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STATE OF FEAR: BRITAIN'S 'COMPENSATION CULTURE' REVIEWED.

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Assertions that Britain is (or is in danger of becoming) a 'blame and sue' society are nowadays so frequently repeated in the media and elsewhere that they have all but become received wisdom. Whether they express a dangerous reality or a passing moral panic deserves serious consideration because of their potential to influence legislative and judicial agendas. This article examines what is meant by the phrase 'compensation culture', evaluates the recent evidence concerning it, and attempts to assess whether the concerns expressed are justified.

Introduction

Claims that Britain is in the grip of a 'compensation culture' and, consequently, a 'litigation crisis' are asserted with increased frequency.¹ Concerns of this kind can be found in the columns of newspapers, in official reports, political discourse, legislative debate, and judicial decisions. Thus, in 2004, the former Trade and Transport minister, Stephen Byers, complained about the adverse effects of 'excessive litigiousness' on both the economy and the national psyche,² while David Davis, shadow Home Secretary, gave an undertaking that a Conservative government, if elected, would cut out 'the cancer of litigation'.³ And at much the same time as a Private Member's bill designed to protect volunteers from negligence liability was being lost,⁴ it was judicially asserted that the 'pursuit of an unrestrained culture of blame and compensation has many evil consequences'.⁵ Yet, as a government commissioned report pointed out in 2003, there is usually 'very little analysis of what this term [compensation culture] means, let alone proof that such a "culture" exists'.⁶ This article reviews some of the recent evidence.

Is there a problem?

The answer to this question is hotly disputed, depending as it does on what exactly is thought to constitute the ‘problem’, as well as on who is asked. The growth of a ‘compensation culture’ implies an increased and unreasonable willingness to seek legal redress when things go wrong,⁷ whilst ‘litigation crisis’ implies that this shift in social attitudes has been translated into undesirable (perhaps unbearable) levels of formal disputing. As we shall see, anecdotal and other evidence of varying quality can be found to support or deny these assertions.

It seems there may be a number of different problems. Frequently it appears that there are too many (successful) claims, at other times that compensation payouts are too costly, quite commonly that lawyers' fees are excessive: sometimes a mixture of all of these. What sorts of claims should count for the purposes of discussion is also disputed. In some versions, litigation risks associated with certain commercial activities are regarded as constituting part of the ‘problem’. Thus, auditors and company directors have recently pressed government for special legislative protection, essentially on the basis that in an era of increasingly complex transactions and potential catastrophe risks, unlimited personal liability is too onerous and a deterrent to (efficient) market participation.⁸ Other candidates for inclusion are claims before employment tribunals, largely on the basis of their number,⁹ and family law disputes because they consume the largest slice of the civil legal aid budget.¹⁰

In 2002, a report by the Institute of Actuaries concluded that there *is* a growing compensation culture, estimating the total cost of claims at about £10 billion a year or 1 per cent of GDP.¹¹ This is a very large sum of money, of course, though it

represents a wide variety of claims, as well as their associated administrative costs and expenses.¹² Moreover, gauging the significance of the Actuaries' headline figure is difficult unless we have some idea what other countries spend.

In 2004, the government's Better Regulation Task Force (the 'Task Force'), drawing on an international review of the cost of just tort claims published two years earlier, listed the UK's expenditure (at 0.6% of GDP) as lower than that of ten other industrialised nations, including Canada (0.8%), Australia (1.1%), Germany (1.3%) and the USA (1.9%): only Denmark spent less.¹³ The Task Force report, which government has since largely accepted,¹⁴ denied that Britain is in the grip of a compensation culture, basing itself partly on the opinion of 'almost everyone' who gave evidence to the enquiry and partly on the declining number of personal injury claims registered in recent years.¹⁵ In any event, the Task Force saw the problem as lying elsewhere than in the statistical facts. The 'real' problem was said to be perceptual. Allegedly, too many of us have been persuaded by media stories and the avaricious advertising of certain claims management companies that 'large sums of money are easily accessible'.¹⁶ According to the Task Force, there is no objectively sound basis for such beliefs or for asserting that Britain is suffering from a 'have a go culture'. Nonetheless, their report paradoxically concluded that an 'urban myth' asserting its existence has been widely accepted as the reality which, in turn, has inclined an unquantified minority to press speculative claims that lack merit or are spurious.¹⁷ These conclusions about changing attitudes to blame and responsibility chime nicely with the findings in some (methodologically doubtful) opinion polls.¹⁸ Arguably more significant is the failure of the report to supply any hard evidence to support its conclusions. A related strand in commonly expressed opinion (seemingly

shared by the Task Force) is to the effect that the mere fear of excessive litigation induces undue caution resulting in adverse social consequences. These range from the potentially serious, such as defensive medical practices¹⁹ and schools denying pupils opportunities to engage in outdoor pursuits,²⁰ to the cancellation of a downhill cheese-rolling competition.²¹

The number of personal injury claims.

The Task Force concentrated on personal injury litigation because it 'attracts most attention from the media...and was raised most frequently in our stakeholder meetings'.²² This certainly is the conventional locus of most disquiet about the growth of a 'compensation culture'.

If we similarly confine our attention to personal injury claims, how is the size of this problem to be calculated? That partly depends on which data sets are consulted. Given that legal aid for personal injury actions virtually disappeared in April 2000, the figures published by the Legal Services Commission are of very limited help.²³ Similarly, the Judicial Statistics are an uncertain guide to how much 'blaming and claiming' is really going on here. First, because they count only those claims that result in the issue of proceedings, which may be fewer than one third of cases²⁴ and, second, because they fail fully to identify how many proceedings across the country are for personal injury damages.²⁵ Despite these limitations, the most recent Judicial Statistics provide little support for the notion that accident litigation is booming out of control.

The Task Force relied on statistics from the Compensation Recovery Unit (CRU) showing the total number of newly registered accident claims as having fallen by some ten per cent to around 557,000 in 2003/4 compared with the preceding two years.²⁶ Seemingly, the CRU retains only such data as relates to the last three years, so obscuring longer term trends, which is unfortunate.

