THE GHENT COLLOQUIUM 1976

by P V Saxton, Secretary
British Insurance Law Association

The more than 100 delegates who attended the colloquium organised in Ghent by the Belgian chapter of AIDA (International Association of Insurance Law) in July 1976 were presented on arrival with a vast weight of papers prepared by distinguished authors on the three themes of the programme. It would be impossible to do justice to all this material in a short (or even fairly long) report, so that I shall attempt to provide only the briefest of summaries. Anyone who is prompted by this to look further will find all the papers lodged in the Library of the Chartered Insurance Institute.

The three themes were:

1. The position of road accident victims who are unable to claim compensation from liability insurers.

2. The indexing of compensation payments to accident victims.

3. Material control of policy conditions and premium tariffs.

The first speaker on theme 1 was Professor H. J. Bartsch, Secretary General of the Council of Europe who referred to the two major European Conventions which provided (a) for compulsory motor insurance in all European countries (only Portugal is now without some form of compulsory cover) and (b) limited strict liability for damage caused by motor vehicles. The latter Convention produced in 1973 has so far been signed only by Germany, Norway and Sweden. No state has yet ratified it. The purpose is to eliminate the basis of fault from liability for accidents caused by motor vehicles, but the principle of contributory negligence is maintained.

Professor L. Schuermans then explained that in Belgium the 'fault' principle still exists in the case of traffic accidents. One aspect of the law that had received recent attention was Article 4 of the RTA of 1956 which prohibited claims against a driver by members of his or her own family. This had been challenged in respect of wives who have separate earnings. A Royal Commission on road traffic accidents had found that many people who were injured did not get full compensation. A report had been collated but not published. Similarly a draft bill placing responsibility for accidents on drivers, without proof of fault, had not reached the statute book. There was a growing awareness of the need for a better system but not enough to get anything done.

Dr. E. von Hippel said that there was a form of strict liability in West Germany, but with the defences of 'inevitable event' and contributory negligence.

Procedures in Germany were tortuous and there was a lack of co-ordination between those for tortious cases and for those under strict liability. The practice of subrogation of social security payments was wasteful and there were other problems such as uninsured cyclists, delays in 'hit and run' cases and the low limits laid down in the compulsory insurance laws.

He suggested that the best solution was an accident insurance system as used for aviation insurance. That was probably too revolutionary, however, so that at present alterations to the present system such as by cutting out contributory negligence except in 'gross' cases was the best that could be done.

Mr. T. W. Marriott described the UK motor liability position and asked if 'no fault' systems could improve the situation. If so, at what cost? Perhaps the most significant improvement would be to speed up the present time for payment of compensation.

Professor W. Warkallo from Poland described a system similar to that in West Germany, except that since 1975 there has been compulsory personal accident cover for the driver and his family.

Mr. J. Millavari from Hungary said that the main criteria to work to were adequate compensation which must be speedily paid. While the law must be the ultimate arbiter of differences it should not be concerned in awarding compensation based on 'fault'. Need was the real factor, and this was a case for social security or insurance or a combination of the two. Nor should contributory negligence be considered as a bar to compensation.

Dr. A. Schaack, pointing out that Luxembourg had a legal liability system that was a mixture of Belgian and French law, spoke of the very dense through traffic in the Duchy. They had a public fund to cover accidents at work which included going to and from work. This now extends to children at school. The compensation limit is 75% - 80% of the national average wage. There were no plans to introduce 'no fault' cover in Luxembourg and he could not see the possibility in future as negligence was 'enshrined' in the Civil Code and was therefore a fundamental legal principle.

Professor B. Wachter thought that the principle of 'no fault' for road accidents was preferable to the current system of negligence in Holland but he, too, stressed the cost factor.

Mr. E. Rikheim spoke from the background of 60 years of strict liability on motorists in Norway. Contributory negligence was still a partial defence, but extensions in recent years gave cover not only to the policy-holder's family but to the driver himself. Motor insurance in Norway is linked to the car registration system.

The cover provided is 100% of the economic loss. There is no cover for 'pain and suffering' but 'reduced physical ability' is included even if it does not contribute to the loss.

Professor J. Hellner painted a somewhat similar picture for Sweden based upon the Traffic Damages Act 1975.

