

LEGAL PROTECTION INSURANCE

by Professor H.A.L. Cockerell, O.B.E.

Both individuals and businesses feel an increasing need to protect themselves against the irregular incidence of legal expenses arising in the ordinary course of their private or business lives. Insurance seems the obvious mechanism for this purpose but before legal protection insurance can become widespread, many obstacles, both in practice and in law, have to be overcome.

First, in England, is the centuries old suspicion of anyone who supports litigation on the part of another. This suspicion arose because it was feared that powerful people might use others as instruments to maintain and support ruinous lawsuits against their enemies without themselves appearing to be involved. The first statute forbidding maintenance of this kind appeared in 1275 and similar provisions were enacted time after time - a sign that the practice of maintenance must have continued, even though it was both a crime and a tort. Not until the Criminal Law Act 1967 did maintenance cease to be an offence; the same Act also abolished liability in tort for maintenance though S.14 (2) provides that this abolition of civil and criminal responsibility does not affect any rule of law as to cases in which a contract is to be treated as contrary to public policy or otherwise illegal. Thus champertous contracts, that is contracts where a party finances litigation in the hope of making a profit out of any damages payable, remain illegal and it is probable, judging from a dictum of Lord Denning in *Hill v Archbold* 1968 1QB 686 that contracts to maintain an action against a third party without the maintainer accepting responsibility for unpaid costs awarded against the party maintained, would be treated as contrary to public policy.

The 1967 Act opened the door to legal protection insurance in England but there was no rush on the part of insurers to pass through it. Only in 1974 did a Lloyd's syndicate start writing the business. A company venture, sponsored jointly by the Phoenix and Deutsche Automobil Schutz, the largest German legal protection insurer, followed.

In Europe, legal protection insurance, in its modern form, dates from 1917 with the foundation of the *Defense Automobile et Sportive* as a mutual insurance company at Le Mans in France. Car driving was still looked on as a sport and the insurance covered individuals in respect of legal expenses incurred in their capacity of outdoor sportsmen. Other sports covered included aviation, hunting, fishing and cycling. The initials DAS were later adopted by many unconnected

enterprises in the same field such as the German company mentioned above. For years the emphasis of legal protection insurance was on motoring and even in 1975 the German DAS drew two-thirds of its income from policies on motoring risks. More recently insurers, led by Germany, have offered policies covering many contingencies to individuals in their private capacity, and enterprises. Legal protection insurance is now big business in Germany and is also practised in most continental countries. An excellent account of European experience is to be found in 'Legal Expense Insurance' by Werner Pfennigstorf (American Bar Foundation, 1975).

In the U.S.A. a slow start has been made, with various local initiatives. As an alternative to insurance schemes groups of American lawyers have experimented with service contracts under which individuals pay an annual subscription in return for a promise of legal services when they are needed. The many American schemes are analysed in 'Legal Service Plans : a Typology' by Werner Pfennigstorf and Spencer L. Kimball (American Bar Research Foundation Journal, Vol. 1976 No. 2).

It might be expected that lawyers generally would welcome schemes whereby more people could be enabled to use their services and to pay for them, but associations of lawyers have been somewhat cautious in their welcome, principally, it seems, because they fear that insurers may either seek themselves to provide legal services, or may restrict the insured in his choice of lawyer, or alternatively restrict lawyers in their independence of action. In March 1974 the Consultative Commission of the Bar Associations of the EEC countries resolved that the following rules should be observed:-

- 1) free choice of lawyer to be guaranteed to the insured;
- 2) the lawyer to be independent in the conduct of the matter;
- 3) appropriate measures to be taken to prevent any conflict of interest to the prejudice of the insured, or separation between legal protection insurers and other insurers;
- 4) insurers to be prohibited from providing legal assistance through their own legal departments.

