4. LIABILITY INSURANCE
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RECENT DEVELOPMENTS IN LIABILITY LAW

1988 has been a mixed year for potential plaintiffs in liability suits and, therefore, a mixed year for defendants' liability insurers. The pattern has been a general tightening up by the courts on matters of principle, but a more relaxed attitude towards imposing liability on specific classes of defendant.

Turning first to matters of principle, the two most important items are causation and economic loss. It is trite law that a plaintiff must prove that the defendant's act was the proximate cause of the loss, but the precise approach of the courts to a case in which any one of a series of events might have caused the loss has never been fully articulated. Matters were, however, clarified by the House of Lords in *Wilsher v. Essex Area Health Authority* [1988] 1 All ER 871 in which their Lordships ruled that a plaintiff who alleges that his loss was proximately caused by cause A, must produce rebutting evidence if the defendant alleges that the true culprit was cause B, C or D. In short, their Lordships appear to have opened the way for a defendant to 'muddy the waters' by raising the possibility of other operative causes. It may be that this will have important limiting qualities in medical negligence cases in particular, where all manner of natural factors may be at work, and it is interesting to note in passing the causation difficulties which emerged in the first whooping cough vaccine damage case, *Loveday v. Renton* (1988, unreported): the court here held that the conflict of medical evidence made it impossible to conclude that the vaccine had caused fits. It may be said, therefore, that establishing actionable negligence is more difficult now than was the case one year ago, and it would further seem - from the Privy Council decision in *Ng Chun Pui v. Lee* (1988, unreported) - that the ever-reliable doctrine of *res ipsa loquitur* (whereby negligence could be assumed in the absence of any other sensible explanation) is itself subject to a 'muddying the waters' principle which operates to defeat the doctrine where the defendant alleges that non-actionable elements were at work.

The second major matter of principle to emerge in the last year is that of economic loss. The history of this is well-known: after decades of judicial consistency in denying damages for pure financial loss outside cases of negligent misrepresentation, the House of Lords ruled in *Junior Books Ltd v. Veitchi Co Ltd* [1983] 1 AC 520 that in principle such losses were recoverable where the parties were in a relationship almost equivalent to contract. However, two recent cases - with facts almost indistinguishable from the customer - sub-contractor relationship in *Junior Books* - in the House of

Lords and Court of Appeal appear to have denied even the limited propositions asserted in *Junior Books:* in both *D and F Estates Ltd v. Church Commissioners* [1988] 3 WLR 368 and *Department of the Environment v. Thomas Bates & Sons* (1988, unreported) plaintiffs who might legitimately have expected to succeed in the wake of *Junior Books* left the court empty-handed. Running parallel with retrenchment in causation and economic loss has been some expansion of the *duty* of care, that is, those circumstances in which a negligence action is theoretically possible. Nevertheless, most members of professions are probably more confused today than they were a year ago. Consider, for example, the plight of a surveyor employed by party A to value property in which party B is about to acquire an interest. In *Harris v. Wyre Forest District Council* [1988] 1 All ER 691 our surveyor was informed by the Court of Appeal that if he is employed by a mortgage lender to value the borrower's intended purchase he is not prevented by the Unfair Contract Terms Act 1977 from issuing a disclaimer to the borrower which will prevent his liability from ever arising. On the other hand, if our surveyor is more cautious, he may choose to believe *Davies v. Idris Parry* (1988, unreported) where a clause of this nature was held to fall foul of the 1977 Act and not to restrict the common law duty of care owed to the putative mortgagor. Our surveyor should not, however, let pessimism cause him sleepless nights, for in *Strover v. Harrington* [1988] 1 All ER 769 it was decided that our surveyor is, when inspecting property, perfectly entitled to rely upon particulars produced by a (doubtless rival) estate agent for the purpose of selling the property to the plaintiff purchaser. Interestingly enough, a surveyor who *undervalues* property for insurance purposes is as likely to escape liability as the surveyor who *overvalues* property for purchasing purposes: *Beaumont v. Humberts* (1988, unreported).

