



PPOs and Security

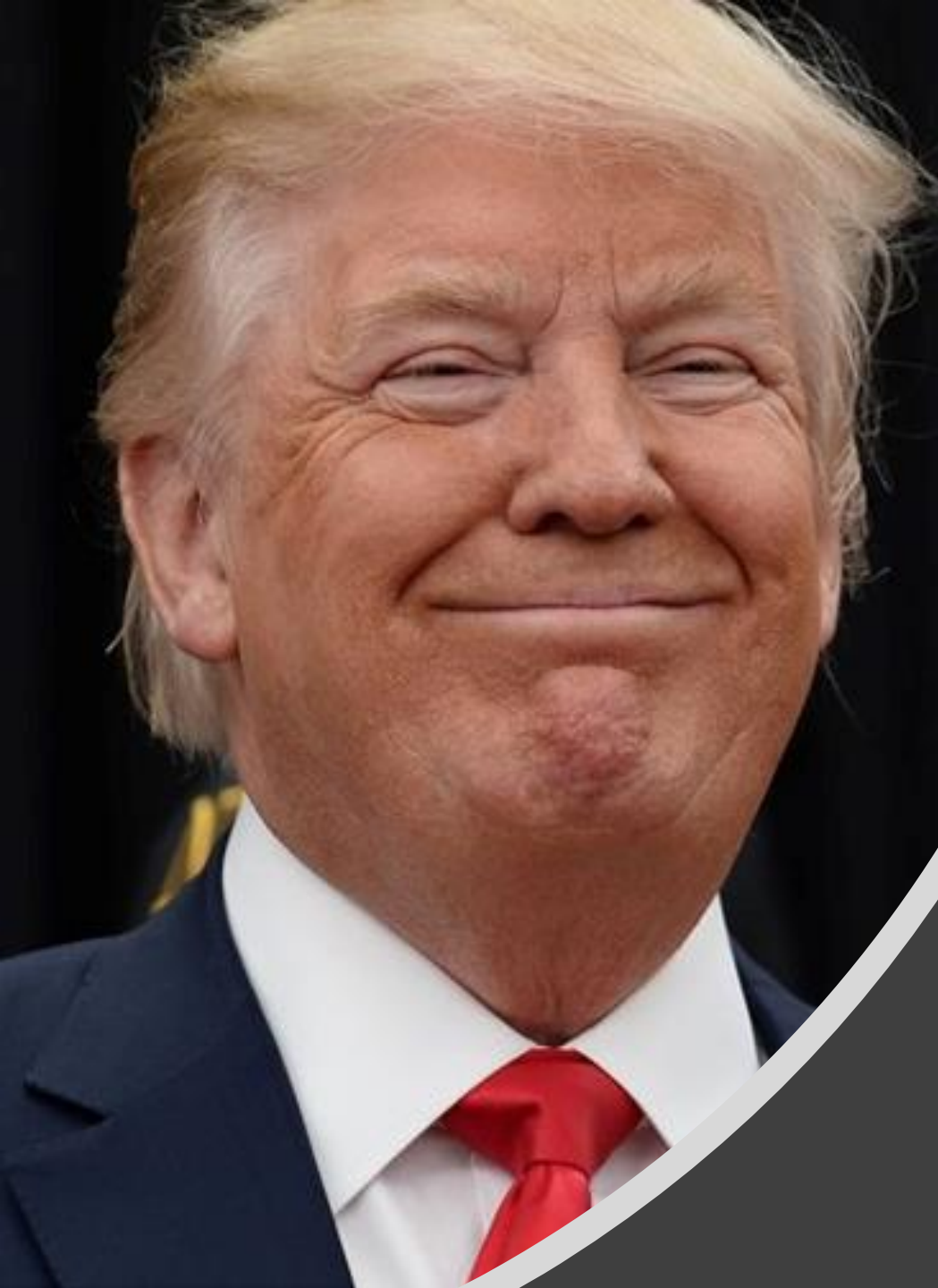
Ian Gunn

Personal Financial Planning Ltd



Warren Buffett

“Put all your eggs in one basket – and watch that basket!”



Reasonably
secure?

Spot the difference

Damages Act 1996
Section 2(4)

For the purpose of subsection (3) the continuity of payment under an order is reasonably secure if—

- (a) it is protected by a guarantee given under section 6 of or the Schedule to this Act,
- (b) it is protected by a scheme under section 213 of the Financial Services and Markets Act 2000 (compensation) (whether or not as modified by section 4 of this Act), or
- (c) the source of payment is a government or health service body.

Damages (Investment Returns and Periodical Payments) (Scotland) Bill
Section 3(2)

For the purpose of section 2(1A), a court is to assume that the continuity of payment under an order is reasonably secure if—

- (a) the right to receive the payments would be protected by—
 - (i) a guarantee under section 6 or Schedule 1, or
 - (ii) a scheme under section 213 of the Financial Services and Markets Act 2000 (whether or not as modified by section 4 of this Act), or
- (b) the source of payment would be a recognised body or office-holder listed in subsection (6).

Recognised bodies and office holders

Subsection 6

This is the list of who is a recognised body or office-holder as referred to in subsections (1)(b) and (3)(b)—

- (a) a part of the Scottish Administration,
- (b) each of—
 - (i) a Minister of the Crown,
 - (ii) a department of the Government of the United Kingdom.