Market analysts, Datamonitor, provide an alternative source of information. Their figures show no consistent trend in the number of injury claims, as distinct from their cost, which all agree has been increasing. Numbers and types of claims fluctuate from year to year. Thus, whilst there was a 7.4 per cent fall to 689,000 claims in 2001/2, in the year following the number of personal injury claims made to insurers increased slightly by some 2.6 per cent due to an increase in industrial disease claims, which offset a fall in accident claims.²⁷

So the statistical evidence is both incomplete and somewhat equivocal, counting as it does different things across different timescales.²⁸ And, of course, even if we could establish with certainty how many claims there are, that would not tell us how many claims is *too* many. It often seems to be assumed, implicitly at least, that any increase is a cause for concern whilst a fall is to be applauded. This broadly seems to be the position of the Task Force, although they enter an important caveat. The phrase ‘compensation culture’, they say, is a ‘pejorative term’ which unfairly suggests that all ‘those who seek to “blame and claim” should be criticised’. This is a position they rightly reject on the basis that in civilised communities the victims of provable injustice or wrongfully caused injury should be in a position to seek effective redress.²⁹

There are two other considerations connected with the numbers issue. First, claimant lawyers often point out with considerable (if self-interested) justification that the great majority of injured persons never resort to the law: that it is precisely the *absence* of a compensation culture that characterises our liability system. In this regard, it appears that not much has changed *overall* since the time of the Pearson Royal Commission almost thirty years ago.³⁰ However, the picture is mixed. Certain sorts of claims are much more likely to be brought nowadays. Thus, the claim frequency rate by those injured in road traffic accidents has increased significantly.³¹ In contrast, while actions for clinical negligence are no longer the rarity they were thirty years ago, the proportion of negligently damaged patients who do claim continues to be very small - maybe fewer than one in fifty.³² Accordingly, it is not entirely clear that it should be a source of satisfaction that only Denmark spends less than the United Kingdom relative to GDP when compensating injured tort victims.³³ It may be that too many wrongful harms in some areas go uncompensated or that compensation levels are low, comparatively speaking.³⁴

A second point is whether legitimate, well-founded claims should be counted as part of the 'problem'. After all, one reason why 'compensation crisis' stories find such ready audiences seems to be related to the ways in which they reflect public anxieties about the decline of social and moral values, such as self-reliance and personal responsibility; anxieties that are represented here by tales of greedy lawyers egging on grasping claimants chasing compensation for trivial harms which in an earlier era would have been stoically shouldered without public complaint. Accordingly, any attempt to test for the existence of a 'crisis' should, arguably, look beyond the

absolute numbers of injury claims to whether there has been an increase in those that are substantially without merit or are bought off simply for their nuisance value.

Unfortunately, there is no direct or reliable evidence to answer to this crucial question either.³⁵ Nor is it easy to find a suitable proxy measure. For example, a 1998 study of legally aided personal injury cases reported a success rate of 63 per cent overall with more than 80 per cent of road traffic claimants recovering damages.³⁶ This appears to suggest that the great majority of injury claims are well-founded and genuine.

However, since all the cases in the sample must have passed the Legal Aid Board's 'merits' test in order to have qualified for public funding in the first place, no such assumption can safely be made. The subsequent disappearance of legal aid effectively means that the economic imperative enshrined in 'no win-no fee' deals (alongside the 'loser-pays' costs rule) must nowadays do duty as the gatekeeper against frivolous litigation. As we shall see, lawyers are unlikely to want to act for clients unless their chances of success are good.³⁷

Disparate Impact or Increased Cost?

Even if there is no new flood of personal injury claims overall and no convincing evidence of a growing number of frivolous ones either, there may be legitimate cause for concern if particular sorts of defendants appear to be fielding more than their 'fair' share or if the costs of litigation or settlement are rising sharply.

The NHS is commonly said to be facing this combination of difficulties to a marked extent. In a relatively short space of time there have been very dramatic increases in both the number of claims for clinical negligence and their cost.³⁸ Reducing litigation expenditure permeates the government's current liability reform proposals, which is

to be expected at a time when spending on the NHS and its efficiency are high on the agenda of all the major political parties.³⁹ Insurers warn that there are other pockets of concern elsewhere in the liability system, for example, the projected cost of future asbestos-related claims.⁴⁰ Furthermore, as the next section notes, there are 'novel' forms of liability that have at least the potential to destabilise some public sector budgets, such as education and social services, who cannot easily pass on these costs, except to taxpayers of one sort or another.

The increasing cost of settling even standard, run-of-the-mill injury claims is an anxiety the public and private sectors (and their insurers) share, the greater flexibility of private sector organisations to distribute these losses notwithstanding. For example, one source calculates that the value of motor injury claims has been rising consistently by almost 10 per cent a year, while public and employers' liability claims have shown sometimes larger, if more erratic, increases.⁴¹ Explanations are readily to hand for the strong upward pressure on damages awards. On top of the inevitable effects of inflation on earnings and prices, the way that compensation for death and injury is calculated is now more favourable to claimants than formerly. In Wells v Wells, the House of Lords decided that damages for future pecuniary losses (consisting principally of loss of earnings and care costs) should be based on the likely rate of return available if the award was invested in index-linked government securities rather than the stock market.⁴² The effect of this change to the 'discount rate', particularly in the case of serious injury, has been to increase significantly the lump sums awarded in order to offset the expected lower levels of investment return.⁴³ In a separate development, the Court of Appeal in 2000 decided that the conventional sums awarded in respect of non-pecuniary losses (such as pain and suffering and loss

of amenity) were too low. In consequence, this element of awards to the most seriously injured has increased by approximately a third with proportionately smaller increases for the less seriously hurt.⁴⁴ This combination of judicially-inspired increases, together with certain statutory changes,⁴⁵ has undoubtedly contributed to pushing up the size of settlements and awards and, consequently, the cost of liability insurance, though not in a directly linear manner.

Higher premiums burden those called upon to pay them and should properly concern the legal system also, which has operated for more than a hundred years on the largely unspoken assumption that the principal categories of defendants are able to insure themselves. Thus Morgan, for example, is plausibly able to say that liability insurance is 'the only thing keeping the tort system viable'.⁴⁶ In 2003, sensitive to misgivings expressed by some business lobbies about the affordability of liability (especially employers' liability) insurance, the government instituted separate enquiries by the Office of Fair Trading and the Department for Work and Pensions.⁴⁷ These reports confirm that the cost of employers' liability cover, in particular, has risen steeply over a relatively short period of time. Accounting for this outcome is less than straightforward, though it appears to have much more to do with insurers belatedly attempting to rectify accumulated losses caused by poor underwriting or investment decisions and historically unrealistic pricing policies, rather than to rises in the cost or number of injury claims. Either way, fortunately, we are nowhere near the point where mainstream liability insurance is unavailable or prohibitively expensive.⁴⁸

The 'real' problem and some of its causes.

