We are most grateful to Jonathan Foster for obtaining for us a very topical article written especially for this Journal by an experienced American Trial Lawyer C. Thomas Ross. His commentary on the USA Jury System is most outspoken and no doubt many of our members will agree with his views. We would be pleased to hear from you if you wish to comment.

Finally a cautionary tale from one of our Vice Presidents Gordon Shaw and a further article from Mark Dawbarn (our Specialist Life Correspondent) with another article on Joint Life Policies to follow in our September issue (unfortunately there was not room for both).

A pleasant Summer break to all our members with the hope that as many as possible will attend the Day Conference and AGM on 20th September next (see Forthcoming Events Section) as well as the Chairmans Lunch on 15th June.

Derek Cole

FROM JUSTINIAN TO PIN-STRIPE MUTUALS, OR MY GOODNESS HOW INSURANCE CHANGES.
A talk given by Michael Summerskill, Chairman of Thomas Miller Professional Indemnity, on 9th Febraury 1988

It is tempting to look at early history, such as that of Greece and Rome, to find traces of mutual insurance as we now know it. The important characteristics of mutual insurance I give as a sharing by the insureds in the outcome, be it a surplus or a deficit, with the twin corollaries of the exclusion of any other interest from such surplus or deficit and a readiness by members to contribute to the deficit, and to share in the surplus. They will also have overall control of the fund and, usually, of the claims.

Of course, when you think about it, you contribute to a deficit now, when the premiums are raised because of someone else's large estimated claim, just as much as, if not more than, when a Supplementary Call, is charged by a Club, 3 or 4 years later but on the basis of what is actually paid out.

There have been many formulae, through the ages, which might meet the description of insurance. When we look at early texts we find, in the maritime field, the nautical loan as described in Justinian's Digest, perhaps Greek in origin, as a loan to fit up a ship for a voyage, it being repayable on her safe return. And so we are swept into an area where our modern labels do not stick, as, enthusiastic as any lepidopterist naming specimens, Stroud's Judicial Dictionary in one hand and a legal notepad in the other, we try to

descry and distinguish bottomry, hypothec, insurance, mortgage, priorities, wages, general average and pledge, and other tidy notions generated by a set of economic relationships about which we now know little, and to which only a set of a Roman merchant's accounts would hold the key.

Then the cargo and the ship often belonged to the same people, so that one cannot clearly apply our rules as shown in Scrutton's Charterparties to easily separable charterers, shipowners and receivers. Yet economic forces even today can ride roughshod across these neat categories, as, on a smaller scale, we find that a small Greek Mediterranean ship has a Master who is part owner with his brother; or on a larger scale, as oil companies are effectively both shippers and receivers, and occasionally shipowners; and as the system of ship finance makes it convenient for the bank to be the legal owner. As one judge said, parodying the usual phraseology, "the plaintiffs are William Brandts, the well-known shipowners."

All this is to show you, though you know already, that you cannot force people into permanent categories and relationships. As the Greeks said, everything flows and changes. Occasionally there is a flash of recognition. My father as an army psychiatrist examined a soldier who said constantly "that's *not* it", as he searched desk-tops, waste-paper baskets and so on, but when delivered his certificate of discharge said: "that's it". Thus, in an early volume of Holdsworth you find the story of the Roman burial societies and the description: "As each member paid the same subscription, it follows that, as far as the burial benefit is concerned, the practice was equivalent to a mutual insurance of the burial expenses at a fixed rate of premium." So there were no supplementary calls – indeed, how would you debit them? And you might say, that's mutuality – but it just as probably was not.

