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EMPLOYERS' LIABILITY INSURANCE WORKING PARTY

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Summary

The paper summarises the background to UK employers' liability insurance. The paper provides an update to a similar paper presented to the Institute of Actuaries' 1990 General Insurance Convention. Some, but not all, of the issues considered in that earlier paper are re-addressed within this paper.

It is hoped that the paper will serve as a useful reference point for this area of insurance, providing detail of the legal and contractual framework, the market's size and current major players, key features of claims and claims reserving and a discussion of current issues affecting this market.

While it was hoped to cover underwriting and rating this was not done. These topics were touched upon in a 1997 General Insurance Convention paper: "The Premium Rating of Commercial Risks".

EMPLOYERS' LIABILITY WORKING PARTY

CONTENTS

1 Introduction

1.1 The working party set out to summarise the background and current state of this relatively large component of the UK liability market. A similar report was presented at the 1990 General Insurance Convention. It was felt that much had changed and an update was overdue.

1.2 The working party hopes that a 'state-of-play' summary will form the basis of further research into claims and underwriting in this area. However, the difficulty of gathering reasonable quantities of claims data must be overcome if this is to be pursued. The working party is hopeful that representatives of the major players in this market will put themselves forward for a future working party to tackle this issue.

2 Legal and contractual framework

2.1 This section of the paper sets out the current legal and contractual framework for employers' liability insurance, and the history leading up to it. The section contains the following sub-sections:

- Employers Liability (Compulsory Insurance) Act 1969
- Policy wordings
- Sources of liability under the 1969 Act
- Excess and self-insurance
- Reinsurance
- Comparison with other countries
- Historical developments.

Employers' Liability (Compulsory Insurance) Act 1969

2.2 The Employers' Liability (Compulsory Insurance) Act 1969 ('the 1969 Act') introduced compulsory insurance of an employer's liability to his own employees for damages. This remains the prevailing piece of employers' liability legislation.

2.3 The 1969 Act requires all employers carrying on business in Great Britain to insure their legal liability for injury or disease sustained by their employees, arising out of and in the course of their employment under approved policies with an authorised insurer. Certain government departments and public authorities are exempt and there is no compulsion to insure in connection with the employment of domestic servants, certain close relatives and persons normally employed abroad.

2.4 For the purposes of the 1969 Act:

- "approved policy" means a policy of insurance not subject to any prohibited conditions or exceptions
- "authorised insurer" means a person or body of persons lawfully carrying on, in Great Britain, insurance business of any class relevant for the purposes of Part II of the Companies Act 1967
- "employee" means an individual who has entered into or works under a contract of service or apprenticeship with an employer whether by way of manual labour, clerical work, or otherwise, and whether such contract is expressed or implied, oral or in writing.

2.5 Provision is also made under the 1969 Act for regulations regarding the amount of employers' liability insurance that must be provided, and for the issue and display of certificates of insurance.

2.6 The Isle of Man, the Channel Islands and Northern Ireland have their own separate, but similar, legislation regarding compulsory insurance against liability for bodily injury or disease sustained by employees.

The Employer's Liability (Compulsory Insurance) General Regs 1971

2.7 The 1971 regulations made the 1969 Act effective from 1 January 1972.

2.8 Under these regulations certain policy conditions are prohibited, including those relating to the requirements on the insured to take reasonable care to prevent injury and any condition requiring the insured to comply with statutory regulations.

2.9 The regulations do not interfere with the freedom to apply underwriting conditions; for example, concerning various types of hazardous work. To provide a specific example, in A J Dunbar v A & B Painters Ltd and Economic Insurance Co Ltd (1986) the insurer was able to repudiate liability for work injuries sustained while working at a height exceeding 40 foot when the policy contained a clause excluding such claims.

The minimum amount of cover required by Law

2.10 The statutory minimum level of cover was set at £2 million per occurrence by the 1971 regulations. In practice, until 1995, the insurance industry provided an unlimited amount of insurance under employers' liability policies; since 1995, most insurers have provided a standard indemnity limit of £10 million. (Offshore risks are an exception to this, where limits of indemnity of usually £2 million were introduced from 1 January 1993. See paragraph 2.13 below.) The withdrawal of unlimited cover can be attributed to the unsatisfactory claims experience of the employers liability market at the time, coupled with increasing concern over potential large exposures. Reinsurers had also become increasingly reluctant to provide protection for direct insurers on an unlimited basis in the light of large claims such as the Piper Alpha catastrophe in 1988.

2.11 The withdrawal by insurers of unlimited cover prompted a Government review of employers' liability insurance and led to the introduction of The Employers' Liability (Compulsory Insurance) Regulations 1998 which came into force on 1 January 1999.

The Employers' Liability (Compulsory Insurance) Regulations 1998

2.12 The Employers' Liability (Compulsory Insurance) Regulations 1998 ('the 1998 Regulations') consolidate with amendments the 1971 Regulations and subsequent amending regulations made under the 1969 Act. The regulations supplement the provisions of the 1969 Act. The main changes made by the 1998 Regulations are as discussed below.

2.13 The 1998 Regulations raised the minimum indemnity limit to £5 million. As insurers generally were already providing £10 million this has had little effect other than for offshore risks. In practice, while many insurers had only been providing £2 million offshore, top-ups to this limit were readily available in the market and many insurers are now providing £5 million as standard for offshore risks. (It should be noted that the regulations provide for employers to insure under one or more approved policies. An insurer does not have to provide the minimum prescribed by law, the minimum limit could be provided under two policies provided by two different insurers. In practice most insurers do provide the minimum amounts of cover.)

2.14 The 1998 Regulations require that the Employers' Liability Certificate issued to an employer should provide more information about the cover than the previous regulations. The employer is now required to retain each certificate issued to him for a period of 40 years. The intention behind this is to make it easier to identify the relevant insurer(s) and, consequently, easier for injured employees to bring their claims. The code of practice for tracing employers' liability policies, which was recently introduced, is discussed in detail in section 6.

Policy wordings

2.15 Wordings vary between insurers but an employers' liability policy must meet the requirements of the 1969 Act and its regulations. The basic wording must provide an indemnity to the insured (the employer) for legal liability for damages (including claimant's costs and expenses) in respect of bodily injury, death, disease or illness sustained by any person under a contract of service or apprenticeship with the insured and caused during the period of insurance, which arises out of and in the course of their employment by the insured in connection with the business and occurring within the territorial limits. It is not intended that this paper should include a full analysis of the wording of an employers' liability policy. However, some of the more important phrases and points are discussed below.

Bodily injury

2.16 The wording will generally refer to bodily injury not personal injury. The distinction is important as the latter term could include non-bodily injury claims such as defamation of character or discrimination under race relations or sex discrimination legislation. The term bodily injury includes nervous shock.

2.17 It should be noted that while ordinarily acts of discrimination are not included within the definition of bodily injury, an act of discrimination that results in mental distress might be included and, if so, would be covered under the policy.

Arises out of and in the course of their employment

2.18 This wording was used in the Workmen's Compensation Acts (which preceded the 1969 Act) and was included in the wording of the 1969 Act. There have been many legal cases on interpretation of this wording, particularly in relation to the time of starting and finishing work. When an employee enters their employer's premises for the purposes of going to work they are usually acting in the course of their employment the moment they pass through the boundary gates.

Trade or business

2.19 The injury or disease must arise in connection with the business. Trade or business is a vital rating factor with this type of insurance. The definition of "business" is usually extended to include such things as the provision and management of canteens, clubs, first aid and welfare facilities for the benefit of employees.

Caused during the period of insurance

2.20 The policy responds to injuries or diseases etc caused during the period of insurance. Under Limitation Acts, an employee has to bring an action within three years of the date that he or she became aware of the injury or disease. In the case of diseases, such as asbestosis, it may be many years after the exposure before the employee becomes aware of the disease and subsequently brings a claim.

2.21 A major problem for insurers has been that given the very late reporting of some claims, the premiums paid by employers 30 or 40 years ago do not bear any correlation to the size of compensation awards made for diseases when the claim is settled many years later. Whilst insurers have discussed changes to the wording, such as a move to a claims made basis of cover, this would require a change of legislation. Even if such a change were possible the Government would want assurances that employees would be compensated. There are no current moves within the market to table such a change with the Government.

Sources of liability under the 1969 Act

2.22 The rules of law relating to employers' liability do not constitute a separate and distinct law of tort or negligence. In short there are two sources of liability: negligence and breach of statutory duty. The employer owes a duty of care to its employees and the standard of care owed is that of a reasonable employer. However, it is fair to say that the duty is a high one. Judges are aware that, with employers' liability insurance being compulsory, there is insurance available to pay for any damages award made. Consequently, judges are inclined to rule in favour of the injured employee if possible within the existing framework of the law.

2.23 The sources of an employer's liability to his or her employees can be summarised as follows:

- Under Common law:
  - personal negligence
  - duty to select competent employees
  - vicarious liability for the negligence of fellow servants
  - duty to provide and/or maintain suitable and safe plant and machinery, a safe place of work and a proper method of working.
- Under a Breach of Statutory Duty:
  - personal negligence. This is simply the employer injuring an employee by, for example, dropping a brick onto the employee's head.

