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I AM, as the programme of this Symposium will confirm, David Dann and I am the Claims Manager of the Ariel Syndicate, an Underwriting Syndicate at Lloyd's in London, which specializes in underwriting liability business, particularly Products Liability. I must also emphasize that what I shall say today is the product of my own thoughts and must in no way be interpreted as a statement of policy on behalf of the Lloyd's Syndicates and London Companies comprising what is known as the London Aviation Insurance Market.

What risk does an Insurer accept when he agrees to provide Products Liability Insurance? There are basically two areas of potential claim against a manufacturer; claims by the purchaser of an aircraft whether or not he has bought direct or by re-sale, and claims made by third parties such as passengers or other persons who may sustain injury, death or damage by reason of an alleged deficiency in the design or manufacture of an aircraft product. I must say at once that I consider no manufacturer of repute consciously sets out to avoid the exercise of reasonable care in the design, construction and testing of his product. However, ever-increasing sophistication in accident investigation and the development of the doctrine of strict liability have led to a substantially more critical view being taken of the manufacturer's position.

In order to view correctly the position of the aviation prime or component manufacturer it must be realized that the majority of international carriage by air is governed by international agreements such as the Warsaw Convention and the Hague Protocol amendments thereto, or by the voluntarily accepted Montreal

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Agreement. These arrangements limit the liability of the carrier to various amounts—the maximum being the US $75,000 of Montreal. It should be noted in passing that the much-discussed Guatemala Protocol only increases the limited recovery to US $100,000 and the proposed United States Government Supplemental scheme which is planned to include domestic carriage within the U.S. provides only a further US $200,000. These sums may well be far below some of the figures which have been needed to dispose of wrongful death cases within the U.S.A. whether by judgment or agreed settlement and therefore the claimant must attempt either to break the imposed limit or to recover from another party and who else but the manufacturer of aircraft products. It has been observed that strict liability makes it easier to obtain recovery from a manufacturer than to attempt to break a limitation. Equally on contemporary domestic carriage within the U.S. the manufacturer shares the risk with the airline and in the field of general aviation the manufacturer—by reason of his diversified sales—quite often has much higher limits of financial stability as well as insurance than a fixed base operator and so becomes a more target-worthy defendant.

Such is the basis of the situation, but on top of this rational approach lie the increasing social pressures of which we are all aware to virtually ensure a substantial payment to persons injured, or damaged in their property more or less regardless of the source of that recovery. It has been regularly said at gatherings of this nature that we live in the age of the protected consumer and the law-suit. It is an observation worthy of repetition and even emphasis, for not only in the U.S.A., though partly due to the influence thereof, but throughout the whole world, more people are suing more people.

From the moment that a manufacturer relinquishes control and possession of his product to a third party, that manufacturer becomes exposed to a products liability loss, this exposure reaching back through the complex chain of contractors, subcontractors and suppliers of raw material who are involved in the construction of a modern jet aircraft. When one views the potential exposure of a manufacturer of a wide bodied jet aircraft it is easy to come up with figures of say US $20,000,000 to US $24,000,000 for hull values for which operators and their hull insurers are certain to

sue if they consider a machine lost due to alleged defect, and a passenger liability of anything up to 350 seats multiplied by an average death settlement figure of say $300,000. It would surely be commercial lunacy and suicide for a corporation to assume these risks for themselves and it is a fact of economic life that Products Liability insurance can stabilize and protect the resources of the corporate entity.

Products Liability insurance is probably the most difficult class of aviation insurance to handle. The current legal climate gives the carrier little defence—he knows immediately when he is involved and can quantify his position. While this may apply in some products situations of a more obvious nature there are still many instances where a manufacturer is unaware that a claim will be pressed against him for some considerable period of time—often just within the applicable statute of limitations. As a record plays a major part in any method of premium calculation the Products Insurer finds that it is difficult to make adequate provision where reserving can be extremely uncertain.

The normal method of assessment of Premium is to apply a rate to the estimated Production turnover for the period in question. The rate will of course vary in relation to the criticality of the product, its potential exposure, and its past record. In addition there will be built into the premium asked, a factor to take account of past production, for this may well be the most definite exposure. Whereas the majority of major aviation manufacturers are extremely accurate in their projections of future sales it quite often happens that a graph of sales tends to shew peaks rather than a regular steady line. Thus there may be years of high sales immediately following the introduction of a new model and then some years of relatively low activity. Although obviously reflected throughout the industry, this applies mainly to the major frame and engine manufacturers—all of us can think of examples.

