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“Liability Insurance: The Shape of Things to Come”

The next 50 years and the impact for the Liability Market

(Social, economic, political and climate change:  
The next 50 years and the impact for the Liability Market)

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Trying to predict the future is clearly not easy, but we have seen from Professor Wilenius' slides that in fact the likelihood of what may happen in the future can be rationalised by breaking the subject matter into a few areas and considering the main influencing factors and then looking at scenarios that could happen.

For my part I want to talk to you about practical changes that may happen in the future, that may or will affect liability underwriting (EL/PL/Products).

However, if I am going to look as much as 50 years into the future, then I want you to appreciate quite how much things have changed in the past 50 years – since 1958...

To do this, I want to summarise some of the changes that have happened in four categories:

- Law and legislation
- H&S developments
- Significant events that have shaped the law or insurance
- Things that came and went without anything really happening

Law & legislation

Donoghue v Stevenson (1932) (Snail in the ginger beer bottle) (Lord Atkin - “who is my neighbour?” – in other words, “Who do I owe a duty of care to?” Lawyers have been asking this question ever since) (more than 50 years ago, but very significant)

Occupiers Liability Act 1957 – that owners and occupiers owe a duty of care to visitors to their premises and land, “a duty to take such care as in all the circumstances are reasonable to see the visitor will be reasonably safe...”

Hedley Byrne & Co. v Heller & Partners (1964) – recognised pure economic (that is not in contract) arising out of negligent mis-statement where the person giving the advice knew that the other person was relying on it

Civil Evidence Act 1968 – a conviction for a criminal offence is admissible in civil proceedings (hence insurers providing extensions to cover criminal defence prosecution costs in respect of criminal convictions under the H&SAWA 1974, etc)

EL (Compulsory Insurance) Act 1969 (a means to compensate the claimant) (minimum limit £2m, though in practice, insurers gave unlimited)

Defective Premises Act 1972

Smith v Manchester (1974) – the claimant was awarded damages for their disadvantage on the open labour market (as a result of the injury that they suffered) (Scarmen LJ: “weakening of the claimant’s competitive position in the open labour market”)

Unfair Contract Terms Act 1977 – an occupier of business premises cannot exclude liability for causing death or personal injury through negligence

The Judicial Studies Board personal injury compensation guidelines (7<sup>th</sup> edition in 2004) (JSB was created in 1979)

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Limitation Act 1980 – in particular, Section 33 that allows the court to over-ride the time limit in respect of personal injury cases (e.g. SmithKline Beecham Plc & Another v Horne-Roberts (2001))

Occupiers Liability Act 1984 (liability to trespassers) – a duty of care to trespassers “whether they have lawful authority to be in the vicinity or not”

Food and Environment Protection Act 1985

Product Liability Directive 1985 (aka Consumer Protection Act 1987)

- uniform law across all of the EU
- The product has to be defective, and the claimant has to show that the defect in the product caused the accident; but it's not necessary for the claimant to show that the defendant was negligent.
- designed to ensure easier compensation for the claimant in the event of a product liability claim (strict liability)
- created a Euro-ring fence (whoever imports the product into the EU is the EU importer)
- 10 year cut-off point from the date the product was first placed in circulation
- a radical piece of legislation that hasn't really caused too much of a problem for insurers, if indeed at all

Food Safety Act 1990

The Environmental Protection Act 1990 (and Part II in 1995)

EL Regulations 1998 – revision of the statutory minimum limit of indemnity limit to £5m (though in practice insurers give £10m as the norm)

Lancaster v Birmingham City Council (1999) – the first time damages for stress (a recognised psychiatric injury) were awarded by a court (although already in practice out of court since 1994)

The Woolf report and the Civil Procedure Rules reforms (1999) (part 36 offers etc)

The Ogden Tables (actuarial tables for use in court cases) (permitted by the Civil Evidence Act 1995 and first used by the House of Lords in July 1999 in Wells v Wells)

CPA 1987 (Product Liability) Modification Order 2000 – amended the definition of “product” to include electricity and agricultural and game products (previously excluded by the Act)

Lubbe v Cape (2000): the right of third parties working overseas for UK companies (and therefore not living in the UK) to be able to bring claims for compensation in the UK courts for workplace injuries sustained outside the UK (in fact not ground-breaking, as it followed judicial precedent set by another case a few years before - Connolly v RTZ (1997) - but nonetheless noteworthy)

