Piper Alpha - Double Indemnity

by Timothy Akeroyd

Insurers and their legal advisers are, from bitter experience, well aware of the uncertainties involved with litigation. Rarely, however, have there been such cries of anguish emanating from the insurance market as in respect of the recent Scottish decision of Lord Caplan relating to the Piper Alpha.

The tragic background to this action is, of course, well known. On the evening of 6 July 1988 the Piper Alpha oil platform which was located in the North Sea some 110 miles north-east of Aberdeen was destroyed in a massive conflagration. 166 persons lost there lives and many of those who survived suffered varying degrees of injury or trauma. The accident was the worst disaster in the history of the British off-shore oil industry.

Following the accident the families of the deceased and the survivors presented claims against the platform operators Occidental Petroleum (Caledonia) Ltd (OPCAL). As is so often the case these claims were threatened to be brought not in Scotland, but in Texas. Here it was perceived that damages, substantially higher than those likely to be awarded in Scotland, might be awarded.

Negotiations took place throughout the Autumn of 1988 between representatives of the victims and lawyers appointed by OPCAL's Insurers. Eventually an agreement was arrived at whereby OPCAL would pay damages to victims to be assessed on a "mid-Atlantic basis". This represented an approximate mid way point between Texas and Scottish levels of damages. These damages were met by OPCAL's liability Insurers subject only to the usual deductibles and a self insured gap in coverage which became known as "the Oxy gap".

Having paid out very substantial sums in damages OPCAL's Insurers sought to bring in the name of OPCAL (which had, by then, been re-named Elf Caledonia Ltd) a series of subrogated claims against the various contractors whose employees were killed or injured. These claims were based on the terms of certain indemnities contained in the contracts under which the contractors were employed. The contracts were subject to Scottish Law.

At the end of an extremely lengthy trial Lord Caplan arrived at what, to the insurers involved, seemed to be a quite extraordinary conclusion. He held that:

> "My conclusion ...is that the Insurers of OPCAL and their Participants do not have any rights of subrogation in respect of the indemnities granted by the Contractors. [OPCAL] no longer have any title or interest to sue the Contractors. This means that if Insurers wish to recover their outlay this would have to be by way of a separate action based on contribution."

This finding has, not surprisingly, caused considerable concern amongst many Insurers and their advisors. It is, however, important to clarify from the outset the scope of this finding. In particular it should be understood that Lord Caplan is not saying that in all Scottish cases rights of subrogation do not exist. Nor that in Scotland subrogated claims must be brought in the name of Insurers and not their assured.

Far from it. In fact, Lord Caplan expressly reaffirmed the well known principles of subrogation. These apply just as much to Scottish cases as they do to English ones. Lord Caplan's judgment does however raise an important issue as to the nature of subrogated claims and the circumstances under which they can be brought.

The subrogation issue arose very late in the hearing. The first time it was raised was on the last day of the defendants closing submissions on day 381 of the trial. Rumour has it that one of the Scottish defence counsel thought up the point late in the trial whilst having a well earned soak in his bath. Whether he leapt out of the bath with the cry of "och aye eureka" is not known but it is certainly an ingenious argument. In order to understand the issue it is necessary to briefly look at the origins and history of the doctrines of both subrogation and contribution.

The concept of subrogation is a very old one. It dates back to Roman law under which a third party, who met a debt for which someone else was liable, was able to be subrogated to the rights of the creditor against the debtor. The principle has been recognised in English law for many centuries. The exact origins and basis of the doctrine has, however, long been the subject of judicial debate. It seems

to have been accepted for at least the last 100 years that the doctrine is based on the nature of a contract of indemnity and is not unique to contracts of Insurance. There are however two distinct schools of thought. The first consider that its origins lie in principles of equity. The second consider that the insurer's rights of subrogation arise out of terms implied by the operation of law into the contract of insurance.

In the vast majority of cases the question of which school of thought is correct is little more than of academic interest. Whatever the precise background of its origins the rationale and basic principles are well known. The rationale is twofold, both firmly based on the concept of fairness. First, that an assured should not be able both to make a recovery under the terms of his policy from his insurers and keep the proceeds of any recovery that might be made from a wrongdoer whose negligence or breach of contract caused the loss. Secondly, that the wrongdoer should not be relieved of his liability merely because the assured has been prudent enough to take out insurance.

From this desire to ensure fairness the basic principles of subrogation have evolved. In particular the rights of insurers to bring a subrogated claim against a wrongdoer arise on payment by the insurers under the policy. They can only be exercised in the name of the assured. The insurer is subrogated to any claim which the assured is entitled to bring to diminish his loss (provided those rights are connected with the subject matter of the insurance).