The idea that defendants are beset by ever increasing numbers of doubtful claims is not proven. Indeed, the 'problem' we started with seems to have come down to this; that whatever may be the *actual* likelihood of irresponsible litigation, many *believe* themselves to be at heightened risk of being unfairly sued. According to the Task Force, this critical misperception or 'urban myth' induces socially and economically damaging risk-averse behaviour. Reputedly, organisations become less innovative, scarce resources that would be better applied elsewhere are unproductively diverted, unnecessarily costly safety precautions are taken, sometimes beneficial activities are fearfully abandoned altogether.⁴⁹ It is worth adding that in low trust organisations operating an internal 'blame culture' there is evidence that staff are less likely to report adverse events, while the accuracy of such reports as are made is likely to be questionable. For such organisations, one unfortunate consequence is that they have fewer opportunities to learn from their mistakes.⁵⁰

Rather than trying to establish the extent of this allegedly fateful misunderstanding or document its precise effects, a difficult task at the best of times,⁵¹ the recent analyses instead seek to identify external causes to explain what looks like a collective loss of nerve on the part of potential defendants. Effectively they say that whilst some liability stories may be media exaggerations or even apocryphal, business and the public sector have been put on the defensive by the introduction of conditional fee agreements (CFAs) and the aggressive tactics of some claims management companies and solicitors' practices. Notwithstanding that Claims Direct and The Accident Group, the initial market leaders, went into liquidation in 2003, the Task Force assert that 'people are still being encouraged to "have a go" by the more unethical claims

management companies'.⁵² If so, they too should soon go out of business since low chances of success mean low rates of fee recovery and unaffordable after-the-event insurance.⁵³ The precise effect of CFAs on the frequency of claims is presently uncertain, though economic logic suggests that their tendency should be to increase claim rates. What research has shown is that some 93 per cent of cases taken on a 'no win-no fee' basis are successful,⁵⁴ which implies two things. First, that only strong cases are likely to be taken up which, while hardly surprising from the perspective of claimant lawyers,⁵⁵ falls well short of confirming the claim sometimes made by politicians that the replacement of legal aid by conditional fees has made justice accessible to all.⁵⁶ Second, that the problem of 'have a go' vexatious litigants, which the Task Force claims to have identified, is likely to be correspondingly small. Even so, external regulation over how an estimated 350 firms of 'claims farmers' advertise and provide their services to the public seems advisable and likely,⁵⁷ despite the failure of the 2004 Clementi review of legal services to recommend specific controls.⁵⁸ Regulation may go some way to reassuring those who fear they are vulnerable at-risk defendants.

While some potential explanations for the number of claims, such as changes in accident rates,⁵⁹ are not much explored by either the Task Force or the Actuaries, both reports make anxious reference to an expanding liability regime. Echoing Stapleton a decade earlier,⁶⁰ the Task Force say that new types of claims 'that were simply not considered by lawyers 20 or 30 years ago are now being pursued'⁶¹ - the implication being that the judiciary must take the blame to the extent that novel claims are admitted. Of course, quite how expansions of tortious liability affect (insured) defendants or society more broadly is both uncertain and disputed.⁶² The OFT report

in 2003, while it thought the picture rather mixed, concluded that the scope of the liability rules have less influence on insurance prices than other factors such as the size of awards (which have increased), access to the legal system, and the propensity to claim.⁶³ My sense is that both sides are right. No doubt the great bulk of claims will continue to be based on conventional legal principles applied to perfectly ordinary road traffic and workplace injury cases. On the other hand, the psychological impact of new, especially uncertain, liabilities on defendants (and on their insurers' underwriting and pricing policies) may be marked, even where the development in question initially appears to advantage relatively few claimants. In fact, some recent judicial decisions have the potential to affect large numbers (albeit we can only guess how many) and destabilise some (particularly public sector) budgets. Among other candidates for inclusion here are the new rules on educational neglect,⁶⁴ suspected child abuse,⁶⁵ work-related stress,⁶⁶ sports and activity injuries,⁶⁷ vicarious liability,⁶⁸ damages for psychiatric injury,⁶⁹ and the patchy relaxations to the doctrine of causation.⁷⁰

Most of these developments have been prompted by judicial assessments of what justice to claimants requires, however unsettling they may be for defendants. This is not to say that courts are unconcerned with the potentially adverse effects which an expanded liability regime might have or how that may be received by the public. Over the years, the senior judiciary, in particular, have shown themselves alert to the dangers of overkill and floodgates, despite the difficulties in gauging their extent or effect. In practice, judges commonly find themselves having to fall back on intuition and commonsense as regards the likely wider impact of their decisions since our bilateral adversarial system is not designed to facilitate informed judgments based on

empirical evidence, even where this is available, which all too frequently it is not. Nevertheless, in the post-Human Rights Act era there has been a marked reluctance to rely on unproven policy fears as a basis for striking out apparently novel duty claims.⁷¹ Conversely, there have been occasions on which courts have plainly wanted to send a forceful message to potential claimants and the legal profession. Thus in Gorringe v Calderdale MBC, Lord Steyn warned that 'the courts must not contribute to the creation of a society bent on litigation, which is premised on the illusion that that for every misfortune there is a remedy'.⁷² Another example is Tomlinson v Congleton BC in which the importance of individual responsibility was strongly emphasised when denying recovery to a 'foolhardy' adult trespasser injured diving into a lake.⁷³ The Task Force rightly, if somewhat naively, welcomes this as indicating that 'the tide may be turning' and as demonstrating that the occupiers of public recreational spaces 'are not expected to take extreme steps to avoid accidents'.⁷⁴

What should be done?