The Scottish Ministers may by regulations—

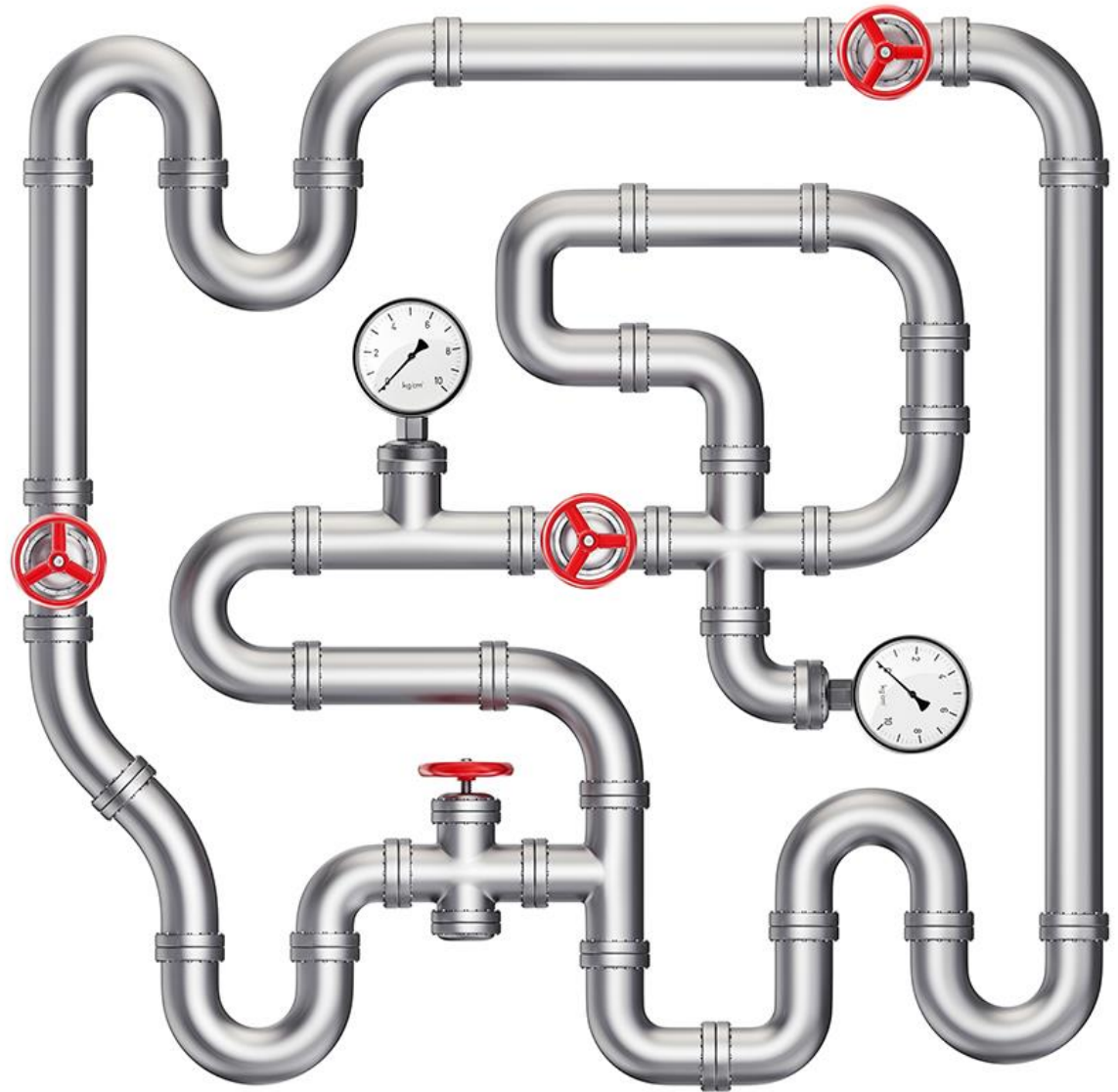
- (a) add an entry to the list in subsection (6) so as to include a particular, or category of—
 - (i) health service body,
 - (ii) non-government body,
- (b) provide for an exception to an entry originally contained in the list in subsection (6) (or remove or modify such an exception provided for in the list).

Regulations under subsection (7)—

- (a) may remove an entry added to the list,
- (b) may not remove an entry originally contained in the list.

Regulations under subsection (7) are subject to the negative procedure.