Phelps v Hillindon Borough Council (etc) (2000) – duty of care by an education authority for failing to spot dyslexia in a child

GPSD 2001 (General Product Safety Directive) (aka General Product Safety Regulations 2005)... the precautionary principle (which is now a mainstay feature of EU product safety law)

Philips v Syndicate 992 (2003) (mesothelioma claims) (apportionment between insurers)

Fairchild v Glenhaven (2002) – House of Lords: asbestos (mesothelioma): joint liability that undermined the causation principle

Hatton v Sutherland (2002): Court of Appeal: Reined back in the ability of people to claim compensation for stress unless it was reasonably foreseeable. Gave guidelines for handling stress claims.

Tomlinson v Congleton Borough Council (2003) (Claimant jumped in lake and suffered severe injury. Defendant not liable) – Lord Hoffman: “[the] law does not provide compensation simply on the basis that the injury was disproportionately severe in relation to one's own fault or even not one's own fault at all.”

CP190 and ICA's and ICR's – the FSA's consultation paper in 2003 on insurance company capital requirements and subsequently the Individual Capital Assessments and Requirements (whereby insurers evaluate their own risk exposure and recommend to the FSA how much capital they actually need)

Bolton v MMI (2006) – interpretation of two PL occurrence wordings and the definition of when an disease injury actually happens (“injury-in-fact”). Numerous implications as a consequence...

Barker v Chorus (2006) – asbestos (mesothelioma) verdict in insurers' favour

Better Regulation Task Force: compensation culture report (2004) – the report that lead to the changes in the Compensation Act 2006

The Compensation Act 2006 - Two provisions intended to address concerns about "compensation culture."

Firstly, in cases in England and Wales involving allegations of negligence (or breach of statutory duty) the courts are now permitted to take into account the deterrent effect of potential liability. In particular, the court can consider whether a finding that a defendant should have taken certain steps might in future prevent desirable activities from taking place (or being carried out in a particular way) or discourage persons from undertaking functions in connection with desirable activities.

Secondly, a provision of the new Act clarifies, rather than changes, the law in a way that is meant to promote less adversarial approach to accidents and injuries. It provides that an apology, an offer of treatment or other redress shall not amount to an admission of liability.

And, it reversed the insurer-friendly decision on Barker v Corus on mesothelioma claims and stated that a defendant who has been responsible for exposing a victim of the disease to asbestos can now be held liable for the whole of the victim's damages even though there may have been other parties responsible at the time.

(Note also that the apology principle was introduced in the Australian tort law reforms in the early 2000's)

The Environmental Liability Directive 2004 (effective 2007)... the directive raises the spectre of compulsory environmental liability insurance (after the report to the EU in 2010)

Harris v Perry, Perry and Harris (the Bouncy Castle claim). Child sustained serious injury after another child fell on top of him. Succeeded in the first instance, but overturned on appeal. No liability after all. But how should people protect themselves from such misfortunes if there is not a legal remedy through fault-based law? Ditto the Tomlinson case...

The Mesothelioma test cases (2008) - following Bolton v MMI in 2006

Pleural Plaques in Scotland (2008), and...

Pleural Plaques in England & Wales (2008)

#### Conclusion:

Progressive increases in legislation, making it easier for consumers to seek redress, whilst, broadly speaking, keeping a balance between plaintiff-greed and defendant's affordability to pay compensation. The boundaries are always being pushed (e.g. pleural plaques, Junior Books) and are usually reined back in where appropriate.

