TODAY'S TARGET THE PROFESSIONS

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CONSTRUCTION AND THE LAW

by Lord Hacking

Biographical Note

Lord Hacking is an independent Peer in the House of Lords where he speaks from the Cross Benches and specialises in legislation relating to Commercial Law.

As well as being qualified at the English Bar, Lord Hacking is a Member of the Bar of the State of New York and, since 1977, has practised as a solicitor of the Supreme Court of England. He is with the London law firm of Richards Butler, who also have offices in Hong Kong and Dubai.

In recent years Lord Hacking has supported or sponsored several Parliamentary Bills which are now on the Statute Book. These include the Aribtration Act (1979), the Protection of Trading Interests Act (1980) and the Lloyds Act (1982). Most recently he has been representing the views of the English construction and building industries during the passage this year of the Latent Damage Bill.

1. There has always been some doubt whether there was a decomposed snail in the opaque bottle of ginger beer from which Miss Donaghue was drinking. Indeed there has always been a general doubt upon the merits of Miss Donaghue's action against the manufacturer of the ginger beer. In any event she claimed that a sludge in the bottom of the ginger beer bottle - be it decomposed snail or not - caused her to be ill and gave her the right to claim damages against the manufacturer, a Mr. Stevenson. There is, however, no doubt about the importance of this case, which went all the way to the highest court in our land - the Judicial Committee of the House of Lords - and had the attention of the finest Judges of the day. More than that Donaghue v Stevenson,[1] which was taken by the House of Lords in 1932, established the principles upon which our modern law of negligence is based. Thus it was in this case Lord Atkin pronounced his famous dictum that every citizen under our common law had a duty:[2]

> "(to) take reasonable care to avoid acts or omissions which (he) can reasonably foresee would be likely to injure (his) neighbour."

* This paper has been prepared with the assistance of Mr. Paul Bridge B.A. (Oxon), B.C.L. (Oxon) Barrister-at-Law, Member of the Honourable Society of Lincoln's Inn. The author records his grateful thanks.

2. Hence Lord Atkin went on to hold that[3]

> "... a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take reasonable care."

3. The development of our common law has always been viewed with some mystery by those who are familiar with codified civil laws. Its development can also be a bit of a mystery to those of us who practice within it! As Lord Scarman[4] described in his Hamlyn Lecture of about 10 years ago:4

> "The common law knows as little of its birth as you or I know of ours. It has grown like Topsy; it is as natural in the English scene as the oak, the ash and the elder. It antedates parliament and the legislative process. We cannot point to any body of learned men sitting around a table and designing the law and the system. It is customary law developed, modified, and sometimes fundamentally redirected by the judges and the legal profession working through the medium of the courts. Thus it is in essence, a lawyers law. Further, it is a lawyers law of universal application. The common law has in theory, no gaps, or omissions, only a few silences which at any time, upon the instigation of the litigant, the voice of the judge can break."

4. The strength and the weakness of our common law lies in its response to change. Its strength is that, as nurtured by the judges, it attempts to respond to the needs of our changing society. Its weakness is that it evolves not only without much logic - probably not a bad thing - but also without any coherent policy. There are several reasons for this lack of coherence. First, Judges can only evolve the law by the cases they try. Therefore the common law has developed quite fortuitiously by the chance of the 'right' case coming before the 'right' judge. Second, Judges can only evolve the law within the constraints of what they identify as 'public policy'. Let us take, for example, the question whether it is in the interests of society that damages should be awarded to plaintiffs whose only injuries are of a "nervous" nature. Earlier this century judges held that it was not within 'public policy' to make awards to plaintiffs whose only complaints were "their nerves were no longer the same". Yet more recently the judges have held that it is within the confines of 'public policy' to make awards to plaintiffs whose injuries are psychological or psychiatric. However, judges are expected to rule upon what is, or what is not, acceptable 'public policy' without the benefit

of any evidence on the point. Nor is the State represented by counsel on the issue. Thus five and a half years ago in a difficult and important medical negligence case[5], which concerned whether a Senior Hospital Registrar should have attempted a "forceps" delivery or should have immediately proceeded with a Caesarian section - the attempted "forceps" delivery had resulted in the disastrous consequence of the birth of a very badly brain damaged child - the decision was made in favour of the doctor and based upon a medical standard of care which the judges believed that 'public policy' demanded. It was, perhaps, not without significance there had appeared, shortly before the Court of Appeal heard the appeal, an article in the British Medical Journal expressing concern that a decision against the doctor could result in more Caesarian births with undesirable consequences for future mothers. It was also significant that Lord Denning stated, when this case was in the Court of Appeal:[6]

> If (medical men) are found to be liable whenever they do not effect a cure, or whenever anything untoward happened, it would do a great disservice to the profession itself. Not only to the profession but to society at large. Take heed of what happened in the United States. Medical malpractice cases there are very worrying, especially as they are tried by juries who have sympathy for the patient and none for the doctor, who is insured. The damages are colossal. The doctors insure but the premiums become very high: and these have to be passed on in fees to the patients. Experienced practitioners are known to have refused to treat patients for fear of being accused of negligence. Young men are even deterred from entering the profession because of the risks involved. In the interests of all, we must avoid such consequences in England. Not only must we avoid excessive damages, we must say, and say firmly, that in every professional man, an error of judgment is not negligent."

