BRITISH INSURANCE LAW ASSOCIATION

B L L E T I N

Bulletin No. 13 December, 1967

Annual General Meeting

The fourth annual general meeting of the Association was held in the Council Chamber of the Law Society on 25 September, 1967, when the following elections were made for the ensuing year:

President:	Dr. C. E. Golding
Vice-Presidents:	H. A. L. Cockerell Gordon W. Shaw
Chairman:	R. Wyeth
Vice-Chairman:	D. C. McMurdie
Hon. Secretary:	Michael A. Cohen
Hon. Treasurer:	R. A. Sims
Committee:	R. W. Boss K. S. Cannar D. J. B. Gatenby Dr. E. Jenkins D. J. Walker Prof. G. S. A. Wheatcroft

After the usual business of the annual general meeting had been conducted, the members of the Association together with guests from the British Institute of International and Comparative Law listened to an informative account of the revision of the supervisory legislation for the State of Wisconsin. The speaker was Professor Spencer L. Kimball of the University of Michigan Law School, eminently qualified to speak on this subject as he has been one of the main architects of this legislative revision.

Change of Address

All enquiries concerning the British Insurance Law Association should be addressed to the Hon. Secretary - Michael A. Cohen, Friendly House, 21-24, Chiswell Street, London, E.C.1.

Enquiries about the B.I.L.A. Bulletin and material for possible inclusion in future issues should be addressed to D. C. McMurdie, 21, Aldermanbury, London, E.C.2.

Luncheon

An enjoyable luncheon was arranged at the Council Luncheon Room at the Law Society's Hall on 25 September, 1967, when 28 of the members were present and Professor Spencer L. Kimball of the University of Michigan Law School was the chief guest.

It is hoped to arrange a further luncheon in the New Year, and details of this will be circulated later.

Estate Duty in relation to Life Assurance

This proved a popular subject among our members and drew a large attendance at the meeting held in January, 1967. It is proposed to hold a further meeting on 9 January, 1968, when Mr. K. W. Chetwood of the Estate Duty Office has promised to address us on "The Estate Duty Scene". Arrangements have been made for this meeting to be held at Aldermary House, Queen Street, London, E.C.4, at 6.30 p.m. Light refreshments will be available from 6 p.m. Further details will be announced in the legal and insurance press, but as the treatment of the subject is expected to be fairly controversial, no doubt members will wish to book the date in their 1968 diaries.

Future Meetings

The Committee is seeking to provide a varied and attractive programme for 1968 which should appeal to all sections of our membership. The intention is to hold life and non-life meetings alternately on a monthly basis until June. It is hoped to consider the following subjects at these meetings:

February:	Speaker - E. W. Eveleigh, Q.C. on a Common Law subject
March:	Segregation of Life Funds
April:	Motor Insurance Law
May:	Impact of Company Legislation on Life Business
June:	An Employers' Liability subject

Further details of speakers, dates and venue will be circulated among members in the New Year.

Paris Congress, 1970

In our last Bulletin we gave details of the subjects for the A.I.D.A. World Congress to be held in Paris in April, 1970. Working parties have now been set up and Professors E. R. Hardy Ivamy and G. S. A. Wheatcroft have kindly agreed to chair the groups for Themes I and II respectively:

Theme I — The rights of third parties against the insurer (creditors, victims, beneficiary third parties)

Theme II — Insurance and fluctuations in monetary value (particularly indexing and payment of claims).

Any members wishing to participate in these working parties should get in touch with the Hon. Secretary.

Membership

It will be remembered that in 1964 we had some correspondence with the General Council of the Bar about the membership of practising barristers. The matter has recently been reopened and we are pleased to report that the Secretary of the General Council of the Bar now writes as follows:

> "Your letter of 19 October has been considered by the Council's Professional Conduct Committee who now see no objection to practising members of the Bar joining your Association".

Audit of Accounts

With a view to the submission of our accounts to the Inland Revenue for tax relief of members' subscriptions, your Committee has appointed Messrs. Charles Rippin & Turner as the Association's accountants, and they have been asked to carry out a professional audit of our accounts.

Association of Insurance Managers in Industry and Commerce

A successful joint meeting was held with the members of A.I.M.I.C. on the evening of 7 November, 1967, and is reported more fully elsewhere in this Bulletin.

A.I.M.I.C. has extended an invitation to members of this Association to attend any of its meetings and has announced the subjects and dates of two forthcoming meetings, as follows:

Wednesday, 17 January, 1968	Public Liability
Wednesday, 21 February, 1968	Products Liability and Guarantee

Further details of time and venue can be obtained from A. S. D. Cross, Chairman, Programme Committee, A.I.M.I.C., c/o St. George's House, Croydon, Surrey, CR9 1NR (telephone: 01-686-3991, ext.2280).

