penal rates has forced the birth of alternative arrangements founded upon mutualisation. In simple language unsatisfied purchasers have clubbed together to form an association which subsequently provides a pool of resource which offers protection on a basis that is more commercially satisfactory than that available from the conventional insurance market. It may well be that on account of the pressures now in the market place we shall see arrangements being made along these lines.

Whatever the future holds it is of paramount importance that the professional in whatever discipline retains the ability to provide a high quality service. This position will be in jeopardy if he is unable to limit adequately his personal liability for negligence either by way of insurance or legal reform.

4. INTEGRATION OF ACCIDENT AND LIABILITY INSURANCE

by Harold Caplan,
International Insurance Services Ltd.

I am grateful for this opportunity to fly a kite before Members of the British Insurance Law Association. I have no expectation that what I say will make the slightest difference to anyone. The insurance industry itself is conservative, and the lawyers who serve it usually see themselves as conservators rather than innovators. All I can do therefore is outline some changes which in the long run may become inevitable. Members of this Association will be forewarned long before mobs take to the streets demanding urgent changes in the law relating to compensation and insurance! I am comforted by the thought that the reports of Lord Justice Winn's Committee (Cmnd. 3691) and Lord Pearson's Commission (Cmnd. 7054) are peacefully gathering dust.

My observation is that the insurance industry has evolved not as a compensation system, but as an economical method of risk spreading for the benefit of specialised groups. Some of the Groups are very large, such as the community of people who require life insurance, or the various groups who require accident insurance, and some of the groups are comparatively small, such as those who fear the financial consequences of rain on school sports days.

The separate groups who require insurance have generated distinct sectors of the insurance industry, all of which require capital, management, staff and premises. The underwriters of life and accident business have very little contact with the underwriters of fire and legal liability business. Most people

would say "Long may this continue" and no-one could question the need for specialisation in the analysis or underwriting of separate classes of business. However there are many calls for improvements in what is loosely called "the compensation system" as articulated on behalf of consumer organisations, and sooner or later the discussion turns to insurance which as I have observed, was never designed as a compensation system, but as a system of protection for specialised interests. If and when society as a whole responds to the call for redesigned compensation systems, I am foolish enough to forecast that accident insurance and liability insurance will be forced to evolve closer and closer together. At present the only common law jurisdiction which appears to have noticed this trend and acted upon it comprehensively is New Zealand. As is well known, in New Zealands all litigation for personal injury and death arising out of accidents has been abolished in favour of a State compensation scheme. I do not speak in favour of or against the New Zealand scheme. I see it as an indicator of what is to come – not necessarily in the form of a State compensation scheme.

To illustrate what I think could happen I refer to the tragic aircraft accident at Manchester in August 1985 which has so recently been in the news as a result of the Coroner's Inquest. The Coroner was careful enough not to ascribe blame to any party. But in terms of legal liability it is easy to see that there must be a large number of potential Defendants – the Airline, the manufacturers of the aircraft and the engines and of the seats whose combustion produced toxic fumes which were responsible for so many of the fatalities. This is by no means an end of all the parties who could be imagined as having some kind of legal responsiblity for what happened – for example the circumstances of the accident clearly involve the aviation regulatory authorities both in the United Kingdom and the United States, the Airport Authority, those who provided emergency services and those who were responsible for supply of water etc. It would not be difficult for a zealous lawyer to compile an extremely long list of potential Defendants each of whom may carry liability insurance – separately paid for and said to be increasing in price every year.

