The 1992 AGM and Seventh Annual Conference Morning Session: The 1992 Updates

1. LIABILITY INSURANCE *OR* THESE TRUTHS WE HOLD TO BE SELF EVIDENT - THE *1960'S* ARE DEAD - OK?

by Iain Goldrein, Barrister.

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Charles de Gaulle, Harold Wilson, Jo Grimmond, Danny Cohn Bendit, Rudi Dutchke - all yesterday's men! All 1960's men. And Lord Justice Stamp? A great man. Tomorrow's man. A man of the 90's. Did anyone know he has died - and many years ago? Judicial proof of life after death?

A generation ago, Lord Denning MR was associated with the proposition that a guide to where liability should lie in the law of tort was the location of the pocket best able to pay.

That pocket was in turn associated with liability insurance.

Was sight lost of the fact that the pocket is funded by Jo Public - amongst whom is numbered everyone of us? Do premiums have inexorably to rise? Recent decisions in the law of tort suggest that insurers have the opportunity to seize the initiative and cut costs. The challenge to them (and their shareholders?) is: Will they exploit the opportunity which beckons?

We must start with snails in beer bottles. Miss Donoghue was a pauper and a Scot. She changed the face of English law. In so doing she proved that the poor could indeed pass through the eye of a needle.

What makes her different? She was given a bottle of ginger beer. She went to drink. She claimed that there was a decomposed snail in the bottom and that she suffered a

violent nervous reaction. She could not sue the vendors, because she had not bought it. It was a gift. So she sued the manufacturers with whom she had no contractual link. On a preliminary point of law, it was held that the action was good. Thus is history made.

But what if the bottle, instead of causing her a nervous reaction, had disintegrated in her hands depriving her of the pleasure of imbibing ginger beer? What then? Could she have sued the manufacturer for the loss in value of her gift? What if I give to you a hoover which falls to pieces in your hands but does you no physical harm? Can you sue the manufacturer for the loss of the hoover?

The answer seems an obvious **NO!** It is an obvious **NO!** It has taken several decades however to have the courts confirm the obvious.

In *Dutton v. Bognor Regis Urban District Council* [1962] QB 373 a house built on a former rubbish tip started to subside and crack. The owners inter alia brought action against the local authority alleging negligent inspection during construction. "Damage" held Lord Denning MR and Lord Justice Sachs feeling compassion and sympathy for poor Mr. and Mrs. Dutton. They recovered compensation for the diminution in value of the house. They were thus put in the position of a donee of a defective bottle of ginger beer being held entitled to sue for the diminution in value of the bottle!

Lord Justice Stamp gave a dissenting judgment. Wrong! - he held, and stated clearly where the demarcation between damage and economic loss lay. In so doing he held out a beacon for lawyers in the future to redress the aberration introduced in the English law of tort. That beacon was taken up by the House of Lords in *Murphy v. Brentwood* [1990] 3 WLR 414. That case is authority for the following principle:

> "The principle in *Donoghue v. Stevenson* applies to impose a duty on the builder of a house to take reasonable care to avoid injury or damage, through defects in its construction, to the person or property of those whom he ought to have had in contemplation as likely to suffer such injury or damage, that principle extended only to latent defects; that where a defect was discovered before any injury to person or health or damage to property other than the defective house itself had been done, the expense incurred by a subsequent purchaser of the house in putting the defect right was pure economic loss."

In summary the case narrows the legal meaning of "damage" and in so doing limits the duty of the builder and local authority. That ruling was followed by the House of Lords in *Department of the Environment v. T. Bates Ltd:* [1990] 2 All ER 943. It will

be remembered that in this case the upper floors of a building leased to the Plaintiff were inadequate to take the weight which they sought to impose on the structure. The decision is authority for the following:

> "... since the tower block had not been unsafe by reason of the defective construction of the pillars but had merely suffered from a defect of quality making the plaintiffs' lease less valuable since the building could not be used to its full design capacity unless it was repaired, the loss suffered by the plaintiffs was pure economic loss, which was not recoverable in tort by them against the defendants."

Thus at long last, a line is being firmly drawn between economic loss on the one hand and damage on the other. And this line is reflected in the case of *James McNaughton Paper Group Ltd. v. Hicks Anderson & Co.* [1991] 2 WLR 641. The facts were that while negotiations were taking place for the take-over of a group of companies by the plaintiff company, the group instructed the defendant accountants to prepare accounts for the group. The plaintiffs inter alia claimed to have relied on such accounts to their financial loss. It was held that:

> ".... there was not such a relationship of proximity between the plaintiffs and defendants as to establish a duty of care; that the defendants could not have expected to foresee the damage which the plaintiffs alleged they had suffered in reliance upon the draft accounts and the answer given by the defendants in general terms; and that, accordingly it was not fair, just and reasonable to impose on the defendants a duty of care to the plaintiffs in relation to the accounts and the answer."

Let us put this decision into *"Donogue v. Stevenson"* context. The plaintiffs were seeking to argue that they had suffered damage just in the same way as a pauper in Paisley near Glasgow suffered damage when allegedly finding a decomposed snail in a beer bottle. The plaintiffs in the *"McNaughton"* case however were a major commercial concern - is it that camels cannot get through the eye of needles? And the lesson to be learnt? Buy in your own accountants - do not seek to rely on those paid for by someone else.