Around the Courts

Professional Negligence

The House of Lords has upheld the decision of the lower courts in Rondel v. Worsley that barristers are immune from legal liability for negligence in the conduct of cases in court. This decision was based on the view that immunity of barristers is necessary in the public interest and for the better administration of justice rather than on the ground that a barrister does not enter into a contract and is unable to sue for his fees.

The House also considered the liability of a barrister for work other than work in court. Lord Reid expressed the view that when a barrister is not engaged in litigation there could be little reason why his liability should be different from that of members of any other profession who give professional advice and service to their clients. Lord Pearson asked the question, "Does the barrister's immunity extend to 'pure paper work', that is to say, drafting and advisory work unconnected with litigation?" His answer was, "The authorities to which I have referred do not show it. It seems to me that ... it is at least doubtful whether barristers have any immunity from liability for negligence in doing 'pure paper work' in the sense which I have indicated". Lord Upjohn also found it "very difficult to see upon what principle the immunity which all your Lordships are agreed must, as a matter of public policy, be granted to counsel while acting in litigious matters should extend to matters which are not litigious".

Lord Pearce, however, said, "The law has no differentiation between the liability of a barrister in litigation and in his other non-litigious work as a barrister". He further added, "It is also clear that the various rulings with regard to immunity of a barrister from liability for negligence were intended to cover all his work as a barrister. In my opinion, therefore, under the law as it now stands and has stood for some two hundred years, and perhaps considerably more, a barrister cannot be sued for negligence in respect of his work as a barrister".

The House further considered the position of a solicitor when appearing as an advocate. While recognising that there are some difficulties in granting to a solicitor advocate the same immunity as a barrister advocate, the House was generally agreed that if it is in the public interest to protect counsel when engaged in litigation a similar protection should not be withheld from solicitors. But, as Lord Upjohn said, this principle "must be rigorously contained for it is only while performing the acts which counsel would have performed had he been employed that the solicitor can claim that immunity". (1967) 117 N.L.J. 1273, (1967) 3 All E.R. 993.

On what trusts was the policy held?

By a marriage settlement of 1932 certain funds were settled on behalf of a husband and wife. The trusts of the husband's fund included a protected life interest in his favour and an absolute interest to the wife, who had since died. The husband had a power of appointment in favour of his issue and in default of appointment the husband's fund was settled on trust for the children of the marriage equally at 21 or, if daughters, on marriage under that age. The husband assigned to trustees a policy on his own life and the trustees were to invest the proceeds therefrom when received and to hold such investments on the subsisting trusts. The husband covenanted not to do anything to render the policy void or voidable. The trustees were empowered to use the capital of the husband's fund to pay the premiums on the policy. They could also surrender or exchange the policy for another to mature at the same date and to apply the proceeds of sale in replacing any moneys forming part of the wife's fund which had been applied towards the policy settled by the fund or any replacement policy. The trustees sought to ascertain by summons on what trusts they held the policy of assurance on the life of the husband.

It was held in the Chancery Division that an intention was clearly shown to exclude the husband from any benefit of the policy during his life and that the point of time at which to determine who were the beneficiaries under the trust should be the maturity of the policy. Thus, a trust to accumulate during the life of the husband any income arising before the maturity of the policy would be implied, and, subject thereto, the policy plus any accumulations were held on trust for the children of the marriage attaining 21 or, in the case of daughters, marrying under that age. Re Midwood's Settlement, Blakey and Others v. Midwood and Others (1967) 3 All E.R.291.

Has shipowner duty of care to person not having title to damaged goods?

This was the issue in Margarine Union G.m.b.H. v. Cambay Prince Steamship Co., Ltd. The plaintiffs entered into contracts for the purchase of part of a cargo of copra already on board the "Wear Breeze". The contracts did not give the sellers the option of tendering delivery orders, but the sellers did so and the plaintiffs accepted four such orders which were parts of larger quantities of copra shipped in bulk under two bills of lading The delivery orders were not ship's delivery orders, nor were the relevant bills of lading issued by the shipowners. Hence, the delivery orders did not confer, at the time of their acceptance, either a legal or possessory title to the copra. The plaintiffs acquired title to the

copra shortly after the parcels were discharged from the ship and separated from the bulk. The copra was found to have been damaged by cockroaches because of the shipowners' admitted negligence in failing to fumigate the vessel before loading her in the Far East. The damage was foreseeable. There was no privity of contract between the plaintiffs and the defendants, nor did s.1 of the Bills of Lading Act, 1855, give the plaintiffs the right to sue.

