Disasters of a financial nature rather than a bodily injury nature includes Ferranti, British & Commonwealth, Bond Corporation, Equiticorp in New Zealand where the directors are already defendants in an action for record damages of NZ$564M, Quintex, National Safety Council, Rothwells Bank.

**The Market**

The market remains a province of specialists, the principals of which are:-

(1) 5/6 Lloyd's syndicates who are leaders.
(2) Sun Alliance.
(3) AIU and Chubb
(4) The composites, who have remained on the sidelines for so long while the market developed and who have now joined forces under the banner of Encon, a Canadian Underwriting Agency.

## 2. THE ENVIRONMENTAL PROTECTION BILL
## By Dr. Malcolm Aickin

I wrote a paper on this subject in the May 1990 issue of the British Insurance Law Association Journal. I was conscious then that things would change by the time it was published. I said then that the Bill was expected to pass into Law before the end of July and that the Government's White Paper on the environment would be published at about the same time. The White Paper was published on 25th September 1990.

The Environmental Protection Bill has passed through the House of Lords Committee stage and is now expected to complete its House of Lords Report stage in the middle of October.

**Contaminated Land**

Since I wrote the previous paper, the Government promised to introduce provisions into the Environmental Protection Bill requiring local authorities to create registers of contaminated land. This has now appeared in the miscellaneous section at the end of the Bill as Section 136. There are other sections in the Bill which deal with contaminated land, as I mentioned in my earlier paper. In particular Section 60 imposes a duty on Waste Regulation Authorities to monitor and secure the safety of closed landfill sites. The application to close landfill sites is mentioned in the marginal note. However, the language of the section itself extends to all land except where a site licence is in force, thus clearly excluding open landfill sites, where one of

three conditions is met. The first two deal with deposits of controlled waste and so obviously apply to landfill sites. The third is more general and refers to land where there are, or may be, concentrations or accumulations of noxious gases and liquids. I said in my earlier paper that I believe this drafting extends to all contaminated land. I still stand by that view.

The new Section 136, to my mind, bears the hallmarks of being a rather rushed attempt to fulfil the Government's promise in response to the House of Commons select committee's report on contaminated land. Much of the detail is left to be specified by the Secretary of State in regulations.

This section will impose a duty on local authorities, but not waste regulation authorities, to prepare a register of contaminated land in their area. The register is to be compiled on the basis of information available to the authority from time to time. The local authority is to include on the register land in its area subject to contamination. Land subject to contamination means land which is being or has been put to a contaminative use. There are two requirements for a contaminative use. Firstly it is a use which may cause the land to be contaminated with noxious substances. This is very similar to the requirement I have already quoted in Section 60. The second is that contaminative use must have been specified by the Secretary of State in regulations.

There is no requirement that the local authority should inspect the land, or that it should in any way satisfy itself that the land is in fact contaminated. There are provisions under Part III for giving Local Authorities powers to inspect and act to prevent statutory nuisance. However these are principally directed to human health rather than the environment. Although there is provision for the Secretary of State to make regulations to prescribe the measures to be taken in informing land owners that their land is the subject of an entry in the register, there is no provision for the land owners to appeal against this inclusion. My view is that it would be more effective to place this duty to compile registers of contaminated land upon the waste regulation authority, who have duties to inspect such land and where that land presents a danger to take the necessary remedial action. The cost of remedial work to land can be very substantial. This is bound to have an effect on the value of the land, which will be felt both by the land owner and by anyone who has lent money using the value of the land as security for the loan.

Contaminated land is not necessarily restricted to industrial or high value commercial uses. There is for example a call to clean up several hundred acres of Cornish farmland which is contaminated by Aldrin residues. The cost of investigation to establish whether or not the land is contaminated can exceed by several times the value of agricultural land.

## Waste Disposal: The Duty of Care

Since I wrote the paper in the May issue of the journal the Department of the Environment has issued a consultation paper on the duty of care in waste disposal. The duty proposed in Section 33 is that all those who deal with waste from its creation or importation through to its disposal shall take all reasonable and applicable measures to prevent the contravention of Section 33 by another, to prevent escape of the waste, to ensure that the waste is only transferred to an authorised person and that on transfer the waste is properly documented. Consultation is of interest in the context of the Environmental Protection Bill. It is also of more general interest because it attempts to specify what constitutes a reasonable standard of care. Reasonableness is a common standard in English Common Law. Like the elephant we recognise it when we see it.

The Department of the Environment consultation suggested that it was reasonable for someone to make sure that the site to which they were consigning waste had a site licence, however, it is suggested that it would be unreasonable to expect the consignor to check that all the waste that he was sending to the site fell within the provisions of the site licence.

The duty of care requires that all those involved with waste should take reasonable steps to prevent the illegal disposal of waste by any other person. However, the Consultation paper suggests that this is limited to waste which has been in one's control.

I should mention that I have not come across anyone who believes the draft code of practice is adequate or will be effective, except for the civil servants who drafted it.

## Integrated Pollution Control

Part 1 of the Environmental Protection Bill introduces the concept of integrated pollution control. Under integrated pollution control the hazardous processes will be designated for central control and listed in Schedule A. This central control will be exercised by Her Majesty's Inspectorate of Pollution (HMIP). However, there are other authorities involved in the process. The emissions to air which are controlled include emissions to air within buildings. There is clear overlap with the Health and Safety Executive who regulates the quality of air within the work place. There are provisions that HMIP will liaise with the HSE over there requirements. It also specifically stated that HMIP may not introduce conditions which are solely directed towards health and safety within the workplace. The discharges to water which are

regulated by HMIP are also relevant to the National River Authority (NRA). HMIP must consult with the NRA over these discharges and in the event of HMIP and the NRA disagreeing there is provision for appeal to the Secretary of State. HMIP will regulate the generation of special wastes and possibly all controlled wastes form Section A processes. However the consignment and disposal of special wastes will be controlled by the Local Waste Regulation Authority (LWRA) albeit with supervision from HMIP. To my mind this is better described as differentiated pollution control than integrated pollution control.

