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**POLITICS, THE MEDIA AND REFINING THE NOTION OF FAULT:
SECTION 1 OF THE COMPENSATION ACT 2006.**

Kevin Williams*

Introduction.

Section 1 of the Compensation Act 2006, side-noted 'Deterrent effect of potential liability', provides:

A court considering a claim in negligence or breach of statutory duty may, in determining whether the defendant should have taken particular steps to meet the standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might -

(a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or

(b) discourage persons from undertaking functions in connection with a desirable activity.

The section seems to be a clear example of 'command emphasis', as the US military calls commitment from the top. When on the pre-election stump in March 2005, Mr. Blair said he had been persuaded that too many public servants (particularly teachers and healthcare workers) were worried they might 'be subject to unfair legal action' and promised that ways would be found to 'protect' them from what he called this 'real problem'.¹ Within eight months, the Department for Constitutional Affairs had produced a draft bill: seemingly, what is now section 1, is a direct response to the Prime Minister's concern. The fact that the Better Regulation Task Force (BRTF) had the previous year concluded that Britain was not beset by a litigation crisis seems to have been overlooked.² So why did government feel it necessary to put a statutory gloss on the common law of negligence when the evidence suggests that, for the most part, the British continue to be 'lumpers' rather than litigators?³

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¹ See 'Focus: On the Road with the PM', *The Observer*, 6 March 2005.

² See BRTF, *Better Routes to Redress* (May 2004). The BRTF has since been re-titled the Better Regulation Commission.

³ See K. Williams, 'State of Fear: Britain's "compensation culture" reviewed' (2005) 25 *Legal Studies* 499 and R. Lewis et al, 'Tort personal injury claims statistics: Is there a compensation culture in the United Kingdom?' (2006) 30 *Journal of Personal Injury Law* 87.

Legislative response to an 'urban myth'.

Both the BRTF report in May 2004 and the later report by the Constitutional Affairs Committee in March 2006⁴ came to a similar (perhaps perplexing) conclusion, namely, that perception has become more important than reality. Regardless of whether claiming behaviour is actually waxing or waning, apparently what matters is what people believe. The fact that there may be no objective proof that we live in an increasingly 'blame and sue' society is beside the point when an 'urban myth' to the contrary is said to have taken hold. Thus, whatever the *actual* likelihood of being the target of litigation, many increasingly *believe* themselves to be at heightened risk of being unfairly sued.⁵

Allegedly, this critical misperception has resulted in two evils. A greater propensity amongst some unquantified and unidentified minority of the public to make claims that are spurious or otherwise lack merit and, second, a marked tendency amongst those who see themselves as potential defendants to adopt socially and economically damaging risk-averse strategies. Reputedly, organisations become less innovative, scarce resources are unproductively diverted, unnecessary and costly precautions are taken, sometimes beneficial activities are fearfully abandoned altogether. The BRTF complained, somewhat despairingly, that 'quoting statistics' showing there is no flood of new claims 'will not win the argument whilst the papers run "compensation culture" stories'.⁶ The Constitutional Affairs Committee similarly thought that excessive risk-aversion and misunderstanding about risk assessment, rather than the actual number of claims, are the real problems.⁷

⁴ House of Commons Constitutional Affairs Committee, *Compensation Culture*, HC 754-I and II (March 2006).

⁵ Whether the beliefs of others (such the general public, the media, insurers, etc) are important and how these might be ascertained is unclear in these reports though one of government's aims is to rectify this misunderstanding, see n 8.

⁶ n 2, at 11.

⁷ n 4, HC 754-I at paras 49-52.

Apparently it is the function of section 1 to help counter these sorts of misapprehensions.⁸ 'A PR exercise' to encourage more robust attitudes is how Marcel Berlins described it.⁹

Media reporting and risk-averse behaviour.