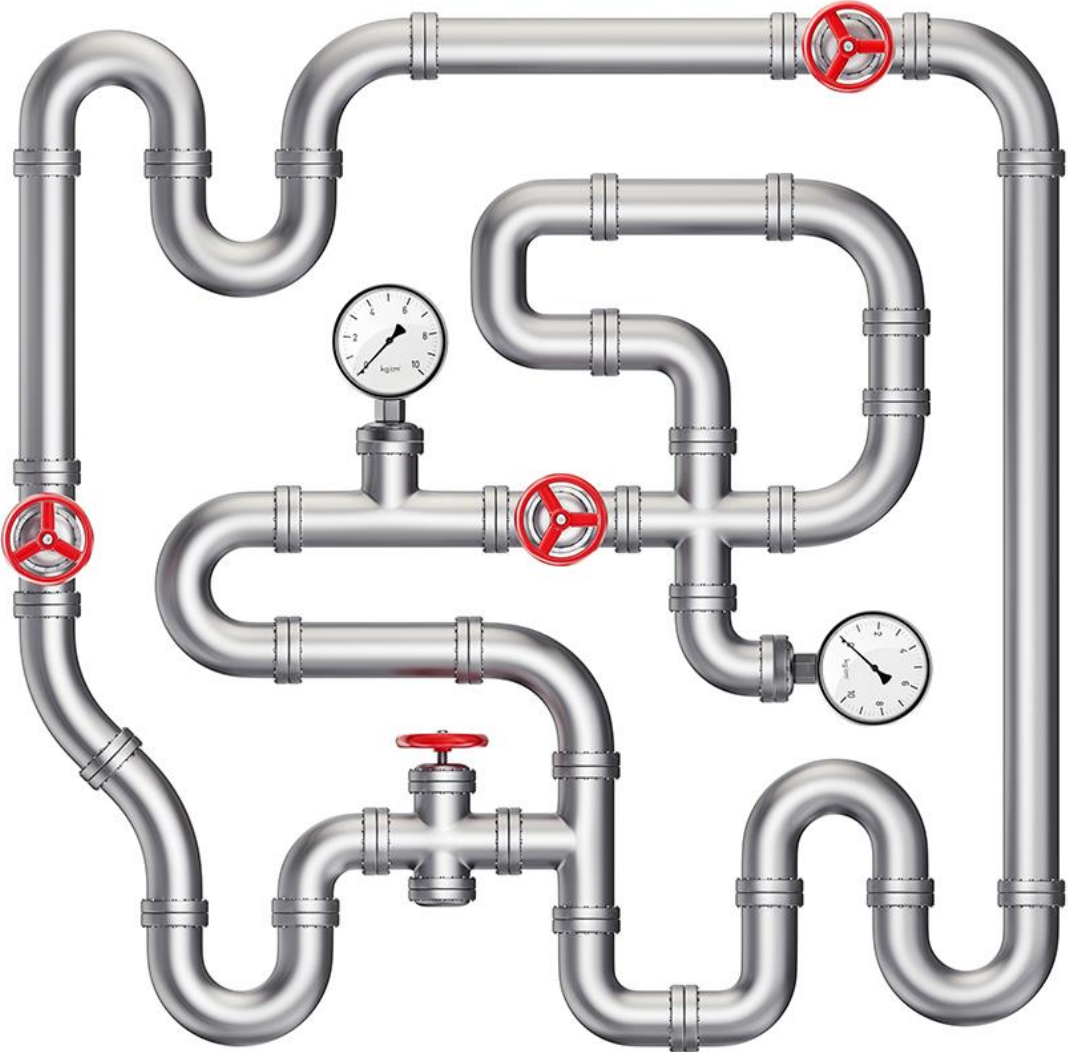
Protecting
cash flows –
where are the
safety valves?





Public sector defenders

- Await regulations in respect of:
 - Health service bodies
 - Non-government bodies

