In contrast, in *Banque Keyser Ullmann* and in the earlier *March Cabaret* case, the judges regarded the duty as somehow apart from the contract itself. There are certainly earlier authorities which seem to support Hirst J's view. In a sense this might be thought to be a rather conceptual point. Why does it really matter where the duty of utmost good faith, whether imposed on the insured or the insurer and whether imposed prior to or during the contract, comes from if, for breach, the law can provide the remedy appropriate to the situation? The problem stems perhaps from the common lawyer's traditional need to classify. But until it is recognised that classification of some wrong as a breach of contract or a tort or something else is really unnecessary, then the issue has to be faced and it must be recognised that there may be different consequences depending on into which category something is put, for example with respect to limitation periods.

I personally hope that when further discussion of this issue arises, and it may well do so soon in the Court of Appeal in respect of the *Keyser Ullmann* case, the duty of utmost good faith will be regarded as arising because of the fiduciary or quasi-fiduciary nature of the insurance relationship. It may well be, however, that final resolution of what I think is a very interesting and important question will still be a rather long time in coming; until then we shall all have to be patient.

UPDATES

1. UPDATE ON LIABILITY LAW
by Iain S. Goldrein, Barrister.

1. The last 12 months have been characterised by a number of different themes, the first of which appears to be a relaxation by the Courts as to their approach to problems of causation. As one Lord Justice of Appeal said:-

   > "A benevolent principle smiles on these factual uncertainties and melts them all away."

2. Against that backdrop, the case of *Wilsher* v. *Essex Area Health Authority* (1987) 2 WLR 425 falls into perspective. Although that case is taken as authority for the proposition that the Health Authority was vicariously liable for the negligence of the Senior Registrar; and further (obiter) that it may be possible to pin primary liability upon a hospital for failing to provide doctors with sufficient skill and experience; the case bears a greater significance. As to causation, it was held that:-

"Although the administration of too much oxygen was not the only factor to be suspected in the state of the medical knowledge, its administration while the catheter was situated in the vein had increased the possible risk factors for a premature baby developing the condition..."

3. And this comment with regard to the proof of "condition" is not unique to that case as evidenced by *Fitzgerald* v. *Lane* (1987) 2 All E.R. 455 where 2 drivers independently had a collision with a pedestrian resulting in injuries amounting to tetraplegia. Each Defendant blamed the other, and challenged the Plaintiff with the proposition: How can you show it was me – rather than the other Defendant? And the ruling was:-

"... Since it had been proved that the Second Defendant owed a duty of care to the Plaintiff and that his negligent driving had created a risk of injury capable of causing tetraplegia the Second Defendant was equally liable with the First Defendant for the Plaintiff's injuries."

4. This is a much easier burden of proof than had previously been established by the case of *McGhee* v. *NCB* which was authority for the proposition that to establish causation, it had to be shown on a balance of probabilities that the Defendant had materially increased the risk of the condition (the subject matter of the claim) arising.

5. It can also be argued that "causation" constitutes the problem which lurks behind the principle enunciated in *Hotson* v. *East Berkshire Area Health Authority* (1987) 3 WLR 232 where the House of Lords overturned the decisions of the lower Courts and held that a Plaintiff could not recover 25% of the value of the avascular necrosis caused by a fall, when through the delay in medical treatment, he had lost a 25% chance of recovery. The ruling was:-

"... It was for the Plaintiff to establish on the balance of probability that the delay in treatment had at least materially contributed to the development of the avascular necrosis and for the Judge to resolve on a balance of probabilities and conflict of medical evidence as to what had caused the avascular necrosis; that the Judge's findings of fact were unmistakenly to the effect that on balance of probabilities the Plaintiff's fall had left insufficent blood vessels intact to keep the epiphysis alive, which amounted to a finding of fact that the fall had been the sole cause of the avascular necrosis; and that, accordingly, the Plaintiff had failed on the issue of causation and no question of quantification had arisen."

6. There are a variety of dicta in the case which amplify rather than reduce the problems posed by the superficially attractive analogy between the principle applied in actions based on contract or tort for the loss of a chance, and the principle of awarding damages for the lost chance of avoiding personal injury or of losing the chance of a better medical result. Suffice it to say that at least Lord Mackay left a loophole by saying:-

> "It would be unwise in the present case to lay it down as a rule that a Plaintiff could never succeed by proving loss of a chance in a medical negligence case."

7. The second theme in the last 12 months has been with regard to disclosure of expert evidence. The classic authority is *Naylor* v. *Preston Area Health Authority* (1987) 1 WLR 958 where it was held that "the issues would be refined, costs saved, and the chances of a consensual resolution enhanced by simultaneous mutual disclosure of the substance of the evidence of the experts on whom the parties intend to rely, together with identification of published of unpublished literature to which reference would be made".

8. This thrust of opinion (cards on the table) is reflected in the new Order 38 Rules 37 & 38:-

   (a) Rule 37: effectively gives statutory authority to the decision in "Naylor" and,

   (b) Order 38 provides for the Court directing "without prejudice" meeting of experts well before trial.