In the ensuing discussion there was much support for Dr. Millavari's criteria and a feeling that there were too many systems into which some order might be introduced. No-one saw 'no fault' as a threat to insurers who could operate whatever scheme were devised. The need was for clarity and similarity where possible. Professor Van der Feltz pointed out that if 'no fault' were to apply on the roads, why not in the home? The demand for compensation would grow, once introduced, so that everyone should be certain that it was right to abandon the time-honoured principle of negligence. Mr. A. Kelly argued against the variety of schemes existing in the USA which were tremendously expensive in some areas, especially in regard to medical and sickness costs, and which threatened the solvency of insurers.

THEME 2

Professor J. Hellner opened the second session pointing out that Sweden had long experience of awarding annuities as lump sum compensation was only awarded in minor cases. The problem was to increase past annuities to current levels and to secure the value of present awards in the future.

In this area the difficulty is to ensure that insurers are able to pay the increasing future costs. Motor insurance, being compulsory, was all right in this respect since the increases could be partly funded and partly financed on a 'pay-as-you-go' basis. A statute in 1967 had therefore provided for indexation of motor accident annuities.

In 1974, in spite of the difficulties in the voluntary areas, increases in such annuities up to 5% p.a., based on rises in the cost of living, had been laid down. This, of course, was totally inadequate in the light of recent inflation. In consequence there was a distrust of annuities which might lead to a return to lump sum awards.

For Switzerland, Mr. J. D. Ducommun said that there, social security payments were indexed to the cost of living, which eased the strain on compensation for injury payments somewhat. Damages were usually awarded in capital sums with little regard for future inflation.

Mr. H. G. W. de Wit, Holland, put an actuarial point of view. Inflation made indexing necessary but it creates financial problems in finding the money needed. It also has dangers in that it lessens resistance to inflation and can create favoured groups (e.g. wage earners compared with retired people).

Therefore caution and restraint are necessary, otherwise the costs will mount beyond the ability of payers to meet them, whether as individuals, insurers or the state. The choice of the correct index was also important and even then future uncertain extra liabilities could not be catered for. (In an interesting appendix to his paper, Mr. de Wit gives some calculations to show the effect of inflation on prices, wages and interest rates.)

Mr. P. Muller of Luxembourg said that capitalised lump sums, as favoured in court awards in the Duchy, might not be the best solution to future problems but at least they avoided the necessity for future policyholders of having to pay towards yesterday's claims.

Mr. K. Cannar, UK, referred to the Insurance Companies Act 1974 (s.27) which prohibited index-linked annuity payments precisely because they created future uncertain liabilities. Nevertheless he saw the justice in indexation, e.g. for the seriously disabled. Again it was a matter of establishing <u>need</u> and finding the best method to meet it. A Royal Commission was examining this problem at the present time.

He suggested that to meet the problems of continued solvency insurers and the state should agree that the government would fund fluctuations from an agreed annual increment limit.

Professor Besson described the position that had arisen in France since indexed annuities for road accidents compensation had been introduced in 1974. At present it applies to accidents where the resultant disability is 75% or more, or on death. The problem of future funding had been met by imposing a surcharge of 1.5% on all motor premiums to create a central fund (Fond légal de Revalorisation) at the Caisse Centrale de Réassurance. It is too early to say whether the fund will be sufficient to meet the calls upon it. If indexed annuity payments are extended the fund would obviously not meet the need and the liability might revert to insurers and reinsurers.

Professor H. Saxen said that Finnish law provided for 'periodical payments' where injuries exceeded 30%-50% or to relatives if an injured party dies. Where these sums are paid by insurers of employer's liability, or motor cover, they are indexed, the resulting extra sums required being met by increasing future premiums. Other third party awards which are indexed run into the snag that the covering insurances do not provide for it and that sums insured may not be sufficient. He felt that an increment with a fixed limit (5% or 10%) could be introduced on a funded basis without much difficulty.

Professor M. Fontaine of Belgium said that this subject was a topical discussion point in his country. In addition to the points raised in previous papers he wished to add that there were problems over the financial competence of beneficiaries of large lump sum awards. They would be more secure with indexed annuities but there is not much experience with them yet.

Nor had he any solution to the problem of creating the financial reserves, though a fund had been set up to provide for increases in employer's liability payments. A general levy on insurers or employers or tax-payers might be the answer but limits would have to be fixed.

According to Professor W. F. von Marschall, the German Civil Code (Art 843) provides for all compensation awarded in the courts to be in the form of annuities unless a capital sum is requested, on the basis of strong reasons. There is no provision for indexing but adjustments are possible according to subsequent economic conditions under Art 323.

Social security payments are adjusted by Parliament on an annual basis according to the growth of the economy, capacity, production and fluctuations in wages and prices.