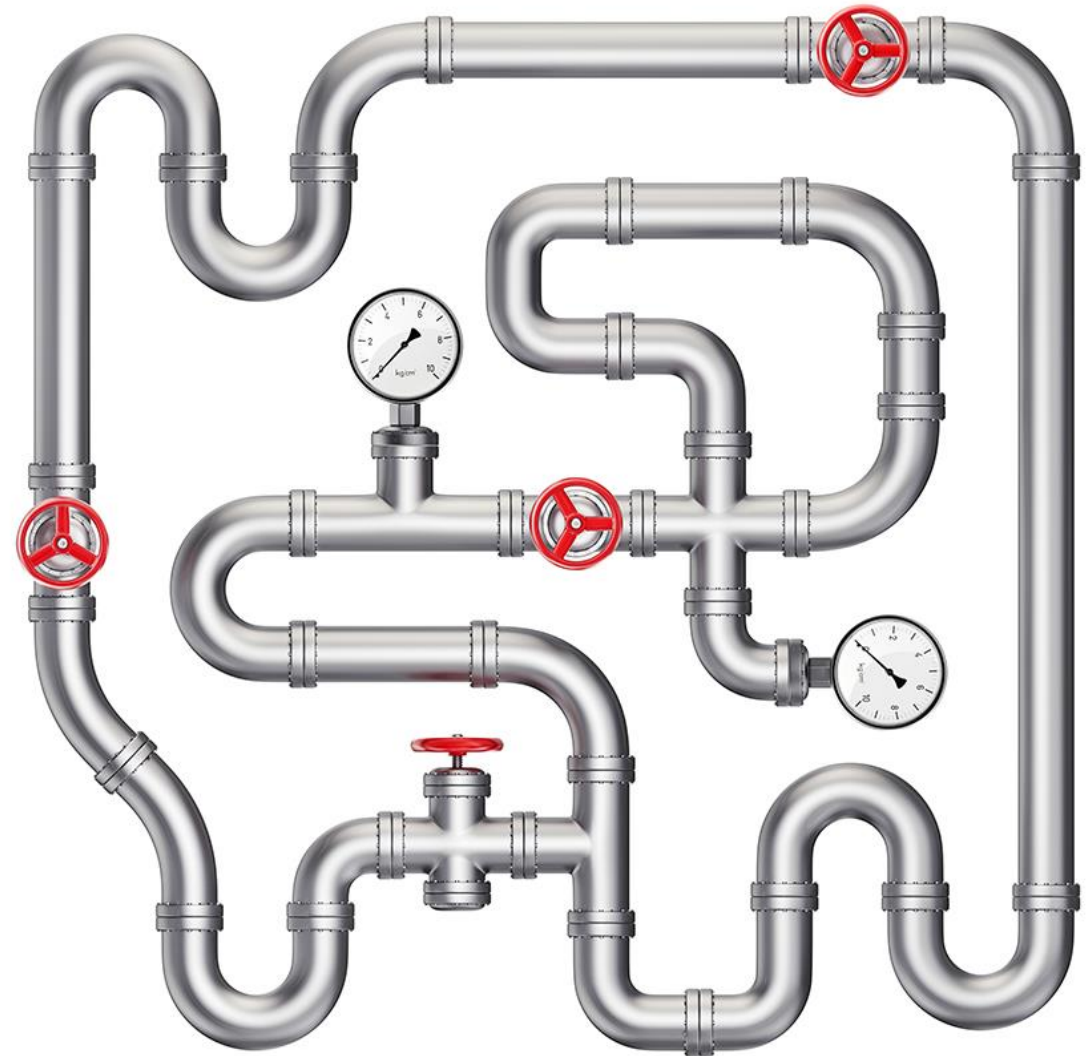




MDU

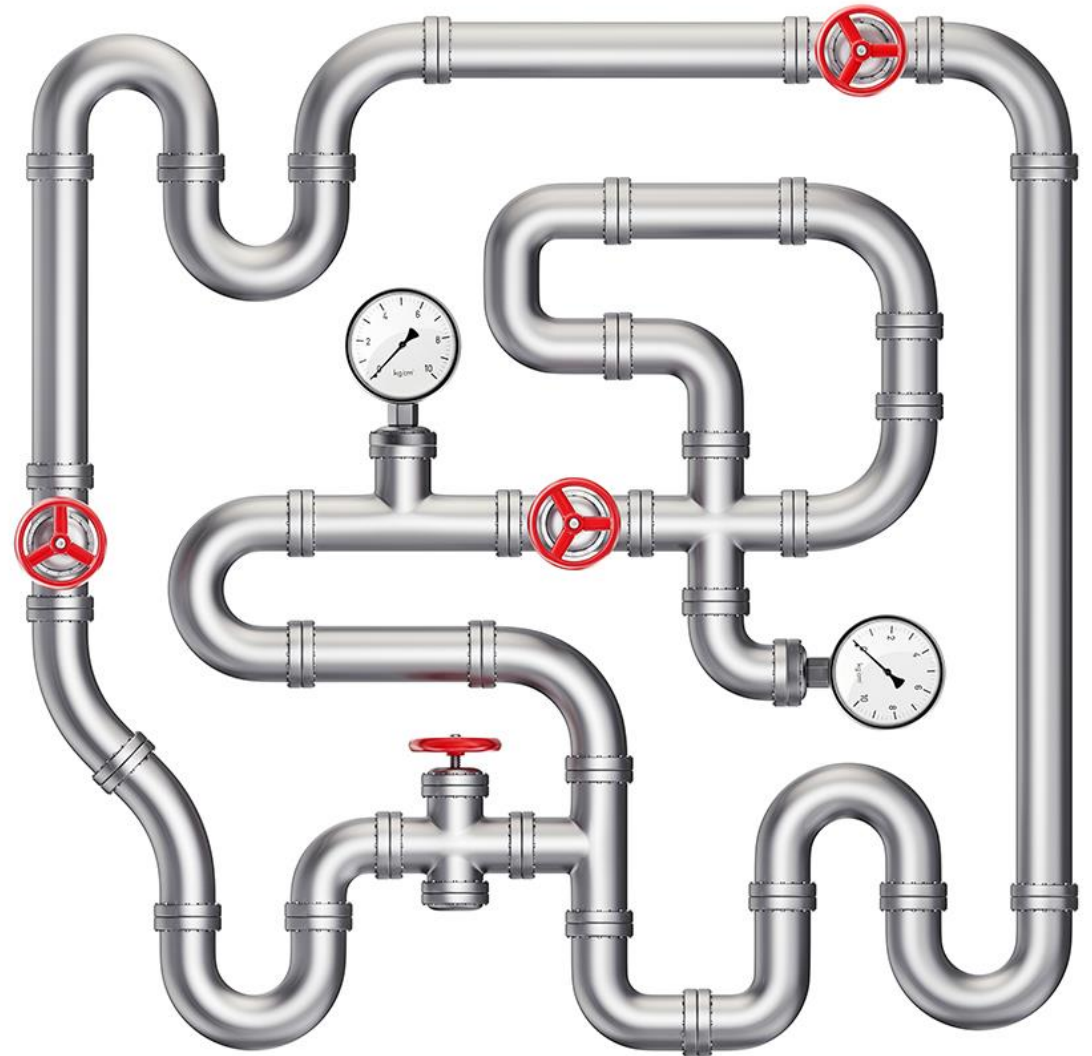
Medical Defence Organisations

- Indemnity is discretionary
- Not contractual right
- Not insurance
- No protection
- Except some MDU members
- No safety valves!
- State-backed guarantee?