Held in the Queen's Bench Division that English law did not recognise a duty of care to lie on a shipowner towards anyone who was not the owner of the goods when the damage was done. Accordingly, the plaintiffs, not having a title to the goods at the time of damage, had no cause of action in negligence against the defendants. (1967) 3 All E.R.775.

No actuaries, please!

In the case of Watson v. Powles the plaintiff sued for damages for personal injuries arising out of a road accident. General damages of £8,000 were awarded plus agreed special damages of £1,531. 14s. 7d. Lord Denning, M.R., said in the course of his judgment that in personal injury cases a judge is to give what is, in all the circumstances, a fair compensation. When working out the sum he notes down so much for loss of future earnings, so much for pain and suffering and the like. That gives him a starting point, but there are so many uncertainties and intangibles involved that he has to gather all the items together in a round sum. It is not the judge's duty to divide up the total award into separate items. He may do so if it would be helpful but he is under no duty to do so.

Counsel for the plaintiff submitted that it should be the general practice to work out the loss of future earnings on an actuarial basis with the assistance of an actuary. Lord Denning said that it may be helpful sometimes but should not be a general practice. If actuaries were called in on such cases, it would add much to the time and expense of the trial, and there are so many intangibles that it might not be found particularly helpful. (1967) 3 All E.R.721.

MULTIFARIOUS LIABILITIES

At the joint meeting with A.I.M.T.C. on 7 November, 1967, our Chairman, Rex Wyeth, discussed the legal liabilities of a fictitious group of companies known as the XYZ Group. The following notes represent the substance of his talk.

The subject was dealt with from three points of view:

(1) liabilities for what the Group produced
(2) liabilities for the manner in which the Group conducted its activities
(3) liabilities arising from the status of the Group as owners and managers of property.

Under the first heading reference was made to the case of Donoghue v. Stevenson (1932) A.C. 562 and it was said that many fears expressed both at the time and subsequent to that case had in practice been realised, so that it has been given a wider application than was first envisaged. The judgment of Lord Atkin was quoted - "... a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care", and pointed out that the range of products to which this judgment has been applied extends to such things as cranes, motor cars, underpants, and hot water bottles. As the XYZ Group manufactures boilers and pressure vessels, they had liabilities to their customers, to customers' servants, and also to visitors to customers' premises. It is possible for the XYZ Group to protect themselves in respect of liability to customers by contract, but the range of potential plaintiffs is much wider and they will not be party to such contracts.

Consideration was then given to the defences available, and it was pointed out that the words "no reasonable possibility of intermediate examination" were construed at first in a restricted way. Nowadays, however, the test is whether it can be imputed to the manufacturer that he should have reasonably expected that there would be an examination likely to reveal the defect. In other words, am I entitled to assume that the product would have been inspected and that the kind of inspection would have revealed the defect? It was maintained that there are very few opportunities of establishing that kind of inspection.

It was further indicated that the liability of the Group is only for negligence, i.e., for want of care, but this does not fall far short of absolute liability in practice. The reason is that the onus usually shifts to the manufacturer who knows the manufacturing processes. It is difficult for a plaintiff to bring evidence to show that there has been negligence, therefore the court says to the manufacturer, in effect, "Your product has operated in a way it ought not to have done and now the onus is on you to show that there was no negligence". In theory, this may be well short of absolute liability, but in practice it is not far short of an absolute warranty.

Attention was next focussed on the Group's liabilities arising from the manner of conducting their activities. In order to illustrate the varieties of nuisance that can be committed in the course of carrying out the Group's activities, reference was made to the case of Halsey v. Esso Petroleum Co., Ltd. (1961) 1 W.L.R.683, where the plaintiff suffered from the activities of the Esso Petroleum Company who had an oil storage depot opposite to his terraced house. The facts of the case were amusingly recited, namely, that the company had two steam boilers with metal chimney stacks from which from time to time noxious acid smuts were emitted which damaged the plaintiff's washing hanging out to dry and also the paintwork of his car standing in the street outside his house. An occasional smell of oil had been present for many years, but more recently had grown in intensity to a particularly pungent oily smell of a nauseating character. In 1956 the defendants had introduced a night shift, the noise of which varied in intensity and at its peak reached 63 decibels, causing the plaintiff's windows and doors to vibrate so that he could not sleep through it. At intervals oil tankers, exceptionally heavy vehicles sometimes in convoy with as many as 15, came and went throughout the night. The noise outside the plaintiff's house when they rattled past was 83 decibels. It was not surprising to learn that the plaintiff succeeded on all his grounds, securing both damages and injunctions restraining most of the activities. It was questioned how far it is an insurable matter if as the result of an injunction a firm is forced to move its factory or to stop a profitable activity.

