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# Courting Mistrust

*The hidden growth of a culture of litigation in Britain*

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## SUMMARY

1. Attitudes towards litigation and compensation have changed in the last 15 years. The numbers of complaints and claims are steadily increasing in a number of important areas. Every sector of public life is affected.
2. Expenditure on both compensation and legal fees has grown significantly. Estimates range from £6.8 billion, to, at the most conservative, £3.3 billion. The public sector alone is forced to pay out around £1.8 billion in compensation.
3. The most significant single development in the rise of the culture of compensation is the expansion of liability to areas that were previously immune from it. Claims for compensation against schools by former pupils alleging that they were let down by the system; claims by soldiers alleging trauma based on events 15 years in the past; claims in negligence against banks for not warning property speculators of a downturn in the market; all these add up to a gross misuse of the law of tort to compensate for every misfortune.
4. This explosion of litigation now has formidable momentum. The inexorable upward trend will be exacerbated by the classification of psychiatric distress as a basis for demanding compensation; by the implementation in April 1999 of the Woolf reforms of civil procedure – particularly its further development of the conditional fee system; and by the advent of the Human Rights Act.

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5. The growth of the culture of litigation has been paralleled by the expansion of the legal profession. During the past two decades, the number of practising barristers and solicitors has more than doubled in England and Wales. Turnover in legal business in England and Wales now represents around 1.3% of the Gross Domestic Product of England and Wales.
6. Litigation is only in small measure conducted through the court (as many as 98% of cases are settled out of court). *The scale of the litigation crisis remains hidden from public view.*
7. Contrary to the arguments of some of its advocates, there is little evidence that litigation contributes towards organisational efficiency. It does, however, create a climate of 'litigation-avoidance'. The dynamic of litigation-avoidance, in turn, leads to the diminishing of the quality of life. The closure of playgrounds and the imposition of restrictions on young people's outdoor activities are some of the untoward consequences of the dictates of litigation-avoidance.
8. A most damaging consequence of the culture of compensation is its impact on human relations. It promotes suspicion and conflict and directly undermines relations of trust and the sense of personal responsibility.
9. Despite the claim of legal professionals, litigation does not empower the individual. On the contrary, it places people in a dependent relationship to professional advisers.
10. The present system of litigation is arbitrary and unfair. It represents an unacknowledged tax on the British public and it deprives the public services of resources which could otherwise be used to improve the public services.

## RECOMMENDATIONS<sup>1</sup>

1. The roots of the culture of compensation can be found in a combination of political, social and legal developments. There will be no easy solutions to the problem.
2. However, greater publicity of the extent of the problem (particularly in the public sector) will at least reveal those organisations who have the worst performance in attracting and resolving compensation claims.
3. In addition, some areas of compensation – such as psychological injury – ought to be restricted. Similarly, the concept of contributory negligence could be reviewed.
4. Upper limits for compensation claims could be set by Parliament (as already happens in the case of employment law).
5. Guidance from the Lord Chancellor or the Lord Chief Justice could recommend that the judiciary should also consider the wider impact on society of compensation payments.
6. However, it must be recognised that changes to the law will not in themselves be enough to reverse a trend which is now running deeply through British society. A wider public debate is needed to bring about the change in attitudes which is necessary if the culture of compensation is not to undermine many of our traditional freedoms.

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<sup>1</sup> See Chapter 11 for further details on these and other recommendations



## CHAPTER ONE

# INTRODUCTION

DURING THE PAST YEAR, a new term has crept into the British political vocabulary: the ‘culture of compensation’. Newspapers have begun to debate and try to make sense of this ‘new’ phenomenon. Considerable public disquiet has been expressed about the large compensation payments received by members of the police and other essential services. As pay-outs for medical negligence have reached record figures, many observers have raised questions about how far Britain has gone down the road of America’s culture of compensation.

Until now, very little research has been conducted into the impact of litigation on British society.<sup>2</sup> Legal professionals – who have seldom considered the wider social and cultural impact of litigation – have written most of the published material that exists. Since most compensation settlements are made out of court, there are no figures on either the total sums involved, or the rate of increase in the number of new cases. Many of the parties involved are disinclined to discuss the issue of litigation in public. Fearing negative publicity, they are reluctant to disclose the sums involved or even to acknowledge publicly the number of claims mounted against their organisation.

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<sup>2</sup> The primary research undertaken for this pamphlet suggests that the lack of transparency regarding claims-making points to a *concealed* culture of litigation. In many instances, investigations have been hindered by the hesitation of relevant bodies and authorities to provide ‘on-the-record’, quotable information.

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The main justification for tort law is that it provides the means for holding individuals and organisations to account for the damage and injury that their negligent action has inflicted on others. Yet the issue of compensation has, in recent years, overtaken this function of allocating responsibility. Sadly, the transformation of the tort law into a system of compensation means that it no longer serves as an efficient instrument for allocating individual responsibility.

The culture of compensation is increasingly becoming separated from legal principles. It is interested mainly in finding someone who can be held liable and who can pay – and not in the issue of responsibility. That is why a campaign launched on behalf of British POWs held in Japan has opted for suing the British Government. Having concluded that the Japanese Government will not pay them compensation, the campaign has reoriented its energies towards a target that is more likely to pay compensation. A similar course of action was adopted in the pursuit of compensation for women allegedly experiencing problems with a contraceptive implant, Norplant. Here compensation was sought not from the doctors who had prescribed the product (and who were arguably more responsible for many of the claimed problems), but from the manufacturers of the product (who were seen to be more likely to make a generous settlement of the case). Clearly the link between the demand for compensation and actual responsibility has become negotiable.

In a just society, individuals must be held accountable for the harm they do to others, and so must corporations. Large companies have the power to affect the lives of many people, and can also use their power to evade responsibility for their actions. Paradoxically, the culture of compensation actually encourages both individual and corporate irresponsibility. When compensation becomes the fundamental objective of a legal claim, issues of responsibility and accountability become negotiable. Through the present system of out-of-court settlements, corporations are often able to avoid taking direct responsibility for

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the damages they inflict on the public and the community. Moreover, the tendency to attribute every misfortune to the action of a private or public organisation creates a climate where the public finds it difficult to distinguish between a company caught up in a trivial compensation case and one that has caused foreseeable damage to the community.

This pamphlet is not written by a lawyer for the legal professional. Although the issues raised in this pamphlet are directly connected to the system of tort, the concern here is with the much wider subject of compensation.<sup>3</sup> The focus is not on questions of jurisprudence but on the sociological and political impact of compensation culture on British society.

Many lawyers, especially those involved in the field of personal injury contend that the problem facing British society is not too much, but too little, litigation. This pamphlet might raise a few questions that will stimulate the legal world to think again about the issues – for the culture of compensation is a subject that is far too important to be confined to the legal profession.

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<sup>3</sup> See Appendix A for an analysis of how this study relates to the system of tort.

## CHAPTER TWO

# THE CHANGING CONTOURS OF LITIGATION IN BRITAIN

IT IS EASY TO FORGET that not so long ago people who had suffered an injury, even a terrible one, did not automatically conclude that they should go to court to seek compensation. Relatives of the 116 children and 28 adults, who died during the 1966 Aberfan disaster, took the view that they did not want to pursue prosecutions because that would be 'to bow to vengeance'. Despite the horror of a village school engulfed by a coal-tip slide, nobody demanded compensation for their trauma or their psychological distress.

Back in the 1970s, individuals who were injured through an act of crime were often puzzled, when they were informed that they were entitled to compensation from the Criminal Injuries Compensation Board. Twenty years ago, the Board was perplexed at the low response to its compensation scheme. By the 1980s, and certainly in the 1990s, attitudes towards complaining, blaming and litigating had changed. So while at the time, the Aberfan parents did not litigate, a woman, who witnessed the disaster as a child of 11, issued a writ against British Coal in September 1990 on the grounds that the horrific scenes of this tragedy caused her to suffer a nervous breakdown 12 years after the incident.