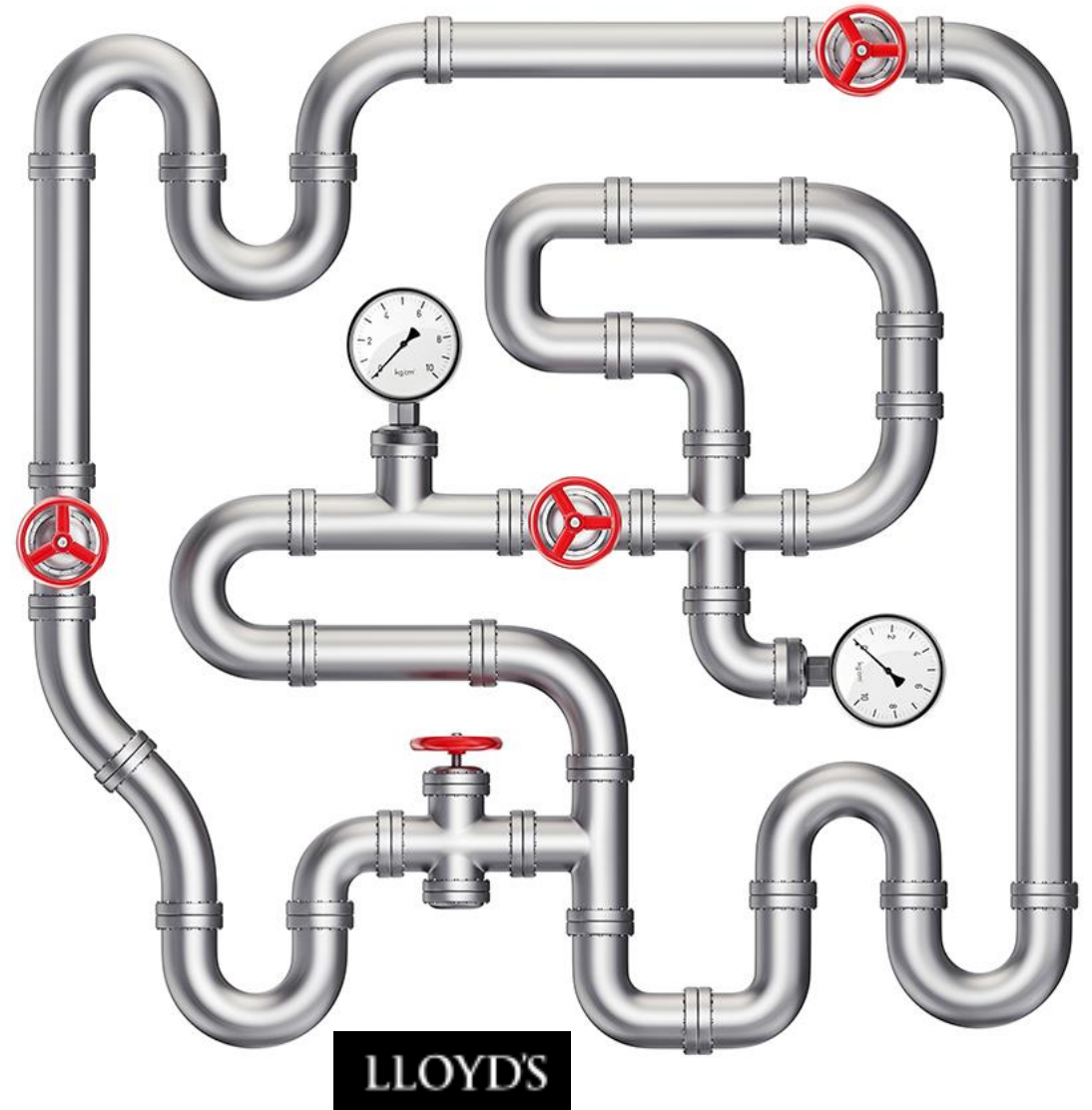
Road Traffic Accidents

- Compulsory insurance contract under the Road Traffic Act with unlimited indemnity
- Driver insured by UK or EEA authorised insurer, or Lloyd's syndicate
- Vehicle registered for use in the UK
- PPO under s2 of the Damages Act or an order imposing a liability on the insurer to pay the pursuer directly and giving a direct right of action makes the pursuer an 'eligible claimant' on FSCS
- 100% protection by FSCS
- Scottish Court can be satisfied that continuity of PPO is reasonably secure under s3(2)(a)(ii)