The purpose of this paper has been to review the evidence concerning the existence of a 'compensation culture'. It has not been to evaluate the likely efficacy of the numerous and diverse suggested responses, except to say that we should be careful to avoid introducing solutions to non-existent or different problems. In this regard, both the Task Force and the Actuaries reports take a wrong turn to the extent that they focus on the supposed motivations of some injured claimants, attributing to them greater greed or other moral failings as the source of the problem.⁷⁵ It has been persuasively argued that in the United States, the usual exemplar of a compensation culture out of control, *individuals* are no more inherently prone to sue than the citizens in other developed societies, and that what has mattered is the extent to which

American social and legal *structures* have actively encouraged resort to law as a primary means of resolving every sort of dispute by creating rights to sue, lowering barriers to litigation or increasing its rewards.⁷⁶

There are some structural changes that can and almost certainly should be undertaken here, such as controlling the activities of claims management companies and the way lawyers charge. Furthermore, whilst it is almost certainly too late to turn back the clock to an era when there were fewer lawyers, who were prevented from having a direct pecuniary interest in the outcome of their clients' cases, that should not be a bar to regulating how and where legal services are advertised today.⁷⁷ More careful risk and experience-rating by underwriters will make insurance bite more effectively and ought to contribute to reducing accident rates.⁷⁸ Improving rehabilitation opportunities for accident victims would be beneficial to them and should reduce compensation costs, perhaps by as much as a third ultimately.⁷⁹ Encouraging defendants to resist doubtful claims as being the cheaper long run strategy seems sensible, though so long as insurers dominate the settlement process exhortation addressed to insureds alone may not work.

CONCLUSIONS

In some quarters, the number of injury claims has been made to appear as a yardstick to measure the moral (and economic) condition of the country. Are we less tolerant and more litigious? Unfortunately, the available data do not provide a conveniently consistent answer, though on balance it looks as if the British continue to be a nation of 'lumpers' rather than litigators. There is good evidence that some sorts of accident claims have risen (from a relatively low base) and that the overall costs of personal

injury settlements have gone up. But there is virtually no reliable evidence about the number of bogus or exaggerated claims or whether they constitute a grave (or increasing) problem. What has been plausibly suggested is that 'some insurance industry commentators rely heavily on anecdotal evidence of a worsening environment in order to justify price increases, quoting individual cases of highly doubtful or speculative claims that cannot be truly representative of claims in general'.⁸⁰ When Lord Levene, the Chairman of Lloyd's of London, complains that a 'deluge' of claims is 'plundering the economy',⁸¹ we sense that this may not be a totally disinterested assessment.

The Task Force analysis seems to be that if we are suffering from a crisis, it is largely one of confidence arising from the misplaced fears of potential defendants and their insurers, rather than from a culture that 'blames and claims' too much. In contrast, in spring 2005 while on the election stump the Prime Minister declared that many public servants (particularly teachers and healthcare workers) were worried that they may 'be subject to unfair legal action' and that ways must be found to 'protect' them from what Mr. Blair called a 'real problem',⁸² which serves to remind us that the liability issue, being about the distribution of resources, is broadly political.⁸³ Recently, Harlow expressed particular concern about the incidence of claims made against state actors accused of various sorts of regulatory failure, as well as surprise at the 'culpable' lack of attention paid by policy-makers to the associated compensation issues given their likely impact on public resources and budgets. 'Tort law', she suggests, 'urgently needs a political steer and legislative input'.⁸⁴ This happened in Australia in 2002,⁸⁵ and is shortly to be provided in this country by a government bill.⁸⁶ When evaluating the bill's provisions, the scope and reliability of the evidence will (or at least ought to)

be critical. Loose talk of a 'compensation culture' no doubt helps to sell the very sorts of newspapers that purport to despise it most: however, we should be cautious before we allow it to dictate the legislative (or judicial) policy-making agenda.

* Thanks are due to the journal's anonymous referees for their helpful comments on an earlier draft. The usual disclaimer applies.

¹ Entering the phrase 'compensation culture' into a UK-only Google search (on 1 December 2004, confined to reports in the preceding 12 months) generated some 25,500 web pages, whilst a search of the LexisNexis database of UK national newspapers produced 503 reports.

² See 'Curb claims culture, says Byers', The Guardian, 10 March 2004.

³ See 'Victim Nation', The Spectator, 21 August 2004. 'Too many rights' seems to be the central thesis. As well as criticising workplace health and safety rules and equality legislation, the Human Rights Act 1998 is caricatured as the 'worst emanation... of the compensation culture'. In fact, the Act appears to have had most effect in the area of judicial review, see Public Law Project, The Impact of the Human Rights Act on Judicial Review, 2003. Elsewhere, its impact has been described as 'in danger of stalling', see Audit Commission, Human Rights. Improving Public Service Delivery, 2003.

⁴ The Promotion of Volunteering Bill (Bill 18 of 2003-4) was 'talked out' on third reading, see HC Deb, vol 423, col 1720, 16 July 2004.

⁵ See Tomlinson v Congleton Borough Council [2004] UKHL 15 at [81]; [2004] 1 AC 46, *per* Lord Hobhouse.

⁶ See Office of Fair Trading, An analysis of current problems in the UK liability insurance market, June 2003, at para 10.4.

⁷ Ronald Walker QC archly offers the following definition: 'an ethos the tenets of which are that all misfortunes, short of an act of God, are probably someone else's fault, and that the suffering should be relieved, or at any rate marked, by the receipt of a sum of money', see 'Compensation Culture: myth or reality?', The Times, 7 October 2003. The Institute of Actuaries, Report of a Working Party, The Cost of Compensation Culture, December 2002, at para 2.1, adopts a seemingly more serious, if inelegant, definition: 'the desire of individuals to sue somebody having suffered as the result of something, which could have been avoided if the sued body had done their job properly'. This appears to equate the 'problem' to all actions for 'negligence' (used in a non-technical sense), except those brought by corporate litigants or other organisations.

⁸ See Department of Trade and Industry, Company Law. Director and Auditor Liability, Consultative Document, 2003. The government's response rejected the call for a statutory cap on the liability of either directors or auditors. Legislating for a 'proportionate liability' regime to protect against 'catastrophic' audit risks as an alternative to capping, though initially ruled out by the consultation document on the basis that such a move would need to be part of a broader reform of the general law of negligence, has now been left open. Interested parties have been invited to consider whether a practical scheme of limiting liability on a proportionate basis by contract can be devised. See HC Deb, vol 424, cols 107-109, 7 September 2004.