Under the third heading reference was made to the duty of care imposed by the Occupiers' Liability Act, 1957. As the XYZ Group occupy an office block, some of which is let off to tenants, it was noted that the company would be liable for those parts of the premises under their control, as, for example, common staircases and lifts. Claims from these sources can be multifarious and cost money to defend, even where they may be ill-founded.

So far as the company's shops were concerned, the case of Broom v. Morgan (1953) 1 Q.B.597 was mentioned where the defendant was the licensee of the "Bird in Hand" public house in Hampstead and employed both the plaintiff and her husband. The plaintiff was injured as the result of her husband's negligent act committed in the course of his employment and the court held the defendant vicariously liable, although the wife could not have sued her husband at the time as the action took place before the Law Reform (Husband and Wife) Act, 1962. It was stressed that legally the employer could recover against his manager; in support the case of Lister v. Romford Ice and Cold Storage Co. (1957) A.C.555 was quoted.

The Group's liability towards children was then considered. It was thought that there might be things lying about in yards which could consitute an allurement to children, especially where staff saw children playing on the premises and did not trouble to chase them off. In other words, toleration of children on premises can give rise to a liability. The case of Pearson v. Coleman Bros. (1948) 2 All E.R.274 was cited, where a child invitee at a circus wanted to relieve herself and wandered under the flap of a tent which contained lions and was mauled. It was contended that she was a trespasser when she received the injuries since she had gone unauthorised into the zoo enclosure. It was held that, as she was a little girl anxious to relieve herself and had retired to a suitable place for the purpose and vis-à-vis a child in those circumstances, the prohibited area had not been adequately marked off from the area into which she was entitled to go. She must therefore be regarded as an invitee at the time and place that she was injured and the defendants were liable.

It appeared that the company had one plant near the site of a disused mine and the possibility of the land subsiding as a result must be considered. A landowner has a natural right to support from adjoining land, but this extends only to land and not to buildings on it. It is, however, possible to acquire an easement under the Prescription Act where buildings have been up for 20 years or more. In other words, if a firm's mining operations cause the subsidence of its neighbour's land, the latter will have a right of action for damages against the firm. On the other hand, where the mining operations cause damage to adjacent buildings, there is no right of action for damage to the buildings unless it can be proved that the land supporting the buildings would have subsided even if it had not been built on.

The subject of riparian rights was discussed next. As riparian owners, the XYZ Group's rights to fish in the stream adjoining their boundary extends to halfway across the stream, unless they occupy both banks. Riparian rights also carry with them liabilities, since the landowner does not own the water in the stream. He may use it for ordinary purposes, such as domestic use or the watering of cattle, without restriction, but he must not withdraw water for industrial purposes unless he returns the water to the stream substantially undiminished in quantity and unimpaired in quality. In other words, you must put it back in a form which will do no harm, you must not pollute it, and you must not take too much. The speaker referred to the case of Pride of Derby and Derbyshire Angling Association, Ltd. v. British Celanese, Ltd. (1953) Ch.149, where the second defendant, the Derby Corporation, admitted that it had polluted the plaintiff's fishery by discharging insufficiently treated sewage into the River Derwent, and that the sewerage system had become inadequate because of the increase in the population of Derby.

The Court of Appeal held that although the Corporation was authorised under the Derby Corporation Act, 1901, to provide a sewerage system, it was not inevitable that the work should cause a nuisance, and the Act on its true construction did not authorise the commission of a nuisance.

The address gave rise to numerous questions, many of which were concerned with products liability. Messrs. Cannar and Shaw, together with the Chairman, formed a panel to deal with questions which ranged over such subjects as a manufacturer's liability for broken glass in a jar of jam, the loss of profit to aircraft operators, where many aircraft have to be grounded as the result of a faulty component, and the liability of manufacturers of drugs which could be potentially dangerous. There was an interesting discussion on the extent to which manufacturers can limit their liabilities, and this led on to a consideration of manufacturers' guarantees. The panel were unanimous in advocating the rejection of a manufacturer's guarantee which in many cases whittles down the consumer's common law rights. Moreover, it was pointed out that even where a consumer accepts a guarantee this does not protect the manufacturer against claims by the consumer's wife and family. Lister v. Romford Ice and Cold Storage Co. (supra) was referred to and it was noted that insurers had agreed not to press their rights of subrogation in such cases, other than in exceptional circumstances. Nevertheless, legally the employer can proceed against his negligent employee and it was thought that personal liability policies might be extended to cover an employee's business liabilities.

SYMPOSIUM AT THE UNIVERSITY OF ROME

At the A.I.D.A. Symposium at Rome in May 1967 the themes considered were "Insurance against damage caused by natural forces" and "Third party compulsory motor insurance". We reproduce in the following page, one of the papers submitted on the first subject and two of the papers relating to the second subject.