HOUSE OF LORDS

Special Public Bill Committee

Third Parties (Rights against Insurers) Bill [HL]

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The Special Public Bill Committee

The Third Parties (Rights against Insurers) Bill [HL] has been committed to a Special Public Bill Committee in the House of Lords. The Bill will give effect, with minor modifications, to the recommendations set out in the Law Commission and the Scottish Law Commission's 2001 joint report *Third Parties – Rights against Insurers* (Law Com No.272; Scot Law Com No.184) which was accepted by the Government in 2002.

Membership

Lord Archer of Sandwell
Lord Bach
Lord Borrie
Lord Goodhart
Lord Henley
Lord Hunt of Wirral
Lord Lloyd of Berwick (Chairman)
Lord Methuen
Lord Paul
Lord Sheikh
Baroness Whitaker

Publications

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TUESDAY 12 JANUARY 2010

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	Borrie, L	Methuen, L
	Goodhart, L	Paul, L
	Henley, L	Sheikh, L
	Hunt of Wirral, L	Whitaker, B

Memorandum by the Ministry of Justice

INTRODUCTION

1. This memorandum briefly describes the consultations carried out in connection with the reforms in the Third Parties (Rights against Insurers) Bill and the principal resulting changes to the text. These consultations fall into two stages; first, consultation undertaken by the Law Commission and the Scottish Law Commission in connection with their original provisional recommendations, and second, consultations undertaken by the Government.

A. *Consultation on the Law Commissions' Original Provisional Proposals (1998)*

2. In 1998, the Law Commission and the Scottish Law Commission published their joint consultation paper on the *Third Parties (Rights against Insurers) Act 1930*. There were 65 responses to this consultation paper from insurers, reinsurers, brokers, lawyers, consumers and businesses. Twenty-two of the responses came from representative bodies (for example, the ABI and the Association of Personal Injury Lawyers ("APIL")). Respondents to that paper confirmed that the burdens imposed by the 1930 Act on third parties caused real hardship and urged reform. The Law Commissions then considered the replies and published their final report and draft Bill in 2001. The Law Commissions' consultation paper and report are available at www.lawcom.gov.uk.

B. *Consultation by the Lord Chancellor's Department on the impact of the proposals (2001)*

3. In November 2001, the then Lord Chancellor's Department sought information on the impact of the Law Commissions' proposals from a number of Government departments and agencies whose policy is affected by the recommendations. Those consulted were: HM Treasury, Department for Trade and Industry, Financial Services Authority, Financial Services Compensation Scheme, Insolvency Service, Office of Fair Trading, the Official Receiver, Small Business Service, Scottish Executive, the National Assembly for Wales and the Northern Ireland Assembly. The responses supported the proposed reforms.

C. *Consultation by the Lord Chancellor's Department for implementation of the Law Commissions' recommendations by a Regulatory Reform Order (2002)*

4. In September 2002, a public consultation exercise was carried out by the then Lord Chancellor's Department about implementing the Law Commissions' proposals through a Regulatory Reform Order (RRO). Those consulted included members of the judiciary, the legal profession, representative organisations, insurers, trade unions and academics. The Department for Constitutional Affairs (as the Lord Chancellor's Department had become) published its response to the consultation in February 2004. There were 21 replies. The majority of consultees who replied (95%) were of the view that reform of the current legislation was necessary, and most (79%) were in favour of all of the Law Commissions' recommendations. Four consultees (21%) did not agree with all of the proposed changes and believed that some of the proposals should not be adopted in their current form due to the adverse impact that they might have on the insurance market and on the third parties themselves. There was also concern that the proposals should not give a third party greater rights than the debtor. The one consultee who opposed the proposals was of the view that they arguably go further than the purpose of the 1930 Act, and would distort the rights and benefits of interested parties where

an insured defendant is found to be insolvent. In the event it was decided that the reforms were not suitable for implementation by RRO. The consultation paper and the response document are available at:

(i) http://www.dca.gov.uk/consult/rro/tparties.htm, and

(ii) http://www.dca.gov.uk/consult/rro/tprairesp.htm.

D. *Consultation by the Northern Ireland Department of Enterprise, Trade and Investment (2005).*

5. In December 2005 the Department of Enterprise, Trade and Investment issued the text of a draft Bill for consultation. Nine responses were received. Eight (88%) supported the draft Bill. One (12%) raised a concern that the Bill should apply equally to UK and foreign insurers. A copy of the summary of the responses is available at http://www.detini.gov.uk/consultation9.pdf.

E. *Consultation by Ministry of Justice on Draft Law Commission Bill (2008)*

6. In December 2008, the Ministry of Justice consulted 35 major stakeholders to assess whether they remained supportive of the proposals and whether they agreed with their implementation by means of the new House of Lords procedure for Law Commission Bills. Those consulted included insurers, reinsurers, the judiciary, the Insolvency Service, lawyers, consumer protection organisations and businesses and Government departments. 23 of those consulted were organisations representing large numbers of insurers, lawyers, consumers and businesses. All responses were positive and none of the consultees disagreed with the proposed implementation of the proposals by the new procedure. As a result of comments made and of further consideration of the draft Law Commission Bill, several changes were made. These are described in the accompanying paper comparing the Bill with the 2001 draft Bill prepared by the Law Commissions (Appendix 1). There were some significant suggestions made that have not been taken forward. One consultee suggested that the scope of the proposals should be widened to include circumstances beyond insolvency and insolvency-type events and that there should be some special provision in some instances for personal injury and death cases. Another suggested that the Bill should apply whenever insurance proceeds were payable in the United Kingdom. One consultee argued that the Bill should establish an Employers Liability Insurance Bureau. These changes would substantially change the nature of the Bill.

Conclusion

7. On the basis of these consultations the Ministry of Justice considers that the Bill is supported by a large consensus of opinion across the insurance industry. This has only been achieved by limiting the scope of the Bill and striking a fair balance between the interests of all those affected where the Bill applies.

Appendix 1

CHANGES TO THE BILL AS INTRODUCED, COMPARED TO THE LAW COMMISSIONS' BILL (2001)

The Third Parties (Rights against Insurers) Bill was introduced on 23 November 2009. It is the second Bill to be introduced under the trial of the new House of Lords procedure for Law Commission Bills.

On 7 December 2009 the Second Reading Committee debated the bill. At the debate Lord Bach stated that he would make a document available outlining the changes between the Bill as introduced and the draft Bill published by the Law Commission and the Scottish Law Commission as part of their 2001 report Third Parties—Rights against Insurers (Cm 5217) ("the 2001 Bill").

This letter describes the principal differences between the Bill as introduced ("the Bill") and the 2001 Bill. This comparison does not mention every change. Changes, such as changes of language and changes resulting from changes in the order of the clauses in the Bill, are omitted.

Extension of the Bill to Northern Ireland

The Bill now extends to Northern Ireland. In 2005 the Office of Law Reform in Northern Ireland informed the Department for Constitutional Affairs that it would be desirable to introduce the proposals simultaneously in Northern Ireland. In late 2005—early 2006 the Northern Ireland Department for Enterprise, Trade and Investment carried out a public consultation on the extension of the Bill to Northern Ireland, the responses to which were very positive.

Order of the Clauses

The order of clauses in the Bill does not follow the order in the 2001 Bill. The changes are intended to make the Bill easier to understand. The Bill now has the following structure:

- transfer of rights and when they can be enforced (clause 1); 2 - new procedure for seeking to establish liability (clauses 2 and 3);
- circumstances which lead to a transfer of rights (clauses 4 to 7);
- limits and conditions etc which affect the transferred rights (clauses 8 to 10);
- new disclosure regime (clause 11 and Schedule 1),
- enforcement (clauses 12 to 14);
- application of the Act (clauses 15 to 18); and
- supplemental matters (clauses 19 to 21 and Schedules 2 to 4).

Circumstances Triggering a Transfer of Rights

The circumstances which trigger a transfer of rights were set out in clauses 1 and 2 of the 2001 Bill. They are now contained in clauses 4 to 7 of the Bill. Additional circumstances have been added, and changes made, to reflect developments in insolvency and company law.

Also, given that the Bill will extend to Northern Ireland references to insolvency events and other circumstances under the law of Northern Ireland have been added. These are equivalent events to those listed for England and Wales and Scotland.

Disapplving Conditions in the Contract of Insurance

An insurance contract may contain a condition that an insured must provide information or assistance to the insurer. Such a condition may be impossible to fulfil if the insured is a body corporate that has been dissolved. Clause 4(2) of the 2001 Bill addresses this problem by stating that the condition does not apply to rights under the contract which have been transferred. The reason for the provision is to prevent an insurer relying on non-fulfilment of a condition to avoid having to make payment, where that condition is impossible to fulfil (see paragraphs 5.17 to 5.19 of the Law Commission report).

However two problems were identified with clause 4(2) during the Ministry of Justice consultation in 2008–09. First, it was recognised that the same problem arises where the insured is an individual who has died. Clause 9 of the Bill therefore expands the provision to include this circumstance.

Secondly, it was pointed out that clause 4(2) of the 2001 Bill could be interpreted as including a condition to provide notice of the claim, since providing notice could be interpreted as providing information. Clause 9(3) of the Bill makes clear that this is not the case. As such, a condition to notify the insurer of a claim is not disapplied where due to the death or dissolution of the insured it becomes impossible to fulfil. The condition remains but by virtue of clause 9(2) of the Bill can be fulfilled by the third party.

Anti-avoidance

Clause 6 of the 2001 Bill contained an anti-avoidance provision. A provision of

an insurance contract was to be of no effect if it sought to avoid the contract or alter the rights of the parties to it when the circumstances which gave rise to a transfer of rights occurred. Clause 17 of the Bill contains the equivalent provision but also refers to a provision which seeks to terminate the contract.

This change is to ensure that a contract cannot avoid the provisions of the Bill

by the inclusion of a provision stating that the contract is to be terminated if the insured becomes a relevant person for the purposes of the Bill: This ensures that the Bill gives full effect to the policy that it should not be possible to draft a contract of insurance in such a way as to nullify the effect of the Bill. A similar change is contained in paragraph 5 of Schedule 1 to the Bill.

Proceedings to Enforce Transferred Rights

Clauses 8 and 9 of the 2001 Bill create a new procedure to enforce rights which

have been transferred to a third party. Instead of having to establish the liability of the insured before being able to bring proceedings against the insurer the third party can, in the same proceedings, seek declarations about both the insured's liability and the insurer's potential liability. Clauses 2 and 3 of the Bill replicate this. However, the Bill makes it clear that a third party does not need to seek both declarations in order to obtain

judgment against the insurer. A third party will, however, have to establish the liability of both the insured and the insurer to obtain that judgment.

Clause 10 of the 2001 Bill which sought to provide an interpretation to clauses 8 and 9 has been removed. This section is now unnecessary because the subject-matter of clause 10(2) and (3) in the 2001 Bill is now covered by clause 1(4) of the Bill. Clause 10(1) of the 2001 draft Bill is now covered by clause 2(11) and 3(10).

Discharge of Insured

The Bill does not contain an equivalent of clause 12 of the 2001 Bill. This is because case law since the Report means the provision is no longer necessary (see The Law Society of England and Wales v Shah [2007] EWHC 2841 (Ch)).

Determination of Domicile

Clause 13(2) of the 2001 Bill applied provisions of the Civil Jurisdiction and Judgments Act 1982 to determine the domicile of various entities. The list omitted the provision relating to the domicile of trusts and this omission is corrected in clause 13(2) of the Bill.

Extension of Jurisdiction as a Result of Equivalent Provision in Northern Ireland

The Bill does not contain an equivalent to clause 13(4) of the 2001 Bill because the Bill extends to Northern Ireland.

Power to Amend Act

Clause 18 of the 2001 Bill gave the Secretary of State power to amend the Acts This was included to ensure that if new insolvency events were created by statute, or if the insolvency events listed in the Act were changed, the Act could be amended to keep pace with such changes. However, it is now recognised that such broad power is not needed—the legislation creating the new insolvency event or amending an existing event will be able to make consequential amendments to the Act. Clause 18 is therefore not replicated in the Bill.

However, clause 19 of the Bill contains a more limited power of amendment relating just to Northern Ireland legislation. This has been included as it will be easier to exercise an order making power under the Act than to exercise the power to make an Order in Council under section 84(2) of the Northern Ireland Act 1998.

Information and Disclosure

Schedule 1 to the Bill contains provisions relating to disclosure of information along the lines of those in Schedule 1 to the 2001 Bill. Consultation following the Report indicated that the requirement for a third party to have reasonable grounds to believe various matters before he or she could request information would be extremely hard to fulfil. Changes have therefore been made to the Schedule to enable a third party to be able to obtain the information he will need in order to bring a claim.

Ministry of Justice

January 2010

Letter from David Hertzell, Law Commissioner, Commercial and Common Law

Third Parties (Rights Against Insurers) Bill

I write in relation to the Third Parties (Rights against Insurers) Bill, shortly to be considered by the Special Public Bill Committee. I have set out below some of the matters which the Committee may wish to consider. I should be very happy to discuss these and any other matters in my oral evidence to the Committee.

Background to the Bill

The Report *Third Parties—Riqhts Against Insurers'* was published jointly in 2001 by the Law Commission and the Scottish Law Commission. A draft Bill accompanied the Report. As is customary, the Commissions carried out an extensive consultation process, involving 65 consultees (including members of the judiciary and legal profession, insurers, reinsurers, brokers, consumer groups, and academics). Since then, Government has carried out a further two consultations, as well as a cross Whitehall consultation. In each case the principles of the Bill have been widely supported. From 2008, Law Commission staff and I have worked closely with officials at the Ministry of Justice in their work to update the Bill.

The Commissions' recommendations were based on the views of the wide range of parties who took part in the 1998 consultation, several of whom continued to provide valuable advice to the Commissions as they prepared the 2001 Report. The Commissions' aim was to reform the Third Parties (Rights against insurers) Act 1930 in a way which took into account the views of all stakeholders, and provided a simplified and easier-to-use means of conducting litigation. In this regard, it is my view that the Bill genuinely achieves a consensus—perhaps a rare thing in the insurance industry—and its principles are generally supported by all major stakeholders in this area.

No doubt there will be aspects of the policy affecting third party liabilities which different groups may wish to alter or expand—I expect that such issues may be raised in evidence before the Committee. However, in my view the Bill represents a careful "balancing act" in its reform of the 1930 Acts (that is, the Third Parties (Rights against Insurers) Act 1930, and the Third Parties (Rights against Insurers) Act (Northern Ireland) 1930)—updating and clarifying the law where appropriate, whilst taking account of the different needs of the particular groups affected by the Bill.

The Bill's Key Reforms

The Bill's main reforms are as follows:

— Under the 1930 Acts, the third party cannot issue proceedings against the insurer without first establishing the existence and amount of the insured's liability in proceedings against the insured. Under the Bill, the third party will be able to issue a claim against the insurer without first having to establish the existence and amount of the insured's liability. (I have attached a flow diagram outlining the different ways in which a third party may proceed under the Bill, which I hope will assist the Committee.)

— If the insured is a dissolved company that has been struck off the register of companies, at present the third party must first bring proceedings to restore it to the register to be able to sue it. Under the Bill, the third party is not required to restore a dissolved company, but may proceed directly against the insurer. The issue of the insured's liability will be resolved in those proceedings.

— Another barrier to the third party's claim under the 1930 Acts is the veil of ignorance under which they proceed. The courts.have decided that the right to information does not arise until the insured's liability has been established. Until then, the third party may (if the insured is insolvent) have to conduct litigation in ignorance of whether any rights under the 1930 Acts have been transferred. The Bill sets out a clear disclosure regime, enabling a third party to write to someone whom they reasonably believe can provide the information specified in the Bill.

— In cases with a foreign element (such as where the insurer is domiciled abroad), it can be unclear whether the 1930 Acts apply. The Bill therefore sets out clearly the occasions on which it would apply. Where the insolvency or the "insolvency-type" event which triggers the transfer of the insured's rights happens in the UK, the third party will be able to bring its claim against an insurer in the courts of the UK, even if the insurer is situated abroad.

— Rights transferred to the third party under the 1930 Acts remain subject to the terms and conditions of the insurance contract. This is because the third party steps into the shoes of the insured, and so is bound by the same limitations as the insured 'would have been. However, in three particular circumstances the Bill enhances the third party's rights against the insurer. Consultees in 1998 supported these exceptions.

— The 1930 Acts have not kept up with developments in company and insolvency law. The Bill applies to all of the insolvency-type situations which now exist, ensuring that the law is up to date.

— The court has held that when a person fails to pay their solicitor and then becomes insolvent, the solicitor cannot sue the insurer directly for the fees which were covered by legal expense insurance. More recent case law has cast doubt on this decision, but there is still a need to clarify the law on this issue. The Bill therefore allows for the recovery of such voluntarily-incurred liabilities,

Issues Raised

You have asked whether any interested parties might have concerns over the provisions of the Bill as it now stands. I have been monitoring legal and industry journals, and have kept in touch with colleagues in the insurance industry, but thus far I have heard very little in the way of concerns about the Bill. However, there are two issues which may be raised with the Committee, and which I have outlined below.

Employers' Liability Insurance Bureau

The Committee may be aware of interest in the possible creation of an "employers' liability insurance bureau" ("ELIB"). An ELIB would function in a similar way to the existing Motor Insurance Bureau. It would provide a fund for injured employees whose employer was defunct, where the employer's insurer could not be traced. As you would appreciate, the Commissions did not consider this issue in any detail in their 2001 Report. Although the Bill goes some way to addressing the problem (by creating a more thorough disclosure regime), it will not help a third party who cannot find any information about potential insurance cover held by his or her employer. Ultimately, the possible creation of an ELIB, although undoubtedly an important issue, is not an appropriate addition to this Bill. It was not considered by the Commissions in the 2001 Report, and is a separate issue to be considered by Government and Parliament, rather than a reform of the 1930 Acts.

Recent Changes to the Bill

Committee members will have seen that the Bill has changed from the Commissions' 2001 version. Although I do not believe that these changes are controversial, it may be helpful if I outline the reason for them.

Since 2008, we have worked closely with the Ministry of Justice to review the Bill, and update it where necessary, particularly in light of responses received to the Ministry's targeted consultation process in 2008. The structure of the Bill has been changed by re-ordering existing clauses into a more logical sequence. The current version of the Bill therefore looks different from the 2001 version although the fundamental policy principles are the same. There have also been a few amendments to update drafting language, reflect developments in the law, and correct anomalies in the 2001 draft.

In addition, the following minor changes have been made to the Bill:

— The Bill has been extended to Northern Ireland. This is as a result of support expressed in a consultation carried out in 2005 by the Northern Ireland Department of Enterprise, Trade and Investment for the application of the Bill to that jurisdiction.

— Previous clause 4(2) of the Bill applied where the insured was a body corporate which had been dissolved, preventing an insurer from relying on a clause which required the provision of information and assistance. In reviewing the 2001 Bill, it became clear that the same problem arises where the insured has died, and so the clause (now 9(3)) was expanded to apply where the insured was an individual who has died. In response to consultation feedback in 2008, clause 9(4) has also been added to make sure the way in which clause 9(3) works is clear.

— In the 2001 Bill, a third party who obtained a declaration in respect of the insured's liability and a declaration in respect of the insurer's liability was entitled to an "appropriate judgment" (see old clauses 8(5) and 9(4)). Under the current Bill, a third party needs only to obtain a declaration in respect of the insurers liability to be entitled to an "appropriate judgment". However, in order to obtain that judgment both the liability of the insured, and of the insurer, must have been established. This is a small change to take account of the fact that a third party may occasionally be in the position of proceeding against an insured, when the insured becomes a "relevant person". The third party may wish to continue those proceedings, but seek a declaration in respect of the insurer's liability. The Bill therefore allows such a person to be entitled to an "appropriate judgment", provided that both sets of liability have been established.

— The Secretary of State's power to amend the Bill by statutory instrument (formerly clause 18, now clause 19) has been scaled back. The extended power is not needed, as any legislation creating a new insolvency-type event will make consequential amendments to the Act. However, a limited power of amendment has been included for Northern Ireland.

— The way in which a third party is able to seek disclosure from an insured party as distinct from any other person has been clarified. This was in response to feedback in the 2008 consultation.

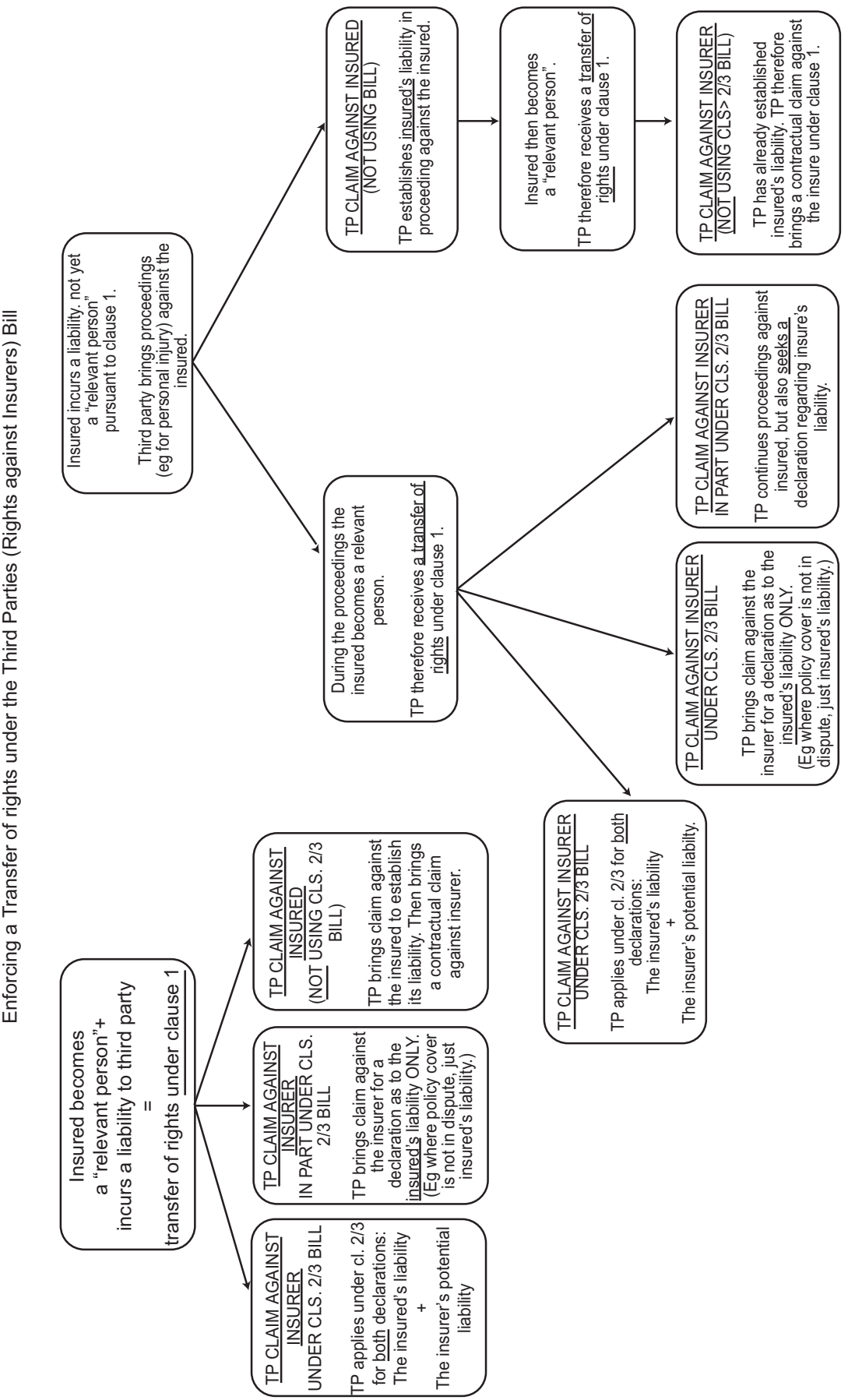
— The third party's ability to apply for a court order where there is non-compliance with a notice requesting information has been included. This codifies the Law Commissions' existing policy.

— Old clause 12 (discharge from bankruptcy etc) has been removed, as it was unnecessary in light of developments in case law.

I should be happy to address any of the changes to the Bill in my oral evidence to the Committee, if that would be of assistance. I look forward to attending the Committee's session on 12 January to assist with its consideration of the Bill. In the meantime, please let me know if there are any particular issues which the Committee may wish to discuss.

David Hertzell
Law Commissioner

6 January 2010


Enforcing a Transfer of rights under the Third Parties (Rights against Insurers) Bill
Insured becomes a "relevant person"+ incurs a liability to third party = transfer of rights under clause 1
TP CLAIM AGAINST INSURER UNDER CLS. 2/3 BILL
TP applies under cl. 2/3 for both declarations: The insured's liability + The insurer's potential liability
TP CLAIM AGAINST INSURER IN PART UNDER CLS. 2/3 BILL
TP brings claim against the insurer for a declaration as to the insured's liability ONLY. (Eg where policy cover is not in dispute, just insured's liability.)
TP CLAIM AGAINST INSURED (NOT USING CLS. 2/3 BILL)
TP brings claim against the insured to establish its liability. Then brings a contractual claim against insurer.
Insured incurs a liability, not yet a "relevant person" pursuant to clause 1.
Third party brings proceedings (eg for personal injury) against the insured.
TP CLAIM AGAINST INSURED (NOT USING BILL)
TP establishes insured's liability in proceeding against the insured.
During the proceedings the insured becomes a relevant person.
TP therefore receives a transfer of rights under clause 1.
Insured then becomes a "relevant person".
TP therefore receives a transfer of rights under clause 1.
TP CLAIM AGAINST INSURER UNDER CLS. 2/3 BILL
TP applies under cl. 2/3 for both declarations: The insured's liability + The insurer's potential liability.
TP CLAIM AGAINST INSURER UNDER CLS. 2/3 BILL
TP brings claim against the insurer for a declaration as to the insured's liability ONLY. (Eg where policy cover is not in dispute, just insured's liability.)
TP CLAIM AGAINST INSURER IN PART UNDER CLS. 2/3 BILL
TP continues proceedings against insured, but also seeks a declaration regarding insure's liability.
TP CLAIM AGAINST INSURER (NOT USING CLS> 2/3 BILL)
TP has already established insured's liability. TP therefore brings a contractual claim against the insure under clause 1.

Examination of Witnesses

Witnesses: LORD BACH, a Member of the House, Parliamentary Under-Secretary of State, Ministry of Justice, and MR DAVID HERTZELL, Law Commissioner, examined.

Q1 ***Chairman:*** Mr Hertzell, may I apologise for keeping you waiting outside and indeed apologise to the others, but we did have one or two matters which we needed to discuss about future meetings and future witnesses and so on. Welcome to this meeting of the Special Public Bill Committee. I think the suggestion is that Lord Bach should start the ball rolling rather than Mr Hertzell; is that right?
Lord Bach: If I may briefly and then perhaps the Committee will hear from Mr Hertzell following my few remarks.

Q2 ***Chairman:*** Indeed, that would be fine.
Lord Bach: Thank you very much, my Lord Chairman. Before giving my evidence can I say how delighted I am that you are chairing this second Special Public Bill Committee in the trial of the new procedure for Law Commission bills. I have no doubt that you will guide our deliberations to a successful conclusion as you did in relation to what is now of course the Perpetuities and Accumulations Act 2009. I should also remind the Committee and congratulate you on the coming into force today, 12 January, of the Law Commission Act 2009 which you sponsored. My Lord Chairman, may I also say, as I know you will have noticed, that Lord Justice Munby who is the present Chairman of the Law Commission, along with some of his colleagues, is at the back.

Q3 ***Chairman:*** I should have given him a special welcome too. May I say we all hope to attend the exhibition which I think is currently to be seen not far from here, so we should be there.
Lord Bach: My Lord Chairman, I am grateful for the opportunity to give evidence today and would like to thank all those who spoke in support of the new procedure and the Bill at second reading committee. There is clearly a consensus of support for the Bill and I hope that will enable us to scrutinise this technical Bill in a constructive way. I do not propose in this statement to repeat at length the material included in my speech at second reading committee or in the memorandum of evidence submitted by the Ministry of Justice to the Committee. May I address points raised by noble Lords at second reading committee briefly. I am of course happy to try and answer any questions that the Committee may have but I am more than delighted that David Hertzell, the Law Commissioner responsible for commercial and common law work at the Law Commission, is here alongside to help me to do so. My own view, for what it is worth, is that the Committee will get much more information and indeed wisdom by asking Mr Hertzell questions than they will by asking me. Of course the Government is very grateful to Mr Hertzell and the Commission for their support for this Bill and the new procedure. If I may address the points briefly raised at second reading committee. My noble Lord, Lord Hunt of Wirral asked a number of questions relating to the Government's progress in implementing the Law Commission Act 2009. I can confirm to the Committee that the protocol referred to in section 2 of the Act is at an advanced stage of preparation. Extensive discussions about the protocol between the Ministry of Justice and the Law Commission have already taken place. Consequently we hope that we will be in a position to be able to lay it before Parliament during this session. The noble Lord also asked at second reading committee whether the list of Law Commission reports on which the Government's decision remains outstanding, which was promised to the hon Member for Christchurch during the debate on the Act in the other place on 16 October 2009, had been delivered. I can record that it was sent on 14 December to the hon Member by my right hon friend, the Ministry for State, who is the Minister responsible for the Law Commission. I have of course sent you, my Lord Chairman, a copy of the letter and placed it in the House Library. The table enclosed with the letter is a complete statement of the then current position. It shows that there were 18 reports outstanding and gives details of their present status. Of these reports, nine were in the process of being implemented and nine remained to be decided upon. The only update that is necessary is that the draft Civil Law Reform Bill, which forms part of the implementation process in relation to four of the reports listed in the table, was published for pre-legislative scrutiny on 15 December last. I hope this demonstrates further our commitment to the Law Commission and its work. The noble Lord, Lord Hunt of Wirral also asked whether we had any plans to consolidate or codify the law in this area once the Bill is passed and what steps we would take to make it more intelligible. In reply I indicated that I would seek the views of the Law Commission. I apologise for the delay. I have now written to the Chairman himself for his views and will respond to the noble Lord in due course. Three noble Lords, Lord Hunt, Lord Goodhart and Lord Borrie all criticised the length of time it has taken the Government to bring this useful and practical measure before Parliament. Lord Hunt asked whether the lack of a new procedure was the reason or whether there were more compelling ones. Lord Goodhart stated he thought it should have been possible to introduce the Bill within a couple of years of the Law Commission's report and welcomed the new procedure as a means of avoiding this kind of delay. I think Lord Borrie echoed those comments.