2.24 There are several key duties that an employer has to meet or face liability under the 1969 Act. These duties are:

- to employ competent employees. Their competence only relates, however, to any possible injury they may cause. This duty is of little importance now because of the vicarious liability for negligent fellow employees
- to take reasonable care in:
  - providing their employees with the necessary plant and equipment with which to do their job
  - providing them with sufficient plant
  - ensuring plant is suitable for the task and not defective
  - maintaining plant and other equipment.
- to take reasonable care for the safety of the premises where employees are asked to work. This includes access to and egress from the employee's place of work
- to establish and enforce safe systems of work. This covers such things as the planning and co-ordination of the work of employees or departments, the layout of machinery, the provision of protective clothing and the provision of instruction, training and supervision.

2.25 An employer is now vicariously liable for the negligent acts of employees one to another. However, before 1948 a doctrine existed known as the doctrine of common employment. This meant that the employer was not liable for the injury to an employee if it was caused solely by the negligence of a fellow employee. This was regarded as something that an employee had to accept as part of their working conditions. The rule was abrogated by the Law Reform (Personal Injuries) Act 1948.

2.26 Prior to the Employers' Liability (Defective Equipment) Act 1969 an employer could defeat an action by an employee injured due to defective plant if he could show that the plant was purchased from a reputable supplier with no apparent defects. This meant that the injured employee had the potentially difficult task of proving negligence against the manufacturer. The Act imposes a strict liability on employers for injury caused by defective plant. The employer, or in practice the insurer in the name of the employer, could then seek rights of recovery against the manufacturer.

2.27 Most duties imposed by the statutes relevant to employers' liability are for the protection of workers and most carry with them the right to sue in civil law for breach of statutory duty. Some regulations are absolute and some must be complied with so far as reasonably practicable. The statutes and regulations made under them are very detailed and it would be impossible and probably not appropriate to review them in this paper. However, some of the more important statues/regulations are discussed below.

2.28 The Factories Act 1961 is still important, not only because of its wide range but because it is an enabling Act and regulations can be made under it without further recourse to Parliament. Current regulations made under it include the Construction Regulations and the Woodworking Machines Regulations. The Factories Act represents the "old style" approach to regulation and is very prescriptive e.g. it states that "refuse shall be removed once daily... the floor shall be cleaned at least once a week"

2.29 The philosophy behind the Health and Safety at Work etc Act 1974 ('the 1974 Act'), which is an enabling Act, differs from the former concept of detailed regulations. It was felt that the masses of detailed regulations, such as those contained in the Factories Act, were self-defeating. It was very difficult even for the most safety conscious employer to be knowledgeable of all the regulations that could apply to them.

2.30 One of the main objectives of the 1974 Act is to replace all previous piecemeal legislation. This is achieved by regulations made under the 1974 Act normally based on recommendations made by the Health and Safety Commission. The regulations generally fall in to three types:

- general regulations applying to all jobs
- specific regulations applying to certain industries
- specific regulations applying to certain particular types of hazard found in some industries.

2.31 The purpose of the Control of Substances Hazardous to Health Regulations 1988 ('COSHH'), which came into full effect on 1 January 1990, is to protect employees and others from exposure to substances likely to damage their health.

2.32 Following on from the COSHH Regulations, the UK enacted the 'six-pack' of Health and Safety Regulations during 1992 under the 1974 Act. This was done in order to implement the 1989 EC Health and Safety Directive which intended to create the framework for a safe working environment across the EC. The six regulations are as follows:

- Management of Health and Safety at Work Regulations 1992
- Workplace (Health, Safety and Welfare) Regulations 1992
- Provision and Use of Work Equipment Regulations 1992
- Manual Handling Operations Regulations 1992
- Personal Protective Equipment at Work Regulations 1992
- Health and Safety (Display Screen Equipment) Regulations 1992.

Excess and self-insurance

2.33 The legislation prohibits any excess or deductible in respect of a claim or aggregation of claims. However, an employer can effect self-insurance in two ways. Firstly, the legislation does not prohibit a provision in a policy whereby the insured reimburses the insurer up to a stated amount per claim after the insurer has settled a claim. In this way the employer can effect an insurance excess and as a consequence by taking on a level of risk, hope to reduce overall costs. Given the structure the interest of employees is safeguarded. In practice excesses in employers liability polices are not common.

2.34 The second method is for the authorised insurer to reinsure to a captive insurer owned by the employer. Generally, the lower level claims are reinsured in this case.

Reinsurance

2.35 The paper of the 1990 working party dealt with employers' liability reinsurance requirements both from the perspective of the insurer and the reinsurer. For the purposes of this section the one significant change worthy of mention since 1990 is the cessation of unlimited liability in 1995 (see above). Although legally insurers are only obliged to provide a limit of £5m per occurrence, most insurers are providing a limit of £10m as standard (excluding offshore risks).

2.36 The withdrawal of unlimited cover led to the creation of an excess employers liability insurance/reinsurance market. The excess insurers insure claims amounts over and above the underlying cover. Because multi-million pound employers liability claims are still rare excess employers liability insurance/reinsurance is fairly freely available and relatively cheap.

Comparison with other countries

2.37 The 1990 working party covered this issue also in some detail. In summary they listed the key features of the main alternative: integrated workers compensation. Used by countries including the USA, Canada and Australia, the key features of workers compensation systems include:

- the principle of no fault
- standardised benefits
- limited rights to sue at common law
- extended compensation to include medical costs, rehabilitation programmes and compensation for pain and suffering (again on a standardised basis).

2.38 A possible topic for future investigation might be a more in depth analysis of the advantages and disadvantages of the system adopted in the UK relative to those used elsewhere. This was not investigated by this working party.

Historical developments

2.39 The historical development of employers' liability legislation provides a context for the current position. The concept of employers' liability has existed in common law since 1837. During the 100 years or so that followed three phases can be distinguished.

Early nineteenth century

2.40 At this time the view was that if a person entered dangerous employment he accepted its risks and would make his own provision for any injury or death that might result from an incident. The first case of an employee bringing an action against his employer is Priestly v Fowler (1837). This case had far reaching effect since it laid down the doctrine of common employment. Under this doctrine an employer was not liable for injury suffered by an employee as a result of an act of a fellow employee in common employment with him.

Mid nineteenth century

2.41 This was the beginning of the recognition that protection was needed for employees exposed to dangerous conditions of work. Mining casualties, factory and railway accidents led to the introduction of the Employers' Liability Act 1880. However, this only applied to railway and manual workers and the extent of damages that could be awarded was limited to three years wages. The Act was of limited benefit to employees.

2.42 In 1897 the first Workmen's Compensation Act (the Work Act) was passed which covered most hazardous work. This provided automatic compensation to be paid by the employer to an employee in respect of injuries arising out of his employment and resulting in incapacity for work. By 1925 various Acts had been introduced to extend the principles of the Work Act so that compensation would be made for diseases as well as injuries. However, while the Acts did not modify an employee's rights to damages under common law, the employee had to choose between the two i.e. accepting the Work Act payment or suing his employer for damages.

2.43 While the above developments were taking place a broad new stream of common law had arisen known as breach of statutory duty. The development of factory law and safety requirements had already begun with the Health and Morals of Apprentices Act 1802 and began to take a modern form in the Factories Act 1844. This contained the requirement, for example, that dangerous machinery must be fenced while in motion. From 1898 it became established law that, if a statute imposed duties but gave no special remedy, a person injured by breach of statute could bring an action for damages under common law.

Modern developments

2.44 Increasingly modern case law is as much in favour of the employee as case law of the nineteenth century was against him. Many changes have been made by legislation and by steady extension of the safety codes.

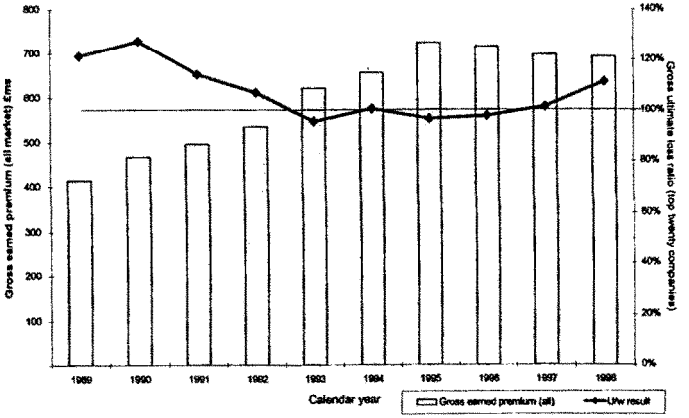
2.45 Under the Law Reform (Contributory Negligence) Act 1945, contributory negligence lost most of its force as a defence. Previously an employee who was found guilty of contributory negligence could recover nothing. This contrasts with the current situation where claimants' damages are reduced in proportion to their own negligence in attaining their injuries. The Law Reform (Personal Injuries) Act 1948 abolished the "doctrine of common employment" and an employer is now liable for the injury suffered by one employee caused by the negligent act of a fellow employee (vicarious liability). The Employers' Liability Act 1880 and the Workmen's Compensation Act 1925 were repealed, and an employee no longer had to choose between compensation under Workmen's Compensation Acts or seeking damages. The Workmen's Compensation Acts were replaced by a state insurance scheme introduced by The National Insurance (Industrial Injuries) Act 1946.

