THE 1989 UPDATES

1. LIABILITY INSURANCE
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The year September 1988 to September 1989 has seen a large number of developments in liability law and in liability insurance law. What follows is a brief and by no means exhaustive survey of those developments.

1. General Principles of Liability

Economic Loss. After a good deal of confusion, the guiding principles for determining the recoverability of economic loss have been established in a series of decisions. A duty of care in relation to economic loss will be owed if three requirements are satisfied:

(a) reliance and loss are reasonably forseeable;
(b) there is the necessary degree of proximity between the parties - this might arise in particular from a voluntary assumption of responsibility or from a relationship equivalent to contract;
(c) the imposition of a duty of care must be just and reasonable - if there is a contractual relationship, it is unlikely that the courts will impose a tortious duty of care which is in any way inconsistent with the contractual duties of the parties.

It will be appreciated that little is left of *Junior Books* v. *Veitchi* these days.

Limitation. The Limitation Act 1980 sets out a basic limitation period of six years during which a writ must be issued. For actions in contract, the period runs from the date of breach, whereas for actions in tort the period runs from the date at which the action accrued (which is normally the date at which damage occurred). The Latent Damage Act 1986 modified the 1980 Act by creating a new period for actions in negligence; the plaintiff has three years, from the date at which he ought to have discovered both the damage and the defendant's liability for it, in which to issue his writ. In *Iron Trades Mutual* v. *Buckenham* the reinsured's broker submitted false information to reinsurers, and the reinsurance contract was subsequently avoided by them. The reinsured issued a writ against the broker within three years from the date at which the reinsurers avoided the contract, but after the expiry of six years from the date at which the false information was given. Kenneth Rokison QC held, in an application for striking out by the brokers: (i) the reinsured's action accrued at the

date of the broker's error and not at the date at which the reinsurers avoided the contract, so that the action was time-barred under the 1980 Act; (ii) the reinsured could not rely on the 'discoverability' period of three years provided for by the 1986 Act by framing an action in contract, as the Act only applied to tortious negligence actions; (iii) it was arguable that the reinsured was owed a tortious duty of care, so that the 1986 Act might be applicable if the reinsured could show that it could not have discovered the true facts more than three years before it issued the writ.

The case is important in two respects. First, it confirms that the period of 'discoverability' under the Latent Damage Act 1986 does not apply to actions framed in contract. Secondly, it provides further support for the proposition, originally derived in a series of cases involving actions against solicitors, that an action against a supplier of services accrues when the mistake is made and not when its consequences become apparent.

'*Course of employment*' This concept is important in that it fixes the scope of the employer's vicarious liability and in that it determines the situations in which an employee is entitled to claim against the employer for work-related injuries. In *Smith* v. *Stages* the House of Lords laid down detailed guidelines for determining when an employee travelling to and from work is doing so in the course of his employment. In very general terms, their Lordships held that normal travel to and from work is outside the course of employment, although the position may be modified where the employee travels on the employer's time or is paid a wage while travelling.

2. Specific Illustrations of Liability

Auditors It was established in *Caparo* v. *Dickman* that auditors, in preparing a company's accounts, owe a duty of care to the shareholders of the company and also to persons who are known to be relying on the accounts (even if the reason for their reliance is not apparent). However, it was further held, for 'floodgates' reasons, that there could be no liability towards persons not known to be relying on the accounts. This reasoning was followed in *Al Saudi Bank* v. *Clarke Pixley*, where lending banks were refused relief against auditors in respect of loans issued to an insolvent company.

Insurance brokers. In *Federation General Insurance* v. *Knott Becker* it was held that a broker, who negligently failed to procure a binding liability policy for its client assured, was not liable to a third party victim of the assured when the assured became insolvent and the third party found himself unable to sue the assured's liability insurers under the Third Parties (Rights against Insurers) Act 1930. The broker's

duties were held to be owed to the assured alone, and the court was of the view that it would have been unreasonable to impose a further duty of care on the broker towards an unforseeable third party.

Surveyors. The leading case here is of course *Smith* v. *Bush*, in which the House of Lords put paid to the previous mass of conflicting authority. Their Lordships held: (i) a surveyor employed or engaged by a prospective mortgagee owes a duty of care to the prospective mortgagor in the preparation of a survey report, and this is so despite any contract between them; (ii) any attempted disclaimer of liability by a surveyor falls within the Unfair Contract Terms Act 1977 and will generally be void for unreasonableness, given the fact that in most cases the mortgagor relies on the report and is known to do so; (iii) liability may, however, be more difficult to establish where the mortgagor is a commercial concern. It might be commented that this situation is one of the few in which economic loss will be recoverable. It should also be added that the mortgagee itself will not be liable to the mortgagor for the defaults of the surveyor unless the mortgagor is the surveyor's direct employer or has at the very least held itself out as accepting responsibility for the report (*Beresforde* v. *Chesterfield BC*).