Today, it is inconceivable that a group of people caught up in a major disaster would reject the option of claiming damages. Compensation is now systematically pursued for a variety of experiences that in the past would not have been interpreted as worthy of litigation. Today, holiday-makers claim compensation from tour operators when their vacation fails to meet their

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expectations; young adults demand compensation from education authorities in the belief that their poor school performance was the fault of their education authorities; and military and emergency services personnel demand compensation for the trauma that they experienced in the course of carrying out their unpleasant duties. Employees now go to court to claim damages for the stress they have suffered as a result of being overworked. Clients unhappy with a hair cut or perm sue hairdressers.

The precise scale of litigious activity in Britain is a source of some controversy. There is little consensus even within the legal profession. Many personal injury lawyers claim that talk of a litigation explosion is misplaced; after all, they maintain, most people who have been injured do not engage in legal action. However, while the exact dimension of litigation can be disputed there can be little doubt that British attitudes towards complaining, blaming and litigating have been transformed.

It is impossible to quantify precisely the scale of this change as most cases – possibly as many as 98% – are settled without a full trial. Such out-of-court payments are often subject to a confidentiality clause, at the defendant's insistence, and such settlements are seldom disclosed to the public. This makes it difficult to obtain the precise facts in this shadow quasi-legal world. Nevertheless, it is possible to garner sufficient information to begin to identify trends.

## CHAPTER THREE

# COMPLAINING BRITAIN

THE TRADITIONAL VIEW OF BRITAIN as a nation of the stiff upper lip, where people rarely complain bears little relationship to the contemporary situation. Many public sector bodies and professional, voluntary and business organisations report that they are receiving a growing number of complaints.

This trend is not restricted to high-profile providers of public services, such as the recently privatised railway companies. Organisations such as the Guild of Professional Beauty Therapists report a rise in 'professional complainers'. Published surveys support a wealth of anecdotal evidence on the subject. *Resolving Civil Disputes*, a survey published by the Lord Chancellor's Department, is categorical on this matter. It noted that the 1980s saw a 'complaints explosion' which materially increased the workload of a diverse range of institutions in the private and public sectors.<sup>4</sup> Organisations, such as the Trading Standards Departments, Banking Ombudsman, Local Government Ombudsman, ABTA and the Independent Television Commission have all reported a steady rise in complaints.

It appears that virtually no public organisation is immune from the complaints explosion. The number of complaints against the police in England and Wales has increased steadily between the years 1973 to 1996 from 12,886 to 35,840. The health sector has

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<sup>4</sup> T. Goriely & T. Williams, *Resolving Civil Disputes: Choosing Between Out-Of Courts Schemes And Litigation; A Review Of The Literature*, Lord Chancellor's Department, Research Series no. 3/97, 1997, p. 13.

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become particularly vulnerable to complaints from the public. In 1997, the General Medical Council reported a 25% increase above the previous year in the number of inquiries and complaints against doctors. Complaints received by the Health Service Ombudsman have risen by an average of 20% each year for the last five years. The Office for the Supervision of Solicitors is facing a major crisis as complaints against solicitors have reached record levels. Unable to deal with the 35,000 complaints it receives a year, the Government has threatened to create a new agency to deal with the problem.

During the past five years complaints in the Gas Industry are up by 48%, in telecommunications, up by 178% and in financial services up by 40%. In 1991, fewer than 8,000 people complained to the Office of Fair Trading about their tour operator. Six years later, in 1997, this figure had nearly doubled to 14,000 complaints.

This culture of complaint is driven by a new industry of complaint advocates, who are dedicated to discovering new problems to complain about. In recent years, various reports have addressed what their authors perceive as a need to 'raise public awareness' about the fact that too few people complain. For example, a recent report by the National Consumer Council includes a section headed: 'Why Don't You Complain?' Consumer organisations and many legal professionals now assume that complaining is by definition a positive and constructive act of civic responsibility because it can alter and improve the way that services are provided to others in the future.<sup>5</sup>

In recent years, politicians across the political spectrum have promoted complaining as useful source of input for the efficient delivery of services. A statement approved by a Conservative Cabinet seminar in February 1993, to the effect that 'complaints are jewels to be cherished', would probably meet with the endorsement of leading New Labour and Liberal Democrat politicians. But the suggestion that the institutionalisation of

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<sup>5</sup> See *ibid.* p. 29.

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complaining is inherently a positive and constructive social development is highly questionable. On the contrary, it is arguable that the promotion of complaining may well divert energy away from the search for solutions, and towards the formalisation of grievances through litigation.

## CHAPTER FOUR

### THE HIDDEN LITIGATION CRISIS

A CURSORY INSPECTION of the number of people directly involved in litigation suggests that, rather than British society becoming increasingly litigious, it is in fact turning its face against the courts. Rather than the number of people involved in litigation being on the increase, as one might expect from what has been written above, the number of litigants is falling. However, such a conclusion would underestimate the full extent of the culture of litigation.

In reality, the majority of litigious activity takes place through alternative dispute resolution, out-of-court action and quasi-legal arenas such as arbitration and mediation boards.

The past decade has witnessed a decline in the number of cases reaching courts under the tort system. Civil cases, disposed of in the High Court decreased by 78% from a high of 19,538 in 1988, to just 4,229 in 1997. The number of personal injury cases disposed of has declined at a similar rate, from 14,410 in 1988 to 2,850 in 1996. One reason for fewer cases entering the High Court is that due to new rules, more cases can be heard in the lower (and cheaper) courts. Since July 1991, county courts have been able to deal with all contract and tort cases, regardless of value. Previously there was a limit of £5,000. However, the work of the county courts has also been declining since the early 1990s, from a recession-led high of 26,722 disposals by trial in 1992, to just 15,511 disposals by trials in 1997.

From these lower figures, many legal commentators conclude that Britain is not experiencing a litigation crisis. But a closer examination of developments provides for a very different

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interpretation of contemporary trends. The full scale of litigious activity can not be grasped from judicial statistics dealing with the High and County Courts. Most litigious activity now takes place in three important areas:

- court linked arbitration, mediation schemes and settlements;
- use of quasi-legal arenas and other mediation schemes;
- out-of-court settlements.

Much of the claim-making in these three sectors remains hidden from public scrutiny. Data on private sector settlements is not even collated.

One of the most important innovations in litigious activity is the growth of arbitration and Alternative Dispute Resolution (ADR). In an effort to reduce the cost of the legal system, government reforms have promoted arbitration as cheap alternative to resolving cases in the courts. Many of the proposed Woolf Reforms, being implemented by the Lord Chancellor at the time of writing, are devoted to expanding out-of-court resolutions through improving support, funding and incentives.

Since the late 1980s, several organisations linked to the legal profession have emerged to promote and support alternative means of dispute resolution. In 1989, the Alternative Dispute Resolution Group was founded to provide solicitors trained in mediation and out-of-court dispute resolution. In 1990, the Centre for Alternative Dispute Resolution (CEDR) was established with the support of the Confederation of British Industry.

Last year, the CEDR reported that the number of mediations in the year ending April 1998 had risen by 106% over the previous year. Figures available for the current year indicate a similar rate of increase. The annual combined claims value handled by the CEDR now exceeds £4 billion with a settlement rate of 85%. Many of the cases handled by the CEDR involve tort claims. Medical negligence accounts for 2% of all cases, while professional negligence has leaped from 19% in the year ending

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April 1998 to 29% of all cases in the current year.<sup>6</sup> Claims-making for medical and professional negligence represent precisely the type of litigious activity that is overlooked by studies that equate litigation to formal court proceedings.

There is considerable evidence that many claim-makers prefer to pursue their case outside the formal court system. A new breed of claims-brokering initiatives has promoted the possibility of claiming compensation, with little risk of going to trial. The large response to these initiatives suggests that avoiding the court is a major attraction for potential litigants. The Law Society launched Accident Line in 1994 to put members of the public in touch with its personal injury panel of solicitors. From its first year of operation until 1998, the average calls received per month rose from 1,000 to just over 2,000. Claims Direct, a commercial franchise scheme offering claims management to accident victims, was launched in 1996 and claims to have settled 2,600 claims to date, with an overall compensation value in excess of £8 million.