2.46 Finally, the Employers' Liability (Compulsory Insurance) Act 1969 introduced compulsory insurance of an employer's liability to his own employees for damages.

3 UK market overview

3.1 This section provides an overview of this significant UK market.

3.2 The total gross written premium for liability insurance in the UK for the 1998 calendar year was £2.6 billion. Of this total, employers liability forms the largest component. While comparable written premium figures for Employers Liability are not available, the gross earned premium for the 1998 year was £697 million, excluding that business written through Lloyd's. The graph below shows the gross earned premium over the past ten years against the gross ultimate loss ratio (for the twenty largest companies).



[Source: ABI]

3.3 To put this premium in perspective, the total gross written premiums for all UK risks in the 1998 calendar year were £26.5 billion. A basic split is given in the following table:

Class	Gross written premium £ms
Motor	8,345
Accident and Health	4,138
Property	8,239
Employers liability	693
Other general liability	1,948
Pecuniary loss	3,098
Total	**26,465**

[Source: ABI]

3.4 The table below shows the current dominance of the top ten companies by premium volume. For comparison similar details from the 1988 year are also shown:

	1988 GWP £m		1998 GEP £m
Eagle Star	84.1	Zurich	161.9
Iron Trades	58.4	CGU	131.8
GRE	50.1	RSA	105.5
Sun Alliance	29.6	Axa/Guardian	91.0
General Accident	24.1	Iron Trades	51.7
Zurich	20.9	Independent	33.1
Commercial Union	20.8	Norwich Union	27.6
Municipal Mutual	16.0	Cornhill	24.9
Norwich Union	14.6	Winterthur	17.3
Royal	13.9	National Farmers Union	17.0
Sub-total	332.5		661.8
the rest (excluding Lloyd's)	64.9		31.1
Total	397.4		692.9

[Sources: 1990 EL Working Party Paper and the ABI for 1988 and 1998 respectively.]

3.5 In 1988 the top three companies held just over 48% of the overall premium, in 1998 this percentage was close to 58%. While data for the 1999 year was not available at the time of writing, by combining Norwich Union and the CGU the top three would control 62%. It will be interesting to observe whether market forces will redistribute this position.

3.6 As noted in section two, under direct retention of risk and the use of fronting arrangements, employers are able to retain a reasonable amount of risk. The use of captive insurers as a mechanism for effecting self-insurance is well established. While accurate information is unavailable, the writers expect that the premium reinsured into captive insurers might represent up to 10% of the overall market.

Key market sectors

3.7 In addition to the number of employees, turnover and payroll, other key dimensions used by underwriters are 'industry' and geographical location. A split of premium volume by sector was sought but again reliable data was not attainable at this time. The 'industry' sectors used vary from insurer to insurer, but the following are reasonably indicative:

- Agriculture
- Clerical
- Construction
- Distribution trades
- Food and drink
- Government body
- Mines and quarries
- Other manufacturing
- Textiles
- Transport
- Utilities.

A bundled product

3.8 Most employers will purchase employers liability cover as part of a package or as part of 'combined liability' cover. Combined liability cover might include employer liability, public and professional liability and maybe even an element of directors and officers cover. A breakdown of the employers liability market into those policies sold with and without accompanying protection was sought but was unavailable in any reliable form.

3.9 The product distribution channels vary. In most cases the major players are happy to accept business with or without the involvement of an intermediary but practice does differ from insurer to insurer.

A competitive market

3.10 This is a very competitive market. The relatively standard basis of cover has driven competition on the basis of price. However, employers are also looking for the insurer to play a role in handling claims and providing up to date support. While the market remains very price sensitive, insurers seek to differentiate themselves on the basis of inclusion of associated services within the cover provided. These services are generally of a risk management nature, for example health and safety training and audits.

4 Claims

4.1 This section discusses the main claim types that affect employers' liability insurance in the UK. Employers' liability claims are normally divided into two main groups: injury claims and disease claims. Injury claims normally relate to a specific single incident although some back and other injuries can be caused by prolonged exposure. Nevertheless, for claim purposes a specific date is chosen for injury claims. Disease claims are usually caused by exposure to a harmful substance or working conditions over a significant period.

Injury claims

4.2 There is a wide range of severity of injury claims from cuts and bruises caused by trips and falls to accidents causing serious injuries or even death. The cost of a claim can similarly vary from a few hundred pounds up to £1 million or more.

4.3 The mix of injury claims by severity tends to differ between motor and employers liability insurance. Motor insurance usually produces a higher proportion of very large injury claims than employers' liability insurance produces.

4.4 The Health and Safety Executive ("HSE") provides statistics on the number of occupational injuries at work. Their statistics exclude a number of types of injuries including those that result in less than three days off work. The overall figures for 1991/92 are summarised in the table below. The HSE statistics provide more detailed analysis of many factors including the type of injury and the accident rates by industry.

	Injury rates per 100,000 employees in 1991/92
Fatal	1.5
Major injuries	82
Over three day injuries	710

[Source: Occupation Health; Decennial Supplement]

Disease claims

4.5 A wide range of industrial disease claims has been reported to insurers. Some of the more common diseases include industrial deafness, vibration white finger, asbestos related conditions including asbestosis and mesothelioma, repetitive strain injuries ("RSI") and asthma.

4.6 Disease claims represent a significant proportion of both the number of employers' liability claims and the cost of employers' liability claims. The following table shows the number of disease claims reported over the last eight years together with the proportion of employers' liability claim numbers and claim costs represented by disease claims.

Year of Notification	Number of disease claims	Number of disease claims as a proportion of total employers' liability claims	Cost of disease Claims as a proportion of total employers' liability claims
1991	57,653	47.1	23.0
1992	65,007	51.8	23.2
1993	68,671	56.6	25.2
1994	51,857	46.8	22.3
1995	43,312	41.3	24.8
1996	41,666	38.1	19.9
1997	37,386	34.3	17.3
1998	36,628	31.5	18.0

[Source: ABI]

4.7 The average cost of occupational disease claims reported in 1998 was around £5,000 although this figure has risen rapidly during the 1990s as the proportion of deafness claims falls and the proportion of the more expensive asbestos related claims rises.

4.8 Disease claims, by their nature, are caused by exposure over a significant period. For example, industrial deafness is caused by exposure to excessive levels of noise with inadequate ear protection. The exposure to such excessive noise often continues for many years. A "date of occurrence" cannot be determined in the same way as for injury claims. Nevertheless, it is necessary for insurers to determine which policy year(s) to allocate a given claim. This allocation is particularly important if the insurer has changed during the period of exposure.

4.9 There are many possible "triggers" which could be used to allocate disease claims to exposure periods. In practice, for most disease claims in the UK, the claim is normally spread over the alleged period of exposure. For example, if a mesothelioma claim is filed alleging exposure to asbestos dust from 1950 to 1969 the claim would be spread over the policies in force in this period with one twentieth of the claim being allocated to each year. The claim is normally handled by the current insurer, if that insurer has a share of the claim cost. The current insurer then seeks contributions from any other insurers that provided cover during the period of exposure.

4.10 The procedure described in paragraph 4.9 applies to diseases known as "long tail" including asbestos related conditions, industrial deafness and vibration white finger. Some diseases including asthma, dermatitis and RSI are, by agreement between insurers, normally treated as "short tail". For short tail diseases the full claim is paid by the insurer who provided cover on the date of manifestation of the disease. In most cases, this is the current insurer.

4.11 We have set out below a discussion of the key features of a number of the most important disease claims.

Industrial deafness

4.12 Industrial deafness is the most common type of disease claim. For notifications in 1998, deafness claims represented 66.2% of disease claims by number.

4.13 Industrial deafness is caused by exposure to excessive levels of noise at work, often for extended periods. The possibility of excessive noise causing industrial deafness was first recognised in 1963 when a pamphlet "Noise and the Worker" was published. Any exposure which took place before 1963 is normally treated as non-negligent and no compensation is payable. The year 1963 is known as the "date of knowledge" for industrial deafness.

4.14 In 1974 the Health and Safety at Work Act and guidance notices from the Health and Safety Executive Code of Practice were introduced. The notes included guidance on how the exposure of employees to excessive noise could be reduced. Further pressure on employers to reduce exposure to excessive noise followed the 1986 EEC directive entitled "The protection of workers from risks related to exposure to noise at work" which was implemented in the UK under the 1989 Noise at Work Regulations.

4.15 The average cost of a deafness claim varies depending on the severity of the hearing loss. The largest claims involve cases where hearing loss produces a loss of earnings. Typical average claims are currently around £2,000 to £4,000 for 100% of the claim. The actual average claim for a given insurer is often rather lower, as the claim costs are spread over the period of exposure and many insurers may be involved. Over the last decade average claim costs have increased only very slowly, and in some cases have reduced, as the more serious claims were generally reported in the 1980s and early 1990s. Since then, increased awareness of the need to reduce exposure to excessive noise has led to a reduction in the number of serious cases.

4.16 Until 1998 many claims were handled under the "Iron Trades agreement". This provided defined compensation to any member of a specified Trade Union who suffered measurable hearing loss based on an audiometer reading.

4.17 The numbers of deafness claims reported to insurers reached a peak in the early 1990s. No doubt the high level of redundancies in this recessionary period had an influence on claim levels. Since the early 1990s the number of claims reported have reduced steadily as is evidenced by the ABI figures given in paragraph 4.6 (deafness claims have generally represented around 75% of total disease claims by number).