Of course, my Lord Chairman, eight and a half years is a long time for a useful, uncontroversial piece of law reform to lie dormant and I regret the delay. Noble Lords and the Committee will appreciate that delays of this kind are not new nor confined to the period in office of this Government and it is a sign, I hope, of our determination to escape from delays of this kind that we have supported strongly the development of the new procedure. My noble friend, Lord Borrie asked two questions at Committee: whether I was satisfied with the operation of the Motor Insurers' Bureau and secondly whether there was a need for a similar arrangement in the field of employers' liability insurance. I can only tell him that my officials are consulting colleagues at the Department of Transport on the one hand and the Department for Work and Pensions on the other. I apologise for the delay and will reply to the noble Lord as soon as possible. My Lord Chairman, that is all I want to say at this stage. Obviously I would be happy to answer any questions. I think, as I have said already, it is likely that a more satisfactory answer to any technical question on this Bill will come from my co-witness.

Chairman: Are there any more general questions therefore for Lord Bach before we ask Mr Hertzell to address the Committee? Yes, Lord Hunt.

Lord Hunt of Wirral: My Lord Chairman, may I first of all join the noble Lord, the Minister in saying how pleased and delighted we all are that you have kindly agreed to chair this Committee.

Chairman: That is enough of that!

Q4 ***Lord Hunt of Wirral:*** Because you presided with such distinction over the Perpetuities and Accumulations Act and pioneered this new procedure and because of course you are now responsible for the Law Commission Act which according to the noble Lord, the Minister comes into effect today. As I understand it, the protocol in the Law Commission Act is now the subject of some discussions between the various parties within government and within the Law Commission. I wonder whether or not the noble Lord, the Minister might consider publishing a draft protocol to enable members of this Committee just to see how it is going to move forward before it is actually laid because that is a good opportunity to put forward any suggestions that we might have as to the wording of the protocol? I would particularly like to thank the noble Lord, the Minister for setting out the changes between the two Bills, the draft Bill which was with the report and then the Bill as it is now published. I found that to be an enormously helpful document and his comments on consolidation are also very welcome indeed. On the general point I think we are now much better placed to proceed in committee for a detailed examination of the Bill thanks to the documentation and information which he and his fellow witness have produced for which I am very grateful. Whether or not this protocol could be shared particularly with members on a draft basis is a matter now on which I await the Minister's reply.

Lord Bach: I would like to take that request away, if I may. We are keen to get on with actually producing the protocol. We want to do it during this session of Parliament which I think everyone knows is likely to be curtailed from a normal session of Parliament. I hope the noble Lord, through you, my Lord Chairman, will forgive me if I do not immediately say yes to that, but I will take it away and discuss it with my officials who will no doubt discuss it with the Law Commission.

Chairman: Any other general comments from members before we ask Mr Hertzell to comment?

Q5 ***Lord Sheikh:*** Do we have a time-line in view of the fact that this goes back to 1998 and 2001? What is the target we have in mind to get this on the books?

Lord Bach: This Bill?

Q6 ***Lord Sheikh:*** This piece of legislation?

Lord Bach: I think in the discussions that took place prior to using this procedure it was agreed by the usual channels, if I may use that phrase, that every effort would be made to get this Bill on the statute book by the time Parliament is prorogued for any forthcoming general election. That is very much our aim and I hope it is the aim of all associated with the Bill.

Q7 ***Lord Sheikh:*** So it will be laid before the general election really?

Lord Bach: Absolutely, that is what I am trying to say.

Q8 ***Lord Sheikh:*** First class, I am pleased to hear that.

Lord Bach: That is the idea because it has been delayed too long, I have conceded that. It seems to have broad consensus and so the sooner we get it on the statute book the better.

Q9 ***Chairman:*** Good. Mr Hertzell, would you like to take over?

Mr Hertzell: Thank you very much. I hope I may just say a couple of words by way of introduction before we get into the questions. First, my Lord Chairman, I am very grateful for the opportunity to give evidence to this Committee and for the opportunity to participate in the second of two Bills being used as pilots for a possible new Law Commission procedure. At the Law Commission we very much hope that such a new procedure, if adopted, will allow us to put forward uncontroversial Bills into a swifter passage to legislation than may hitherto have been the case. So far as this Bill is concerned, it has been very widely

consulted on. I would like to stress that point. It has been consulted on twice since the original consultation in 1998. There has also been a subsequent cross-departmental cross-government consultation and a specific consultation in respect of Northern Ireland. Everybody with an interest in this area of law has had a very ample opportunity to give us feedback on it. I am very pleased to say that it continues to enjoy very wide support from all interested parties, including insurers and claimants' representatives too. It remains uncontroversial in all senses. It is important I think to stress that this Bill does preserve the key mechanisms of the 1930 Third Parties Act by which the rights of the insured against the insurer are transferred to the third party when that insured becomes insolvent, so that mechanism which was there in 1930 we have preserved. It means effectively that the third party steps into the shoes of the insured and the insured's debts are disentangled from insolvency procedures. That is an important point to make because when we have had to come and look at various pseudo insolvency processes we have kept that disentanglement in place. The Bill does not alter the substantive rights of the parties. What it has tried to do is to improve the processes by which those parties enforce their rights. The second point to make is that the Bill is of general application. Wherever there is a third party interest in the proceeds of an insurance policy this Bill would apply. I can give you a couple of examples. If you look at employers' liability, you would have the employer as the insured, you would have the employers' liability insurer as the insurer and the injured employee would be the third party. That is a very common scenario. Another one would be for example a professional indemnity situation in which the professional practice would be the insured, the professional indemnity insurer would be the insurer and the client would be the third party in that scenario. So it has general applications not limited to any specific class although the roots of the 1930 Act lie in motor insurance. The latest figures available from the Association of British Insurers, to give you some guidance on how the Bill is used, shows that 30 per cent of actions involving the Third Parties Rights Act are employment liability, 42 per cent are public liability insurers, 12 per cent are professional indemnity insurers and the balance is made up of various other bits and pieces of different types of insurance.

Q10 ***Chairman:*** Could you give us those figures again.

Mr Hertzell: 30 per cent is employment liability, 42 per cent is public liability and 12 per cent professional indemnity, the balance being a mix. The final general point I would like to make by way of opening is although this is an uncontroversial Bill, recent financial conditions will have made it more relevant, I think. In 2008 there were 23,000 corporate insolvencies and 114,500 personal insolvencies in round numbers. The final figures for 2009 are not yet available but taking trend estimates forward that would give us around 27,000 corporate insolvencies and 157,000 personal insolvencies, so there is an increased potential there for this piece of legislation to apply. Finally, I would just say that we perhaps need to remember that many of these third party claimants that may be affected by this Bill are vulnerable people such as injured former employees for whom the cost and complexity of the current legislation is a significant additional hurdle to overcome. I am very happy to take any questions that you may have on the Bill.

Chairman: Who would like to start the questions?

Q11 ***Lord Hunt of Wirral:*** My Lord Chairman, I would just like to ask Mr Hertzell if he can share with us if there are any areas of the Bill that could give rise to further problems just as the 1930 Act, although it was never intended at the time, gave rise to a number of loopholes? The specific example I was just going to put, if I may, my Lord Chairman, to Mr Hertzell is the position of what are called P&I clubs—protection and indemnity clubs—where I have carefully looked through for instance clause 9 and I am not sure we do address the position of P&I clubs. This is just one specific example to demonstrate a much wider problem which I would like Mr Hertzell to address. In sub-paragraph (6) of clause 9 it says: "In the case of a contract of a marine insurance, subsection (5) applies only to the extent that the liability of the insured is a liability in respect of death or personal injury." Those who understand P&I clubs know that clubs do raise something called the "pay first" principle to deflect claims by injured claimants on to other paying defendants. I can see there is a need for an addition here to ensure that the liability includes a liability to indemnify or contribute to the liability of another tortfeasor in respect of death or personal injury otherwise the avoidance will continue because it is not a liability in respect of death or personal injury; it is a liability to indemnify or contribute to the liability of another tortfeasor. I just wonder whether that might be an example of something which we have to carefully go through with considerable care because just as the 1930 Act demonstrated a whole plethora of case law which followed the 1930 Act we must do everything we can to make sure that there is not a further burst of such litigation following this Act.

Mr Hertzell: Could I just answer that in a series of points really. First of all, just to make a general point really, Lord Hunt, that the P&I clubs are supportive of the particular changes being put forward here, as I think you know. P&I clubs put forward in their

consultation a specific response to this in relation to themselves as a very specific type of insurer focusing on marine insurance, and as mutual insurers where the participants in insurance may well also be participants in the claim—so it is a circle in many ways—and they wish to preserve the concept of pay first by which the insured is under an obligation to pay the claim before it can collect off the insurer, as part of that preservation of the mutual rights that they have amongst themselves. There were questions raised in the consultation as to whether or not P&I clubs, strictly speaking, continue to operate in quite that way now or whether they have a more general and commercial application. Nevertheless at the time we felt it was a relatively contained area of insurance and not one that was likely to have an impact on the wider public, and so we preserved the condition of pay first, as you say, for P&I clubs with the exception of death and personal injury and, as I understand it, that is their current practice. As to whether or not it is possible to have a contribution from another, the general point in this Bill is that the rights are transferred whether or not there is a right to collect off somebody else, so in effect whether there is a possibility of collecting from another does not prevent the transfer of rights taking place, so you would be able to collect through from the P&I club in respect of death and personal injury but not otherwise. Does that answer your question?

Q12 ***Lord Hunt of Wirral:*** It does not meet my point but no doubt you may have an opportunity to give it some further thought because I was saying that they have been raising the pay first principle to deflect claims by injured claimants for personal injury on to other paying defendants including of course the government.
Mr Hertzell: Yes.

Q13 ***Lord Hunt of Wirral:*** And if there is not some addition to this sub-clause I can see that the P&I clubs may continue to avoid their liabilities in this way. I was looking for assurance that they could not.
Mr Hertzell: I do not think they can avoid their liabilities to the third party because I think the rights go straight through so you are able to claim direct against them because a transfer has occurred. I will confirm that to you to make sure you can see the relevant clause.

Q14 ***Lord Hunt of Wirral:*** My point is can we be assured that similar situations have been thought through in respect of other parts of this Bill, bearing in mind the plethora of case law which has occurred on the 1930 Act we do not want to be meeting in ten years' time to try and amend this Bill to cover the situations which have arisen because we are dealing with a highly intricate and technical area of law.
Mr Hertzell: We have stress-tested it as far as we possibly can through a huge amount of consultation but of course we can never entirely predict what may happen in the future.
Chairman: Are there any other comments or questions on the points raised by Lord Hunt or do you have a new point?

Q15 ***Baroness Whitaker:*** It is slightly similar, Lord Chairman, to the point raised by Lord Hunt but I think it is not identical and I hope you will forgive my lack of legal experience. I should say I was once responsible for policy on employers' liability compulsory insurance so I hope that serves as a tiny bit of background. My question is: if the wrong doer's insurer is insolvent is it just the same procedure or does something else need to be written in?
Mr Hertzell: It is outside this really in a sense. If the insurer is insolvent then the remedy would be with the Financial Services Compensation Scheme as a kind of insurer of last resort in effect so the procedure would be different.

Q16 ***Baroness Whitaker:*** So there is always going to be money there?
Mr Hertzell: One would hope so, yes.
Baroness Whitaker: Thank you.

Q17 ***Lord Sheikh:*** Except for clarification, my Lord Chairman, it is only a percentage of money that is available just so that the noble Baroness is not misled to think that all the money would be available. The scheme only pays a percentage.
Mr Hertzell: Yes, although I think the compulsory insurance is 100 per cent for employers' liability and motor and 90 per cent for general, and it is for consumers in general not for corporate claimants.

Q18 ***Chairman:*** Any other questions? Could I just ask one thing. It is some time since I have actually read the report although I have. To what extent did you carry out any international comparisons? Do other countries have equivalent legislation to Third Parties (Rights against Insurers) Bill?
Mr Hertzell: We did do some. We did look at Australia. This was a consultation that took place some time in the past. We looked at what happens in Australia and they have a different system there. They have a form of security regarding the insured debt and so the insolvency practitioner, be it the administrator or the liquidator, is obliged to be involved to effectively take forward the claim on a secured basis against the insurer. We felt that was a less satisfactory approach than the 1930 Act transfer of rights because it still did not disentangle insurance debt from insolvency procedures and it required the insolvency team to undertake various actions which they may have very little interest in doing. Our view

was it was better that the third party who is likely to have the greatest interest in this particular claim should be the party that pursues it. We have looked at a certain amount of Commonwealth alternatives.

Q19 ***Chairman:*** It should not just be confined to the Commonwealth. It seems in a sense such a beneficial idea that one imagines other countries—France, Germany and so on—will have something rather equivalent to Third Parties (Right against Insurers)
Mr Hertzell: I am afraid I do not know.
Lord Hunt of Wirral: It is a good point.
Chairman: Do you know the answer to that question? Does anybody know the answer?

Q20 ***Lord Sheikh:*** Can I make the point, and it is an important point with regard to France and Germany. If you look at the five largest insurers three of them are French and German-owned so it is important therefore that we establish this. If you look at them, and I will not mention names, they are very large European insurers and therefore we need to ensure that what we agree here, particularly in light of the fact that we have a domicile provision written in the Act, that we do get co-operation from those two countries which have been already mentioned.
Mr Hertzell: We will have a look at what procedures they have and let the Committee know. As you say, there is a provision in this Bill to deal with the foreign element if there is a foreign insurer.

Q21 ***Lord Hunt of Wirral:*** My Lord Chairman, I think it is an important point here because discussions have been taking place in the European institutions and in the European Parliament in particular around this area. Are you aware of anything there which might be relevant?
Mr Hertzell: I am not. The discussions I am aware of are more in the context of reciprocal arrangements around insolvency rather than insurance. We will have a look at the situation.
Lord Hunt of Wirral: Cross-border.

Q22 ***Chairman:*** I think that would be of interest and it would be helpful as well.
Mr Hertzell: Yes.
Chairman: Lord Borrie, have you any questions to ask?
Lord Borrie: No, thank you.

Q23 ***Lord Archer of Sandwell:*** I do not know whether this is the moment to raise it, my Lord Chairman, but this is something that has been troubling me and I wondered how it was dealt with under the Motor Insurers Bureau. If the insured fails to give information to the insurers that would normally defeat the claim because it would be a condition of the insurance. We are told by clause 9(3) that that does not apply to the giving of assistance to the insurer, but then clause 9(4) says that does not apply, so that we are back to saying that the liability of the insurer is defeated if the insured fails to give him notice that a claim has been made.
Mr Hertzell: Yes, although the third party does have the option to give that notice. However, the third party would have to do so quite quickly.

Q24 ***Lord Archer of Sandwell:*** It just seems to me that it might duplicate the amount of litigation if before anyone knows that there is an insurer they have litigated the liability in the first place, possibly because the insured did not defend and so there was a default judgment.
Mr Hertzell: Yes.

Q25 ***Lord Archer of Sandwell:*** That has already been decided. Now the insurer comes along and says, "Well, that is not fair because I did not have an opportunity to argue the case." Does that mean then that the whole thing has to be litigated again?
Mr Hertzell: Well, we have attempted to address that issue. The first point to make I think in answering that is that the third party does not acquire any better rights against the insurer in general than the insured has, so if there is a deficiency with the underlying insurance I am afraid the third party is bound and affected by that as well. However, the declaration procedure we put in place in clause 2 of the Bill does address your concern which is the entire proceedings involving both the insurer and the insured are heard in one go, so if there is a deficiency with the insurance that should hopefully become apparent early on. Schedule 1 of the Bill allows the third party access to information in a way which is more extensive than the 1930 Act so, again, hopefully they would know any deficiencies with the insurance before embarking on litigation.

Q26 ***Lord Sheikh:*** Could I raise another point. Clause 10 causes me a bit of concern and that is the insurer's right of set-off. It causes me concern on two points. Firstly, let us say there is a policy holder who has not paid their premium and therefore it can be argued that the policy is not valid from day one, from the insurer's point of view, but let us look at the other side vis-à-vis the third party's point of view, if a claim arises, let us take an employers' liability claim (and in fairness you said that 30 per cent of actions relate to EL) if you have a hazardous risk the premium could be quite substantial. I have policies where a premium of £1 million can arise depending on the work which is being done. The third party has been hurt. The policy holder has not paid their premium. How is that premium going to be deducted in a case where the premium is very substantial is something we need to address basically from two points of view. Number

one, non-payment makes the policy void and number two recovery with regard to payment of premiums from the third party.
Mr Hertzell: I am afraid you are absolutely right, the right of set-off here would in one of your examples effectively wipe out the third party claim if there was a huge unpaid element of premium and a relatively small third party claim, yes, I am afraid that would happen. If the insurance policy itself was invalid then again the third party would have no better rights than the insured and therefore again the third party would not be able to pursue the insurer. Although these are not deficiencies in this context there are intrinsic risks for the third party, in the context of having a situation in which the third party steps into the shoes of the insured. In a way, the answer to your question lies outside this Bill or the work we have done because what effectively you are looking at here is uninsured risk and perhaps it raises a question of whether there should be some procedure to deal with uninsured risk, which I mentioned earlier on. In the context of this Bill I am afraid you are right the third party could potentially be unprotected.

Q27 ***Lord Sheikh:*** The intention I presume was to protect the third party. This is beyond protection to a third party, is it not?
Mr Hertzell: The intention of this legislation is to protect the third party in the context where first of all you have an identified insured and identified insurer and secondly where there is a valid insurance policy that could respond to the insured and therefore to the third party. If those criteria are not met then the third party is outside the scope really of this Bill.
Lord Hunt of Wirral: My Lord Chairman, may I first of all just declare—and I did declare it at the second reading—the interests set out in the Register.
Chairman: I should have mentioned that we all ought to do that and I hope we will before the meeting closes.

Q28 ***Lord Hunt of Wirral:*** Particularly as a partner in Beachcroft. I was just going to ask about legal expenses insurance because they are covered for the first time. A lot has happened in the last eight and a half years about legal expenses insurance. Are you reasonably content with the provisions now in the way that they are being extended? Are they extended far enough to cover this sector? To what extent have you consulted those who do not appear in the consultation list, particularly major companies like DAS and other very substantial companies in the area of legal expenses insurances? Are you reasonably happy that all is well in that area?
Mr Hertzell: The part of the Bill which addresses legal expenses insurance is not specifically about legal expenses insurance per se it is about voluntary incurred liabilities of which that would be an example, so it is addressing it in the round if you like. We have not specifically spoken to DAS or any others only to their representatives such as the ABI on that point. Of course this whole area is subject to review at the moment with Lord Justice Jackson so it is quite difficult for me to answer the question. As far as we have gone we are relatively satisfied but we do not know what the outcome of that review would be and whether it would have an impact on this.

Q29 ***Lord Hunt of Wirral:*** You should know that by our next meeting. If I could just move on to ask again because of the delay, you have never really consulted with the Financial Ombudsman Service because they were not created as such until about the time you were producing your report. As I understand it, they are going to deal with any claims which arise now because the Insurance Ombudsman Bureau, which was taken over by the FOS, was consulted. Are you happy that the FOS are content that they have the requisite material and resources to deal with any claims that will now arise under that extension?
Mr Hertzell: I find that hard to answer in terms of the full FOS resources. The FOS itself is a supporter of this measure and we did discuss it with them in the more recent consultation we have done since 1998 so they have signed up to it but I cannot really comment on their resources.
Lord Sheikh: Apart from legal expenses technically health insurance could come under the same umbrella.
Lord Hunt of Wirral: Good point.

Q30 ***Lord Goodhart:*** On the point that Lord Sheikh raised about whether the insurer can deduct unpaid premiums, it does seem to me that the insurer must be entitled to do that because it would be, I would have thought, unreasonable to expect an insurer to pay more because the insurer has gone into insolvency than they would have had to pay if the insured had remained solvent.
Mr Hertzell: Certainly.

Q31 ***Lord Goodhart:*** Certainly if that was not the situation insurance companies would not be very happy with this Bill.
Mr Hertzell: That is correct.

Q32 ***Chairman:*** Your answer was that is correct?
Mr Hertzell: That is absolutely correct. The third party is stepping into the shoes of the insured and

therefore has only the same rights and obligations as the original insured, that is quite right.

Q33 ***Chairman:*** Does that conclude everything that anybody would like to ask? Thank you very much both of you. Did you want to add anything at the end, Lord Bach?

Lord Bach: No, it has been fascinating.

Chairman: Perhaps we should just go back to where we should have started and if you have any interests that should have been declared would you now declare them. Lord Hunt and Beachcroft. Any other interests that need to be declared? Well, thank you both very much indeed.

Second letter from David Hertzell, Law Commissioner, Commercial and Common Law

THIRD PARTIES (RIGHTS AGAINST INSURERS) BILL

In the course of my oral evidence to the Special Public Bill Committee on Tuesday 12 January, Committee members asked about a number of matters relating to the Bill. There were three issues that I promised the Committee I would look into:

- ~~the~~ the status of third party rights against insurers in other jurisdictions;
- the support of the Financial Ombudsman Service in considering claims under the Bill; and
- the multiple parties scenario described by Lord Hunt.

I have set out my comments on those three issues below.

OVERSEAS COMPARISONS

Lord Lloyd of Berwick asked whether the Law Commissions had carried out international comparisons to determine the approach adopted by other countries in relation to third party rights. Lord Hunt of Wirral asked in particular about developments in the European Union.

In addition to the research conducted in relation to Australia (which I referred to in my evidence), the Commissions also found that a number of countries had adopted a "direct right of action" approach in respect of the third party's right to sue an insurer. Several of these are explained at Appendix F to the Commissions' 1998 consultation paper.

In the past week I have researched the position in a number of other countries. Although in some cases it has been difficult to find current English-language versions of the different statutes, I have set out briefly below what I understand to be the approach taken in different countries, with a particular focus on the European Union.

Belgium

It appears that under Belgian law, a third party will be able to claim directly from an insurer where there is compulsory insurance for the liability event.[1]

Canada

Insurance law is dealt with at provincial (rather than federal) level in Canada. However, several provinces have legislation dealing with third party claims against an insurer. For example, section 132 of the Ontario Insurance Act 1924 provides that a third party may proceed against an insurer where the third party can prove:

- a valid insurance policy exists;
- the third party has obtained a judgment in respect of the insured's liability; and
- the insured has not satisfied that judgment.

Finland

In Finland, section 67 of the Insurance Contracts Act provides:

> "A person who has sustained bodily injury, property damage or financial loss under general liability insurance is entitled to claim compensation in accordance with the insurance contract direct from the insurer, if:

[1] Articles 86 and 87 of the *Loi du 25 Juin 1992 sur le Contrat d'Assurance Terrestre (Moniteur beige)*, 20 August 1992, cited in Campbell, *International Insurance Law and Regulation* (2009) BEL–18.

(i) the insurance policy has been taken out pursuant to laws or regulations issued by the authorities;

(ii) the insured has been declared bankrupt or is otherwise insolvent; or

(iii) the general liability insurance has been mentioned in marketing efforts launched to promote the insured's business."[2]

That section goes on to set out the requirements in respect of the insurer notifying the insured, and giving the insured an opportunity to provide information. It also provides that if an insurer accepts a third party's claim, the acceptance is not binding on the insured. Section 68 makes further provision about direct claims by an injured third party.

France

In French law there is a general concept of *"action directe"* which allows an injured person to sue the insurer of the person or entity which has caused the injury. Originally developed through the case law, action directe was subsequently codified, and can now be found in the *Code des Assurances*, particularly article L124, which relates to liability insurance (but see also article L112–6).

To proceed against the insurer, the third party must still establish the liability of the insured by way of a claim in court, or an out of court claim;[3] however the court claim may either be a joint action against both insured and insurer, or separate actions.[4]

Germany

The existing insurance Contract Act (Versicherungsvertragsgesetz) was substantially revised in 2007 (taking effect in 2008).[5] Included amongst the key changes were new provisions in respect of contracts for compulsory insurance, providing an injured party (ie the third party) with a direct right of action against an insurer.

The third party will be able to proceed against the insurer in any of the following circumstances:

— where the insured has taken out third-party motor insurance (under the Act on Compulsory Insurance for Keepers of Motor Vehicles);

— where insolvency proceedings have begun, or where insolvency proceedings have been dismissed because of a lack of assets, or where a provisional insolvency administrator has been appointed; or

— where the whereabouts of the insured are unknown.[6]

Israel

The Insurance Contract Law, enacted in 1981, takes account of a direct action between a third party and an insurer.[7] Section 69 applies where the insured has undergone certain bankruptcy or liquidation events, and the insured has also incurred a liability to a third party (either before or after the bankruptcy etc event). In those circumstances, section 69 provides that: the rights of the Insured against the Insurer in respect of that liability shall not become part of his assets but will pass to the third party, who may sue the Insurer on the strength of these rights, but a plea available to the Insurer against the Insured may also be set up by him against the third party".[8]

Italy

It appears that, subject to a small number of exceptions (motor vehicle, boating and hunting accidents) Italian law does not allow an injured third party to proceed directly against an insurer.[9] instead, proceedings must be brought by the insured against the insurer.[10]

Poland

In Poland, property insurance contracts are regulated by articles 821-828 of the Civil Code. "Property

[2] Insurance Contracts Act, No 543, 28 June 1994.
[3] Article L124–1.
[4] Tournois, M *Direct actions by victims against insurers of wrongdoers in France* [1996] IJIL 194 at 199.
[5] Insurance Contract Act, Federal Law Gazette I page 2631. English translation viewed at httpa/www.gesetze-im-internet.de/enalisch vvg/engiisch vve.html on 19 January 2010, administered by the German Ministry of Justice.
[6] Section 115, Insurance Contract Act.
[7] Insurance Contract Law 5741–1981.
[8] Section 68 makes provision for the payment of insurance proceeds directly to a third party—this does not appear to be confined to the situation set out in section 69, but in relation to third party liabilities generally.
[9] See Italian Insurance Code (Legislative Decree 7 September 2005, No 209) for vehicle and boating exceptions. See article 8(7) of Law 27 December 1977, No 968 for the hunting exception.
[10] Cassazione Court, sez III, decision of 20 April 2007, No 9516.

insurance" includes third-party liability insurance.[11] Article 822 provides that any person entitled to indemnity in relation to a contract of civil liability insurance may bring a claim directly against an insurer.

South Africa

In South Africa, insolvency legislation provides that a third party may proceed against an insurer where the insured's estate has been sequestrated.[12]

Motor insurance in the European Community

Committee members may also be aware that, separate from the third party regimes in different countries, throughout the European Community there are specific arrangements for third party rights in the context of motor insurance. The European Community introduced the Fourth motor insurance Directive (2000/26/EC) which allowed a person visiting another Member State to bring a direct action against the insurers in the Member State of their domicile. This was extended further in the Fifth motor insurance Directive (2005/14/EC), which granted direct action against insurers on all victims.

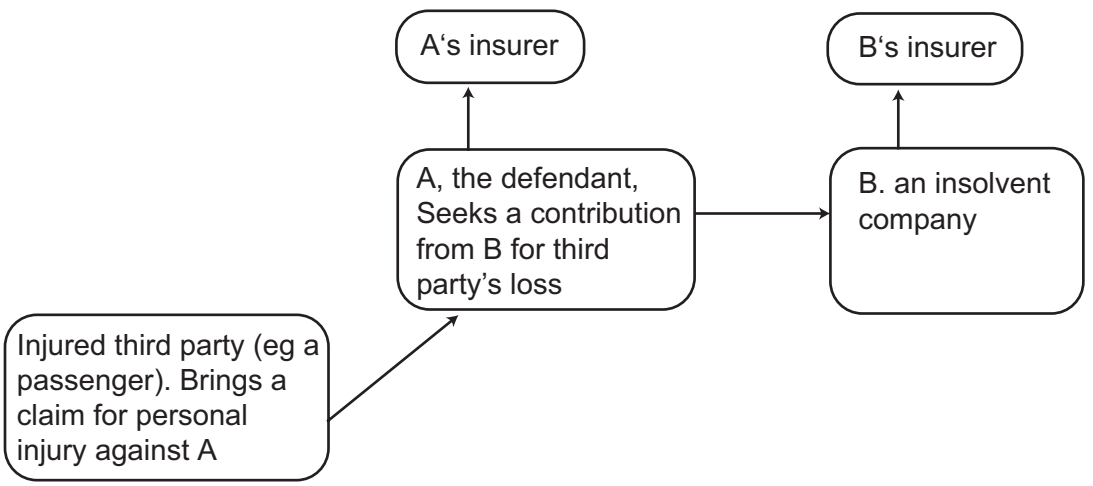
The Financial Ombudsman Service

Lord Hunt of Wirral asked whether the Financial Ombudsman Service was content with the Third Parties (Rights against Insurers) Bill, given that the Service will be able to investigate claims made in the context of the Third Parties Bill in particular, Lord Hunt asked whether the Service felt that its resources were sufficient to manage claims made under the Third Parties Bill. I indicated that the Financial Ombudsman Service had expressed its support for the Bill—the Service was consulted as part of the 2008 Ministry of justice consultation process.

I have since contacted Mr Peter Hinchliffe, the lead ombudsman for general insurance, to discuss the particular issue of resourcing. I was advised by Mr Hinchliffe that a slight increase in workload is expected if the Third Parties Bill comes into force. However, Mr Hinchliffe indicated that only a small number of cases are brought under the current legislation (the Third Parties (Rights against Insurers) Act 1930). He expects that the number of cases under the new legislation would be similarly low.

Multiple tortfeasors scenario

Lord Hunt asked about the situation where an insured (referred to hereafter as "A") who is liable to an injured third party, seeks a contribution from another insured ("B"). That is:



Lord Hunt suggested that B's contract of insurance with its insurer alight contain a "pay first" or "pay to be paid" clause, which would ordinarily require B to pay out its contribution to A (if liable) before being able to recover from its own (ie B's) insurer. (I have assumed that the scenario described by Lord Hunt involved marine insurance contracts, which are the subject of clause 9(6) of the Bill. I have also assumed that the third party's claim was for death or personal injury.)