5. These are indeed words of comfort to all professional men. While Lord Denning did not refer to the engineering profession, he did make some nice comments about the profession of judges and lawyers. I cannot resist quoting them to you:

> "(it is suggested) that the law (should make) no allowance for errors of judgment. This would be a mistake. Else there would be a danger, in all cases of professional men, of their being made liable whenever something happens to go wrong. Whenever I give a judgment, and it is afterwards reversed by the House of Lords, is it to be said that I was negligent? That I did not pay enough attention to a previous binding authority or the like? Every one of us every day gives a judgment which is afterwards found to be wrong. It may be an error of judgment but it is not negligent. So

> also with the barrister who advises that there is a good course of action and it afterwards fails. Is it to be said on that account that he was negligent?"

Yet Lord Denning and his fellow judges, as did the Lords of Appeal in Ordinary, when this case came to the House of Lords, took their entire stand on 'public policy' without a jot of evidence being put before them.

6. A short analysis of the essential elements of the law of negligence will show why the professions, not least of all the engineering profession, have felt increasingly threatened by it. In essence the plaintiff has to establish first that the defendant owes him a duty of care, second that the defendant has acted in breach of that duty and third that he has suffered damages arising out of the defendant's breach of duty. Each of these elements in the law of negligence turn on the current standards which judges feel society is asking them to apply on their behalf. Hence, since Lord Atkin's famous dictum in Donaghue v. Stevenson,[1] there has been a progressive raising of the standard of care expected of defendants. Although I am citing a case which was taken by the House of Lords three years before Donaghue's case[1] there is a tremendous contrast between the 1929 case[7], which concerns a four year old boy killed by being crushed in the wheel of a haulage system belonging to a colliery company, and the 1972 case,[8] which concerned a six year old boy who was injured on the live rail of a railway line. In the former case there was no fence and the area of the colliery was used by children as a playground. In the latter case there was a fence (although not in good repair) and the railway was not an area in which children played although they were known to do so on a nearby meadow. The infant's claim in 1927 was rejected by the House of Lords but in the 1972 case it was accepted.

7. As with the more exacting standard of care expected from defendants, so has there been a great increase in the range of persons who can be sued - a plaintiff now has many more "neighbours" than he did in 1932 - and in the range of damage which has been held sufficiently "foreseeable" for the defendant to be liable to the plaintiff. As a constraint on the defendant's liability the courts have always applied a 'remoteness" test under which a plaintiff, or the damage which he has sustained, can be held to be "too remote" from the wrongful act (i.e. the breach of duty) of the defendant. The difference now, however, is that the judges have been progressively stretching the "remoteness" test. Thus the line of causation has been ever growing. A solicitor, therefore has been held to owe a duty of care not only to his client but to a beneficiary in a client's Will. Thus, as just illustrated, the owner of land is now liable in certain circumstances, for injuries suffered by a trespasser on his land[8]. Thus the manufacturer of multi-purpose electric water pumps has been held liable for the loss of an entire stock of

lobsters - although not for loss of profit arising out of this disaster - which occurred during a very short failure of the electric water pump[10]. Thus an architect has been held liable to his client for not warning him that a planning consent granted by a Local Authority, could be invalid[11]. Thus the designer and erector of an 1,250 ft. high television mast, which was constructed in the forefront of modern technical knowledge, was held liable for its collapse.[12] In the words of Lord Edmund-Davies "The law requires even pioneers to be prudent" which, if followed by our forefather pioneers, could have left us without so much as the wheel - a state of affairs which Speke and Burton found among the primitive African tribes during their journey of the 1850's into the upper reaches of the Nile!

8. English lawyers - and as one of them I plead guilty - delight in unfairly citing American cases. Thus I cite to you the judgment of Chief Justice Rose Bird, in the Californian State Court, when she held a manufacturer of telephone booths liable to a plaintiff who claimed he was insufficiently protected (while making a telephone call in one of the defendant's telephone booths) as a drunken driver crashed into it and him! Thus I also cite another case quoted in the Wall Street Journal on 12th March, 1985 of an insurance company being ordered by an American Court to pay damages of $260,000 (plus some form of monthly allowance of 1,500) to a plaintiff who had been injured when he fell through the skylight of the defendant's school while burgling it! It would, however, be fair to record that the plaintiff failed in her action against the manufacturer of the microwave oven for the distress and anguish she suffered, when (being unable to switch off her oven) she witnessed her pet poodle being cooked before her eyes. Apparently she had placed the unfortunate animal in the oven as part of a quick drying process which she carried out after a wet stroll on her neighbourhood sidewalks.