How far the print media, in particular, is responsible for this unwarranted state of fear is an intriguing question. By definition most media stories are not typical or representative; some are just fabricated. For example, since at least 2002 an entirely false claim has been circulating in the USA that a Mr. Merv Grazinski was awarded \$1.75 million plus a new motor home by a jury when he sued the makers of his Winnebago for not warning him that the cruise control setting did not allow him to go 'in back' and put on the coffee. Mr. Grazinski's fictional 'success' has featured in the annual 'Stella Awards' which are given to mark what purport to be the 'most frivolous successful' US lawsuits. The Awards are named after the elderly Stella Liebeck who famously *did* succeed against McDonalds after being scalded by very hot coffee, which the BRTF discusses under the heading 'Don't believe everything you read'.¹⁰

False or exaggerated liability stories of this sort are politically significant and not just infantilising 'infotainment' because they help (indeed, sometimes seem designed) to influence legislative and judicial 'tort reform' agendas. Regrettably, there is no British equivalent of the fascinating and thoroughgoing study by

⁸ Baroness Ashton of Upholland, HL Deb, 28 November 2005, cols 81-82, said the Bill was part of a wider set of government initiatives designed to reassure the public and discourage speculative claims. The Constitutional Affairs Committee, n 4, HC 754-I at para 62, observed that public education and challenging sloppy references to the so-called 'compensation culture' may be better ways to change attitudes. Recent press releases in this vein include 'Ministers to combat human rights "myths"', *The Times*, 25 July 2006 and 'Health and Safety is no excuse', *The Guardian*, 22 August 2006.

⁹ *The Guardian*, 7 November 2005.

¹⁰ n 2 at 12-13.

Haltom and McCann of the sensationalised and politically motivated accounts of the American 'litigation crisis' by parts of the US media and other elite groups.¹¹

However, let me offer one (highly selective) example of a home-grown media manufactured story which has turned out to be politically influential here.

Early in 2004, some of the older lamp posts in the centre of Bury St. Edmunds were replaced when it was discovered they were no longer up to supporting the 90lb weight of a double flower basket. On 10 February 2004, The Sun newspaper reported, for the first time, that the local authority had in fact voted to have the baskets themselves taken down for fear that, should they fall, the council would be sued. In the following thirty months, versions of this story appeared a further thirty-one times in the national press as follows: Daily Mail, 13 times; The Sun, 4; Daily Telegraph, and Independent, 3 each; The Guardian, 2; The Sunday Times, Sunday Telegraph, The People, Observer, Mirror, and Daily Express, 1 each.¹² All but two of the reports (one each, The Guardian and The Independent) treated the story as unquestioned, gospel truth. Hardly any journalist appears to have noticed that throughout the spring and summer the town's traditional floral displays were hanging as usual or that Bury (again) won an 'Anglia in Bloom' award (Best Large Town category) in the summer of 2004.

The context of these press accounts is usually moral outrage at some absurd (commonly, public sector) decision variously illustrating the onset of the nanny state, the death of personal responsibility and commonsense, the risk-averse effects of the so-called 'compensation culture', the excessive influence of health and safety laws or the activities of pernicious lawyers and claims farmers.

When the story is re-cycled there is usually no mention of its date or provenance. Clearly, good reporting guidelines were simply ignored here.¹³ Whether this is due simply to lazy and incompetent journalism is an open question; it certainly is

¹¹ See W. Haltom and M. McCann, *Distorting the Law* (University of Chicago Press, 2005). The Glasgow University Media Group has analysed the British media's coverage of some other controversial public issues, such as industrial disputes and the AIDS crisis.

¹² Derived from a search of the *LexisNexis* database of UK national newspapers to 17 August 2006.

¹³ For examples of good practice, see BBC Editorial Guidelines and Lord Nicholl's criteria for judging 'responsible journalism' in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.

an example of an 'urban myth' with important political consequences. In May 2005, Mr Blair, in an otherwise thoughtful speech at the IPPR about risk in public policy, having berated the press for floating misleading compensation stories ('headlines have an afterlife', he said) then went on to cite the removal of Bury's 'hanging baskets' as a true story which illustrated the need for the Compensation Bill and a reassuring refinement to the law of negligence.¹⁴

Liability fears and real world effects.