Asbestos related claims

4.18 There are four main types of asbestos related diseases. Mesothelioma is a cancer of the lining of the lung which is almost always fatal within eighteen months of diagnosis. Fibrosis of the lung tissue is known as asbestosis and can range from mild cases with little or no symptoms to fatal cases. Asbestos exposure is also believed to increase the risk of lung cancer. The final and usually least serious type of asbestos related claim is pleural thickening.

4.19 Asbestosis can only be caused by asbestos exposure and while the association between mesothelioma and asbestos exposure is very strong it is believed that there is a very low natural background level of mesothelioma. In contrast, the predominant cause of lung cancer is smoking although asbestos exposure is believed to increase the risk of lung cancer. In order to obtain compensation for asbestos related lung cancer in the UK, the claimant has to demonstrate a clinical sign of asbestos exposure in addition to lung cancer.

4.20 The latency period (the delay from the exposure to asbestos to the manifestation of the disease) is very long for all of the asbestos related conditions. For example, for mesothelioma, the latency period is often over 50 years.

4.21 Claim amounts vary between the four different diseases and by the severity of the condition. The largest claims involve loss of earnings although this is relatively rare as the long latency periods mean that manifestation is often after retirement. Typical average claims for each of the four disease types are set out below. These average claim sizes are for 100% of the claim and so individual insurers may well have lower averages, as claims are often shared between insurers (as discussed above).

	Typical average claims £000s		
Mesothelioma	80	-	100
Asbestosis	25	-	35
Lung cancer	50	-	70
Pleural thickening	8	-	15

4.22 The frequency of asbestos related diseases in a group of workers is obviously dependent on the extent of the exposure to asbestos. There are a number of different types of asbestos, the most dangerous of which is crocidolite or blue asbestos. Workers with the highest frequency of asbestos related conditions were generally asbestos miners in Australia and South Africa. In the UK the occupations with the highest level of mesothelioma include metal plate workers, plumbers, gas fitters, carpenters, electricians, construction workers and production fitters.

4.23 Based on ABI statistics, asbestos related conditions produced 9.7% of industrial disease claims reported in 1998. The proportion has risen steadily from 2.4% in 1991. The differing characteristics of the four asbestos related diseases usually necessitate separate projections for each disease. Unfortunately, the ABI does not provide separate statistics for each disease type.

Vibration white finger

4.24 Vibration white finger ("VWF") is damage to the fingers of the hand caused by vibrating tools. In its mildest form VWF is a blanching of the tips of the fingers with no other symptoms. More serious cases involve vascular damage and can result in a loss of use of a number of fingers. The severity of cases is graded on the Stockholm scale which ranges from 0 (minor symptoms) to 3 (severe symptoms).

4.25 The date of knowledge for vibration white finger is 1976 and exposure before this date is generally seen as non-negligent.

4.26 ABI statistics show a significant increase in VWF claims reported in 1996 and 1997. In 1998, VWF claims represented 11.6% of industrial disease claims reported. Many insurers have seen a further increase in claim numbers in 1999, probably caused by the publicity surrounding a number of test cases which examined the appropriate level of damages for VWF.

4.27 Average claims are currently around £12,000 to £15,000 (again for 100% of the claim). The average cost has increased significantly in recent years following various test cases. The extent of the increases can be judged from the increase in the Judicial Studies Board guidelines for general damages from the third (1996) to the fifth (2000) edition.

Other diseases

4.28 Based on ABI Statistics, deafness, asbestos related claims and VWF represent 87.5% of industrial diseases reported in 1998 by number. The remaining 12.5% is made up as follows:

	Proportion of disease claims reported in 1998
	%
Upper limb disorders	7.4
Skin diseases	1.6
Asthma	2.0
Lung disease other than asbestos related	1.0
Stress	0.3
Other cancers	0.3
Total	**12.5**

4.29 Upper limb disorders (often known as repetitive strain injury, RSI or tenosynivitis) represent the majority of these claims. RSI is essentially aches and pains felt when a task is performed repetitively. In the workplace this most commonly occurs from excessive use of a keyboard. RSI is one of the diseases normally treated as "short tail" by insurers and therefore allocated to the policy year of manifestation.

5 Claims reserving

5.1 This section of the report deals with the specific issues surrounding the formation of actuarial reserves for employers' liability claims. As discussed in section 4, the nature of employers' liability claims differs significantly between injury and disease claims. It will be no surprise therefore that the appropriate reserving techniques differ between injury and disease claims also. This section, therefore, deals with injury and disease claims separately.

Injury claims

5.2 For injury claims, the most common reserving methods are chain ladder and average cost per claim methods, based on either paid or incurred claims data. Large claims, especially for small accounts, and calendar year effects for example due to legislative changes and alterations in case estimation practices, can cause problems when applying traditional reserving methods. This is because in these circumstances the assumptions underlying the traditional methods, namely consistency between the past and the future, do not hold.

5.3 Difficulties may also arise if the available data covers only a limited period. In this circumstance benchmarking and curve fitting methods would generally be considered in selecting a 'tail-factor' beyond the development period for which the latest data is available.

5.4 Given the long tail nature of the claims it is also important to make adequate allowance for inflation. The inflation assumptions, whether implicit or explicit, in any chain ladder method applied should be examined carefully.

5.6 The techniques relevant to injury claims and those mentioned in paragraph 5.3 above, should be familiar to most readers and have been covered fully elsewhere. As a reference point, Appendix B provides an extract relating to employers' liability from the Claims Run-off Pattern Update, presented at the 1998 GIRO Conference.

Disease claims

5.7 Disease claims cannot generally be reserved for using traditional chain ladder methods as the key assumptions of such methods do not hold. In essence, chain ladder methods are not appropriate because of the strong calendar year effects that are often apparent in disease claim development. Calendar year effects often arise from the spreading of disease claims across the period of exposure. As a result, any surge in reporting of claims will cause deterioration across a diagonal. Substantial changes in the level of awards and new treatments can also cause calendar year effects.

Understanding the disease

5.8 As a first step, the actuary should ensure that they have sufficient understanding of the disease from which claims are derived. Answers to the following questions may give an actuary a much better starting point for reserving:

- What causes the condition, e.g. a material, a pollutant, a chemical, working conditions, types of work carried out?
- Are there many types of subsets of the condition which are of significantly different severity or arise from significantly different causes?
- Given the severity of the condition how much is a typical claim going to cost?
- Which age range does the condition effect?
- How long does it take to develop the condition?
- How long is it before the disease becomes manifest?
- Of the claims reported so far, are there any trends, e.g. ageing claimants, all of one sex, all in one geographical area, etc.?
- When did the cause first start to affect employees in general?
- When did the link between the cause and the disease become public knowledge?
- Has the effect been eliminated from industry?

- Which industries does it affect?
- Which of these industries does the insurer(s) whose data is being used insure? Has there been any fluctuation in this market penetration?
- How much potential is there to share the cost with other insurers, e.g. when the employer has changed insurers?
- Do any claim benchmarks exist for the type of disease claim that we are forming reserves for?

Possible reserving approaches

5.9 A working party paper on reserving for unknown liabilities was presented to the 1999 GIRO Conference. This discusses the failings of more traditional methods and discusses alternatives that might be used for newly emerging diseases in detail.

5.10 Another paper, Disease and Employers Liability Claims was presented at the 1994 GIRO Conference which covered reserving and gave detailed discussion on upper limb disorders and RSI, industrial deafness and stress claims.

5.11 For more established and well-known diseases a two step method, relying on numbers of reported claims, average claim amounts and an 'exposure profile' might be used. This is discussed below.

5.12 By plotting the number of claims reported per year we might extrapolate this curve out over the future years for which claim reporting is expected to remain significant. The shape of the curve (height and duration) will depend upon a number of factors including:

- the insurer's market share
- the insurer's period of exposure
- the 'knowledge date' of the disease
- the period where exposure to the disease's cause remained
- the latency period of the disease
- the age of those exposed to the disease.

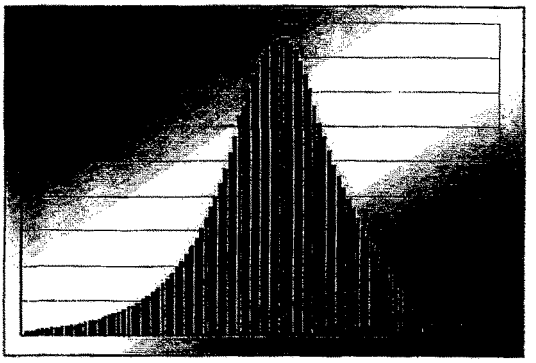
5.13 By multiplying the expected number of claims reported in each future year by an average cost for claims reported in that year, we establish an estimate of total costs per future reporting year arising from the disease. Clearly, the inflation rate used to project the average claim amount will have a significant impact on the ultimate projected claim cost. The actuary must also allow for inflation between date of reporting and date of settlement.

5.14 The second stage is to allocate the costs from each year of reporting back to year of occurrence. By selecting an 'exposure profile' for claims reported in a given year we can spread the costs from the reported claims back over the assumed period of incidence. For example, if our exposure profile suggests that 10% of reported claims result from exposure in each of the previous ten years, then 10% of the cost associated with the reporting year would be allocated to each of the ten preceding occurrence years.