9. Yet there have been pretty remarkable recent cases in England. For example, in June of this year, a High Court Judge held a Health Authority liable for an unsuccessful sterilization operation upon her when her "damage" was the birth of a healthy child - an event which was then followed (although this did not form grounds for aggravated damages) by the birth of another healthy child five years later.[12] Nor was this the first case in which our courts have held the medical profession liable for damages for unsuccessful sterilization operations resulting in the birth of a healthy child. In the two leading cases[13], in this new form of action, the claims have succeeded, not on the grounds of negligent sterilization operations but on the grounds that the doctors failed to warn the husband and wife that the operation could not be "guaranteed" to be successful and that they should still take contraceptive measures if they wished to avoid having further children. This throws upon the medical profession an even higher standard of care towards their patient although there is another leading recent case in which a

doctor was held not to have committed an act of negligence towards his patient by failing to warn her of the serious danger of undergoing a spinal operation.14

10. I did not wish to take up too much of your time considering problems arising out of personal injury action. While you are exposed also to these actions, they are of less impact upon you than other claims made against your profession. Yet one of the best illustrations of the progressive extension of the law of negligence lies in the nervous shock cases to which I have already made reference. In 1901 it was held that recovery for nervous shock was not possible unless the plaintiff feared for his own safety.15 By 1925 it was decided that the estate of a mother who died from nervous shock could recover even though her health was not in danger. A driver of a lorry had allowed his vehicle to travel out of control, and driverless, around a corner and down a steep street where she had watched her children go. Indeed her further distress was that one of her children had, infact, been knocked down, although not seriously injured, by the lorry.16 Then in 1967 the court held that there was a duty of care owed to a man who went to rescue victims after a train collision and who, from the horrific sights which he saw, became psycho-neurotic. To move further on, in 1982 a plaintiff, who was nowhere near the accident in which one of her children was killed and her husband and two other children injured, succeeded against the defendent in her claim for damages for nervous shock, distress and injury to health resulting from her hearing the grim news and seeing her family in hospital.18 Interestingly enough the House of Lords found in favour of the plaintiff despite the judgments of both the trial judge and the Lord Justices in the Court of Appeal who were strongly influenced by considerations of 'public policy' and held the defendant not liable. In the words of Lord Justice Griffiths:

> "If the plaintiff's argument is right it will certainly have far reaching consequences, for it will not only apply to road traffic accidents. Whenever anybody is injured it is foreseeable that relatives will be told and will visit them in hospital, and it is further foreseeable that in cases of grave injury and death some of those relatives are likely to have a severe reaction causing illness ..... Every system of law must set some bounds to the consequences for which a wrongdoer must make reparation. If the burden is too great it cannot and will not be met, the law will fall into disrepute and it will be a disservice to those victims who might reasonably have expected compensation. In any state of society it is ultimately a question of policy to decide the limits of liability."19

It was, therefore, with good reason that Lord Denning stated some ten years ago that in "recent years the law of negligence has been transformed out of all recognition".20

11. It is not, I think, difficult to identify the forces which have caused this significant increase in the exposure of defendants to liability. It arises out of the greater use of money, in a mutliplicity of ways, in the society in which professional men offer their services. Thus when a citizen, through no culpability on his part, suffers an injury or loss, not only is society more willing, but also more able, to find compensation for him. The more awards which are made by the courts the more citizens are alert to the need for insurance cover. The more insurance cover, the more monies there are available for meeting plaintiff's claims. It is a kind of roundabout: more claims, more insurance ..... more insurance, more claims. Yet there is a price. Insurance premiums go up. The trust between the client and his adviser is strained. "Defensive" postures are taken up. The casualties include even plaintiffs. All of us, who are in the business of litigation, know how plaintiffs (and defendants too) can become wholly absorbed by their litigation, to the point that they have no other real existence in their careers and in their lives. Nor do we do ourselves a service by creating a compensation seeking society. There are many occasions when litigation does not run to the true benefit of any of the participants in it.