[11] Campbell, International Insurance Law and Regulation (2009) POL–11.

[12] Section 156 Insolvency Act 1936. Case law indicates that a third party may also bring such proceedings where the insured is a close corporation which is subject to a winding up order—see *Unitrans Freight (Ply) Ltd v Santam Ltd* [2004] ZASCA 20 (20 March 2004), at para 7.

I examine in turn the position of the three main parties. First, if we consider the position of the third party, he or she will be able to recover their losses in full (provided that there are no liability or coverage issues). If A (from whom the third party seeks compensation) is solvent, the third party should be able to recover its losses from A. If A's contract of insurance with its insurer contains a pay first clause, A may be required to pay out the third party's claim before recovering from its insurer.[13] Alternatively, if A is an insolvent company, then (under the Bill) the third party will be able to proceed against A's insurer directly. If the contract of insurance contains a pay first clause, it will be of no effect, because the third party's claim is for death or personal injury (see clause 9(6)). So it appears that the third party's claim, provided it is a valid claim, will be met in full.

We then consider the position of A, who is liable to the third party. A seeks a contribution from B, on the basis that B's actions contributed to the loss suffered by the third party. Although Lord Hunt did not say so explicitly, I assume that B is an insolvent company (or another "relevant person" for the purposes of the Bill—see clauses 4 to 7). It is important to remember that it is only if there has been a liability event (eg B's actions causing As loss) and an insolvency-type event (making B a "relevant person") that the provisions of the Bill are invoked—in the absence of either event, the provisions of the Bill will not apply to A's claim against B.

A seeks a contribution from B. B is insolvent, so A's claim, under the Bill, is brought directly against B's insurer. The contract of insurance between B and its insurer contains a "pay first" clause, which means that B must pay A's claim before recovering the amount from its insurer. B clearly cannot pay. As it is a marine insurance contract, but A's claim is not for death or personal injury, B's insurer will be able to rely on the "pay first" defence—that is, it will be entitled to insist on payment of the claim by B first, before it will indemnify A (this, of course, is a result of the House of Lords decision in The Fanti & The Padre Island [1991] 2 AC 1).

This outcome is the result of the general policy position that the third party (whoever he, she or it may be) steps into the shoes of the insured. For this reason, insurers' ability to rely on defences against third parties is largely undisturbed by the Bill; this approach was supported on consultation (see the Law Commissions' 2001 Report, paragraphs 5.10 to 5.12). In the context of marine insurance (where pay first clauses are most frequently used), the International Group of P and I Clubs strongly supported the retention of pay first clauses. Their concern was that a general change to the law beyond the restriction for death or personal injury would lead to a migration of the clubs to other jurisdictions. Given the relatively limited use of pay first clauses the Commissions agreed that with the exception of death or personal injury, insurers should be entitled to rely on such clauses in the context of marine insurance.

25 January 2010

[13] Although I understand that industry practice in marine insurance is that P & I Clubs do not rely on pay first clauses in cases of death or personal injury.

TUESDAY 26 JANUARY 2010

Present	Archer of Sandwell, L	Lloyd of Berwick, L (Chairman)
	Bach, L	Methuen, L
	Borrie, L	Paul, L
	Goodhart, L	Sheikh, L
	Henley, L	Whitaker, B
	Hunt of Wirral, L	

Memorandum from Professor Rob Merkin, Professor of Commercial Law, University of Southampton

1. The Background

1.1 The Third Parties (Rights against Insurers) Act 1930 was passed in tandem with the Road Traffic Act 1930, the latter for the first time making motor liability insurance compulsory in the UK. The purpose of the former was to ensure that the injured victim of a negligent driver, whose claim would almost certainly render the negligent driver insolvent, would not be in the position that his claim generated sums which would simply go into the bankrupt's estate so that he would at best obtain a share of them: that was the position at common law (*Hood's Trustees v Southern Union* [1928] Ch 793; Re *Harrington Motor Co* [1928] Ch 105). The 1930 Act, a very short measure, provided that if the victim had obtained judgment against the wrongdoer, which had not been satisfied, then the victim could enforce that judgment against the insurers. The Road Traffic Act 1934 created a specific right of this type in motor insurance (which still exists), and since that date the 1930 Act has operated to support other forms of compulsory and voluntary liability insurance. It has proved to be particularly significant in employment personal injury claims, where insurance has since 1972 been compulsory but the regime is far less impressive than that which applies to motor accidents under what is now the Road Traffic Act 1988. But for the 1930 Act many asbestos victims would have gone uncompensated.

1.2 The 1930 Act has proved to have many deficiencies, and the most blatant of them—the inability of an injured victim to bring an action against a defunct company so as to provide the trigger for a claim against its liability insurers (exposed in *Bradley v Eagle Star* [1989] 2 WLR 568)—was commendably reversed with retroactive effect by the Companies Act 1989 which provided a mechanism for the revival of defunct companies. There have been other minor amendments to deal with new forms of insolvency and the statutory creation of limited liability partnerships. The measure for the first time attracted the attention of the Law Commissions when it was preparing the report which led to the Contracts (Rights of Third Parties) Act 1999, and the deficiencies of the 1930 Act led the Law Commissions to produce their 2001 Reports and Draft Bill (Law Commission No 272; Scottish Law Commission No 184).

1.3 Following the publication of those Reports, a series of cases involving the 1930 Act were decided by the English courts, and something of a sea-change in attitude is evidenced in the decisions: a number of the Law Commissions' recommendations were, in other ways, effectively implemented by the courts. The judicial revisions were ad hoc and imperfect, and there remains a clear need for the implementation of the Law Commissions' recommendations.

1.4 The 2009 Bill is a little different in structure from that drafted in 2001, but remains faithful to most of the drafting of the original. It should be stressed that there is no general dispute that a reformed 1930 Act is essential: equivalent measures exist in most, if not all, common law jurisdictions, and in many of those jurisdictions the 1930 Act has been adopted as a model but with modifications making it more effective. There is some room for dispute as to whether the 2009 Bill goes far enough in all respects, but no room for dispute that the measure should go ahead. In my opinion the Bill is fit for purpose, and I have only very minor suggestions for its improvement.

1.5 The 1930 Act works on the basis that if a third party has established and quantified the liability of the insured, and the insured is or becomes insolvent, the third party is given a direct claim against the insured's liability insurer. The third party has no rights against the insurers in advance of the insured becoming insolvent, so that the Act by its terms does not countenance the possibility of the insured obtaining information about the policy from the insurers in advance of the claim against the insured being established and quantified, and it also does not set out any mechanism by which the third party can establish whether or not the insurers are liable to satisfy any judgment that the third party might obtain against the insured. To overcome these deficiencies, the courts have developed the idea that a third party pursuing an insolvent insured

has "contingent" rights against the insurer as soon as the insured becomes insolvent (*Cox v Bankside* [1995] 2 Lloyd's Rep 437; *Spriggs v Wessington* [2005] Lloyd's Rep IR 474; Re T & N (No 4) [2006] EWHC 1447 (Ch)). Those contingent rights give the third party the right to obtain insurance information in advance of any judgment against the insured (Re OT Computers [2004] EWCA Civ 653), the right to prevent the insurer from varying the terms of the policy once the insured has become insolvent (*Centre Reinsurance International v Freakley* [2005] EWCA Civ 105), to be joined to any proceedings in which the insurer seeks a declaration of non-liability under the policy (*Chubb Insurance v Davies* [2005] Lloyd's Rep IR 1) and, arguably, the right to seek declaratory relief at an early stage. The 2009 Bill provides for the same form of transfer of rights following the insolvency of the insured, but removes much of the need for the "contingent rights" fiction, by expressly conferring upon the third party the right to obtain information and declaratory relief in advance of insolvency. However, there is nothing in the Bill which is inconsistent with the contingent rights principle, and it may prove to be important in some of the situations outlined in this paragraph.

2. The Transfer

2.1 The Bill preserves the two key uses of the 1930 Act. The first is the right of a third party who wishes to pursue an insolvent insured, to turn to the insured's insurer once a judgment has been obtained. The second is the ability of the third party to use the 1930 Act as a method of enforcing a judgment against a solvent insured. The third party can bring an action against the insured, obtain a judgment and, if it is not satisfied, then insolvency proceedings can be initiated against the insured, thereby giving TP direct access to the insured's liability insurer.

2.2 Under clause 1(1) there is a transfer of rights if "a relevant person" (RP): (a) incurs liability against which there is insurance; or (b) an insured person having incurred liability becomes a "RP". The concept of "RP" is defined in clauses 4 to 7, and in essence means a person who has become subject to an insolvency procedure (referred to for convenience in what follows, as having become insolvent). So clause 1(2) has the effect that if a person is insolvent and has incurred liability, or has incurred liability and then becomes insolvent (probably because he has been made the subject of insolvency proceedings by the third party (TP)), there is a transfer of the RP's rights to the person to whom liability was incurred (TP) and a direct action can be brought against RP's insurer.

2.3 Under clause 1(3), TP can bring proceedings in respect of transferred rights against the insurers without having established and quantified RP's liability, but TP cannot enforce those rights without having established and quantified that liability. The insured's liability can be established or quantified, under clause 1(4) by: obtaining a judgment against the insured; obtaining an arbitration award against the insured; entering into a settlement with the insured (although a settlement can ultimately be challenged by the insurer on the ground that it is not in full or in part made on the basis of legal liability); or obtaining a declaration to that effect under clause 2. This is at the heart of the Bill. Under the 1930 Act, TP has to establish and quantify the insured's liability, and then show that the insured is insolvent, as a precondition to bringing an action against the insurer under the policy: an immediate action against the insurer pending the determination of the insured's liability is not possible (*Post Office v Norwich Union* [1967] 1 All ER 577). Under the Bill, once there is insolvency, TP can turn his attention to the insurer in order to establish the insurer's liability, but he cannot actually enforce the insured's rights until he has established and quantified RP's liability. He may do this by separate proceedings against the insured, or, more likely, by seeking a declaration as to the insured's liability in the same proceedings as have been brought to establish the insurer's liability under the policy. In practice, therefore, once the insured has become insolvent, TP will seek to establish and quantify the insured's liability to TP as a matter of law, and to establish liability under the policy, in a single set of proceedings.

2.4 It has been held under the 1930 Act that a TP who obtains a judgment on liability against the insured, with damages to be assessed, can obtain an interim award from the insurer under the Civil Procedure Rules Part 23. It is not clear whether the Bill preserves this position.

2.5 Clause 8 is concerned with the case in which the insured's liability to TP is less than the amount of the liability of the insurer to the insured, eg, because the policy covers defence costs. Clause 8 provides that the transfer of rights to TP is only for the former amount.

3. Relevant Persons

3.1 The Bill applies only if the insured has become a RP by becoming subject to one or other insolvency provision. A good deal of consultation has taken place to make sure that the list of statutory insolvency procedures is exhaustive. Most significantly, the Bill has been extended to individual voluntary arrangements, a lacuna under the 1930 Act (Re *Greenfield* 1998, unreported). The Bill does not cover contractual insolvencies, as where a receiver is appointed under a floating charge following the occurrence of an event which causes the

floating charge to crystallise. The need for change here was considered but rejected by the Law Commission, on the basis that neither TP nor the insurers would be aware of crystallisation.

3.2 As regards individuals, clause 4(1) lists the relevant insolvency procedures. The clause does not deal with a discharged bankrupt, as the clause is limited to the situation in which a bankruptcy order is "in force". However, the position of a discharged bankrupt was dealt with by the Court of Appeal in *Law Society v Shah* [2007] EWHC 2841 (Comm), it there being held that if a bankrupt has been discharged then the claim against him is not extinguished but simply becomes unenforceable against him, so that it remains open to TP to establish and quantify the liability of a discharged bankrupt for the purpose of obtaining judgment against the bankrupt's insurer. In the light of this decision the Law Commissions' original Bill, which referred to discharged bankrupts, has been modified. A deceased insured is to be treated in the same way as a live one (clause 5).

3.3 As regards legal persons (both companies and partnerships), clause 6(1)-(2) lists the relevant insolvency procedures. Clause 6(1)(a) is concerned with arrangements with creditors: the company remains the RP until its liabilities are transferred, at which point the transferee becomes the RP (clause 6(5)). As far as a company is concerned, clause 6(1)(b) provides that if the company has been dissolved and not restored to the register, it remains a RP. The effect is that proceedings can be initiated against a dissolved company's insurer in order to establish its liability (under clause 2(2)(b) without the need to apply to the court for the restoration of the company to the register, as is required under the existing law.

4. Contracts within the Bill

4.1 The Bill applies only to rights under a contract of insurance (clause 1(5)). This term is not defined, but it may be assumed that it encompasses P&I Club rules which technically do not qualify as contracts of insurance to the extent that the Club does not undertaken any legal liability to pay but rather merely has a discretion to do so.

4.2 The Bill does not apply to reinsurance (clause 15, continuing the policy of the 1930 Act). The clause may give rise to problems in a very small number of cases, as it is not always clear whether an insurer's liability has arisen under a contract of insurance or under some other form of arrangement (eg, a captive insurer, a bond or an extended consumer warranty—the latter was discussed inconclusively in *Re OT Computers* [2004] EWCA Civ 653). These issues are quite properly left to be resolved as and when they arise.

4.3 However, under clause 16, the Bill does apply to a liability whether or not voluntarily incurred. The purpose is to catch liability only in contract as well as liability in tort. Most liability policies do not extend to liabilities voluntarily incurred, unless there is a parallel tortious action, but the Bill brings such claims within its scope where the policy covers them. The provision codifies the decision of the Court of Appeal in *Re OT Computers* [2004] EWCA Civ 653, which extended the 1930 Act to legal expenses incurred under contract. It may be noted that at the time of the Law Commissions' Reports the 1930 Act was thought not to cover voluntarily incurred liabilities (*Tarbuck v Avon Insurance* [2002] Lloyd's Rep IR 393), a decision which the Law Commissions thought should be reversed. The Court of Appeal in *Re OT Computers* did just that, anticipating the 2009 Bill.

5. Effect of Transfer on Claim against Insured

5.1 Where the insured's rights have been transferred to TP, clause 14(1) prevents TP from enforcing his claim against the insured itself insofar as the claim is covered by insurance. The claim has to be brought against the insurer for the insured sum, and a claim against the insured remains only in respect of uninsured sums. Thus the assured can proceed against the insured only for the amount of any deductible under the policy and also in respect of the amount by which liability exceeds the amount of the insurer's liability (clause 14(6)(b)). If there is some arrangement with creditors, then clause 14(2)-(3) take the insured sums outside those arrangements and confer upon TP a prior claim on the policy moneys.

5.2 If the insurer has insufficient funds to meet a claim, TP may also proceed against the insured for the relevant sum (clause 14(6)(a)) but under clause 14(7) only to the extent that TP's claim is not protected by the Financial Services Compensation Scheme (which applies when an insurer becomes unable to pay claims).

6. Declaratory Relief

6.1 A person (P) who claims that rights have been transferred to him under a contract of insurance but who has not yet established and quantified the insured's liability, has the right to seek declaratory relief: clause 2(1), (6) and (8). The clause refers to an "insured" rather than to a "relevant person", to distinguish between an insured who has become insolvent and one who has not, thereby making the point that clause 2 is triggered

by a mere claim that the insured has become insolvent. In the same way, it is to be assumed that clause 2 refers to P rather than TP, because a TP is a person who has established that rights have been transferred to him.

6.2 P is entitled to seek a declaration in respect of: (a) the liability of the insured to P; or (b) the insurer's potential liability to P (clause 2(2)). Clause 2(2)(a) is concerned with the validity of P's claim against the insured, and clause 2(2)(b) is concerned with whether the insured has become insolvent (failing which there cannot be a transfer) and whether there is liability under the policy (see clause 2(11)). The effect is that the liability of the insured, and the liability of the insurers, can be resolved in a single set of proceedings. Clause 2(6) allows the court to give an "appropriate judgment" in conjunction with a declaration, which will generally mean a money judgment. All of this means that there is no longer a need for the insured to initiate separate preliminary proceedings to resurrect a defunct insured's company in order to attempt to establish and quantify its liability so that the claim can be pressed against the company's insurer and can lead to judgment.

6.3 The right to a declaration (the court has no power to refuse) is, under clause 2(3), subject to any defence on which the insurer may rely, In relation to (a) the defence will be in respect of the substantive claim or its quantum, and in relation to (b) it will be the absence of the insured's insolvency or a defence under the policy. These points are amplified later in the clause. If declarations under both heads are sought, the insurer may be faced by the possibility of being forced to run conflicting defences. An example may be a product liability matter, where the defence to the claim by P against the insured is that the product was not defective, and the defence to the claim by the insured under the policy is that the defect in question is excluded by the policy wording. In such a case the insurer is perfectly entitled to run alternative defences.

6.5 If a declaration is sought against the insurer in respect of the insured's liability to P under clause 2(2)(a), then clause 2(4) states that the insurer can rely upon any defence that would have been open to it in proceedings brought against the insured. However, clause 2(5) provides that this is subject to clause 12. Clause 12(1) applies to the situation in which P has commenced proceedings against the insured within the limitation period applicable to the claim (the statutory limitation period for a claim in contract or tort, as the case may be) and the claim has not been resolved (clause 12(3)), but the limitation period has expired in the course of those proceedings. In such a case, clause 12(2) provides that the insurer cannot rely upon the expiry of the limitation period to defeat a further action by P against the insurer to seek a declaration as to the liability of the insured to P.

6.6 Clause 2(9) provides that the insured can be made a defendant to the proceedings, which may have procedural advantages in respect of evidence and documents, and joinder also only binds the insured of there is joinder (clause 2(10)) which may be useful if the declaration relates to the insured's liability to P but there is loss outwith the policy. If the insured is a company which has been dissolved and not restored to the register, there is no need for P to apply to have the company restored to the register so that it can be joined to the proceedings. The action against the insurers can simply go ahead (by way of contrast to the present position). It is possible to contemplate the situation in which TP's claim against the insured arises under a contract containing an arbitration clause, or is a claim in tort which is nevertheless subject to arbitration, or which has become the subject of an ad hoc submission to arbitration once the dispute has arisen. If a direct claim is brought against the insurer for a declaration that the insured is liable to TP, the arbitration clause is irrelevant because the insurer is not a party to the arbitration clause. However, if TP has a residual claim against the insured, or for procedural reasons wishes to join the insured, the arbitration clause presents a potential bar to such joinder. The Bill does not reconcile this conflict.

6.7 If a declaration is sought in respect of the insurer's liability under the policy, in accordance with clause 2(2)(b), he will have to do so within the limitation period, namely, six years from the date on which the insured's liability has been established and quantified. The Bill does not permit the insured to be joined to the proceedings if clause 2(2)(b) is the sole ground of application: I wonder whether there may be situations in which it would be useful to join the insured, so that all policy issues can be resolved in a single set of proceedings. As I understand it, CPR is to be amended to permit the insured to seek to be joined as co-defendant.

6.8 If the policy contains an arbitration clause, the position under the 1930 Act and also the Bill is that P is also bound by it (Freshwater v Western Australia Insurance [1933] 1 KB 515). By clause 2(7) (which is clumsily drafted), at the same time as P seeks a declaration from the arbitrators as to the scope of the policy, he may also seek a declaration as to the insured's liability to P. The Law Commissions discussed this matter and concluded that such an approach was necessary to preserve the integrity of the arbitration. I am not sure about the wisdom of this. The arbitrator may be an expert on insurance law, but may—at P's option—be faced with quite separate issues arising under, eg, a construction contract, alleged breach of a copyright licence leading to allegations of infringement, or a personal injury claim. Again, the tribunal may be appropriately constituted for an insurance dispute (a legally qualified chairman and two market "wingmen" is typical), but a three-arbitrator tribunal may be wholly inappropriate for the liability matter in question. The insured, through its

insurers, may find himself defending an arbitration in the absence of any arbitration agreement (particularly if—and this is not clear—clause 2(9) permits the insured to be joined the proceedings where the arbitrator is asked to deal with clause 2(2)(a) issues). Also, there may be aspects of the arbitration agreement which are inappropriate to a hearing on liability, eg, an agreement to exclude judicial review for error of law under section 69 of the Arbitration Act 1996. Finally, an arbitration clause is unenforceable in a consumer contract, but P may be a consumer who could not as a matter of law be required to pursue his dispute in arbitration: the Bill removes that protection.

6.9 The Bill does not deal with the situation in which the insurer takes pre-emptive action in advance of any judgment in favour of P against the insured, and seeks a declaration that it is not under any liability for any claim which may be made by P against the insured. *Chubb Insurance v Davies* [2005] Lloyd's Rep IR 1 recognises the right of P to be joined to such proceedings, in order to prevent a default judgment where the insured has no interest in defending them. Presumably this right is retained where the insured has, or where P asserts that the insured has, become insolvent.

7. Information Conditions Affecting Transferred Rights

7.1 A major problem with the 1930 Act has proved to be non-compliance with claims conditions. There are numerous cases in which the insured has failed to give required information to the insurer in respect of a third party claim, often because the insured has become insolvent and has no interest in whether or not the claim is defended, and the insurer has been able to rely upon a breach of the claims condition. The only weapon open to the courts in this situation is to construe the claims condition as one which does not make compliance a condition precedent to liability, so that breach does not give a defence to a claim. Clause 9 is concerned in general with conditions imposed upon the insured's own rights under the policy (and also other conditions, although it is not clear what is caught by this category). The (unstated) basic rule is that TP has no better rights than the assured, but there are three modifications to this principle in respect of claims information.

7.2 The first is that if TP satisfies the condition, then it cannot be relied upon (clause 9(2)). Some conditions require personal performance, so this provision is needed.

7.3 The second is that any condition which requires the insured to provide information or assistance to the insurer is to be disregarded where the insured cannot comply because it is a dissolved corporation or a deceased individual (clause 9(3)). This would typically be the case under an occurrence or events policy which relates to an exposure or injury affecting TP occurring years in the past, and in respect of which a claim is made by TP at a much later date (clause 9(3)).

7.4 The third is that, although any condition requiring the insured to provide information or assistance to the insurers remains in force insofar as the insured has not died or been dissolved, that condition is ineffective insofar as it requires the insured to notify a claim to the insurer (clause 9(4)).

7.5 The effect of all of this is as follows.

7.6 Take, first, a claims made liability policy. This will typically state that coverage for a policy year is triggered if either: (a) the insured notified to the insurer within the currency of the policy (and as soon as is reasonably practicable) any circumstances which may give rise to a claim—any later claim is then deemed to have been made in the policy year; or (b) a claim is actually made against the insured in the policy year. Nothing in the Bill prevents the insurer from denying liability for circumstances arising in the currency of the policy if those circumstances have not been notified. This will not matter if a claim arising out of those circumstances is subsequently made against the insured in the policy year, because the insured can rely upon (b) and cover is provided by reason of the claim and there is authority for the proposition that (a) and (b) are distinct heads of cover so that a breach of (a) does not prevent recovery under (b). However, it will matter if the claim against the assured is not made until a later year, because a later year's policy may exclude claims arising out of circumstances that could have been notified under an earlier policy. So, where notifiable circumstances have not been notified under an earlier year, a later policy may not respond to the actual claim made against the insured and there is nothing that TP can do about it. One possibility might be to prevent an insurer from relying on this type of clause if an insolvent insured has failed to notify circumstances in an earlier year. If, however, a claim under (b) has been made against the insured, and it is not notified, then clause 9(4) in effect wipes out the obligation to notify the claim. A claims made cover is, therefore, likely to be preserved only in the absence of circumstances notifiable under a previous policy year. Once a claim has been notified, the insured will be under a duty to co-operate with the insurer in defending the claim, by providing information and documents. The Bill allows the insurer to rely upon a condition precedent to recovery in the case of breach, although the Bill operates on the assumption (which is not necessarily accurate) that TP will, having exercised rights to obtain insurance information, be aware of the problem and will itself co-operate so as to bring itself within clause 9(2).

7.7 Alternatively, the policy may be in exposure or injury form, thereby imposing long-tail cover on the insurer. The issues are slightly different, in that the insurer's obligation to indemnify does not rest upon a claim being made but upon an exposure or injury having taken place. Nevertheless, there will be a notification clause, and it is only notification of the claim itself that is protected, by clause 9(4). Thereafter, TP has obtain the necessary insurance information as soon as possible and then to act so as to bring itself within clause 9(2). Clause 9 is thus of limited effect.

7.8 In some situations, the relevant information is provided by the insured to a broker, and the broker fails to communicate the information to the insurer. Plainly the insured has a claim against the broker in such a case, but it is far from obvious that the broker owes a duty of care to TP, and it is only rights under the policy—as opposed to claims against others—that are transferred under the Bill. This issue is outside the scope of the Bill.

8. Pay to be Paid

8.1 P&I Club rules are written on a "pay to be paid" basis, so that the insured cannot recover from the insurer unless and until it has paid TP. Such clauses have been upheld under the 1930 Act (*The Fanti and the Padre Island* [1990] 2 All ER 705), with the effect that TP can rely upon a direct claim against the insurer only in the case where such a claim is not needed, ie where TP has been paid. Clause 9(5) retains that position generally, but clause 9(6) lays down an exception in the case of a marine policy where the claim is one for death or personal injury: in such a case pre-payment is not an enforceable requirement. Pay to be paid provisions are rarely (and possibly never) found outside P&I Club rules, so confining the exception to marine insurance is not problematic. A distinction is nevertheless drawn between personal injury claims and other claims, eg, cargo losses, collision liabilities, pollution liabilities and other risks covered by P&I Clubs. This may cause a difficulty where insurance is compulsory under international maritime conventions, although those conventions for the most part contain their own direct action rules. Clause 19 could be utilised for this purpose if necessary.

9. Set-off

9.1 Clause 10 is concerned with unpaid premiums or other sums due to the insurer under the policy. Clause 10 provides that if the insurer possesses a right of set-off, then that can be enforced against TP. This codifies the position under the 1930 Act: *Cox v Bankside* [1995] 2 Lloyd's Rep 435. It is to be noted that clause 10 does not permit the insurer to exercise anything other than contractual set-off in respect of the "policy": that means that there is no set-off of sums payable by the insured under separate contracts, or indeed under earlier years of cover in respect of which the premium remains outstanding. It is also to be noted that the Bill does not rescue TP if the payment of premiums is not simply a debt obligation but rather is a condition precedent to the inception or continuation of cover (or even, in marine cases, a warranty). It is only where non-payment has no impact on cover but merely creates a debt that clause 10 is of assistance. Any modification of the Bill to override payment conditions would, however, contravene the principle that TP has no better rights than the insured.

10. Other Conditions

10.1 Other policy conditions, eg, warranties, fraudulent claims, compliance with statutory obligations and the like are unaffected by the Bill. This is the position under the 1930 Act (see, eg, *Cleland v London General* (1935) 51 Ll LR 156). The principle remains that TP is no better position than the insured would have been, unless TP is himself in a position to remedy the breach under clause 9(2). Equally, under a P&I Club or other mutual policy, the only right of the insured is to have a claim fairly and properly considered, so that TP has the same right and not an absolute right to be paid (see *CVG Siderugicia v London Steamship Owners' Mutual* [1979] 1 Lloyd's Rep 557). This is probably a sensible compromise.

10.2 One unresolved issue under the 1930 Act is whether a public policy defence open to the insurer against the insured can be pressed against TP. It has been suggested that if the insurer's defence is based upon, eg, the criminality of the insured's act which gave rise to liability, that criminality is merely a personal bar which does not prevent a valid claim from being transferred (*Total Graphics v AGF* [1997] 1 Lloyd's Rep 559). It may be thought that the Bill does not affect this reasoning: if the policy is construed as providing a defence only against the insured personally, then there are valid rights to be transferred if the claim is brought by TP.

11. Limitation Periods for Direct Claims

11.1 The limitation period applicable to a claim by the insured against his liability insurers starts to run from the date on which the insured's liability has been established and quantified by judgment, award or settlement. So the insured has six years from that date to bring his claim. If TP has established and quantified the insured's liability, and commences direct proceedings against the insurers under the Bill, the limitation period for TP's claim is not to be any different. So the claim has to be brought against the insurers within the insured's limitation period.

11.2 This gives rise to a problem where the insured has himself commenced proceedings against the insurers within the limitation period and then—in the course of the proceedings and after the expiry of the limitation period—has become insolvent and thus a RP. Prior to the insured becoming insolvent there are no rights under the Bill, so there is no possibility of a direct action until insolvency occurs. However, following the insured's insolvency, TP cannot commence a fresh action because he is time-barred. So he can keep within the limitation period only if the Bill transfers to him the right to take over the insured's proceedings against the insurers. However, the Bill does not achieve that: it merely transfers rights "under the contract" (clause 1(2)). It would seem therefore that the third party must take steps to enforce his judgment, award or settlement against the insured within six years, so that if the insured defaults an insolvency procedure can be initiated and a direct claim can be brought by TP against the insurers.

11.3 There is a procedural solution under CPR 19.4, which permits one party to be substituted for another even after the expiry of the limitation period, so in effect the proceedings may be transferred from the insured to TP and the limitation position is preserved. But the CPR does not apply to arbitration. So the rights of TP could be defeated if the insurance contains an arbitration clause. There is complex case law on this point, and it remains unresolved. *The Felicie* [1990] 2 Lloyd's Rep 21 holds that fresh arbitration proceedings have to be commenced (so that any limitation period has to be satisfied), although it has since been assumed in cases not involving the 1930 Act—notably *Baytur v Finagro* [1991] 4 All ER 129—that existing arbitration proceedings can be assigned.

12. Contracting Out

12.1 Clause 17 negatives any policy term which directly or indirectly avoids or terminates a policy, or alters the rights of the insured, in the event that the insured becomes a RP (ie, becomes insolvent) or an individual dies insolvent. This reflects the 1930 Act. It was held in *The Fanti and the Padre Island* [1990] 2 All ER 705 that a "pay to be paid" clause was unaffected because it did not alter the insured's legal (as opposed to practical) rights on insolvency: the insured's rights were always the same, solvent or insolvent, namely to pay in order to be paid. This provision is to be construed in the same fashion.