The lack of connection between the propensity to sue and court action is well illustrated in the case of medical negligence. The NHS litigation authority estimates that no more than 5% of claims reported to the authority by NHS trusts reach trial status. The overall number of negligence and personal injury cases reaching the High Court has declined by 40%, from 1,600 in 1988 to 960 in 1996 (excluding road accidents and accidents at work).<sup>7</sup> However, this fall in court-related activity is not reflected through a lower volume of claims. The National Audit Office projects the costs of clinical negligence litigation against NHS trusts to rise 488% from £85 million in 1991 to £500 million in the coming year. This rise includes an increase in both the volume of claims and quantum levels. Several NHS trusts have reported a steady rise in the number of solicitors' letters they have received in recent years. Compensation and legal payments made by the mutual

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<sup>6</sup> *Annual Report 1997/98*, CEDR, 1998.

<sup>7</sup> Lord Chancellor's Department, *Judicial Statistics, Annual Reports*, HMSO, 1988-96.

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funds of the Medical Defence Union have increased from £29 million in 1992 to £67 million in 1997. This represents a rise of 231% over 5 years.

A survey carried out by the National Audit Office covering hospitals in Wales reported that the cost of incidents which could lead to a claim of medical negligence have increased by 700% in just one year. The escalating cost of these claims has left Welsh health authorities with an estimated debt that could amount to almost £50 million by the end of March 1999.

According to most estimates, only one or two per cent of claims, even among accident victims with serious injuries, lead to a contested court hearing.<sup>8</sup> The rest are conducted out of court on the basis of private negotiations between the two sides. For example, a recent study of 150 sample personal injury cases found that all of them were dealt with out of court.<sup>9</sup> With so many claims promoted informally and behind the scenes, it is impossible to quantify the full scale of Britain's concealed litigation culture.

The finances of public organisations, such as NHS trusts and the police authorities, are a matter of public record and therefore some general data is collated about the cost of compensation and claims-making. But in the private sector, other indicators of litigious activity have to be used, particularly where settlements are reached 'off the record' and hidden from public scrutiny. Settling is often done 'without prejudice' – that is with no admission of liability by the party making an offer of claim settlement. Such arrangements are also often the subject of strict secrecy clauses. In some situations, a claim-maker provides no substantial evidence of negligence, but still the case is settled. Such settlements are often motivated by a company's fear of bad

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<sup>8</sup> Even the Legal Aid Board Research Unit can only make a 'guestimate' of the percentage of cases that go trial. One of its reports notes that 'the precise figure remains unclear'. See P. Pleasence, S. Maclean & A. Morley, *Profiling Civil Litigation*, Legal Aid Board Research Unit, Research Paper 1, London, 1996, p. 33.

<sup>9</sup> P. Pleasence, *Report of the Case Profiling Study, Personal Injury Litigation in Practice*, Legal Aid Board Research Unit, London, 1998, p. 15.

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publicity and the concern that publicising an actual or impending court case could lead to a collapse of public confidence in a specific product.

Personal injury lawyers know that companies do not want bad publicity. Lawyers identify such concerns as weaknesses they can exploit and use it to pressurise companies to settle in order to avoid litigation. This approach is promoted in a well-known handbook, *Pollution & Personal Injury: Toxic Torts* which offers advice to would-be litigates in the field of environmental law. The authors argue that since companies have to worry about their 'own public image' and 'their relations with the media', they may not pursue an avenue 'potentially fruitful in the litigation' but which may harm their 'wider interest'.<sup>10</sup> The authors have rightly concluded that the threat of negative publicity places pressure on organisations to come to secret out-of-court settlements.

Nervousness about litigation means that insurance companies, public corporations and businesses are reluctant to discuss the volume of claims made against them. They are also concerned to avoid publicity regarding the size of awards reached through out-of-court settlements. Off-the-record interviews with senior managers indicate that insurance companies actively encourage private settlements on the grounds of saving legal and other costs. In one instance, a senior manager, who was a fervent believer in the value of his product and who regarded a claim for damages as a welcome opportunity to demonstrate its safety, was placed under strong pressure from his head office to settle. It was only when he made the matter an issue of confidence in the product and the company that he was allowed to contest the claim. This he managed to pursue to a successful conclusion. Such examples are rare in a climate where even the potential threat of negative publicity encourages many companies to offer a behind-the-scenes deal.

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<sup>10</sup> C. Pugh & M. Day, *Pollution & Personal Injury: Toxic Torts*, Cameron May, 1995, pp. 56-57.

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Information gained from Local Authorities indicates that this sector has also become an important area for litigation. Consequently, Local Authorities are facing problems with their insurance cover due to the inordinate rise in claims against their emergency and public services and education authorities over the last ten years. This has caused their main insurer, Municipal Mutual Insurance to cease trading and, in education cases, authorities cannot now insure against the first £100,000 of any claim.

The problem faced by local authorities is not the cost of individual claims, which tend to be quite small – on average around £1,750 – but their cumulative cost. Some large authorities face around 1,000 total claims a year and this can cost them over £2 million in compensation and legal fees.

Litigation is also on the increase in the workplace. In 1997, 110,000 people took their grievances to an industrial tribunal, a fourfold increase over the 1990 figure. Personal injury claims are on the rise in the emergency services. The armed forces have seen a steep rise in such cases. In 1987, the legal immunity of the armed forces from personal law suit was scrapped, leading to the growth of a compensation culture into the military. There were four personal injury cases in 1989. By 1994, it had risen to 136. Three years later, this figure rose to more than 1,000 claims and last year, nearly 1,500 law suits were initiated. The total cost of compensation payments paid out by the armed forces last year was £65 million.

A similar pattern is at work in the police force. It is estimated that between 3,000 and 4,000 officers are currently seeking compensation for injury, with total claims in excess of £40 million. The compensation bill for the armed forces and the police alone now exceeds £105 million.

## CHAPTER FIVE

# THE LIABILITY EXPLOSION

THE MOST SIGNIFICANT DEVELOPMENT in British litigation is not the volume of court cases but the extension of formalised liability into new areas. As a result the number of scenarios which can now lead to a demand for compensation has expanded dramatically. As one important review of this phenomenon observed:

We are now seeing whole new types of claims which were simply not considered by practitioners twenty or thirty years ago.<sup>11</sup>

The examples alluded to in this review includes the case of a man who won legal aid to sue, for 'personal injury and loss', a council he claims negligently failed to have him adopted when a child. Another example of this trend was the case of a man who secured £45,000 in an out-of-court settlement from Trafford Health Authority on the grounds that one of the causes of his killing his mother was the Health Authority's negligent discharge of him.

The expansion of litigation has had an important impact on the work of even voluntary organisations and sporting bodies. Organisations like the Boy Scouts now take the threat of litigation seriously. In recent years there has been an upsurge in sports related-litigation. As a result sportsmen and women are now advised to take out full public liability insurance against any potential claims: as a result of a number of test cases, a referee can be subject to civil action if he fails to send a player off for an offence and later that

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<sup>11</sup> See J. Stapleton, 'In Restraint of Tort' in P. Birks (ed.) *The Frontiers of Liability*, Oxford University Press, 1994, pp. 83-84.

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player caused an injury to another. According to a leading sports lawyer, gymnastics, golf, tennis and track and field trainers 'are risking potential litigation if an athlete who is paying for tuition does not improve, or even worse, loses form'.<sup>12</sup>

In some cases, new liabilities have been the product of new British or European regulations. In 1992, a European Directive (incorporated into British law as the Package Travel Regulations 1992) made package holiday operators legally responsible for all aspects of the holidays they sell. A landmark High Court action two years later set a new precedent when a plaintiff brought an action against a tour operator after she suffered food poisoning while on holiday in the Caribbean. The operator was eventually forced to settle and paid compensation to around 100 claimants. Although it was kept secret, the total settlement was rumoured at £750,000. This action helped encourage a wave of similar claims over recent years. One of the largest claims is being co-ordinated by a firm of solicitors in Nottingham, and involves the cases of 600 people who suffered food poisoning on holiday in Bodrum.

In 1996, legal aid was granted to two young women to pursue their claim against the company, Thomson Tours after experiencing sexual harassment on holiday in Tunisia. Thomson was eventually ordered by the court to pay £3,000. The success of this case has also led to a rise in the number of distress claims against tour operators. Not surprisingly, holiday companies now face an explosion of claims, including a multi-party action claim for damages for post-traumatic stress, following a plane overshooting the runway. The tourism industry does not compile figures for compensation payment, though it is estimated that in 1997 a record £50 million was paid to dissatisfied holiday makers.