12. Although it may not always be acknowledged, either by them or us, our judges and our Parliamentarians are full members of our society. Occupation by judges of "ivory towers" is not occupation by them of their normal abodes. Like the rest of us, they travel in trains, read newspapers and watch television and are equally affected by the changes in society and the environment in which we live. It has therefore been quite natural for them to have relaxed the restraints of 'public policy' and to make larger awards to a wider range of plaintiffs. Similarly Parliaments in our, and other, countries have extended more compassion towards injured citizens and, in doing so, made it easier for one citizen to make a compensatory claim against another when it appears the other has the means to pay. Thus we have witnessed a worldwide movement towards strict liability concerning defective products. I refer, for example, to the recent Council Directive of 25th July, 1985 of the EEC.20A Similarly some jurisdictions, such as your jurisdiction in New Zealand, have introduced "no fault" legislation relating to personal injuries. I refer, of course, to your Accident Compensation Act (1972) as now amended and restructured by your Accident Compensation Act (1982). Nor has this movement towards "no fault" legislation been ignored in the United Kingdom. Thirteen and a half years ago Mr. Robert Carr (now Lord Carr of Hadley) who was then Home Secretary in the Heath Government, set up a prestigious Royal Commission which was charged with examining "civil liability and compensation for personal injury". They reported eight years ago.21 Although they did not recommend across the board "no fault" legislation they were sympathetic towards it and urged that the progress of no fault compensation in New Zealand and Sweden should be kept under review.22

The possibility, therefore, of the introduction into the United Kingdom of some "no fault" compensation legislation remains. It is interesting to note, for example, that as recently as 30th July, 1986 there was a report in The Times of the British Medical Association calling for a state funded scheme to provide compensation on a "no fault" basis for victims of medical negligence. The BMA, as reported, is particularly concerned by the increasing incidence of doctors practicing "defensive medicine" to protect themselves from being sued by patients. We have all heard, whether true or false, of doctors in the U.S.A. passing injured victims, on the other side of the road, lest their assistance to the injured should result in claims for compensation being made against them.

13. The recent Latent Damage Act[23], which received the Royal Assent in England on 18th July of this year, is another example of society moving sympathetically towards plaintiffs. Once this Act comes into force, on 18th September, 1986, it will be possible for plaintiffs who have suffered damages arising out of defects in buildings (and indeed out of the manufacture of products and the provision of services) to have an extended time, under our law of limitation of actions, for the bringing of their actions for three years from the date the plaintiff knew, or ought to have known, of the defect. The other main provision, contained in this Act which gives defendants a "cut off" from exposure to litigation after fifteen years from the date of their alleged wrongful act, should be seen as a 'quid pro quo', principally as a benefit to the construction industry, against this substantial <u>increased</u> exposure to liability in the Act which could give plaintiffs, in latent defect cases, more than double the time(from six years to fifteen years) to bring their actions.

14. No-one, in the construction industry or elsewhere, can argue that it was fair for plaintiffs to have been deprived of the right to bring actions before they even knew they had suffered loss.[23] Yet this Act represents (despite the "cut off" after fifteen years) a further shift of risk from the "victim" to those who advise or assist him. Indeed it is right to remind ourselves that every "victim" is also, to some degree, a "beneficiary" in society. This is easy to state in relation to the construction industry where the owner of a splendid new buiing is the beneficiary of both the skills of those who have built it and of the advances of science and technique which have placed his building on the frontier of modern technology. Yet every "victim", however pitiful and disabilitating are his injuries, is also the beneficiary of a society which despite its shortcomings is more comfortable, more safe and more capable of excellence. In making this comment I do take into account the ability of medical science to keep alive some who are not left with much opportunity to enjoy life. The exercise of the decision, whether to live or die (or, more accurately, the refusal of doctors and society to exercise this decision) opens up philosophies

on the destiny of man which do not, I argue, displace my proposition that all "victims" are also "beneficiaries" of our modern society.

15. So it is, to return to the central thesis of my paper, that the professional man, particularly the professional adviser, finds himself in what has been described in the U.S.A. as the "liability crisis". I do not know who has it the best. Doubtless you will state the lawyer, with his closer relationship to the mechanisms which have brought about the so-called "liability crisis", has done better for himself than has the doctor or the engineer or the accountant. The question, therefore, to be asked is: what can be done about it? And since I am your guest at this conference it is appropriate to narrow the question to: what can consulting engineers do about it? While I will attempt to provide some answers I cannot vouch for the accuracy of my replies. Indeed, before giving any reply, I publicly record that I am to be treated in no way responsible for my advice to you. If, therefore, any of you follow the advice which I give to you, you do so at your own risk! Quite apart from the fact that I am personally without wealth (and am probably not covered by my professional indemnity insurance when delivering this paper to you) I wish you to know that both under the law of tort and contract I am not giving - at least not intending to give - any of you the right to sue me. So much for a lawyer operating the system for his benefit!