12.2 The Bill does not cover the issue of changes in the insured's rights prior to his insolvency. This point may arise in two ways. First, the policy may provide for a variation of the insured's rights in given circumstances which do not amount to a statutory insolvency covered by clause 4 of the Bill: this possibility was left open in *Centre Reinsurance v Freakley* [2005] EWCA Civ 105. The second is that the insurer and the insured may enter into a settlement contract in respect of the claim before the insured has become insolvent. The 1930 Act does not preclude any such settlement (*Normid Housing v Ralphs* [1989] 1 Lloyd's Rep 265), at least in the absence of proof of conspiracy (alleged but not proved in *Rowe v Kenway* (1921) 8 Ll LR 225). This may give rise to a problem where an insured employer enters into a commutation agreement in respect of all future claims arising out of, eg, asbestos exposures (where the policy covers year of exposure), injuries (where the policy covers year of injury) or claim (if the policy is claims made). Future claimants may find that there is only a limited sum available to pay all claims (as in *Re T&N Ltd* (No 4) [2006] EWHC 1447 (Ch).

13. Obtaining Information

13.1 A major weakness with the 1930 Act is its failure to make proper provision for TP to obtain insurance information before launching a claim against the insured: if insurance is not in place, of limited value or for one or other reason unenforceable, then an action is simply a waste of time and money. The cases on the 1930 Act initially deprived TP of any right to information, and although that lacuna was remedied by the Court of Appeal in *Re OT Computers* [2004] EWCA Civ 653, the actual method for obtaining information has remained unresolved. Clause 11 of, and schedule 1 to, the Bill, deal with this matter in some detail. However, they appear not to achieve their intended purpose

13.2 The right to obtain insurance information arises where A reasonably believes that B has incurred liability to A and also reasonably believes that A is a RP (ie, is insolvent). In that case (para 1(1)) A may give notice to B requesting the insurance information set out in para 1(3)). That information will allow A to determine whether there is a policy in force and, if so, what and how much it covers. If the request for disclosure is not

complied with, an application can be made to the court for an order, under para 2(3). There are two potential weaknesses with this provision. The first is that the insured may refuse disclosure and is then able to satisfy the court that there is no insolvency procedure in place: para 2(3) does not say that the court must make an order, so even if absence of an insolvency procedure is not a jurisdictional barrier to disclosure, at best the insured is reliant upon the court exercising its discretion to order disclosure. The second is that there is no insolvency procedure in place, and TP is close to certain that the insured will be unable to satisfy any judgment. However, the Bill does not in that situation permit TP to seek information under clause 1.

13.3 The only solution under the Bill is for TP to commence proceedings against the assured and to attempt to obtain disclosure of insurance information under the CPR. A further problem arises at the outset, in that the relevant disclosure provision, CPR 18.1—which permits a court to order a party to clarify any matter in dispute or give any additional information in relation to such a matter—appears not to apply to disclosure of insurance information. There are conflicting authorities on the point, with Irwin J in *Harcourt v Griffin* [2007] EWHC 1500 (QB) adopting a generous view of CPR 18.1, but with *David Steel J in West London Pipeline v Total UK* [2008] EWHC 1296 (Comm) taking the opposite approach (albeit with undisguised reluctance). The latter view, although restrictive, may be thought to be correct in its analysis that there is no dispute between the insured and TP as to the insurance, only as to its disclosure. Disclosure of a policy and related documents may be obtained during the proceedings, under the disclosure rules in CPR 31, but such disclosure will not reveal whether the insurer has a potential defence under the policy. So, the position as it stands is that proceedings against the insured will have to be initiated and taken to the point of disclosure, but that will secure only limited information. Once the insurer has been identified, it will then be possible to seek information from the insurer (see para 13.5).

13.4 Perhaps para 1(1)(b) should be amended to read that there is a right to seek information where TP reasonably believes that the insured will not be able to satisfy any judgment or award in respect of the claim.

13.5 An alternative right to obtain information arises under para 1(2) where A reasonably believes that B has incurred liability to A, that B is insured, that rights have been transferred to A (ie, that B is insolvent) and that there is another party, C, (who who may be, for example, an insurer or broker) possesses the relevant information. In that situation the information may be requested from C. The difficulty is that A may have no idea about B's insurance position, and so is unable to trigger the procedure. In any event, the provision applies only where B is insolvent, and so cannot be used if A merely suspects that B may not be able to satisfy a judgment (even if A knows exactly who the insurers are).

13.6 If a request for disclosure is validly made, the information to be disclosed is set out in para 1(3)-(4). Under para 2 the information must be disclosed within 28 days, failing which a court order may be obtained. Special provision is made for documents not under the control of C, and for privileged documents.

13.7 In the case of a direct action against an insurer involving the liability of a defunct company which has not been restored to the register, that information may be obtained from an ex-officer or insolvency practitioner (para 3). Disclosure and inspection then follow (para 4).

13.8 Policy terms which purport to restrict the right of information are void (para 5). The rights are without prejudice to whatever other rights of disclosure are available under the CPR (para 6). As already noted, the CPR is not likely to be of assistance.

14. Foreign Element

14.1 It was uncertain how the 1930 Act applied to a case with a foreign element, and in particular whether the policy had to be governed by English law or whether some other link was required (see *Irish Shipping v Commercial Union* [1989] 2 Lloyd's Rep 144). Clause 18 of the Bill lays down a straightforward rule, which is that if the insolvency procedure is an English one then the Bill will apply irrespective of the place in which liability was incurred, the domicile of the parties, the law applicable to the policy and the place where payment has to be made. The rules relating to the jurisdiction of the English courts over an insolvency are complex in the extreme, although the rules where an insolvency occurs within the EU at least have been agreed.

14.2 The Brussels Judgments Regulation, European Parliament and Council Regulation 44/2001, contains rules for jurisdiction in insurance cases. In general, under article 9, an insurer can be sued in the country of its domicile or in the country of the insured's domicile Article 11, which deals with liability insurance, lays down the rule (article 11.2) that if a direct action is permitted by the law of the forum, article 9 applies. This has been held by the European Court of Justice to mean that the action can be brought against the insurer in the country where the injured party is domiciled, if local law allows a direct action (*FBTO Shadverzekerigen NV v Odenbreit* Case C-463/06). The effect of this on the Bill is that if TP is domiciled in England and the insurer is domiciled in an EU (or EFTA) country, a claim may be brought by TP against the insurers in England even

though the policy is not governed by English law and even though the right that TP is trying to enforce against the insured is not governed by English law.

14.3 It is less clear how jurisdictional rules apply if either the insurer is not EC-domiciled or TP is not domiciled in England. That depends upon the English court possessing jurisdiction under one or more of the grounds in CPR Practice Direction 6B.

14.4 As regards intra-UK jurisdiction, in essence the rules in Regulation 44/2001 are applicable in modified form. However, the matter is put beyond doubt by clause 13, which allows a TP domiciled in one part of the UK to bring an action against an insurer domiciled in another part of the UK in the domicile of either, any contractual provision on jurisdiction being overridden.

15. Exhaustion of Funds

15.1 Where there are competing claims to a limited fund, the insurance moneys can be allocated pro rata or they can be allocated on a "first past the post" basis. The 1930 Act operates on the latter basis (*Cox v Bankside* [1995] 2 Lloyd's Rep 437) and the Bill does not deal with the matter. This reflects the Law Commissions' decision to preserve the position.

January 2010

Supplementary memorandum by Professor Rob Merkin, Professor of Commercial Law, University of Southampton

I have had the opportunity to review the comments of Professor Adrian Briggs[1] and Maggie Hemsworth.[2] They cast doubt upon various aspects of the Bill. My view is that, these comments, notwithstanding, the Bill is for the most part "fit for purpose" and that there is no real impediment to legislating (subject to the minor points raised in my initial report).

Professor Briggs

Professor Briggs is largely concerned with conflict of laws issues, and he raises points of great complexity where the jurisdiction for the proceedings is not England or where the policy/claim are not governed by English law. However, these should not be of great concern. The Bill is an insolvency measure, designed to ensure that if there is an English insolvency then the insured's assets, insofar as they consist of the insurance proceeds of a liability claim, are taken outside the insolvency and diverted to the third party whose claim is generated those proceeds. In effect, the Bill makes the third party a secured creditor in the insolvency, by allowing the third party to obtain his own judgment against the insurer under the policy. The issues raised by Professor Briggs are complex, but my submission is that the international tail should not be allowed to wag the domestic dog.

The Bill allows a third party to establish and quantify the insured's liability, typically by judgment. If the judgment is not satisfied, and the third party is not at that stage insolvent, then the third party can institute insolvency proceedings against the insured in order to become the transferee of the insured's right of action against the insurer. If the insured has no assets in England then the Bill cannot operate because the insured cannot be a "relevant person" for insolvency purposes. Thus, in most cases with a significant foreign element, the chances are that the insured will simply not be a "relevant person". By contrast, if the insured does have assets in England, if only in the form of an insurance claim payable in England, then the Bill can operate because English insolvency proceedings are possible.

There are two separate issues relating to a direct claim against the insurer, jurisdiction, and applicable law.

Jurisdiction

The Bill creates a direct claim against the insurer by the third party. Where the third party is domiciled in England and the insurer is domiciled within the EEA, that claim can be brought in England by virtue of articles 9 and 11 of the Brussels Regulation (44/2001), and exclusive jurisdiction clauses are for the most part overridden. Assuming that the insured is not domiciled in England, or the insurer is not domiciled within the EEA, it may be more difficult for the third party to establish the jurisdiction of the English court over a direct claim against the insurer, although it may be possible to join the insurer as a necessary and proper party to a substantive claim by the third party against the insured if the English court has jurisdiction over that claim. Whether or not the permission of the English court is required to serve the insurer (and I would bow to Professor Briggs' view that CPR 6.33 removes the need for permission), the third party may still be faced with a stay application by the insurer on the grounds of an exclusive jurisdiction clause in the insurance policy or

[1] Printed at pp xx–xx
[2] Printed at pp xx–xx

possibly just forum non conveniens. Ultimately the English court has the right to refuse to stay its own proceedings in the face of an application for such stay, and the potential operation of the Bill may be just the situation which would justify refusal of a stay. There is indeed authority for this proposition under the 1930 Act: *The Irish Rowan* [1989] 2 Lloyd's Rep 144.

If the claim against the insurer is not one over which the English court has any jurisdiction, then obviously the direct claim recognised by English law will be unavailable unless the law of the jurisdiction in question recognises such a claim. If the third party obtains a foreign judgment against the insurer, then presumably it can be enforced in England. Plainly the Bill cannot deal with this situation.

Applicable law

If the English courts possess jurisdiction over a direct action by the third party against the insurer, the claim against the insurer is almost certainly to be classified by English conflicts rules as contractual, in the light of the ruling of the Court of Appeal in *Maher v Groupama Grand Est* [2009] EWCA Civ 1191, so that the law applicable to the claim has on the face of things to be determined by the rules in the Rome I Regulation. If that law is not English law, and that law does not recognise any transfer of rights, I am not sure that it matters. It could be argued that the issues are procedural and not substantive, so that Rome I does not apply at all. Alternatively, it could be argued (and I think that there is a stronger case than Professor Briggs recognises) that the Bill is a mandatory rule of the forum which cannot be ousted by the application of a foreign law (under article 9 of Rome I).

Other matters

Professor Briggs has made some other observations, in italics below. I have annotated these with my own comments.

> *Clause 1(4): does "judgment or decree" mean a judgment from an English court? Or does it include a judgment which was given by a foreign court but which qualified or would have qualified for recognition in English private international law? Or does it include a foreign judgment which, however, would not qualify for recognition in English private international law? It seems improbable that the last of these is included, but the middle option is harder to predict. What is the effect, for example, of a judgment from a foreign court declaring that the insurer had no liability to the insured?*

The rules for recognition of foreign judgments in private international law are not strictly relevant to insurance contracts. The question in every case is whether the insured has established and quantified his loss, as a trigger for a direct claim against the insurer. Where the insured has been sued to judgment in a foreign court, that judgment is to be treated as binding on the insurer unless it is manifestly perverse or unless the insured failed to defend the claim properly. Of course, in practice, in the majority of cases the insurer will have conducted the defence and so the latter argument will not be open to it. The principles were laid down in the analogous reinsurance context in *Commercial Union v NRG Victory* [1998] 2 Lloyd's Rep 600. So it will always be open to an insurer to challenge a foreign judgment (or, presumably, an arbitration award) on these grounds, in the direct action brought by the third party. That necessarily goes also for a settlement of the claim against the insured, which is only binding on the insurer if it reflects what would have happened if the assured had been sued to judgment. The point, however, is that armed with a judgment, award or settlement, whatever its origins, the third party can bring his action against the insurer, and it is then open to the insurer in those proceedings to demonstrate that the insured's liability had not been properly established and quantified so that there is no liability to indemnify the insured (clauses 1(3) and 2(3)).

> *Clause 2(7): I am not clear whether this provision deals with the case in which the liability of the insurer to the insured, and no more, is according to the policy of insurance required to be sorted out by arbitration, or a case in which the third party, to whom the rights have been transferred, has to bring his direct claim against the insurers by way of arbitration. If it is the former, I am not sure how this would work, for if it is only the rights which are transferred to the third party by clause 1, it is not obvious that the obligation (duty, burden) to proceed by arbitration does transfer. If "rights" means "rights and associated obligations"', this would be less of a point, but that does not strike me as the way to interpret "rights". If it is the later (sic), it would appear to be necessary to say specifically that this Act shall be applied in arbitration proceedings?*

In my view it is obvious that the obligation to arbitrate is transferred under the policy. There is authority for that proposition under the 1930 Act (*Freshwater v Western Australia Insurance* [1933] 1 KB 515), and clause 9(1) puts the matter beyond doubt: an arbitration clause is a separate contract, and operates as the only means by which the insured claim from the insurer (any attempt to bring judicial proceedings will be stayed under section 9 of the Arbitration Act 1996).

What would happen if the arbitrators were to come to the conclusion that, because they are entitled to choose the law which they will apply, that they will choose to apply the law which governs the contract of insurance and that as a result they will not apply the provisions of the Act? It may be that this is the intended result, and that the power of the tribunal to choose the law which applies in the dispute is more important than the application of the rules of this Act. But at the moment, I do not see what will prevent arbitrators choosing not to apply the provisions of the Act in a case in which they consider that the claim of the third party should be dealt with by (and rejected by reference to) the law which governed the insurance contract.

I do not see the issue here. In the first place most policies containing arbitration clauses also contain choice of law clauses, so that the arbitrators have no right to choose the applicable law. But even if they do have the right to choose the applicable law, I don't understand how they can refuse to apply the Bill, because the Bill is nothing to do with them. The function of the arbitrators is to determine whether there is any liability under the policy. Once they have done that, and they have ruled that there is liability, it is for the third party to enforce the award under the Bill: the arbitrators are irrelevant at that stage. The Bill also contemplates that, if the insured's liability to the third party has not been established, the third party is entitled to raise that issue in the arbitration. As long as the arbitration has its seat in England, if the arbitrators refuse to deal with the liability issue they can be required to do so by means of an application to the English court under section 67 of the Arbitration Act 1996.

Jurisdiction agreements in insurance contracts. I do not see what is intended to be the result if the insurance contract provides, on a true construction, that all claims under it (including any direct claim) are to be brought before a particular court. In the context of jurisdiction agreements falling within the scope of the Brussels I Regulation, I can see that there may be little which legislation can say. But what is to happen if the insurance provides that all claims against the insurer are to be brought before the courts of New South Wales? Jurisdiction clauses are not proscribed by clause 18: does that mean that a court can give effect to such a clause? If that is so, it looks odd that a court is directed by clause 18(c) to apply the Act even though there is a choice of law agreement for another law, but is not prevented from giving effect to an agreement on jurisdiction which will mean that the Act is not applied after all. I suspect that I have not fully understood the intention here.

This is an unlikely scenario: if the defendant is subject to English jurisdiction, there is little prospect that he will be insured by Australian insurers. Let it be supposed, however, that the policy contains a NSW exclusive jurisdiction clause. The third party brings an action in England to establish and quantify the liability of the insured, and then seeks a declaration of liability under the policy. The English court is perfectly free to refuse a stay of the declaratory proceedings and to deal with the issue itself, at least if the insured itself has not issued proceedings against the insurer in Australia.

Service out of the jurisdiction on insurers to whom the Brussels I Regulation does not apply to give or to refuse jurisdiction. If the claim under the Act is seen as one falling within CPR r 6.33(3), which it seems to me that it is, service out on an overseas insurer will be allowed without the prior permission of the court. That would mean that an Australian insurer could be served without the prior permission of the court, even though the insurance contract was not governed by English law, the liability of the insured to the insurer had nothing to do with England or English law, and none of the parties had any residential connection to England. That may be exactly what is intended, but it is a striking assertion of jurisdiction over a case whose component parts may have little to do with England. If such service is made (or if the insurer has been served here), may the insurer nevertheless apply for a stay of proceedings on the ground of forum non conveniens, pointing to the weakness of connection to England and the strength of connection to another jurisdiction? It is not obvious to me, but there must be a possibility that the wording of the Act would lead a court to the conclusion that no power to stay is permitted. First, if permission is not needed to serve, it may seem odd that that discretionary element still returns to play a part if the defendant insurer contests the jurisdiction or its exercise. Second, cl 18 could be taken to say that the Act is to apply even though there are these foreign elements; that if there is a stay on the grounds listed as irrelevant to the application of the Act in cl 18, the effect would be that the Act would not apply, and that therefore the court may not grant a stay of proceedings. That would give the Act a very wide sphere of operation.

If none of the parties has any connection with England, the insolvency proceedings are unlikely to be English so the Act would not apply anyway. But that aside, in this type of case the assured, armed with his judgment against the insured, can seek to enforce that judgment and to initiate insolvency proceedings in England if it is not satisfied. On the assumption that the insured is prepared to lapse into insolvency rather than make a claim against its liability insurers, there would be every reason for the English court to refuse to stay proceedings by the third party against the insurers for a declaration as to their liability under the policy and thus their liability to the third party, given that there are no Australian proceedings.

Application of the Act in cases where all the contacts are not with England: Clause 18. It is easy to see why the Act should not be prevented from applying just because the contract of insurance is governed by a foreign law when everything else is English, or when the insurer is foreign (esp, perhaps, if it is Gibraltarian) when everything else is English, and so forth; and Clause 18 says that. But it also appears to say that the Act will still apply even though all the matters listed in Clause 18 are non-English; the Notes on Clauses could easily be read as making that point. Or, to put it another way, there is no geographical, personal, or other limit on the application of the Act. Is it really intended that it should apply to cases in which there is no English connection at all? It may be that the correct way to read Clause 18 is simply saying that the factors listed do not prevent the application of the Act, but that the question whether the Act does apply is also subject to (answered by) the principle that Parliament is presumed not to intend to legislate for its laws to have extra-territorial effect. Something similar arose before the House of Lords in Serco Ltd v Lawson [2006] UKHL 3, which dealt with unfair dismissal. The legislation in that case was also silent as to its scope, but no-one really supposed that it applied to and employee and employer from Ruritania who were parties to a Ruritanian contract performed in Ruritania. Lord Hoffmann was able to deduce and limit the scope of the Act, but it cost a lot of someone's money for Parliament's will on this point to be ascertained, and to be shown to be different from what the Court of Appeal had found it to be. In the case of this proposed Act, is it the will of Parliament that the Act apply to every single case in which a person with a claim against an insured wishes to pursue the insurer? If it is not the will of Parliament that this be permitted in every single such case (and bearing in mind that service out appears to be available as of right if the insurer is not here), I cannot myself see where the limitation is. Reasonable people may disagree as to what it should be, but it is not apparent to me that the answer is given on the face of the text.

There is a geographical limitation on the Act: the English court must have jurisdiction over the claim by the third party against the insurer, and the insolvency must be in England.

Application of Clause 18 and the Rome I Regulation. In a case in which it is intended to that the Act apply (sic), but in which the lex contractus is not English, it may be assumed that Clause 18 will make the Act apply. But it is possible to see the argument which would defeat this. If the liability of an insurer to the third party is seen as a matter relating to the contract of insurance, there is a chance that it will be seen as a contractual obligation for the purposes of the Rome I Regulation (Reg (EC) 593/2008). In this regard, the fact that the Court of Appeal is inclined to the view that, as a matter of common law private international law, a direct claim is to be characterised as a claim in tort is of no relevance: Maher v Groupama Grand Est [2009] EWCA Civ 1191 is authority on the common law, but not on the interpretation of the Regulation. That Regulation applies its own choice of law regime for matters falling within its material scope. Suppose that the law which governs the policy of insurance does not allow for the transfer of rights, or does so only in a way which conflicts with the provisions of the Act. On the face of it, it would not be possible for the Act to be applied, to override the contradictory provisions of the law which governed the contract of insurance. If it is intended that the Act nevertheless apply, it would have to be under the mechanism in Article 9 of the Regulation, that is, on the basis that the Act is an "overriding mandatory provision" of English law as law of the forum. Looking at the current wording of cl 18, it is not certain that it would pass the test as this is explained in Art 9.1, for the introductory wording of cl 18 is rather understated. It does not say, for example, that "The provisions of this Act shall be applied notwithstanding that . . .". Such language would, to my mind at least, make it more likely that an English judge would find (and if the European Court ever had to address the question, would be more likely to accept) that the provisions of the Act would measure up to the standard set out in Art 9.1 of the Regulation and have the effect they were evidently intended to have.

As indicated above, the law applicable to the policy is not important. That law is relevant only to determine whether there is or there is not liability under the policy. If the third party has established and quantified the insured's liability, he can almost certainly—for the reasons that I have set out above—seek judgment under the policy irrespective of its applicable law.

Equivalent foreign laws on direct actions. I suppose that there is no need to provide that the corresponding provisions of a foreign equivalent Act do not apply? If the idea is that in England, this Act applies to all direct actions, what would happen if a claim were to be made under an equivalent foreign law (assuming this to be the law otherwise applicable to the direct claim, as to the identification of which there is room for debate) which was more generous in some respect, whether as to the need to obtain a declaration of liability to the insured, or (perhaps more plausibly) as to limitation? I do not see anything in the Act which prevents a claimant seeking to rely on a foreign equivalent law. It will not be easy for him, not least because the jurisdictional rules which allow service out to be made without permission will not apply. But if the intention is that this Act, and no other foreign analogous law, govern direct claims in England, it may be helpful for it to say so. A slightly similar issue arose in relation to the Civil Liability (Contribution) Act 1978, in AMF v Hashim, in which the judge ventured to suggest that the 1978 applied to the case before him, but if it did not, a foreign law still might do so. The answer to this will, one supposes, depend on whether (the Serco v

Lawson point, above) there are cases in which the Act has no application (as distinct from there being cases in which the Act does apply but does not give a remedy, or maybe does not give the third party as good a remedy as, for example, the law which governed the contract of insurance would have done). The Act does not, expressly at least, provide that other laws shall not be available to a claimant, or does not provide that the Act is to be exclusive of all other laws. But if it does not intend to preclude other claims, how is the conflict of laws to be resolved?

The English courts have dealt with cases involving foreign third party measures which have provided for arbitration in England. In *Through Transport v New India* [2005] 1 Lloyd's Rep 67 the Court of Appeal granted a declaration that a direct claim brought in Finland against a P&I Club was in breach of an English seat arbitration clause in the Club's Rules, the effect of the declaration being to render any Finnish judgment unenforceable in England against the Club. I am not sure that issues of this type affect the Bill.

Maggie Hemsworth

Maggie makes a number of important comments on the Bill, but I do not think that they should be regarded as rendering the Bill unfit for purpose. Many of her points were considered by the Law Commissions. Her comments are italicised; my comments appear as annotations.

1(a) Transfer of the insured's rights to the third party claimant arises on the double trigger of insured insolvency made manifest and the occurrence of insured liability as a matter of fact and law (cls1, and 4-7 of the Bill). The sequence of these two events is not significant for this purpose. However, cl. 1(1)(a) is likely to be far more limited in practical scope than cl. 1(1)(b): the insolvency regimes are necessarily temporary and, for example, bankruptcy and administration are both likely to end at the 12 month point. So for cl. 1(1)(a) it is a matter of chance whether the event of liability takes place during this period as appears to be required (see clauses 4 and 6 which are expressed in the present tense when speaking of the insolvency regimes). It is likely that a court would seek out the accrual of the cause of action as the critical date, as it does for the purposes of limitation so there are likely to be arguments and proceedings on this point alone. By contrast, where the sequence of events is as required in cl 1(1)(b) the field of claimants will be potentially greater (liability pre-insolvency is more likely as a matter of fact simply because the transfer of insured rights will take place automatically on the making, eg, of the Bankruptcy Order, and will at that date take in all prior acts or omissions of the insured as may give rise to claims; in addition, the insured is more likely to be commercially active prior rather than post insolvency and it is his commercial activity that commonly gives rise to liability). However, where liability has taken place pre-transfer the claimant is in a difficult position with regard to the applicable limitation period. He may be able to delay commencing his claim for some time and might be minded to do so where there is a realistic prospect of the insured entering into one of the insolvency regimes in the short term but, for example, personal injury claimants are subject to a relatively short time period, currently three years as a primary period (Limitation Act 1980, s 11). Contract based claims and other kinds of tort based claims have a more generous 6 year period. The ethos of civil procedure is to commence proceedings in a timely fashion albeit that any such proceedings are viewed as the last resort. Furthermore, claims up to £25,000, being the current Fast Track limit (CPR Part 28), tend to be managed such that trial takes place within a target of eight months. Unless the insolvency of the insured has already taken place the claim will likely be considered by a court prior to any statutory transfer of rights as envisaged by the Bill. Thus, many claimants will need to proceed without any benefit from many of the provisions of the Bill.

The Bill operates in three cases. (1) Where the insured is insolvent at the date when proceedings are brought against him by the third party. This situation falls within clause 1(1)(a). Many of the claims likely to be brought involved dissolved companies facing long-tail liability for, eg, asbestos claims. Clause 1(1)(a) is thus of huge significance. (2) Where the insured becomes insolvent during the currency of the proceedings brought against him by the third party. As soon as that occurs, the third party has a contingent direct claim against the insurer, and the insurer can be joined to the proceedings for the purpose of declaratory relief—it may even be appropriate to stay the main action until the policy issues have been resolved. (3) Where the third party establishes and quantifies the liability of the insured, and the insured unable or fails to satisfy the judgment. Here, an insolvency procedure can be initiated, and the insured's claim against the insurer is transferred to the third party. Potential limitation problems arise in situation (3), where the third party does not initiate insolvency proceedings but simply allows the insured to bring an action against the insurer, and the insured becomes insolvent in the course of those proceedings but after the expiry of the limitation period for a claim under the policy. However, as pointed out in my original Report, the third party can be added to the proceedings under the CPR, so that he is not faced with the problem that he has to start a new action against the insurer outside the limitation period. This does remain a problem in arbitration, and so the solution is for the third party to issue institute insolvency proceedings so that he can secure a transfer in the limitation period.

1(b) The transfer of insured rights takes place in an automatic fashion (cl 1(2)). Yet there may be multiple claimants (either one event giving rise to multiple claims or multiple events in any given insured period). The Bill does not appear to address this. It thus appears that claimants may find themselves in some kind of race with person(s) unknown in order to claim on insurance monies before any applicable insurance limit is reached. It is not clear how this would be managed.

The Bill does not address this. It was considered in detail by the Law Commissions, and they preferred to opt for the conclusion reached in *Cox v Bankside* [1985] 2 Lloyd's Rep 437, namely, first past the post. There are only two options. One is first past the post. The other is that no-one recovers until all claims are resolved, and the money is then apportioned. The latter sounds fairer, but in practice it would prevent payments for many years, particular in personal injury cases where the number of potential claimants is not known. There is no easy answer, but the Law Commissions' decision to let matters lie is probably the fairest of the two possibilities.

1(c) The Bill appears to be silent on the position where there is an annulment of say the Bankruptcy Order (Insolvency Act 1986, s.282).

This was dealt with by the Court of Appeal in Law Society v Shah [2007] EWHC 2841 (Comm)

1(d) There appears to be no express provision for administration other than by Order (cl 6) (Insolvency Act 1986, Part II and Sch B1).

This matter was addressed by the Law Commissions, and it was decided that no change was needed.

1(e) The third party claimant is only in a position to fulfil certain insurance conditions once the insured's insolvency has become manifest in accordance with the basic provisions of the Bill (cl 9). This is likely to be limited in practical application because the management of many insureds will be less efficient and less observant of insurance terms and conditions during the 'twilight period' in the run up to manifestation of insolvency (see, for example, George Hunt Cranes Ltd v. Scottish Boiler and General Insurance Co Ltd [2002] Lloyd's Rep. IR 178, CA). Moreover, the occasions on which the claimant can fulfil obligations on the insured by cl 9(3) is somewhat limited.

Agreed. This was a major weakness of the 1930 Act, and the Bill does make some attempt to deal with the problem. The issue, however, is maintaining a fair balance of the interests of the parties, and insurers should be allowed to rely upon policy conditions designed to protect them. There is a wider issue as to whether insurers should be allowed in any circumstances to rely upon conditions precedent (my view would be that they shouldn't) but, given that the law permits this in dealings between the insured and the insurer, it would be difficult to remove that right simply because the claim has been transferred to a third party.

1(f) The anti-avoidance provisions of cl 16 will not be sufficient to prevent compromises as between insured and insurer prior to manifestation of the insured's insolvency; perhaps this is intentionally so. The anti-avoidance mechanisms of the Insolvency Act 1986, most notably sections 238, 339 and 424, may not be adequate. There is some potential for a claim, albeit at considerable cost, to seek and obtain a freezing order (CPR Part 25, and see on this Normid Housing Assoc Ltd v. Ralphs (No 2) [1989] 1 Lloyd's Rep. 274).

Strongly agree. This is unsatisfactory, but there is no obvious solution other than perhaps the possibility of challenging a settlement on the basis that it was reached in bad faith and with an intention to deprive the third party of a valid source of funds.