Building sub-contractors. The decision in *Norwich City Council* v. *Harvey* is arguably, but by no means certainly, of historical interest only, as it was decided under the now superseded wording of JCT 80, clause 22C, which put fire damage to the employer's existing works at the employer's 'sole risk'. The Court of Appeal held in *Harvey* that a negligent sub-contractor could rely on clause 22C to escape a subrogation action by the employer's insurer, even though the building contract in which the clause appeared was between the employer and the contractor, the sub-contractor not being a party to it. As is well known JCT 80, clause 22C was revised in 1986, and a distinction is now drawn between 'nominated' sub-contractors (ie sub-contractors appointed by the employer) and 'domestic' sub-contractors (ie. sub-contractors appointed by the contractor); a nominated, but not a domestic, sub-contractor is entitled to be named as a co-assured, thus freeing him from subrogation actions by the employer's insurers. The revised JCT 80 does not say specifically that a domestic sub-contractor is to face liability (although that is clearly the intention), and it theoretically remains open to the courts to apply the *Harvey* principle to domestic sub-contractors despite the revisions in wording.

Extra-contractual liability of insurers . Some mention must be made of *The Good Luck*, in which the Court of Appeal decided that an insurer owed no duty to inform the assignee of the policy proceeds (in this case, a mortgagee bank) that it had a defence under the policy. Unaware of this, the bank had made further advances to the assured after loss, believing that payment under the policy would be forthcoming. The Court,

more specifically, ruled: (i) as the owner of the mortgaged vessel had remained the assured under the policy, the duty of utmost good faith owed by the insurer was owed only to the assured and not to the bank as assignee of the proceeds; (ii) the letter of undertaking given by the insurer to the bank, under which the insurer agreed to pay any proceeds to the bank and to inform it in the event that the insurance *ceased*, did not oblige the insurer to inform the bank of circumstances which gave the insurer the right to avoid liability; (iii) the letter of undertaking was not of itself a contract of utmost good faith requiring disclosure; (iv) a tortious duty of care was not owed by the insurer to the bank, as imposing such a duty would distort the commercial agreement between the parties.

3. Liability Insurance

Motor Insurance . It should be noted that the Road Traffic Act 1972 has, with effect from 1989, been superseded by the Road Traffic Act 1988. No substantive changes have been made to the law.

Reasonable care clauses. There is much authority for the proposition that a reasonable care clause in a liability policy is to be construed narrowly, so that the assured is denied recovery only where he has been at the very least reckless. These authorities ensured that the third party victim was able to obtain a remedy. The first case to consider third party *property damage*, as opposed to *personal injury*, has reached the same conclusion. In *Aswan* v. *Iron Trades Mutual* (which was in fact a direct action by the third party under the Third Parties (Rights against Insurers) Act 1930) it was held that the assured could claim an indemnity for liability incurred under contract for delivering unmerchantable goods, the defects in which were not known to the assured. However, recovery was disallowed in respect of one consignment which the assured had known to be defective when dispatched, as such conduct was classed as at least reckless.

Third party rights. There have been a number of important developments here. First, in *Bradley* v. *Eagle Star* the House of Lords confirmed that an employee of a dissolved company cannot bring an action under the Third Parties (Rights against Insurers) Act 1930; as a company cannot be sued more than two years after its dissolution, its liability cannot be demonstrated and thus its liability insurers cannot be sued. The Companies Act 1989 has, however, amended section 651 of the Companies Act 1985 so that a dissolved company can be restored to the register within 20 years of its dissolution to allow it to be sued in these circumstances. Due to a last-minute concession, the new provision is retroactive for 20 years, so that, limitation problems aside, the *Bradley* litigation and the other outstanding cases may

well now have happy endings (although not all insurers would agree with 'happy'). In *The Fanti* and *The Padre Island* the Court of Appeal ruled that a 'pay to be paid' clause did not prevent the operation of 1930 Act: while such a clause did not constitute an unlawful contracting out from the 1930 Act, the apparent obligation on the third party - to pay itself before it could claim - was superfluous and could be disregarded. On this basis, the clause ceased to have any real meaning where the assured had become insolvent.

Finally, in *The Irish Rowan*, the Court of appeal discussed, but did not choose between, the various situations in which the 1930 Act might have extraterritorial effect. It remains unclear whether jurisdiction to apply the Act is founded upon the proper law of the policy, whether the assured was wound up in England, or whether the policy moneys were payable in England.

2. MEDICAL NEGLIGENCE
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A good enough starting point is Wilsher v. Essex Area Health Authority [1988] 1 All E.R. 871 (House of Lords). This was quite a victory for the Insurers. A child born prematurely received an excess of oxygen during the first weeks of his life due to a mistake on the part of Hospital Staff. He developed retrolental fibroplasia, an incurable condition of the retina, which caused partial blindness. He sued the Health Authority on the ground that this condition was caused by a lack of care and skill in the management of his oxygen supply following his birth. The Health Authority was found to be negligent and the child was awarded substantial damages. The Authority appealed unsuccessfully to the Court of Appeal. On further Appeal to the House of Lords, it was held that the most important issue to be determined was whether the mistakes of the Hospital Staff caused or materially contributed to the Plaintiff's condition. The onus of proving causation lay on the Plaintiff. The decision in McGhee v. National Coal Board did not establish a new principle of law whereby, in the absence of proof that a culpable act had no effect, defendants should be liable for any injury arising from the risk they had created. In the present case there was conflicting expert evidence as to whether the excess of oxygen administered to the plaintiff in the first days of his life caused or materially contributed to his condition or whether it was due to other factors. Where the Judge was unable to resolve such a conflict there was no alternative to a retrial. Accordingly, the Appeal was allowed and a retrial ordered.

It is not without significance that this case turned on "causation" - an area of jurisprudence which can hardly be graced in England and Wales by the word "Conceptual". There is a variety of cases, such Hotson v. Fitzgerald [1987] A.C. 750,