Then there's that annoying force, morality, not just economic need, which also appears in the kaleidoscope. As we move into the Middle Ages this other motive, the moral one, arises. As R.H. Tawney says; "... there is no place in mediaeval theory for economic activity which is not related to a moral end..."; and you find that fundamental factor, the charging of interest, becoming a moral football, with the Christians delegating the work of the usury to the Jews, so as to keep their own hands clean. Indeed they actually imported Jews into Florence for that purpose. So every transaction, including insurance and mortgages, would be, as Tawney put it, tried "by a rule of right". Such matters as interest, and the position of the middleman and the broker, of whom more later, were put under the spotlight as severely as the present government might test a public enterprise for profitability. Indeed Tawney suggested that the true descendant of St. Thomas Aquinas, through Calvin – in whose Geneva usury was treated more severely than

adultery – in the heavy moral climate in which business was thus put to the test, was Karl Marx. And so too, a not to be underestimated element in the 18th and 19th centuries, and today, has been the moral, the friendly element, often gathered together and forged from a number of practical needs felt by the customers, the insureds. One of Professor Hugh Cockerell's books distinguishes the insurance companies by the sources from which they drew their original funds: on the one hand from the policy holders, the members, as with the early life offices and fire insurance companies, with the profits being distributed as bonuses; and on the other hand the proprietary insurance companies.

By the end of the 18th century there were twenty shipowners' associations providing hull insurance, with P. & I. development coming in the eighteen-forties, but the hull clubs declining in the eighteen-nineties. The traditional modern pattern has been that Club managers are responsible for a Protecting and Indemnity Club, insuring third party liabilities, and for a Defence Club insuring legal expenses, relating to uninsured matters such as claims for freight and demurrage.

It is the diversification from these about which I will say something now. Like most matters, its source is earlier than one would expect. Before the First World War the U.K. Club Managers and other Managers established British War Risks Clubs, for hull insurance, reinsured by the governement for Queen's Enemy Risks, or King's Enemy Risks as they then were. In 1960 the Greek War Risk Club was established, in competition with the market, but today covering over 90 per cent of all Greek tonnage. And I have here a document from 1963 when 40 airline representatives pooled their statistics and met in London to discuss with us the establishment of a mutual for airline liabilities – an idea which came to fruition in 1987.

At the time of these early discussions with airlines about a mutual, I was at a quiet Sunday morning sherry party in Sevenoaks when I was introduced to a Very Senior Insurance Person. Learning the name of my firm he said: "You're the people who are stabbing us in the back." Apart from the impoliteness to my host, I reflected later that we are not in business to protect each other's backs, or fronts. Bernard Shaw once said that you cannot expect the world to stand still because you are English – or, I add, because you are in any one set pattern of insurance.

So I pass speedily through the establishment and the flourishing of the Through Transport Club, covering companies engaged in the container or unit load industry, now a formidable insurance force, and also the two mutuals which insure shipbrokers and agents for their errors and omissions,

known as CISBA, and TIM (Transport Intermediaries Mutual), and managed by Tindall Riley & Co. and Thomas Miller & Co. respectively. They are both P.I. Mutuals.

We began to think about professional indemnity, perhaps for three interlinking reasons: (1) people from the professions would come and talk to us about it – a prominent shipping Solicitor years ago understood about mutuals, and was trying to persuade The Law Society to go mutual, for example; (2) capacity would occasionally become restricted, and people were subject to some fierce increases, sometimes stemming from problems with other professions, and occasionally imposed at the last moment; and (3) some of the more successful managers were looking at the possibility of diversification. Could they use elsewhere the proven matrix of non-profit-making-liability insurance, on a mutual basis, controlled by the insureds and serviced by managers whose renumeration they would fix?

And there is a fourth factor which, as I have indicated, should not be ignored, and which adds to all this some moral force – the impact of consumerism and the wish of people that there should be accountability and that they could run their own show.

In 1984 we proposed to The Law Society Indemnity Insurance Committee a way in which their Master Policy scheme might be mutualised. It was a concept of which they were already well aware. At that time, in a published document, they acknowledged our work and the value of mutuality, and indicated that as and when premiums increased further, and capacity became more restricted, this step might be taken. This duly occurred in 1987, for a two-year provisional period, with the Solicitors Indemnity Fund, as it is known, managed by London Insurance Brokers Ltd., which is owned by Minets and Bowrings. It is legally a statutory fund, under the Solicitors Act 1974. In effect it is a mutual, with some stop loss reinsurance, but a rolling fund, with no anticipated supplementary calls, mainly because the whole profession is insured by it.