1(g) The information a claimant would need in practice would extend to the potential for competing claimants under the policy; this is not listed in the current Bill, sch 1. Claimants need to be able to estimate the amount available under the policy. It is not clear whether the obligation to give information is a once only obligation or whether it continues as it would under CPR Part 31. The penalty is not clear; is it intended that contempt proceedings are possible for knowingly false statements?

Agreed, although this would be useful rather than essential as it only affects a minority of cases.

2. The provisions create a perverse incentive in forcing an insured defendant into one of the insolvency regimes. A personal injury claimant, for example, would have difficulty doing so prior to Judgment or an Order for interim payment (CPR Part 25) but could do so at that stage. Courts may be faced with difficult decisions on petitions to wind- up or make bankrupt. Such claimants would also have incentive to vote in favour or a CVA/IVA simply to bring about the trigger of transfer of rights. There is some time pressure on a claimant in this regard given that he would be subject to a limitation period (presumably 6 years as contract) from the date of his own judgment (cl 12 of the Bill).

This is plainly right, but matters will not inevitably get to that stage. If the third party obtains a judgment against the insured which the insured fails to satisfy, the third party can present a winding up petition or institute some other relevant insolvency provision. That often will be enough to make the insured pay if it can, or cause it to make a claim against its liability insurer if it can't. But if there is no payment, the third party—

just like every other judgment creditor—has the right to force an insolvency procedure, the only difference being that the third party is a secured creditor in the event that he can fulfil the requirements for a claim against the insurer

> *Moreover, it is a basic premise of insolvency law that existing rights and obligations as between insolvent and third parties are not altered merely by the fact of insolvency. The 1930 Act is one exception to this and there are others of course, primarily preferential creditors under Sch 6 of the Insolvency Act 1986. These exceptions are usually the product of social and or political desires. They need however, to be carefully considered. It is also a basic principle of insolvency law that the entirety of the insolvent's assets should be made available for the creditors as a group and in accordance with the statutory scheme of distribution. Little objection is likely where insurance monies on property fall into the assets of the insolvent on the loss or destruction of the insured property: one asset is merely replaced by another. Liability insurance differs in that although the policy is an asset it serves to indemnify for a loss/liability rather than to replace a lost asset. The Law Commission's standpoint and thus the stand point taken in the Bill is to respect the philosophy of the 1930 Act. Thus, there has been no debate on the position of liability insurance more generally. There has been no consideration of whether it might be right to remove the requirement of any manifestation of insured insolvency as a precondition for transfer of certain rights to third parties. As is well known the 1930 Act came into being in order to remedy a perceived anomaly displayed in Re Harrington Motor Co, ex p Chaplin [1928] Ch 105 and in Hoods' Trustees v Southern Union Ins Co of Australasia Ltd [1928] Ch 793. The position of motor accident claimants is now radically different, being the product of discrete reform from 1930 and more recently the product of EU Directives. The motor claimant is now the exception rather than the classic example of the norm; he has a direct right of action against a liability insurer regardless of the insured's financial position. This kind of claimant does not need to rely on the provision of law first developed for his benefit. The current reform has not dealt with the larger issue of whether review more generally should take place; specifically whether it is right that motor claimants should be treated as a distinct group, and whether it is right that all other types of claimants are unable to make direct claim on a liability insurer unless the insured is insolvent. It is hard, for example, to justify the position of, say, a postman injured whilst on his rounds by a speeding motorist who is able to make direct claim on the liability insurer regardless of the solvency of the motorist, but who if injured when attempting to deliver post as he falls into unlit excavations around a householder's property is unable to make a similar claim unless and until the householder is insolvent.*

Agreed absolutely, but this matter was considered and rejected by the Law Commissions. Motor claimants have a special position as a result of the five EC Motor Insurance Directives and there is a strong case for extending that regime to employers' liability claims (albeit for domestic rather than single market reasons). But reopening that wider issue now would simply kill the Bill. What the Law Commissions have produced is perfectly workable.

January 2010

Examination of Witness

Witness: PROFESSOR ROB MERKIN, Professor of Commercial Law, University of Southampton, examined.

Q34 ***Chairman:*** Professor Merkin, first of all, can we welcome you to this Special Public Bill Committee on this Bill, on which, if I may say so, you are evidently a very great expert. We are all extremely grateful for the trouble you have taken both in relation to your first paper, but also your supplementary paper in which you deal with some of the points made by others. Now, one of the great advantages of your first paper is that you deal with things, as it were, clause by clause. I am sure the Committee will want to go through these matters very carefully because they are not altogether easy, even for the lawyers, to understand Many of the members of the Committee are not lawyers, so I hope you will be merciful to them in your explanations! I think the first thing would be to ask you if there are any general points which you would like to make about the Bill as a whole?

Professor Merkin: I think the only general point is that it is actually dealing with two quite different situations and they are intermingled in the Bill, and I think that is possibly why it is not as clear as it might be. One is the situation where somebody is suing an insolvent defendant and you know right at the start that that person is in insolvency and has no money and the insurer is the only source of funding. The second situation is where the defendant is not insolvent and may be insolvent if he cannot meet the judgment or may not be, and the Bill operates in quite a different fashion in that respect because you are then using the Bill as a method of enforcing a judgment against the defendant who was not insolvent at the time, but he may become insolvent as a result of the judgment. I think they need to be kept quite separate, but there is at least one point in the Bill dealing with information where the two issues are not really separated.

Q35 ***Chairman:*** I think that, in some respects, that anticipates the first very general question which I was going to ask just in order to get the ball rolling. Obviously, there are points which are going to arise, and I am amazed at the number of decisions which there have already been on the old Act. I had no idea that it had been so fiercely litigated over the years and certainly I was not aware of most of those decisions. Apart from what you have just mentioned, are there any major defects in the Bill, as you now see it?
Professor Merkin: I think there are three or four areas that may need looking at. One is the one I just mentioned now which is that, if you are suing somebody who, you are pretty sure, is not going to be able to meet the judgment, it would be nice to know upfront whether it is worth bothering, and there is no mechanism under the Bill for obtaining information in advance of that. It is contrary to the 'cards on the table' approach of the CPRs, I think, and certainly on the other side, if the claimant is funded by 'after the event' insurance, he has to disclose that under recent decisions, but the defendant does not under the Bill, so I think the balance needs to be redressed in that regard.

Q36 ***Chairman:*** That is the point which you come to, if I am understanding it right, under paragraph 13.4 of your first paper.
Professor Merkin: Yes, that is right.

Q37 ***Chairman:*** And you deal with at the top of page 13. Is that right? Am I following you?
Professor Merkin: Yes.

Q38 ***Chairman:*** That is where you say, "Perhaps para 1(1)(b) should be amended to read that there is a right to seek information where TP reasonably believes that the insured will not be able to satisfy any judgment".
Professor Merkin: That is right.

Q39 ***Chairman:*** Well, that is an important point and we obviously would have to consider whether we should table an amendment to the Bill to deal with that point.
Professor Merkin: Yes.

Q40 ***Chairman:*** Are there any other, as it were, defects? We have one or two noted which we are going to come to as we go through them clause by clause.
Professor Merkin: I think that one and there are two others. There is the issue of set-off in clause 10, and I am not sure if I am using the right version of the Bill, but in the version I have it is clause 10, the insurer's right of set-off.

Q41 ***Chairman:*** Again, I have that noted as one of the things we are going to have to consider.
Professor Merkin: Because, in practice, many policies, probably most policies, do not simply require a premium to be paid, but they are required to be paid as a condition precedent to cover and, if the premium is not paid, then there is simply no cover and there is nothing the third party can do about it.

Q42 ***Chairman:*** That will be another area which we must explore.
Professor Merkin: The difficulty of course is that, if you do modify that, what you are then doing is altering the insurer's rights to be adverse in a third-party claim, which is not what the Bill is trying to do, so I think it is just an issue that I wanted to point out, but whether you can deal with it or not, I do not know. Then there was the rather curious provision in clause 2(7) about the issue of arbitration.

Q43 ***Chairman:*** Yes, I agree and again I have noted that as another area where there is a difficulty which may arise.
Professor Merkin: I think, whatever you do, it is not going to be right in this one because, once you have a situation where the policy has an arbitration clause, but there is no arbitration between the claimant and a defendant, either you waive the arbitration clause or you extend the arbitration clause or you have two parallel sets of proceedings. There is nothing else you can do, so something has to give. My own personal preference is that the arbitration clause gives, but that is another story.

Q44 ***Chairman:*** So those are the three areas which you have now, as it were, highlighted.
Professor Merkin: Sorry, there are four. The other one is the issue of claims-made policies, professional indemnity policies, and how they work when the insured has failed to notify circumstances and thereby finds himself debarred from notifying claims in a later year because they were notifiable under an earlier year's policy, but claims-made policies are a nightmare anyway.

Q45 ***Chairman:*** Well, I think that is very helpful in, as it were, highlighting, as I say, the points which the Committee may wish to consider. Now, I think the best thing would be for us to look through your paper more or less paragraph. I suspect that the simplest thing to do is to ask any member of the Committee whether they have any points before we come to paragraph 6. Are there any questions which anybody would like to ask on paragraphs 4 or 5? No, so is there anything you would like to add on those paragraphs?

Professor Merkin: No, thank you.
Chairman: Is there anything on paragraph 6?

Q46 ***Lord Borrie:*** I have one or two on 6, my Lord Chairman. On paragraph 6(6), and I have the Bill at clause 2(9), I can see the advantages of joinder, especially because there is a need for uninsured losses to be claimed and a desirability to do that in the same proceedings. May I suggest that at line 3, the fourth word should be "if" rather than "of"?
Professor Merkin: Yes, quite right.

Q47 ***Lord Borrie:*** Then may I go down to the sentence beginning, "It is possible to contemplate the situation in which the third party's claim against the insured arises under a contract containing an arbitration clause" et cetera, et cetera, and then you have made the point, Professor Merkin, just touching on this subject a moment ago, that of course "the arbitration clause is irrelevant because the insurer is not a party to the arbitration clause. However, if the third party has a residual claim against the insured or, for procedural reasons, wishes to join the insured, the arbitration clause presents a potential bar to such joinder". It is impossible to have a joinder in that case, I think.
Professor Merkin: Indeed.

Q48 ***Lord Borrie:*** The Bill does not reconcile this conflict. I think you have just alluded to this point in saying to my Lord Chairman that there are different ways of dealing with it.
Professor Merkin: I was actually dealing with the situation where the insurance contract has an arbitration clause. What I am dealing with here is where the dispute between the insured and the third party has an arbitration clause.

Q49 ***Lord Borrie:*** Indeed you are. Then on this point that 6.6 is dealing with, the Bill does not reconcile the conflict, but it would simply mean, would it not, that there would have to be parallel proceedings, one an arbitration against the insured who was bound by the arbitration clause and the other in the courts?
Professor Merkin: Quite.

Q50 ***Lord Borrie:*** I am not sure whether I know what "parallel" might mean, if one could follow the other or what they do.
Professor Merkin: Well, they may be simultaneous, depending on what the arbitrator decides to do. The arbitrator might decide to stay his proceedings so that other issues can be resolved first.

Q51 ***Lord Borrie:*** That seems to me a nuisance rather than a conflict, but I am only saying that to inspire your response! It is a nuisance of course to have two types of proceedings going on on the same subject, but I do not see how you can avoid that. One has signed up to arbitration and the other has not.
Professor Merkin: Yes, as I said before, whatever you do in that situation is wrong. If you force somebody to arbitration when they should not be there, that is wrong and, if you take them out of arbitration when they have got a right to be there, that is wrong too, so I do not think there is any easy solution to this. In fact, there is not a solution to it and I think you have to just live with it.

Q52 ***Lord Goodhart:*** Well, I was wondering here whether we, as the parliamentarians, should say, "Well, it's too bad. It's a bit of nuisance, but does it really matter?"
Professor Merkin: I think it might matter, but there is nothing you can do about it, I think, is the answer.
Chairman: Are there any further questions on that particular point? No, but it is observed that that point has been made, so there is a conflict there and it cannot be reconciled or we cannot reconcile it, which brings one to 6.8 which is the case where the arbitration clause is in the insurer's contract rather than in the contract between the third party and the insured. Are there any questions on 6.8?

Q53 ***Lord Borrie:*** There seems to be an assumption here, which I would be very grateful if Professor Merkin could explain, that, if there is a liability matter in issue, arbitration is inappropriate.
Professor Merkin: What I am saying is that the sort of arbitration panel you would have in order to resolve an insurance dispute may not be an appropriate arbitration panel to resolve a liability issue. Insurance arbitration panels vary. Sometimes they are sole and sometimes there are three people, a QC and two wing people, and, if the issue is something to do with, I do not know, occupier's liability or something, it may be completely inappropriate for that particular panel to deal with that issue of liability. That is the point I am making.

Q54 ***Lord Borrie:*** Well, I am just wondering if it is a question of appointing appropriate members. If appropriate members are appointed, knowing in advance the kind of case they are going to have to determine, including matters of liability, then why cannot the choice of members set the issue?
Professor Merkin: Because very often the arbitration clause in the insurance policy will specify who the arbitrators are to be, not by name, but by qualification. A chief executive of an insurance company is quite often nominated or the Arbitration Service for Insurance, ARIAS, has a panel of arbitrators, all of whom are either insurance people or qualified lawyers and, if it is an ARIAS arbitration clause, then you are stuck with the people on that panel.

Lord Borrie: Thank you, you have explained that very well.

Q55 ***Lord Sheikh:*** My Lord Chairman, generally the arbitration clause is only present in material damage policies, which means covering damage to property rather than liability. I have not seen any policy containing an arbitration clause relating to liability. It normally refers to a dispute between the insurer and the insured.
Professor Merkin: I am not sure that is right for the full range of liability policies; they are many and varied.

Q56 ***Lord Sheikh:*** I have not seen any policies like that.
Professor Merkin: I think the more sophisticated, for example directors' and officers' policies, may contain arbitration clauses, but you are certainly right that material damage is where you would tend to see arbitration clauses, and they would be confined to quantum rather than liability anyway.

Q57 ***Lord Sheikh:*** And the arbitration is binding, unless of course there is a mistake in law, so, therefore, both parties agree on the arbitrators.
Professor Merkin: Yes, indeed.

Q58 ***Lord Sheikh:*** And, if they cannot agree the two arbitrators, then of course there will have to be an umpire, so that situation where agreement cannot be reached is normally umpired.
Professor Merkin: Well, it depends upon what the appointment rules say. Umpires are not used these days in practice, but the way that it would normally work is that each party would appoint one and those two would appoint a third who would be a chairman, and each side would tend to appoint an arbitrator who is most likely to be favourable without being biased, favourably inclined to their side of the argument. You may be right in practice, but certainly in employer's liability cases you would not get arbitration clauses. You would get them in more sophisticated forms of professional indemnity, I think, and many of the cases that we have are indeed of that type.

Q59 ***Lord Goodhart:*** I am not very familiar with the way that these insurance policies work in this field, but the arbitration clauses may deal only with the question of the amount of damages, or they may deal with both the question of the amount of damages and liability. Is that right?
Professor Merkin: In material damage policies it tends to be just quantum.

Q60 ***Lord Goodhart:*** What is a material damage policy?
Professor Merkin: Damage to property and business interruption, policies like that. In liability policies, if you get arbitration clauses, they tend to cover everything because one of the objects is to keep the thing confidential very often.

Q61 ***Lord Goodhart:*** If there is an arbitration clause and it does cover both the amount of damages and the liability and this is something which was written into the contract, why should it not continue to be treated as written into the contract here?
Professor Merkin: I think it would be. I think the issue is that what the Bill is proposing is extending the arbitration clause to matters which it was never intended to cover. It was only intended to cover the issue of coverage under the policy, which may mean the construction of words, it may mean the construction of an excess deductible, it may mean the construction of a condition. What it will not deal with is the underlying liability; that is a matter for the insured to be sued to judgment on in some other place.

Q62 ***Lord Goodhart:*** But, if the arbitration clause does not provide for the question of liability to be investigated, how does it then happen that under this Bill it would apply? I do not really follow that.
Professor Merkin: I think I owe you an apology because the word "liability" has been used in two senses. I am talking about the liability of the insurers and of the policy, not the liability of the insured to the third party as that is a completely different issue and that would not be a matter of arbitration in the ordinary course of events. The issue would be: does the policy cover the liability of the insured? That would depend upon the wording of the policy. The liability of the insured could come from any one of many sources, some of which may be within the expertise of the arbitrators and some of which may not.

Q63 ***Lord Goodhart:*** Given that this Committee is well aware that it is desirable in order to avoid difficulties here to make as few amendments as possible, how important would you regard this particular amendment as being? What do you suggest?
Professor Merkin: As I said at the outset, whatever you do is wrong on this. This is as good a way of being wrong as any, I would have thought! The alternative is to remove the arbitration clause if you want to have the two things settled in the same set of proceedings and, if you take away the arbitration clause, the confidentiality which the parties have insisted upon would disappear. I think that probably is the overriding consideration when it comes to arbitration, the confidentiality, so my guess is that

what the Law Commission has come up with is problematic, but it is probably the best solution.

Q64 ***Chairman:*** Are there any further questions on that? So, in effect, although an arbitrator appointed under the policy will not necessarily be the best person to determine the liability of the insured to the third party, nevertheless, that is all one can do?
Professor Merkin: Yes.

Q65 ***Chairman:*** That is what they have come up with and you cannot think of a better solution? Is that right?
Professor Merkin: If you are going to maintain the concept of a single set of proceedings, that is all you can do.

Q66 ***Lord Sheikh:*** There are merits in having an arbitration clause. Even if you look at a dispute on a liability policy, quite often the two parties would let the matter be decided by mediation, so the point is that there is some merit in keeping the arbitration clause. You made the point about confidentiality and we really do not want to go to court, but we want to try to resolve the matter by mediation, even if there is no arbitration clause.
Professor Merkin: Yes, I think we are looking at the three or four per cent of cases that do not settle, but of course, as lawyers, you always do!

Q67 ***Chairman:*** Can we then move on to paragraph 7. Am I right in thinking that we ought to have in mind also what you said in paragraph 13 in relation to obtaining information? Are these connected or are they unconnected?
Professor Merkin: Information conditions are policy conditions which the insured has to comply with, but has not because of his insolvency.

Q68 ***Chairman:*** I see, so they are separate points.
Professor Merkin: Yes, completely separate points.
Chairman: Does anybody have any problems with paragraph 7? Is there anything which needs further explanation? I have got a query against paragraph 7.6, the last sentence, but are there any other questions before we come to that?

Q69 ***Lord Sheikh:*** On clause 9.4, I just want your opinion on this. You see, it talks about a condition requiring the insured to provide information or assistance to the insurer, but in regard to liability policies it is imperative that an investigation be carried out as quickly as possible and loss adjustors need to be appointed, they need to visit the scene of the accident and make a statement, but do you see this working against the insurer in the case where an investigation could not be undertaken as quickly as possible?
Professor Merkin: Yes, it may or it may not; it depends upon the nature of the policy and the nature of the claim, I think. There are some situations where co-operation with the insurer is of no particular assistance to the insurer and there are other situations in which it may be very important very quickly as there may be another third party who is potentially liable by way of subrogation, or it may be that there is no evidence of what happened, so in some cases it may be very important, but I think it is very difficult to generalise and say, "Yes, it is always going to be" or "It is never going to be".

Q70 ***Chairman:*** Could you just explain again to me why you say that clause 9 is of limited effect because it only refers to the notification of a claim?
Professor Merkin: Yes, this goes back to the way that claims-made policies operate in practice. Claims-made policies are used almost universally for professional indemnity insurance and they are now even creeping into employer's liability, although I think they are probably unlawful in that context, but the way they work is that the insured can either notify circumstances which may give rise to a claim and then, when a claim arises at a later date, the claim is dragged back into the year of the notification of the circumstances, or he can notify a claim made against him. Now, either of those two are triggers of liability under the policy. The problem arises in that, if circumstances arise in year one which are not notified, the year two policy is likely to exclude any claim arising from circumstances which could have been notified under an earlier year, so, if the insured has not notified circumstances in year one, maybe a different insurer in year two is going to say, "Well, you should have notified that in year one. We're not liable", so it is going to be of limited assistance.

Q71 ***Chairman:*** Is there a solution to that particular problem which you can recommend?
Professor Merkin: The only solution is to override the rights of insurers which they would have against the insured himself, but again that is not consistent with the policy of the Bill, so I am just pointing it out as an issue. There is a case in the Court of Appeal at the moment, we are awaiting the outcome on it, on the way that employer's liability policies respond to asbestosis and other meso claims, but, as long as those types of policies are not used for personal injury matters, I do not have a problem. If they are used for professional indemnity, then so be it.

Q72 ***Lord Sheikh:*** The point is that in the past claims-made conditions have appeared in employer's liability policies, and I appreciate and understand that generally they would be present in professional indemnity policies where the claim has got to be

notified. That also works against a normal policy-holder, for example, never mind the complexity of third parties, so the point I am making is that in the past, particularly four or five years ago when the liability market hardened considerably, it was difficult to get cover for certain types of risks and claims-made policies did appear with regard to employer's liability, so it is likely to happen in the future if the market becomes hard.

Professor Merkin: Well, I hope that the Court of Appeal in the *Durham* case is going to say that it is not lawful to use that type of policy in employer's liability cases. That is one of the side issues in that case.

Q73 ***Lord Archer of Sandwell:*** One can envisage two quite different scenarios. Most of the contracts of insurance that we are concerned with here will be by commercial people who operate normally and fulfil their obligations, but the insured of course in some of these cases might be a little old couple who never deal with their correspondence at all, so they never get round to notifying their insurers. I gather from clause 9(4) that that does not let out the insured, but you could envisage a situation, could you not, where, without anyone knowing that there is an insurance policy, there is litigation between the third party and the initial party and then you have an elaborate series of litigations, judgments and summons, and at the end of all that someone says, "Oh, we didn't know there's a policy of insurance". Is there any way of avoiding that situation, or is it something we can deal with in this Bill?

Professor Merkin: I do not think it is a particular risk because there is actually no point in suing an individual without assets, unless you know that there is an insurance policy somewhere in the background, so I am not sure it would actually happen. It could happen in some cases if you have got maybe a retired couple who own their own home and somebody comes along and trips on the step and thinks, "Well, I can claim against these people and sue them to bankruptcy, if necessary". That may happen, but I do not think it happens very often.

Chairman: Can we then move to paragraph 8, which concerns P&I clubs. Are there any questions? The P&I clubs seem to be satisfied with the Bill as it stands, provided there is no amendment. Could we then move to what is obviously an important question here, set-off, paragraph 9.

Q74 ***Lord Sheikh:*** I raised this point last week as it is causing me a little bit of concern and that is in regard to employer's liability policies where, you will appreciate, the premiums can be quite substantial. If you have an injury to an employee and if we were going to invoke this clause, it would mean that the injured person would not be able to get adequate compensation because of that. Do you have any comment?

Professor Merkin: Yes, you can imagine a situation where the premiums are large and the claim is relatively small.

Q75 ***Lord Sheikh:*** Which most of the claims are. Normally, they would be £3/4/5,000.

Professor Merkin: Yes, in that case, as you say, the victim would obtain no compensation, but again, if you alter that rule, you put the insurer in a worst position dealing with a third-party claim than dealing with a first-party claim, and I think that the insurance industry would probably not appreciate that and suddenly this Bill would become contentious.

Lord Sheikh: But it could happen.

Q76 ***Lord Goodhart:*** We have heard the statement of the view of the Association of Personal Injury Lawyers here who say that they think there should be no set-off. Now, I think that would be difficult for us because it would of course mean that the insurance companies would be very unhappy with this, but is this something that could be dealt with by the point which you raised at the beginning, which we have not reached yet here, which is information so that, if you made it possible for the third party to get the information from which they could appreciate that there was no worthwhile amount available after set-off had been taken into account, then that would, at any rate, prevent the third party from having to waste money on a valueless claim?

Professor Merkin: I think that is probably right, that would help. It does not deal with the problem of how you compensate that employee of course. One of the weaknesses with the 1969 Act is that maybe a dozen or more years ago it was decided that there is no personal liability on directors who cause their company to be uninsured because they do not pay the premiums. That would be a very useful reform, but maybe not for today.

Q77 ***Chairman:*** Are there any further questions on set-off? We have had some evidence from, as has already been mentioned, the Association of Personal Injury Lawyers and they suggested that it might be possible to modify the rule of set-off in relation to personal injury claims beneath a certain level, and £5,000 is what they suggest. They say one could make an exception in relation to personal injury claims in the same way as we have done in relation to marine insurance. Do you see any merit in that?

Professor Merkin: I see every merit in giving injured employees compensation, yes. The difficulty is how you do that without offending the rights of the insurers, but yes, I do see merit in that.

Q78 ***Chairman:*** I think the point is that, if we persuade the insurers to accept the marine insurance position that it will not apply that exception to personal injury claims, they would be saying, "Well, could that not be applied in relation to personal injury claims in set-off?"
Professor Merkin: If insurers could be persuaded of that, that would be great, but whether they could or not, I do not know. You are talking about P&I clubs for personal injury claims?

Q79 ***Chairman:*** No, I am not talking about P&I clubs specifically now, I think we have left that one, but we are talking about set-off in general. The argument, as I understand it, is that you are bound to allow set-off in the ordinary way because, otherwise, one is interfering with the rights of the insurer. But an exception could be made in relation to small personal injury claims where the set-off would wipe out the claim altogether. That is the point they are making. I do not know whether others have understood it in the same way. Is there some merit in that?
Professor Merkin: I am just wondering whether there is some method of maybe requiring the insurers to seek their remedy against the employer rather than by way of set-off, which might resolve the problem, but maybe only if the sum is irrecoverable from the employer do they have the right of set-off. Of course, the employer, by definition, is insolvent anyway, so I suppose it does not really get you much further.
Chairman: Are there any follow-ups on that?

Q80 ***Lord Sheikh:*** One point I would like to make is that, bearing in mind that we are only giving some enhancement particularly in regard to notification to others, it could be possible, if the insurers agree to this?
Professor Merkin: If the insurers agree to it, I would be the first in line, believe me.

Q81 ***Lord Sheikh:*** Because the intention is that the third party does not have any more rights than the insured has, but the point I make is that there is already some enhancement written in the Bill itself.
Professor Merkin: Yes, there is moderate enhancement. Yes, I would be perfectly happy with that, I would be delighted with it. As I say, any employee who does not get compensated, in my view, is unfortunate and should be dealt with, but this Bill may not be the way of doing it, I do not know.

Q82 ***Chairman:*** Thank you. Are there any questions on paragraph 10? No, which brings us to limitation, paragraph 11, which is obviously a difficult area. Are there any questions on paragraph 11? The main point is really on paragraph 11.3, since the Civil Procedure Rules do not enable the same limitation period to apply where there is an arbitration clause.
Professor Merkin: That is right.

Q83 ***Chairman:*** Perhaps you had better explain that more clearly than I have.
Professor Merkin: The problem arises where the third party has obtained judgment against the insured and the insured then has six years to bring a claim against his insurers under the policy within the Limitation Act. The insured, for whatever reason, waits five years, 11 months to bring his action, brings his action and then, three months later, becomes insolvent, at which point the rights of the insured are transferred to the third party. Now, the third party cannot commence a fresh action at that point because he is time-barred, but what the CPRs allow is for him to take over the proceedings which have been started by the insured. The question is: can that be an arbitration? There is nothing in the CPRs which allows it, so what you need to achieve is maybe an assignment of the arbitration proceedings. There is a Court of Appeal authority for the proposition that you can assign arbitration proceedings, but I think it would not be in the context of this Act. I think maybe a statement somewhere that that is possible would be useful as it would resolve the issue. It may be that the court would actually say, "Well, the authority exists and there's no problem", but there is a potential conflict of authority on this point.

Q84 ***Chairman:*** Do you see anything that we could do in this Bill to resolve the particular problem other than hoping that the Civil Procedure Rules might be amended so as to apply to arbitration?
Professor Merkin: I just wonder whether it is possible to amend the Practice Direction, and I think it is Part 62 which deals with arbitration, just to deal with this particular point, to allow arbitration proceedings to be transferred after the expiry of the limitation period.

Q85 ***Lord Sheikh:*** The six-year rule, as we know, applies to basically third-party property damage, but, if you look at personal injury, the limitation is three years. Do you have any comment on that?
Professor Merkin: No, we are talking about a claim against the insurer by the insured, not the claim by the insured against a third party. There are separate limitation periods for each of those things. In practice, anyone who is properly advised should not have a problem because they should not allow the insured to wait five years before bringing an action. You should issue a bankruptcy notice immediately against that person as soon as you get your judgment and then of course you get your rights transferred to you.

Q86 ***Chairman:*** So, although there is a problem, it is one which is not perhaps going to arise all that often?

Professor Merkin: Yes, and, if it is an arbitration issue, it is almost certainly going to be a commercial matter and, therefore, we need not worry too much about it.

Q87 ***Chairman:*** Then paragraph 12. Are there any questions? You have given us help with that already. Then paragraph 13, obtaining information. Again, this is the other aspect of obtaining information.
Professor Merkin: Sorry, but could we go back to paragraph 12? There is a gap which I think Maggie Hemsworth referred to in her note as well, which is the problem of a settlement prior to an insolvency. Now, most insurers and most policy-holders will reach sensible settlements anyway, but you can imagine the situation in which the insured knows he is going to be insolvent and does not care and insurers are looking to buy off the claim for as small an amount as possible and, if they do a deal at that point, the third party loses his rights. There is a suggestion in the very old cases that you can actually claim conspiracy in that situation, but I would not wish to hang my hat on that one! I just wonder whether there is any method of controlling what happens when the insured is potentially insolvent.

Q88 ***Chairman:*** Yes, and have you any suggestion to make?
Professor Merkin: I do not. Again, if there is no actual insolvency at that point, the third party has no rights and the insured can bargain away his contract if he so wishes.

