9. **Construction:** *Stratton & Phillips* v. *Dorintal* (1987) 1 Ll.R. 482 tackles the perennial question: To what do the percentages in a R/I slip relate? (See e.g. *Wace* v. *Pan Atlantic* (1981) 2 Ll.R. 339, 349). Since the R/I order will frequently be unkown the customary answer is the 100% limits referred to on the slip.

10. **A future prognosis:** (a) Continuing Trans-Atlantic jurisidictional disputes, and (b) reinsurance litigation to resolve the effects of the U.S. courts' rulings on asbestosis and (possibly thereafter), hazardous waste.

MEMBERS' CHOICE
1. DUTY OF CARE AND DISCLOSURE UNDER HOUSEHOLD POLICIES
by Derek Cole

Have you read your Household Policy recently or more important still have you looked at the proposal form you completed when you took the Policy out? It may well be that you do not even have a copy of the form that you originally completed, and therefore will be unable to remember what was said or stated at the time. Action on both these matters could prove vital to avoid problems in the event of a loss.

Duty of Care

Duty of Care on the part of an Insured appears to be fairly straightforward. An Insurance Policy is based on Uberrima Fides – Utmost Good Faith – and in my opinion the insured is expected to act in a reasonable manner i.e. as if he was uninsured. Fraud is an exclusion in all policies for obvious reasons. If the insurers are wise they will make it very clear to the insured in the policy by a warranty that "the insured will take reasonable steps to protect the property and prevent accidents", and some insurers, add "and maintain the property in a sound condition and good repair".

What are 'reasonable steps to protect property'? One has only to read the Ombudsman recent reports of 1985/86 to discover that it is unreasonable to leave ones personal effects on the beach unattended whilst going for a swim, or to leave valuables in a car overnight because you are too tired to take them into the Hotel where you are staying. However, the Courts have held that it was reasonable for a lady to carry nearly £30,000 worth of jewellery in her handbag resting on a trolley whilst at Gatwick Airport. Had she left the trolley to go to a self-service food bar instead of her concentration having been momentarily distracted by her children causing an opportunity for

theft, the Judge might well have *not* considered reasonable care had been exercised. Would it not be wiser for the insurer to give some guidance to their insured at the time of effecting the Policy or is it a fact that after the Gatwick case no insurer will have the courage to avoid a claim of a similar nature, bearing in mind the judge's comments that an All Risk Policy meant "All Risks"? One wonders if the existing or any other insurer would offer terms following a loss of such nature. No insurer is bound to offer renewal terms.

It is reasonable to go next door to visit a neighbour leaving the back door unlocked? Of course, if there is a protections maintenance clause you would be in breach of such a warranty. If you go away for Christmas, are you expected to turn the water off at the mains, or even further drain the tanks – the insurers do not say. In *Fraser* v. *Furman* (1967) 1 WLR 898 Diplock L.J. in discussing a duty of care condition in a liability policy stated that the insured's omisson or act "must be at least reckless, that is to say, made with actual recognition by the insured himself that a danger exists, and not caring whether or not it is averted. The purpose of the condition is to ensure that the insured will not, because he is covered against loss by the policy, refrain from taking precautions which he knows ought to be taken". It does therefore seem that only a "reckless act" by the insured will prevent a recovery under his policy. A momentary lapse such as a lady removing her rings in a washroom in order to rinse her hands and leaving them on the side of the basin whilst in a hurry to rejoin her friends on a coach would not be considered "reckless" and therefore guilty of a failure to take reasonable care.

As a Broker I cannot state too strongly that constantly changing your insurer for the best market rate compared with having had your insurance with the same insurer for 20 years without loss, is not much of an encouragement to an insurer for making an ex-gratia payment. However, the replacement of cover with another insurer does have the advantage of relieving the proposer of any misstatement made in a previous proposal.

The Ombudsman has laid down basic criterea for theft claims as follows which must consider the following aspects:

(a) The value of goods at risk.

(b) The reason for their being in the place from which they were stolen.

(c) The actual precautions taken to safeguard the goods.

(d) The alternatives open to the Policy holder.

With Insurers now incorporating "Duty of Care Clauses" as a regular feature of Household Comprehensive Policies is it going to be more difficult to avoid claims where there is no Clause and a failure of duty of care is present?

Having completed a proposal form and having been warned that failure to disclose material information which is further explained as facts which are likely to influence a prudent Underwriter to decline the risk or to accept it at a greater premium or different terms, this duty in common law in the UK is based on the understanding that it does not arise again until renewal unless such material information does not survive a change which affects the fundamental constitutive element. If your private house is converted into a shop this is a fundamental change, and should be advised to insurers as and when the change takes place. However, if you have read your policy you may find a warranty as with one leading Insurer.

"You must tell us of any change of circumstances after the start of the Insurance which increases the risk of loss, injury or damage".

The above Clause is in line with other European countries where duty of disclosure exists in law throughout the policy term. It may well be that we are moving towards this end.

The majority of Household Policies do not have this notice of disclosure clause. Insurance is a bargain which, once struck does not have any contractual obligation to disclose factors aggravating the risk during its currency. If therefore you are asked to declare on your proposal form that the house is normally occupied during the day, and that the parties to the insurance are not all involved in full-time occupations, and two months later after taking out the policy your wife accepts a full-time job so that you are both away from the house during the day, you have no duty to advise the insurer until the policy falls due for renewal. This is important because the insurer in this case may load your premium for the day unoccupancy feature. Incidentally some insurers now include a copy of the proposal form with the newly issued policy. Most insurers have a 30-days unoccupancy clause which restricts cover after that period although this does not appear to be a regular feature of Lloyds wordings. This may be particularly relevant if you are intending to have a new roof or major alteration to the property where the duty of disclosure may arise according to the conditions of your policy or at the commencement of the insurance year. If you knew at the commencement of the insurance year that the work was intended during the next 12 months you should advise your insurers accordingly.

And when does a "material fact" become important? One must refer to the Association of British Insurers Statement of General Insurance Practice which also deals with "misrepresentation" and breach of warranty or "condition":

"2 (b) An insurer will not repudiate liability to indemnify a policyholder:-

(i) On grounds of non-disclosure of a material fact which a policyholder could not reasonably be expected to disclose.

(ii) On the grounds of misrepresentation unless it is a deliberate or negligent misrepresentation of a material fact.

(iii) On grounds of breach of warranty or condition where the circumstances of the loss are unconnected with the breach unless fraud is involved."

An example of (i) may be information that the house was in sound structural condition when it was later proved to be incorrect. The insured not being a Chartered Surveyor or Architect could not reasonably be expected to have known of the defect bearing in mind that he had a Building Society survey at the time of the purchase.

An example of (ii) could be when the insured describes his occupation as a "Company Director" but does not mention the particular business in which he is engaged. The insurer would not normally accept a proposal from a Company Director of a firm of Bookmakers but having disclosed he was a Director, the insurer should have pressed for further details if they felt they required full information. Some insurers are now asking for details of the insured's usual occupation together with other part-time occupations.

An example of (iii) would be when a fire occurs in the insured's kitchen whilst he is away from the house and the insurers try to avoid the claim under the Protections Warranty due to all locks not having been in operation at the time of the loss.

How many people on the proverbial Clapham bus are aware of insurers obligations, and do they even understand them? Are they aware of their obligation to insurers? We have seen many new wordings in the household market, some of which are alleged to be in *"plain English"*. A number state what is not covered – a commendable advance.

I would suggest insurers should go further, and would it not be clearer if the clauses relating to Duty of Care and Material Information were standard and agreed throughout the market?