The BRTF and numerous others claim that 'fear of litigation does change behaviour'.¹⁵ Seemingly, even false perceptions may have real results. Plainly, there are connections *of some sort*, though as Peter Cane has said the precise nature and magnitude of the regulatory impact that potential tort liability has on peoples' conduct 'is largely speculative' and, we may add, is also difficult to measure.¹⁶ Studies of the practical aftermath of negligence decisions continue to be comparatively rare.¹⁷

Nonetheless, some connections seem plainer than others. It is said that out-of-school trips, especially those involving potentially risky outdoor pursuits, have become less common. If true, this appears to be due, at least in part, to the alarmist advice given by one teachers' union to its members about the likelihood of personal liability should things go wrong.¹⁸ On the other hand, why less rugby

¹⁴ Speech available at www.number-10.gov.uk/output/Page7562.asp

¹⁵ See n 2 at 6 and n 4, HC 754-I at para 31.

¹⁶ See P. Cane, 'Reforming Tort Law in Australia: A Personal Perspective' (2003) 27 *Melbourne University Law Review* 649. See too Jane Stapleton, 'Regulating Torts' in C. Parker et al (eds), *Regulating Law* (Oxford University Press, 2004) at 131, 'In general, there is insufficient empirical evidence to conclude whether tort doctrines are influencing public regulation or social norms, such as the behaviour of the target population, either at the pre-tort stage or in how they react to the commission of a tort'.

¹⁷ See D. Dewees et al, *Exploring the Domain of Accident Law: Taking the Facts Seriously* (Oxford University Press, 1996) for a North American analysis of this sort. When judges are invited to decide (particularly novel) causes of action they operate prospectively and usually in an empirical vacuum.

¹⁸ See House of Commons Education and Skills Committee, *Education Outside the Classroom*, Second Report, (HC Paper 120, February 2005) describing teachers' fears of being sued (or prosecuted) following an accident as 'entirely out of proportion to the real risks'. See too Ofsted, *Outdoor education. Aspects of good practice* (HMI2151, 2004), and generally J. Fulbrook, *Outdoor Activities, Negligence and the Law* (Ashgate Publishing, 2005).

is played in schools nowadays is less clear and may have a variety of causes. Perhaps football has become more popular, playing fields continue to be sold off or that the number of grammar schools has declined. It may also be that judicial decisions, such as Van Oppen v Bedford Charity Trustees¹⁹ and Voles v Evans,²⁰ have contributed to schools' and teachers' attitudes.

Why are fewer doctors opting to specialise in obstetrics and gynaecology? Is this another example of risk-averse behaviour; a form of 'defensive medicine'?²¹ A recent study by the Royal College concluded that the main factors were NHS workforce planning, doctors' experiences at the undergraduate level, work-life balance issues, and future consultant responsibilities.²² Yet, as reported by the Daily Telegraph and the Daily Mail on 3 February 2006, fear of litigation was made to appear as if it was the principal deterrent to the recruitment of staff to this specialty.²³

Of course, it is not just parts of the media who may wish to see the world in a particular way. Politicians are happy to feed the 'urban myth' when it suits their particular purpose. Notwithstanding strenuous efforts elsewhere across government to talk down fears of a 'compensation crisis', Health minister, Jane Kennedy, unhelpfully and inaccurately justified the introduction of the NHS Redress Bill as 'an important step in preventing a US-style litigation culture'.²⁴

¹⁹ [1990] 1 WLR 235 (no duty on school to insure pupil injured playing rugby or to advise parents to do so).

²⁰ [2003] 1 WLR 1607 (referee of adult rugby match who failed to control scrum liable for injury).