16. First and foremost I believe the remedy for consulting engineers is publicly to make out your case in whichever society and in whichever country you practise your skills. As you see it, society is being unjust to you. Yet society benefits from your skills. Hence it is appropriate for society to know that its actions against you have a detrimental effect upon the skills which you provide for its benefit. Thus, if I may so comment, FIDIC has got off on the right foot by publishing in March of this year the excellent discussion paper "Construction, Insurance and Law". Thus FIDIC continues, if I may also comment, on the right journey by convening this conference which is designed specifically to focus upon your problem of being, as you perceive it, a "target" for not only litigation but government policies in areas such as competition law and the costing of projects.

17. As I have earlier argued, judges do have considerable latitude in formulating 'public policy' as they see it. Moreover they are now more honest about it. Let me again quote from Lord Denning:[24]

> "It seems to me that it is a question of policy which we, as judges, have to decide. The time has come when in cases of new import, we should decide them according to the reason of the thing. In previous times, when faced with a new problem, the judges have not openly asked themselves the question: what is the best policy for the law to adopt?

> But the question has always been there in the background. It has been concealed behind such questions as: was the defendant under any duty to the plaintiff? Was the relationship between them sufficiently proximate? Was the injury direct or indirect? Was it foreseeable or not? Was it too remote? and so forth. Nowadays we direct ourselves to considerations of policy.

To recognise the influence on judges of what is, or what is not, appropriate 'public policy' is not to state that the judicial process is the right forum for defining public policy. Lord Simon of Glaisdale, Lord Scarman and other Lords of Appeal have rightly pointed out the limitations on courts in formulating 'public policy'. In one of the cases, which I cited relating to the extension of the law concerning claims for nervous injuries, Lord Scarman stated in the House of Lords in May 1982:[25]

> "I differ, however, from the Court of Appeal in that I am persuaded that in this branch of law it is not for the courts but for the legislature to set limits, if any be needed, to the law's development.
>
> The appeal raises directly a question as to the balance in our law between the functions of judge and legislature. The common law, which in a constitutional context includes judicially developed equity, covers everything which is not covered by status...
>
> Why then should not the courts draw the line, as the Court of Appeal manfully tried to do in this case? Simply, because the policy issue (of) where to draw the line is not justiciable. The problem is one of social, economic, and financial policy. The considerations relevant to a decision are not such as to be capable of being handled within the limits of the forensic process."

18. It therefore follows that the public relations exercise, which I am commending to you, is one which should be directed to both the judiciary and to Parliament. It must continue to be directed to the judiciary because they are exercising decisions which directly bear upon 'public policy'. It should be directed to Parliament because, under statute, Parliament has the power to curb and redirect the development of our law. Interestingly the importance of Parliament, and the passage of Bills through Parliament, is not simply in what a Bill states nor even in the successful passage of a Bill. Sometimes it is sufficient just to use Parliament, especially (if I mention) the House of Lords, as a good public forum for influencing judges and administrators to react differently to the problems which come before them. I was, for example, closely involved in changes in our arbitration law. Until the end of the 1970's, we had in England a form of judicial review of arbitrations which

had given us a bad name internationally. This judicial review, called the Case Stated procedure, had blatantly been used in a few cases - but in big ones - as an instrument of delay. Hence a few major companies, who believed - or so they stated later - that they had come to England for a quick, private and effective arbitration, found themselves dragged, at the great cost of time and expense, into the courts. The judges, who rather liked exercising judicial review over arbitrations and also saw it as the "fountain" for the development of our commercial law, were reluctant to agree to changes in our arbitration law. We therefore began our endeavours to get changes in our arbitration law by directly speaking to the late Lord Diplock and other senior judges whom we knew to be of special influence. After a long walk round the lake at Selsdon Park with Bob Clare, the then senior partner of Shearman & Sterling in New York, Kenneth Diplock was persuaded that change was needed. So it was that I and others were able to sponsor the Arbitration Act (1979) through the House of Lords.[26] Yet the major impact of the Act was not in the changes in arbitration law which it contained, but in the change of attitude which it gained from the judiciary. Since the passing of the Act Lord Diplock and his fellow judges, in a new "hands off" policy, went far further in leaving arbitrators and arbitrations alone than was, or is required of them under the Act![27]

19. Thus I am commending to you that the construction industry in England do continue to present their case to the public and to members of both Houses of Parliament. I say "continue" because you are already holding seminars and presenting papers, such as the FIDIC paper of March of this year, in England which are receiving good publicity. I also say "continue" because after no little amount of negotiation, the construction industry was able, as a whole, to put forward an agreed and coherent case during the recent passage of the Latent Damage Bill. The fact that the construction industry felt that it had made little impact on this Bill arose out of the lateness, in which they were able to put their act together, and in the stubborn inflexibility which, unlike the other Departments of State, the Lord Chancellor's department regrettably too often displays. As one who was heavily involved in this exercise, I am not depressed. Nay, I see the agreement and coherence which the construction industry established, during the passage of this Bill, as the very momentum which your industry needs for further and, I hope, more successful lobbying of our Parliament. For example, the one law reform which is most keenly felt throughout the industry as needed, is the reform of the "knock on" effect or, in legal terminology, the "joint tortfeasor" rule. In a memorandum presented in February of this year to the Secretary of State for Trade and Industry by the Institute of Chartered Accountants, the case against this "joint tortfeasor" rule was powerfully argued. It seems to me, therefore, this is exactly the type of law reform which your industry can, as a whole, strongly

urge upon Parliament.

