

A COMPENSATION CULTURE?

Talk to the David Hume Institute on 30 October 2003 by Tony Weir, Fellow of Trinity College, Cambridge

“Our Nation is overly litigious, the civil justice system is overcrowded, sluggish and excessively costly, and the costs of lawsuits, both direct and indirect, are inflicting serious and unnecessary injury on the national economy...”

A gloomy diagnosis, indeed. Fortunately it is not our Nation which is being diagnosed. It is the United States, and these are the words of the Preamble of a Congressional Bill vetoed by President Bill, who depended for his election funds on plaintiffs’ lawyers who, if successful, take 30 – 40% of the damages awarded by a ductile jury, subject, admittedly, to judicial control, now reinforced by the Supreme Court of the United States.

1. Our own society today is characterised by greed. This is clearly demonstrated by the amount of debt of the average household, incurred for obtaining things, and more often services, which they cannot afford. Of course the law is about meeting people’s expectations, but surely only reasonable expectations. A judge has recently had to say what consumers are “entitled to expect” by way of safety in products. He held that they were entitled to expect blood to be 100% pure though there was no known way of purifying it: they were entitled to expect it to be better than it could be. (*A v. National Blood Authority* [2001] 3 All ER 289). That is the attitude of most of our fellow-citizens towards life in general.

2. The greed is often productive of fraud. The best ways to get money to which you are not entitled just by asking for it are (a) to get social security payments or relief, (b) to claim on an insurance policy, and (c) to bring a tort suit. I leave aside the improper avoidance of payment of debts, such as taxes and rent.

3. The figures, which are admittedly soft, are staggering:

Social security fraud seems to cost £2 bn per annum, including ca. £800 million by way of housing benefit, some 7% of the total.

Insurers (first-party insurers in the main) say that from 10% to 35% of claims are fraudulent and cost £20m. per week. (One man claimed that his appendix had been removed on nine successive holidays).

Tort claims: figures are not available, since a claim is deemed honest once it has been met, and the judges are naively slow to castigate claimants for being fraudulent, though many of them obviously are. Quite apart from Jonathan Aitken and Lord Archer (if he is still that), one can consider *Vernon v. Boseley* [1997] 1 All ER 517 and 614. The claimant represented in his claim for damages for shock that his mental condition was still lamentable as a result (“it could not possibly have been feigned”, said the trial judge, Sedley J.) at the very time that he was representing in the family court that he was quite better. In the Court of Appeal Stuart Smith LJ said “It is the duty of every litigant not to mislead the court”. One would have thought this is glimpse into the obvious but Evans LJ doubted whether a party is under a duty not to mislead the court, and certainly under no duty of disclosure after the close of evidence. Another such case is *Prentice v. Hereward Housing Association* (Court of Appeal, 22 March 2001) where the report in the Cambridge Evening News of an award of £238,000 to the claimant caused his neighbours to make witness statements to the effect that the accident had by no means taken place as the claimant (“an obviously honest witness”, per the trial judge) testified, and the case was remanded for a new trial on the ground that there had probably been wilful deception of the judge. But most fraudulent claimants in tort cases surely laugh all the way to the bank.

4. The Responses of those defrauded.

Social Security: We now have the Social Security Fraud Act 2001; it has been criticised by human rights lawyers.

Insurers have responded by introducing lie-detecting methods (also criticised by human rights lawyers), and by taking technical defences even against honest claims.

The tort system's response is not so obvious. A defendant may get into difficulties if he films a claimant doing things he says he can't: see *Jones v. Warwick University* [2003] 1 Weekly LR 954.

5. The cost of tort liability. The figures regarding tort liability are very slippery. As to this the NHS Litigation Authority's reports will be of assistance. For the NHS in particular it seems that actual payouts (in 2002 terms) have risen from £6.3 m. in 1974-75 to £446 m. in 2001-02, the last year having seen a rise of £31m. The projected liability according to the National Audit Office increases from £4.4 bn in March 2001 to £5.25 bn. In March 2002. In part this results from judicial decisions regarding the level of damages. Employers' liability insurance premiums have recently gone up 20% for one third of firms (that pay), and 40% for one in ten.

6. Other evidence suggests that claims are on the decline.

The Compensation Recovery Unit reports that disease claims are off by 26%, employers liability by 16% between 2000 and 2002. Their 2001 report finds that compensation claims dropped by 7.4% in 2000.

In the county court claims dropped by 7%, and personal injury claims in the High Court (mainly over £50,000) numbered 827 in the past year. Diminution in the figures for trials are doubtless due to the Woolf reforms which are designed to reduce trials to the minimum.

As compared with other countries, we are told that while tort litigation costs 1.9% of GDP in the US and 1.3% in Germany, in the UK it is only 0.6%. I have little faith in these figures.