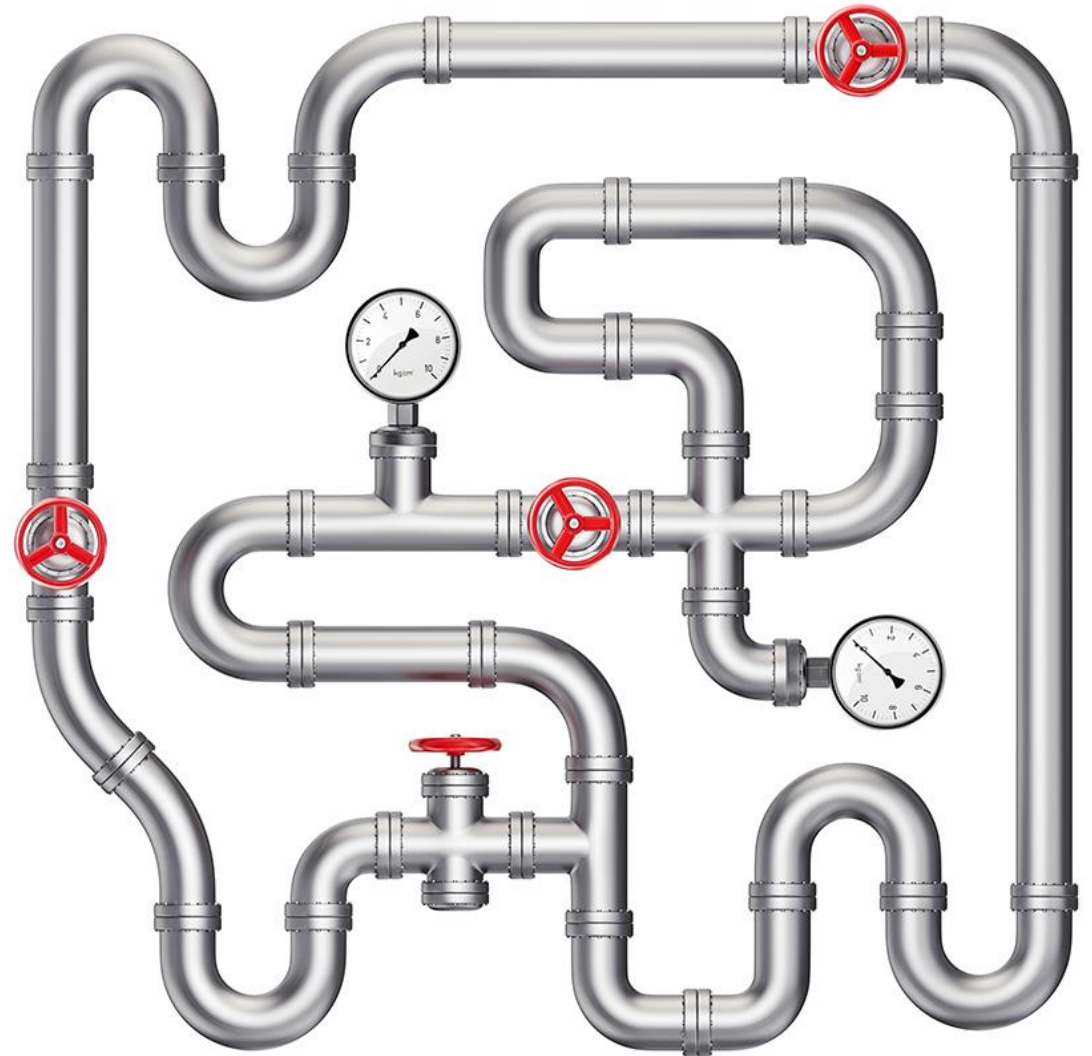
Road Traffic Accidents

- Inoperative policy
- Road Traffic Act insurer
- Although there is no contract FSCS protection applies provided the pursuer is entitled to the benefit of a judgment under s151 of the Road Traffic Act 1988



Road Traffic Accidents

- MIB Uninsured Drivers' Agreement
- No FSCS protection
- Reliant upon the ability of the MIB to meet its cash flows, i.e. the ability of members to pay levies as and when called upon to do so
- Courts in England have been provided with evidence by the MIB and satisfied that continuity of PPO reasonably secure



The bar is set
high....

While therefore, I am only required by the statute to consider whether the proposed order is reasonably secure and not required to find that it is entirely secure or free of all risk, it seems to me that my satisfaction has to reach a high level, given what is involved and I must finish up satisfied on something higher than a mere balance of probabilities.

Mackay J, *Bennett v Stephens* [2010] EWHC 2194 (QB)

Wednesday Newspaper Review - Irish Business News and International Stories - - March 31, 2010

By Finfacts Team
Mar 31, 2010 - 6:07:28 AM

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Irish Independent
IRELAND'S BEST-SELLING DAILY NEWSPAPER

MUNICH MISERY
ROONEY INJURY ADDS TO UNITED WOE

Foinsc
Details inside Foinsc

FREE IRISH ONLINE TUTORIAL

Worst nightmare

- 'Appalling' scale of the banking crisis revealed by Lenihan
- Will cost everyone €2,000 a year
- Insurance levy fear after Quinn goes into administration

INSIDE
Banks in crisis
Shoddy practices will cost us dearly

Lise Hand
In the land of Biffo-topias

Editorial Comment #22

Brendan Keenan

Finance Minister Brian Lenihan at the press conference on banking arrangements to Dublin yesterday. [View on Twitter](#)

The Irish Independent reports that the scale of the country's crippling debt mountain can be laid bare today -- and it leaves taxpayers footing the bill for a multi-billion-euro bailout of the banks, developers and Ireland's second largest insurance company.

Donald, where's your troosers?



janus

March 2, 2017

Global Warming Malarkey,
Photography, Poetry,
Politics, The Dark Side

<http://www.scotsman.com/news/world/donald-trump-visit-will-shift-to-scotland-to-deter-protests-1-4380716>



Let the wind blow high
Let the wind blow low
Through the streets
In my kilt, I'll go
All the lassies say hello
Donald, where's your troosers

*Farrugia v
Burtenshaw,
the MIB and
Quinn
Insurance*
[2014] EWHC
1036 (QB)

Catastrophic RTA
November 2008

Quinn placed in
administration April 2010

Trial March 2014

Security diluted to
homeopathic levels?