20. There are other practical steps which, I think, consulting engineers, and other professional men, can take to protect themselves from their increased exposure to liability. There are, however, some cul-de-sacs up which I do not advise journeys to be made. Firstly I do not think the solution lies in new arrangements with the insurance industry. I am much aware that the insurance industry has provided considerable protection to professional men when faced with claims against them. I am aware too that certain sectors in the insurance industry have displayed commendable ingenuity and intelligence in providing insurance arrangements which are helpful to the professions, not least of all to your profession. Yet the provision of insurance does nothing to remove the risk of liability. It, in fact, only transfers the risk from the insured to the insurer. It also increases the number of persons who are involved in the litigation process and can result in litigious disputes where the real battle is not between the plaintiff and the defendant but between one insurance company and another. Yes, your profession does need help and assistance from the insurance industry but it cannot look to that industry for the resolution of the "liability crisis".

21. Similarly I do not think the solution lies in introducing into your industry, strict liability or any concept of "no fault" compensation. Even though this may result in limiting the awards granted to plaintiffs and in a substantial reduction in the incidence of litigation, it would be almost impossible to administer within the construction industry and, could, in any event, have undesirable results. You may be reluctant to acknowledge it but the "fault" basis of negligence claims does have its benefit for society. It carries with it a sense of responsibility for each of us. If we do wrong, and in doing wrong, injure our neighbour, we are responsible to our neighbour to compensate him for the wrong which we have done to him. There is, therefore, nothing bad about the basic concept upon which the law of negligence operates. The trouble lies not in the central elements of the law of negligence, but in its extensions. Experience has shown, for example, that much the most effective discipline on a factory owner to keep his machinery safe and his employees free from harm, lies not in prosecutions instituted by factory inspectors for contravention of the Factories Acts but in civil claims brough by the employee, often supported by his trade union, against his employer. Actually it is here that the insurance industry also makes its contribution for good. Their own inspectors also visit their client's factories and gauge the range of the insurance cover, and the cost of it, against their judgment of the safety of their client's premises and of the operations which he carries out in it. Heavy increases in insurance premiums, or refusals to provide insurance cover, have a very salutory effect on a factory owner.

22. A lot of the problem in the "liability crisis" is that the law of tort has taken over from the law of contract. While the former is not within the control of the individual citizen, the latter basically is. There are, of course, rules about what is lawful and what is unlawful in a contract ....as indeed there are lawful and unlawful contracts. Also it is not possible in a contract to oust the jurisdiction of the Court. This has long been deemed to be against 'public policy'! Yet there is much a professional man can do in order to protect his and his clients' interests in the field of contract. In the first place, in simple layman terms, he can identify his role, his client's role, the contractor's role and so forth in his contract with his client. All of this can be done quite informally in, for example, an exchange of letters. It need not require the use of the FIDIC contract, the RIBA Contract or other standard form contracts used in the industry. I believe a lot of the present problems lies in the client not understanding the true relationship he has with his professional adviser. If, therefore, the client is not prepared to educate himself on the true nature of his relationship with his professional adviser, then it is for the professional adviser to educate him. It is all a bit late for the consulting engineer to tell his client, after the client's building has collapsed, that it was the client and not his consulting engineer who was taking the risk in the use of that particular form of structure!

23. There are other initiatives too that professional men, such as consulting engineers, can take. As has been suggested in the FIDIC discussion paper of last March, use can be made of contracts which are structured not in 'legalese' but in the language of the job. Hence, if a dispute arises, the judge or the arbitrator will find himself required to construe the contract within the needs of the technical operation which it covers. There is also much to be gained I believe, in consulting engineers concentrating upon the management process of a project. Many construction disputes arise, I believe, because of a breakdown in the management arrangements for a project. The Victorian pioneers were not always successful when they took on, as they invariably did, the entire management of a project. Insufficently qualified engineers managed projects which were well beyond their expertise and which resulted in a few awful disasters like the Tay Bridge catastrophe. Here the Victorian pioneer, Sir Thomas Bouche, simply did not understand wind dynamics and built a bridge which had no hope of surviving the normal (although fierce) weather conditions of the Firth of Tay.