Q89 ***Chairman:*** So then paragraph 13, obtaining information, which brings us to Schedule 1. This is an area, paragraph 13.4, where you do make a specific suggestion for amendment. Perhaps you might just touch on that and why you think it would be desirable to have an amendment to cover a case where a third party reasonably believes that the insured may not be able to pay.
Professor Merkin: I think the spirit of the Civil Procedure Rules is 'cards on the table', and I think this is a situation in which sometimes it is possible to buy off litigation by refusing to disclose insurance information. If the response of the defendant is, "I'm not going to tell you whether I'm insured. Sue me and you'll find out", I do not think that is particularly conducive to the way that we should be operating that system. These rules work perfectly well in the first of the situations that identified right at the very start whether the insured is insolvent rightaway and you know whether it is worth suing him because you have obtained the information. Where it does not work is where you know, as a claimant, that the insured cannot afford to pay the bill, but you have no way of knowing whether or not there is a policy in force, whether he has paid the premiums, whether there is a deductible which is overriding the claim and so on and so forth.

Q90 ***Lord Goodhart:*** This really deals with the problem I raised on the question of clause 10 and the problem of set-off. That problem of the set-off would be dealt with to at least a fairly considerable extent by something in the nature of paragraph 13.4. Is that not correct?
Professor Merkin: Well, insofar as the third party would know that there has been a settlement that he cannot overturn.

Q91 ***Lord Goodhart:*** No, sorry, I was thinking of the right to seek information. The problem is that you will only know whether it is worth suing at the moment if there is actually insolvency, but, if you are in a situation where it is likely that insolvency will be coming along soon, the third party is not able to assess whether it is financially worth going ahead with the proceedings.
Professor Merkin: Quite, and of course there may be a situation in which insurance is compulsory, but it does not necessarily mean that the defendant has insurance, so there is no way of knowing under the existing law whether there is a policy in force, and there is nothing in the CPRs after the *Buncefield* case, assuming that is rightly decided and I think it probably is, which allows you to get the policy upfront.

Q92 ***Lord Goodhart:*** In paragraph 13.2, the second line, where it says, "incurred liability to A and also reasonably believes that A is an RP", should that not be "believes that B is an RP"?
Professor Merkin: Yes, quite right, thank you.

Q93 ***Chairman:*** Are there any other questions on 13.4? Could I just then have your view on this point. The possible amendment would be in paragraph 1 of Schedule 1 to say, "If a person (A) reasonably believes that another person (B) has incurred a liability to A, and B is a relevant person, or maybe unable to satisfy a judgment against him". Is that what you are aiming towards?
Professor Merkin: Yes, so that you are dealing with both situations, not just the one of the insolvent insured, but the potential insolvent insured.

Q94 ***Chairman:*** So that obviously would be an amendment which would be quite a simple and straightforward amendment.
Professor Merkin: Yes.

Q95 ***Chairman:*** How often is this likely to arise in practice?

Professor Merkin: Very often, more often than not in fact, I would have said, because, when there is an insolvent insured, there is normally an employment case or something like that, but in many cases of civil litigation you do not know the defendant's status and you do not know whether he is worth suing. If he is an accountant or a solicitor, you can assume that there is a professional indemnity policy there, but he may be in a profession which does not require liability insurance, so I would have said that it was a very common situation.

Q96 ***Chairman:*** Who would be likely to object to this amendment, if we were to make it?
Professor Merkin: It would probably be the insurers.

Q97 ***Chairman:*** What would be the nature of their objection?
Professor Merkin: In the *Buncefield* case, they actually hired a QC to argue that there was not any obligation upon them to disclose insurance.

Q98 ***Chairman:*** But it is not going to cost them money though, is it, as in the case of set-off?
Professor Merkin: It is going to cost them money in that claims might be brought which would not otherwise be brought.

Q99 ***Lord Archer of Sandwell:*** My Lord Chairman, that is quite a financial burden which may arise. If the employer is a small firm, presumably somebody is going to go through all their books, all their invoices, all their contracts, and they have got to get all these things out in order to determine whether they might become a relevant person.
Professor Merkin: I think that all you really want from the insured is the name of the insurer and the policy number and you then want from the insurer whether the policy limit has been exceeded for that year, what is the deductible, what are the policy terms and whether the premiums are paid. The insurer is really the key person here.

Q100 ***Lord Hunt of Wirral:*** My Lord Chairman, would you agree that, although 'cards on the table' is very much the policy which is being pursued once litigation has commenced, where litigation has not yet commenced and where people are considering the risk involved, and of course it is not just the insurers we are talking about, it is the defendants, including the Government through local authorities, MoD, et cetera, am I not right in recalling, because I seem to recollect a court case about this, that there is always a wish on the part of the claimant or the claimant's solicitors to know information and a line has to be drawn somewhere? Although the immediate circumstances in which the change is made or the amendment is put forward may appear to justify it, I think the reason why it does cause controversy is that it may open the doors to a whole series of other areas of information which I think the rules in the past have always been designed to protect, and that is why you have to go to court, for instance, in medical negligence cases to make an application for papers to be disclosed or nursing records, et cetera. Am I not right in thinking that this whole area is like opening Pandora's box because you are never quite sure what information is going to be requested and, if so, by whom and, therefore, we must protect the rights of all the parties involved in accordance with the established procedure, or am I misrecalling the history of this? You, as a professor, will know better than me.
Professor Merkin: I think you are certainly right, that there is a risk that people could make requests for information which is of no concern to them and which simply imposes a burden upon the defendant. I accept that. However, I think that, if a person has a genuine claim against a defendant and wants to know whether that claim is worth pursuing, I am not sure that that is the thin end of any wedge, in particular.

Q101 ***Lord Hunt of Wirral:*** We had a lengthy debate yesterday on an amendment which was inserting the word "genuine" in the Equality Bill. How do you define what is genuine or not? It is huge and it is another area which we spent an hour yesterday debating, although there are other issues as well.
Professor Merkin: There is another way of dealing with this which may be not to amend the Bill, but to amend the CPRs because 31.14, which I think is the relevant provision, gives the court a discretion to order the disclosure of information which clarifies it, and you could add to that that there may be insurance information which may be part of that and then the court decides what is to be admitted and what is not.

Q102 ***Lord Bach:*** If you were to amend the Bill, it is possible that that change itself could open a floodgate, could it not, of uninformed enquiries and costs could increase quite hugely for the insurers. You were asked who would not like it and you replied that it would be the insurers, but they would not like it one little bit, would they?
Professor Merkin: No, but I think that, if you went down the road of amending the CPRs, and there are proceedings in force anyway and, therefore, there are genuine interests, what you need to do is to cut out the vexatious litigant. I am not quite sure, but people actually have a hobby at the moment of claiming on insurance policies for potential defendants, but, if there were not a risk of that, then obviously there would be a problem. Maybe the way to do it is to amend the CPRs so that that particular issue could be

dealt with by the Rules Committee. There is, after all, a conflict of precedent authority on this.
Lord Sheikh: Certainly I think Lord Bach was saying last week that we intend to pass this as soon as possible before the General Election.
Lord Goodhart: We very much hope so.
Lord Sheikh: Of course it depends on when the General Election is going to be. The point is that, if we start amending this, we are going to open the floodgates, and I think I would certainly reinforce the point that Lord Hunt made. I think the suggestion would be, if possible, to keep it as it is and amend, as the Professor says in his second recommendation. Otherwise, I think we are going to go on talking, talking and talking, and we have been talking since 1998.

Q103 ***Baroness Whitaker:*** But, my Lord Chairman, was it not the suggestion that the CPRs be amended by a clause in this Bill?
Professor Merkin: No. You can deal with this in one of two ways. You can deal with it either in the Bill or by the rules of court which empower the court to extend what information they can insist upon being disclosed.

Q104 ***Baroness Whitaker:*** Without primary legislation?
Professor Merkin: Yes.

Q105 ***Chairman:*** Could we then perhaps leave paragraph 14 on one side until we come to the supplementary paper? So just finally on this paper look at paragraph 15, which supports 'first past the post'. Are there any questions on that? Well, we will leave that then and turn to your supplementary report. How is it best that we should deal with it because it considers first Professor Briggs' evidence, which we have read just as we have read your comments on it, and then it deals also with the evidence of Maggie Hemsworth. We are very grateful to you, Professor, for having taken all this trouble. How would it be best to deal with it, or how would the Committee like to deal with Professor Merkin's comments on Professor Briggs? Do we want to deal with the comments one by one, as we have been doing up to now, or can we take them very broadly? Professor Briggs was concerned specifically about the private international law problem which arise, but what is your main point which you want to make in relation to Professor Briggs?
Professor Merkin: I think I have two points. One is that these issues very rarely arise and it would not be sensible to lose the whole Bill over a very small percentage of cases. The other is that I think the Bill actually deals with them. Issues of choice of law and jurisdiction are complex, but are largely irrelevant, I think, to this Bill. The issue is whether there is an English insolvency procedure, and clause 4 deals with the various forms of insolvency and they are all English procedures, so, if there is a significant link with England in that sense, it should not matter what the jurisdiction issues are and what the choice of law issues are in relation to the policy.

Q106 ***Chairman:*** In general, is there anything which we could put into the Bill which would help to resolve Professor Briggs' problems?
Professor Merkin: I do not think that any of Professor Briggs' issues actually cause a problem in practice.

Q107 ***Chairman:*** Then there may be problems, which we cannot foresee, which would have to be dealt with by the courts?
Professor Merkin: Yes, I think that is probably right. I do not see why it matters what the law applicable to the insurance contract is. I do not see why it matters where the case is heard. The issue is about getting the victim's hands on the insurance money and, if there is an English insolvency procedure, that is what the Bill allows, so I do not think that these issues are actually significant.

Q108 ***Chairman:*** Has anybody any questions to ask Professor Merkin about that? No, so turning to Maggie Hemsworth, what is the main point you would like to make in relation to her evidence?
Professor Merkin: Again, I think the main point I would like to make in relation to Maggie, who is an old friend of mine, is that she raises issues which, for the most part, are dealt with and resolved by the Law Commission in its report. She wishes to reopen the issue of 'first past the post', for example, which has been resolved. I think the object of this Bill is to implement what the Law Commission wish to do and I think it would be wrong at this stage to revisit these issues because there are two views that you can take on these issues and the Law Commission has taken a view on each of them.
Chairman: Are there any questions on what Maggie Hemsworth has said and what you have heard from Professor Merkin?
Lord Borrie: I would like to agree with Professor Merkin, otherwise we go right back to the beginning!

Q109 ***Chairman:*** I think that is the general view of the Committee. Well, is there anything more you would like to add in a very general way? I think you have made your views extremely clear. As I said at the start, you are clearly an expert in this branch of the law and we are very, very grateful for your evidence and for all the trouble that you have taken.
Professor Merkin: All I would say is that I became involved with this project way back in the 1990s when the Law Commission was looking at privity in general and produced a report on privity which said,

"There are various exceptions to privity, including the 1930 Act which works very well", and that produced a letter from me, as in those days it was letters rather than emails, saying, "Oh no, it doesn't" and I gave them 20 reasons why it did not work. That, plus other comments, led to the Law Commission looking at the 1930 Act, so I am delighted to see this, although I am sad that it has had to wait for so long. However, the one thing I would say is that between 2002 and today the courts have done a lot of the job of the Law Commission anyway in cases like *OT* and others, so the issue is not actually as pressing as it was, but I think this Bill is very useful and I do not see any reason why anyone could object to it.

Q110 ***Chairman:*** Well, thank you for expressing those views. I hope that, if this Bill does go through, it will not bring to an end your interest in this subject. *Professor Merkin:* I will send you a copy of the book! Perhaps I should have declared that as a personal interest!

TUESDAY 2 FEBRUARY 2010

Present	Archer of Sandwell, L	Lloyd of Berwick, L (Chairman)
	Bach, L	Methuen, L
	Borrie, L	Paul, L
	Goodhart, L	Sheikh, L
	Henley, L	Whitaker, B
	Hunt of Wirral, L	

THIRD PARTY (RIGHTS AGAINST INSURERS) BILL

Memorandum from the Rt Hon the Lord Mance

1. My interest in the 1930 Act stems from experience of its difficulties in commercial practice prior to 1993. Although personal injuries was not my field, I also became involved with others in the reversal of the House of Lords decision in *Bradley v Eagle Star* [1989] AC 957, by the insertion of s 651(5) into the Companies Act 1985.[1] I then gave the 1994 Donald O'May lecture on the subject of which the Committee has the text.[2]

General

2. It is welcome that the Bill updates the circumstances of insolvency capable of giving rise to a transfer of insurance rights to a third party. It also caters for most of the main concerns expressed in my 1994 lecture:

(i) Clause 1(1) and (2) makes clear that it is the combination of insolvency and the incurring of liability that triggers the statutory transfer, and that the establishment of such liability is not a pre-requisite to such transfer.

(ii) Clause 1(3), 2 and 3 make clear that the third party may sue the insurer without first suing or establishing the liability of the insured.

(iii) Clause 11 and Schedule 1 deal with the question of provision of information. In *In re OT Computers Ltd* [2004] EWCA Civ 653, the Court of Appeal has in fact overruled some of the problematic decisions which I discussed in this area, but the new Act represents a new and more comprehensive scheme. Schedule 1 it differentiates appropriately between the basis for disclosure from the insured and from others (eg brokers), and introduces useful provisions for disclosure from officers or employees of defunct bodies.

(iv) I take the point, discussed in Prof Merkin's evidence, that the Bill does not provide for disclosure where a third party is concerned that the insured is in a difficult financial state (or will be, if judgment is given against him/it) and wishes to know whether it is worthwhile pursuing the insured. In a number of areas of course, the third party will be aware that the insured is required to have insurance. And the information obtainable under Schedule 1(3)(b)(iii) never enables a third party to be certain regarding the validity of or scope of coverage under the insurance (the third party is entitled simply to know whether the insurer has claimed not to be liable). There is a limit to the extent to which, pre-insolvency, a third party can expect to be able to ascertain what assets a defendant has or is likely to have, although it is well to remember that, in cases where a freezing order is appropriate, full disclosure of assets is a usual concomitant. I suspect that Prof Merkin's alternative approach (that this aspect could be dealt with, if appropriate, by procedural rules) is preferable. On no view should the Bill fail because of this point.

(v) Schedule 1(3)(b)(iii) could be extended to cover any sums which the insurer would claim to set-off. Any extension to require the provision of information from which the third party could judge how likely it was that the insurer would be able to avoid liability would probably be controversial. (Such information might well relate to the particular third party claim, eg where the insurer was reserving its position, because of alleged non-disclosure relating to the circumstances of that claim or because of a possible breach of a policy condition relating to such circumstances.)

[1] Lord Templeman who had dissented in Bradley had to speak twice legislatively to ensure that this occurred.
[2] Not reporduced here. Preinted as *Insolvency at Sea* in Lloyd's Maritime and Commercial Law Quarterly, at pp 34–56.

(vi) The Bill in clause 17 and Schedule 1 para, 5 reproduces anti-avoidance provisions found in ss 1(3) and 2 of the Act (terms purporting to avoid or terminate the insurance or alter the parties rights in the event of insolvency or of disclosure of information under the Bill are of no effect). But it makes mild improvements to the third party's position by enabling him or it to fulfil any insurance condition in the insured's stead (clause 9(2)) and by providing that the rights transferred are not subject to any condition requiring the insured to provide information (other than notice of a claim) or assistance which the insured cannot fulfil because it has, if a company, been dissolved or, if a person, died (clause 9(3)). I agree that these provisions do not avoid the risk that an insured who is insolvent or approaching insolvency may prejudice the insurance position, without the third party being able really to do anything about it (see Maggie Hemsworth's point 1(e)), but this is inherent in the policy (also reflected in the 1930 Act) to preserve the basic insurance position (see further point 5 below). Any change in this approach would I suspect arouse considerable insurance industry resistance. Again, even if one were to disagree with the approach, the best should not be allowed to be the enemy of the good.

(vii) Clause 9(5) and (6) also solve the problem identified in *The Fanti and The Padre Island* [1991] 2 AC 1: the transferred rights will not be subject to any "pay first" clause in the insurance, save in the case of marine insurance against perils other than death or personal injury. I note the question regarding multiple tortfeasors and contribution raised by Lord Hunt of Wirral on 12/01/10 at Tr pp 9–10 and addressed by David Hertzell at pp 4–5 of his supplementary letter dated 25/01/10. I would tend to disagree with David Hertzell's answer. If A, after paying the third party, seeks a contribution from B, the basis for this is ssection 1 of the Civil Liability (Contribution) Act 1978, which enables "any person liable in respect of any damage suffered by another person to recover contribution from any other person liable in respect of the same damage . . .". Cl.9(6) also covers "liability in respect of death or personal injury" (not liability "for" death or personal injury). I do not (at least presently) see great difficulty about treating "liability in respect of death or personal injury" in clause 9(6) as covering any liability which B may have to A in respect of the third party. So B's insurers should be unable to rely on any "pay first" clause against A, in the same way that they could not have done in relation to any claim by the third party directly against B

(viii) Clause 18 addresses the question of the Bill's scope, making clear that the place of incurring of liability, of parties' residence and of payment of insurance monies are all irrelevant, as is the proper law of the insurance. By inference the Bill will apply in the event of any UK insolvency wherever jurisdiction can be founded over the insurer. Broadly, I agree with Prof Merkin's comments in his supplementary note on the points raised by Prof Briggs.

Limitation

3. The Bill is less complete and satisfactory in its treatment of limitation:

(i) Clause 12 provides that an insurer against whom the third party brings proceedings for a declaration as to the insured's liability to the third party cannot rely on the expiry of the limitation period for proceedings by the third party against the insured, if an action by the third party against the insured, started within the limitation period, is in progress. It is doubtful whether this adds anything to the law as it would be anyway.

(ii) The problem not addressed concerns the limitation period for proceedings against the *insurer:* see Prof Merkin's first note, section 11. The insured's right to sue the insurer starts when the insured's liability to the third party has been established. If the limitation period for a claim against the insurer expires without any proceedings being begun against the insurers, then any subsequent claim against the insurer will naturally fail. But what if the insured commences proceedings against the insurer and becomes insolvent near the end of the limitation period, too late for the third party itself to start separate proceedings against the insurer? The Act does not clarify whether the right to pursue the existing proceedings is embraced within the transfer under clause 1(3). However, assuming that it is not, it should be possible under the Rules of Court to substitute the third party as claimant in the proceedings brought by the insured against the insurer.

(iii) The greater problem which I thought in my lecture that the Bill should address (pp 50–51), but it does not, arises where the insurance contains an arbitration clause and the insured has commenced arbitration proceedings. Does the third party have power to step into the insured's shoes as claimant in the existing arbitration? The courts will, one day, have to return to this issue. It is a pity that the Bill does not solve it once and for all.

Arbitration

4. The Bill is also obscure, and could usefully be clarified, in its treatment of arbitration:

   (i) If the third party's claim against the insured is subject to an arbitration agreement, is that overridden by clause 2(9), entitling the third party to join the insured as a defendant in court proceedings under clause 2(2) against the insurer? (See Prof Merkin's first note, section 6.6) Maybe not, and maybe parallel proceedings remain unavoidable in such a case.

   (ii) And, if the insured's claim against the insurer is subject to arbitration, does clause 2(9) entitle the third party to join the insured as co-defendant in arbitration proceedings brought under cl.2(2) against the insurer? (Prof Merkin, section 6.8).

   (iii) Prof Merkin has discussed the appropriateness of giving insurance contract arbitrators jurisdiction to decide issues between the insured and a third party (cl.2(2) and 2(7). I am not too worried about this. Insurance arbitration tribunals (in my rather dated experience, often chaired by a lawyer) do from time to time have to deal with issues as to whether the insured was liable to a third party.[3]

5. Compromises and conduct prejudicing the insurance:

   (i) The third party has relatively limited protection regarding compromises or commutation or other pre-insolvency conduct (including non-disclosure rendering an insurance invalid, or failure to pay the premium as a condition precedent to insurance) prejudicing the insurance position: see Maggie Hemsworth point 1(f) and Prof Merkin Tr.Qus 41–42. However, this is always the case. Even where third party liability insurance is compulsory, the insured may in fact fail to take it out. The problems arising in "claims made" insurance probably belong in the same category, and appear difficult to address in the Bill.

   (ii) Set-off is also subject to the same general consideration. But clause 10 is welcome in limiting any right of set-off expressly to any liability of the insured arising under the [particular insurance] contract. But the information provisions might be strengthened to require disclosure of any likely set-off.

   (iii) The Bill does not appear to have any equivalent of section 3 of the 1930 Act dealing with post-insolvency settlements between the insured and insurer. This is presumably on the basis that, the statutory transfer having occurred, no such provision is necessary.

Reinsurance

6. I am not too troubled or surprised that my lecture suggestion (p 51) that the scheme might be extended to specific facultative reinsurances has not been taken up.

Brokers

7. I do however regret that the Bill does not address the position of insolvent brokers who fail to place a valid third party liability insurance (particularly in circumstances when such insurance is compulsory by law or professional practice): see my lecture p 51–52, discussing *Macmillan v A W Knott Becker Scott Ltd.* [1990] 1 Lloyd's Rep. 98.[4] I suggested that the "insured's" right against its insolvent brokers in respect of the failure to place a valid insurance should also be transferred to the third party, to the extent that the insurance would, if valid, have been available to meet the third party's claim against the "insured". Again, however, this is not a big point.

8. Pari passu distribution of claims under the Bill: Again, I am not surprised or too troubled by the Bill's silence on this intractable subject. The law will remain "first past the post" as in *Cox v Bankside* [1995] 2 Lloyd's Rep. 437, although this is capable of leading to some remarkable results, depending on the uncertainties of court listing and decision-making.

January 2010

[3] While not directly relevant in the present context, the extent to which even a judgment between the third party and the insured binds liability insurers may be open. Prof Merkin cites in this regard Commercial Union v NRG Victory [1998] 2 Lloyd's Rep 600 (see his first note under clause 1(4)) but the remarks there were referred to (by me) as obiter and their correctness left open for future consideration in Lexington v Wasa [2009] UKHL 40, para 37.

[4] As unsuccessful counsel in that case, I again declare an interest.

Examination of Witness

Witness: RT HON LORD MANCE, a Member of the House, examined.

Q111 ***Chairman:*** Lord Mance, first of all, may I thank you very much for coming to this meeting of the Special Public Bill Committee on the Bill. Like Professor Merkin, who gave evidence last week, it is clear to us all that you are a great expert on this Bill. I wonder whether you might like to start by telling us something about the decision of the House of Lords in *Bradley v Eagle Star* and what the consequences of that decision were?
Lord Mance: Thank you very much first for inviting me to give evidence. That was a decision of the House of Lords that in circumstances where an insurer was insuring a company that was not only insolvent but had disappeared in the sense of being struck off the register and no longer existed, there was no possibility of the third party who had a claim against the insured pursuing that claim or therefore of establishing the insured's liability, and, in those circumstances, there could be no transfer of rights under the Third Parties (Rights against Insurers) Act 1930 and it was bad luck for the third party, in that case a typical personal injuries plaintiff, if I remember, a victim of a long-term infirmity. A number of people, including myself, felt that that decision, which was reached by a majority of the House of Lords, with Lord Templeman dissenting, was most unfortunate. Subsequent research leading to an article of mine, which you have seen, indicated to me that it was also completely unnecessary and it was contrary to the original intention of the Act. Be that as it may, when the decision of the House of Lords came out, we took steps to redress it and I actually enlisted the assistance of a very well-known Lloyd's insurer, Robert Kiln, who was a great friend, sadly now dead, and he very public-spiritedly wrote to the Attorney General, who was Lord Lyell at that stage, who blessed a retrospective amendment to the Companies Act 1985. It happened that the Companies Act 1989 was going through at that stage and we inserted into that 1989 Bill an amendment which went through the Commons. It was rather more contentious in the Lords and Lord Templeman, as you saw from my note, had to speak twice in order to ensure that it went through, but it did go through and, broadly, it did not directly reverse *Bradley*; what it said was that companies that had been struck off the register could now be restored within a much longer period than was previously possible. I think the period for restoration had previously been as short as two years and it was now extended, if I recall, to something like 20 and as a result I think even Mrs Bradley's defendant company could be restored to the register, judgment could be obtained against it, and then of course the statutory transfer under the 1930 Act would, according to the decision in *Bradley v Eagle Star* itself, take effect.

Q112 ***Chairman:*** It follows from all that you have been concerned with this subject since 1989, is that right, or possibly even before?
Lord Mance: I think from before because we have all been conscious at the Bar of the importance of the Third Parties (Rights against Insurers) Act 1930 and of some of the difficulties.

Q113 ***Chairman:*** For a long time you have been concerned?
Lord Mance: Yes.

Q114 ***Chairman:*** Then of course you gave the lecture which I think we have all read. That was in 1994, was it not?
Lord Mance: Yes.

Q115 ***Chairman:*** And at the end of that lecture you called for legislation, as I recall, and of course legislation is what we have now got. Could I just ask you this very general question right at the beginning: are you satisfied with the general approach adopted in the Bill as a result of the call that you made as long ago as 1994 for legislation in this field?
Lord Mance: Yes, I am very satisfied. The most basic change of course is that it does sweep away the actual decision in *Bradley v Eagle Star*. It provides that it is no longer necessary first laboriously to establish the insured's liability and only then to get the benefit of the full statutory transfer. You can now proceed directly against the insurer and establish the insured's liability in that proceeding against the insurer, and you can join the insured to that proceeding if you wish. To my mind, that is a huge improvement and actually one that goes back to the original spirit of the 1930 Act, in my view.

Q116 ***Chairman:*** I am sure we are all very grateful for that answer, particularly I think the Law Commission will have been very glad to hear that. Unless you have any better ideas, we might now look at the notes which you have provided for us and take the matters more or less one-by-one. I think you cover all the points covered earlier by Professor Merkin so, with that in mind, one could perhaps start with paragraph 2(iv) at the bottom of the first page of your notes, which is of course the question of a possible amendment under Schedule 1 paragraph 1(1)(b). This is the point which Professor Merkin dealt with in paragraph 13.4 and discussed at page 22 of the transcript.
Lord Mance: Yes, I see the force of Professor Merkin's point. It is of course a more general point and I think that may be the problem. I note the suggestion is that one might add the words "or may be unable to satisfy a judgment against him". I think the more general point is that it would often be very nice for a claimant

to be able to know what assets a potential defendant has. An insurance claim in respect of liability is of course only one asset, but there is no general right in the law at the moment to ascertain substantively or procedurally what assets a defendant has. Of course if you have a well-founded suspicion that a defendant is likely to be salting away his assets, or would be likely to do so, then there is a very well-established jurisdiction to obtain a freezing order. It may be confined to United Kingdom assets, it may be world-wide, and that is always accompanied in practice with an order for disclosure of assets, so in that way a claimant can ascertain assets where a defendant is, so to speak, suspect in his conduct, but there is no general right, where you are simply concerned that an apparently honest defendant may not have assets, to find out about how valuable his house is or whether it is in his wife's name or whether it is on mortgage and so on. In that sense, the amendment will perhaps be going further than the general law and raises a general problem that might need more general consideration. If one takes the view, as I can see could well be the case, that in many quite common instances liability insurance is a special field, and of course the Act does to a large extent take that view—and it is especially applicable in the case of compulsory liability insurance—then I can see the force of the argument for a brief addition along the lines that have been suggested.

Chairman: Has any member of the Committee got any questions on paragraph 2(iv) of Lord Mance's paper?

Q117 ***Lord Archer of Sandwell:*** I just wonder whether Lord Mance can tell us how serious this problem is? Is it something that occurs regularly or can it in fact be dealt with procedurally as you suggest?

Lord Mance: I think it would be dangerous for me to try and generalise here. I think that the existence of insurance in respect of liability is often a pretty important factor when you are considering whether to commence proceedings. In some cases, as I say particularly in compulsory insurance, you are pretty confident that there will be someone behind the defendant and you often know that quite well from the nature of the solicitors who pop up answering your correspondence. Of course, what you cannot say, and what even the disclosure here might make it difficult to say is what the prospects of recovery under the insurance would be if there is a dispute between the insured and the insurer, and that can still exist even if the insurer's solicitors are acting for the insured. They may have reserved the position and there may be some lurking problem, or indeed there may be limits or something like that which are going to be unhelpful to you. However, I think in general terms the answer is that the existence of liability insurance is a pretty important factor and it would be helpful to some claimants to know whether it exists, and of course one thinks in particular of non-commercial circumstances.

Q118 ***Lord Archer of Sandwell:*** So it is not a case where you might have a pretty shrewd guess one way or the other?

Lord Mance: I think certainly in the case where insurance is compulsory, either by law or by professional practice, you would normally assume that insurance was in place and that is good enough.

Q119 ***Chairman:*** Any other questions on that paragraph? Then I think you move on from that to a possible extension of 1(3)(b)(iii) which covers the question of set-off. Could you explain that?

Lord Mance: I think that this would possibly already fall within the existing wording which covers situations where the insured has been informed by the insurer that the insurer is claiming not to be liable, but I am not confident of that. It may be that the insurer had not directly raised the point yet, and if one was seeking information from the insured then if the insurer had not raised the point the insured would not know about it, but I can see the force of clarifying 1(3)(b)(iii) by making it clear that it covers situations where the insurers or the person who is receiving the request for information knows that the insurer is claiming some set-off.

Q120 ***Chairman:*** Yes, I follow. Any questions on 1(3)(b)(iii), which obviously could say more than it does but I think your suggestion is that it is adequate as it stands? Is that right?

Lord Mance: I think certainly if the insured had been informed by the insurer that the insurer was claiming a set-off then, to that extent, the insurer was claiming not to be liable, I would have thought. One hopes it would be construed in that way.

Q121 ***Chairman:*** We then move on to your sub-paragraph (vi), which is clause 17 and Schedule 1, paragraph 5. Is there anything that you would like to add to that, Lord Mance?

Lord Mance: Yes, this is the anti-avoidance provisions which to some extent simply reproduce what is already in the Act but do make mild improvements, and I welcome those improvements. I think they clearly aim to offer a balance between the overriding principle that all that is transferred is the insured's actual rights against the insurer and the exigencies of insolvency which do require some slight modification of that principle, and that is achieved in clause 9(2) by enabling the third party to do things which are necessary to preserve the policy and also by providing that if an insured has completely disappeared from the scene, been dissolved, or in the

case of an individual died, then conditions cease to be relevant. I think all that is to be welcomed. One could go further but it would be impinging on the position as between the insured and the insurer and would be correspondingly controversial. The basic point which is likely to give rise to problems in practice still is clause 9(4), which provides that a condition requiring the insured to provide information or assistance to the insurer does not include a condition requiring the insured to notify the insurer of the existence of a claim under the contract of insurance. However, one understands why that is there, because insurers are entitled to at least know there is a claim.