#### H&S in the workplace

Factories Act 1961

Construction (Health & Safety and Welfare) Regulations 1966

Health & Safety At Work Act 1974

The Control of Asbestos at Work Regulations 1987

Noise At Work Regulations 1989

Personal Protective Equipment At Work Regulations 1992 (enactment of the PPE directive 1989)

Health & Safety (Display Screen Equipment) Regulations 1992

The Management of Health & Safety At Work Regulations 1992

PUWER 1992 (Provision and Use of Work Equipment Regulations)

The Manual Handling Operations Regulations 1992

CDM Regulations 1994 (Construction Design Management)

RIDDOR 1995 (Reporting of Injuries, Diseases and Dangerous Occurrences Regulations (effective 1996) (obligatory reporting of certain accidents and diseases to the HSE)

The Lifting Operations & Lifting Equipment Regulations 1998

COSHH Regulations 1999 (Control of Substances Hazardous to Health)

Management of Health & Safety at Work Regulations 1999

COMAH Regulations 1999 (Control of Major Accident Hazards) (as amended in 2005) (which was the implementation of the Seveso directive – 96/82/EC) (following the Seveso disaster)

CAWR 2002 (The Control of Asbestos at Work Regulations) (asbestos registers)

Control of Vibration at Work Regulations 2005

Work at Height regulations 2005

Control of Noise at Work Regulations 2005 (and Part II in 2007)

REACH Regulations 2006 (effective 2007) (Registration, Evaluation, Authorisation and Restriction of Chemicals) (implementation of EU REACH directive 1907/2007) (single unified regulatory system for recording chemicals and their characteristics)

Corporate Manslaughter & Homicide Act 2007 (effective 6<sup>th</sup> April 2008)

Conclusion:

A safer world as a result of all this?

HSE stats...

From 1974 to 2007:

- Fatal injuries: fell by 73%
- Reportable non-fatal injuries: fell by 70%
- but asbestosis deaths have risen

#### Significant events that have shaped the law or insurance

Thalidomide (1950's and 1960's) (a pill to combat morning sickness that was prescribed to pregnant women in the 1950's and 1960's. Caused severe limb deformities in nearly 10,000 children born in Europe between 1956 and 1962 – changed drug regulatory processes throughout the world)

Asbestos (1960's, 1970's, 1980's, 1990's, 2000's)

Flixborough explosion 1974

The Seveso disaster (Industrial accident at a chemical plant at Seveso near Milan, Italy in 1976. Released a toxic cloud that injured about 500 people) (prompted the Seveso II Directive aka COMAH)

Clapham Rail crash 1979 (...Bob Reid standing on the bridge in the evening and publicly saying that "everyone will be compensated")

Kings Cross London underground fire 1987 (31 dead)

Piper Alfa explosion 1988 (167 killed)

IUA Bodily Injury Awards Study (1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>...)

Herald of Free Enterprise disaster 1987. Bow doors left open as the ferry left harbour. The flooding and subsequent capsizing of the passenger ferry on 06.03.1987 resulting in the loss of 193 lives. (...CM&CH Act 2007) (also lead to the creation of the Marine Accident Investigation Branch in 1989)

The Bradford fire (1985) (56 dead) and the Hillsborough disaster (1989) (96 dead) and ...lead to claims for PTSD (post traumatic stress disorder) which were declined (i.e. clarification of foreseeability)

These disasters also prompted the Taylor report that lead to improved crowd management (crush injuries at Hillsborough) and non-combustible stadiums (Bradford fire) (not forgetting either the 1971 Ibrox disaster at Rangers football ground where 66 people died of crush injuries that prompted the Wheatley report on crowd management in 1972) (or Heysel stadium in 1985 where 39 football supporters died of crush injuries following the collapse of a stadium wall when rival fans began fighting)

Gulf War syndrome (the first gulf war) (1990) (the adverse reaction to an untested concentration of vaccines; and poisoning caused by insecticidal sprays that were used in the troop living quarters, which contained organophosphates)

Lloyds "Reconstruction & Renewal" (early 1996) – ring fencing of Lloyd's asbestos liabilities and other US litigation, from the rest of the business, through the creation of Equitas)

Southall train crash (1997)

Ladbroke Grove train crash (1999)

Hatfield train crash (2000)

Potters Bar train crash (2002) (...all contributed to the demand for the CM&CH Act 2007)

Independent Insurance Company collapse (...brought on / contributed to the hard market)

WTC terrorism attacks in 2001, the Madrid train bombings (2004) and the "07/07" – the July 2005 terrorism attacks in the UK (affected insurers perception of the risk of terrorism)

Buncefield (2005) – reminded us of Rylands v Fletcher (1863) and Cambridge Water (1994) (strict liability)

Conclusion: May be not surprisingly, the evolution of our laws are for the most part reactive to disasters that happen, rather than proactive.