Most of the points raised in discussion referred to those made by one or other of the authors of the papers. The verdict was that indexing seemed to be socially desirable but that as yet no-one had found a way of paying for it except on a very limited basis.

THEME 3

Professor G. Levie of the European Commission led the field on this theme by summarising the progress made so far with the harmonisation of insurance. At present, under existing directives, individual member states are still free to operate their own control systems but the draft directive on freedom of services will prohibit individual control of rates and conditions for 'large risks', transport, fidelity guarantee and credit insurance. The proposed directive on insurance contract law may also affect laws on material control but this is at too early a stage for its precise implications to be seen.

Professor H. Moeller (the President of AIDA) showed that in West Germany 'control' has meant complete material control since 1901. Policy wordings and rates have to be previously approved by the supervisory authority. Only special conditions for large individual covers are excluded unless they are in standard use. There are two rules subservient to the general principle that the insured's interests are paramount: 1. that conditions must be transparently clear, and 2. that they must be uniform for all insurers. This makes it difficult to introduce new clauses or to move ahead of competitors.

In spite of these rules the general conditions of policies are not thought to be satisfactory as several court decisions have shown. A new law relating to general business conditions includes insurance and a new body will supervise this aspect so that there will now be two separate control authorities.

Mr. J. P. Moreau of France pointed to a similar situation there with the minister having authority to decree the addition or deletionof clauses to or from insurance contracts. Approval of policy wordings can take some time if there is disagreement on particular points, so that model wordings have been produced to save time.

The French consumer associations have meetings with insurers to discuss wordings but there have been no concrete results so far. The principle is 'simple and clear' but this is never easy. French controllers now aim for flexibility as far as possible as they see that too precise controls hamper progress.

Mr. G. Shaw set out the UK approach and suggested that freedom in this area could best meet the needs of clients and avoid stifling bureaucracy.

Mr. R. Capotosti said that in Italy controls ranged from mere approval in reinsurance to government intervention by a state company (in life assurance). In between there was material control particularly for compulsory liability insurance.

Professor van der Feltz argued for freedom from controls as in Holland, although market agreements in life assurance produced a similar effect. A strong broker market could exercise sufficient influence on wordings and rates, some of which were now frozen because of general price controls rather than insurance supervision.

For Switzerland, Professor B. Viret spoke of their restrictions on policy conditions and premiums. A new Supervision Act would produce stronger controls on rates, while the Swiss people would shortly be asked to decide by referendum if motor insurance should be nationalised. Minimum and maximum rates of premium are already laid down and the Supervisory Authority will now (Art 21 of the new bill) verify that rates are fair according to the risks covered. This raises the question of what is fair. He added that the Swiss Supervisory Authority has a negative attitude towards competition.

Professor C. M. Roos said that in Sweden the Insurance Law Committee was considering a revision of insurance contract legislation, at present uncontrolled. The likelihood was that there would be no prior approval but that cases of dispute could be taken to the courts under the provisions of an Unfair Contracts Act. His criteria for control was that it should ensure that conditions were lawful; clear and informative; easily comparable among insurers and fair (i.e. adequate and suitable for the risk). He suggested finally that perhaps package policies should be capable of being broken down into separate sections to give more freedom of choice. (No-one asked what the point of package policies would be if this advice were followed!)

Mr. A. Kelly, USA, opined that his country had tried every possible form of regulation: statutory, supervisory, by the courts, general administration, state involvement and so on. He felt that the multiplicity of controls was stifling to innovation and competition, and operated against the interests of industrial insurance buyers, especially the multinational companies who wanted uniformity of cover around the world. He questioned also whether individuals really got a better deal. His view was that 'less was more' - the simplest systems produced the best results.

In a long discussion, representatives of several other countries described varying systems of control which basically lined up with one or more of those already set out here. Of interest was the comment of Dr. R. Pollak, the Head of Austria's Supervisory Authority, that the bulk of his department's useful work was informal discussions with insurers to try to resolve problems outside the statutory systems. Most agreed that controls were cumbersome to operate but that with consumer pressure the demand for them was likely to grow. The pity of that was that it really did not seem to some of us to be worth all the time, money and subsequent stagnation that it apparently entails.

In conclusion a tribute of gratitude must be paid to Professor S. Fredericq and his assistants at the University of Ghent who spared no effort to make sure that their guests were comfortable, informed and entertained. The latter included a visit to Holland to see the barrier work on the estuaries, a splendid concert of medieval and baroque music, several visits of interest for the ladies and a magnificent closing dinner in a fabulous chateau. A memorable week and enough material for a life-time's study.