Q122 ***Chairman:*** Any questions on sub-paragraph (vi) on page 2? Presumably any attempts to change the emphasis there would be resisted by insurers quite strongly?
Lord Mance: That would be my guess.

Q123 ***Chairman:*** Then could we move on to sub-paragraph (vii), the "pay first" clause and P&I clubs. What would you like to add there?
Lord Mance: I welcome that. I think there might have been a case for going further but it probably would have been controversial, and I think the solution is pragmatic and does not appear to be controversial. I have dealt in my note with a point which Lord Hunt of Wirral mentioned and I hope that is clear enough.
Lord Hunt of Wirral: Yes, it is.
Chairman: Do you want to press that point?
Lord Hunt of Wirral: No, it is very clear, thank you.

Q124 ***Chairman:*** Any other questions on sub-paragraph (vii) P&I clubs? Then we move to perhaps more difficult areas now. First of all, would you like to add anything to paragraph (viii)?
Lord Mance: No, I think again the provisions of clause 18 of the Bill are clearly going to give rise to some case law in the future. As to how far they go, I do not want to disqualify myself too completely from being involved in it, but, broadly, it seems to me, at the moment that Professor Merkin's comments in his supplementary notes on the points raised by Professor Briggs have force, and this provision must, as both of them point out, be read against the background of both the Brussels Regulation on civil jurisdiction and judgments, which regulates jurisdiction between different European countries, and to some extent regulates it between Europe and the rest of the world, and also against the background of English procedural rules to which they have referred. I think Civil Procedure Rule 6.33(3) is the rule. It does look as if the intention is that there should be very broad jurisdiction in the British courts, subject of course to the jurisdiction being one which is permissible under the Brussels Regulation, but the Brussels Regulation itself caters for this type of situation (direct actions against insurers and joinder of the insured to those actions) and, in those circumstances, certainly where the insurer is domiciled in a European state, and the claimant is domiciled here, the insurer can easily be sued here. Of course, in other situations one will have to find some other basis for service, but the Act itself appears to contemplate litigation in England, and in those circumstances there is provision in the rules for service, as has been pointed out, even on an Australian insurer, apparently without leave.

Q125 ***Chairman:*** Thank you very much for that answer. There appears to be no great difficulty in relation to that?
Lord Mance: I can see some arguments arising but I think not.

Q126 ***Chairman:*** Coming then to the more difficult areas in your paragraph 3 on page 3, you start by considering limitation in respect of claims against the insured, is that right, in paragraph 3(i)?
Lord Mance: Yes. This deals with clause 12 which deals with a situation of a claim against an insurer and the insurer seeking to say that the claim against the insured is time barred. Clause 12 says that that is not the case so long as the claim against the insurer is brought while there are proceedings against the insured in progress if those proceedings were themselves begun within the limitation period. Personally, I am not sure whether that would add anything to the law as it is anyway.

Q127 ***Chairman:*** It is certainly not doing any harm?
Lord Mance: It is certainly not doing any harm.

Q128 ***Chairman:*** Then in (ii) you come on to limitation in a claim by an insured against insurers; is that right?
Lord Mance: No.

Q129 ***Chairman:*** Against the insurer.
Lord Mance: This is limitation for a claim against the insurer by a third party where the insured's right to sue the insurer has expired.

Q130 ***Chairman:*** Exactly.
Lord Mance: If it has expired before anyone brings proceedings against the insurer, whether it is the third party or the insured, then of course it is too late, but if it has expired but the insured began proceedings against the insurer within the limitation period and those proceedings are still continuing, the question arises can the third parties step into those proceedings, and the answer suggested is probably yes under the rules. Perhaps it is a pity that the Act does not clarify that that is possible. Under the rules, if you have existing proceedings brought by the

insurer, then, if there is a statutory transfer of the right of action to a third party, the rules should allow the third party to be substituted. The problem arises if the proceedings by the insured against the insurer are arbitration proceedings.

Q131 ***Chairman:*** We will come to that in your (iii).
Lord Mance: Yes, and here there has been some most unsatisfactory authority. I analysed it in my lecture. It has not been solved since. I suggested in my lecture that any Bill should address the problem and make it clear that the third party has the right to step into the insured's shoes as the claimant if the insured had already commenced an arbitration against the insurer. That is not made clear by the Bill. I think that is a pity. The courts will have to return to the issue one day. It would have been quite simple to say, and one suspects it may well reflect the general law, that if the insured is pursuing proceedings against the insurer in arbitration then if there is a statutory transfer the third party may step into the shoes of the insured and pursue the arbitration proceedings.

Q132 ***Lord Hunt of Wirral:*** That change would have wider implications, would it not?
Lord Mance: I think not. It would simply be a provision which applied to this particular context. It may also, as I have been suggesting, reflect the general legal position, but that would mean that it is even less harmless. If it does not reflect the general legal position then it remains simply as an exception.
Chairman: Any other questions on (iii)? Yes, Lord Goodhart?

Q133 ***Lord Goodhart:*** I just wanted to raise a rather broader question which is what we are looking at here is a new procedure for dealing with Law Commission bills, fast track, mainly concerned with non-controversial bills, and we are anxious, of course, not to put forward amendments unless they are unlikely to be controversial or are so important that we really might be prejudicing our position if we did not accept that amendment. Do you think this matter falls into either of those categories?
Lord Mance: Absolutely not. I do not think any of the points which I have mentioned are what I may describe as "dealbreakers". I welcome the Act. The Act is a good piece of draft legislation, in my view. It has been, if I may say so, well redrafted and is clear and I have made these points and I do not have in mind any more than to try to be helpful in pointing out points where one might have gone further.

Q134 ***Lord Sheikh:*** Is there anything you would suggest with regard to changing the procedures rather than making amendments to the Bill, to reinforce a point to me, and that is we are trying to get this legislation through, if we can, providing we do not have a big issue on any particular point? Is there anything you can suggest regarding amending the procedures in order to improve the points that you have made?
Lord Mance: Do you have in mind the procedures of the House?

Q135 ***Lord Sheikh:*** The procedures of the courts basically.
Lord Mance: I think that the courts could address some of these points by procedural rules, possibly even the disclosure point, although that is quite a substantive point in some ways, but I think the right to step into existing proceedings is probably, as I suggest, already covered by the rules. Arbitration could not be covered by court rules of course. That is a matter for arbitrators[1] though a matter for court decision ultimately to decide whether it is possible, but, yes, there is some scope for procedural steps to be taken but not much.

Q136 ***Lord Sheikh:*** Or perhaps a proviso that perhaps we give a recommendation to the insurers, because the arbitration clause is in the policy itself really, and whether the insurer would be willing to improve on what is already in existence?
Lord Mance: It could theoretically be dealt with by a specific provision in the arbitration clauses, yes. I doubt whether that will happen.
Lord Sheikh: Thank you.
Chairman: Any other questions?

Q137 ***Lord Borrie:*** I am not absolutely clear from what Lord Mance has said to Lord Sheikh. Following Lord Goodhart's question, if I revert to paragraph 3(iii) of Lord Mance's memorandum on page four, I think Lord Mance has been saying that if an amendment to the Bill would be so simple as to make the logic on Lord Mance's point that if you step into the shoes of the insured it should not matter whether the insured is engaged in court proceedings or arbitration proceedings?
Lord Mance: Yes.

Q138 ***Lord Borrie:*** If Lord Mance feels that there is no ground in principle for distinction between the two for the purposes of the Bill, then if it can be done very simply, and I am no parliamentary draftsman, is Lord Mance suggesting that perhaps it should be dealt with by way of amendment?
Lord Mance: I think my answer to that would be yes as long as it does not prejudice the passage of the Bill.
Lord Borrie: My answer would be the same if we were in the reverse position!

[1] and parties to arbitration [Note added by Lord Mance on reading the transcript].

Q139 ***Chairman:*** Can we then move to the next paragraph, also dealing with arbitration, but in a slightly different context. On paragraph 4(i), is there anything you wish to add, Lord Mance?
Lord Mance: No. This is dealing with the question: can the insured be joined in court proceedings against the insurer, notwithstanding that the third party's claim against the insured is subject to an arbitration clause? I saw the discussion on that and I think Lord Borrie suggested, and Professor Merkin accepted, probably not. I have written "maybe not" here and maybe parallel proceedings remain unavoidable in such a case. The only point I am making is that the Act is capable of giving rise to argument on that point because it just leaves it in the air.

Q140 ***Chairman:*** Any suggestions in respect of that clause? No, so 4(ii)?
Lord Mance: That is a similar point, but a different way round. If the insurance claim, the insured claim against the insurer, in other words, is subject to arbitration, can the insured be joined in arbitration proceedings? That is perhaps a more radical possibility. People are not infrequently joined in court proceedings, or have been in the past, notwithstanding an arbitration clause, but to join someone to an arbitration when they are not party to the arbitration agreement is of course going to surprise arbitrators. Again, the point is simply that the draft is unclear. It occurred to me that both these points could actually be made clear if one takes the view that actually an arbitration clause does compel parallel and separate proceedings. If one took that view, one could make that clear in clause 2(9) by simply saying that it should read, "When bringing proceedings in court under subsection (2)(a), P may also make the insured a defendant to those proceedings" and then adding the words, "subject to any arbitration clause applicable between P and the insurer".
Chairman: I think I follow that. Are there any questions on that?

Q141 ***Lord Sheikh:*** What would be the benefit?
Lord Mance: Well, the benefit would be simply to make the position clear because, otherwise, people are going to argue under this, "Here is a statutory provision which entitles me to join him in the arbitration" or, "Here is a statutory provision which entitles me to join the insured in court proceedings, notwithstanding the arbitration clause". That will be sorted out in court proceedings one way or the other and it may well be that the answer is the one that Lord Borrie gave on the last occasion, that parallel proceedings are inevitable. I think the legislator should perhaps make up his mind as to what he wants. If he wants to override arbitration clauses, he should say and avoid any argument. If he wants to respect them, he should say so and accept that there are parallel proceedings.

Q142 ***Chairman:*** Then, in paragraph 4(iii) you come to the question of whether an arbitrator appointed in a contract in relation to the insurer and the insured is likely to be able to deal effectively with any issue of liability between the insured and the third party. That was a point which was canvassed at the last hearing. What is your view about that?
Lord Mance: Well, as I have indicated, I am not too worried about this. I saw there was quite a lot of discussion. In reality, in insurance arbitrations, and I have to accept my rather dated experience, it is the fact that the position between the third party and the insured is, in one way or another, something which often has to be considered. For example, the insurer may be saying, "You, the insured, accepted a liability to the third party which was non-existent". Very often of course the insurance will have some provision which binds the insurer by reasonable settlements, at least, if the insurer has had the opportunity of disagreeing with them, sometimes a QC clause exists to determine whether an incoming claim should be settled. Disputes can arise as to whether the insured was liable to the third party, and there is an issue of law which I have mentioned in the footnote as to whether even a judgment against the insured is actually binding on liability insurers, but, leaving aside that issue, very often these claims are handled by the insured in a particular way which, the insurer may say, prejudices the insurer. The idea of insurance policy arbitrators considering the position as between the insured and the third party seems to me not too strange or unfamiliar an idea and, in practice, especially if they are chaired by a lawyer, these tribunals get their minds round the most esoteric problems and usually insurance covers almost all the world's activities and they find themselves dealing with things which they are not very familiar with other than insurance.

Q143 ***Chairman:*** Thank you. If we can move to your paragraph 5, here we are concerned with what happens where there has been non-disclosure or breach of some condition in relation to the premium so as to invalidate the insurance. How should that affect the third party?
Lord Mance: This falls within the general principle that what the third party gets is what, in general, the insured has and, if the insured has conducted himself in a way which prejudices the insurance position, then the third party suffers. Commutation is one example, non-disclosure is another, and failure to pay the premium as a condition precedent is of course yet another which does strike one sometimes as very harsh, but it is a fact of life that, if you do not pay the premium, it sometimes counts as good or as bad as if you did not take out any insurance at all in the first

place. Sometimes, there are ways round that and sometimes you might argue that the premium can be paid later in that situation under clause 9(2), that is that the third party itself could pay the premium doing what the insured could. Sometimes, you can say it is not really a condition to cover and sometimes you could say that the premium is deemed to be paid because the broker, under the custom of Lloyd's, accepts liability to the insurer and is deemed to have paid the insurer straightaway; that custom extends to the marine insurance field and may extend, I think it has been argued in the past, to some other fields. I am afraid conduct as between the insured and the insurer which prejudices the insurance before a statutory transfer is a fact of life and, without radically extending the scope of this Bill, it could not really be covered. I think many of the points made in this connection really are points in support of more general insurance law reform, and that is of course certainly something on the Law Commission's books at this moment and may indeed be on the European Commission's books.

Chairman: Are there any questions on paragraph 5(i)?

Q144 ***Lord Sheikh:*** The third party should not be put in any better position really because, if there are defences available to the insurer, the insurer could utilise those defences. The point I am making is that the third party, under the circumstances of what you are talking about, cannot have anything more than what the insured would get in the courts. With regard, for example, to the premium, I have seen policies which say that the insured has paid the premium, but the point I am making is that the third party should not be entitled to any more than the insured would be.

Lord Mance: I think I have been saying that, in general, that is the philosophy of the Act with some modifications, which are contained in clause 9. To go further would, I accept, be probably to enter an area where the better course, which may well happen, is more general law reform relating to the law of insurance, which, I am afraid, frequently has been said to be particularly harsh in this country in the fields of non-disclosure and in the fields of breach of warranty and condition precedent; others, besides me, have made that point.

Q145 ***Lord Sheikh:*** In the submission from the ABI, you see that they agreed basically with what is being proposed, so why rock the boat?

Lord Mance: Well, I see that they have said that, and I think again I said that nothing that I have suggested should prejudice the Bill because it has been a long time in its genesis, it is a good measure and I think it restores the original spirit of the 1930 Act which, I am afraid, court decisions have considerably weakened, although one must welcome more recent cases, like the *OT Computers* case which have gone back to first principle.

Q146 ***Chairman:*** In sub-paragraph (ii), you come to the question of set-off in that connection and here we are going to be hearing evidence from the next witness on the subject of set-off. I do not know if you would like to express any additional views on that?

Lord Mance: No, I will not. I see the force of the suggestion that there might in some fields be a modest further entrenching upon the rights of insurers. The present clause itself represents something of a compromise in that the set-off relates to the policy itself and not to anything else, which is fair enough, and one could go somewhat further perhaps in the personal injuries field, as, I think, is being suggested.

Q147 ***Chairman:*** Well, thank you, Lord Mance. Now, do we need to touch on your paragraph (iii) there, or could we go on to your views about reinsurance?

Lord Mance: I think we can move on.

Q148 ***Chairman:*** Finally, you have put a point about brokers generally, an interesting one.

Lord Mance: This, as you see, is a point where I have to declare a particular interest since I was the losing counsel in *Macmillan v Knott Becker Scott;* perhaps I did not mention that in here. It is perhaps unfortunate that, particularly in circumstances where insurance is compulsory, if a broker fails to place valid liability insurance for a company which then becomes insolvent, and brokers are professionally required to be insured, there is no statutory transfer of the insured or the rights of the person who should have been insured against the broker in respect of the failure to place a valid insurance to the third party to the extent—and actually I am looking at the sentence I have written here and I am not sure it is particularly correctly phrased—that he should be.

Q149 ***Chairman:*** I was looking to see whether that point of yours is covered at all in the Law Commission report. Do you happen to know the answer to that?

Lord Mance: No.

Chairman: I could not find it when I was looking through it again quickly this morning.

Lord Bach: My Lord Chairman, we do not think it is, my officials are telling me.

Q150 ***Chairman:*** I certainly could not find it. Does that create a difficulty in doing anything about insolvent brokers at this stage, Lord Mance?

Lord Mance: Actually, I think the error is in the word "insolvent" in my note. I do not think the word "insolvent" should appear here, so perhaps you could just delete it. What I was suggesting in my lecture and intending to suggest here, dealing with the situation of an insolvent defendant who should have had a valid

third party liability insurance and brokers who negligently fail to place the insurance, particularly where the insurance is compulsory, in *Macmillan v Knott Becker Scott* it was held that the insured's right against the brokers for failure to place the insurance went into the insurance liquidation pot, in other words, it formed part of the insured's general assets. What I am suggesting here is that that is illogical, that the insured's right against his brokers—and please delete the word "insolvent" where it appears in the second line and also in the fifth line from the end in my note—that the insured's right against the solvent brokers, not insolvent, in respect of the failure to place insurance should be transferred to the third party as a substitute for the transfer of the insured's right against the insurer which the broker has failed to create. That is the point, and the truth is that, if the third party should have had the benefit of a compulsory liability insurance, let us suppose, and the broker has failed to give the third party that benefit, the insured has a perfectly good right against the broker and that right should be transferred to the third party as a substitute for the third party liability insurance which should have existed.

Q151 ***Lord Archer of Sandwell:*** Presumably, there would be no point in making the provision if the broker is insolvent?
Lord Mance: Absolutely, and I am sorry about the word "insolvent" having crept in there. It of course remains the insured who is insolvent. In *Macmillan v Knott Becker Scott*, the argument was that the broker owed a duty of care in tort to the third party because the broker knew that the compulsory liability insurance was being placed for the benefit of third parties, and I argued in favour of that proposition. The court held that that was wrong, that there was a contractual scheme and there was no reason to create a duty of care, but it seems to me, especially in cases of compulsory liability insurance, there is every reason why the right of action against the broker, which is effectively a substitute for the valid insurance, should benefit the third party rather than the general pot of creditors.

Q152 ***Chairman:*** I think I follow it. It is almost more clearly set out, I think, in your lecture than it is in your note.
Lord Mance: I am afraid that I was faced with a deadline of Friday morning and at this stage I was near the end of the note and in a hurry!

Q153 ***Lord Goodhart:*** I was just having a look at the long title of the Bill, which is "to make provision against the rights of third parties against insurers' liabilities to third parties in cases where the insured is insolvent and in certain other cases". What, I think, is not being proposed is that the Bill should be extended to cover brokers as well as insurers.
Lord Mance: Insofar as the claim against the brokers is a substitute for the insured's claim against the liability insurers, yes, indeed you are right.
Lord Goodhart: So one would have to at least find some way of altering the long title of the Bill before we could make that amendment.

Q154 ***Chairman:*** There is also the difficulty, if Lord Bach is right, that, if this was not discussed at all by the Commission, it might be difficult for us to go out on a limb at this stage.
Lord Mance: Well, the most I can hope is that at some stage someone gives this some attention.
Chairman: Perhaps you will in due course in your judicial capacity!

Q155 ***Lord Sheikh:*** Perhaps we ought to be thinking about what right the third party has under the professional indemnity policy of the broker who failed to act. It is a scenario which could arise.
Lord Mance: Unfortunately, that is the whole point.

Q156 ***Lord Sheikh:*** But not against the insurer of the insured, but against the PI insurer of the broker.
Lord Mance: Well, that of course would be the point of pursuing the broker, but, unless the broker is under some liability to the third party, there is no way in which you can get to the broker's professional indemnity insurance, and what I am suggesting is that the broker who has failed to create the third party liability policy should stand in for it.
Lord Sheikh: I think it would be unwise to import it at this stage into the Bill.

Q157 ***Chairman:*** Lastly, in paragraph 8 you deal with what you call the "intractable subject of 'first past the post'", and you suggest that there is not much that can be done now other than to leave the Bill as it stands.
Lord Mance: Yes.

Q158 ***Chairman:*** It is as good an answer as any.
Lord Mance: It is far too intractable a subject. I pointed out that it does lead to some remarkable results. In the Lloyd's litigation, the Gooda Walker Names scooped the first bite of the pool as a result of a decision that their case should come on first in court.
Chairman: Are there any further questions any member of the Committee would like to ask?

Q159 ***Lord Hunt of Wirral:*** Well, we are very grateful to you for the amount of time and the trouble you have taken with this Bill. I am just rather relieved, my Lord Chairman, that I do not have to declare any interest as either a successful or unsuccessful solicitor in cases because that could run into thousands! I do take your point that you have seen a number of situations where

you feel that the law could be improved, and I share your concern that after the 1930 Act there was a considerable amount of litigation arising out of that Act, and I just am seeking some assurance to set against our task. Looking at the Bill as a whole and the history of the consultation that has taken place, I am not asking you if we are making a better job of the situation than happened in 1930 because time has moved on, but can you see any glaring omissions which, you feel, might fuel a series of litigation, bearing in mind the long title to the Bill and the area that we are scrutinising, or are you reasonably happy that we will not see a substantial number of cases arising out of certainty or uncertainty of some of the provisions?
Lord Mance: I think, because the Bill does build on the 1930 Act, but aims to restore the underlying principles and ensure that they are in future observed, it can be hoped, with some degree of assurance, that it is going to have a reasonably case-free future, but any lawyer who predicted the future course of litigation would be most unwise! What can be said is that the Third Parties (Rights against Insurers) Bill did give rise to problems over a remarkably long time-span, and that may suggest that it was only over a considerable time-span that actually the courts really, in the light of other developments and thinking, began to depart from its original conception, so I hope that, if things go wrong, it will be a time-span in which I do not have to answer!

Q160 ***Chairman:*** Well, it is 80 years since the original Act was passed and perhaps we had better come back in 80 years' time, which will be 2090, and see whether your prognostication is correct or not. But then that might disappoint Lord Hunt! Thank you, Lord Mance, very much indeed for an extremely impressive, if I may say so, account of the problems in this area.
Lord Mance: Thank you very much for your interest and may I wish the Committee well in its deliberations.

Memorandum from the Association of Personal Injury Lawyers (APIL)

Introduction

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation with more than 4,000 members across the UK, all of whom practise personal injury law on behalf of injured people. Our key objectives include:

— To campaign for improvements in personal injury law.

— To promote safety and alert the public to hazards wherever they arise.

— To promote full and just compensation for all types of personal injury.

APIL has taken great interest in this issue from the outset, and has been a supporter of, firstly, the Law Commission and then the Ministry of Justice in the work being undertaken in this area.

Due to the remit of our organisation, the following comments relate to personal injury cases only, and our remarks are restricted to clause 10 of the new Third Parties (Rights against Insurers) Bill, along with two points relating to schedule one.

Clause 10

Insurer's right of set off

In relation to personal injury cases, this clause effectively means that insurers would be able to set off the amount of (for example) any unpaid premiums against the compensation payable to the third party.

Most personal injury claims are of a low value (around £5,000 or less). Clause 10 presents a very real danger, therefore, that this insurer's right of set off could result in a compensation claim for personal injury being completely wiped out. Larger, more serious cases, including asbestos cases, could be similarly affected especially, for example, where a large company with a substantial unpaid premium becomes insolvent. We do not believe this can possibly be the intention of this legislation and we submit that an exception should be made for personal injury claims, with the following amendment to clause 10, paragraph 2, page 2, line 20, to read as follows:

"transferred rights, apart from a third party claiming damages for personal injuries or death".

We submit that the principle for this is accepted in clause 9, paragraph 6 of the Bill, which makes a clear exception for cases of personal injury or death in relation to maritime law, and elsewhere in the law generally.

SCHEDULE 1, CLAUSE 3, SUB-SECTION 5

This sub-section assumes that a defunct body which has either been restored to the register, or ordered to be restored to the register, is to be regarded as no longer defunct for the purpose of acquiring information. This does not reflect the reality of the situation as, in these circumstances, the restoration of defunct bodies is a legal device to enable a claim for compensation to be pursued. The restoration of the body is in name only.

For this reason we submit that sub-section 5 of clause 3, schedule 1 should be deleted.

SCHEDULE 1, CLAUSE 4

Sub-section 1(b) places an unnecessary restriction on the provision of information to third parties, which goes against the spirit of the Bill. Under the Civil Procedure Rules of parties to court proceedings there is, in fact, no automatic right to disclosure of insurance details. By using the device of referring to the Civil Procedure Rules, the Bill becomes subject to the courts' interpretation of CPR as case law upon it develops, or to any future amendment to the disclosure provisions of the civil procedure rules. Even now, for example, it remains unclear whether disclosure of insurance information can in fact be compelled under CPR. To achieve its purpose the Bill should provide its own mechanism for this, in place of the presently drafted Schedule 1 Clause 4.

January 2010

Examination of Witness

Witness: MR MARTIN BARE, Past President, Association of Personal Injury Lawyers, examined.

Q161 ***Chairman:*** Mr Bare, can we welcome you to this meeting of our Committee, and thank you very much for the evidence which we have already received. From that, it is apparent that your Association, the Association of Personal Injury Lawyers, has taken, as I understand it, an interest in this subject for quite a long time.
Mr Bare: Yes, that is correct, my Lord. If I might start by clearing up a little bit about the Association itself, the Association is a victims' organisation, it is not a lawyers' trade union. What it is is 4,500, nearly 5,000, lawyers, all of whom are solicitors, barristers, academics and others. Its primary interest is on behalf of the victim and it is not a lawyers' trade union, but we are a victims' organisation. Because the law can be complex, as I have heard this morning, the view was taken that the victims themselves cannot be left without expert assistance in this area, which was the reason why the Association was formed, because obviously the lay person really has no voice in this type of situation, so that is the Association and that is why I am here. Perhaps I can also say, like Lord Mance said, this Bill has our strongest support and anything I say, which might prove to be controversial, we would not wish to affect the passage of this Bill which we have wanted for a long time.

Q162 ***Chairman:*** Thank you very much, and you have expressed your support for the Bill in the written evidence you have already given and now you confirm that, in general, you are supportive of the Bill.
Mr Bare: Yes, indeed.

Q163 ***Chairman:*** You have three points which you have set out, and perhaps it would be best if we took those three points in turn. The first of course is the question of set-off, which we have touched on with Lord Mance a few moments ago, which you probably heard. What really is the point that you want to make about that?
Mr Bare: The main point here is the way that this would potentially impact upon the innocent victim. It has been touched on, as you say, but let us suppose that a defendant becomes insolvent, having already partially paid his insurance premium. The insurer, under this Bill, will be entitled to offset that unpaid portion of the premium against the damages that it pays the victim. Now, that has been the situation in the past, but there are other areas of law where that is not the situation, and this Bill presents an opportunity, I would submit, to look again at that question. Now, if that takes us into a controversial area, then, in view of how I opened, I will defer to the passage of the Bill, but nevertheless, the chance, in my submission, should be taken to have a look at this. If we start with the position in other areas of law, the personal injury victim is given, if you like, special rights. We know from section 3 of the Compensation Act 2006 that a mesothelioma victim is given special rights in terms of causation and proving the cause of the mesothelioma. We know from Europe that road accident victims can sue insurers direct without any worry about whether the premium has been paid or not, and that is an important point and I do not want to skip over that because the majority of personal injury cases in fact are road accidents, so, if the ABI were to say to you that removing this insurer's potential defence or set-off in the clause would be a major concern, that would be partially contradicted by the fact that they are already with that ball anyway because the majority of claims are road accidents and, by virtue of European law, they are stuck with that and, whether they have

been paid a premium or not, they cannot, under European law, set that off, so then you are left with occupiers' liability cases or employers' liability cases. If we then look at occupiers' and employers' liability cases, we know that their ability to set off is already restricted in relation to, and there are two categories, partial payment of premium, as I have mentioned, and policy excess, which is a familiar concept and we have all got policy excesses on our cars, et cetera. Now, we know that, in an employers' liability case, the insurer is not allowed to set off that policy excess *vis-à-vis* the innocent victim. It is in the Law Commission report and, if one needs, I can refer you to it. The relevant cases are *Monktonhall* because that was the name of the colliery in Scotland, and we know that that is an interpretation of the Employers' Liability (Compulsory Insurance) Regulations 1998 which come from the Employers' Liability (Compulsory Insurance) Act 1969. Now, my concern is that, whilst that remains the law under the Regulations, those Regulations are of course subordinate legislation, they are a Statutory Instrument, and we are here concerned with primary legislation. Therefore, if we have a potential conflict, and I am not a parliamentary draftsman, between primary legislation, saying, "There is a right to set-off", yet we have case law dependent upon a Statutory Instrument, then the primary legislation will in fact take precedence so that the old case law and an old interpretation of the 1998 Employers' Liability (Compulsory Insurance) Regulations will fall by the wayside by virtue of the wording of this particular set-off part of the Act or what will be the Act, I hope. One must also remember in terms of future-proofing that this Bill will be around for another 80 years, as you said, yet the Regulations could be changed either by the Lord Chancellor or the Secretary of State for the Department for Work and Pensions, I think it is actually, so we have got that interesting, it is not a conflict, but they do not sit neatly together. The position here is that the European law is saying that you simply cannot offset *vis-à-vis* a road accident victim and the Employers' Liability (Compulsory Insurance) Regulations are saying that you cannot offset an excess against an employer's liability to an employee, yet here in this Act we have a total set-off clause.

Q164 ***Chairman:*** So what you are suggesting, as I understand it, is an amendment to clause 10(2), page 8, line 20, to read as you have set out here, which would exclude third party claims for personal injuries from the ordinary right of the insurer to set off claims. Is that what you are saying?
Mr Bare: Yes, that is it exactly. It is to create a special category, and I heard what Lord Mance said about that, in relation to personal injury victims or in cases of death.

Q165 ***Chairman:*** If I can just make sure I am understanding it, would that cover personal injury claims, no matter how large, or would it be limited to claims beneath the figure of £5,000, which you have mentioned?
Mr Bare: No, it would cover them, no matter how large, and, in my submission, it is right and proper for that to be so. One does not have to look too hard to find examples of how this could actually come to pass. There used to be a store on every high street that sold bottles of Coca-Cola and pick-n-mix, and I will not name it, but it was reported by the BBC that in a particular store in Bideford in Devon, I think it was, asbestos dust covered effectively the whole store. They were subsequently prosecuted by the Health & Safety Executive, or it might have been the local authority actually, as the enforcing authority, because they had simply failed to control the asbestos, and they were fined £40,000, and that was proven in a court and reported by the BBC. What they did, and part of the reason why the fine was so large, was that they asked the staff to wipe the bottles of Coca-Cola that were covered in asbestos dust with a wet cloth and then they sold them. Now, that company has since become insolvent and I do not know if they had paid their premium or not, but I know that for a very large company it would be a very large premium. If one of those workers, for argument's sake, was to go on to develop mesothelioma in 30 years' time, that claim could be worth, say, £150,000 in today's money because that person is going to die, yet the premium could be huge for such a large organisation.