Most often, new liabilities are constructed and defined by the courts through the cases that are given leave to proceed. For example, in 1996, a 59 year-old cancer sufferer from Portsmouth, Cyril Smith, was granted legal aid to pursue a case against the

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<sup>12</sup> See R. Elvin 'Laying Down the Law', *Leisure Management*, October 1998, p. 19.

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NHS because he was still alive. He claimed for loss of earnings and trauma because he had been told, upon diagnosis of his cancer three years before, that he had only three to six months to live. The Cyril Smith case symbolises the new legal consensus that contends that individuals can assign blame on service providers for the unexpected consequences of their misfortune. The reallocation of blame through litigation helps endow the complainant with moral authority.

Recently, a man who was paralysed when his car skidded on black ice gained legal aid to sue a local authority for damages of up to £3 million. In this precedent-setting case, for the potential liability of local authorities, the Court of Appeal ruled that East Sussex County Council had failed in its statutory duty as the highway authority.

The extension of liability has also had a major impact on employers. An important focus for litigation against employers is the surge of claims from staff claiming compensation for suffering from stress. The important legal precedent was set in April 1996, when John Walker, a senior social worker received £175,000 compensation for the 'psychiatric damage to a normally robust personality'. The High Court ruled that an 'impossible workload' placed on Walker was the cause of his nervous breakdown. This rise in stress claims may help to account for the fact that, despite the decline of heavy industry and dramatic improvements in health and safety standards, the number of cases going to employment tribunals is on the increase. The trade unions have been at the forefront of promoting stress claims, and now actively encourage their members to sue for compensation.

One of the most extraordinary innovations of the culture of litigation has been the acceptance of an ever-widening understanding of psychological distress. Claims based on a new generation of psychological injuries are on the rise, and seem set to continue to do so. Mental distress, trauma, stress, and loss of confidence and self-esteem are increasingly presented as legitimate grounds for compensation.

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Recently a deputy head teacher received £100,000 in an out-of-court settlement after allegations that a bullying head teacher drove him to a nervous breakdown. The central incident in the saga occurred when he was asked to present a wrapped Christmas gift to a former teacher. It turned out to be a chocolate penis, which he was asked to hand over with the words: 'I hope you enjoy a nibble this Christmas'. The incident apparently caused the litigant so much distress that he could no longer continue in the teaching profession. Many were drawn to ask whether this sort of banter was worthy of a £100,000 pay-out. The culture of compensation, however, leaves such scruples trailing in its wake. It is the subjective standard of how people feel that seems to be the new motor of litigation, rather than any more objective standard based on genuine damage after a meaningful harm.

## CHAPTER SIX

### A NEW LEGAL CULTURE

IN THE PAST, IT WAS CLAIMED that one of the reasons why litigation was more prevalent in the USA than in Britain was because the latter lacked a contingency fee system, or a mechanism for class actions. It was also argued that restrictions on advertising prevented British lawyers from going down the road of American style ambulance-chasing. Today, all these mechanisms are in place in Britain and lawyers and their clients are actively borrowing from the American experience of litigation.

1995 saw the introduction of the Conditional Fee Agreements Order. Since then, the conditional fee system has expanded to create a restricted version of the American 'no-win, no fee' system. On 26 April 1999, the date for the implementation of the Woolf report, the system will be extended further. Although it is not clear whether this shift to a more extensive conditional fee system will by itself stimulate more litigation, it will provide entrepreneurial lawyers with more opportunities to extend the boundaries of compensation culture. Innovative 'no win – no fee' cases have been mounted in areas as far apart as libel and sports injury. Indeed, the whole tenor of the Woolf Report is to make it easier for litigants to bring cases, to make litigation simpler, speedier and cheaper. While this is in many ways entirely commendable, there can be little doubt that it will also have the unintended consequence of encouraging more people to look to the courts for the answer to their problems.

Since the 1980s, litigation through multi-party action has become institutionalised in Britain. According to one study,

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innovation in this area has been ‘one of the remarkable features of the last decade’. Another study has noted that the emergence of multi-party litigation has been ‘truly remarkable’.<sup>13</sup> What was perceived as highly exceptional in the early 1980s had become commonplace by the end of the decade. Today, multi-party actions are on the increase in Britain, often copying American precedents. A group has been formed to sue the hamburger chain, McDonald’s, on the grounds that hot drinks served in the restaurant scalded them. Group actions have also been mounted against a number of employers, hospital trusts, local authorities, holiday and pharmaceutical companies and mobile phone operators. These actions may be numerically insignificant but they have a disproportionate significance: because of the publicity they inevitably attract, large companies are tempted to settle cases out of court, thereby contributing to a culture in which ever more claims are likely to be brought.

An important recent change to the British legal culture has been the gradual relaxation of the traditional restrictions on the right of lawyers to advertise for clients. Since 1984, the Law Society has loosened the rules on advertising, allowing lawyers to look for clients. This development has allowed lawyers to recruit clients for multi-group action and has directly encouraged claims-making. Lawyers involved in environmental law and other campaigning issues now advertise in order to increase the number of claimants involved in particular cases.

Advertising has directly assisted the emergence of lawyer-led litigation. In numerous instances, it is a firm of solicitors that identifies a potential complaint, advertises for clients, encourages the setting up of action groups and mobilises support in the media before launching a formal action. Many of the most high profile cases – such as the multi-party actions against British Nuclear Fuels, or Hoechst Marion Roussel (the suppliers of the contraceptive

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<sup>13</sup> C. Wells, *Negotiating Tragedy: Law and Disasters*, Sweet and Maxwell, p.102 and C. Harlow & R. Rawlings, *Pressure Through Law*, Routledge, 1992, p. 152.

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device Norplant) or manufacturers of MMR vaccines – are the product of a new innovative style of lawyer led litigation.

The growing climate of litigation is widely praised by legal activists who argue that it represents a redistribution of power to the underdog. Ian Walker, president of the Association of Personal Injury Lawyers (APIL) argues that:

What we have is a culture where access to the legal system is greater than it has ever been, through conditional fees...[we] have much greater knowledge in the public partly because of advertising and partly because of media coverage.<sup>14</sup>

Many legal commentators, especially those involved in personal injury law, contest strongly the claim that there is a growing compensation culture in Britain. Indeed, they often claim that the problem is not too much but too little litigation. Many plaintiff lawyers, and the related advocacy groups, are committed to expanding the boundaries of claims-making.

They are committed to bringing about social reform through the mechanism of the courts – a rather inappropriate forum, many would feel – but they fail to acknowledge the broader social effect which their approach to the law is having.

The complicity of the judiciary in the litigation explosion is not restricted to the law of tort. Judges have been instrumental in leading individuals to see the courts as their first port of call across the legal spectrum. The expansion of judicial review in the past 40 years – by at least a hundredfold – is but one example of the legal free-for-all which is now being witnessed.

Another import, this time from Europe, will also have a real effect on the levels of litigation. The incorporation of the European Convention on Human Rights into English law through the Human Rights Act 1998 means that, for the first time, individuals can test their rights in the English courts. The experiences of New Zealand and Canada after the introduction of similar “Bills of Rights”

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<sup>14</sup> ‘Moving from legal restraint to compensation culture’, *Guardian*, 17 October 1998.

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suggest that the courts will find themselves drawn into examinations of areas of the law which hitherto went unquestioned. Only the time and expense of pursuing a case to the European Court of Human Rights in Strasbourg has kept the amount of litigation in this area at a limited level in Britain. Few in the legal community doubt (indeed, many hope) that the granting of the ability to pursue such claims – albeit only against public bodies – in the English courts will lead to a vast increase in such litigation. Furthermore, the lessons of New Zealand and Canada suggest that it will often be the least deserving who will benefit the most.

## CHAPTER SEVEN

### THE POLITICS OF CLAIMS-MAKING

WHO IS RESPONSIBLE for the growth of the culture of compensation? Paradoxically, virtually every important political interest group has contributed directly or indirectly to its development.