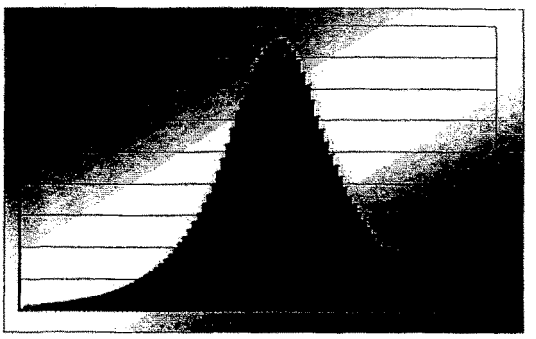
5.15 Extending the example, if we are carrying out a valuation as at 1 April 2000 then 10% of the claims costs relating to the year of reporting to 31 March 2001 relates to future rather than past exposure. Given this, by applying the exposure profile we allow for not only those expected claims that are genuinely incurred but not reported at the valuation date but also those that we might expect relating to future underwriting periods.

5.16 The charts below show typical reported claim number patterns for the contained and ongoing diseases. (The x-axis represents 'year of reporting' and the y-axis represents number of reported claims.)

Type 1 – The Contained Disease – Reported Numbers Pattern



Type 2 – The Ongoing Disease – Reported Numbers Pattern



6 Current and potential issues

6.1 This section discusses a number of recent and potential issues relating to the employers' liability market. The issues discussed are:

- The general damages reform
- Lord Chancellor's consultation paper on damages
- Discounting of loss reserves
- Woolf reforms
- Conditional fees
- The Human Rights Act 1998
- Code of practice for tracing employers' liability policies
- Combined code for corporate governance
- NHS trusts.

General damages reform

6.2 In April 1999 the Law Commission published a report titled "Damages for Personal Injuries: Non-Pecuniary Loss (Law Com No 257)". The report recommended reform in two areas, namely the law governing the assessment of damages for non-pecuniary loss in personal injury cases and the role of juries in the assessment of damages generally.

6.3 Detail on the content and the consultation process which influenced the report is available in last year's General Insurance Convention paper "Bodily Injury Claims" by Phil Ellis et al.

6.4 The main recommendation, from an insurer's perspective, was that damages for non-pecuniary loss (pain and suffering and loss of amenity) in the case of serious personal injury should be increased. For injuries where the current award for non-pecuniary loss would be more than £3,000, the Law Commission recommended that awards should be increased by at least 50% but by not more than 100%. For injuries where the current award for non-pecuniary loss would be in the range £2,000 to £3,000 the Law Commission recommended that the award should be increased by tapered increases of between 0% and 50%. For injuries where the current award for non-pecuniary loss would be less than £2,000 the Law Commission did not recommend that any increase was necessary.

6.5 The Commission also recommended that legislation should be avoided and that damages would be increased as recommended by the Court of Appeal and the House of Lords.

6.6 Estimates of the annual cost to the insurance industry of the recommendations were of the order of £1 billion with a retrospective cost of £2 billion. Significant additional costs would also be incurred by the NHS, local government and organisations which self-fund liabilities.

6.7 In March this year the Court of Appeal gave judgement on eight test cases involving a variety of circumstances and severity of injury.

6.8 The Court recognised that their decision would have a significant effect on the public at large, both in the form of higher insurance premiums and as a result of less resources available for the NHS. The Court did not accept submissions on behalf of the claimants that economic material was not relevant to the Court's task and so should not be taken into account.

6.9 Increases in the expectation of life were also considered important in arriving at an appropriate level of damages. Again, the impact was considered significant for more serious injuries, and less so for smaller claims.

6.10 The Court did not consider it appropriate to increase the levels of awards to the extent recommended by the Law Commission but concluded that awards for the most serious injuries, which stood at £150,000, should be increased by around one third. The Court also concluded that no increase was necessary for claims with existing general damages awards of below £10,000 and that awards between £10,000 and £150,000 should increase on a tapered scale. A suggested scale was provided in the judgement.

6.11 The cost of the judgement was a small proportion of the original Law Commission proposals: probably of the order of £150 million retrospective cost rather than £2 billion.

Lord Chancellor's department consultation paper

6.12 In March this year the Lord Chancellor's Department published a consultation paper with the title "Damages: The Discount Rate and Alternatives to Lump Sum Payments". The paper sought views on two issues:

- The rate of return that the courts should take into account when assessing damages for future pecuniary loss in personal injury claims
- Alternatives to lump sum awards for the compensation of future pecuniary loss in personal injury cases, under which payments to the claimant might be made wholly or partly by periodic payments. Under this alternative it would be for the defendant to decide which financial arrangement should provide the claimant's benefit, for as long as it was judged necessary to provide benefits to the claimant.

6.13 The consultation paper gives the background to the historic discount rate of 4-5% per annum and the move to the Ogden tables at 3% per annum (Wells v Wells, House of Lords judgement in July 1998). These and many other issues covered in the paper have been extensively discussed in previous papers and are not repeated here. We include some key issues from the consultation paper below but would recommend the entire text to interested readers.

6.14 In Wells v Wells, the House of Lords ruled that Courts should apply the 3% per annum rate in other actions, unless there was a very considerable change in economic circumstances, until a rate was prescribed by the Lord Chancellor under the Damages Act 1996.

6.15 One option suggested in the consultation paper is to base the discount rate on a mixed investment in equities, fixed interest gilts and indexed linked gilts (ILGS). However, the House of Lords dismissed this approach. An alternative option suggested in the consultation paper is to base the rate for short-term awards on ILGS and a mix of gilts and equities for long-term awards.

6.16 The advantages and disadvantages of setting a fixed rate or defining a formula for setting the discount rate are discussed and, in particular, the consultation paper mentions the possibility of manipulating claim settlements to benefit from a changing discount rate.

6.17 The consultation paper also discusses the taxation considerations when deciding on the discount rate. The incidence of tax varies according to the size of the award and the claimant's other financial circumstances.

6.18 Consultation was also sought on the use of periodic payments as an alternative to lump sum settlements. A number of options were discussed including:

- Courts having power to impose structured settlements or other non-reviewable periodic payment
- Courts having the power to order reviewable periodic payments.

6.19 In May this year the profession published a reply to the paper "The Lord Chancellor's Department Consultation Paper on Damages... Joint response by the Faculty and Institute of Actuaries and the Association of Consulting Actuaries". Again we refer interested readers to the full text.

6.20 In respect of the first part of the consultation paper the reply takes the view that the House of Lords has addressed the mix of assets issue in Wells v Wells and clarified that claimants should not have to take the risk of investing in equities. The preferred method of setting the rate is a formula based approach; the prevailing discount rate would be published by the Government Actuary on a periodic basis (monthly or quarterly). Regarding the issue of periodic payments the Institute of Actuaries' reply favours that the Courts be given the power to order bottom-up structured settlements. If the Courts were not granted this power, agreement to structure the settlement may be less likely as either the claimant or defendant will have a financial preference for a lump sum settlement.

6.21 The profession also considers that reviewable periodic payments would provide a better match to the principle of indemnity, but suggests that the issue should be pursued separately. Reviewable periodic payments would introduce a more open-ended liability, which would need to be considered in the context of the current regulatory environment.

Discounting of loss reserves

6.22 This year the Budget included changes to reform the tax rules applying to general insurance companies and Lloyd's members. The aim of the reform is to bring the tax treatment of general insurance companies and Lloyd's members broadly into line with other companies.

6.23 A document was published setting out the detail of the reforms and sought consultation on a number of issues including the following:

- Appropriate discount rate to use
- Margin of error (see below).

6.24 When making long term provisions, companies other than general insurers must follow accounting standards that require a reserve to be the best estimate of the relevant liability, discounted where material. The stated aim of the legislation is that a general insurer will pay tax worth the same to the Exchequer as if it reserves had been set at exactly the right discounted level needed to pay future claims, taking into account a reasonable investment return on the amounts reserved. The rules for the calculation of the reserves for inclusion in a company's accounts have not been changed.

6.25 The aim of the legislation is to be achieved by reviewing provisions set up previously, and re-calculating them with the benefit of hindsight. If it turns out that provisions previously set were "excessive", then an addition is made to trading profits, which is effectively an interest charge on the excessive amount.

6.26 The provisions will be regarded as excessive if it is significantly more than the discounted value of the liabilities. The definition of 'significant' is set out in the calculation described below and by the margin of error that is finally chosen by the Exchequer.

6.27 The steps to determine whether an additional tax charge applies in an accounting period are as follows:

- For each prior accident year, the amount of the liabilities is re-computed taking into account events since the prior accounting date. All claims that have been paid in respect of the accident year since the prior accounting date are included in the re-computation, discounted at a prescribed rate
- For each prior accident year, the amount deducted in the current period for liabilities arising in the accident year is included in the re-computation as if it were a payment made at the current balance sheet date in full settlement of all liabilities of the accident year. It is included in the accident year re-computation at a discounted value

- The result of the re-computation is compared with the actual amount deducted in the accident year
- The difference is then compared with the allowable margin. If it is within the margin (5% proposed), the difference is assumed to be nil
- The remaining difference (over the margin) is compared with amounts taken into account in previous years, and the balancing amount is the excess identified in this period. This gives rise to an addition to trading profits of the period, which is calculated as if it were an interest charge arising on the amount of the excess for the period from the end of the accident year to the end of the current year
- If provisions for a particular accident year were insufficient, or if a previously calculated excess turned out to be too large, the above steps would lead to the calculation of a negative amount of "interest". The negative amount can be used to set-off against other positive "interest" calculations in the same period (on other accident years) or a later period, but may not be deducted from other trade profits.