⁹ Across a ten-year period the number of applications tripled to over 130,000 in 2000/01. The enactment of significant new statutory rights and changes in the economy appear to be the principal explanations, rather than any increase in the litigious propensity of workers, see Department of Trade and Industry, Explaining the Growth in the Number of Applications to Industrial Tribunals 1972-1997, 2001. Notwithstanding, a number of substantive and procedural changes intended to stem the growth in applications and to save costs have been introduced. However, after two years of decline, the latest Employment Tribunal Service, Annual Report, 2003/04, shows a rise in applications to 115,042, seemingly for much the same reasons.

¹⁰ See Legal Services Commission, Annual Report 2003/04, HC 870, Table 3c. See too LSC, A New Focus for Civil Legal Aid: Encouraging Early Resolution; Discouraging Unnecessary Litigation, July 2004, the self-explanatory title of which reflects the approach of the Better Regulation Task Force, see n 13.

¹¹ See n 7. The report candidly admits that its costings 'are by no means precise and in places rely on some heroic assumptions' (para 4.1). Nevertheless, the £10 bn figure is frequently repeated without qualification in the media and elsewhere. Cf. F. Furedi, Courting Mistrust (London: Centre for Policy Studies, 1999) estimating the cost of a 'growing US-style compensation culture' to be £1.8 bn in the public sector and £1.26 bn a year in the private sector - roughly a third of the Actuaries' figure.

¹² The report has been heavily criticised by claimant lawyers for, amongst other things, inflating the total cost of compensation by including criminal injuries payments and the very substantial sums paid to farmers as a result of outbreaks of foot and mouth disease and BSE in the 1990s. See, eg, D. Marshall, 'Compensation Culture' [2003] JPI Law 79.

¹³ See Better Regulation Task Force, Better Routes to Redress, May 2004, at 15.

¹⁴ See Tackling the "Compensation Culture". Government Response to the Better Regulation Task Force Report: 'Better Routes to Redress', November 2004. An inter-departmental 'Ministerial Steering Group' is responsible for considering what regulatory changes are desirable.

¹⁵ n 13 at 11.

¹⁶ According to the Task Force, *ibid*, 'Quoting statistics will not win the argument whilst the papers run "compensation culture" stories'. By definition, claims reported in the media are unlikely to be representative: exceptionally they are simply fabricated. Nonetheless, they may be highly influential in shaping public debate. For an account of the selective and sensationalised nature of much media reporting in the USA concerning America's 'litigation crisis', the role of the media and other elite groups in constructing a populist moral panic, and its implications for the direction of tort law legislative reform, see W. Haltom and M. McCann, Distorting the Law. Politics, Media, and the Litigation Crisis (Chicago: University of Chicago Press, 2004).

¹⁷ *ibid*, and Foreword titled 'Compensation Culture: Exploding the Urban Myth'.

¹⁸ By means of a leading question, a survey for insurers, Norwich Union, elicited the response that '96% of people in Britain *believe* we are more likely to seek damages today than a decade ago', see 'The truth behind the claim game', The Observer, 23 May 2004. The Actuaries' report, n 7, also claims that public attitudes have changed for the worse, though since those surveyed were 'actuaries and their friends' the sample is hardly representative. A Local Government Association Press Release, 5 February 2004, reporting that '68% of councils have experienced an increase in the number of tenuous claims' appears to be based only on the 'impressions' of local government respondents. Insurance consultants, AON, say that 62% of employer respondents had seen an 'increase in the cost of claims', though the magnitude of the increase, its causes, types of claim, and the timescale, are all unspecified. See 'Blame, Claim and Gain: The Compensation and Blame Culture, Myth or Reality?' July 2004.

¹⁹ Defensive medicine is a phenomenon whose existence is widely asserted. However, there seems to be little reliable evidence documenting its precise nature, extent or effects. As to the UK, see M. Ennis and C. Vincent, 'The Effects of Medical Accidents and Litigation on Doctors and Patients' (1994) 16 *Law and Policy* 97, at 99-106. For the position in North America, see D. Dewees *et al*, Exploring the Domain of Accident Law. Taking the Facts Seriously (New York, Oxford University Press, 1996), at 104-112.

²⁰ See Ofsted, Outdoor education. Aspects of good practice, HMI 2151, 2004, and House of Commons, Education and Skills Committee, Education Outside the Classroom, Second Report, HC 120, February 2005, describing teachers' fears of being sued (or prosecuted) following an accident as 'entirely out of proportion to the real risks'. Cf. 'Compensation Culture Harms British Way of Life, says Judge', The

Independent, 21 June 2004, where Lord Phillips MR expresses concern that fear of litigation is threatening the pursuit of risky sporting and leisure activities.

²¹ See LawZone Newswire, No. 225, 26 August 2003.

²² See Better Routes to Redress, n 13 at 7. This focus reflects the class-based nature of much of the debate, as the Task Force explicitly recognised. Thus, the Actuaries' report defines the 'compensation culture' so as to exclude corporate litigants entirely, see n 7. By way of contrast, one commentator mischievously cites as examples of 'scandalous compensation claims' the actions brought by Lloyd's names 'suing because they had not realised that underwriting insurance was not simply a licence to print money', see R. Levy, 'Just who's playing the claim and blame game', The Times, 1 June 2004.

²³ Currently, there are two significant categories for which legal aid funding exceptionally continues to be available, namely, clinical negligence claims above £5,000, and public interest group litigation actions (some of which are personal injury actions against the NHS). In 2003/04, the number of new certificates for representation issued in each category fell by 3.9% and 38.4% respectively, see Legal Services Commission, Annual Report, 2003/04, n 10, at 32-33 and Table 3d. Residual legal aid funding for personal injury cases may soon disappear entirely, see Legal Services Commission, A New Focus for Civil Legal Aid, July 2004.

²⁴ See P. Pleasence, Report of the Case Profiling Study. Personal Injury Litigation in Practice (Legal Aid Board Research Unit, 1998), at 12.