24. Yet there is, I believe, much to be learned from the management of the construction process by the great engineers of the 19th Century. I believe, therefore, the emphasis again on the management of projects, in which the consulting engineer is closely involved, is to be encouraged. More attention to management should result in a better product and in a reduction of claims.

25. I hope this paper has thrown challenges in a few directions. Of these, there is one challenge which I am prepared to take up. At least I will do my best to do so. For the reasons which I have put forward in this paper, judges and lawyers, assisted by Parliament, should properly evaluate the extent of liability which should fall, and upon whom, under the law of negligence. If needs be, Parliament should be prepared to restate the law of negligence as it has thus far only done with occupiers of land - and the duties which they owe to their visitors and now their trespassers.28 The target for this exercise - and I use the term deliberately - is not so much the passing of a Law of Negligence Act of 1988 but the influence that proceedings in Parliament should have upon the judges and the exercise by them of the restraints of 'public policy'.

NOTES

1. Donaghue-v-Stevenson 1932 AC 562.

2. Ibid at 580.

3. Ibid at 599.

4. "English Law - The New Dimension (Stevens & Sons 1974)".

5. Whitehouse-v-Jordan 1980 1 AER 650: Court of Appeal; 1981 1 AER 267: House of Lords.

6. Ibid at 658 C-E.

6.A. Ibid at 658 A-C. This dictum of Lord Denning was disapproved by the House of Lords. Lord Edmund-Davies said at 276 H:, "Counsel ... persisted in submitting that his client should be completely exculpated when the answer (to whether he is at fault) is "Well at worst he was guilty of an error of clinical judgment". My Lords, it is high time that the unexceptability of such an answer be finally exposed. To say that a surgeon committed an error of clinical judgment is wholly ambiguous, for while some such errors may be completely consistent with the due exercise of professional skill, other acts or omissions may be so glaringly below proper standards as to make finding of negligence inevitable". This is the established view.

7. Addie's case 1929 A-C. 358.

8. British Railways Board-v-Herrington 1972 1 AER 749. Both this case and Addie's case concerned, of course, the duty towards trespassers.

9. Ross-v-Caunters 1979 3 AER 580. The duty is however limited. It will not extend to the opponent of the

solicitors' client. In Ross-v-Caunters the mistake was glaring, namely allowing the beneficiary's spouse to attest to the Will.

10. Muirhead-v-Industrial Tank Specialities Limited 1985 3 AER 705: Court of Appeal.

11. B.L. Holdings-v-Wood 10 Build LR 48.

12. Gold-v-Harringay AHA Times June 17, 1986. In Thake-v-Maurice 1986 2 WLR 337, the Court of Appeal held that the Defendant surgeon was negligent in failing to inform the Plaintiff of the risk of becoming fertile again after a vasectomy. It had already been decided in Emeh-v-Kensington & Chelsea AHA 1982 QB1166 that the birth of a healthy child could be viewed as damage.

13. Supra.

14. Sidaway-v-Governor of Bethlem Hospital 1985 1 AER 643, House of Lords. However, in that case a general warning was given by the doctor. Their Lordships rejected the American doctrine of "informed consent" (Canterbury-v-Spence 1972 464 F (2d) 772) by a 4-1 majority. Not every risk has been mentioned. If, however, the risk is substantial (say 10%) it must be referred to come what may.

15. Dulieu-v-White 1901 2 KB 669.

16. Hambrook-v-Stokes Brothers 1924 1KB 141: Court of Appeal.

17. Chadwick-v-British Transport Commission 1967 2 AER 945.

18. McLoughlin-v-O'Brian 1982 2 AER 298: House of Lords; 1981 1 AER 809, Court of Appeal. The majority of their Lordships considered that public policy was relevant. However, they considered policy dictated that there should be recovery. This illustrates how one judge's policy is not another's.

19. Ibid.

20. Dutton-v-Bognor Regis UDC 1972 1 AER 462.

20.A. OJ 1985 L 210/29. Council Directive on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products.

21. The Royal Commission on Civil Liability and Compensation for Personal Injury published its report in January 1978 (Cmnd 7054). It is normally known as the Pearson Commission after its chairman, Lord Pearson, a Lord of Appeal.

22. The Pearson Committee made some 188 recommendations. The principal ones were as follows:

(1) The action of tort should be retained. The principle of making full reparation for the loss suffered should be continued. Minor changes to the assessment and method of payment of damages were put forward; for example a system of periodic payments was proposed in cases of death or serious and lasting injury.

(2) A no-fault compensation scheme should be introduced for injuries caused by motor vehicles modelled on that in respect of work injuries. The scheme should be administered by the DHSS and should be financed by a levy on petrol.