6.28 The data required for the proposed reforms are already collected for the purposes of the current regulatory framework.

6.29 There are also two rules under which the tax adjustments will not apply. The first applies in cases where provisions have only slightly exceeded the discounted best estimates of the claims to which they relate (5% proposed). The second eliminates the need for adjustments for Lloyd's members, where a member participates in only a very small proportion of a syndicate's business (4% proposed).

6.30 The reforms apply for company periods of account beginning on or after 1 January 2001 and, in relation to individual members of Lloyd's, for the tax year 2001-02. For the purpose of the calculations it is assumed that provisions for periods of account commencing before 1 January 2001 all relate to liabilities incurred in the year 2000.

6.31 Reaction from the industry has not been positive. Comparison to tax regulations of other EU countries has been made and the change is felt to put UK insurers in an uncompetitive position. Lobbying by the industry may influence some change. Given the long tail nature of employers' liability claims, investment income on reserves plays an important role. Whatever the impact of the final regime, employers' liability is likely to be disproportionately effected relative to shorter tail business. It is suggested that a future working party might examine the impact of the final new regime on the liability and employers liability markets.

Woolf reforms

6.32 Regarded as the most fundamental change to the legal system in England and Wales over the last hundred years, the new Civil Procedure Rules came into effect on 26 April 1999. Any proceedings already in progress on that date and any new proceedings issued after that date are governed by the new rules. Commonly referred to as the 'Woolf reforms' the changes followed a review of the civil justice system by Lord Woolf published in 1996.

6.33 The detail and likely impact of the reforms was discussed in a workshop run by Jim Ryan at the 1999 General Insurance Conference and some key features are repeated below.

6.34 The reforms introduced a new procedural code with the overriding objective of enabling the Court to deal with cases justly. This involves :

- ensuring that the parties are on an equal footing (e.g. preventing rich litigants from having an unfair advantage over poorer litigants through the extent of the resources available to them)
- saving expense (as the cost of litigation prior to the Woolf reforms was considered to be too expensive)
- dealing with cases in a way which is appropriate to the financial amount involved, the importance of the case and the complexity of the issues (i.e. no case should develop in such a way that the costs become the most important issue involved)
- allocating an appropriate share of the Court's resources (so that judges and Court officials do not get bogged down in dealing with cases which do not justify the amount of public time expended).

6.35 A "Three Track" system has been introduced based on the financial value of a case. The small claims track will deal with most claims for amounts under £5,000. The fast track deals with most claims worth between £5,000 and £15,000, the band where most personal injury cases will fall. On the fast track, the amount of costs recoverable will be strictly limited, as will the length of the trial. Expert evidence will usually be in writing only.

6.36 The multi-track will deal with all other cases. The Court will either give directions for the management of the case and set a timetable or will call a case management conference. The parties' representatives will attend the conference and the court will set a timetable and fix the date for trial.

6.37 The impact on the handling of employers' liability claims could be significant. The Rules contain a strict timetable which, if not adhered to, can result in significant financial penalties. Therefore, the efficient transfer of information from the insured to the insurer is essential. Such information might include the accident book entry, minutes of health and safety meetings, documents to comply with Safety at Work Regulations etc.

6.38 The reforms may impact upon the data used for reserving. In particular, the Woolf reforms require an earlier exchange of information and documents that should enable the claims handler to arrive at a firmer case estimate earlier in a claim's development. Claim notification patterns and claims payment patterns are likely to change as insureds report more incidents which have the potential to develop into claims, and parties are encouraged to agree settlement earlier and avoid litigation.

6.39 Faster settlement of claims would mean claim amounts would be less affected by inflation, but would also result in lower investment income.

Conditional fees

6.40 In April 2000 Legal Aid was replaced for the majority of bodily injury claims by the Legal Services Commission. Conditional Fee Agreements ('CFAs') were introduced and there was a review of Court procedures to deal with these matters.

6.41 Under a CFA a solicitor's remuneration depends on the outcome of the case: no win, no fee, but an increased fee if the case succeeds. After the event insurance is intended to cover the consequences of a claimant losing and being found liable to pay the defendant's costs. If the claimant wins the case, the success fee will be recoverable from the defendant as will the cost of the insurance premium.

6.42 The existence of a success fee must be disclosed to the defendant but the amount of the success fee (percentage uplift) need not be disclosed.

6.43 It is too early to state what effect this new arrangement will have on overall claim values but it is expected that claimant solicitors' costs will increase. Companies such as Claims Direct are expanding to take advantage of this new market and intend to build a chain of retail outlets, suggesting that an increase in the number of personal injury claims may ensue.

The Human Rights Act 1998

6.44 The Human Rights Act is one of the most significant pieces of constitutional legislation enacted in the United Kingdom. The act will be fully implemented on 2 October 2000. Earlier sections were implemented in November 1998.

6.45 The Act will enable individuals and companies to challenge any public authority over perceived violation of rights. Therefore the main insurance impact will be for local authority public liability insurers. However, the potential also exists for claims to arise under employers' liability cover.

6.46 The immediate effect of the act is to allow people to claim their rights under the European Convention on Human Rights in the UK courts, rather than having to go to the European Court in Strasbourg. This should lead to reduced costs for the losing party and speedier decisions - there is currently a five-year wait to have a claim heard in Strasbourg. However, the relative ease of taking action may lead to a higher number of cases, therefore increasing the total legal bill.

6.47 The Act requires public authorities to act compatibly with the Convention rights. 'Public authorities' are not defined exhaustively but in a UK context it is likely to include:

- Government departments
- local authorities
- the NHS
- police, prison, immigration officers
- public prosecutors
- Courts and tribunals
- non-departmental public bodies
- any person exercising a public function.

6.48 Only a person considered a victim can bring proceedings against a public authority under the Act. Victims can include companies as well as individuals and may also be relatives of the victim where a complaint is made about his death. A victim may also be a person who is at risk of being directly affected by a measure. An organisation or interest group or trade union cannot bring a case unless it is itself a victim. But there is nothing to stop it providing legal or other assistance to a victim. Governmental organisations, such as local authorities, cannot be victims.

6.49 A Task Force was set up in January 1999 with the following Terms of Reference:

- 1: The purpose of the Task Force is to:

  (i) help Departments and other public authorities prepare for implementation of the Human Rights Act 1998; and

  (ii) increase general awareness, especially amongst young people, of the rights and responsibilities flowing from the incorporation of European Convention on Human Rights and thus to help build a human rights culture in the United Kingdom.

- 2: To maintain a dialogue between Government and non-governmental organisations on the readiness of public authorities for implementation. It will help identify, promote and support, as appropriate, a range of initiatives and opportunities to assist training and development, including the production and dissemination of appropriate guidance, good practice and publicity material.

6.50 The impact of the Act cannot easily be assessed. It is likely to manifest itself in a number of high profile cases. The risks for employers and potentially for employers liability insurers arise from the following articles:

- Article 8: The Right to Respect for Private and Family Life, Home and Correspondence - covers matters such as the disclosure of private information, monitoring of employees' phone calls and email, carrying out body searches and restrictions on entering a person's home. It also touches on issues such as the right for families to live together or the right not to suffer from environmental hazard

- Article 9: The Right to Freedom of Thought, Conscience and Religion - guarantees the right for everyone to manifest their religion or belief in worship, teaching, practice and observance. Article 9 points may be raised, for example, where a person's religious or other beliefs require or prevent them from carrying out a certain activity, such as wearing particular clothes or working on a Holy Day.

- Article 10: The Right to Freedom of Expression - freedom of expression covers such things as what we say in conversation or in speeches, publishing books, articles or leaflets, broadcasting, art, the Internet and many other areas. It applies to the media as well as individuals.

- Article 11: The Right to Freedom of Assembly and Association – this includes the right to join, or not to join, trade unions.

Code of practice for tracing employers' liability policies

6.51 The code of practice for tracing employers' liability insurance policies came in to effect from 1 November 1999. There are two parts of the code. The first covers members of the Association of British Insurers ('ABI') and the second members of the Non-Marine Association ('NMA') at Lloyds. Each part has the same purpose, approach and standards.

6.52 The purpose of the code is to improve the tracing of employers' insurance polices. This has two aspects. Firstly to help current potential claimants trace the insurers of past employers more effectively and, secondly, to ensure that insurers keep future records in ways which will make tracing such policies mush easier.

6.53 The code is voluntary, entered into by insurance companies and syndicates at Lloyd's. It does not provide potential claimants with any rights that do not already exist in law.

6.54 The code sets out the procedure to be followed when an enquiry from a potential claimant is received. Such an enquiry should be referred to a central contact point within the insurer/syndicate. The enquirer must provide some basic information such as:

- name
- name and address (including postcode) of employer and/or the policyholder
- type of injury and when caused, or type of illness/disease and period of exposure which caused that illness/disease.