²¹ The practice of defensive medicine is widely assumed to exist, not least by doctors themselves and, sometimes, by judges. However, disputes about its meaning and the unreliability of the evidence make it a highly contested phenomenon. As to the UK, see M. A. Jones, *Medical Negligence* (Sweet and Maxwell, 3rd ed, 2003) at 16-19. As to the USA, see T. Baker, *The Medical Malpractice Myth* (University of Chicago Press, 2005).

²² See Royal College of Obstetrics and Gynaecology, *A Career in Obstetrics and Gynaecology* (January 2006).

²³ It is, however, the case that claims against Obstetrics and Gynaecology are by far and away the most costly. They constitute 21% by number but 49% by value of all CNST claims against the NHS, see NHS Litigation Authority, *Factsheet 3: information on claims* (July 2006).

²⁴ See Department of Health press release 2005/0349, 13 October 2005. There is no such 'litigation culture'. Whilst the number of claims has increased dramatically in recent years, see Department of

The possible effects of section 1.

Section 1, being addressed to the courts, looks uncontroversial - technical lawyers' law. Moreover, the 'Explanatory Notes' which accompanied the Bill tersely state that it does no more than 'reflect the existing law' as expressed 'in recent judgments of the higher courts'. Repeating what lawyers already know about the common law is an unusual legislative strategy, and one which seems poorly suited to changing lay attitudes, especially those of public sector workers, such as teachers and healthcare professionals who seem peculiarly prone to exaggerating their exposure to ruinous litigation. If such attitudes really are a, perhaps *the*, problem - because they promote excessive risk-averse behaviour - the section seems poorly suited to changing them. Of course, it may be making a point about *government's* attitude to risk but it is very doubtful that worried defendants will be reassured when told the provision actually changes little since judges can already consider the social utility of an activity when deciding how much care is enough care.

Section 1 is expressly confined to questions of *breach* – with how the standard of care is to be applied – and not with the prior issue of *duty*. Courts, therefore, remain free to recognise new responsibilities in negligence, which may not be quite so welcome to defendants facing recently minted causes of action, such as complaints of educational neglect or social work failure,²⁵ though to the extent that reliance on duty as a control device may be declining, the emphasis of liability inquiries may increasingly focus on what constitutes actionable fault.²⁶

Health, *Making Amends* (2003), the ratio of claims to adverse events continues to be very low. Estimates vary but maybe as few as one in a hundred patients who have been negligently damaged sue, see P. Pleasence et al, 'The experience of clinical negligence within the general population' (2003) 9 *Clinical Risk* 211. According to a report from the National Audit Office, *A Safer Place: Learning to Improve Patient Safety* (HC 456, November 2005), the NHS has still to learn fully from its experience of actual malpractice litigation. For comment on the NHS Redress Bill, see the report of the Constitutional Affairs Committee, n 4, HC 754-I at paras 84-110 and their further report, *Compensation Culture: NHS Redress Bill*. Fifth Report of Session 2005-06, HC 1009 (March 2006).

²⁵ See, for example, *Adams v Bracknell Forest Borough Council* [2004] UKHL 29 (dyslexia) and *JD v East Berkshire Community Health NHS Trust* [2005] UKHL 23 (child abuse).

²⁶ For a recent example of breach (rather than duty) being used to deny an 'educational neglect' claim, see *Carty v London Borough of Croydon* [2005] EWCA Civ 19.