Things that came and went without anything really happening

Sick Building Syndrome

Acoustic shock

Passive smoking

EMF's caused by photocopiers (a passing scare in the 1970's or 1980's)

Salmonella in eggs (1980's)

BSE in the 1980's (mad cow disease) (fear of human variant V-CJD) (a few tragic cases, but never to the extent that was feared)

EMF's caused by mobile phones (see also the article in The Times, "Bullying is the chief concern surrounding mobile phones")

Toxic Mould (a problem in the States that never caught on over here)

Organophosphates (the toxic chemical used in sheep dip in the 1980's and 1990's) – July 2001: the Organophosphate Sheep Dip Action Group's claim against various manufacturers and employers was struck out by the High Court in London. On the basis that there was no satisfactory evidence to support claims for ill-health being caused by exposure to chemicals containing organophosphates.

Y2K (Year 2000 IT bug)

DVT (Deep Vein Thrombosis) caused (or exasperated by) flying in aeroplanes – "economy class syndrome". 2002: the High Court ruled that DVT could not be defined as an "accident" under the terms of the 1929 Warsaw Convention.

Aspartame (a sugar-substitute in soft drinks that was alleged to have harmful side effects)

RSI (Repetitive Strain Injury) ...raised as a concern that it could lead to hundreds of office strain claims, but which didn't

Stress ...raised as a new source of hundreds of claims, but in fact it's proved fairly manageable

H5N1 ...the bird flu virus that is fatal to humans. Raised as a potential danger (and remains so), but to date no pandemic has yet happened (though plenty of opportunity to happen at some point in the future)

Conclusion: a lot of scares, but often difficult to prove the causal link.

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All of that be as it may... but what's going to shape our world in the future?

Professor Wilenius looked at five aspects when analysing the future. I'm going to look at three of those...

- Globalization and Society
- Demographics
- Resources, Environment and Technology

I'll then finish by looking at a couple of other points outside of these headings, and finally by looking at how the world might be 50 years hence for the Liability underwriter.

**Globalization and Society**

**Economic regionalism**

It's seem likely that in the medium term the world is likely to become seven major regional zones focused around economic, financial and mineral resource issues, these being:

North America

Central & South America

Europe (the EU)

Africa (the African Union)

Russia

The Middle East

The Far East

It's likely that this will lead to the decline of the nation state and instead we will see the merging of currency, law and use of common language in each area. It's likely that civil remedies will become more uniform in each major area and it's also likely that compensation expectations will become more consistent.

These changes will be driven by trade, by commerce. The pressure for change will in part from large global organisation who will seek consistent standards wherever they do business, and partly from regional government who will want to maximise the integration between their trading neighbours by seeking harmonisation in law, currency and trading standards – in, of course, the exact manner that has already happened in Europe.

#### Environment

The conceptual risks associated with climate change through the process of global warming is now recognised, in accordance with the IPCC's (Intergovernmental Panel on Climate Change) 4<sup>th</sup> Technical Paper ("Climate Change And Water"). Potentially this could mean that architects or construction companies undertaking projects both now and in the future might be held liable if it transpired that they failed to take account of, for example, the increased flood risk that might arise through climatic change.

One of the problems encountered by the organisers of the recent Beijing Olympics was an outbreak of blue-green algae off the coast, near where the sailing events were due to be held. China isn't the only place to be affected by algae blooms. They also occur off the coast in Sweden, Florida, the Caribbean and Hawaii. They're caused by sewerage, and by fertilizers that have run off from farmland into rivers and then the sea. Such waste is high in nitrogen and phosphorous and causes explosive growth in algae, which in turn reduce the oxygen content of the seawater, either killing off marine life or forcing it to move elsewhere. The increased concern over the environment, reflected for example by the Environmental Liability Directive, means that polluters can expect to be held liable for the costs of clean up associated with such environmental problems.

#### Demographics

It's quite possible that with the rise in "minority" populations both across Europe and the USA that there will be a demand for dual systems of law – the prominent example being Sharia law operating alongside the incumbent system.

In developed nations, as we have seen, the population will "age". There will be shortages of younger workers in developed nations which will prompt wide-scale immigration to maintain adequate labour supply, and prompted also by economic hardship elsewhere through resource shortages (for example, scarcity of water).