6.55 The insurer/syndicate may ask the enquirer for additional information. If additional information is requested then it will be explained to the enquirer that the information is being sought to increase the likelihood of a record of insurance being traced. The additional information can include:

- whether the employer is still in existence
- whether the enquirer is aware of the employer's insurers
- whether enquiries have been made of the employer regarding insurance arrangements (including details of any broker involvement).

6.56 The insurer has to make every practical effort to try to establish whether they were on risk at the time of the injury or during the period of disease exposure, and to reply to the enquirer within 20 working days irrespective of whether the search has found a successful match.

6.57 If the insurer is unable to trace any record of relevant insurance the enquirer is then informed that the matter will be referred to the ABI or NMA as appropriate.

6.58 On receipt of an enquiry by the ABI/NMA, whether referred by an insurer/syndicate or whether received directly, a central contact point will respond to the enquirer within 5 days stating that the matter is being dealt with.

6.59 Every 20 working days the ABI/NMA will circulate details of all enquiries received or referred to all participants of the Code. A list is also sent to the other trade association, as appropriate. Each insurer/syndicate will reply to the circular within 20 working days irrespective of the outcome of the search.

6.60 When an insurer/syndicate is found the ABI/NMA will reply to the enquirer within 5 working days giving the name, address and telephone number of the designated contact at the insurer/syndicate.

6.61 In the event that no insurer/syndicate can be traced within 20 working days of receipt of the circular the ABI/NMA will contact the enquirer within 5 working days explaining all the steps which have been taken.

Combined code of corporate governance

6.62 The combined code of corporate governance ('the code') moves the importance of risk management up the corporate ladder. If the code is followed in spirit then this could develop into a powerful risk management tool with beneficial impact on claims cost. Alternatively it may become a compliance exercise adding little value. Given the potential impact on employers' liability claims we have decided to address the code in brief.

6.63 To respond to the issues raised in the code, the Institute of Chartered Accountants in England and Wales have published "Internal Control: Guidance for Directors on the Combined Code." ("the Turnbull report").

6.64 Some key messages of the Turnbull report are:

- the board should maintain a sound system of internal control to safeguard shareholders' investments and the company's assets
- the effectiveness of the system of internal control should be reviewed at least annually, and it should be reported to the shareholders that this has been done
- the review should cover all controls including financial, operational and compliance controls and risk management
- the application of the code should be embedded within the normal management process and not carried out as a separate exercise
- the application of the guidance should take account of the particular circumstances of each company.

6.65 When a company determines its policies with regard to internal control, the Turnbull report states that the board should consider the following factors:

- "the nature and extent of risks facing the company
- the extent and categories of risk which it regards as acceptable for the company to bear
- the likelihood of the risks concerned materialising
- the company's ability to reduce the incidence and impact on the business of risks that do materialise
- the costs of operating particular controls relative to the benefit thereby obtained in managing the related risks".

NHS trusts

6.66 One change to the employers liability market since early 1999 has been the loss of the Health Trust business to a pool arrangement. While not very significant in premium terms (about £55m across all lines) it is unusual in terms of government intervention in a competitive market and a reduction in choice for customers.

6.67 NHS trusts used to be able to insure commercially all risks they considered appropriate. During the 1990s the majority began to insure commercially. Following an exercise in 1998, it was assessed that the potential savings arising from moving the NHS trusts away from a reliance on commercial insurance, and reinvesting the money in NHS services, were assessed as very considerable.

6.68 The annual savings were estimated at £45 million based on the results of a survey carried out by the NHS Executive during January and April 1998. However, the instructions for completing the surveys specifically mentioned that reserves that insurers were holding for outstanding claims were to be excluded from the figures submitted. Consequently a Department of Health (DoH) press release announced "Much of the money ends up as profit for the insurance companies at the expense of frontline patient services. By co-operating, NHS trusts will save the NHS up to £45 million a year for investment in frontline patient care".

6.69 The insurance industry warned that many of the risks covered could take a long time to settle and that the calculations were flawed. The Healthcare Financial Management Association also warned that the figures were "simplistic" and warned that the government should not fall into the trap of failing to collect sufficient premiums in the early years to cover future commitments. Further warnings came from the London Ambulance Service who said that as a result of the risk management discipline imposed by risk managers, brokers and insurers, trusts were more careful with their property and assets and it had started to see a reduction in the accident rate.

6.70 Despite these and other comments two new risk-pooling arrangements were established from 1 April 1999 covering the majority of non clinical risks previously insured commercially. These are the Liabilities to Third Parties Scheme and the Property Expenses Scheme.

6.71 NHS trusts do not have to observe the requirements of the insurance companies' legislation that requires companies to fund each year against all potential future liabilities relating to that year. Hence they have the ability to form a risk pool on a "pay as you go basis".

6.72 The schemes are administered by the NHS Litigation Authority (NHSLA), who also administer the Clinical Negligence Scheme for Trusts (CNST). The CNST covers NHS trusts for clinical negligence and covers all clinical staff for incidents leading to claims that arise from NHS activity.

6.73 On a positive note, actuaries have been appointed to advise the NHSLA on setting the contribution rate from each trust. It is intended that as the pool develops the contribution rate for each trust will depend to a certain extent on the claims experience of that trust.

Appendix A - References

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Lord Chancellor's Department Consultation Paper:
www.open.gov.uk/lcd/consult/generai/damag

Home Office Human Rights Unit
webside: www.homeoffice.gov.uk/hract

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The ABI: website: www.abi.org.uk

The Inland Revenue
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Appendix B – Extract from the 1998 Claims Run-off Patterns Update

CLAIMS RUN-OFF PATTERNS UPDATE

1998 GENERAL INSURANCE CONVENTION
AND
ASTIN CULLOQUIUM

7-10 OCTOBER 1998
GLASGOW
SCOTLAND

Risk Group :	EMPLOYERS LIABILITY											Method : Inflation Adjusted Chain Ladder
Future Inflation :	6%	RUN-OFF PATTERN PER MILLE										
Name	Size	0	1	2	3	4	5	6	7	8	9	"Tail"
Avon Insurance	17,775	22	86	137	196	182	148	84	46	45	39	15
Co-operative	44,317	26	96	129	145	130	99	88	64	47	16	159
Commercial Union	335,429	36	146	186	187	151	109	62	38	18	14	55
Cornhill	79,659	12	78	126	136	103	79	61	29	26	26	324
Eagle Star	1,202,528	15	120	155	149	125	92	65	45	33	24	178
General Accident	299,228	21	125	178	164	142	106	60	39	24	14	125
Guardian	629,247	38	171	187	164	142	103	63	41	27	18	46
Iron Traders Emp	454,129	57	194	186	154	121	87	56	43	28	19	56
Iron Traders Ins	261,406	12	99	126	123	109	86	64	52	49	23	256
Norwich Union	186,624	12	88	135	165	152	124	80	42	25	15	163
Pearl Assurance	15,406	18	92	170	163	192	143	54	56	52	34	27
Prudential	108,715	32	103	156	165	140	109	75	39	24	20	136
Royal Insurance	161,870	16	84	106	109	89	68	44	30	20	15	419
Sun Alliance & London	377,123	15	106	160	167	146	110	77	52	37	14	117
UAP Provincial	71,571	14	95	161	195	151	135	71	63	32	18	65
Wesleyan	532	14	90	139	171	381	13	128	20	0	0	43
Aggregate	4,245,514	24	130	164	157	132	98	64	43	29	19	138
1995 data	3,785,151	26	136	169	161	133	98	64	43	29	19	123

TABLE 10.1

Risk Group :	EMPLOYERS LIABILITY												Method : Inflation Adjusted Chain Ladder
Future Inflation :	8%				RUN-OFF PATTERN PER MILLE								
Name	10	11	12	13	14	15	16	17	18	19	20	21	22+
Avon Insurance	9	0	1	1	3	0	0	0	0	0	0	0	0
Co-operative	9	11	2	5	3	3	4	6	8	9	1	4	95
Commercial Union	14	1	1	0	1	1	1	0	0	0	1	8	25
Cornhill	9	4	3	3	3	4	3	3	4	1	3	1	283
Eagle Star	17	14	14	13	13	14	14	14	15	16	18	16	1
General Accident	8	6	4	3	8	5	8	7	10	17	6	7	37
Guardian	10	6	3	4	2	2	2	3	2	3	1	1	8
Iron Traders Emp	13	11	7	5	4	5	3	1	3	2	0	0	1
Iron Traders Ins	17	173	65	1	1	0	1	0	0	0	0	0	0
Norwich Union	16	6	6	6	8	10	11	15	12	6	7	18	43
Pearl Assurance	16	1	1	7	1	0	0	0	0	0	0	0	0
Prudential	14	8	1	2	0	0	2	1	7	17	20	1	62
Royal Insurance	9	9	7	6	14	7	7	18	8	35	11	9	277
Sun Alliance & London	10	9	6	6	5	8	8	6	5	4	5	8	37
UAP Provincial	5	5	1	5	0	1	1	2	1	3	3	0	38
Wesleyan	0	17	0	0	0	0	0	26	0	0	0	0	0
Aggregate	13	13	9	7	7	7	7	8	7	10	7	7	34
1995 data	12	14	9	7	7	7	7	7	8	7	7	33	-