Mysteries surrounding two other professions are nevertheless somewhat closer to solution. First, the Court of Appeal determined, in its majority decision in *Caparo Industries plc v. Dickman* (1988, unreported), that company auditors owe a duty of care to existing shareholders as well as to the company which employs them. Secondly, the many members of the public who have long puzzled over how pharmacists alone can read the unintelligible scribble used by doctors on prescriptions may take at least some comfort from *Prendergast v. Sam & Dee* (1988, unreported): a patient who is supplied with incorrect drugs may sue both the doctor for failing to write clearly (25% liability) and the pharmacist who attempted to decipher the doctor's writing without checking what was intended (75% liability).

One further group of cases, involving public authorities, might usefully be mentioned. Undoubtedly the most significant decision is *Minories Finance Ltd v. Arthur Young* (1988, unreported), in which Saville J ruled that the Bank of England owed no duty of care to ensure that bodies under its supervision - here, Johnson Mathey Bankers Ltd -

conducted their business prudently. More of this case will surely be heard once the dust settles on the Barlow Clowes fiasco. Other points of interest are decisions dismissing actions by prisoners, against prison governors, for injuries suffered at the hands of fellow inmates (*Palmer v. Home Office; Porterfield v. Home Office,* both 1988, unreported - duty of care not broken) and by the parents of a victim of the 'Yorkshire Ripper', against the police, for failing to apprehend him in time (*Hill v. Chief Constable of West Yorkshire* [1988] 2 All ER 238 - no duty of care).

Finally, an oddity. The generosity of the courts towards rescuers was reaffirmed by the House of Lords in *Ogwo v. Taylor* (1988, unreported), where a fireman injured in a rescue attempt was permitted to recover in tort against the person who had by his negligence committed the act which rendered rescue necessary. This form of liability is well established, and only rarely are the courts prepared to give a discount to the defendant representing the rescuer's contributory negligence; insurers might do well to bear the 'rescuer'principle in mind.

RECENT DEVELOPMENTS IN LIABILITY INSURANCE LAW

The last year has seen a number of important developments in liability insurance. Perhaps the most significant are statutory: the strict product liability provisions of the Consumer Protection Act 1987 came into force in Spring 1988 while the amendments to the Road Traffic Act 1972, whereby third party property damage is brought within the compulsory insurance regime, were published at the end of 1987 and take effect from the end of 1988.

A statute which has been in force for some time but which has undergone some drastic judicial surgery in the period under consideration is the Third Parties (Rights against Insurers) Act 1930. It will be recalled that this piece of legislation seeks to preserve the rights of the third party victim of an assured's tortious conduct where the assured has ceased to be solvent: in such circumstances, the third party is statutorily subrogated to the rights of the assured against the assured's liability insurer, and may claim against it. If a claim is to be made by the third party against the assured's liability insurer, it is necessary initially to establish the assured's liability to the third party. This can only be done where the assured, if a company, has remained in existence, and in *Bradley v. Eagle Star* (1988, unreported) the Court of Appeal reached the inevitable conclusion that once an assured company has been struck off the register of companies, its liability can no longer be established and the third party must fail. Assuming that the third party has established the assured's liability to him, the third party then becomes entitled to the assured's rights against the insurer, with the caveat that the third party cannot be placed in any better position than the assured himself

would have been. An issue which had long been perplexing lawyers in this context arose for decision on two occasions in our period: what is the effect on the operation of the 1930 Act of a clause in an insurance policy (more specifically, in P & I Club rules) which renders the insurer's liability to the assured conditional on full payment to the third party by the assured? Clearly this is a condition which the third party cannot meet. In *The Fanti* [1987] 2 Lloyd's Rep 299 Staughton J held that a term of this nature produced an absurdity in the context of the 1930 Act and could be disregarded, and that in any event it fell foul of the provisions of the 1930 Act which prevented contracting out. Shortly afterwards, in *The Padre Island* [1987] 2 Lloyd's Rep 529, Saville J reached two opposite conclusions: the clause had the effect of preventing recovery by the third party, and that it did not constitute an attempt to contract out of the 1930 Act. This conflict is due to be resolved by the Court of Appeal shortly.