Age discrimination will probably disappear completely as older workers will be as valued as younger workers. The retirement age will continue to increase in developed nations, partly due to the difficulty of providing a decent standard pension but partly also because a lot of people will want to keep working for the sake of being busy, rather than face 20 or maybe 25 years of retirement, in of course, remarkably good health.

The fact that workers in may work beyond the age of 65 will mean that the age multipliers for injury claims will increase, making such claims more expensive than before. On the other hand, medical improvements and rehabilitation skills on the part of insurers will mean that it is likely that fewer people will be permanently invalidated, and therefore it could be that the net effect will be that there is little change, and may be improvement for insurers.

#### Pandemics

From time to time the threat of a pandemic emerges in the newspapers – an outbreak of bird flu or the risk of an accidental release of a laboratory-grown historic virus such as cholera. In fact pandemics have been a threat to people since records began – and rightly so that they are considered a danger. In AD541 there was the Plague of Justinian in Constantinople. It wiped out between 25% and 40% of the city's population. The Black Death in the 13<sup>th</sup> and 15<sup>th</sup> centuries killed one third of the population of Europe. The Great Plague of London in

1665/1666 killed between 75,000 and 100,000 people. Influenza (Spanish Flu) in 1918/1919 killed between 20 million and 50 million globally. Aids/HIV is estimated to have killed between 25 million and 65 million people since 1981.

We live at risk in the future of pandemics that could be naturally occurring (e.g. bird flu) or man-made – either through the accidental release of a virus from a laboratory or through a terrorist attack – such as the Sarin gas attack in Tokyo in 1995 that killed 12 and injured over 1,000.

What is the liability of the underwriter who insures the laboratory that accidentally releases the virus? What is the liability of the underwriter of the public transport system that negligently failed to maintain sufficient security measures when it knew that there was a heightened risk of attack? By the way, in this country the Terror Alert status is presently "Severe"<sup>2</sup> which means, according to the government's web site, that an attack is "highly likely".

### **Resources, Environment and Technology**

#### **Technology**

You and I are not able to comprehend the changes that will take place to our lives over the next 50 years through advances in technology – albeit I'm going to tell you. There are dozens of changes that have happened over the last 40 years that have revolutionised our lives from what life was like in the 50's or 60's... mobile phones, the internet (which has brought us a social life via the internet – Facebook, Bebo and the like, and instantaneous knowledge thanks to Google searches and Wikipedia), digital cameras, remote control units, digital media (iPods and MP3's), robotic vacuum cleaners, anti-skid technology in cars, elimination of diseases by vaccine, MRI scanners in hospitals, GPS navigation systems, SatNavs in cars, radio-controlled clocks, the Hubble telescope, email, electron microscopes...

There are three technological revolutions taking place at the moment:

- quantum mechanics (the physics of very small things down to the atomic level) including things like nanotechnology
- bio-molecular knowledge (being able to manipulate living organs at the fundamental level), including things like genetics in medicine
- intelligent computing

These three areas will combine to make tomorrow's world in 10, 20, 30... 50 years time, as radically different as our world is today from the 1960's. To quote a scientist recently, "The rate of technical progress and its impact is doubling every decade. An exponential growth is quite phenomenal. It literally means that these technologies will be a billion times more powerful than they are today in 25 years from now."<sup>3</sup> They will bring about changes that will mean that we, as a society, will re-evaluate the way we live.

And as you know, those changes are taking place at the moment and we are already seeing changes taking place in our lives which are symbolic of future changes that will occur.

In the 1960's the best computer was the size of a room and could perform 4,000 calculations a second. Today your mobile phone (well, if it's a decent one) has computing power that can perform 1 billion calculations per second – and it fits in the palm of your hand. If these technologies that I just mentioned are a billion times more powerful in 25 years time than they are today, what sort of things do you think will be possible?

These are all things that are taking place at the moment:

Robotic arms that are powered by the mind. This picture shows a monkey with a robotic arm controlled by sensors in its brain. In the future people who are paralysed or who have lost a

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<sup>2</sup> Source: [www.direct.gov.uk/en/NII/Newsroom/PublicSafety](http://www.direct.gov.uk/en/NII/Newsroom/PublicSafety) as at 28.08.2008

<sup>3</sup> Ray Kurzweil

limb, may be through a motor accident or an accident in the workplace, will be able to have prosthetic limbs that they can accurately control via signals from their mind.

