part of the test is settled by *Pan Atlantic v. Pine Top* and I hope I summarise it correctly by saying it is whether the non-disclosed or misrepresented fact would have been taken into account by a prudent insurer when assessing the risk.

My own view is that, even after the addition of the subjective part of the test (actual inducement), this tilts the matter too heavily in the insurers' favour. Mr David Higgins of Herbert Smith has observed that it does not reflect the way in which insurance business is actually underwritten to suppose that an insurer just sits silently while a presentation is made to him and then, without speaking a word, signs a slip or other contractual document. As Staughton LJ said recently (*Kausar v. Eagle Star* (1997) CLC 129):

> "Avoidance for non-disclosure is a drastic remedy. It enables the insurer to disclaim liability after, and not before, he has discovered that the risk turns out to be a bad one; it leaves the insured without the protection which he thought he had contracted and paid for . . . . I do consider there should be some restraint in the operation of the doctrine. Avoidance for honest non-disclosure should be confined to plain cases."

Any rational discussion of this thorny topic needs to take into account alternative formulations. Six possible alternative formulations spring to mind and, no doubt, others can be considered.

1. Whether a prudent insurer would have considered that, if the relevant matter had been disclosed, the risk was a different risk; this is the formulation preferred by the Court of Appeal in *St Paul Fire and Marine v. McConnell* (1995); they obviously did not consider it any different from the *Pan-Atlantic* test; but I do wonder; a prudent insurer may take something into account without it being a factor that would make the risk different in any sensible use of the word "different"

2. Whether, if the matter had been disclosed, the prudent insurer would have declined the risk or written it in different terms (the decisive influence test which was espoused by the minority but rejected by the majority in *Pan Atlantic v. Pine Top*);

3. Whether a reasonable insured would have considered the undisclosed matter to be material to a prudent insurer. (This is the solution adopted by statute in Australia and was recommended here by our own Law Commission);

4. Whether the actual insured ought to have considered the undisclosed matter to be material to a prudent insurer;

5. Whether the undisclosed matter was a matter which a reasonable insured would realise was within the knowledge only of himself (or those for whom he is responsible) rather than a matter which could have been independently investigated and verified by insurers;

6. Whether the duty on an insured should be merely to answer correctly any question asked by the insurer; this would be to abandon any requirement of disclosure at all.

While I would not favour the total abolition of the requirement of disclosure, my own view for what that is worth is that option 5 has much to commend it viz that the insured should only be expected to disclose what a reasonable insured in his position should have appreciated was material and within his own knowledge rather than a matter which could have been independently verified.

This seems to have been the law in the aftermath of Lord Mansfield's famous decision in *Carter v. Boehm* (1760) in which, it is sometimes forgotten, the insured actually succeeded. In 1817, it was expressly held in *Friere v. Woodhouse:*

> "What is exclusively known to the assured ought to be communicated; but what the underwriter, by fair inquiry and due diligence, may learn from ordinary sources of information need not be disclosed."

Of course, ordinary sources of information are far more extensive now than in the early nineteenth century but that seems to me to make stronger rather than weaker the case for a professional underwriter having to equip himself with knowledge of matters that can be independently investigated and verified.

Remedies

I have already remarked that one of the difficulties about a doctrine of avoidance for non-disclosure and representation in insurance law is that it is such an extreme remedy. That was a major reason why the House of Lords in *The Star Sea* declined to extend the doctrine of good faith in its widest form to post-contract dealings. The remedy would be worse than the disease.

The remedy may, however, be equally extreme in relation to pre-contract non-disclosure and misrepresentation. This was, of course, considered by the Law Commission in their 1980 report. They rejected, for good reasons as it seems to me, the notion of proportionality as espoused in some European countries and in the then proposed European directive. But I feel they may have rejected too readily the idea that the court should be vested with a discretion in a suitable case to adjust the parties' respective responsibilities. It is a concept that appealed to at lease one member of the Court of Appeal when it decided *Pan Atlantic*. It would not be so necessary, no doubt, if there were to be reform of the law to adopt the reasonable insured test since, if an insured cannot recover on that test, he would only have himself to blame; it may well be for this reason that the Law Commission did not consider the proposal in any substantial detail. But if the tests for disclosure and misrepresentation are to remain as they are, a discretionary apportionment of the loss has much to recommend it. It would, of course, lead to some uncertainty but that, after all, was a reason against the introduction of the concept of contributory negligence which, in the event, is a concept that has worn the test of time very well. In these days when the incidence of costs in litigation may depend on well or ill-informed guesses made by the litigant, at the time they are obliged to serve pre-action protocols, uncertainty is endemic, yet the court, and litigants, are quite good at getting used to it. Moreover, the Insurance

Ombudsman Bureau apparently uses its discretion on occasion to apportion the loss and appears to have no difficulty with the concept.

