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
By Iain S. Goldrein, Barrister, Liverpool and London.

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,

and Fitzgerald v. Lane [1988] 3 W.L.R. 356, which shows that the courts approach causation on a very pragmatic (and dare I say it - unsophisticated) level. This may interestingly be contrasted with the voluminous legal theory which has developed in other jurisdictions, such as Romano - Dutch Law.

The next case to attract one's attention (and, indeed, popular headlines) was of course Prendergast v. Sam & Dee Limited [1988] Independent 17th March. This is the doctor's writing case (one asks rhetorically - how does the Broker approach the Underwriter at Lloyd's now - when broking medical professional negligence insurance? Is it just claims previously made - or is there to be a written test as a criteria in medical expertise?) In this case, the Plaintiff who suffered from asthma, visited his doctor and obtained a prescription for his usual maintenance medication and a drug to combat a chest infection. The dispensing pharmacist misread part of the prescription and dispensed a drug used for the control of diabetes. As a result the plaintiff suffered the symptoms of hypoglycaemia, leaving him with permanent brain damage. He brought a claim for negligence against the pharmacist and the doctor. It was held that the pharmacist should have been put on enquiry by the doctor's unclear handwriting, by the dosage and number of tablets and by the fact that the plaintiff paid for the drugs, whereas diabetics are exempt from charges. He dispensed the prescription mechanically and, in doing so, had fallen below the standard of ordinary skill expected of a pharmacist and the exercise of his duty of care to the person to whom he was dispensing. The name on the prescription was capable of being read as the name on the diabetes drug. The prescribing doctor was under a duty to the patient to write a prescription clearly and should have allowed for some mistakes on the part of a busy pharmacist who might not have been able to give sufficient attention to the prescription. The doctor in the present case fell below the appropriate standard of legibility in writing the prescription. Although the pharmacist's reading and dispensing of the prescription was negligent, this was due in part to the doctor's negligent writing. Accordingly, responsibility was apportioned - 25% to the doctor and 75% to the pharmacist.

One also questions rhetorically, to what extent do the skills of the pharmacist have to be tested - when his professional indemnity insurance is being broked? And I confess to a personal view - might the 75%/25% have been the other way around? It is so much a matter of feel and complexion for the judge - rather than any scientific approach to apportionment. This decision was upheld by the Court of Appeal [1989] Times, 14th March, where it was further held that the chain of causation from the doctor's bad handwriting was not broken.

An interesting case - where insurers surely felt a flutter of cardiac concern, was

Phillips v. Grampian Health Board [1988] S.L.T. 628 (Auderhouse). The deceased was found to be suffering from a malignant tumour in 1979. He was married in 1981. Treatment for his condition was unsuccessful and he died in 1986. In 1985 he had brought an action against a Health Authority claiming damages for his illness on the ground that the hospital concerned should have diagnosed his condition in 1978, when he was examined on a number of occasions, and that he probably would have recovered if treatment had been administered at that time. After his death, his widow joined in the action as his Executrix and also as an individual claiming damages in respect of his death. The Health Authority argued that when the widow married the deceased he was already suffering from a fatal disease and his death within a few years was inevitable. Accordingly, the widow had no prospect of enjoying his company for more than a few years, nor could she have expected any support from him for more than that period; she was suing in respect of something that she had not lost because she had never had any prospect of acquiring it. The Court disagreed. It held that under the relevant legislation, a relative included "any person who immediately before the deceased's death was the spouse of the deceased." If the Health Authority's argument were correct, it would be expected that the definition should be "any person who immediately before the act or omission causing personal injury leading to death was the spouse of the deceased and continued to be so until his death". Damages were not merely compensation for an unexpected or untimely death, but were compensation for the loss of support suffered or likely to be suffered as a result of the act or omission in question. The date of the marriage was immaterial to the widow's claim. It had to be assumed that the deceased would not have died but for the Authority's negligence. The relevant expectation was not that which the widow had at the time of the marriage but the expectation she would have had if the deceased had not died. Had the action been concluded prior to death, the deceased would have received substantial damages for future loss of earnings which he could never have earned. Accordingly, compensation for notional loss was a concept which had been envisaged by Parliament. The Health Authority's argument was rejected.