One of the unintended consequences of the last Government's emphasis on the Citizen's Charter was to concentrate the public's mind on seeking redress. The Citizen's Charter also encouraged other government departments to establish their own schemes for handling complaints. Many reports on the impact of this initiative identify its contribution to the creation of a more assertive and complaining public.<sup>15</sup>

This formalisation of new consumer rights has stimulated individuals to make claims – financial and otherwise – on institutions that previously they accepted as imperfect. As Harlow and Rawlings predicted, even if it did not contain any specific rights to action, the Citizen's Charter is 'likely to push complainants towards the courts.'<sup>16</sup>

The Charter initiative did not set out to encourage litigation. However, in the wider climate of complaint, new rights outlined in initiatives like The Patient's Charter, The Victim's Charter or The Parent's Charter have tended to be interpreted as vehicles for gaining redress, often in the form of financial compensation. Officials involved in the handling of complaints procedures have

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<sup>15</sup> See T. Goriely & T. Williams, *op. cit.*, pp. 17-18.

<sup>16</sup> Harlow and Rawlings, 1992, p. 321.

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alluded to the linkage between Charter awareness and claims-making activity.

Consumer advocacy groups have also been in the forefront of popularising the right of people to complain and to gain redress from private and public service providers. Organisations like the Consumer's Association and a bewildering variety of Advice Services have played a useful role in educating the public about their rights to seek redress. However, in recent years such organisations have also transformed claims-making from being an individual issue to a strategy for influencing the British political agenda. Many legal activists and consumer lobbyists now regard civil disputes as a means of reforming society. Often driven by the motives of 'social justice', lobbyists have helped contribute to a climate where litigation has become an instrument for changing specific policies. For example, the APIL web-site boasts that it uses 'the litigation process to expose unsafe practices' and it mounts campaigns designed to 'put pressure on government for change'.

Some legal advocacy groups look to the civil justice system as a potential instrument for political reform. According to Roger Smith, director of the Legal Action Group (LAG), the provision of public access to justice provides an alternative route to winning political influence. He claims that the decline of local government and of trade unionism has 'encouraged the resolution of more disputes within the legal and justice structure'. Calling for a widening role for litigation, Smith advocates a more activist legal system:

Culturally, we have tended to decry litigation and have sneered at our characterisation of what we saw as writ-happy North Americans. However, high litigation rates may well be a sign of an active citizenry, prepared to be vigilant as to their rights. Indeed, as economic and political forces reduce the scope for democratic decision-taking, we should expect rising levels of litigation. We should predict – and welcome – greater use of our civil justice system.<sup>17</sup>

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<sup>17</sup> R. Smith, *Justice: Redressing The Balance*, Legal Action Group, 1997, pp. 9 & 10.

## THE POLITICS OF CLAIMS-MAKING

The conviction that the extension of the power of the courts represents a positive alternative to promoting change through the political system underpins the outlook of litigation activists. Many of the leading personal injury lawyers believe that private grievances provide an effective vehicle for effecting legal and political change.

It is not only lawyers who have promoted litigation as a cure for society's perceived ills. Trade unions – who in the 1990s have found it difficult to promote their interests in the traditional language of trade unionism – now often look to the courts to settle disputes. Strategies centred on litigation have not only helped to improve the image of unions; it also provided a language through which their demands could be formulated. Whereas industrial action is often perceived in negative terms, taking a boss to court is far more likely to be accepted as a legitimate form of behaviour.

Finally it is worth noting that consumer lobbyist and legal activists no longer play the role of campaigning outsiders. They are regularly asked by government to provide representatives on new statutory bodies, advisory committees and commissions that deal with legal and consumer-related issues. Consequently, their involvement at the highest level of policy deliberation ensures that the scope for complaining and litigation continues to grow.

## CHAPTER EIGHT

# THE IMPACT ON BRITISH SOCIETY

THE SPEED WITH WHICH the culture of compensation has engulfed British society means that it is difficult to be precise about its impact on everyday life. A culture of compensation first emerged in the United States in the late 1950s and continued to steadily evolve until the late 1980s, when it evened out. In Britain, the new culture of compensation emerged around 1984 and came into its own in the 1990s. In this relatively short period of time, Britain has nearly closed the litigation gap with the United States. With the consolidation of the new legal culture in Britain, this trend is likely to intensify.

There can be little doubt that the resources devoted to paying out compensation, and to covering the costs of litigation, represent a serious burden on society. The Legal Aid system is already under heavy strain. In the financial year 1997/98, it made gross payments over £1.6 billion. It is worth noting that the percentage of legal aid expenditure devoted to personal injury litigation has been steadily expanding since 1981. It represented 19.4% or £323.2 million during last financial year.<sup>18</sup>

The total overall cost of litigation to society is difficult to estimate since there are no reliable figures on the amount that the private sector spends on compensation payments, legal fees, liability insurance and on employing personnel who deal with claims. However when one considers that in England and Wales, lawyers

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<sup>18</sup> Despite government attempts to cut the legal aid bill, no real savings have yet been achieved.

## THE IMPACT ON BRITISH SOCIETY

earn almost £1 billion in gross fees on personal injury cases and that the cost to the justice system is around £1.8 billion, the scale of this expenditure becomes evident. At the most conservative estimates, the public sector spends around £1.8 billion on compensation payments and the private sector around £1.2 billion.<sup>19</sup>

	<b>Lower estimate</b>	<b>Upper estimate</b>
Public sector payments on compensation/litigation:*	£1.8 bn	£3.1 bn
Private sector payments on compensation/litigation:†	£1.2 bn	£2.4 bn
Legal costs:‡	£0.3 bn	£0.7 bn
<b>TOTAL</b>	<b>£3.3 bn</b>	<b>£6.2 bn</b>

\* The lower public sector estimate includes expenditures by the NHS (£500 million); the emergency services (£110 million); and local authorities (£1,190 million). The higher public sector figure also includes costs incurred by the Home Office (£200 million); the costs of administering tribunals and courts (£700 million); and the cost of litigation insurance (£400 million).

† The lower private sector figure is based on the sums paid out in professional negligence suits and in compensation payments; the higher figure is an estimate derived from a sample of executives of legal fees and compensation claims.

‡ The lower figure for legal costs is based on legal aid payments for personal injury cases; the upper figure includes the costs of administering tribunals and the system of justice for such cases.

Spending on insurance also represents a significant cost to society. During the past ten years, liability insurance has accounted for between 11% and 13% of the overall insurance market. At Lloyd's in 1998, professional indemnity cover alone totalled £328 million.

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<sup>19</sup> Compensation and insurance fees paid out in work related accidents are omitted from the calculation. According to the Health and Safety Executive, accidents and work-related ill-health currently cost the British economy between £6 billion and £12 billion a year. A significant proportion of this figure is accounted for by compensation and insurance payments.

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Allowing for double counting, the culture of litigation costs society at least £3.3 billion and possibly as much as £6.8 billion. These totals do not include the costs of insurance premiums paid on liability insurance and the costs incurred in the private sector on litigation insurance.

Specific examples can illustrate how spending on litigation can damage the public's interest. The litigation bill for obstetrics was £264 million during the years 1995 to 1998. The cost of employing 250 consultants necessary for the efficient management of obstetrics in England and Wales costs only £15 million a year. The annual running cost of an inner city Accident and Emergency Unit is around £1.5 million. An in-patient hip operation costs between £3,000 and £4,000.

Considerable sums of money are also paid out in the form of compensation to victims of crime. During the financial year 1996/97, the Criminal Injuries Board paid out more than £1.9 billion in compensation. This figure represents an almost fourfold increase in the amount paid out by the criminal injuries board a decade previously.

Not surprisingly, the growth of a culture of compensation has been paralleled by the growth of the legal profession. The number of barristers has increased from 4,263 in 1978 to 9,698 in 1998. During this period, solicitors with practising certificates in England and Wales have increased from 33,864 to 75,072. The number of law graduates is also growing, from 4,834 in 1987 to 8,892 in 1997. The legal industry has become big business. In 1997/98 the total turnover in legal business in England and Wales was around £8 billion representing nearly 1.3% of the Gross Domestic Product of England and Wales.<sup>20</sup> Not surprisingly, growth in solicitors' total income consistently outstripped the growth in the total income of the economy.

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<sup>20</sup> In comparison, this sum is the equivalent of the total annual expenditure by business on computers.