Here's a run-of-the-mill news item that appeared on about page 4 of a paper recently, "Cancer fears are lifted in the womb". A woman has conceived Britain's first child guaranteed not to suffer from hereditary breast cancer, it says. Genetic knowledge means that scientists have identified the harmful gene and have removed it from the foetus while still in the womb.

There is a computing project underway at the moment that is creating a cancer genome atlas. It will be an encyclopaedia of all human cancers that means that in 20 years or so, every gene that causes cancers will be known, and may be even treatable. You'll be aware that we have already mapped the entire human genome. A project that began in the 1990's and was completed much quicker than scientists originally anticipated – thanks basically to computing power. From this the next stage is to analyse the genetic code in our own individual bodies to identify our particular and personal dispositions to particular genetic diseases. Not fiction, but reality. This technology is in its infancy. The price will fall and it will become affordable to everyone. What will it mean to you and me in five or ten years time when the technology is much more advanced and can identify doubtless every genetic heredity risk, and quantify it, and for which potential cures will, or may, be available for some of the identified risks? In the future our children may choose to vet their partners – examine their DNA profile – and will be influenced in their decision about who they pick based on their partners DNA profile and their exposure to hereditary diseases (and thus maximise the health of their children)...

The example that I mentioned earlier, about the woman screening out breast cancer from her child whilst still in the womb, is called gene therapy – replacing a defective gene in a person's body and replacing it with a genetically modified cell, from which the person then creates more of these "good" cells and can then fight the disease. It will be used to cure many more diseases.

Another example... computer models are now being designed of sufficient complexity (thanks to extraordinary computing power) that simulate the action of a drug on the body and speed up the development of new medicines and prevent children or adults unnecessarily being used in clinical trials... In due course, fewer clinical trials, and safer medicines.

It goes on... Scientists at the Institute for Regenerative Medicine in North Carolina in the USA are now actually building replacements for simple organs in the laboratory - examples being skin, cartilage, windpipes, bladders and kidneys. In the future there will be a ready-made supply of organs in hospitals so that people who lose organs in accidents can simply have their organ replaced by an off-the-shelf laboratory-grown replacement. In the future may be you'll [audience] compensate the injured party in a road or rail crash with the medical costs of acquiring new limbs or new organs, rather than compensate them for loss of the same? May be insurers will buy hospitals and cut out the middle man, as it were, and sponsor the research...

All of which raises questions about the human life span. As we grow old we could find ourselves having the technology to replace our defective organs as they wear out and naturally fail. When will we die? And if we don't die, then what will we do with our time? Sorry, I digress...

The motor industry... In the UK last year (2007) there were 2,943 deaths on the roads – the lowest figure ever since motoring records began in 1926. And last year's figure was a fall of 7% against the previous year. The highest number of deaths was in 1966 when numbers peaked at 7,985. The continuing fall is a reflection of improved car safety technology and greater compliance with speed limits by drivers. More radically though, engineers and designers are now talking about a point in the future when there will be no deaths on the roads (or a number so small as to be minuscule).

Major motor manufacturers such as Mercedes and Volvo are already designing intelligent cars that can brake and slow the car if it gets too close to the car in front. This sort of technology will, of course, become a standard feature in all cars in due course (just as anti-

lock brakes began as the preserve of the few when they were first invented, but are now a standard feature on almost every car).

You might think that another invention on the horizon might be CCTV footage of the vehicle as it travels. Imagine how useful this would be for larger vehicles when arguing about whether they were at fault if they are involved in accident. Or indeed useful technology for any car. In fact a company has already launched a device called SmartDrive that is already being used by commercial motor fleets. It consists of an inward facing camera that records the actions of the driver (including whether they have their safety belt on – useful if arguing contributory negligence) and an outward facing camera. The camera is permanently on and saves any footage 30 seconds either side of any jolts, impacts, swerving, sharp braking or aggressive acceleration. Resisted initially by the drivers, all parties concerned can now see the benefits that accrue. Not least when accidents occur and it can be clearly shown that another party is at fault. And think about the benefits in the event of a fatality and a subsequent corporate manslaughter claim. The recorded footage will give a clear record of what actually happened, and will assist defending a corporate manslaughter prosecution, or will save time arguing about a case that clearly can no longer be defended. But with the driver aware that all his movements are being recorded, there's a fair chance that this sort of technology will simply reduce the risk of a fatal accident even more.