(3) A no-fault compensation scheme would not be appropriate in any of the following areas: rail transport; products liability; services other than medical and carriage.

(4) A no-fault scheme for medical accidents should not be introduced at present. However, the progress of legislation providing for no-fault compensation in the event of medical accidents in New Zealand and Sweden should be studied and assessed so that the experience could be drawn upon if such such a scheme were to be introduced in this country.

(5) Strict liability should be introduced in certain areas: injuries caused by rolling stock; products liability; injuries caused to volunteers for medical research; injuries from vaccinations; injuries from things or operations which create exceptional risks.

For a full list of recommendations, see pages 372 - 388 of the Report.

23. The Latent Damage Act 1986. This amends the Limitation Act of 1980 so that by section 14A of the latter Act a new limitation period is introduced for negligence actions, other than personal injuries cases, where the facts relevant to the cause of action are not known at the date of its accrual. The limitation period of 3 years starts from the date on which the Plaintiff or any person in whom the cause of action was vested before him first had both the knowledge acquired for bringing an action for damage in respect of the relevant damage and the right to bring such action, section 14A (4);(5). The old limitation period of 6 years running from the cause of action accruing remains if it is a greater period.

The knowledge required is that of the material facts about the damage in respect of which a claim is made; that the damage was attributable in whole

or in part to the act or omission which is alleged to constitute negligence; the identity of the defendant; the identity of any other person and the additional facts supporting the bringing of an action against the defendant (section 14A (1); (7); (8)). The overriding time limit for negligence actions not involving personal injuries is found in section 14B of the amended Limitation Act 1980. No action for negligence shall be brought after 15 years from the act or omission which is alleged to constitute negligence and to which the damage is attributable. This applies notwithstanding that the cause of action has not yet accrued.

Section 3 of the Latent Damage Act gives a cause of action to successive owners in respect of latent damage to property. A fresh cause of action accrues to the successors if the prior owner did not know the material facts giving rise to the action. The limitation period, however, runs from when the original cause of action accrued.

23.A. The Latent Damage Act has altered the unsatisfactory present state of the law. The House of Lords in Pirelli-v-Oscar Faber 1983 1 AER 65 decided that the limitation period ran from the date of the occurrence of the damage, whether it was reasonably discoverable or not. This rule was said to be arbitrary and was criticised both judicially and extra-judicially. It also created considerable problems when trying to establish the date of the occurrence of the damage. (see, for example, Dove-v-Banham Patent Locks 1983 1 WLR 1436, in that case the limitation period ran from when a house was burgled rather than when the defective lock was actually installed).

24. In Dutton-v-Bognor Regis UDC (supra) at page 474 C-E. The actual case concerned whether a subsequent purchaser of a house could sue the local authority who had approved the foundations. The Court of Appeal held that he could. Previous cases were overruled.

25. McCloughlin-v-O'Brian (supra) at pages 310 - 311. He was, of course, in a minority of one in the House of Lords in expressing this view.

26. The Act abolished the procedure of a Statement of Case for a decision of The High Court. An arbitration award can no longer be set aside merely because there are errors of fact or law on the face of the award (section 1(1)).

In order to appeal from the arbitration award leave must be sought from The High Court which will only be given if "it considers that, having regard to all the circumstances, the determination of the

question of law concerned could substantially affect the rights of one or more of the parties to the agreement" (section 1 (4)).

27. The 1979 Act first came up for consideration by the House of Lords in the Nema 1981 2 AER 1030. Lord Diplock emphasised that the undue dragging out of arbitrations in the courts "may well endanger the maintenance of the reputation of London arbitration as a forum for the resolution of commercial disputes".

In that case the House of Lords gave a very firm guideline on the granting of leave to appeal. If the dispute involves a one-off contract and one-off set of facts, then leave will very rarely be granted. The arbitrator must be clearly wrong in such a case. At the other end of the scale, leave will normally be given if the dispute turns upon the interpretation of a contract which is of general use in a particular trade. These guidelines clearly go beyond the strict wording of section 1 (4) of the Arbitration Act 1979.

28. The duty of an occupier to lawful visitors is set down by the Occupiers Liability Act 1957 which replaced the common law rules. By section 2 (2) the occupier has "a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe using the premises".

The duty of an occupier to a trespasser is laid down by the Occupiers Liability Act 1984. This replaced the common law which had developed considerably in the wake of Herrington's case (see note 8 and text). Not surprisingly the duty is not as onerous as that to be shown to a lawful visitor. By section 1 (3) the duty of care only arises if the occupier has reasonable grounds to believe the danger exists; that he has reasonable grounds to believe that the defendant is in the vicinity of the danger and that the risk is one such that "in all the circumstances of the case, he may reasonably be expected to offer the other some protection".