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
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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.

And legal developments in the field of defective products are now being applied to environmental impairment.

Hardly a day goes by without some item or other concerning the environment appearing in one or other of the news media.

And even Prince Charles is turning his attention from architects to polluters – and not such a bad thing at that. Not least since architectural monstrosities can be prevented or removed without long term harm to the human and physical environment. Not so with pollution.

True catastrophic losses are few. But we cannot fail to be aware of the snowball effect of some of the more spectacular disasters in recent years – Mexico City (19 November 1984), Bhopal (2 December 1984), Sandoz (1 November 1986).

The result? Heightened public awareness of the enormity of the pollution problem.

I do not want to over-dramatise the subject but I do think we are going to have to face up to the fact that the ecological balance is slowly but surely being destroyed. And it is the slow but sure nature of this destruction which is most disturbing – because it is not only the fate of our generation but also of future generations which is in question.

Future prospects were neatly summarised in the Global 2000 Report to the President of the United States on Entering the Twenty-first Century (1981) which reminded us that "environmental problems do not stop at national boundaries."

The Report continued:

> "If present trends continue, the world in 2000 will be more crowded, more polluted, less stable ecologically, and more vulnerable to disruption than the world we live in now.
>
> "Serious stresses involving populations, resources and environment are clearly visible ahead. Despite greater material output, the world's people will be poorer in many way that they are today."

These considerations are an essential backdrop to discussion on insurance and the environment.

Pollution is no respecter of national frontiers. Pollution is a global problem.

Does insurance have a role to play – especially at a time when the trend towards the "polluter pays" principle (based, inter alia, on the notion of the "good citizen") is unlikely to be reserved?

I believe insurance (private insurance) does have a role to play but how far and in what way it can fulfill its role remains uncertain.

I should like to address two issues here.

First, the problem of claims clauses.

The liability underwriter can be forgiven for wondering just how far he is expected to go today in writing risks which, by their very nature, are unknowable.

He has to face the very real prospect of increasingly having to pay claims at some future date in circumstances which could not have been conceived when he first went on cover.

The liability insurer rightly envies his opposite number in the property branch.

The property insurer has very largely solved the key problems of risk analysis and risk control. He "knows" the risk. He is able to calculate his maximum exposure to loss. His calculations are backed up by a wealth of statistical information.

He is solely concerned with losses occurring during the policy period. And in most cases claims can be quickly established and quickly settled. Not so with liability insurance.

In many cases liability claims may take many years to establish – not least because in many cases damage or injury may quite simply be unknown.

How, in fact, do you determine the moment of loss especially in the case of damage which may only become apparent over many years?

Historically, liability insurers in western Europe have tried to address the problem in three different ways!

- by providing cover under the policy in force at the time the act giving rise to damage was *committed,* e.g. at the design or production stages.

- by providing cover under the policy in force at the time the damage *occurred.*

- by providing cover under the policy in force at the time the claim is *notified to the insurer* (the so-called claims-made policy).

Both the act committed basis (only used to any extent in Switzerland) and the occurrence basis (widely used throughout western Europe) have distinct drawbacks.

Briefly, cover under a policy written often ten or more years ago is more than likely to be wholly inadequate in today's conditions where insurers can be forgiven for wondering if and when the inflation spiral will take off once again.

It may also prove difficult, if not impossible, to trace the policy in force at the time the act was committed or the damage occurred – always assuming that we can determine with any precision the exact moment of act or occurrence.

There are obvious difficulties in hazardous waste cases where a large number of waste generators have been using the same pits, ponds or landfills over many years.

Hence the obvious charms of the claims-made basis.

Both insurer and insured are relatively secure in the knowledge that the level of indemnity is more or less sufficient to meet claims notified during the policy period – though the adequacy of the policy limites may be stretched by lengthy litigation.

The insurer, of course, benefits from the cut-off at the end of the policy period – and it is here that the problems arise.

First, there may be no cover in force in respect of future claims, e.g. in cases of bankruptcy or cessation of activity.

Second, the insurer may (understandably) be reluctant to renew cover, e.g. in cases where damage is known to have occurred but claims have not yet been notified.

Claims-made can be described as insurer-friendly or more correctly, perhaps, reinsurer friendly since it was reinsurers who were largely responsible for pushing claims made covers.

Insurance buyers are understandably concerned with the prospect of being "left naked" just at the very time they need cover most.