Here I will pause and apologise for being parochial. England is not the only place where groups have bonded together to form mutuals in the Professional Indemnity field. Notably, in the United States there are at least two lawyers' mutuals, and plans are afoot in other countries. But today I will keep to what I know fairly well.

It might help you to form a clearer view of what is available here if I divide the activity into three areas – (1) lawyers, (2) bricks and mortar, and (3) others.

(1) LAWYERS

I have mentioned The Law Society Fund, begun in 1987, covering the first £½m. of any one claim for all Solicitors in England and Wales. With an initial annual premium of over £60m. it could pay 120 full claims of £½m. in the first year (and of course this is a long-tail business) without taking into account the investment income.

Then there is the Solicitors Indemnity Mutual Insurance Association, or SIMIA, begun by Millers in conjunction with Tindall, Riley, also mutual club managers, in 1986. This deals in the so-called top-up layer of £4½m. excess of the Law Society's £½m., and takes what I might describe as a vertical line of about £1m. or 22 per cent of the £4½m. It is a following insurer. Its membership in the second year increased from 36 to 48 Firms, and from 1200 to 1500 Partners, with the premium increasing correspondingly. It now has Members and Directors from the Provinces.

On 1st April 1988, the Bar Mutual Indemnity Fund will begin covering all the 5,500 Barristers in England and Wales from the ground up to £2m. any one claim. It is managed by a Miller subsidiary, Bar Mutual Management. As we are covering from the ground up we will be handling claims. There are 14 Barristers on the Board, selected partly on a regional basis and partly as a result of their specifications. These are the three legal mutuals.

(2) Secondly, there are two bricks and mortar mutuals. In 1987 there was set up the Housing Associations Mutual Insurance Association, or HAMIA, with 42 Housing Associations as members. It covers, up to £2m., the professional negligence of in-house architects and design teams. It is managed by a Miller subsidiary, HAMIA Management.

Then there is an architects' mutual, known fittingly as WREN. This began in 1987, with about 30 Firms, for whom cover is available up to £5m. It is managed by Tindall Riley & Co.

(3) Thirdly, there are other mutuals, some in prospect. As for accountants, there is one known as MAPIC, under the auspices of another firm of P. & I. Club Managers, A. Bilbrough, Managers of the London P. & I. Club. You will be aware that there is published regularly a league table of the gross fee incomes of accountants. This group of about 170 firms come from the middle and lower ranges. It is understood that other groups of accountants, with larger fee incomes, are also examining the possibilities of setting up mutuals.

Certain other professions are studying the mutual route, though I am required not to give further details at this stage.

Though it is not a P. & I. mutual, I want to confirm, as reported in Lloyd's List and elsewhere, that the aviation mutual, which I mentioned earlier, eventually took off, in the shape of Airline Mutual Insurance, or AMI, in 1987. It takes a 5 per cent line, in respect of not only liabilities, as originally conceived in 1963, but also hulls, and has 21 airlines as members.

Some questions:-

1. **Are there areas in which the mutual principle is inapplicable?**

   Yes. The group has to have, at least at the outset, some cohesiveness. It is fortunate that such groups exist, often with very active leaders, who would have thought about mutuality without any encouragement from the specialists in the field, like ourselves. But there are limits. Take Directors' and Officers Insurance, or DANDO as it is often called. I doubt whether there is yet sufficient common unity of interest, sufficient unified driving force, to enable such a mutual to start.

2. **What about captives?**

   There is no theoretical reason why a captive should not be used for mutual insurance. In practice many have tended to be captives of large individual firms, as when an American oil company would start a captive in Bermuda, but its own captive, though open in law to other interests to use for insurance. If a profession insures in a mutual, however, there is no problem of regular shareholding adjustments, for a mutual is a company limited by guarantee, with no shareholding, but only members, who are the insured.

3. **Offshore or onshore?**

   Some major P. & I. Clubs, i.e. the Shipowners' Clubs, moved offshore. This is especially relevant where there is a wide international membership. Then, provided that the Directors do not make their decisions in the U.K., the investment income can, in a place such as Bermuda, be tax-free. But this is not essential for a mutual, and the Professional Indemnity mutuals which I have mentioned to you today are based where their Members live, with the exception of the shipbrokers' mutuals.