One further potentially damaging decision made under the 1930 Act should also be noted. In *Normid Housing Association v. Ralphs* (1988, unreported) it was held that an agreement between the assured and a liability insurer, under which the insurer's liability in respect of a particular potential claim should be limited to a fraction of that claim, could not be overturned by the third party when the assured finally became insolvent: in the court's view, the contracting out provisions of the 1930 Act do not apply to pre-bankruptcy/liquidation agreements between assured and insurer. It will be appreciated that this decision is a damaging one to the operation of the 1930 Act, and that the only real hope of the third party is to attack the agreement between insurer and assured on the basis of duress or undue influence or some related vitiating factor.

This brief survey of liability insurance cases may be concluded by reference to two small but nevertheless significant points of construction. In *Thorman v. New Hampshire Insurance Co (UK) Ltd* [1988] 1 Lloyd's Rep 7 it was decided that the word 'occurrence' in the notification clause of a liability policy referred to the issue of a writ and not its subsequent service. It will be recalled that under the Rules of the Supreme Court the plaintiff has one year in which to serve the writ on the defendant following its issue, so that this decision may well determine which of two liability insurers is liable in respect of a particular claim. Finally, in *M/S Aswan Engineering Establishment Co v. Iron Trades Mutual Insurance Co Ltd* (1988, unreported) it was finally settled that the phrase 'liability at law' in the insuring clause of a liability policy means liability for breach of contract as well as liability in tort.

RECENT DEVELOPMENTS IN THE LIABILITY OF LIABILITY INSURERS

The recent decision of the Court of Appeal in *La Banque Financiere de la Cite v. Westgate Insurance Co* (1988, unreported) has been dealt with elsewhere. It is

sufficient to note the following points of doubt involved in the case, most of which will doubtless be aired before the House of Lords some time next year (1989).

(1) Given that the insurer does owe a duty of utmost good faith, to what does it apply? Can it, as the Court of Appeal thought, extend to the prospects of a successful claim by the assured under the policy, or is it limited to factors which might reduce the premium which the assured is willing to pay?

(2) Is there a worthwhile remedy? According to the Court of Appeal, reversing Mr Justice Steyn, damages are not available. Moreover, the Court of Appeal ruled that damages in *tort* were not available, on the basis that damages for economic loss should not be awarded for failure to speak.

(3) Is the insurer's duty of utmost good faith a continuing duty, that is, does it operate after the contract has been formed?

Insurers are awaiting the answers to these questions with bated breath.

The Proposed Directive on Winding Up of Insurance Undertakings

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The idea of an EC directive on the winding up of insurance undertakings has been about for a long time. The first text, on which there was consultation in the mid-seventies, stood by itself. Later there was going to be a Bankruptcy Convention, harmonising the general law of bankruptcy throughout the Community and the directive was conceived as an adjunct to that. Now the Convention has been shelved and the directive has re-emerged as an independent document (Official Journal C71 of 19 March 1987). It has been formally proposed by the Commission to the Council of Ministers and is at present awaiting discussion by the European Parliament.

The proposal does not attempt a comprehensive harmonisation. It is based upon a single central idea which is seen as a guarantee that policyholders in all Community countries will receive an equal degree of protection in the event of failure of an insurance enterprise which has carried on business in more than one country.

The idea is that the assets representing the technical reserves should be segregated from the rest. They should then constitute a fund earmarked for the policyholders. There should be a pooling of these funds from the head office and all the branches in