## THE IMPACT ON BRITISH SOCIETY

The economic impact of litigation cannot be reduced to the language of figures. Public and private sector organisations have been forced to reorganise around litigation avoidance. Large organisations like Shell, the Post Office and W.H. Smith are employing stress counsellors, in order to protect themselves from stress-related litigation from their employees. Company officials have indicated that contesting claims often force them to use the valuable time of their best people; those who would otherwise be in the forefront of the management of their organisation. Even small general medical practices are devoting time and energy to 'cover their backs' by doing more paper work and by maintaining new complaints procedures.

Those who claim that litigation forces organisations to become more effective and more responsive to consumer interests often overlook the negative consequences of the litigation avoidance strategies adopted by management. The demands of organisational responsibility have little to do with the strategy of litigation avoidance. Litigation avoidance can lead to a defensive posture, where both the efficiency of the organisation and the interests of society become subject to irrational constraints.

The problem of defensive medicine is now widely recognised and has been much discussed. There is now disturbing evidence that the culture of compensation helps to create a climate whereby doctors have become concerned not only with clinical outcomes but also with the threat of potential litigation. This may affect their prescribing practice; alternatively it may cause them to employ or avoid certain procedures as part of a litigation avoidance strategy. Surveys have indicated that doctors are increasingly using practices which they consider to be unnecessary but which protect them from the threat of a suit.<sup>21</sup>

Defensive corporate and public sector activity is no less important. When a local authority closes down a playing area

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<sup>21</sup> See E. Annandale, 'Professional Defences: Medical Students' Perceptions of Malpractice', *International Journal of Health Services*, vol. 26, no. 4, pp. 764-65.

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because it fears that an accident to a child may lead to litigation, it acts no less defensively than a doctor who, with an eye to a potential law suit, avoids a medical procedure which he or she believes is in the best interest of the patient.

The threat of litigation, and the publicity associated with it, is a deterrent to product innovation and experimentation. Although Hoechst Marion Roussel has successfully seen off a multi-party action that claimed that one of its contraceptive devices, Norplant, was unsafe, media publicity of the case helped to destroy public confidence in the product. Other pharmaceutical companies have also been scared off by concerns over negative publicity and are holding back from the market much needed contraceptive technology. Sadly, the social and economic interests of society have become distorted by the demands of litigation avoidance.

The distortions forced on organisational life by the threat of litigation can actually undermine good practice. In the university sector, academics have been told not to charge students with plagiarising their work on the ground that the institution might be sued. In some cases, administrators would prefer university teachers pretended that cheating did not exist rather than face a potential legal wrangle.

Litigation avoidance can lead to an absurd waste of resources. The threat of litigation has forced manufacturers to go into extraordinary detail about the potential hazards and side-effects of their products. Anyone reading the numerous warnings contained in product information leaflets can be excused for becoming anxious about using the product. Companies feel that they must cover their backs even if they overstate the risks facing the consumer. Paradoxically, such leaflets will do little to reassure the consumer. To warn of everything is to degrade the meaning of a warning. Warning has become an empty ritual, when the advertisement for every financial product concludes with the phrase 'your investment can go down as well as up'. Financial companies can claim that they have responded to the demands of

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a litigious climate but it is unlikely that this warning has spared any individual from financial loss.

The consequences of the culture of compensation go beyond its impact on large organisations. They have a direct influence on everyday life. Local councils face hundreds of cases involving accidents caused to children in playgrounds and other recreational areas. This is why gradually British parks have become denuded of big, fast moving roundabouts and heavy rocking horses. Fixed goal posts have been removed from school playgrounds. Witches Hats and the plank swing have been banished. Newly-installed roundabouts are smaller and slower than previously and the swings are shorter. Some local councils are so worried that they might be sued by parents of children injured ‘conkering’, that they have implemented a policy of ‘tree management’ to make horse-chestnut trees less accessible to children. Diminishing the childhood experience of playing is one adverse outcome of the institutionalisation of litigation avoidance.

It is not just parks that are affected. Sports organisations, Boy Scouts, Girl Guides and outdoor schemes in general must subject their activities to the dictates of litigation avoidance. Children’s accidents that were formerly understood to be an inevitable part of growing up are now seen through the prism of litigation. The restriction on children’s outdoor activity has predictable consequences for their development. Numerous reports on children’s health have warned about the negative consequences of their sedentary lives. Legal activists who proclaim the virtues of litigation seldom pause to reflect on the impact of the culture of compensation on the experience of childhood.

## CHAPTER NINE

### THE PROBLEM OF TRUST

GENERAL EXPERIENCE SUGGESTS that the rise of litigation is an expression of a decline in trust and that this, in turn, breeds suspicion between people, and between individuals and institutions. Trust in authority and the extension of law exist in an inverse relationship. Although individuals have complex motives for complaining, it is the atmosphere of mistrust that leads to the search for legal solutions. People who litigate are demonstrating their mistrust of their doctor, teacher, referee or nursery worker.

The trends towards legal activism and towards the culture of compensation reflect fundamental changes in the relationship between the individual and society. More specifically, the tendency towards individualisation has led to a situation where private grievances are less mediated through legitimate institutions – such as the Church or respected local figures – than in the past. One of the most striking developments in British society has been the decline of institutions whose authority remains unquestioned.

The lack of trust in the professions has been widely commented on. The erosion in professional authority has opened the way for claim making. Even fundamental institutions, such as the church and the education system, face a barrage of complaints and law suits. This weakening of authority has encouraged the demand for legal intervention. Ambiguities about authority coexist with uncertainties about family life and interpersonal relationships. Lack of clarity about personal conduct has encouraged the tendency to formalise personal relationships. British institutions –

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business, education, the public sector, the church, and the military – are busy producing codes of conducts and establishing complaints procedures.

Ironically, the very attempt to formalise human relations and to codify appropriate forms of behaviour actually feeds mistrust. It disposes people to regard each other and those in ‘authority’ with suspicion, and leads to the anticipation of negative outcomes. When people do not believe that others could take their interests to heart, making claims can become a sensible substitute for dialogue. There are people who now keep written records of grievances or the discomfort caused by their neighbours, in preparation for some possible future claim in court.

The corollary of the formalisation of personal relations is the growing sense of personal injury. Lack of clarity about what is ‘appropriate’ behaviour helps to stimulate misunderstanding and conflict. People are no longer just slighted or badly treated. In an era where personal conduct has been formalised the aggrieved person becomes injured, offended, victimised, traumatised, damaged and abused. Each of these states of mind constitutes a potential entitlement for compensation. A profound sense of injury is characteristic of people who live in the shadow of the rule book.<sup>22</sup>

It used to be the case that people went to court as a last resort to sue those whose word they could not trust. It was the impossibility of working out a mutually satisfactory solution that invited third part intervention. The fact that today litigation has become more routine suggests that there are very few people who we are prepared to trust. Even relatives and close family members can now become a target of a law suit. People, who believe that their health was damaged in childhood by passive smoking, have begun to take legal advice about suing their parents. In October 1997, Patrick MacDonald, a law student sued his mother for £400 a month living costs. A few days later it was reported that two

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<sup>22</sup> These points are further developed in F. Furedi, *Culture of Fear: Risk Taking and the Morality of Low Expectations*, 1997, Cassell.

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other students had won legal aid to sue their parents for financial support. At the time, a spokesman for the Catholic Church in Scotland expressed dismay at these cases and stated that children taking their parents to court was 'materialism gone stark raving mad'. However, cases such as this do not represent the rise of materialism so much as the growing acceptance of legal intervention in the conduct of human relations.

The extension of law into new areas of everyday life reinforces the erosion of trust relations. It sharpens every dispute and difference, whether between neighbours or between a doctor and patient. It also continually invites new disputes and conflicts. A conflict over who has the best claim for compensation often leads to sordid disputes between different claim-makers. Wrangles over the distribution of money after the tragedy at the Dunblane shootings illustrates the degrading consequences of compensation culture.

In November 1996, a dispute broke out between the Dunblane Snowdrop Petition campaigners, a community group established following the tragic massacre of several young school children and one of their teachers, and members of the emergency services about who would get how much. Ann Pearston, head of the campaign, stated that she was worried about police personnel suing over trauma. As she stated:

I am concerned that the dividing line between compensation sought by emergency services and that awarded to members of the community may cause resentment.