²⁵ See Department for Constitutional Affairs, Judicial Statistics, 2003. Tables 3.2 and 3.6 unhelpfully show only the number of personal injury proceedings issued in the Queens Bench Division at the Royal Courts in London (amounting to 16% of the total). Nor do the statistics for the County Court identify personal injury claims separately, except where there was a hearing in the small claims jurisdiction (amounting to 4 % of that total, according to Table 4.10). What the statistics do show is a dramatic decline in the workload of QBD *overall*. Between 1994 and 2003, proceedings issued fell from around 120,000 to just over 14,000 (un-numbered table, at 30). Possible (if unsubstantiated) explanations for this drop include expansion of the jurisdiction of the County Court, the introduction of pre-action protocols, greater resort to negotiated settlements and alternative dispute resolution, the decline in public funding, new costs rules, and greater caution by commercial and corporate litigants (who initiate the bulk of proceedings in QBD, which are actions for debt and breach of contract).

²⁶ See n 13 at 11 and 12. The CRU kindly provided the author with data for claims *settled*, as distinct from initiated. They show a rather more mixed picture. It is unclear whether settlement data were available to the Task Force. The Task Force report, somewhat confusingly, says that the figures cited for new claims 'ignore the fact that many claims are settled out of court' when, of course, they do not refer to settlements at all. The CRU (now part of the Department for Work and Pensions) was set up in 1997. Its task is to recover certain social security benefits and NHS charges where a person is subsequently compensated (by an insurer, usually) in respect of the same injury or disease.

²⁷ See UK Personal Injury Litigation reports, 2002, 2003 and 2004, summarised at www.researchandmarkets.com Datamonitor predicts that the trend will be for injury (excluding disease) claims to slowly increase by around 0.4% per annum between 2001 and 2007.

²⁸ For example, the CRU figures relied on by the Task Force, see n 26 and text, concern new claims initiated in the preceding three years. Since some categories of potential liability, such as medical negligence and asbestos-related occupational disease, are especially prone to reporting (and settlement) delays the evidence on claim frequency may be unreliable, particularly across such a short period.

²⁹ n 13, at 5 and 37.

³⁰ See Report of the Royal Commission on Civil Liability and Compensation for Personal Injury, Cmnd 7054, 1978, vol. 2, para 74, estimating that only 6.5% of accident victims actually recover damages. See too the later 'Oxford survey' reported by D. Harris *et al*, Compensation and Support for Illness and Injury (Oxford: Clarendon Press, 1984), at 65, suggesting a figure of 12% but with almost three quarters of accident victims not considering the possibility of claiming damages at all. For a

functionalist review of tort's (in)efficiency as a compensation mechanism see D. Harris *et al*, Remedies in Contract and Tort (Croydon: Butterworths, 2nd ed, 2002), chapter 24, trenchantly characterising it as 'a failure judged by each and every one of the standards by which public investments are normally evaluated'.

³¹ See International Underwriting Association of London, Third UK Bodily Injury Awards Study, March 2003, showing the average rate of increase to have been 3% per annum between 1992 and 2000. See too S. Lloyd-Bostock, 'The natural history of claims for compensation after an accident' in M. Mitchell (ed), The Aftermath of Road Accidents, 1997, tracing the complex relationship between perceptions of fault and decisions to claim.

³² Estimates vary as to the incidence of negligence within the NHS. There may be 850,000 'adverse events' annually, half of which may be avoidable, see Department of Health, An organisation with a memory: Report of an expert group on learning from adverse events in the NHS, 2000. A more recent study suggests the claim frequency rate may be closer to one claim per 100 patients damaged by negligence, see P. Pleasence *et al*, 'The experience of clinical negligence within the general population' (2003) 9 Clinical Risk 211.

³³ See n 13 and text.

³⁴ The OFT report, n 6 at para 9.14, makes the important point that since insurers 'are likely to fight hard over large claims and not waste money in defending small ones, it is often suggested that accident victims are under-compensated when their injuries are serious but over-compensated when they are trivial.'

³⁵ On the other hand, the absence of evidence is not evidence of absence, and it is not difficult to find media reports of claims that appear to be devoid of merit, though their accuracy and provenance may be open to question, see n 16. The Task Force, n 13 at 11, merely confined itself to asserting that there is a 'perception' that the public is more likely to seek redress than 'ever before'. The Actuaries' report, n 7, did not attempt to quantify its concerns about unwarranted claims at all.

³⁶ See Pleasence, n 24 at 11-13.

³⁷ See n 54 and 55 and text.

³⁸ The number of claims rose almost fifteen-fold between 1995/6 and 2002/03. Annual expenditure increased from an estimated £1 million in 1974/5 to £446 million in 2002/03. Where the compensation paid was below £45,000, legal costs exceeded the value of the claim in the majority of cases. See Department of Health, Making Amends. A consultation paper setting out proposals for reforming the approach to clinical negligence in the NHS, 2003, paras 31 and 35. Even so, a 'no fault' alternative to litigation was rejected as being likely to be too expensive. The number (and cost) of clinical negligence claims, almost 90% of which currently continue to receive legal aid funding, appears to be declining slowly. In 2003/04, around 6,250 claims (constituting about 1.5% of all personal injury claims) were received and the cost of settling clinical negligence cases was £422.5 million, see NHS Litigation Authority, Factsheet 3: information on claims, 2004. See too n 32.

³⁹ Making Amends, *ibid*, at 9, seeks to reassure critics by declaring that the primary purpose of its proposals is not to cut compensation levels but to target resources to meeting the needs of injured patients more effectively. Nonetheless, it would be surprising if government were to be entirely sanguine about the prospect that extra investment intended to provide additional 'frontline' services might be swallowed up by ever more expensive compensation claims. An 'NHS Redress Bill' is expected sometime in 2005.

⁴⁰ See Institute of Actuaries, UK Asbestos - The Definitive Guide, November 2004, estimating future claims at between 80,000 and 200,000 and the cost to UK insurers at between £4 and £10bn. The number of deaths is predicted to peak at 5,000 per annum between 2011 and 2015. The evidence from the USA is that very large numbers of costly asbestos-related claims may overwhelm the legal system as well as defendants who are inadequately insured.

⁴¹ See Datamonitor reports, n 27. The IUA report, n 31, suggests the average annual rise in the cost of each motor injury claim has been 6.7% with the number of claims having increased on average by 3% per annum. The OFT analysis, n 6 at paras 9.6 and 9.17, drawing on different sources, indicates average rises in settlement costs across all types of liability claims at between 9% and 15% per annum, depending on the gravity of the injuries.

⁴² [1999] 1 AC 345.