An interesting case featured in the Independent newspaper on the 6th February 1989, namely Gregory v. Pembrokeshire Health Authority. It was held that where a Health Authority negligently failed to give the plaintiff the result of an amniocentesis test which did not produce any result, that negligence did not give rise to a claim in damages as the plaintiff would have accepted medical advice not to repeat the test and proceed with the pregnancy. The nub of this case is that although there was negligence, there was no causation. More disconcerting to insurers is the case of Davis v. City & Hackney Health Authority [1989] The Times, 27th January. This was a decision heard at first instance in the Queen's Bench Division. It was held that a person suffering from cerebral palsy, born in 1963, was not barred from bringing an

action of damages for personal injuries alleging his disabilities were due to medical negligence at birth. The Court in deciding when he had knowledge of the relevant facts was required to consider whether an individual of his age, background, intelligence and disabilities could reasonably have known those facts. That being the case, it would appear that medical records running from the early 60's would still be relevant - an awe-inspiring task for a medical bureaucracy.

Well there it is - a brief overview - from which the conclusion can readily be distilled that nothing of very major proportions has been happening (at least as reflected through the Law Reports) in the medical negligence field. But did I, throughout the year, discern a certain buoyancy in the shares of Moet Chandon? Of course, insurers are far too discreet to announce good news through the medium of the tabloid press. One can only look to the subtle indicia of rejoicing. Was it perhaps the change in the rules which has resulted not only in reciprocal disclosure of medical reports on liability, but also in relation to witness statements?

This change in the rules, which has effectively abrogated trial by ambush (when the doctors on both sides did not know what the other side was going to say until the relevant witness went into the witness box), means that cards are very much more on the table. At a much earlier stage, both sides can appreciate the strength of their cases. But insurers are significantly assisted by the case of Maynard v. West Midlands Area Health Authority [1985] 1 All E.R. 635, which is authority for the proposition that:

> ".....in the medical profession, as in others, there was room for differences of opinion and practice and a Court's preference of one body of opinion to another was no basis for a conclusion of negligence; that, accordingly, where it was alleged that a fully considered decision by two Consultants in their own special field had been negligent, it was not sufficient to establish negligence for the plaintiff to show that there was a body of competent professional opinion that considered that the decision had been wrong if there was also a body of professional opinion, equally competent, that supported the decision as having been reasonable in the circumstances."

Accordingly, if a plaintiff obtains two expert witnesses on liability who are in his favour - and the defence come up with two experts of similar status who advise against liability - one may expect the defence to invoke the decision in "Maynard" to justify the Court in dismissing the action. That it a very substantial hurdle for plaintiffs to get over - which accentuates the need for choosing the right expert, instructing him carefully in relation to the relevant issues, and for a thorough preparation of the claim. The Association of Victims through Medical Accidents clearly has targeted this

aspect of practice with a view to assisting plaintiffs - but if one was forced to choose between whether or not it was the plaintiffs who have had the upper hand in the last 18 months or so or the defendants, there are many arguments to justify that putting one's money on the defence would have been the better bet.

3. RECENT DEVELOPMENTS IN AVIATION LAW
by Tim Scorer, Barlow, Lyde and Gilbert

The Warsaw Convention System

This year marks the 60th anniversary of the Warsaw Convention, an international convention signed in 1929 between most of the developed countries of the world. It aimed to provide a liability and compensation framework for the world's infant air transport industry, and an internationally enforceable strict liability regime. In short, member states agreed on behalf of their air carriers to accept strict liability for injury to passengers, and loss of baggage and cargo, in return for a financial limitation on that liability. Defences would be strictly limited, limitations could only be broken in the event of the carrier's wilful misconduct, and the jurisdictions in which claims could be made were prescribed.

Considering the declared intention of the Warsaw drafters, to provide a unified liability system for international air transport, it could today be said in some quarters that the intention has failed. The system frequently comes under attack and new and imaginative ways are attempted to circumvent the limits, or eliminate them altogether. The arguments tend to centre mainly on whether the airline has behaved with wilful misconduct or whether there has been some fundamental irregularity in the ticket which would exclude the application of the limits. Needless to say the USA is top of the league when it comes to the challenge to the Warsaw Convention.

On the other hand it could equally be said that the Convention has served the airline transport industry well, has protected it in its "fledgling" years and beyond and has for the most part been upheld and implemented worldwide as was its design. It might then be said that it has now really served its purpose. Why should airlines continue to enjoy this limitation of liability which is not enjoyed by aircraft manufacturers, by airport authorities or by air traffic controllers? Has the time not come for a change? Keep the strict liability framework, especially jurisdictional provisions but discard the limits. Let a passenger be compensated in the same way as if he suffered the death or injury in a road accident in his own country of residence. What argument can there be for saying he should receive less (or perhaps, more) than that, just because he dies or is killed in an air disaster? If the airline can establish that some other party was