The position for the less hazardous Schedule B processes is more fragmented. The local authority will have control over emissions to air, including those within the workplace under integrated pollution control, but will not control discharges to water or waste disposal.

Under integrated pollution control HMIP will need to produce somewhere in the order of 230 guidance notes. HMIP has produced 21 guidance notes in 10 years. There are a significant number of vacancies within HMIP's established staff. Many of those staff in post have been withdrawn from carrying out field inspections in order to write the necessary guidance notes.

It is clear that in future the operation of integrated pollution control will be much more adversarial than it has been in the past. HMIP will simply not have the resources to indulge in the detailed discussions which have previously been a feature of pollution control in this country.

The first 11 guidance notes of all local control have been published for consultation. These include processes such as relatively low volume glass manufacture and maggot breeding.

I have mentioned that local control will only be exercised over air emissions. Within the proposed guidance notes are proposed conditions that storage tanks should be adequately bunded to contain 110% of the contents of the largest tank. Whilst this is an entirely sensible provision it is only obliquely related to air pollution. If the content of the tank is not contained and it spreads over a wide area, then the vapour hazard may be increased.

I have also mentioned that conditions under integrated pollution control should not be solely designed to affect health and safety within the workplace. In the draft guidance note for the operation of clinical waste incinerators, there is a condition that boxes of sharps should not be opened prior to incineration. Again this is an entirely prudent

precaution; however, its sole object must be to prevent operators from stabbing themselves with broken glass or used needles and becoming infected with HIV or serum hepatitis.

**Genetically Manipulated Organisms**

The final area I want to touch on is that of genetically engineered, or manipulated, or modified organisms, depending upon how alarmist or downbeat one wishes to be. These techniques do present enormous opportunities. It is already possible to produce human insulin in large quantities by the use of genetically modified bacteria. Insulin is vital in the control of diabetes. Most of the insulin for this use is both bovine in origin. There are some diabetic suffers who develop an allergy to bovine insulin. They are enormously advantaged by the production of human insulin in large quantities through the generic manipulation of bacteria. These bacteria are not released to the environment and therefore do not come under this part of the bill. However, this is an existing demonstration of the opportunity presented by genetic modification.

I envisage that it will be possible to introduce genes for the fixation of nitrogen into cereal crops through genetic modification. These plants will be able to flourish, fixing their own nitrogen without the need for the application of nitrogenous fertilizers. This potentially represents a huge opportunity in solving problems of food supply with an increasing world population and of reducing both the costs of nitrogenous fertilisers and the pollution which stems from their use. However, in taking these opportunities it is important to have a firm base for the control of the release of genetically modified organisms.

The second reason for talking about genetically modified organisms is that the provisions in the Environmental Protection Bill are in many ways similar to those for integrated pollution control but do not suffer from the same complications of Schedule A and Schedule B processes and the relationships with other regulation authorities.

Section 105 requires that those involved with genetically manipulated organisms take reasonable steps to ascertain the risks of environmental damage associated with the release of the organisms. If on the basis of this risk analysis, there is a risk of harm to the environment, then they are not allowed either to keep or release the organisms in question. There is a requirement that the best available techniques not entailing excessive cost should be applied to prevent damage to the environment.

Section 115, which was added at the Commons Report Stage, puts a reverse onus of

proof on those involved with genetically manipulated organisms to show that there was no better available technique not entailing excessive cost than the one they actually used. This section also allows the absence of a record showing observance of a condition to be admissible as evidence that the condition was not met.

There are powers for inspectors to seize and render harmless genetically modified organisms which are in imminent danger of causing harm to the environment.

There are of course provisions for the prosecution of those who fail to adhere to these requirements. In addition to the reverse onus on proof which I have mentioned this is a strict criminal code, there is no requirement to show that there was an intention to cause harm to the environment.

Section 147, which is a general provision applying to all sections of the Act, provides that where an offence has been committed by a corporate body, with the consent or connivance of, or attributable to the neglect of, any director, manager, secretary or similar officer of the corporation, or a person purporting to act as such, then he as well as the corporation shall be liable to be proceeded against and punished accordingly. There is no restriction as to who may bring prosecutions for breach of the provisions dealing with genetically manipulated organisms. This is generally the case within the Environmental Protection Bill.

## 3. RECENT DEVELOPMENTS IN THE FIELD OF PROFESSIONAL INDEMNITY
## By Michael J.Pugh, Barlow, Lyde & Gilbert

The past twelve months or so have been a particularly exciting period for developments in English law relating to professional indemnity. They have witnessed two major decisions of the House of Lords, both of which significantly affect the legal position of professionals in the duties they owe, and at least six other cases and one piece of legislation which make important contributions in this field.

### DUTY OF CARE IN TORT

The area which has undergone the most change is the duty of care. The courts have, in a series of recent decisions, moved resolutely to re-define and restrict the circumstances in which a party will be found legally liable for economic loss caused to another in the absence of a contractual relationship between them. This trend was, unsurprisingly in the wake of the Court of Appeal judgement in *Caparo Industries plc -v- Dickman and*