

## **Legislating in the echo chamber?**

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### **Published version**

WILLIAMS, K. (2005). Legislating in the echo chamber? *New law journal*.

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## LEGISLATING IN THE ECHO CHAMBER?

The publication on 3<sup>rd</sup> November of the Compensation Bill 2005 is a fine example of what the US military calls 'command emphasis'. In March 2005, when on the pre-election stump, the Prime Minister announced that many public servants (particularly teachers and healthcare workers) were worried they might 'be subject to unfair legal action' and that ways must be found to 'protect' them from what he called a 'real problem'. Within eight months, the Department for Constitutional Affairs has produced a bill which, at least in part, appears to be a direct response to this newly revealed Prime Ministerial concern. The fact that a report in May 2004, *Better Routes to Redress* from the Better Regulation Task Force (BRTF), had said there was little hard evidence to support the idea that Britain was beset by a 'litigation crisis' or was developing an undesirable 'compensation culture' seems to have been overlooked.

Part 2 of the Compensation Bill is a consumer protection measure providing powers to regulate 'claims farmers'. Something of the sort was widely anticipated, having been recommended by the BRTF, and is likely to be strongly supported in Parliament. No more will be said here about this, though numerous examples of sharp practice will, no doubt, be adduced to justify the attention of our legislators. Instead we will concentrate on Part 1 of the Bill.

Part 1 consists of a single clause. It provides that XXXXX.

Being addressed to the courts, at first sight this looks uncontroversial, technical lawyers' law, and for that reason may attract only limited parliamentary scrutiny, which would be unfortunate. The 'Explanatory Notes' accompanying the Bill claim the clause does no more than re-state the existing law as declared in the superior courts in recent times. But what exactly it means and how it might be expected to give effect to Mr. Blair's wish to see potential defendants, particularly those in the public sector, better protected from unfair harassing litigation and judgments is less than clear.

The first thing to note is that the clause expressly confines itself to dealing with questions of *breach* – with how the standard of care is to be fixed – and not with the *duty* issue. Judges will, therefore, continue to be free to go on recognising (in the now conventional, post-*Caparo*, incremental manner) new categories of relationships said to be capable of giving rise to responsibility in negligence. Had it been otherwise, it is doubtful whether the Minister could have certified that the Bill complied with the UK's commitment to respect the European Convention of Human Rights.

The clause is side noted 'Deterrent Effects of Negligence'. This effect, which is sometimes (though by no means universally) assumed by courts, is frequently contested by academic commentators. As Professor Cane recently observed, 'the evidence we have about the positive regulatory impact of tort law is patchy and inconclusive', adding that while it seems reasonable to suppose that the possibility of tort liability 'has some impact on people's conduct, the precise

nature and magnitude of that impact is largely speculative'.<sup>1</sup> A good example of this sort of uncertainty is 'defensive medicine', the deleterious existence of which is strongly asserted, especially by doctors. Yet it is a contested phenomenon, for which there is little reliable evidence documenting its precise nature, extent or effects. As a recent report from the National Audit Office points out, the NHS has not even fully exploited its experience of actual malpractice litigation.<sup>2</sup> What we do know is that the medical profession has a strong tendency to exaggerate its exposure to the risk of being sued: a condition that seems also to have infected teachers recently.<sup>3</sup> Currently, there are few demonstrable connections between (the threat of) liability and real world behaviour, which will leave judges having to continue their common sense speculations about the likely impact of any decision about where to pitch the standard of care.

The notion of instructing judges to have regard to the effects on 'desirable activities' of breach decisions seems fraught with difficulties. Of course, it is well established that we are all entitled to take exceptional risks in an emergency in order to avoid (life-threatening) adverse outcomes that would not be justifiable in the absence of the emergency. A single Good Samaritan doctor with few resources attempting to save a roadside casualty is, rightly, unlikely to be criticised, let alone judged against the standards of a specialist team operating with the backup of a hospital A & E department. A driver is justified in swerving violently to avoid a child who runs into the road in front of his vehicle, even though by doing so he may put his passengers and others at risk. On the other hand, the notion that undefined (socially) 'desirable activities' require special consideration

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<sup>1</sup> See Peter Cane 'Reforming Tort Law in Australia: A Personal Perspective' (2003) 27 Melbourne University Law Review 649.

<sup>2</sup> See NAO/D of H, *A Safer Place: Learning to Improve Patient Safety* (HC 456, November 2005).

<sup>3</sup> See *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'.