7 What is certain is that the range of situations where compensation is awarded has increased, even if we leave aside statutory inventions such as discrimination. Not only have claims been allowed increasingly for accidents in schools and on the sports field, but defences have been increasingly disallowed: the rules which barred claims by those who consented to the injury and those who were engaged in criminal activities have been greatly weakened: a claim in respect of a deliberate suicide was allowed in *Reeves v. Commissioner of Police* [1999] 3 All ER 897, as was a claim by a burglar shot, but not aimed at, by the old man he was trying, with colleagues, to burgle (*Revill v. Newbery* [1996] 1 All ER 291). The courts are dismissive of the suggestion that such decisions might or would outrage public sentiment, as they do. Every one of their Lordships so stated in a restitution case *Tinsley v. Milligan* [1993] 3 All ER 65, and in a case where a person threw himself out of a window to escape imminent lawful arrest sued the police for letting him do so Sedley LJ who would have allowed his claim decried the public conscience as "an elusive thing, [which] as often as not turns out to be an echo chamber inhabited by journalists and public moralists. To allow judicial policy to be dictated by it would be as inappropriate as to let judges dictate editorial policy." He comments adversely on the newspaper headline which accurately if tersely summed up a Law Commission Report: "Law Paves Way for Thugs to Sue Victims". [*Vellino v. Chief Constable* [2002] 3 All ER at 91]

As to claims, those for stress at work have escalated: the procedure is: apply for promotion, find you can't hack it, sue for stress, and get paid for the higher job you're now not doing, but someone else is being paid to do. The Court of Appeal has finally proved quite stalwart here. *Hatton v Sutherland* [2002] 2 All ER 1, confirmed in *Bonser* [2003] EWCA Civ 1296, and it is just as well: in 2001 6,428 companies paid out an average of £51,000 each and in 2000 a total of £320m. According to the Health and Safety Executive, reported instances of stress, depression and anxiety have doubled since 1990 and now number an annual 563,000, half as many as muscle and bone injuries, more than twice as many as breathing and hearing injuries combined.

In a recent case during the school sports day five-year old Ryan Simonds was told by his mother, with whom he had been picnicking, to go back to his teachers while she went shopping, but he went to a playground which was out of bounds and, pretending to be Superman, jumped off a swing and broke an arm. Judgment at first instance for £4,250 was reversed (what on earth was the money for – lost earnings, or just educational pain and

suffering?). His mother was outraged. She wasn't doing it for the money (of course not), just what any mother would do. And it was disgraceful of the school to spend so much defending the claim when they could have spent the money better on the school (that is, her brat). (The Times, 25 September 2003).

8. Let us suppose, without asserting, that there are too many claims. Who is to blame, or what are the causes?

a) The courts: *Parry v. Cleaver* [1969] 1 All ER 555 is indicative. A policeman injured on point duty was allowed to keep both the wages which the defendant had made him lose and also the disability pension which the defendant had enabled him to claim. Here the law of tort was actually enriching the claimant, not just compensating him. Some time later when another fireman, called Smoker, was allowed to cumulate a £10,000 pension and two years lost wages of £13K, Lord MacDermott said "It is easy to stigmatise such a result as unjust, unreasonable and contrary to public policy. But it is the legal result that follows from *Parry v. Cleaver*." True on both points.

It is also certain that the awards of compensation have increased, both for pain and suffering (*Heil v. Rankin* [2000] 3 All ER 138) and for future economic loss (*Wells v. Wells* [1998] 3 All ER 481). A recent decision of the House of Lords has made it unnecessary to show that the defendant's negligence actually contributed to the harm in issue: it is enough if it contributed to the risk of the harm. *Fairchild* –. But the worst scenario was that of the unwanted baby. For thirteen years, pursuant to a decision of the Court of Appeal in which the judges didn't even bother to take time to think about their decision, the medical services were paying for the upkeep of healthy children born to parents who had wanted safe sex, that is, sex without babies, and to whom the bouncing child was born because the doctors had fouled up the contraceptive operation or whatever. This at a time when the medical services didn't have enough money to cure sick children! The House of Lords put paid to that in *McFarlane* [1999] 4 All ER 961, a decision they were urged to reverse a few years later. Instead they decided that the parents should receive a lump sum cheque for £15,000 per unwanted baby, healthy or not (£30,000 for twins?) *Rees v. Darlington Memorial Hospital NHS Trust* [2003] UKHL 52, 16 October 2003. You only have to ask, and it will be given unto you.