*Farrugia v
Burtenshaw,
the MIB and
Quinn
Insurance*
[2014] EWHC
1036 (QB)

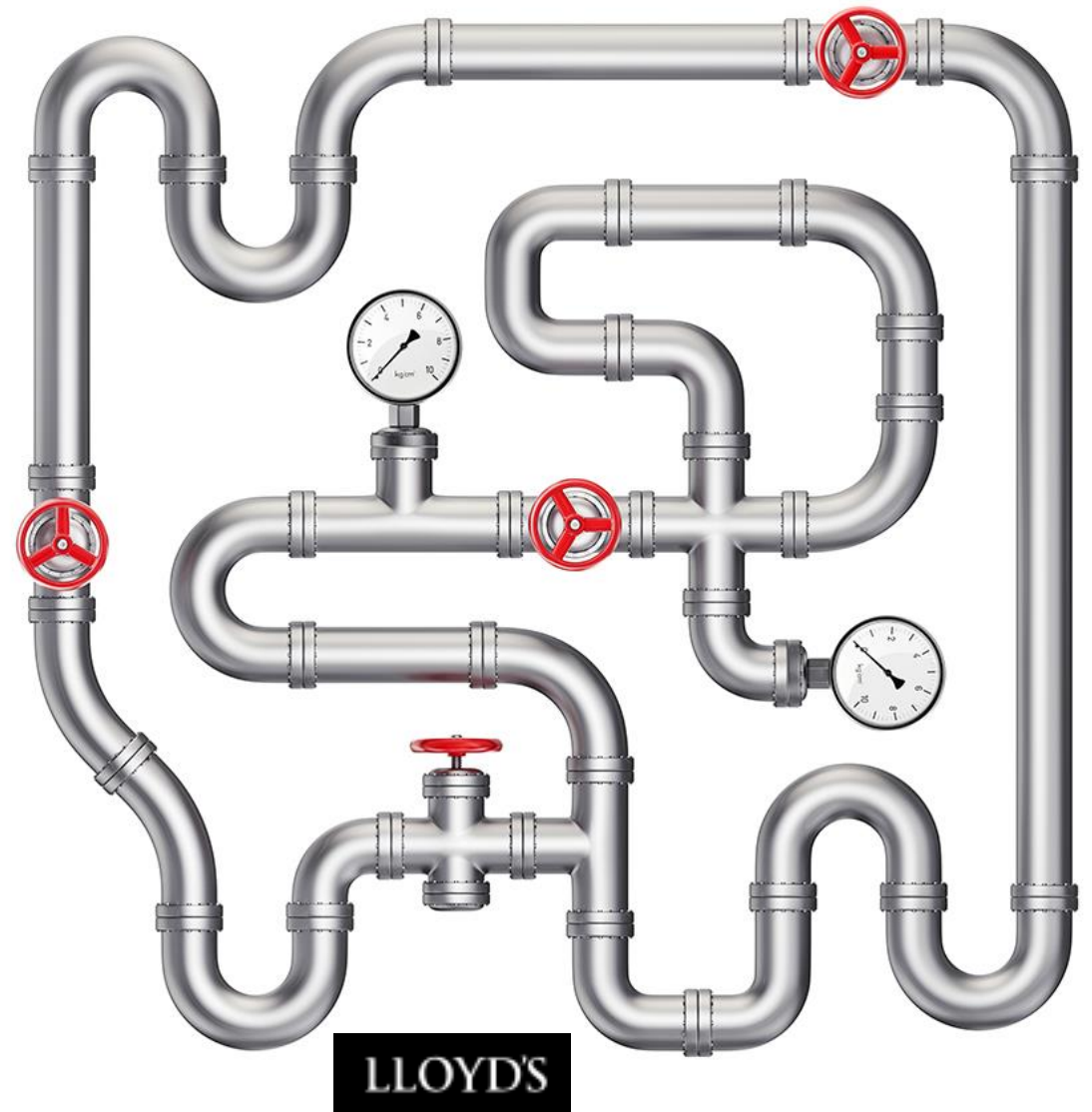
Mr Justice Jay
awarded PPO for care
& case management
£250,329.48 pa,
stepped up to
£277,878.14 pa from
15th December 2040

Links in the chain of
security

- Irish Compensation Fund
- FSCS – cover of last resort
- MIB – obligation to pay unsatisfied judgment