In the event claims made has only been used to any extent in specialist covers, including environmental impairment liability covers under the various continental pools I shall discuss in a moment.

It is, I think, significant, that reinsurers are no longer pushing for claims made.

And in the Federal Republic of Germany, where insurers are under considerable pressure to provide broad pollution cover (including gradual pollution), there is some suggestion of moving towards a *damage manifestation* basis as a more satisfactory way of settling pollution claims.

What I believe is clear is that insurers must seriously consider how they can respond to demands (from government, from industry and from environmentalists) for better and quicker compensation of environmental damage. Pools may be one way of doing so.

Pools (like other market developments) are a response to changing market conditions governing particular risk exposures, e.g. the "newness" of risk, the catastrophe potential or the need to maximise capacity.

Pools also offer cover which, for one reason or another, is not (or is no longer) available on the conventional market.

If insurance buyers want a certain type of cover, e.g. extended environmental impairment liability cover which the conventional market is unwilling to provide (for whatever reason), the formation of a pool may be the only answer.

The cover offered by a typical pollution pool seeks to fill in the gaps left under a conventional liability policy.

The typical policy currently available in most markets will exclude (or will have intended to exclude) events which are neither sudden nor accidental.

There is, however, no clearly-established cut-off between sudden and non-sudden events. And I am not aware of any court rulings in Europe which would throw light on the problem.

Suddenness, in fact, has little meaning in cases of gradual pollution involving, for example, leakage or seepage.

Three types of problem can be identified:

1. **residual pollution** – resulting from the emission of pollutants, in tolerable or tolerated quantities, which even the strictest control cannot eliminate;

2. **synergistic pollution** – resulting from the "mix" of one company's tolerated emissions with equally tolerated emissions of other companies, thereby producing an unacceptable level of pollution;

3. **contingent pollution** – resulting from substances considered harmless today (given the current state of knowledge) but capable of causing widespread damage tomorrow.

The need to cover such risks was one of the underlying reasons for the formation of pools in France (GARPOL), The Netherlands (MAS-Pool), Italy (ANIA-Pool) and the US (PLIA Pool).

Opponents of pools (especially in the London market) argue that pools are unnecessary.

Adequate cover, they say, is available on the conventional market. Requests for cover which fall outside the normal insurance parameters (sudden and accidental events) should not be the object of a private insurance system.

This brings us to the crux of the problem.

If, on the one hand, the Post Magazine is right that insurers intend to exclude gradual pollution and if, on the other hand, buyers are no longer convinced they can get adequate cover under the commercial liability policy, then it seems to me there is a clear conflict of interest between insurer and buyer.

Now I am not suggesting that pools are the only way of resolving this conflict but I am suggesting that pools are one way.

I might add in parenthesis that at least one company in France covers (subject to additional premium) both sudden and gradual pollution under its commercial liability policy. The only condition is that the event must be fortuitous (that is, unintended).

Pooling experience in the case of pollution liabilities in western Europe has not been particularly satisfactory so far.

In part, this is due to selection against the insurer – "those who can afford it don't need it – and those who need it can't afford it".

It is also due to the fact that the pools are having to compete on unequal terms with cover under the commercial liability policy (where, as I said earlier, there is no clear dividing line between sudden and non-sudden events).

Capacity is far from adequate. And unlikely to increase substantially in the foreseeable future.

Pollution is very much on the agenda at the present time.

The European Community has long been debating whether to introduce legislation basd on the "polluter pays" principle.

The OECD is discussing whether to introduce a convention on the transfrontier movement of hazardous wastes.

And the United Nations Economic Commission for Europe is trying to reach agreement on liability for the carriage of hazardous goods (the so-called UNIDROIT Convention).

Finally, the Council of Europe has arisen phoenix-like from the ashes to find itself charged by the EC and OECD with looking into all aspects of environmental impairment, including liability and insurance issues.

Not surprisingly people are wondering where this is all leading to. Patience is running out. Especially in Germany.

German politicians are particularly sensitive to environmental questions. And this is true of both left and right.

This is due in large measure to the electoral system which combines stability with representativity – with the result that pressure groups like the Greens are able to influence government policy.

And it is not at all improbable that we shall see within the next few months federal legislation providing for liability of the polluter independent of fault.

The big question: will the legislation contain compulsory insurance provisions? German insurers hope not. Compulsory insurance is not necessary, they say.