The unfortunate passengers also have their own range of insurances – separately paid for. Passenger insurance will include life insurance and accident insurance purchased by means of credit cards, or a holiday package. Some of the life and accident insurance will be financed by individuals, some will be financed by employers. Thus far, everything is as it should be: all those organisations which may have some legal liability probably have legal liability insurance, all those passengers who are sufficiently prudent will have adequate life and accident insurance. But what happens when legal liability claims are finally paid? In relation to the Manchester accident the public has

been informed that compensation agreements have been worked out as between representatives of the passengers and representatives of the leading Defendants and their insurers. The wisdom of such a scheme is that without the necessity for expensive and time consuming litigation, fair compensation can be paid. What is fair compensation? If this was a simple question one would certainly not need lawyers or Judges or text books to try to provide answers. And although it can be said that the object of legal compensation is to try and place the injured party (as far as money can do it) in the same position as would have existed before the accident – in practice everybody knows that this is an impossible aim. This is not simply because neither life nor injury can be measured in purely financial terms, it is as much because the rules for calculating compensation produce gross distortions of financial reality.

For example, it can be unreal to speculate (as the Courts do) on future job prospects, or the performance of the Stock Market in the distant future. But the most important distortion of financial reality is that legal compensation totally disregards the proceeds of life and accident policies. the rules which exclude these benefits were evolved in an era when life or accident insurance was comparatively rare, and few employers provided these benefits as part of their total remuneration package. Today, although no-one can pretend that every traveller is adequately insured (or could be adequately insured against every eventuality) it is certainly time to re-examine the question, and ask whether justice demands that some account should be taken of the existence of life and accident insurance in damage calculations. The argument that no-one should be penalised for their own prudence, no longer has the same ring of conviction when it may be an employer's prudence and wise provisions which should be applauded.

The overall result of continuing to keep the benefit and burden of separate life, accident and liability insurance as water-tight compartments, means that the financial resources to deal with the financial consequences of a major accident are duplicated or triplicated unreasonably. The underlying reason is, of course, that in England the so-called "compensation system" does not really exist. No-one has ever designed a compensation system. The mixture of liability and other insurances which are today available at varying prices, is simply the unplanned aggregate of responses over the years to public and commercial perception of insurance requirements. It is not surprising that an unplanned accumulation of separate insurances cannot be regarded as a coherent or rational compensation system.

Returning to the Manchester accident – what would be a step in a more rational direction? Suppose, for example, that purchase of an airline ticket automatically included some accident insurance, the benefits of which would

be available to the passenger or the passenger's dependents. Suppose further that the law was amended so that these benefits could be deducted from any legal claim for damages. In these circumstances the airline might have some real incentive to provide an adequate level of accident insurance within the price of a standard ticket. At present there is no such incentive because the proceeds of an accident policy cannot be deducted from a legal claim for damages. Under the present law the airline may justifiably fear that to provide automatic compensation (without any alleviating deduction) would be simply a means of fuelling litigation. If the law were amended to permit this to be done, there would then be nothing to prevent the airline selling as much life or accident insurance as may be required by individual travellers. It seems a very small change in the law which could provide the first step in rationalising and intergrating the benefits of accident and liability insurance for the benefit of travellers at large. Of course there would be no reason to confine such a system to airline travellers. It should equally be available to travellers by any form of transport.

No matter how small this may be as a change in the law, I have no doubt whatsoever that this change will not take place. If the tremendous works of eminent gentlemen such as Lord Justice Winn, Lord Pearson and their colleagues have made no impact on our society, I cannot hope for a better fate, but I would urge the members of this Association to be responsive when the clamour for change becomes more insistent.

If ever any steps are taken to integrate accident and liability insurance it will also be desireable to preserve full subrogation rights for insurers. Or will it? Perhaps BILA would consider promoting a discussion on the uses and abuses of subrogation. It is useful or wasteful ....?

5. IF THE "POLLUTER PAYS" PRINCIPLE IS AN EXTENSION OF ENTERPRISE LIABILITY IT IS UNINSURABLE

by Dr. Malcolm Aickin,
Toplis and Harding (Market Services) Ltd.

As a result of the Polluter Pays Principle it is generally accepted that the polluter should pay. It is however less than clear how much, for what and when the polluter should pay. Going back to publications of the seventies when the principle was first articulated is not of great help either. For example the Polluter Pays Principle published by OECD in 1975 states:
"What should the polluter pay?
The Polluter Pays Principle is not a principle of compensation for damage