lump sum disability compensation in the region of £500,000 to £600,000 to twenty year olds. Enough to provide an income an order of magnitude higher than the maximum they could obtain through first party coverage. (assuming average wage levels).

In New Zealand the state provides no fault compensation for injury. This uses a fixed scale of compensation but has stopped short of providing compensation for sickness. Because compensation is provided out of state funds this is better considered no blame compensation rather than no fault.

If an expanded Polluter Pays Principle is to embrace compensation for social damages at the full economic costs granted by the tort system without regard to fault, forseeability or adherence to Government regulations then the costs will probably not be substainable. Certainly this is the logic behind the curtailment of the New Zealand scheme. (3) They are certainly no susceptible to insurance.

The reason is fundamental, insurance can only deal with certain well defined classes of risk.

References.

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UPDATES

1. UPDATE ON INSURANCE AND LIABILITY

by Derrick Owles
Gresham Fellow in Law

I have 20 minutes to give you an update on Insurance Law and Liability and that in effect means I have to pick out one or two topics in the hope of mentioning something of interest to you. Some events of the last year have already been publicised, the EEC Directive on Product Liability, for instance, and the Latent Damage Act for another.

As regards product liability I need say only this: insurers need not fear that strict liability is going to open the floodgates of litigation. It will, of course,

allow an occasional claim to succeed where previously it would have failed. What would be disastrous could be any extension to other jurisdictions of the twin pillars of US litigation, contingent fees and jury damage awards. I see no danger of jury verdicts entering the UK system, and that is a classic example of good coming out of evil. It was the Nazi evil that persuaded the UK government to adopt a temporary wartime measure of doing without juries for the duration. We are fortunate in this case at least that temporary measures usually remain for a long time. We still keep to the drinking hours laid down by DORA, the Defence of the Realm Acts of the 1914-18 war. As regards the contingent fee I am not so happy. The Law Society, an unpredictable institution, has been talking about contingent fee and some lawyers who ought to know better have been supporting the concept. We must hope for the best and fear the worst.

The Latent Damage Act received Royal assent on July 18th and has not yet made any impact on the courts. It is probably of most value to surveyors and architects although there is still that gray area of doubt – when does a cause of action arise? Solicitors form another category of professionals affected by the Act, and there is one point to be remembered. Some torts are continuous in the sense that the breach of duty consists of a failure to do something and it is not until the power to do that thing has been lost that the limitation period begins. An example is "Midland Bank Trust v. Hett Stubbs & Kemp" where the breach of duty was the failure to register a charge. The limitation period in that case began when the property was sold and the charge could no longer be registered.

The explosion of liability cases in the USA has had its effect on the UK Insurance companies which were once eager for US business. UK direct insurers seem to be recovering, but re-insurance business was also affected and there is a shortage of reinsurance capacity. Where once there were 120 reinsurance companies of reasonable size, today there are 60. The difficulties of reinsurers no doubt have their origin in the large awards made by US juries, but the UK courts in a different way have also contributed. In "South Carolina Insurance v. De Zeven Provincien" the House of Lords held that plaintiffs in an English court could proceed against third parties in the US courts for discovery. We know what discover in the US system means.

Another recent case affecting re-insurers was "Vesta v. Butcher" which was about a choice of law problem. An English reinsurance contract was in the same terms as the direct Norwegian policy and the proper law of the reinsurance contract was English law. The court held that the contract should be interpreted in accordance with Norwegian law. It would be commercially impracticable to apply English law to a package intended for a foreign insured.

Liability awards by US juries have also aroused great interest in the USA itself, and insurance companies have been in the forefront of agitation for reform. By reform is meant in this instance removing some of the plaintiff's advantages and UK companies still writing business in the USA are directly affected by the legislation which resulted from this agitation. Over 30 states have passed what are usually called Reform or Tort Liability Acts. Features of these acts are:

1. Limits on non-economic damages ranging from $450,000 to $875,000.

2. Some controls over punitive damages: for example, in Florida punitive damages are limited to three times the compensatory damages. Florida is also one of the few states allowing the plaintiff to have only part of the punitive damages and requires 60% to go to the state. Most states have been content to be less definite: thus, Alaska requires "clear and convincing evidence". Iowa refers to "wanton disregard for safety".

3. Restrictions on joint and several liability. The general concept is that a joint tortfeasor should be made to pay only an appropriate share of the total damages.