9. As a third theme, I draw your attention to a couple of decisions which can be linked, namely:-

   (a) Firstly: *Hussain* v. *New Tatlow Paper Mills Limited* (1987) 1 WLR 336. In that case, the Plaintiff received sick pay from his employers for the first period of 13 weeks of his incapacity, and thereafter, received payments under the employers' Permanent Health Insurance scheme to which the employees did not contribute. The Plaintiff sought to argue that the payments which he had received after the period of 13 weeks should not be deducted from his loss of earnings because they were collateral benefits accruing from an Insurance Policy. However, the Court of Appeal held that such

payments were not to be regarded as the proceeds of the Plaintiff's private insurance to be left out on account of asessing his loss of earnings. They were identical in nature to the uninsured sick pay paid in lieu of wages during the first 13 weeks of the Plaintiff's disability and were, therefore, to be taken into account in reducing the award of damages. Similarly, reference should be made to *Jackson* v. *Corbett* (1987) 3 WLR 586 which is authority for the principle that the Law Reform (Miscellaneous Provisions) Act 1946 is the exclusive regulator as to the deduction of the statutory benefits – and I pause just to mention: that statute passed nearly 40 years ago is surely profoundly out of date – why should a Plaintiff enjoy double recovery, by being obliged to deduct only half the statutory benefits accrusing within 5 years of the accident?

10. In this context, reference can also be usefully made to *Dews* v. *NCB* (1987) 3 WLR 38 – a case which reflected litigation running for a period of 10 years between the Miners' Union and the Coal Board with regard to pension contributions during a period of disability. It was the case for the miners that if they were injured and lost their earnings, they also lost the pension contributions compulsorily deducted from their pay packets. The case for the Coal Board was that – at least in the case of *Dews* – the pension provision would not be affected whether or not such contributions were paid, and accordingly, the Plaintiff would have enjoyed double recovery were he to be awarded also the pension contributions which would otherwise have been deducted from his pay packet.

11. The third theme to which I would draw your attention is medical negligence – which appears to be driving doctors in particular, and professional people in general, to distraction. Awards, of course, have now beaten the one million pounds barrier. It is, accordingly, not entirely surprising that the British Medical Association should be recommending in all accident cases, a "no fault" liability scheme – drawing from the experiences of New Zealand and Sweden, and particularly looking favourably upon the Swedish experience. It is a matter of interest to note that both the New Zealand system and the Swedish system in the very nature of things have to define those types of accidents which fall within – and without the scheme – and in so doing, particularly the Swedish system comes close to adopting a formula which we would recognise as something very close to negligence (which is an irony, taking into account the concept of "no fault" liability). In the event, the inference is open to be drawn that in the present political

climate, the legislature may be expected to look less favourably upon such proposals than – perhaps – 10 years ago (and yet, 10 years ago, the Pearson Committee, in its report on personal injury litigation, was of the view that although there were attractions to no fault liability, the stage had yet to be reached where the climate was right). Well if the climate was not right then, it certainly isn't right now.

12. The next theme is Civil Justice review – which is going dramatically to affect the procedures in the Civil Courts during the next few years. It identifies the problems of delay and expense, characterised by the following:-

    (a) Personal Injury Litigation County Court: 3 years average from date of accident to date of trial – legal costs being in the region of £125 plus for every £100 in damages;

    (b) High Court: 5 years average from date of accident to date of trial – costs being about £60/£80 for every £100 in damages.

13. The Winn Committee in 1968 berated the profession for its apparent failure to comply with the rules – and indeed in *Hollis* v. *B. Jenkins* (1986) 31st January, the Court of Appeal was strong in its ciriticism with regard to a failure to keep to time limits. An argument can, perhaps, be advanced when a change in the rules is being considered, that there may be mileage in the argument that provisions requiring stricter compliance with the present rules may be advantageous in contrast to revising those rules fundamentally. And one asks the rhetorical question – in a market economy such as the present – why is it that whereas in America and Australia, pressure has come from the insurers to reduce legal costs, such as pressure has not been matched in the present jurisdiction and against that backdrop, one can, perhaps tentatively, explore the following avenues of enquiry:-

    (a) If litigation was conducted much more speedily and efficiently, would "error and omission" cover be such a problem to place (and gap cover between "claims made" and "claims occurring");

    (b) Similarly, will the pressure from professional negligence claims generate a greater need on the part of the professions for specialisation (whereby greater knowledge in smaller fields constitutes its own insurance policy.)

14. The fifth theme is the 1976 Convention on Limitation of Liability for Maritime Claims which came into force on the 1st December 1986. It has the following effects:-

(a) It raises the amount of compensation available for loss of life or personal injury or property damaged (including damage to other ships or harbour works) by a considerable amount;

(b) The test barring the right to limit liability change;

(c) The position of salvors will be strengthened.

(d) The calculations for limitation tonnage will be subject to the terms of the 1986 Tonnage Measurement Convention.

15. I mention briefly, as a separate theme, the question of Provisional Damages. I ask the question – "much ado about nothing?" It is common ground that when these provisions were enacted, there was considerable concern amongst insurers as to what bombshells were going to emerge years after litigation was apparently complete – and yet I suspect that life in the market place is rather different from that which has been anticipated. It is perhaps presently the case that practitioners are now settling claims on a final basis – with a separate item of damages representating the value now of the risk of some deterioration in health in the future. Of course that was open to practitioners prior to the "Provisional Damages" provisions – but these recent provisions accentuate a head of damages which perhaps had not been sufficiently emphasised hitherto.

16. And finally, I mention the repeal of Section 10 of the Crown Proceedings Act 1947 – whereby actions in negligence can now be brought by servicemen in Her Majesty's Armed Forces, so long as the injuries are sustained otherwise than during active service.

2. UPDATE ON AVIATION LAW
by Tim Scorer, Barlow, Lyde and Gilbert.

I am delighted to be given the opportunity to address you briefly today at your Second Annual Conference, and I am honoured to be included in a list of so many distinguished speakers under the able Chairmanship of Lord Goff.

It will not surprise you to know that "Recent Developments" in aviation law and practice in the United Kingdom are relatively few especially when compared to the constant process of development in the United States. In some ways I would like to be delivering this talk two years hence. I feel that