This principle of robust self-reliance - the challenge to protect one's own interests rather than asking the mamby pamby State through its courts to look after one - is the message flowing from *Smoker v. London Fire and Civil Defence Authority* [1991] 2 All ER 1052. In that case the Plaintiff was employed as a fireman. He, together with his employers, had contributed to a pension scheme. He was injured in the course of his

employment. The injury triggered the payment of the pension.

Held: Pension payments not deductible from the claim for loss of earnings.

> "... Insurance companies and employers are at liberty to draft, although not bound to insist on, pension schemes in a way which will negate the effect of *Parry v. Cleaver*. ..."

Thus an employer (and behind him, the liability insurer) can provide for the deduction of pension payments from a loss of earnings claim - by contracting for that result.

So there is a further challenge to liability insurers: Should a condition precedent to entering into a contract for employer's accident insurance be a review of the contracts of employment and a renegotiation of terms? Should Jo Public pay through the increased premiums or the cost of manufactured goods increased through a rise in premiums? And what if Jo Public elects not to buy shares in the insurer because of the poor return on dividends? And what if the insurer goes bust?

The fact that the threshold of liability is being drawn further back in the field of tort law is reflected in another landmark decision - the *Hillsborough Case* - namely: *Alcock v. Chief Constable of South Yorkshire Police* [1991] 3 WLR 1057. This was a claim for damages for psychiatric illness resulting from shock caused by negligence at a football ground. Relatives brought actions against the relevant police force claiming to have suffered nervous shock eg through seeing the tragedy enacted on their television screens. It was held that a claim for such shock can be made without the necessity of the plaintiff establishing that he was himself injured or was in fear of personal injury. But very tight controls were placed on the limits of liability. Such a claim can generally only be made when shock results:

i) from the death or injury to the plaintiff's spouse or child or the fear of such death or injury and

ii) the shock has come about through the sight or hearing of the event or its immediate aftermath.

Again, the trend in liability is in favour of the liability insurer. And that trend is as much by reference to a definition of the limits of "damage" as it is by reference to the limits of "liability". How else can one interpret the case of *Watts v. Morrow* [1991] 1 WLR 1421? In that case a full structural surveyor's report bespoken by plaintiff

stated that a second home to be purchased by plaintiff would be reasonably trouble free. It was wrong. The issue was the measure of damages. It was held:

> ".... in the absence of any warranty that the condition of the property had been correctly described by the defendant, there was no basis for awarding the cost of repairs; that the proper measure of damages was the sum needed to put the plaintiffs in as good a position as if the contract had been properly performed; and that, accordingly, the financial loss of the plaintiffs was limited to the difference between the value of the property as it was represented to be and its value in its true condition...
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> "That in the case of the ordinary surveyor's contract general damages were recoverable only for distress and inconvenience caused by physical consequences of the breach of contract; that such damages should be a modest sum for the amount of physical discomfort endured ...."

Now I hear some of you saying: But does not the case of *McSherry v. British Telecommunications* [1992] 3 Med LR 129 damage liability insurers? That decision is authority for the following proposition:

> "The Offices, Shops and Railway Premises Act 1963, s 14 obliges an employer to provide employees who work in a sedentary position with a suitably adjustable seat and a separate footrest."

The point is: that decision orientates liability insurers towards where their responsibilities may be said to lie in the future. Insistence with the insured employer that there are reasonably safe facilities for work **AND** that the employee is properly trained to use them. Imagine if there is a proper training programme - imagine how the Defence pleaded by a barrister could then read:

> "Further or in the alternative, the said accident was caused by the negligence of the Plaintiff in that he consistently ignored the following warnings (setting them out ....) and acted contrary to the training programme which he underwent on the .... day of .... as evidenced by his signed acknowledgement of having been so trained. (The Defendant will at the trial herein rely inter alia on the training video used for its full meaning and effect).

The proposed health and safety regs. flowing from Europe give enormous opportunity to the liability insurer to go down this road.

The greatest opportunity perhaps, however, lies in **"REHABILITATION"** - a challenge which no liability insurer can surely ignore and which every shareholder in every insurance company must whole-heartedly welcome. It can properly be argued that it is the only realistic technique presently available for the abridging of the ever escalating claims in cases of injury of maximum severity. It is a topic which should surely be on the agenda of every board meeting of every insurer. It goes hand-in-hand with "structured settlements".

Thus those theories of yesteryear as to the role of the law of tort - theories born of an era which believed in the bottomless pocket - such theories are as outdated as communism and the Berlin Wall.

We as tort lawyers can raise our heads and say with confidence: "These Truths We Hold To Be Self-Evident - the 1960s are dead: OK?"

2. EC
by Patrick Devine, Clyde & Co.

As our chairman has indicated it is my task this morning to offer an update on legal developments in EC insurance law in the past twelve months.

This would be a daunting prospect at the best of times - and not just because I am aware that I am addressing such a distinguished company.

My main difficulty with this presentation is that this is, of course, 1992 and the Community's institutions have been particularly busy in bringing forward the legislation identified as necessary to create the Single Insurance Market from January 1st 1993.

Before I go any further I want to say a word about the proposed Maastricht Treaty which has been the focus of much debate in the media recently. What does Maastricht mean, if anything, for insurance if it proceeds to ratification in the Member States?

There are no direct implications for insurance. The agreement is mainly concerned with:

- foreign policy;
- economic and monetary union;
- subtle changes to the balance of power of the Community institutions.