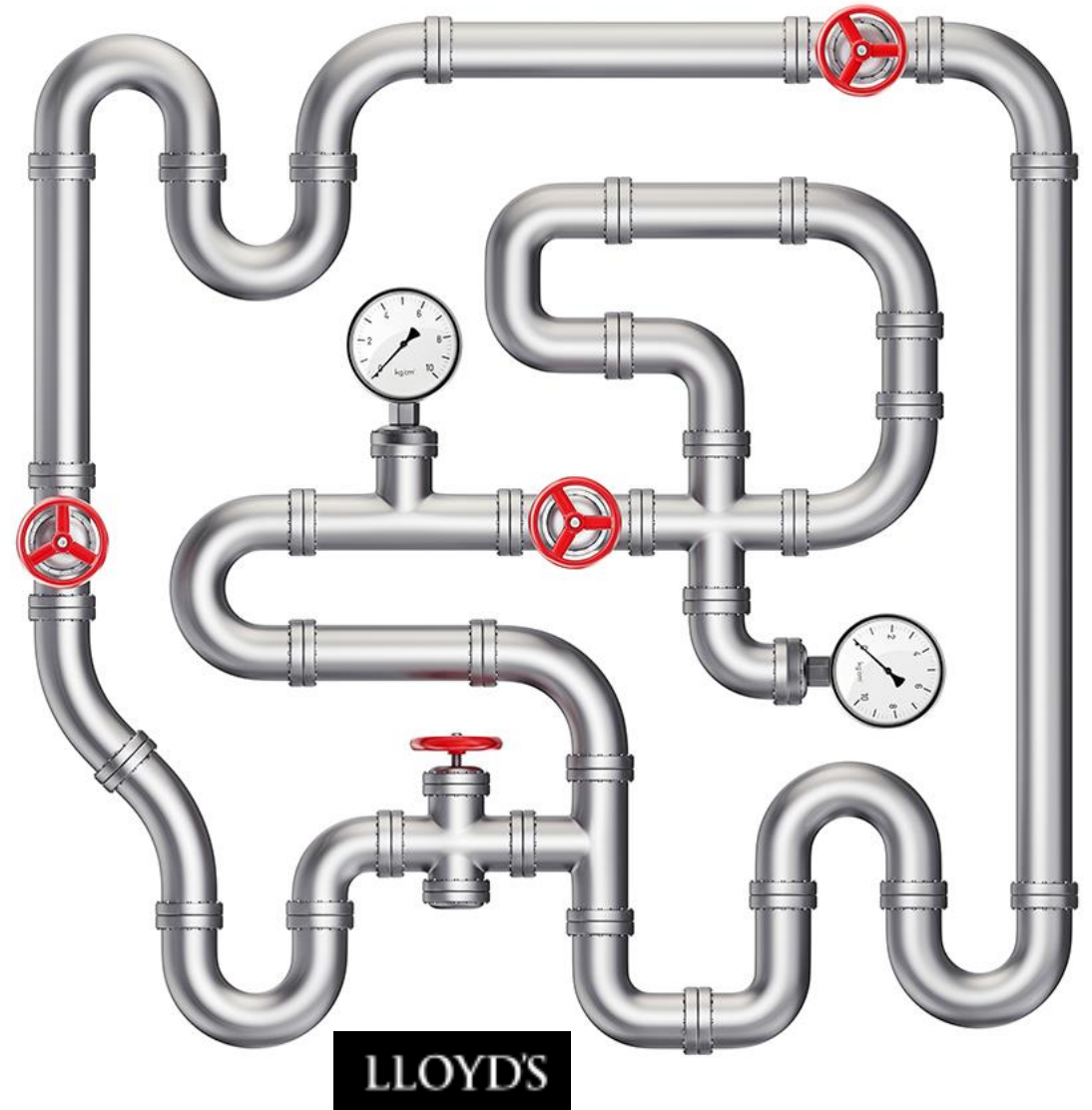
Accidents covered by employers'/public liability insurance

- EL insurance is compulsory but the market only offers limited indemnity
- Statutory minimum £5m set in 1988
- Most offer £10m
- PL not compulsory and likewise limited indemnity
- May be sufficient to cover lump sum settlements, but increasingly challenged at lower discount rate, and may be inadequate to meet a lifetime of PPs
- Issue is that insurers simply add up total payments, *including inflation/earnings growth*
- Must check adequate indemnity, with a suitable stress test (Kotula)



What about Brexit?

- Bank of England notice 24 July 2018: Temporary Permissions and Regulations Regimes
- *Financial Services Compensation Scheme (FSCS) membership will be extended to all deposit-takers and insurers in the regime with a branch in the UK. Firms in the regime without a branch in the UK will be outside of the scope of the FSCS, with the exception of EEA insurers that currently operate in the UK via a passport but without a branch, which will retain their existing FSCS membership whilst in the regime. A consultation on the broader approach to FSCS protection will be published later in the year.*





Summary

- 'Reasonably secure' = fundamental requirement of a PPO
- Statutory requirement: Scotland
 - Ministerial guarantee – yet to be used in England & Wales
 - A contract of insurance with FSCS protection and sufficient indemnity cover
 - An order against the Scottish Government, a UK Government Department or a Minister of the Crown
 - Regulations to come in respect of health service & non-government bodies
- Common law test: 'higher than the mere balance of probabilities'

The (re)insurer's perspective



- Insurers pass on risk to reinsurers, often syndicated to spread credit risk
- PPO capitalisation clauses:
 - Uncapitalised: 'pay as paid' with inflation linked deductible (insurer bears inflation risk)
 - Capitalised lump sum – set discount rate (1.5% typical) and may be reverse indemnity clause
 - Delayed 20 capitalisation: pay as paid for 20 years and then capitalise at normal life expectancy
- Further disincentives to offer a PPO include
 - Ties up more capital for longer – someone must bear the cost
 - Administration cost
 - Business model & regulation are based on annual contracts not long term liabilities
 - No costs hazard in only offering a lump sum: most will settle out of court
 - Long tail liabilities on mortality – may not be sufficiently offset by the ability to pool risks
- Which adds up to a strong shove to say “NO”!
- But some (re)insurers have embraced more than others. Lack of available reliable independent data on take up rates. PFP experience?