Disputes over the distribution of donations erupted again in May 1998, when parents of injured children accused the trustees of the multi-million pound fund of spending money on memorial projects at the expense of the needs of the surviving pupils. These disputes continue to this day. In February 1999, several parents attacked the trustees for giving more money to people with stress than to their children who were still suffering physically. They also insisted that less money should have been spent on memorial projects and more on children. That the sense of community built

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around this terrible tragedy could so easily give way to conflict about the distribution of money illustrates the corrosive impact of compensation culture.

The experience of Dunblane is by no means unique. In the aftermath of the Hillsborough tragedy, when 96 victims were crushed to death, members of bereaved families expressed bitter words against the police and other emergency personnel who were claiming compensation for the trauma they suffered during the course of carrying out their duties. The relative of one victim, who was in the middle of fighting for compensation was bitter when she heard that several police officers were successful with their claim. Mrs Anne Williams was reported as stating that she was 'disgusted'. 'My son died because they lost control, yet now they are getting compensation', she added.

The claim by legal activists, that litigation empowers individuals, is directly refuted by the British experience. In a climate of mistrust, a culture of compensation reinforces the tendency towards suspicion and conflict. By continually inviting third-party intervention, rights-claiming individuals become dependent on their professional advisers. Individuals become less, and not better, able to sort out their problems. Insofar as there is any empowerment, it is the giver of professional advice, the mediator and the lawyer who reap the benefits.

## CHAPTER TEN

# BLAME AND RESPONSIBILITY

THE MOST NEGATIVE CONSEQUENCE of compensation culture is not the amount of money paid out on frivolous cases. It is the extension of formalised liability into areas that were hitherto considered to be the domain of personal responsibility. This extension of liability has led to the construction of a bewildering variety of new injuries, which in turn have served to alter the traditional relationship between individual action and responsibility. It contributes towards relieving the burden of responsibility from the individual by reinterpreting misfortune as by definition the responsibility of others.

Advocacy groups, consumers' organisations and legal activists are in the forefront of promoting the idea that there is no such thing as an accident for which you automatically bear responsibility. A leaflet published by Accident Line, an organisation launched to raise public awareness by the Law Society, directly encourages people to look for someone to blame for their predicament:

### **IT WAS JUST AN ACCIDENT...OR WAS IT?**

Even if you believe that your injury was just an accident, and that no-one was to blame, it's still worth talking to a specialist solicitor. Many people who believed at first that their accident could not be blamed on anyone but themselves have gone on to make a successful claim.

The leaflet assures the reader that 'sometimes you don't even realise that someone or something else is to blame'. Educating people to discover that what they thought was their fault can

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actually be blamed on someone else seems to be the central mission of the new complaints industry. Encouraging blaming and complaining is increasingly presented as a service to the public. And the litigant is frequently depicted as an active citizen standing up for his or her rights.

Blaming involves externalising problems to sources outside the self. Today, even one's state of mind can be causally linked to actions precipitated by an external source. It merely requires that one's mental state is defined as a psychiatric illness and that this condition be attributed to another party's negligence. Since the meaning of psychiatric injury is continually expanded to incorporate a growing variety of unpleasant emotional experiences, the foundation for claims-making continues to grow.

Hitherto, unexceptional human reactions, like the pain and trauma experienced by parents when the child they love dies can now be recast as a psychiatric illness for which a 'negligent' hospital can be held responsible.<sup>23</sup> No doubt, hospitals and other large institutions can be insensitive in their handling of the bereaved. But to hold them responsible for the 'abnormal grief reaction' of the bereaved is to lose sight of the complex influences that shapes the reaction of the self. And if even the intense pain we feel over the loss of a child is the consequence of someone else's negligence, are there any feelings left for which we bear a measure of existential responsibility?

The causes of a particular mental condition are complex and can rarely be reduced to a single event.<sup>24</sup> Unfortunately, blame-seeking is intolerant of complexity and believes that one's state of mind can be directly attributed to an external agent's negligence. It is also

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<sup>23</sup> A recent report by the Law Commission takes a very different view on this matter. It described a court decision, which dismissed the claim for damages for 'abnormal grief reaction' as 'harsh' and 'arbitrary'. See Law Commission, 1998, *op. cit.*, p.35.

<sup>24</sup> See a useful exploration of this subject in M. Hotopf, and S. Wessely, 'Stress in the Workplace: Unfinished Business', *Journal of Psychosomatic Research*, 1997, vol. 43, no. 1, p. 2.

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increasingly acceptable to blame one's state of mind on the negligent act of others 10, 15, 20 years ago. While the development of a compensation culture is a recent phenomenon, it has encouraged many people to revisit past grievances and make them the subject of new claims. It has become fashionable for British adults to sue their schools, foster homes and other institutions for the trauma they suffered during childhood. Schools are being sued by former pupils who claim that they were bullied as far back as 15 years ago. Some former students who have done poorly in their exams are claiming that their school has let them down and that they are therefore entitled to compensation.

It is not just lazy students who have jumped on this bandwagon. Soldiers, policemen and policewomen and other emergency workers are now demanding compensation for incidents that were previously considered a normal part of their duties. An ex-soldier, who saw a friend killed by an IRA land mine 15 years ago, has sued the Ministry of Defence. He claims to be suffering from post-traumatic disorder and holds the Army responsible for his failure to hold down a job and the break-up of his long-term relationship. It appears that failure in life has become a reason for compensation.

The tendency to blame others for one's predicament represents a profoundly disturbing statement about the way society regards the potential that human beings have for controlling their lives. It assumes that most of the time people are passive, pathetic creatures unable to make real choices and who therefore should not be expected to be responsible for their actions. From this perspective, suffering and injury are most likely to be presented as the fault of others. The culture of compensation encourages people to inflate these injuries and to present every traumatic experience as a 'life sentence'. It appears that people are so influenced by the negligent actions of others that they become 'scarred for life' and can rarely recover from their traumatic experience. Such a debased conception of the human potential informs the proceedings in the culture of

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compensation. Once the question, ‘how can I be expected to bear responsibility for what has happened to me?’ becomes a natural response, then very little remains of any notion of the self-determining individual.

This institutionalisation of irresponsibility was well illustrated by a High Court judgement in September 1995 which held Lloyds Bank liable for the failure of two of their customers to repay their loan. Julia Verity and Richard Spindler sued Lloyds for £500,000 after being lent £150,000 in 1988 to buy a house that they intended to renovate and sell at a profit shortly before the collapse of the market. Instead of making a profit, the couple fell into debt. The judge ruled that Lloyds did not exercise reasonable care in advising the plaintiffs and that therefore they were responsible for the couple’s predicament and ordered to pay £77,000 compensation. From the perspective of this ruling, individuals are not expected to be able to act according to their interests and negotiate a commercial transaction. Extending the liability of a bank for a customer’s speculative activity may seem like a blow against an unpopular financial institution. However, it also affirms the notion that ordinary people cannot think for themselves and act in their own best interest.

There is nothing objectionable about complaining or blaming as such. In British society there are many issues and problems to complain about and all too many targets of worthwhile blame. Blaming only becomes a problem when the self becomes denuded of any sense of responsibility for one’s predicament. We all live in circumstances over which we can exercise little control. But if we renounce the possibility of having some choice over the direction of our life then we diminish the meaning of our humanity.

The advocates of compensation culture always present complaining and blaming as the defiant acts of the active citizen. No doubt, in certain circumstances pointing the finger represents an act of bravery. But too often today, blaming offers a popularly sanctioned excuse from tackling the consequences for one’s action.

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Human beings do not need professionals to encourage them to blame. Experience has shown that most of us are all too ready to hold others responsible for the consequences of our action. Sadly, this very human instinct is now promoted as prime virtue. Therapists continually seek to assure their patients with the words 'don't blame yourself'. The same tune is played by a bewildering variety of professionals who believe that salvation lies in transcending any notion of individual responsibility. In a society where complaining and blaming has been transformed into a culturally acceptable mode of behaviour, it invariably represents passivity and dependence rather than the defiant act of an active citizen. And sadly, for many of us complaining has proved to be an irresistible alternative for sorting things out for ourselves.

## CHAPTER ELEVEN

# RECOMMENDATIONS

THE CULTURE OF COMPENSATION'S greatest accomplice has been a lack of public understanding. The lack of information in the public domain has impeded any sort of proper debate about whether we are prepared to bear the costs of this development, and our willingness to place more and more facets of our lives into the straitjacket of legal relations. The public needs to be properly informed.