4. **What of the brokers?**

   For the brokers who are broking risks into the mutual, their position depends upon what the Member-Directors of that mutual decide about brokerage. A mutual depends for its success not on any refusal to pay

brokerage, or any reduction in brokerage, but upon the fact that, in the long run, a mutual must be cheaper (a) to the extent that it removes the profit element; and (b) in that it devotes the investment income to the membership, and they are told how much it is. With the Bar Mutual there will be no entry through brokers for its cover of up to £2m., though Barristers use brokers to get cover above that figure. With the top-up Solicitors' Mutual, SIMIA, brokers are essential as SIMIA is one of a group of co-insurers, who constitute a package put together by the Solicitor's broker. It pays the usual P. I. commission, which is now 17½ per cent. and was till recently 20 per cent. Some brokers, and a growing number, have been sympathetic to the mutuals. They see an increase in capacity; and an insurer, as in the case of a co-insurer like SIMIA, which can sign for over 20 per cent. for one visit.

There has been some hostility, but in the end a broker will doubtless act loyally as the agent of the insured, which he is. He will be mindful of the analyses given in *Anglo-African Merchants v. Bayley* (1970), in the *North & South Trust* case (1970) and indeed in the Bible, all to the effect that no one can serve two masters. The Bible has less binding force than the views of the High Court.

The first two decisions are sometimes referred to as those two decisions on a broker's duty given by Mr. Justice Megaw and Mr. Justice Donaldson, as they then were, and whose words I read fondly as I was pupil to each in turn many years ago.

5. **What about the reinsurers?**

We have observed a distinct change in the last 2 years. From initial reluctance they have proceeded to reasonable enthusiasm, especially on the part of some of the Companies.

Some reinsureres can see a lot to be said for cases being handled at the lower level by professional club managers. That major reinsurance on the London marine market, that of the International Group of P. & I. Clubs, has been a good experience over the last 30 years and is a favourable precedent for similar relationships. These are now emerging in the P.I. field.

Conclusion.

There is of course no one voice of the market. There are individual interests, thank goodness, who make their own choices as to their attitudes towards the P.I. mutuals. Of course there have been voices saying that all this is a temporary reaction, and part of the cycle of ups and downs in premium and

capacity. I think that this is a limited view. Now is not the time, some people always say. I am reminded of Martin Luther King, not a name often conjured with in the British Insurance Law Association. I do not refer to his speech beginning with the words "I have a dream", but to another speech, when he talked of his efforts (putting black people in the white section of buses) to ensure that white southerners obeyed their country's Federal law in the matter of segregation. He said: "I have yet to engage in a direct action that was not described as ill-timed". So we have yet to engage in a new mutual that was not described by some as ill-timed. Nevertheless they are healthy plants and the garden is extending.

INSURANCE AND THE ENVIRONMENT PERSPECTIVES FOR THE FUTURE

by John G. Cowell
Deputy Secretary General Comite Europeen des Assurances

Insurers always need time to wake up to what is going on around them.

At least that seems to be the case if we are to believe the Post Magazine review of liability developments last year.

> "Pollution", we are told, "became a topical subject during 1987 and, with the reinsurers taking the lead, pollution began to be excluded from many public liability policies, perhaps with an option to buy back the cover except for the US where the exclusion was absolute."
>
> "New wordings," the review continues, "began to appear, the main feature being that, where pollution cover was given, it was restricted to that of a sudden or accidental nature, the intention being to exclude gradual pollution."

Another point in the review is worth mentioning.

> "The movement to convert policies onto a claims made basis seems to have run out of steam and many insurers openly advertised that losses occurring cover was readily available."

Whether the Post Magazine is right about pollution only becoming a "topical subject during 1987" is something I would prefer to leave to you but I think there is no doubt about one thing.

If product liability was the issue of the seventies we can probably say that environmental impairment liability is the issue of the eighties and beyond.