However, the exposure of a manufacturer does not rise and fall in direct comparison to his sales for any one year. It remains constantly linked to the sales of his product actually in use at any one time. Attempts have been made to transfer premium forward, to build up funds in good commercial years, but with limited success. It may well be that what is required is a complete re-assessment of the traditional rating plan, and that a potential assured should be

quoted terms upon the exposure generated by his past sales, that is the number of aircraft or engines or magnetos or assorted components actually in service. If a manufacturer were to cease trading in aviation commodities this very instant, he would require a policy protecting him from future suits arising out of items already introduced into the stream of commerce for as long as his products were in use. It could therefore be argued that current exposure rather than turnover is the best rating basis. Some London Insurers have recently turned to this thinking.

Whatever the basis used however, the overriding factor which will always affect the basic rating philosophy of an insurer is the loss experience of a client and the handling of claims is the main area in which Assured and Insurers must really act in a united manner, and an area which has seen more developments than any other in recent years.

For many years Insurers took premium and paid losses. This they considered was their sole function. Some contemporary thinking has broadened this attitude to ensure that from the moment of policy inception a system of products support is created which can educate the Assured and his staff into all developments in the products liability field, to provide legal and technical advice as may be necessary and thus to avoid some of the pitfalls which can lead to loss and ensure that if a loss situation does arise then it is handled in the most efficient manner possible. This products support should ideally be commenced before inception of coverage and must be a continuous two-way process. It is a costly process for the Insurer, but properly handled can obviously lead to a reduction in claims cost, and hopefully, thus in premiums charged.

This method of operation coupled with the efficient handling of claims when they are made is not only to the benefit of Insurer and Insured but to the community as a whole. We live in an inflation-prone era, and any attempt at cutting of costs must be of advantage. I have indicated how some insurers feel that by working closely with their Assureds in the fields of education and product support they are offering a better value for the premium dollar than ever before where the sole purpose of the insurer was to defend and indemnify. I would strongly urge that this new approach by insurers is of far more general benefit than is at first realised. The oft-quoted case of *Singleton v. Bussey* stated that a policy of third

party insurance was really effected for the benefit of the third-party rather than the Assured. In the same way I submit that insurers who do their utmost to work with their Assureds minimising the financial and economic loss suffered by the community as a whole are discharging a very valuable duty. If claims increase in numbers and in cost then premiums must rise also and premiums must be passed on to purchasing consumers in the same way that even no-fault plans are not subsidised by pie from the sky but by levies or taxes or premiums once again. The more that economic loss arising from Products Claims can be reduced, the better economically for the entire community.

I do not wish to rest solely upon economic advantage however. I am well aware that when accidents happen those who suffer in person or in property must be allowed the right to seek recovery under the relevant legal provision, whether negligence, no-fault, or some other arrangement. Insurers are always conscious of the responsibility they assume when they take over the defence and conduct of a case against an Assured. The days are far removed when Insurers were alleged to prey upon widows and orphans and to display a negative social conscience. They are well aware of their position, their social responsibilities and do their best to discharge them for the benefit of the community as a whole. Economic wastage by means of excessive claims cost which has to be recouped from some source is as harmful as any other cause of inflation.

Inflation is of course a main enemy of the Products Liability Insurer. He takes a premium in say 1974 but may not be called upon to settle a claim arising from an incident in that year until perhaps 1978 by which time the purchasing power, or shall we call it settlement value of that amount of the premium dollar set aside for claims has been eroded by probably 7 per cent to 10 per cent compound interest in most Western countries, while at the same time a similar rate of increase has been applied to the amount of money necessary to settle a case or satisfy a judgment. Therefore the Insurer loses on both counts.

This is one reason why, as I said earlier, it is necessary for insurers to create reserves at the earliest possible date after knowledge of an incident. In the past all insurers tended to wait until suits were presented in full detail and there was sufficient evidence to justify every cent in the reserve dollar. The feeling of insurers

now is that if there is exposure then it must be reserved. A case can be reviewed in a more definitive manner as it progresses and this can be reflected in reserve alterations.

Early and reliable reserving goes hand in hand with an efficient claim service. I have already emphasized the educational element of Products Insurance. I now go further and take as the third and most vital plank of a Products Liability programme, allied to indemnity and educational support, identifying this as a positive claim handling service. An Aviation Products Liability Policy more than any other form of insurance is absolutely ineffectual without an adequate claim service. The usual type of assessor, adjuster or lawyer is completely out of his depth. With the ever increasing exposures, the ever changing law and the increasing costs of insurance it is vital that Aviation Products matters are handled throughout all stages of their development by fully qualified, competent and experienced personnel with full access to all the specialist advice they may need. Pre-loss educational contact can set up channels of communication between Assured and Insurer so that when notice of potential claim is given a pre-arranged scheme of investigation swings into operation. It is essential today and will be more so in the future that losses are expeditiously investigated in detail and where necessary and appropriate counsel can commence a vigorous defence.