The Law Society has both approved legal protection insurance in principle and welcomed the two pioneer schemes but has laid down certain guidelines:-

- 1) There must be a free choice of Solicitor by the insured;
- 2) The Solicitor - client relationship must exist to the fullest extent;
- 3) The proposal form must clearly state the scope of the cover and if it includes defence against criminal charges the clause or clauses relating thereto must be approved by the Society before publication;
- 4) There must be some element of co-insurance to keep down costs;
- 5) The Solicitor must be entitled to take all steps which he thinks are necessary for the conduct of the case in the interests of his client;
- 6) In case of a dispute between the insured and the insurer, the differences must be decided by an arbitrator being a Solicitor or Barrister, of at least five years' standing, chosen jointly by the insurer and the insured; in case of disagreement between them, the arbitration should be by a Solicitor nominated by the President of the Law Society;
- 7) The cost of resolving any difference between the insurer and the insured shall be paid in full (a) by the company where the decision of the appointed arbitrator is in favour of the insured or (b) by the insured where the decision of the arbitrator is in favour of the company or (c) otherwise as the arbitrator shall apportion;
- 8) No scheme shall mention that it is specifically approved by the Society.

It is possible to criticise the Law Society's guidelines in detail. For example, why should only a Solicitor be eligible for nomination as an arbitrator if the parties fail to agree on an appointment? And is not the inclusion of co-insurance in the policy a matter for the commercial judgement of the insurer rather than for the Law Society? But with the spirit of the guidelines no-one will quarrel, and evidently they are not to be applied rigidly. For example, the Lloyd's scheme permits the underwriters to reject the insured's first choice of Solicitor, and a Phoenix DAS policy does not necessarily include a co-insurance clause, yet both schemes were welcomed by the Law Society.

Legal protection is of three types, defence of a civil claim against the insured, pursuit of a civil claim by the insured, and defence of criminal proceedings against the insured. Most claims against an insured will in practice be defended at the expense of a liability insurer. The main interest therefore centres on the pursuit of the insured's own claims for damages and his defence in criminal proceedings. Each of these types presents problems of its own.

Conflict of interest, it has been suggested, can arise if a legal protection policy is issued by an insurer and the insured's civil claim is against a third party whose liability is covered by the same insurer. The insurer will in that case be financing the litigation on both sides. Is there not a danger that his support of the legally protected insured will be less than wholehearted? And will the insured not gain an unfair advantage when he exercises his right to be told all the strengths and weaknesses of the claimant's case? In Germany the situation arises fairly often because of the smaller number of insurers operating and the fact that the business of some is concentrated in certain localities. The German supervisory authority considers it necessary that companies writing legal protection insurance should not be allowed to write liability insurance and vice versa though practical difficulties have modified this in two ways. First, a legal protection insurance company is allowed to be a member of a group that also writes liability insurance, provided the managements are kept separate; and, second, a liability insurance company may write legal protection insurance covering the expenses of prosecuting claims in foreign countries against foreign defendants. The suggestion has been made in the EEC that general insurers should not be allowed to write legal protection insurance.

Undoubtedly conflicts of interest are a possibility, but these will not be eliminated even if the German (and Swiss) precedent is followed. They can arise, for example, if both parties to litigation over an uninsured occurrence have legal protection cover with the same insurer. Various measures are possible to ensure that rights under legal protection policies are safeguarded without necessarily barring the transaction of the business by general insurers. In Austria, for example, legal protection policies provide that whenever the insured is claiming against a person covered by the same insurer, the insured can elect to provide information about his case to an independent lawyer nominated by him rather than to the insurance company.

The main difficulty in respect of defence costs in criminal proceedings is of a different nature. Insurers naturally do not wish to subsidise persons guilty of deliberate wrongful acts. No doubt it would be against public policy to do so. British policy excludes 'any deliberate and criminal act or omission of the insured'. Another excludes any offence that 'by its nature can only be committed intentionally or has been committed intentionally'. The first wording would presumably not bar the expenses of defending a prosecution for shop-lifting if the insured is acquitted, whereas the expenses would not in any event be recoverable under the second wording. Whether the other policy covers defence of a prosecution for exceeding the speed limit or parking on a double yellow line would seem to depend on the state of the insured's mind at the time the offence was committed.

In Britain it is unlikely that legal protection insurance sold by itself will make rapid strides. The immediate future probably lies with insurances linked to other risks. For example it is common sense for a motorist who confines his cover to third party fire and theft risks, as a third of motorists do, to take legal protection cover that will finance him in seeking to recover the cost of repairs to his car from a negligent third party. And employers' liability policies can well be supplemented by a policy indemnifying the firm and its managers against the cost of a prosecution under the Health Safety and Welfare etc. Act. It would be inconvenient if potentially useful covers of this type could not be offered by general liability insurers.