Q166 ***Chairman:*** But is it not the same point, however large the claim is and however large the premium?
Mr Bare: Well, yes, exactly so.
Chairman: I think we have got that point now, Mr Bare, so shall we see what the views of the Committee are on your suggestion that we should add this amendment to the Bill.

Q167 ***Lord Borrie:*** Could I just put this point, Mr Bare: you say in your written note that you do believe that this can be the intention of the legislation. Well, I do not suppose the 1930 legislation wanted the outcome that you have just mentioned, but surely one of the very clear intentions of the 1930 legislation was that the third party should stand in the shoes of the insured and not be better off than the insured in the claim that could be made against the insurer, so, if the insurer has a set-off right, particularly because of non-payment of premia, then that should be transferred, under the 1930 legislation, to the third party. You are proposing something which, over a whole range of personal injury cases, is a very radical change to the notion that what the 1930 legislation and the amending legislation today is designed for and which

the Law Commission has proposed should be simply that one stands in the shoes of the other.

Mr Bare: I would answer that in this way: that in the historical context of 1930 the only insurance which was compulsory was motor insurance under the 1930 Road Traffic Act. Since then, if you like, the compulsory insurance safety net has been extended to include obviously employers' liability insurance. We now know that that right of the insured to set off a premium has vanished in relation to motor accidents and has also vanished, if the 1998 Regulations are not changed or this Act does not change them, in relation to employers' liability cases, so time has moved on since the original 1930 Act. What I am suggesting is that, maybe by mistake, this Bill could trump or superimpose the 1998 Employers' Liability (Compulsory Insurance) Regulations because it is a primary Act rather than Regulations, so there may be an unintended change being made because this is primary legislation whereas the case law is on a Statutory Instrument.

Chairman: You have made the point, if I may say, very, very clearly, and shall we just see if there are any other questions which might be asked on that.

Q168 ***Lord Goodhart:*** When we were hearing evidence from Professor Merkin the last time we came here, we were discussing, I think, at this point not in fact removing the right to set-off, but an associated provision which would be less damaging, I think, to the insurers which would have involved providing more information to them, information at an earlier stage than is the case now. Professor Merkin took the view then that this would be something which would cause upset among the insurers if they were forced to produce this information. Do you agree with that? Also, perhaps moving on to the question here, is it not very likely that, if the insurers are going to be upset at having to give that information, they will be even more upset at having to provide the insurance money to the third party, even without deducting the set-off?

Mr Bare: In response to that, I cannot speak for the insurance industry, but I can suspect that it would not go down well. If I go back to first principles, insurance is a way of spreading losses and it is about fairness. If it is compulsory, it is about fairness; you have to have the insurance, so then it goes to fairness, and who has the loss? Now, if an insurer has been done out of his premium, but has to pay the innocent victim, if I can use the vernacular, then one knows that insurers are very good at analysing risk. The innocent victim has no way of judging the solvency of the organisation with which he is employed or into whose shop he goes, whereas the insurer does and the insurer has actuaries who can. The concept of insuring a premium is not new: "We might not get this premium, so we can build that in". Now, your point is, and I take it, that this could be moving towards an area where there is not consensus.

Q169 ***Lord Goodhart:*** Well, I think, if I may interrupt you there, that, in a way, is our problem. I would have no hesitation in saying that we should put something in of this kind if we were dealing with the ordinary procedure of legislation. The problem is that this is now being dealt with under the new, fast-track procedure for, what are thought to be, non-controversial Law Commission Bills.

Mr Bare: I did not hesitate to raise it because I see from the ABI's paper to you that they have already said that they accept that this Bill enhances some of the rights of the innocent victim, the third party, and they say, "The rights transferring would be subject to the same defences. However, a small number of enhancements would be made to third party rights", including, for example, the right to fulfil the insurer's policy conditions. There is also another one which deals with the question of legal costs, which is not very exciting. The Bill adopts something on page 85 of the Law Commission report and the ABI do not even comment on it, and they will know of it. I cannot speak for them, as I said, but there is a measure of acceptance, I hope, from the concept of fairness that I was talking about before, because inroads have already been made by other legislation or, as I have already talked about, other statutory instruments, so there is not a lot left in terms of personal injuries as a category that this amendment would actually change, but, without it, you run the risk of railroading the 1998 Employers' Liability (Compulsory Insurance) Regulations and with it, as Lord Goodhart has pointed out, there is the potential for the special procedure to be effected. I simply draw the attention of the Committee to it.

Chairman: Well, you do make the point very clearly and it is obviously an important point.

Lord Sheikh: This question about the unpaid premium, which is causing you concern, I have been reflecting on it. You referred to road traffic accidents. Following the Road Traffic Act, it was then discovered that there were people who did not have insurance and insurers set up the Motor Insurance Bureau, and that was, if you like, a voluntary act on the part of insurers and the Motor Insurance Bureau is funded by levies on motor insurance. However, the point which you raised with regard to other issues is a much wider point, but I think the intention certainly is that every third party must be compensated with regard to employers' liability, but there would be situations where the third party does not get compensation, and you have talked about the deduction of set-off, but there would be also instances where there is no insurance cover and where there is no payment of a premium, or, for example, where there is a flaw, where there is a non-disclosure aspect

to it or misrepresentation, so the policy is not valid. The point I am making, and we have discussed it and the points have been raised over and over again, is that, if there is satisfaction, then the intention is to look at passing it, and I think the point you are making perhaps would be best dealt with by looking at the setting up of a mechanism where employers' liability claims are satisfied. I have this feeling that, if we start doing this, then the premiums could be quite substantial. You have talked about the asbestos situation and asbestos policies are quite hefty, and, although I have every sympathy, I thought about it last week, that the whole intention must be to the injured third party and that under motor insurance or employers' liability it is properly dealt with and compensated, I have this feeling that, if we start putting that in, we may be asking for trouble, although I have every sympathy, and I have thought about it a lot over the last few weeks.

Q170 ***Chairman:*** Unless you have wish to add anything to what you have already said, we could move on to your second point.
Mr Bare: I am happy to move on to the second point, but I agree with the view expressed in relation to the Motor Insurance Bureau, but here there would be a policy in existence, so the uninsured situation does not arise, but it is just a question of how you access that policy, and that is what this Bill deals with.

Q171 ***Chairman:*** Your second point is really on Schedule 1, clause 3(5) where you say that that really is doing nothing and should, therefore, be left out of the Bill. You say it is simply a legal device. This is perhaps not quite such a strong point as your first point.
Mr Bare: Again, if I may again use the vernacular—sorry, I am from Newcastle—this actually just does not need to be there. This actually is going to create problems. What this section of the Bill, as I understand it, deals with is the right to information. If one looks at 3(1)(a) and (b), if the person has started proceedings under this Act against an insurer in respect of that liability and there is a defunct body, the person may, by notice in writing, require a person to disclose any documents where there is that liability, and then it sets out the people who might have those documents for such a defunct company, such as the people who are directors, the company secretary, the insolvency practitioner or the Official Receiver, and then it goes on to say what the claimant would have to give that person or those persons with that request, and it then provides that they will then reply on behalf of the defunct body because the defunct body does not exist. So far, so good and very good too, it has my total support, but then, in my submission, the Bill falls into the problem area because it then says, "But a body corporate is not defunct for the purposes of this paragraph if it has been restored".

Q172 ***Chairman:*** It seems to me, and I do not want to cut you short, that this is quite an important provision that, if the body has been restored, it is not necessarily the concern of some of these other people, so it is actually quite an important point.
Mr Bare: That is my point because, if it has been restored, there is still no natural or real person to ask questions of. You have simply got it back on a computer in Cardiff and there is nothing else, there are no offices, there are no directors, there is no secretary, but it is simply back on the list. There are no real people that you can ask. The only real people, live people, are those listed in the earlier part, so it is a mistake to say that, just because it has been restored to the register, there is somebody who can reply on its behalf. There is nobody who can reply on its behalf; it has simply been reactivated somewhere on a computer.

Q173 ***Chairman:*** I think we follow that point. Are there any questions on whether we should leave out sub-paragraph (5)? No, so your last point is on Schedule 1, clause 4, and here you say that we should set up in this Bill its own separate procedure rather than relying on the Civil Procedure Rules.
Mr Bare: Yes, I do.

Q174 ***Chairman:*** What is the reason for that?
Mr Bare: This is quite a detailed point, but the case law has actually been referred to by, I think it was, Professor Merkin at one point in one of his papers, and that is whether standard disclosure, as defined by the Civil Procedure Rules, would actually give the third party a right to this information. I heard Lord Mance refer to the *OT Computers* case, and the *OT Computers* case uses Part 18 of the Civil Procedure Rules and standard disclosure is in Part 31, so this Bill does not refer to *OT Computers*. Secondly, there was a case decided subsequently to that which Professor Merkin does cite, *West London Pipeline v Total and TAV*, which is a case arising out of the Buncefield oil disaster where Total were being sued as a result of events in Buncefield. They had bought something which, they alleged, caused the problem from a company called TAV and they wanted to know how much insurance TAV had as to whether to bother to try and claim part back from them. The High Court judge in that case held that the Civil Procedure Rules did not permit Total to know that, and that Part 31 of the Civil Procedure Rules, which deals with standard disclosure, could not be used to provide that information to Total in that case, so the only case which is spot on the point dealing with standard disclosure in Part 31 says that that insurance information cannot be compelled under

that part of the Civil Procedure Rule. On the narrow point, therefore, it does not work and, on the wider point, I go back to a point I touched on slightly, that the CPRs again are subordinate legislation, a Statutory Instrument, they can be changed by Order in Council and we do not have future-proofing if we have got primary legislation referring to the CPRs. Otherwise, every time you change the Civil Procedure Rules, you are, by definition, changing an Act without actually necessarily meaning to, and we know from other areas of work that the Civil Procedure Rules have recently been considered by the independent judges in different contexts and we may have changes there as well. It seems to me that the early parts of Schedule 1, subclauses (1) and (2) set out a very workable procedure in those circumstances and there is no need then in subclauses (3) and (4) to default to the Civil Procedure Rules.

Q175 ***Chairman:*** In a sense, you are saying that the Civil Procedure Rules, from your point of view, are too flexible a procedure and we do not quite know what may happen tomorrow.
Mr Bare: That case I referred to could be appealed and next week the law could be different, or a different case could be appealed and next week the law could be different, but that then, because of the way the Bill is drafted, changes what the Bill is, and I do not think that can be the best way forward. I do not think there is any argument from anybody, and certainly not from Lord Mance from what I heard, that this requirement of information is not a good thing, but I am just seeking to advise the Committee of the mechanics of that.
Chairman: Are there any questions on that?

Q176 ***Lord Bach:*** Just in very simple terms, the Civil Procedure Rules are well-respected and have become an important part, as I understand it, of civil justice. If we were to set it up, as I think you are proposing, to have separate rules in this particular instance, would that not slightly undermine the Civil Procedure Rules' theory, as it were, but also set up a potential source of competition that may not be a very good precedent?
Mr Bare: In that case, I have failed to express myself at all clearly.

Q177 ***Lord Bach:*** I am sure it is my fault.
Mr Bare: The earlier parts of the Bill, let us say, of Schedule 1 itself, subclause (1), "Notices requesting information", and then the next page, "Provision of information where notice given under paragraph 1", they set out the procedure to follow in the circumstances described, and a very good procedure it is too and it has my total support. When we then go to subclauses (3) and (4), for some reason, there is a reference to the Civil Procedure Rules. Now, there does not need to be. The Civil Procedure Rules, for the reasons I have outlined, can be changed, they can be subject to case law. At the moment, the case law suggests that this will not work. Now, the Bill can set out, with everybody's support, its own requirements, so it does not compete with the Civil Procedure Rules, but it is simply the Bill setting out is requirements for the provision of information, as it already does in subclauses (1) and (2), but does not in (3) and (4) because in (3) and (4) it uses, if you like, a shorthand of going to the Civil Procedure Rules, but, unfortunately, the shorthand does not give you what it wants. As the industry, the insurers, the insured and other respondees and Professor Merkin would agree, it does not do it because of the case law, and it is the *West London Pipeline v Total and TAV* case, which the eminent professor has indeed referred you to, so this is not a controversial thing and there is no suggestion that the Civil Procedure Rules are wrong in anything that they do or deal with, but it is just that they are the wrong vehicle for what this Bill is seeking to achieve, in my strong submission.
Chairman: Well, Mr Bare, I think we are very grateful to you and to your Association for coming along today and helping us with this difficult question and thank you very, very much indeed.

Written Evidence

Memorandum from the Association of Insurance and Risk Managers (AIRMIC)

Thank you for the invitation to give evidence to the Special Public Bill Committee on the Third Parties (Rights against Insurers) Bill.

AIRMIC is a membership body that represents the insurance buyers employed by large organisations. It is estimated that the members of AIRMIC control about £5 billion of insurance premium spend with a further £2 billion premium paid to in-house or captive insurance companies and a further £2 billion paid in insurance claims that are paid directly by the member company. The latter £2 billion represents payments within deductibles (or excesses) and other retentions on insurance policies. .

AIRMIC members do not represent consumers and therefore AIRMIC has no opinion on the proposed reforms insofar as they benefit personal or consumer claimants. However, there are circumstances where an AIRMIC member organisation may have suffered a loss that is believed to be caused by the fault of a third party. In these circumstances it is possible that an AIRMIC member may discover that the third party they wish to claim against has become insolvent and been struck off the register of companies.

In these circumstances the AIRMIC member organisation will benefit from the proposed amendments to the Third Parties (Rights Against Insurers) Bill. Accordingly, AIRMIC fully supports the proposed changes as they will simplify the procedures that need to be followed in these circumstances.

Whilst AIRMIC would be happy to present oral evidence to the committee, I would suggest that the AIRMIC position is simple and straightforward. I do not have information about how often these circumstances have arisen or the sums that are likely to be involved.

Paul Hopkin
Technical Director

18 January 2010

Memorandum from Adrian Briggs, Professor of Private International Law, Oxford University

At first sight, the following questions and comments arose. It may be that, with the benefit of more time for reflection, some of these points or concerns may be seen to be illusory. I have tended to use 'Act' where it may have been more proper to use 'Bill'. I have not made any attempt to re-draft parts of the Bill which seem to me to be in need of it, because I see more in the way of questions; it is not for me to presume to have answers.

Clause 1(4): does 'judgment or decree' mean a judgment from an English court? Or does it include a judgment which was given by a foreign court but which qualified or would have qualified for recognition in English private international law? Or does it include a foreign judgment which, however, would not qualify for recognition in English private international law? It seems improbable that the last of these is included, but the middle option is harder to predict. What is the effect, for example, of a judgment from a foreign court declaring that the insurer had no liability to the insured?

Clause 2(7): I am not clear whether this provision deals with the case in which the liability of the insurer to the insured, and no more, is according to the policy of insurance required to be sorted out by arbitration, or a case in which the third party, to whom the rights have been transferred, has to bring his direct claim against the insurers by way of arbitration.

If it is the former, I am not sure how this would work, for if it is only the rights which are transferred to the third party by clause 1, it is not obvious that the obligation (duty, burden) to proceed by arbitration does transfer. If 'rights' means 'rights and associated obligations', this would be less of a point, but that does not strike me as the way to interpret 'rights'.

If it is the later, it would appear to be necessary to say specifically that this Act shall be applied in arbitration proceedings? What would happen if the arbitrators were to come to the conclusion that, because they are entitled to choose the law which they will apply, that they will choose to apply the law which governs the contract of insurance and that as a result they will not apply the provisions of the Act? It may be that this is the intended result, and that the power of the tribunal to choose the law which applies in the dispute is more important than the application of the rules of this Act. But at the moment, I do not see what will prevent

arbitrators choosing not to apply the provisions of the Act in a case in which they consider that the claim of the third party should be dealt with by (and rejected by reference to) the law which governed the insurance contract.

Jurisdiction Agreements in Insurance Contracts

I do not see what is intended to be the result if the insurance contract provides, on a true construction, that all claims under it (including any direct claim) are to be brought before a particular court. In the context of jurisdiction agreements falling within the scope of the Brussels I Regulation, I can see that there may be little which legislation can say. But what is to happen if the insurance provides that all claims against the insurer are to be brought before the courts of New South Wales? Jurisdiction clauses are not proscribed by clause 18: does that mean that a court can give effect to such a clause? If that is so, it looks odd that a court is directed by clause 18(c) to apply the Act even though there is a choice of law agreement for another law, but is not prevented from giving effect to an agreement on jurisdiction which will mean that the Act is not applied after all. I suspect that I have not fully understood the intention here.

Service out of the jurisdiction on insurers to whom the Brussels I Regulation does not apply to give or to refuse jurisdiction

If the claim under the Act is seen as one falling within CPR r 6.33(3), which it seems to me that it is, service out on an overseas insurer will be allowed without the prior permission of the court. That would mean that an Australian insurer could be served without the prior permission of the court, even though the insurance contract was not governed by English law, the liability of the insured to the insurer had nothing to do with England or English law, and none of the parties had any residential connection to England. That may be exactly what is intended, but it is a striking assertion of jurisdiction over a case whose component parts may have little to do with England.

If such service is made (or if the insurer has been served here), may the insurer nevertheless apply for a stay of proceedings on the ground of forum non conveniens, pointing to the weakness of connection to England and the strength of connection to another jurisdiction? It is not obvious to me, but there must be a possibility that the wording of the Act would lead a court to the conclusion that no power to stay is permitted. First, if permission is not needed to serve, it may seem odd that that discretionary element still returns to play a part if the defendant insurer contests the jurisdiction or its exercise. Second, clause 18 could be taken to say that the Act is to apply even though there are these foreign elements; that if there is a stay on the grounds listed as irrelevant to the application of the Act in clause 18, the effect would be that the Act would not apply, and that therefore the court may not grant a stay of proceedings. That would give the Act a very wide sphere of operation.

Application of the Act in cases where all the contacts are not with England: Clause 18

It is easy to see why the Act should not be prevented from applying just because the contract of insurance is governed by a foreign law when everything else is English, or when the insurer is foreign (esp, perhaps, if it is Gibraltarian) when everything else is English, and so forth; and Clause 18 says that. But it also appears to say that the Act will still apply even though all the matters listed in Clause 18 are non-English; the Notes on Clauses could easily be read as making that point. Or, to put it another way, there is no geographical, personal, or other limit on the application of the Act. Is it really intended that it should apply to cases in which there is no English connection at all?

It may be that the correct way to read Clause 18 is simply saying that the factors listed do not prevent the application of the Act, but that the question whether the Act does apply is also subject to (answered by) the principle that Parliament is presumed not to intend to legislate for its laws to have extra-territorial effect. Something similar arose before the House of Lords in *Serco Ltd v Lawson* [2006] UKHL 3, which dealt with unfair dismissal. The legislation in that case was also silent as to its scope, but no-one really supposed that it applied to and employee and employer from Ruritania who were parties to a Ruritanian contract performed in Ruritania. Lord Hoffmann was able to deduce and limit the scope of the Act, but it cost a lot of someone's money for Parliament's will on this point to be ascertained, and to be shown to be different from what the Court of Appeal had found it to be.

In the case of this proposed Act, is it the will of Parliament that the Act apply to every single case in which a person with a claim against an insured wishes to pursue the insurer? If it is not the will of Parliament that this be permitted in every single such case (and bearing in mind that service out appears to be available as of right if the insurer is not here), I cannot myself see where the limitation is. Reasonable people may disagree as to what it should be, but it is not apparent to me that the answer is given on the face of the text.

Application of Clause 18 and the Rome I Regulation

In a case in which it is intended to that the Act apply, but in which the *lex contractus* is not English, it may be assumed that Clause 18 will make the Act apply. But it is possible to see the argument which would defeat this. If the liability of an insurer to the third party is seen as a matter relating to the contract of insurance, there is a chance that it will be seen as a contractual obligation for the purposes of the Rome I Regulation (Reg (EC) 593/2008). In this regard, the fact that the Court of Appeal is inclined to the view that, as a matter of common law private international law, a direct claim is to be characterised as a claim in tort is of no relevance: *Maher v Groupama Grand Est* [2009] EWCA Civ 1191 is authority on the common law, but not on the interpretation of the Regulation.

That Regulation applies its own choice of law regime for matters falling within its material scope. Suppose that the law which governs the policy of insurance does not allow for the transfer of rights, or does so only in a way which conflicts with the provisions of the Act. On the face of it, it would not be possible for the Act to be applied, to override the contradictory provisions of the law which governed the contract of insurance. If it is intended that the Act nevertheless apply, it would have to be under the mechanism in Article 9 of the Regulation, that is, on the basis that the Act is an 'overriding mandatory provision' of English law as law of the forum. Looking at the current wording of clause 18, it is not certain that it would pass the test as this is explained in Article 9.1, for the introductory wording of clause 18 is rather understated. It does not say, for example, that 'The provisions of this Act shall be applied notwithstanding that . . '. Such language would, to my mind at least, make it more likely that an English judge would find (and if the European Court ever had to address the question, would be more likely to accept) that the provisions of the Act would measure up to the standard set out in Article 9.1 of the Regulation and have the effect they were evidently intended to have.

Equivalent foreign laws on direct actions. I suppose that there is no need to provide that the corresponding provisions of a foreign equivalent Act do not apply? If the idea is that in England, this Act applies to all direct actions, what would happen if a claim were to be made under an equivalent foreign law (assuming this to be the law otherwise applicable to the direct claim, as to the identification of which there is room for debate) which was more generous in some respect, whether as to the need to obtain a declaration of liability to the insured, or (perhaps more plausibly) as to limitation? I do not see anything in the Act which prevents a claimant seeking to rely on a foreign equivalent law. It will not be easy for him, not least because the jurisdictional rules which allow service out to be made without permission will not apply. But if the intention is that this Act, and no other foreign analogous law, govern direct claims in England, it may be helpful for it to say so.

A slightly similar issue arose in relation to the Civil Liability (Contribution) Act 1978, in *AMF v Hashim,* in which the judge ventured to suggest that the 1978 applied to the case before him, but if it did not, a foreign law still might do so. The answer to this will, one supposes, depend on whether (the Serco v Lawson point, above) there are cases in which the Act has no application (as distinct from there being cases in which the Act does apply but does not give a remedy, or maybe does not give the third party as good a remedy as, for example, the law which governed the contract of insurance would have done). The Act does not, expressly at least, provide that other laws shall not be available to a claimant, or does not provide that the Act is to be exclusive of all other laws. But if it does not intend to preclude other claims, how is the conflict of laws to be resolved?

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14 January 2010

Memorandum from Maggie Hemsworth,[1] Senior Lecturer, University of Plymouth

OBSERVATIONS AND RESERVATIONS ON THE THIRD PARTIES (RIGHTS AGAINST INSURERS) BILL [HL]

This note seeks to deal with two broad types of reservations: (1) those relating to specific potential problems in the practical application of the provisions, and (2) a general reservation that insufficient attention has been given to the broad issue of third parties' rights in relation to liability insurance.

SPECIFIC PROBLEMS

1. (a) Transfer of the insured's rights to the third party claimant arises on the double trigger of insured insolvency made manifest and the occurrence of insured liability as a matter of fact and law (clauses 1, and 4–7 of the Bill). The sequence of these two events is not significant for this purpose. However, clause 1(1)(a) is likely to be far more limited in practical scope than clause 1(1)(b): the insolvency regimes are necessarily temporary and, for example, bankruptcy and administration are both likely

[1] *Note by the Clerk:* Mrs Hemsworth has indicated that she cannot give oral evidence on either of the dates set aside for evidence taking.

to end at the 12 month point. So for clause 1(1)(a) it is a matter of chance whether the event of liability takes place during this period as appears to be required (see clauses 4 and 6 which are expressed in the present tense when speaking of the insolvency regimes). It is likely that a court would seek out the accrual of the cause of action as the critical date, as it does for the purposes of limitation so there are likely to be arguments and proceedings on this point alone.

By contrast, where the sequence of events is as required in cl 1(1)(b) the field of claimants will be potentially greater (liability pre- insolvency is more likely as a matter of fact simply because the transfer of insured rights will take place automatically on the making, eg, of the Bankruptcy Order, and will at that date take in all prior acts or omissions of the insured as may give rise to claims; in addition, the insured is more likely to be commercially active prior rather than post insolvency and it is his commercial activity that commonly gives rise to liability). However, where liability has taken place pre- transfer the claimant is in a difficult position with regard to the applicable limitation period. He may be able to delay commencing his claim for some time and might be minded to do so where there is a realistic prospect of the insured entering into one of the insolvency regimes in the short term but, for example, personal injury claimants are subject to a relatively short time period, currently 3 years as a primary period (Limitation Act 1980, s.11). Contract based claims and other kinds of tort based claims have a more generous 6 year period. The ethos of civil procedure is to commence proceedings in a timely fashion albeit that any such proceedings are viewed as the last resort. Furthermore, claims up to £25,000, being the current Fast Track limit (CPR Part 28), tend to be managed such that trial takes place within a target of 8 months. Unless the insolvency of the insured has already taken place the claim will likely be considered by a court prior to any statutory transfer of rights as envisaged by the Bill. Thus, many claimants will need to proceed without any benefit from many of the provisions of the Bill.

(b) The transfer of insured rights takes place in an automatic fashion (cl 1(2)). Yet there may be multiple claimants (either one event giving rise to multiple claims or multiple events in any given insured period).The Bill does not appear to address this. It thus appears that claimants may find themselves in some kind of race with person(s) unknown in order to claim on insurance monies before any applicable insurance limit is reached. It is not clear how this would be managed.

(c) The Bill appears to be silent on the position where there is an annulment of say the Bankruptcy Order (Insolvency Act 1986, section 282).

(d) There appears to be no express provision for administration other than by Order (clause 6) (Insolvency Act 1986, Part II and Schedule B1).

(e) The third party claimant is only in a position to fulfil certain insurance conditions once the insured's insolvency has become manifest in accordance with the basic provisions of the Bill (clause 9). This is likely to be limited in practical application because the management of many insureds will be less efficient and less observant of insurance terms and conditions during the 'twilight period' in the run up to manifestation of insolvency (see, for example, *George Hunt Cranes Ltd v Scottish Boiler and General Insurance Co Ltd* [2002] Lloyd's Rep. IR 178, CA). Moreover, the occasions on which the claimant can fulfil obligations on the insured by cl 9(3) is somewhat limited.

(f) The anti-avoidance provisions of clause 16 will not be sufficient to prevent compromises as between insured and insurer prior to manifestation of the insured's insolvency; perhaps this is intentionally so. The anti- avoidance mechanisms of the Insolvency Act 1986, most notably sections 238, 339 and 424, may not be adequate. There is some potential for a claim, albeit at considerable cost, to seek and obtain a freezing order (CPR Part 25, and see on this *Normid Housing Assoc Ltd v Ralphs (No 2)* [1989] 1 Lloyd's Rep. 274).

(g) The information a claimant would need in practice would extend to the potential for competing claimants under the policy; this is not listed in the current Bill, schedule 1. Claimants need to be able to estimate the amount available under the policy. It is not clear whether the obligation to give information is a once only obligation or whether it continues as it would under CPR Part 31. The penalty is not clear; is it intended that contempt proceedings are possible for knowingly false statements?

General Reservation

2. These specific practical problems indirectly raise a more general or broad reservation about the current proposals for reform.

The provisions create a perverse incentive in forcing an insured defendant into one of the insolvency regimes. A personal injury claimant, for example, would have difficulty doing so prior to Judgment or an Order for interim payment (CPR Part 25) but could do so at that stage. Courts may be faced with difficult decisions on petitions to wind- up or make bankrupt. Such claimants would also have incentive to vote in favour or a CVA/ IVA simply to bring about the trigger of transfer of rights. There is some time pressure on a claimant in this regard given that he would be subject to a limitation period (presumably six years as contract) from the date of his own judgment (cl 12 of the Bill).

Moreover, it is a basic premise of insolvency law that existing rights and obligations as between insolvent and third parties are not altered merely by the fact of insolvency. The 1930 Act is one exception to this and there are others of course, primarily preferential creditors under Sch 6 of the Insolvency Act 1986. These exceptions are usually the product of social and or political desires. They need however, to be carefully considered. It is also a basic principle of insolvency law that the entirety of the insolvent's assets should be made available for the creditors as a group and in accordance with the statutory scheme of distribution. Little objection is likely where insurance monies on property fall into the assets of the insolvent on the loss or destruction of the insured property: one asset is merely replaced by another. Liability insurance differs in that although the policy is an asset it serves to indemnify for a loss/liability rather than to replace a lost asset. The Law Commission's standpoint and thus the stand point taken in the Bill is to respect the philosophy of the 1930 Act. Thus, there has been no debate on the position of liability insurance more generally. There has been no consideration of whether it might be right to remove the requirement of any manifestation of insured insolvency as a precondition for transfer of certain rights to third parties.

As is well known the 1930 Act came into being in order to remedy a perceived anomaly displayed in Re Harrington Motor Co ex., p. Chaplin [1928] Ch 105 and in *Hoods' Trustees v Southern Union Ins Co of Australasia Ltd* [1928] Ch 793. The position of motor accident claimants is now radically different, being the product of discrete reform from 1930 and more recently the product of EU Directives. The motor claimant is now the exception rather than the classic example of the norm; he has a direct right of action against a liability insurer regardless of the insured's financial position. This kind of claimant does not need to rely on the provision of law first developed for his benefit.

The current reform has not dealt with the larger issue of whether review more generally should take place; specifically whether it is right that motor claimants should be treated as a distinct group, and whether it is right that all other types of claimants are unable to make direct claim on a liability insurer unless the insured is insolvent. It is hard, for example, to justify the position of, say, a postman injured whilst on his rounds by a speeding motorist who is able to make direct claim on the liability insurer regardless of the solvency of the motorist, but who if injured when attempting to deliver post as he falls into unlit excavations around a householder's property is unable to make a similar claim unless and until the householder is insolvent.

18 January 2010