Future developments include technology for cars that can read speed limits and one-way signs and warn the driver if they are exceeding the speed limit or driving the wrong way. If you have an accident and you are lying in the car upside down, then technology is being designed that will automatically call out the emergency services – to the right location using GPS. The faster response time by the emergency services has been estimated that it will lead to 10% fewer fatalities.

Finally, manufacturers are already tinkering with designing prototype cars that are driverless and make their own way along roads using kerb-mounted sensors. How long before this becomes the norm? 2020? 2030?

### **Other things that will change**

#### **Quality of research**

There will be future issues and scares just like there have been in the past with lead, asbestos, EMF's and silica etc,. One thing that is adamantly clear from the past is that much of the associated research and evidence that was submitted in proof of these past issues was often poorly researched and biased in favour of the party commissioning the research. We shouldn't be surprised about this. Evidence submitted by defendants inevitably paints the world in a contrary light. Even governments cannot necessarily be trusted to be impartial. However, I think we owe it to ourselves to have a credible, independent source of research that compiles evidence in an impartial way, so that people might be able to have access to an assessment of what the true risks associated with a product really are. I think that this would probably needed to be philanthropically funded.

#### **Alternative means of compensation...**

One of the things that strikes me, when looking back at the past events and claims that I mentioned at the beginning, is both the fight by the claimant for compensation, and the fight by the underwriter not to be coerced to pay claims where they shouldn't have to. And both cases are quite easy to illustrate.

Of the claimant... the fight for compensation for workplace stress (*Lancaster v Birmingham*); for compensation for the "weakened position in the labour market" (*Smith v Manchester*); for a severe injury when diving into a lake (*Tomlinson*); for post traumatic stress disorder (*Bradford & Hillsborough fires*); for the costs of raising an unexpected child after a sterilisation failed (*McFarlane*); for compensation for deep vein thrombosis on airline flights; for blood contaminated with Hepatitis C (*A and Others v National Blood Authority*); for asbestos-diseased miners in another country to have their cases heard here (*Lubbe*); for compensation

of scaring of the lung tissue (pleural plaques); for an accident on a bouncy castle (Harris v Perry)...

And then the pitch of the underwriter. Fighting for the right not to pay any more than they originally envisaged that they would, for the right that the flood gates should not open and that the entire compensation system gets out of control, for the right to only pay what they (or rather their client) is actually legally obligated to pay... And, thus, in the same way... that scaring of the lining of the lung is not a compensatable injury (pleural plaques); that stress should only be compensated in certain circumstances (Hatton); that a party should not be held liable for the liability of others because those other parties cannot be traced (Barker); that there is an obligation on the part of a claimant to be accountable for the risks that they undertake, especially where they have been so warned (Tomlinson); that tragic accidents can't be compensated where the blamed party weren't actually at fault (Harris v Perry)...

And it's those last two cases that I particularly want to highlight. Tomlinson dived into a lake at a park and broke his neck. A tragic accident, and one for which the council were not liable – they had discharged their responsibility to keep the recreational park safe and warn people of dangers. And Harris, the child who broke his neck playing on a bouncy castle – where the parent organising the birthday party was accused of being at fault, but found not so. Why should they not be compensated? A question asked previously at these conferences – no less so than in 1994 by Peter Cane who extensively discussed alternatives to the tort system and declared in his paper, that "the tort system is fatally flawed."

It is our enduring dilemma. Balancing the risk of injury with the fun of the activity. And balancing a system of compensation where an aggrieved party can be compensated, with the right of the individual not to be blamed when they are not at fault.

I describe it as a dilemma, but it's probably not so much a dilemma as a fact of life. If an accident happens to you when undertaking some kind of activity then:

- you may have recourse against a third party if they are at fault (in which case you can get compensation from them via the tort system, assuming that they are insured)
- and if a third party is not at fault then your only prospect of any form of compensation for any loss or injury that you suffer will be via any:
  - o property damage via a household policy or a travel or motor policy
  - o medical costs via a travel policy or private medical cover
  - o critical illness cover
  - o personal accident cover
  - o life cover for your dependents.

