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

caused by pollution. Nor does it mean that the polluter should merely pay the cost of measures to prevent pollution. The Polluter Pays Principle means that the polluter should be charged with the cost of whatever pollution prevention and control measures are determined by the public authorities, whether preventive measures, restoration, or a combination of both. If a country decides that, above and beyond the costs of controlling pollution, the polluters should compensate the polluted for the damage which would result from residual pollution (when the measures taken by the public authorities do not imply a total ban on pollution), this measure is not contrary to the Polluter Pays Principle, but the Principle does not make this additional measure obligatory: in other words the Polluter Pays Principle is not in itself a principle intended to internalize fully the costs of pollution".

The principle is clearly delightfully vague as how much and what the polluter should pay for. There is similar lack of clarity over when the polluter should pay. In advance of, or at the time of the pollution or afterwards.

The principle has been generally interpreted as meaning the Polluter should pay prospectively for pollution abatement plus some predetermined charge for residual pollution. One can discern, even from the all things to all men language I have quoted from OECD's publication, that this may have been the original intention.

However we are now hearing arguments which go beyond this. The Acting Director General of the EEC Commission on the Environment Consumer, Protection and Nuclear Safety argues that the Polluter Pays Principle should embrace social damage costs in order to fully internalise the costs of production. (1)

These arguments begin to have a familiar ring to them. The theory of Enterprise Liability was developed and implimented in the United States during the 50's and 60's by James Prosser, Kessler, Wade, Keeton and others.

This theory has three underlying factors:

1. Manufacturer Power. Manufacturers posses vastly greater power than consumers with respect to all relevant aspects of the product defect problem. Manufacturers are able to control the rate of product related accidents by investments in product safety features or in quality control, while consumers, generally, are powerless to avoid accidents from product use. Consumers have little influence over product quality through buying behaviour, in part because of low levels of

consumer information about product quality. It follows that manufacturers, if allowed to do so, will exploit the inferior bargaining position of consumers.

2. The Benefits of Manufacturer-provided Insurance. It is advantageous to spread the risks of product injuries broadly through insurance in order to reduce the incidence of loss to any specific individual. Risk spreading can best be provided by manufacturers, rather than by consumers in private insurance markets, because manufacturers can easily collect a small insurance premium in the price charged for the product.

3. Internalization of Injury Costs to Manufacturers. Society will benefit from internalizing the costs of operation to product manufacturers, including losses resulting from product-related injuries. Although the principal benefits from internalization are greater manufacturer investments to prevent losses and to provide insurance, other less tangible benefits may also accrue. Manufacturers, if forced to internalize costs, may make greater research investments into the sources of product-related injuries. At the minimum, an internalization policy will introduce an appropriate control on the level of manufacturing activities, in general and with respect to individual products. As the losses generated by a particular industry increase, the industry's costs of operation will increase. (2)

One can replace 'Manufacturers' by 'Polluters' and 'Customers' by 'Citizens' and this then becomes a statement of the rationale behind the Polluter Pays Principle.

The Theory of Enterprise Liability has lead to a Capacity crisis in the Products Liability Area in the United States. It does so for a fairly simple reason.

The traditional Common Law system has been built upon a standard of reasonableness. That it is unreasonable to shift the cost of one mans misfortune to another, out of humanitarian concern for compensation, unless it is more likely than not that the other is to blame. It is worth noting in passing that this more likely than not standard of proof is considerably less onerous than a scientist would consider proof of an hypothesis. Pollution is an area where law and science intermingle. The conflicting views of proof in the two disciplines lead to confusion, misunderstandings and distortions.

The standard of reasonableness or forseeability, which goes with blame, is an important safeguard built into the Tort System which we set aside at our

peril. Social scientists are criticised by physical or biological scientists for investigating and proving what has been accepted wisdom. Many economists employ a test of intuitive reasonableness to their results. The pure scientists skepticism is not well founded. Statements like 'Red sky at night shepherds delight' or 'Rain before seven fine by eleven' do not mean that meteorological study of depressions is not worthwhile. Simply not understanding the underlying logical rationale for the standard of reasonableness which has built up over many centuries is not good reason to abandon it. Some might argue that the rule in Rylands v. Fletcher is one of strict liability which purposely lays aside a defence of reasonable conduct. However the rule in Rylands v. Fletcher is stated in Addisons Law of Torts as follows;
'The person whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but just that the neighbour who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues, if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequence, whether the things so brought be beasts, or water, or filth, or stenches'.

While there is no defence in having taken all reasonable steps to contain the mischief, i.e. there is no state of the art defence. It seems to me that there is a requirement for the forseeability of the mischief and that this itself is a standard or reasonableness.

The marriage of a no fault standard with the full restorative costs allowed by the tort system will not work because the costs will overwhelm the available resources.

The shift of the financial burden from innocent victims to blameless injurers increases the costs of compensation dramatically. Innocent victims may protect themselves through the purchase of first party insurance. However they do not, or can not do so for full economic costs. The life insurance industry suggest that a proper level of cover is fourteen times earnings, but admits that few achieve this level. There is a market for permanent health insurance. It will provide neither more than two-thirds of lost wages or a lump sum payment in event of disability. On the other hand courts will award

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.

(1) A.J. Fairclough Chemistry in Industry 388-392 (2 June 1986).
(2) G.L. Priest. The invention of Enterprise Liability J. Legal Studies XIV 459 (1985)
(3) Report of the Royal Commission of Enquiry 'Compensation of Personal Injury in New Zealand (1967)

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,