There are however limitations. For example, where the assured has caused his own loss, but has a claim under a policy, the insurers cannot seek any set off as against their assured as wrongdoer: see *Simpson* v. *Thompson* (1877) 3 App Cas 279. Similarly there are practical restrictions on bringing subrogated proceedings in the name of one assured against a negligent co-assured who also has an interest in the subject matter of the insurance. Such claims sometimes (but not always) fail by reason of circuity of action: see, for example, *Petrofina (UK) Ltd* v. *Magnaload* [1984] QB 127. Other examples can be found where under the terms of the policy Insurers waive their rights of subrogation against an identified party. Richard Aikens QC wrote an excellent article in the May 1997 edition of this Journal in which he explained in some depth the circumstances whereby underwriters are or are not able to bring a subrogated

claim in the name of one co-assured against another. Readers of this Journal will therefore be well informed as to the issues and I will not go over the same ground again.

Further, it is important to distinguish a genuine subrogated claim brought in the name of the assured against a wrongdoer from a claim for contribution. Claims for contribution can arise whenever a party has rights of indemnity against more than one person. The most common examples of a claim for contribution happen when assureds have taken out double insurance. The basic principles of double insurance are well known although in practice they can create considerable difficulties. It is perfectly lawful for an assured to insure any subject matter in which he has an insurable interest as many times as he likes. Provided, of course, that the purpose of such double insurance is not fraudulent. This does not mean that the assured can recover more than his loss. In a case where an assured is over-insured by reason of double insurance he will be limited to recovering his actual loss and no more. He has however (subject to express policy terms) the right to choose which of his insurers he wishes to recover from.

If the paying insurer had no remedy against his co-insurers this could lead to an injustice. The courts, however, provide an equitable solution. The insurer is not entitled to make a subrogated claim in the name of his assured under the alternative policies. However, subject to some rather complex rules and the precise terms of the relevant policies, the paying insurer is often entitled to make a claim against his co-insurers for an equitable contribution. This claim has to be distinguished from a subrogated claim as it is brought in the Insurers own name and is not for the full sum insured under the alternative policies.

The difficulties OPCAL's insurers have experienced flow directly from the doctrine of contribution. The subrogated claim being brought by insurers in the name of the Piper Alpha's operators against the contractors was being made pursuant to the terms of the relevant contracts which existed between them. Although the precise terms varied between the various contractors they all contained a series of indemnities a representative example of which reads:

> "The contractor shall indemnify, hold harmless and defend [OPCAL]...against any claim, demand, cause of action, expense or

> liability (including but not limited to costs of litigation) arising ...by reason of ...Injury to or death of persons employed by... the contractor ...irrespective of any contributory negligence, whether active or passive, of the party to be indemnified, unless such injury or death was caused by the sole negligence or wilful misconduct of the party which would otherwise be indemnified"

The applicability of this clause was hotly contested by the contractors who argued that the deaths and injuries suffered by their employees were caused either by the sole negligence of OPCAL or by their wilful misconduct. Lord Caplan however found that the disaster was not caused by the sole negligence of OPCAL, nor by their wilful misconduct. Importantly, he also held that the loss was not caused by the wrongdoing of any of the contractors who were defendants to the action.

In his judgment Lord Caplan recorded the fact that insurers who paid out in the first instance should either be able to recover their whole outlay through subrogation or a proportionate part of their outlay through contribution. He went on to say that, obviously they could not do both as the remedies were mutually exclusive. Having confirmed that, in respect of a claim against a wrongdoer, subrogation is the appropriate remedy he went on to state:

> "If a party enjoys the benefit of two or more indemnities granted to him to cover a particular loss then if that loss emerges he can choose to recover from which of the indemnifiers he chooses. If he recovers his whole loss it is difficult to see upon what principle he retains a right to enforce his indemnity against the non-paying indemnifier. His loss has been satisfied. There is no established principle that I am aware of that would entitle him to enforce his loss from the contractor as there is in a case of a wrongdoer."

Accordingly Lord Caplan held that the only claim to survive was OPCAL's own claim in respect of the uninsured "Oxy gap".

There can be no doubt that this decision took insurers by surprise, but on analysis it is not as outrageous as the response of certain insurers might suggest. It is,

however, in many respects a troubling case. This is not least because of the fact that this issue did not emerge until very much the eleventh hour of the trial. It would seem that the defence team argued that they were unaware that the claim was being brought by underwriters exercising their rights of subrogation. That this emerged only during the course of the trial and that they responded promptly once they learned of the fact. Frankly this does not sound very credible. Surely it must have been clear to all that OPCAL were insured for this loss.

Whatever the explanation it meant that an important and novel point was dealt with very much as an afterthought. Lord Caplan did not even have the benefit of seeing the policies under which OPCAL were insured so that he could consider any provisions that might of been of relevance. The claimants were unable to put their house in order by bringing a claim in insurers names as an alternative cause of action. It would seem likely that any such claim is now time barred.

An appeal is almost inevitable. However until such time as the Court of Appeal give their views there is one certain lesson for all insurers and their advisors. Beware of the double indemnity.

Timothy Akeroyd is a Partner
at Elborne Mitchell, London