But are they right? After all, German insurers insist (at this stage) on excluding events which are neither sudden nor accidental. And this is just the sort of cover German industry wants. And environmentalists as well.

Insurers are, in fact, going to have to face up to some very unpleasant questions.

And not only in Germany.

Can insurers reconcile freedom to accept or decline risks with the need to provide improved protection against pollution damage?

Can conventional insurance alone provide adequate protection or must there be some form of state guarantee to back up conventional insurance facilities, e.g. on the lines of nuclear liability guarantee (insurer, state, operator)?

Could the high cost of insurance encourage industry to think again about various forms of self-insurance?

And if insurers refuse, for example, to cover gradual pollution how will governments react?

It is by no means inconceivable that refusal to offer broad pollution cover in the conventional market could lead to irresistable pressure on governments to look at alternative means of compensating victims.

The insurance industry cannot necessarily rely on conservative-minded governments to oppose changes in the law which may well strain insurance capacity in future years.

So what is to be done?

Which is better – cover under a general liability policy or cover under a separate EIL policy (written individually or by a pool)?

Partisans of the general liability policy argue (not unreasonably) that a comprehensive package is less likely to leave gaps in cover.

Everything depends on the ability and the readiness of the insurer to provide cover and capacity and on the ability and the readiness of the insurance buyer to pay the price required.

Partisans of the separate EIL policy (and by extension the pools) point out the continued reluctance of the conventional market to provide broad pollution cover.

One thing seems pretty certain. Separate cover would not be necessary if the requirements of supply and demand were satisfied on the open market. But this would seem to be far from being the case at present.

I have taken as my starting point that there is indeed a future – that Armageddon will not come in the year 2000.

And that there will be a place for the liability of the polluter and for the insurance of the polluter's liability.

Pollution liability insurance, of course, is predicated on the possibility of identifying the polluter.

This would, it seems to me, exclude insurers being called on to provide cover for long-term pollution problems, e.g. landfills, where there is no possibility of identifying the polluter(s) concerned.

Such problems more readily lend themselves to a fund solution financed by contributions from industry.

One key issue of concern to governments is the hazardous waste problem – waste is still being dumped around the globe without any real thought of what might happen in twenty or thirty years' time (when most of us will have moved on to another place).

Think, for example, of the fourteen million cubic meters of domestic and industrial waste at Georgswerder (Monte Mortalis), Hamburg, or the three million tonnes or more of toxic waste which circulates within the EC every year (UNEP figures).

Let me try to summarise.

First, pollution is here to stay. We cannot get away from it. Even the air we breathe in the hills of Scotland or Snowdonia is highly polluted.

Second, pollution damage must somehow be compensated. Clearly, the sudden and accidental event is no longer a satisfactory criterion – at least as far as government, industry and ecologists are concerned.

Third, pollution liability insurance has a future provided you can identify the polluter.

Fourth, insurers will have to decide how they are going to satisfy demand for broader cover. It is not enough to adopt a "take-it-or-leave-it" stance.

The conventional market must be ready to re-think its policy conditions (cover on a damage-manifestation basis of any environmental impairment provided such impairment is fortuitous).

Will it do so?

If it does not then new ways will have to be found to handle what is still very much a new area of liability. But if liability insurers are unable to deliver the goods – what then?

Private insurance will only have a future if it can show that it can continue to offer the public a better deal than that offered by the state or any other compensation system.

SURVEYORS' AND VALUERS' LIMITATION OF LIABILITY AND THE UNFAIR CONTRACT TERMS ACT 1977 ("UCTA").

by Karen Willis,
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It is a common feature of written contracts that one party may try either wholly or in part to absolve himself of liability under the contract or from a tort connected with the contract.

Where the parties' bargaining strength is not equal, for example where a person is dealing as a consumer or where a small business is dealing with a powerful company, the Courts have tried to correct the imbalance by adopting rules of construction notwithstanding the general principle of freedom to contract. These rules include the "contra proferentem" rule i.e. a clause is construed against the party whose clause it is and who is seeking to rely upon it. Clauses must be clear and unambiguous stating what the party's intention is and refer to all instances that are intended to be covered, especially if liability for negligence is sought to be excluded or restricted. Clauses must extend to the exact contingency or loss which has occurred. These rules of construction have been complemented by the Unfair Contract Terms Act ("UCTA").