⁴³ It was estimated in the Wells case itself that the effect of moving from the then prevailing discount rate of 4.5% to 3% increased the award by about £108,000. Making Amends, n 38 at para 47, estimates that lowering the rate from 4.5% to 3% (in 1998) and then to 2.5% (in 2001) cost the NHS an additional £20 million in 2001/02 and may cost £500 million for future liabilities. If interest rate rises were to persist, the Lord Chancellor could use the Damages Act 1996, s 1(1) to recommend an increase in the discount rate, so producing a corresponding fall in damages awards.

⁴⁴ See Heil v Rankin [2001] QB 272. Discussed by R. Lewis, 'Increasing the Price of Pain: Damages, the Law Commission and Heil v Rankin.' (2001) 64 MLR 100.

⁴⁵ In 2002, the value of Fatal Accidents Act bereavement awards was increased by S.I. 2002/644 from £7,500 to £10,000 per claimant (capped at £30,000 per death). Additionally, the CRU, see n 26, has progressively been given extra powers to recoup the value of state benefits paid to claimants from defendant liability insurers who settle personal injury claims so effecting a transfer of costs from the public purse to insurers. For a discussion of this policy, see OFT report, n 6 at paras 9.21-9.28.

⁴⁶ J. Morgan, 'Tort, Insurance and Incoherence' (2004) 67 MLR 384 at 399.

⁴⁷ See Office of Fair Trading, Liability Insurance. A report of an OFT fact finding study, August 2003 and Department for Work and Pensions, Review of Employers' Liability Compulsory Insurance, Second Stage Report, December 2003.

⁴⁸ See OFT report, *ibid*, at paras 4.17 - 4.19. More recent research by the Trades Union Congress indicates that fewer than one in ten of the 850,000 who suffer workplace illness or injury each year recover compensation from their employer or from the industrial injuries scheme. The average cost of a successful claim for damages is estimated to be £10,000. See TUC, 'A Little Compensation', Hazards, May 2005.

⁴⁹ See Task Force report, n 13 at 3 and 18. These echo the sorts of 'no duty' policy arguments familiar to tort lawyers. Nowadays, British courts appear less inclined to credit them in the absence of proof, even where it is sought to make a public body liable, see Phelps v Hillingdon LBC [2001] 2 AC 619.

⁵⁰ See V. L. Mayatt (ed), Tolley's Managing Risk in Healthcare. Law and Practice (London: LexisNexis, 2nd ed, 2004), chapter 4, and Making Amends, n 38 at 13, discussing this phenomenon in the context of allegations of clinical negligence. On the importance of trust generally, see O. O'Neill, A Question of Trust (Cambridge: Cambridge University Press, 2002).

⁵¹ Establishing causal connections between (the threat of) civil liability and real world behaviour is tricky and rarely attempted, which may explain the lack of evidence on the point here. On the other hand, tort's supposed deterrent effects have commonly been assumed, at least by courts, if not always by academics. For a summary of the empirical evidence concerning deterrence, drawn mainly from North America, see Dewees *et al*, n 19 at 414-421.

⁵² See Task Force report, n 13 at 12. A 'sting' survey of the willingness of claims farmers to take on a highly unlikely hypothetical claim provides some support for this view. See 'How a puppy, a paving slab and a passing cyclist made a bad break worth thousands', The Guardian, 23 October 2004. See too 'Injury claims firm offers nurses cash to refer accident victims', The Guardian, 16 March 2005.

⁵³ Following the insolvency of The Accident Group, one of the insurers who underwrote its after-the-event policies is reported to be suing some 800 law firms alleging that many of the personal injury

cases TAG referred to them should never have been taken up, see G. West, 'Preparing for Battle', *Law Society Gazette*, 17 March 2005. This litigation may throw light on the extent of frivolous claims.

⁵⁴ See S. Yarrow, Just Rewards: The Outcome of Conditional Fee Cases (London: Policy Studies Institute, 2001). The Citizens' Advice Bureaux report, No Win, No Fee, No Chance, December 2004, para 1.5, calculates that in the first four years to 2003/04 over a million personal injury claims were brought using CFAs. It is proposed to simplify by regulation the operation of CFAs, the uplifted success fees of which inevitably increase the cost to defendants of successful claims, see Department for Constitutional Affairs, Making Simple CFAs a Reality, CP 22/04, June 2004.

⁵⁵ The CABx report, *ibid*, para 9, observes that CFAs 'create perverse incentives for the legal profession and provide the conditions for cherry-picking high value cases with high chances of success'.

⁵⁶ Having largely abolished civil legal aid for personal injury claims, the Labour government has been anxious to have CFAs seen as an efficient and effective replacement while denying that they promote unnecessary litigation or push up costs to defendants. See, for example, written answer given by David Lammy, Minister for Constitutional Affairs, HC Deb, vol 410, col 32W, 8 September 2003.

⁵⁷ See Government Response to the Better Regulation Task Force Report, n 14, accepting the need for tighter controls while allowing the Claims Standards Council (the trade body) until December 2005 to devise a scheme of self-regulation. The OFT is currently scrutinising a code of conduct drafted by the Council. In Ireland and parts of Australia, the content and location of claims advertising is regulated by legislation, see A. Morris, 'Claims advertising: access or excess?' (2005) 155 NLJ 345, 11 March 2005.

⁵⁸ See Review of the Framework for Legal Services in England and Wales, Final Report by Sir David Clementi, December 2004. The Association of Personal Injury Lawyers (APIL) declared itself 'bitterly disappointed' by this failure, see Press Release, 15 December 2004. See too the CABx report, n 54, bemoaning the absence of effective regulation and the mis-selling of legal and insurance-related products. Since 14 January 2005, claims management companies advising on or arranging (legal expenses) insurance must be authorised by the Financial Services Authority, see the Insurance Mediation Directive (Miscellaneous Amendments) Regulations 2003, SI 2003/1473.

⁵⁹ OFT report, n 6 at para 9.12, notes that the number of workplace and road traffic accidents, which give rise to the bulk of injury claims, are already low historically. The scope for further improvement may be limited and is thus expected to have only a marginal impact on the number of future claims.

⁶⁰ See J. Stapleton, 'In Restraint of Tort' in P. Birks (ed), The Frontiers of Liability (Oxford: Oxford University Press, 1994), vol 2, at 84.

⁶¹ See Task Force report, n 13 at 3 and 14.