The problem has its roots in many factors – cultural, political, judicial, legal – and is therefore not amenable to simple solutions. In many cases, compensation remains entirely proper and necessary: corporate negligence and irresponsibility is best punished through the courts. However, if it is accepted that the culture of compensation has gone too far, it is necessary to take action which will, at the very least, inhibit its further growth. The following proposals are not intended to be a comprehensive solution to the problem – but they may serve as a starting-point.

### **Transparency in the public sector**

The problem is perhaps particularly pressing in the public sector, since the billions of pounds now spent on litigation come out of the taxpayer's pocket and effectively reduce the resources available for the public services. Little or no information relating to the amounts being spent, and the responsibility of those bodies whose (negligent) actions cause that expenditure, ever reaches the public domain.

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Transparency will help to identify the scale of the problem. The Audit Commission should therefore compile and publish league tables which state, for every public sector organisation:

- the number of claims made against that organisation;
- the number of claims settled out of court and the amounts paid in compensation;
- the number of claims resolved in court and the compensation paid;
- the legal costs incurred in settling compensation claims.

These figures should be easily obtainable and would be an invaluable contribution to our understanding of the problem. *Could the publication of this data encourage a more responsible attitude on the part of both the litigant and the public sector?*

### **Psychological injury**

Psychological harm – one of the areas of greatest litigation growth – needs re-examination. Although the courts have tried to curb attempts to expand definitions of psychiatric injury, there is considerable social pressure to compensate claims for new forms of alleged psychiatric harm. There has also been an exponential growth in the number of professional medical expert witnesses who support such claims. The phenomenon of the full time expert witness, who is no longer involved in practising medicine, and who is nevertheless seen to provide authoritative statements on claims which are medically disputed, raises important questions. *Should Parliament pronounce on the issue and confine the definition of psychological injury to medically recognised damage to the nervous system? And should we seek to curb the practice of using professional expert witnesses and rely instead on medical consensus arrived at through the process of peer review?*

### **The role of the courts**

Much of the burden for righting these wrongs must lie with the courts. People in general, and perhaps especially businesses taking

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commercial risks, need to know the extent of their responsibility and liability.

The plight of many victims of harm leads to a natural predisposition towards them, but the wider social costs should also be considered. A change of judicial attitudes cannot, of course, realistically be achieved by edict, particularly in an area dominated by common law rather than statute, and where change has occurred by virtue of ever more generous interpretation rather than major shifts in the law itself. *Could guidance from the Lord Chancellor or the Lord Chief Justice that judges should explicitly consider the social impact when making awards reverse the trend?*

### **Setting a ‘cap’ on compensation claims**

In employment law, the upper limit that a plaintiff can claim for unfair dismissal has been set by Act of Parliament. *Should Parliament define the upper limits for all other categories of compensation claims?*

### **Contributory negligence**

One way of spiking unmeritorious claims would be closely to examine the issue of contributory negligence. This legal device permits a finding that the plaintiff has been 10%, 20%, or 30% to blame for the harm caused, and the award is reduced accordingly. As well as contributing to the culture of compensation, it has led to a diminution of the allocation of responsibility for faults. The absurdity of attempting to place a precise figure on relative culpability, the nonsense of trying to turn a subjective judgement into a supposedly definitive quantification of responsibility, must call into question the logic of this device. *Should a plaintiff who is largely responsible for his own loss be allowed to claim at all? Should the issue of responsibility for harm be seen in black and white?*

### **Corporate responsibility**

Companies are often seen as easy targets for aggressive litigators and lawyers. All too often they find themselves faced with speculative actions which – because of their sensitivity to the threat

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of poor publicity – they are under pressure to settle. While irresponsible and wrongdoing companies need to be held to account for their actions, spurious claims must be discouraged. *Can any legal mechanisms be introduced which will deter litigants from taking unfair advantage of the system?*

### **Insurance**

Historically, tort law has served as a means of allocating responsibility for damages and as an instrument for compensating the harms suffered by the injured.<sup>25</sup> But as an instrument of compensation, tort law is both arbitrary and inefficient. A public debate is needed to consider what is the best way of compensating those who have been genuinely injured. Recently Cherie Blair provoked controversy when in her capacity as a QC, she argued that there are:

...good policy arguments why injuries which arise out of the failure of social welfare rights, such as the right to education, are not satisfactorily resolved by the award of damages many years later in a court of law, especially when those damages simply deplete an already over-stretched education budget.<sup>26</sup>

Separating the question of compensation in the public sector from tort law would seem to deal with the dilemma posed by Cherie Blair. Consideration could be given to a scheme of no-fault liability that transfers the function of compensation to a system of insurance run either by the state or by the private sector. Since the rise in medical litigation, the British Medical Association and the Action for Victims of Medical Accidents group have argued for a no-fault approach.

However, care must be taken when considering such a move. The dangers of encouraging irresponsibility when insurers will cover all costs must be a primary worry, as must the possibility

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<sup>25</sup> For a discussion of these principles, see P. Cane, *The Anatomy of Tort Law*, Hart Publishing, 1997.

<sup>26</sup> Cited in *Daily Telegraph*, 28 January 1999.

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that it could turn out to be more expensive than the existing system of fault-based liability. Moreover, such a system may not be as simple as it might seem: while the issue of fault would be taken out of the equation, difficult problems of causation would still have to be dealt with. *Is an arguably fairer system worth these risks, or would it create more problems than it would solve?*

### **The other side of the coin: the social factors**

To some extent, the culture of compensation is a symptom of even wider social trends: the widespread loss of religious faith, the erosion of a sense of community, the apparent decline in respect for authority, the shift in relations of trust have been mirrored by the growth of “me against the world” attitudes. These cannot be the subject of legislation. Easy answers are not to be found in an area where social factors play a huge role. Changes to the law cannot reverse a trend which is now running deeply through British society. *But can a wider public debate lead, imperceptibly, to the change in attitudes which is necessary if the culture of compensation is not to undermine many of our traditional freedoms?*

## APPENDIX A

# THE TORT SYSTEM AND ITS RELATION TO COMPENSATION

CLAIMS UNDER THE TORT SYSTEM are non-contractual claims of a civil nature that arise from the duties and obligations placed upon us by society. In tort, we all owe each other a duty of care depending upon the principles of proximity and foreseeability. That is, each of us owes a duty of care to those with whom we have a proximate legal relationship – such as that between a doctor and his or her patient – and where it is reasonably foreseeable that a person could be harmed by our negligent action.

These legal definitions are empty vessels into which a different social meaning is poured in different periods. So, for example, in 1925, a manufacturer did not owe a duty of care to the end-point consumer of his goods, whereas in 1999 manufacturers are under such a duty as a result of *Donoghue v. Stephenson* (1932) and by reference to modern consumer protection legislation.

The focus of our study has been claims under the tort system, with a particular focus on the tort of negligence.

The tort of negligence has been, in the past, a system of accident compensation based on fault liability. However, fault liability has little meaning when virtually everyone can be found at fault. Doctors were found negligent in the High Court in February 1999, for failing to diagnose smear test abnormalities in three women, despite the judge's acceptance that there was only a 50-50 chance of detecting such abnormalities. Referees in sports matches have been found negligent for failing to stop a game despite widespread acknowledgement that it is impossible to predict a moment when a serious injury may occur. It appears that the legal system seems

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unable to resist social developments that lead to an extension of fault liability to a growing number of experiences.

Negligence used to embody a doctrine of personal responsibility on the parts of both defendant and plaintiff. In recent years, however, we have witnessed the incredible expansion of the ambit of personal responsibility for the defendant, and its concomitant decline for the plaintiff, as issues of responsibility and blame have become more plaintiff-friendly.

The compensation culture that we are investigating is not restricted to claims under the tort of negligence. Through exploring the extension of fault, we have observed that compensation culture extends to growth in quasi-legal claims, growth of arbitration and administrative tribunals as against court hearings, and increasing off-the-record activity. In all of these areas, which have been termed the 'Shadow Legal World', the extension of fault liability meets with fewer challenges than it does in the courts, and it is therefore here that we see the strengthening roots of a litigation crisis.

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