The greatest expansion in liability recently is that of the social and educational services. To fail to diagnose dyslexia is now to cause a personal injury, and substandard teachers may be liable for not forwarding the careers of their charges. It started with the social services, when the House of Lords held that they could not be sued for failure to take into care a child they knew was being abused at home. Shortly thereafter the House held that the social services could indeed be liable once they had taken a child into care for not looking after him properly. Now the Court of Appeal has held that the former decision cannot stand after the enactment of the Human Rights Act and the way Strasbourg deals with the Convention. (*D v. East Berkshire NHS Trust* [2003] 4 All ER 796, 823)

The influence of Strasbourg is not negligible here. The court has made it plain (or as plain as it makes anything) that even if it is not (as they previously held) a breach of a person's right to a fair trial to hold on the basis of his pleadings that the defendant owed him no duty of care, nevertheless the state must provide a remedy for any breach of a person's Convention rights. The result has been sharply to reduce the number of cases where a claim is "struck out" before much evidence is led. They are to go to trial, the claim must have his day or week in court, even if it's futile, and the defendant's staff must leave their jobs and wait around to give evidence after spending much of their working time providing documentation of one kind or another. No wonder council taxes are going up relentlessly.

b) The Health and Safety Executive, which has been described as hyperactive despite underfunding, has recently issued a Stress Code, explicitly to make it easier for employees to sue their employer!

c) The Law Commission: I find it difficult to be polite about the contributions of the Law Commission to the law of liability, starting with the Animals Act 1971, a clause of which has been controverted for over thirty years until the House of Lords recently applied it so as to make the keeper of a tame animal liable for the harm it does by behaving normally under

abnormal circumstances (*Mirvahedy*). Their proposals almost always increase the range of liability, and in one remarkable report the quantum of recovery, threatening legislation if the courts did not comply with their suggestions (as the Court of Appeal nearly did in *Heil v. Rankin* [2000] 3 All ER 138, raising the largest awards by £200,000).

d) *Lawyers*: Let us take the *McLeod* case. (*McLeod v. United Kingdom* (24755/94) decision of 23 September 1998 of ECHR, from *McLeod v. Commissioner of Police* [1994] 4 All ER 553)

Ms McLeod had refused to obey a court order that she deliver up to her ex-husband property belonging to him, and was committed to jail, but given seven days to allow her to comply. In order to save her the trouble of delivering the property her ex-husband offered to collect it at a given time on a given date, and thought she had agreed.

When he went to the house with his solicitor and two policemen, Ms. M was not at home, and her aged mother knew nothing about it. They went in and removed the designated property. An hour and a half later Mrs M returned in a rage.

She first instituted criminal proceedings against all parties, in vain, and then separate civil suits. The claim against the police was dismissed, and on her appeal the decision was confirmed: they had behaved reasonably in view of the possibility of a breach of the peace. The civil parties were held liable for trespass and made to pay £1,950 plus VAT.

Not content with this, Ms M unsuccessfully sought leave to appeal to the House of Lords from the dismissal of her claim against the police, and then took a legal cavalcade up the Rhine to Strasbourg, where the court there situate held 7-2 that though the English law regarding breach of the peace was clear enough to meet their standards, the action of the police in entering was disproportionate, since there was really no risk of violence; furthermore, they had not verified that Mr. M had the right to enter the house for his property, not having seen the court order, only heard of it. The Court did at least stop short of awarding damages to this tenacious termagant, holding that the finding of violation was in itself just satisfaction.

I leave aside the question whether it is really the function of the Strasbourg court to serve as a court of appeal on questions of fact, as it seems to have done in this instance, and ask about the conduct of the lawyers. Human rights lawyers are often presented, not only by themselves, as the *preux chevaliers* of the 21st century, white horses, lances and all, but actually they very often are not disinterested. In the *Hatton* case where the Full Court overruled the first decision in Strasbourg that our government had to pay a fixed sum to each plaintive groundling unhappy at the noise of overflights from Heath Row, on the ground that they hadn't conducted their consultation process quite as the judges in that section thought right, the claimants sought, at first instance, £153K, which was reduced by the court to £70K, and on appeal claimed £178K, which was reduced to £50K. Possibly disproportionate claims for expenses?

But why was the wretched *McLeod* case taken to Strasbourg at all, except to claim expenses? Can anyone have thought seriously that an important issue was involved? Surely not. I quite accept that in principle litigants should be able to find lawyers to represent them, especially when political or socially sensitive issues are involved, but *il y a des limites* and *genug ist genug*. In my view, the lawyers owed it to the state and the their profession to tell Mrs M to get lost, and, if need be, to nurse her wrath to keep it warm, as Tam o'Shanter's wife was said to do.