TABLE 10.2

Risk Group :	EMPLOYERS LIABILITY						Method : Inflation Adjusted Chain Ladder				
Future Inflation :	6%					MEAN TERMS					
Name	0	1	2	3	4	5	6	7	8	9	10
Avon Insurance	4.62	3.71	3.02	2.48	2.17	1.98	1.94	1.77	1.36	1.08	1.63
Co-operative	7.19	6.37	6.01	5.96	6.27	6.86	7.55	8.73	10.10	11.66	11.76
Commercial Union	4.69	3.85	3.45	3.31	3.49	4.02	5.07	6.34	7.93	8.83	9.94
Cornhill	10.85	9.97	9.78	10.28	11.34	12.38	13.40	14.35	14.41	14.44	14.55
Eagle Star	6.31	5.40	5.08	5.08	5.29	5.66	6.04	6.32	6.43	6.40	6.21
General Accident	5.90	5.01	4.68	4.78	5.15	5.93	7.13	8.11	8.91	9.37	9.38
Guardian	4.38	3.54	3.19	3.02	2.97	3.14	3.53	3.97	4.54	5.21	6.04
Iron Traders Emp	4.20	3.42	3.18	3.06	3.03	3.09	3.20	3.23	3.35	3.44	3.41
Iron Traders Ins	6.31	5.38	4.92	4.65	4.45	4.26	3.99	3.58	3.07	2.52	1.70
Norwich Union	6.68	5.75	5.27	5.10	5.37	6.02	7.13	8.29	8.88	9.08	8.87
Pearl Assurance	4.64	3.71	3.04	2.65	2.27	2.20	2.30	1.88	1.56	1.46	1.69
Prudential	6.39	5.59	5.19	5.23	5.66	6.46	7.67	9.11	9.98	10.47	10.92
Royal Insurance	11.97	11.16	11.15	11.58	12.34	13.11	13.74	13.95	13.83	13.44	12.91
Sun Alliance & London	5.95	5.03	4.57	4.48	4.69	5.19	5.94	6.85	7.80	8.85	8.85
UAP Provincial	5.41	4.48	3.91	3.66	3.81	4.12	5.09	5.93	7.88	9.69	11.19
Wesleyan	5.02	4.05	3.38	2.88	2.54	5.25	4.40	10.66	13.52	11.59	9.69
Aggregate	5.97	5.10	4.81	4.85	5.15	5.72	6.47	7.14	7.68	8.02	8.08
1995 data	5.67	4.80	4.50	4.51	4.78	5.29	5.98	6.61	7.13	7.49	7.57

TABLE 11

Risk Group : EMPLOYERS LIABILITY Method : Basic Chain Ladder

		RUN-OFF PATTERN PER MILLE										
Name	Size	0	1	2	3	4	5	6	7	8	9	"Tail"
Avon Insurance	17,775	21	78	132	195	189	139	90	49	47	42	17
Co-operative	44,317	22	78	111	132	123	95	95	73	58	18	196
Commercial Union	335,429	26	128	170	181	151	116	69	45	20	17	75
Cornhill	79,659	9	62	105	118	93	74	60	28	25	29	398
Eagle Star	1,202,528	12	103	137	137	121	93	67	47	36	27	219
General Accident	299,228	18	109	161	156	141	112	64	42	27	16	154
Guardian	629,247	36	160	179	162	143	106	66	43	29	20	56
Iron Traders Emp	454,129	56	173	173	148	123	94	61	49	32	21	69
Iron Traders Ins	261,406	12	94	118	116	103	82	62	53	49	26	287
Norwich Union	186,624	10	77	119	152	147	124	81	41	25	16	206
Pearl Assurance	15,406	17	84	148	147	194	152	58	64	61	42	33
Prudential	108,715	27	94	147	157	139	112	75	40	24	23	164
Royal Insurance	161,870	13	65	89	97	81	65	43	30	21	16	460
Sun Alliance & London	377,123	13	95	148	159	143	110	79	54	39	14	146
UAP Provincial	71,571	12	81	142	189	152	140	74	70	36	19	83
Wesleyan	532	9	68	145	190	367	15	128	23	0	0	55
Aggregate	4,245,514	21	114	148	148	130	100	67	46	32	22	173
1995 data	3,785,151	22	117	152	151	131	100	68	47	33	22	159

TABLE 12.1

Risk Group EMPLOYERS LIABILITY Method : Basic Chain Ladder

RUN-OFF PATTERN PER MILLE

Name	10	11	12	13	14	15	16	17	18	19	20	21	22+
Avon Insurance	10	0	2	1	3	0	0	0	0	0	0	0	0
Co-operative	10	14	2	5	3	3	5	7	10	12	1	6	117
Commercial Union	19	1	1	0	2	1	1	1	0	0	2	12	34
Cornhill	9	4	4	4	4	4	3	3	5	1	4	1	352
Eagle Star	19	16	16	15	16	17	17	18	19	21	24	21	0
General Accident	9	7	4	3	9	6	10	9	13	22	8	9	45
Guardian	11	7	3	4	3	2	3	3	3	4	1	1	10
Iron Traders Emp	15	14	9	6	5	7	4	2	3	3	0	0	1
Iron Traders Ins	20	195	72	1	-1	0	1	0	0	0	0	0	0
Norwich Union	18	8	7	6	10	12	14	19	15	8	10	24	55
Pearl Assurance	20	2	1	9	1	0	0	0	0	0	0	0	0
Prudential	15	10	2	2	0	0	2	2	8	23	27	1	72
Royal Insurance	10	9	8	7	14	8	8	21	10	44	14	12	315
Sun Alliance & London	11	10	6	8	6	10	10	7	6	6	6	11	47
UAP Provincial	6	6	1	5	0	1	1	3	1	4	4	0	51
Wesleyan	0	24	0	0	0	0	0	31	0	0	0	0	0
TOTAL	15	16	11	8	9	9	9	10	10	13	10	10	44
1995 data	13	17	11	8	9	9	9	9	10	10	9	43	-

TABLE 12.2

Risk Group EMPLOYERS LIABILITY Method : Basic Chain Ladder

Name	MEAN TERMS 0	1	2	3	4	5	6	7	8	9	10
Avon Insurance	4.71	3.80	3.08	2.53	2.22	2.07	1.96	1.80	1.40	1.12	1.69
Co-operative	8.05	7.22	6.80	6.68	6.93	7.41	7.89	8.92	10.17	11.79	11.84
Commercial Union	5.19	4.32	3.90	3.76	3.96	4.50	5.55	6.78	8.28	9.01	9.94
Cornhill	12.52	11.63	11.37	11.75	12.63	13.46	14.23	14.95	14.85	14.68	14.70
Eagle Star	6.98	6.06	5.70	5.65	5.81	6.12	6.43	6.64	6.67	6.58	6.34
General Accident	6.50	5.61	5.25	5.32	5.66	6.44	7.64	8.54	9.25	9.64	9.58
Guardian	4.59	3.74	3.39	3.22	3.17	3.37	3.78	4.25	4.80	5.42	6.21
Iron Traders Emp	4.49	3.73	3.45	3.31	3.23	3.26	3.38	3.40	3.55	3.63	3.59
Iron Traders Ins	6.57	5.65	5.18	4.90	4.67	4.44	4.11	3.65	3.11	2.51	1.69
Norwich Union	7.43	6.50	6.01	5.84	6.11	6.78	7.89	8.98	9.38	9.38	9.09
Pearl Assurance	4.89	3.96	3.29	2.83	2.40	2.30	2.36	1.91	1.57	1.43	1.63
Prudential	6.94	6.12	5.72	5.76	6.20	7.01	8.25	9.59	10.32	10.57	10.96
Royal Insurance	13.22	12.38	12.23	12.48	13.05	13.61	14.06	14.13	13.92	13.49	12.92
Sun Alliance & London	6.49	5.57	5.11	5.03	5.26	5.80	6.55	7.44	8.31	9.23	9.10
UAP Provincial	5.90	4.96	4.36	4.08	4.26	4.62	5.67	6.51	8.56	10.38	11.65
Wesleyan	4.69	3.73	2.97	2.43	2.05	3.62	2.85	5.70	6.92	5.92	4.92
Aggregate	6.63	5.75	5.44	5.46	5.75	6.30	7.01	7.62	8.06	8.31	8.29
1995 data	6.33	5.46	5.13	5.12	5.37	5.86	6.50	7.07	7.51	7.78	7.78

TABLE 13

Risk Group : EMPLOYERS LIABILITY Method : Inflation Adjusted Chain Ladder

Future Inflation: 6% MEAN TERMS

	11	12	13	14	15	16	17	18	19	20	21	22+
Aggregate	7.88	7.77	7.42	6.90	6.42	5.97	5.51	5.09	4.67	4.49	4.19	4.00
1995 data	7.30	7.24	6.94	6.46	6.01	5.60	5.20	4.82	4.53	4.25	4.00	-

Risk Group : EMPLOYERS LIABILITY Method : Basic Chain Ladder

MEAN TERMS

	11	12	13	14	15	16	17	18	19	20	21	22+
Aggregate	8.04	7.89	7.49	6.94	6.42	5.94	5.47	5.02	4.58	4.41	4.14	4.00
1995 data	7.45	7.36	7.01	6.49	6.01	5.57	5.15	4.76	4.47	4.20	4.00	-

TABLE 14