Given the paucity of demonstrable connections between (the threat of) liability and real world behaviour, instructing judges to have regard to whether a 'desirable activity' may be 'prevented' or 'discouraged', and to what extent, by a breach decision seems potentially fraught. On the other hand, it is well established that the perceived social utility of a risk-creating activity is one component of the negligence calculus helping to decide what precautions the reasonable person would have taken to avoid the harm. Thus, we are all entitled to take abnormal risks in an emergency to avoid life-threatening outcomes, which in the absence of the emergency would not be justified.²⁷ A driver may swerve violently to avoid a child who runs into the road. A Good Samaritan doctor who helps an injured stranger at the roadside is unlikely to be made liable, not because his actions are 'desirable', which clearly they are, but for the better reason that it is simply not realistic to judge the quality of assistance that can be provided in 'battlefield' conditions against the standards of a trauma specialist operating with full hospital backup.²⁸ Moreover, there are limits to forgiveness. Thus, drivers of emergency service vehicles have no special status in the civil law (whatever the criminal law says) merely because they are hurrying to assist or transport a casualty. When driving on the roads, at least, good ends rarely justify bad means.²⁹

Uncertainty over what qualifies as a 'desirable activity' (which is not defined) may provide more, rather than less, scope for litigation if defendants come to believe that section 1 somehow holds out a promise of judicial leniency. No doubt some activities will continue to be thought of as more worthwhile than others and that protecting people will continue to be seen as more important than safeguarding things. Yet in a capitalist society it is difficult to see how the

²⁷ See, for example, *Watt v Hertfordshire CC* [1954] 2 All ER 368 and *King v Sussex Ambulance NHS Trust* [2002] EWCA Civ 953.

²⁸ Doctors overwhelmingly do act as Good Samaritans and such altruistic decisions are largely untainted by fear of adverse legal consequences. In practice, they are not sued. See K. Williams, 'Doctors as Good Samaritans: Some Empirical Evidence Concerning Emergency Medical Treatment in Britain' (2003) 30 *Journal of Law and Society* 258.

²⁹ See *Gaynor v Allen* [1959] 2 QB 403 and *Ward v London CC* [1938] 2 All ER 341. In *Watt v Hertfordshire CC*, n 27 at 371, Denning LJ said that 'fire engines, ambulances and doctors' cars should not shoot past [red] traffic lights...the risk is too great to warrant incurring the danger'.

pursuit of even purely private profit may not qualify to be a 'desirable activity'.³⁰ Unhelpfully (but not unexpectedly) the government has merely said that courts will be able to 'consider the wider social context of the activity'.³¹

Conclusion

Perception is sometimes more important than reality and is now a suitable subject for legislation, apparently. Section 1 has not been well received, however. The Constitutional Affairs Committee concluded that whilst 'well meaning' it was 'unnecessary' and lacked clarity.³² By providing a statutory steer to the courts, government purports to be improving the lot of defendants whilst simultaneously allowing judges to continue to act as they always have done. How this gives effect to the Prime Minister's wish to see (worthwhile) defendants *better* protected is obscure. Crucially, section 1 is unlikely to reduce fear of litigation, defensive practices or the number of frivolous claims; nor is it likely to cause socially valuable activities, such as volunteering, to increase. Unless it is read as a tacit invitation to judges to raise the height of the breach barrier section 1 looks like a strongly media-driven phoney solution to a phoney problem: an empty legislative response to the noises in 'the echo-chamber inhabited by journalists and public moralists.'³³

³⁰ The TUC was anxious lest workers in jobs deemed 'desirable' might, when injured, be treated as second class citizens, see n 4, HC 754-II, Ev 120. To some extent this is already the position, see cases at n 27.

³¹ Department for Constitutional Affairs, Written Ministerial Statement, Baroness Ashton of Upholland, 2 November 2005. Significantly, the 'Final Regulatory Impact Assessment' accompanying the Compensation Bill makes no reference to the expected effects of clause 1.

³² n 4, HC 754-I at para 67.

³³ See *Vellino v Chief Constable of Greater Manchester* [2001] EWCA Civ 1249 [at 60] *per* Sedley LJ. I have made some of these points elsewhere, at the Society of Legal Scholars' Annual Conference, University of Keele, 7 September 2006, in 'Legislating in the Echo Chamber' (2005) 155 *New Law Journal* 1938 (16 December 2005), and in evidence to the Constitutional Affairs Committee inquiry, see n 4, HC 754-II, Ev. 182.