From the single claim against a manufacturer, the Products situation has developed to a position where the whole range of products can be under detailed attack and where despite the protection of insurance the whole future of a commercial organization can be placed in jeopardy. This has been brought about not only by specialization among those members of the legal profession who practise in the Plaintiff's field, but also by the recent spectre of awards of Punitive Damages assessed by a lay jury who are incited to believe that they are the conscience of the consumer-victim and that so-called punishment must be related to the worth of a Company. Some years ago the slogan used to be "sue for safety" among plaintiffs—now it appears to be "sue for revenge."

I do not wish to question the right of any aggrieved party to seek damages in compensation. Nor, as an alien—I hope not too undesirable an alien—to criticize your legal system, but I must state my support for those who argue that a person or entity should

not be placed in double jeopardy. Large compensatory awards satisfy the plaintiff in so far as any legal system can provide and are surely by reason of their consequences, punishment enough. Sanctions can be properly imposed by the F.A.A. upon persons who violate its ordinances—which is usually alleged within a punitive complaint. Surely an independent, technical, government body is best able to calculate the consequential harm done to industry and the community and to be the judge of the penalty to be exacted rather than an easily swayed lay body of jurors. This would then be properly penal rather than punitive, and satisfy the commonwealth in its public duty over and above the individual's need for compensation. While not wishing to raise the other problem of whether punitive damages hit the Corporation or merely the shareholders, I would observe that while some States allow the insurance of Punitive Damages none allow insurance of fines so my suggestion means a penalty imposed by the F.A.A. could not be passed on to insurance.

Where then do we stand as Insurers of the Risk? There is no doubt that with our Assureds we must have a close relationship of mutual trust and this must be of a long term nature to derive maximum benefit from the suggestions I have made here today. There is no doubt that with constant increases in the cost of commodities and in labour rates to say nothing of escalation of Court awards rates must be constantly reviewed. A long term relationship works both ways for the Assured wants to be certain that not only does his Insurer educate him, handle and investigate his claims but also that they are going to be in existence many years in the future to pay his claims and build upon their relationship. Insurers and Insureds who are in and out of the legitimate market are of no value. Products Insurance is not a commodity where one selects purely on the basis of cost. In many instances the best service costs more but is a more viable economic proposition over a period.

Before such an eminent gathering of legal luminaries I have not ventured to embark upon a critical analysis of the development of U.S. law from privity and negligence into strict liability other than to indicate that this was for the benefit of the consumer, I would make two observations however. First that while no one will properly deny the rights of the consumer to recover easily in respect of truely consumer purchases such as soap and shoes under a defect

only regime, I would submit that the more involved technical products should perhaps remain in an area of true negligence or possibly one where the state of the art at the time of manufacture would still be a defense. Foreseeability of a currently unknown and unforeseen scientific phenomena should surely not be imposed on manufacturers.

Secondly with reference to claims made by operators against manufacturers the current attack upon exculpatory language in sales contracts is surely misguided since it would be a major blow to commercial transactions if bargaining as to terms and conditions between parties of equal standing—as airlines and manufacturers surely are—were disallowed upon law review principles.

I would reemphasize in closing the part played by the Insurers. More and more they have become the key link in the chain of co-ordinating the efforts of Assured, experts and legal counsel. They are the policy makers, theirs is the responsibility to equate commercial necessity with legal advice and precedent. They must establish the philosophy of handling which with financial backing is the protection the Assured must have in the contemporary Products Liability climate. In many cases where a manufacturer has been severely mulcted in damages in court this has been through the failure of defendants to agree and co-operate. This is particularly apposite in the manufacturing field and Insurers too must learn to work together for the good of the industry as a whole and not adopt a too parochial attitude.

Insurers are probably the force behind the defence of 99 per cent of Products Liability claims brought against Aviation Manufacturers so I need not apologize for burdening you with my views. Insurers are confident they can work in most regimes of law and of course they are especially vital in a tort system. We do not exist to become faceless entities resisting just claims. Insurers should be risk-takers, they should be genuine underwriters, unlike many entities presently in the market place solely to obtain a ready cash-flow position, living on uncertain interest rates and a quicksand of dubious re-insurance. These people cannot properly discharge the duty of long-term service and risk management. The genuine Products Liability Insurer provides as I have said these benefits in addition to his indemnification for loss. I submit that by so doing he is aiding the consumer with his just claim and the

manufacturer who requires protection from such claims and that this is of major benefit to the social and economic way of life we enjoy.