⁶² On the connections between the availability of liability insurance and the symbiotic development of negligence liabilities, see M. Davies, 'The end of the affair: duty of care and liability insurance' (1989) 9 LS 67. Cf. Morgan, n 46, advocating that tort return to its roots in individual responsibility and eschew insurance-based aspirations to provide collectivist compensation.

⁶³ OFT report, n 6 at paras 9.9 - 9.11.

⁶⁴ See Adams v Bracknell Forest Borough Council [2004] UKHL 29 (failure to deal with pupil's dyslexia results in 'personal injury' rather than mere economic loss. Hence claims are more likely to attract a duty of care and to be in time within s.11 Limitation Act 1980) and Phelps v Hillingdon LBC, n 49.

⁶⁵ See JD and others v East Berkshire Community Health NHS Trust and others [2003] 2 FLR 1166 (incompetent intervention where abuse suspected).

⁶⁶ See Sutherland v Hatton [2002] 2 All ER 1, Barber v Somerset CC [2004] 1 WLR 1089. There may be in excess of 500,000 workers suffering stress-related ill health, see Health and Safety Executive, Self-reported Work-related Illness, (SW103/04), 2003/04 survey.

⁶⁷ See Vowles v Evans [2003] 1 WLR 1607 (liability of match official), Condon v Basi [1985] 1 WLR 866 (participant), Watson v British Boxing Board of Control [2001] QB 1134 (regulatory body). Cf. Blake v Galloway [2004] 3 All ER 315 ('recklessness' standard unexpectedly applied to informal game or horseplay resulting in no liability).

⁶⁸ See Lister v Hesley Hall Ltd [2002] 1 AC 215 (sexual abuse by institutional carer). Mattis v Pollock (t/as Flamingo's Nightclub) [2003] 1 WLR 2158 (attack on clubber by bouncer). Godden v Kent and Medway Strategic Health Authority [2004] EWCA 1629 (refusal to strike out a claim that the Authority could be vicariously liable for the torts of a General Practitioner, despite not being his employer).

⁶⁹ See Page v Smith [1995] AC 155 (psychiatric injury to primary victim need not be foreseeable). AB v Leeds Teaching Hospital NHS Trust [2004] 2 FLR 365 (successful action by parents arising from hospital's undeclared policy of retaining children's organs).

⁷⁰ See Fairchild v Glenhaven Funeral Services [2003] 1 AC 32 (liability for negligent exposure to asbestos in multiple employments) and Chester v Afshar [2004] UKHL 41 (neurosurgeon liable for failing to warn of inherent risks even though patient might have consented to the operation at a later date). Cf. Gregg v Scott [2005] UKHL 2 (failure to diagnose cancer promptly so reducing the patient's chances of survival from 42% to 25% not actionable).

⁷¹ See Phelps v Hillingdon LBC, n 49, and JD and others v East Berkshire Community Health NHS Trust and others, n 65.

⁷² [2004] UKHL 15 at [2].

⁷³ See n 5. See also, to similar effect, the consistent refusals by courts to allow motorists to shift the blame for accidents from their driving to the condition of the roads. Stovin v Wise [1996] AC 923 (obstructed sight lines at a junction). Goodes v East Sussex CC [2000] 1 WLR 1356 (no gritting). Sandhar v Department of Transport [2004] EWCA Civ 1440 (no salting). Gorringe v Calderdale MBC, n 72 (no 'go slow' warning).

⁷⁴ n 13 at 18 and 19. Tomlinson is described in Wattleworth v Goodwood Road Racing Co. Ltd [2004] EWHC 140 at [115] as a 'salutary reminder (at a time when, in the perception of some, a "compensation culture" prevails)' that occupiers are ordinarily not duty bound to prevent others from taking risks inherent in activities freely undertaken.

⁷⁵ This is not to say that problems of moral hazard and fraudulent claims are non-existent or should be ignored. Commercial insurers nowadays pool and exchange (claims) data. In November 2004, several local authorities set up a telephone hotline to encourage the public to 'name and shame' people suspected of making false compensation claims.

⁷⁶ See T. F. Burke, Lawyers, Lawsuits, and Legal Rights (Berkeley: University of California Press, 2003). See too R.A. Posner, Law and Legal theory in the UK and USA (Oxford: Clarendon Press, 1996).

⁷⁷ See n 57 and text.

⁷⁸ As Davies, n 62 at 83, remarks 'In most cases, the major modern deterrent attached to legal liability is the prospect of increased insurance premiums'.

⁷⁹ See DWP Report, n 47 at 29-35, and DWP, Discussion Paper on Framework for Vocational Rehabilitation, May 2004. See too, IUA/ABI Working Party, Psychology, Personal Injury and Rehabilitation, 2004 and APIL, Best Practice Guide to Rehabilitation, 2004.

⁸⁰ See OFT, n 6 at para 10.4.

⁸¹ See 'Blame culture is the road to suicide', Daily Telegraph, 3 February 2004.

⁸² See 'Focus: On the Road with the PM', The Observer, 6 March 2005.

⁸³ One commentator claims that the spectre of a compensation culture has become 'the right's new bogeyman' allowing 'big business to associate its victims with scroungers' and opening up 'a new front in their perpetual war against regulation', see G. Monbiot, 'The Myth of the Compensation Culture', The Guardian, 16 November 2004.

⁸⁴ See C. Harlow, State Liability. Tort Law and Beyond (Oxford: Oxford University Press, 2004), at 132.

⁸⁵ Following the collapse of two major liability insurers, the Australian Federal government came to the political judgment in 2002 that the 'award of damages for personal injury has become unaffordable and unsustainable' and instructed an ad hoc committee to recommend changes to the tort system, see Commonwealth of Australia, Review of the Law of Negligence. Final Report (Canberra, September 2002). The 255 page (Ipp) report contains a wide-ranging (if less than radical) set of proposals for limiting liability and quantum.

⁸⁶ See the Queen's Speech, 17 May 2005, and 'Law aims to head off compensation culture', The Financial Times, 18 May 2005. The 'Compensation Bill' itself has yet to be published. Apparently, it will 'introduce whatever legislation may prove necessary' to deal with invalid claims while 'improving the compensation system for those who have a valid claim'. Measures may include 'clarification of the common law on negligence' and the 'regulation of claims farmers'. At the time of writing, it is uncertain whether the bill will be confined to personal injury claims or those against the public sector.