I think it's inevitable that methods of compensation will get discussed again in the future, just as they have been in the past. The options seem to be:

1. the fault-based tort system as it is
2. a strict liability system, supported by compulsory liability insurance (if someone has an accident on your premises, or using or consuming your product, or doing something at your invitation or for which you charge a fee, then you pay...)
3. greater encouragement of self-insurance via personal accident cover, critical illness cover and the like

Let me just quote from the Government's response to the Better Regulation Task Force's paper on compensation (back in November 2004):

"Of course the government believes that people who have a genuine claim should be able to force their rights in compensation. Otherwise people would be able to offload the cost of their negligence onto their victim or the tax payer. But we strongly oppose any culture where people believe that if there is an injury there must inevitably be someone else to blame, and someone else to pay. And we oppose people being encouraged to believe it is always worth "having a go", however merit-less the claim.

This creates false expectations that there is easy money just waiting to be had. Some personal injury advertising does just this."

I think that sentence in the middle puts paid to the idea of a strict liability system.

I think, going forwards, there is an opportunity for insurers to offer first party insurance products that offer meaningful protection for accidents that might occur where no one else can be found at fault.

How underwriting might look in 2058 (and as likely sooner!)

Predicting how liability underwriting will be in 50 years time is clearly very difficult, although to put in perspective, if that underwriter retires at the age of 65 in 2058, then he or she will be 15 years old right now. Given some of the factors that we have looked at so far, I think that the reality is that the liability underwriter will be faced with a world where:

- There will be uniform legal system across the EU
- There will be consistent system of legal liability, probably codified law
- Legal liability will be mostly strict liability in most instances
- There will be a uniform system of employee compensation, via Workers Compensation, with disease exposures pooled
- There will be standard liability wordings with standardised policy triggers across the EU
- Pollution will be separate from the PL/Products section, possibly with pooled pollution underwriting (common already on continental Europe) or separate Environmental Impairment Liability (EIL) policies that give first party clean up costs cover and third party legal liability cover, with gradual pollution cover considered on application. The cover will include Regulatory Order clean up costs as standard (Bartoline).
- The EU will have reviewed the compulsory insurance requirements of the ELD directive in about 2012 (a bit later than planned) and concluded that the insurance market can readily provide cover, which initially will be a separate ELD policy, but will later on be incorporated into the EIL policy
- Compulsory insurance will be much more widespread
- Cars will be controlled and driven by computers meaning that will hardly be any road deaths across Europe
- As a consequence motor insurance will get cheaper in real terms
- All vehicles and all public transport will, irrespective of whether robots or computers drive them, have CCTV to record external events so that legal liabilities about who might have caused an accident will be resolved by a Black Box rather than witness statements
- Injuries in the workplace will continue to fall, although major disasters will continue to occur from time to time through human error, through computer malfunction, and the like ("Swiss Cheese" theory of accidents)<sup>4</sup>
- Most people who suffer injuries will potentially be able to recover completely
- People who lose organs in accidents will generally be able to have them replaced with man-made replacements
- People who lose limbs in accidents will generally be able to have them replaced with man-made prosthetics that connect up to the nerve system and can be controlled by the brain, as though normal and ordinary
- People with severe brain damage will be able to have computer chips inserted that will replace lost brain functions. Memories will also be able to be uploaded as well (if downloaded first).
- Viruses and bacteria will mostly be controlled by computer designed drugs and by nano robots
- Future care costs in personal injury claims will generally be less severe than they are now, as most people with injuries will be able to recover and therefore need less care in the long term (after, though, intensive therapy to help people adjust to new brain-controlled prosthetics, etc)

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<sup>4</sup> Swiss Cheese theory – mentioned in a paper by Alan Fisher of Fisher Scoggins LLP

- People will be living longer in 2058 and so loss of earnings multipliers will be higher, meaning that some severe injury claims will be more expensive
- Insurance companies will see the advantage of new prosthetics in injury compensation claims and will finance a lot of the technological research. They will apply the patents, meaning that major insurers will also become central healthcare providers (as they already provide private medical cover as well, at the moment). They will also move into care home management, looking after the elderly as part of their longer term interests in the economy.