What is particularly interesting is the promise in many states of more reforms to come. Many of the statutes passed in the last few months set up commissions of enquiry to report on further legislation. The federal government too is joining in. President Reagan has sent Congress three proposals to limit (a) non-economic damages to $100,000; (b) the amount of contingent fees; (c) the liability of the federal Government and its contractors. These proposals will probably not become law as they stand, but they show the way the wind is blowing.

There is evidence that solicitors and accountants would like to feel a similar wind in this country. They have asked the Government to study ways in which civil damages for professional negligence could be reduced. The Government refused. The Department of Trade and Industry said the public interest as a whole had to be considered and not just sectional interests. It added that the public interest far outweighed the sectional interests and we should applaud such a comment. The pre-occupation with legal costs and damage awards must not lessen our concern for victims of negligence and defective products. We have to ask whether any legal system can satisfactorily compensate those who suffer severe injury as the result of an unforeseen and often unavoidable accident. The development of an alternative system would benefit insurance companies as much as the rest of society.

The Law Society has drawn our attention to the legal problems caused by section 310 of the Companies Act 1985. This section is better known to us as section 205 of the 1948 Act and nobody will dipute that its effect is to prevent a company from excusing a director from liability for breach of duty. What we can dispute is the extent to which the section goes.

If we look at the wording of section 310 we see that it is ambiguous. Here is the section in full:

> **Sec.310 Provisions exempting officers and auditors from liability.**
> **310(1) (Application)** This section applies to any provision, whether contained in a company's articles or in any contract with the company or otherwise, for exempting any officer of the company or any person (whether an officer or not) employed by the company as auditor from, or indemnifying him against, any liability which by virtue of any rule of law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company.
>
> **310(2) (Provisions as in sec. 310(1) void)** Except as provided by the following subsection, any such provision is void.
>
> **310(3) (Indemnity by company)** A company may, in pursuance of such a provision, indemnify any such officer or auditor against any liability incurred by him in defending any proceedings (whether civil or criminal) in which judgment is given in his favour or he is acquitted, or in connection with any application under section 144(3) or (4) (acquisition of shares by innocent nominee) or section 727 (director in default, but not dishonest or unreasonable), in which relief is granted to him by the court.

I have underlined the offending words "or otherwise". The Companies Act, it goes without saying, controls companies and section 310 quite properly tells a company that it must not exempt an officer or auditor from liability for "any negligence, default, breach or duty or breach of trust". The Law Society, or rather a committee of its members, would go further and claim that it also prohibits liability insurance. Apart from this section there is no rule of law that makes void an insurance policy indemnifying the policyholder from the consequences of his negligence.

There are three levels of interpretation of s.310 among practitioners. The strict interpretation, which I suspect is held only by a minority, is that it makes void any insurance policy which indemnifies a director against his own

negligence. The liberal interpretation is that the section does not affect insurance policies at all. Then there is an intermediate opinion, probably held by the majority, that the policy would be effective so long as the director himself pays the premium. That is the interpretation adopted in the Australian Companies Act of 1981 which has a section based on the old 205 with an additional clause providing that an insurance policy which indemnifies a director or auditor against his own negligence is not rendered void so long as the premiums are not paid by the company or a subsidiary.

Premiums for liability insurance are likely to be substantial and not all directors would willingly incur the cost personally. A possible alternative is to prevent if possible a duty of care from arising. Articles could contain a clause drafted in accordance with the principle accepted in "Hedley Byrne v. Heller".

For example, one private company has a clause reading as follows:

> "... no director or other officer shall be liable for any loss, damage or misfortune which may happen to or be incurred by the Company".

So I finish these comments on liability with the question:

> "Would such a clause be effective"?

2. UPDATE ON MARITIME LAW
by John M. Maskell, Solicitor

At the turn of the century Britain was at the height of its imperial and maritime power. Legislation rarely leads, but generally reflects the views of society at any given time. At the time an enormous proportion of the world's trade was carried in British ships, and an even larger proportion of those ships and cargoes were insured at Lloyd's. Nowhere other than England had a body of maritime insurance law grown up to any serious extent, and Parliament in the many statutes which were passed in that period, clearly wished to ensure that the British shipowner and British underwriter was properly protected. Under the Merchant Shipping Act 1894 and the Marine Insurance Act 1906 these principles were enshrined and those acts still form the basis of a large part of British marine law at the present time.

It is impossible to consider marine insurance in isolation. Since 1906 Lloyd's, while remaining the most important insurance centre for marine risks, had had its position eroded by insurance companies in a number of other