I do not think I need say anything in particular about the 4th and 5th topics on my list; breach of warranty and basis of the contract clauses. The evils of the present law are, I think, well enough known and universally acknowledged and it is about time that the law was changed to accord with an ordinary person's expectations.

Mind you, the doctrine of warranty sometimes works against insurers. I expect that most of you know of the recent case about the man from North Carolina who insured a box of two dozen expensive cigars against, among other risks, fire; having smoked the entire stock and without even having paid the premium for the policy, he sued the insurers on the basis that the cigars had been lost "in a series of small fires"; the company refused to pay but the judge held the company liable on the basis that it had warranted that the cigars were insurable and had not stipulated what they considered to be an unacceptable fire. So the company had to pay the claim amounting to $15,000. However the story has a happy ending because once the insured had cashed the cheque, the insurance company had him arrested on 24 charges of arson and the insured was convicted of intentionally burning the insured property, which resulted in 24 months in jail and a fine of $24,000.

The question of delay in paying valid claims is a newer topic, which, it seems to me, does merit consideration. The courts have set their face against there being an implied term of an insurance contract that valid claims will be met and thus do not award damages against an insurer even if his delay in negotiating the claim means that the insured goes out of business. In a sense this is part of a wider point viz. whether interest is truly compensation for delayed payment of claims for damages. But it has always been an oddity that a claim under an insurance policy is treated by the law as a claim for damages rather than a straight debt. This is a doctrine that could be usefully considered, I suggest, by the Law Commission.

Where Do We Go From Here?

In terms of legal principle and abstract justice, the case for reform in the areas about which I have been talking is extremely strong.

Opposition to reform may come from the insurers' side of the insurance industry who like to rely on the content of the present law and, perhaps, from Government on the grounds of inertia rather than principle. Siren voices will say "Show us the law is working unjustly in practice before we take any interest in proposals for reform." On

the assumption that, unlike Odysseus's crew, we should not consent to have our ears stopped with sealing wax, there are perhaps two separate ways to deal with these siren voices.

The first is to do some empirical research in order to discover whether insureds have suffered injustice in the areas I have been considering. In this respect the records of the Ombudsman Bureau will be an early port of call. The experience of other Law Commissions e.g. in Australia and Canada can be investigated. London firms of insurance brokers and of solicitors will be able to help, but it may be even more important to consult out of London brokers and solicitors. Barristers will be much less help because for every insured whom counsel has, regretfully or otherwise, to advise that he is likely to lose, there will be many insureds who have already given up the struggle in correspondence, well before there is any question of obtaining counsel's opinion. The judiciary is even less well placed to give examples of injustice since no insured will want to fight a case he knows he will probably lose. Despite the difficulties, I would urge the Law Commission to undertake a research project. I doubt if they would find that there is any widespread devotion to the present state of the law.

But secondly there is the question of principle. How can it be right that a lawyer insuring his home and household possessions can rely on a more relaxed test of non-disclosure under the Statements of Practice, but the small trader, e.g. the garage owner or the fishmonger insuring his premises, cannot. The truth is that the same standard should apply to both and it should, at least, be the standard of the reasonable insured.

The very fact that insurance companies are so anxious to persuade people that the best form of self-regulation is to ensure that the law is not enforced in its full rigour shows that insurers are worried that, if the law if reformed, they would have to pay more claims. If they accept that for the consumer, why should the law not be the same for the small business as indeed a wealthy business? The very acceptance by the insurance industry of the Statements of Practice shows that the law ought to be different from what it is. If even insurers accept that, surely it is time that the rights of not merely consumers but of all insured persons should be enforceable as a matter of right not as a matter of discretion. Surely we should be able to look forward to a better day.

And the third event of importance in 1906? A short note was published in the Classical Review for that year. The author pointed out that the last word of the Latin

manuscript of the version of the fable about one master being as good as another should be "unicas" not "meas" and he thus restored sense to the fable that had been missing for centuries. "What difference does it make to me whose slave I am, so long as I only have to carry one burden at a time". Like the ass, the insured should not have to carry more than a single burden. The author of that note was A E Housman. Can we look forward to a better day? I finish by quoting Housman in a more poetic mood: -

"West and away the wheels of darkness roll,
Day's beamy banner up the east is borne;
Spectres and fears, the nightmare and her foal,
Drown in the golden deluge of the morn"

Sir Andrew Longmore

The Pat Saxton memorial lecture was delivered at the invitation of the Trustees of the British Insurance Law Association Trust on 5th March 2001