e) The government's tergiversations as regards civil legal aid (which was not unduly expensive, since the Fund got its costs back if the claimant won) have resulted in a perplexing situation. The sole beneficiaries, so far as one can see, are the companies providing insurance for legal costs, for the cost of after-the-event insurance is met by the unsuccessful defendant. Whether the introduction of "no win, no fee" arrangements has increased the number of successful claims is uncertain; one would have expected, if solicitors know their job, that the number of claims would have diminished and that the proportion of those that were successful would have increased. But in this area it is just guesswork. Note that civil legal aid is generally forthcoming for human rights claims.

f) One thing certain, however, is the rise (and in some cases the fall) of claim management companies, intermediaries between claimants and lawyers, whose advertising is vulgar enough to be effective to the ductile public. They are quite simply a parasitical blight.

g) The Human Rights Act and the Strasbourg Court. This has already been mentioned. Increasing people's consciousness of their rights, including their supposed rights, is the royal road to increasing the number of claims, especially by people such as Ms McLeod, not injured but merely aggrieved.

h) The trade unions. In the early nineties the London Fire Authority set up a Special Projects Group to investigate claims for damages. Of the 432 claims investigated it found that only one was fully justified, and saved the public some £2.2m. The Firemen's Union insisted on the disbandment of the Group, and having done so, boasted that it had obtained over £5m. for its members, a rise of £1m. from the previous year.

9 The bad consequences of undue tort liability:

(a) "The pursuit of an unrestrained culture of blame and compensation has many evil consequences and one is certainly the interference with the liberty of the citizen." Lord Hobhouse in *Tomlinson v. Congleton BC* [2003] 3 All ER 1122, 1163. This decision is greatly to be welcomed, since it disapproves of overreaction by local authorities to the fear of liability: the Court of Appeal had held the authority liable for failing to prevent physical access to a popular recreational lake in which the claimant, ignoring prohibitory notices about swimming, managed, very oddly, to break his neck by plunging in the water. The beneficial fallout effect of this fine decision will predictably extend far beyond the area of occupiers' liability.

(b) Defensive medicine. Needless tests take time, and those who need them have to wait. Every technical advance provides claimants with an argument that it should have been used.

(c) Trials: Now that claims are less frequently "struck out", trials take people, especially policemen, social workers and other local government employees, away from their jobs to give evidence. This could be said to be the fault of our emphasis on oral testimony, but the preparation of documents takes time also, and documentation is beloved by bureaucrats and civilian lawyers.

(d) If liability insurers have to pay more, the premiums they charge must go up. Motor insurance premiums have risen considerably as a result of the courts' decisions raising the quantum of recovery and Parliament's decision to make the motorist pay for the treatment of his victims in the National Health Service. Decisions from Brussels have also contributed here, in particular by making it mandatory to insure against the risk of being held liable for property damage, and not just personal injury: this is dysfunctional, because (a) property damage in traffic accidents costs much more than personal injury, and (b) most of such damage is done to other cars which it should be for the owner to insure against collision, as he probably has. The cost of employers liability insurance has also risen steeply. Axa reports that 210K smallish firms have none, though it is legally required.

(e) Another unfortunate consequence is that possible defendants are inhibited from admitting that they were at fault, or even the facts of the case. In the same way civil servants are reluctant to answer questions for fear of liability (and all the attendant hassle).

10. The good consequences:

(a) The imposition of liability or the threat of it may serve as an incentive to safe conduct and proper care. The deterrent idea has not figured very much in tort litigation, indeed one is rather defensive; thus Lord Bingham once said: "I cannot accept, as a general proposition, that the imposition of a duty of care makes no contribution on the maintenance of high standards." [dissenting in *Bedfordshire in CA*]. And Evans LJ said that the "policy consideration, namely that imposing a duty of care might lead to defensive conduct on the part of the person concerned and might require him to spend time or resources on keeping full records or otherwise providing for self-justification, if called upon to do so, should normally be a factor of little, if any weight." Sometimes, indeed, liability is extended lest negligent persons "get away with it". This seems to have been one of the factors in the case where a negligent solicitor was held liable to disappointed legatees: in such cases, where the person with title to sue has

suffered no loss and those who have suffered the loss have no title to sue (the “black hole” syndrome), there is a tendency to impose liability one way or another lest the negligent defendant escape liability.

In the United States the deterrence argument is much more often heard, but there, perhaps, the law of tort has to make up for deficiencies in administrative methods of advancing safety.

(b) The imposition of liability may have played a role in the reduction in the number of accidents. According to the Health and Safety Executive, fatal accidents in industry are down 15%, fatal accidents to the public down 14%; and if major injuries to workers remain static, those to the public are down 31%. It is well known that the number of traffic accidents in Britain is the lowest in Europe, but this is hardly attributable to liability.

(c) A further good consequence is the transfer from private liability insurers to public funds. According to the Compensation Recovery Unit it last year obtained £75 m. for NHS alone.

(d) And of course there is more money for lawyers: over a third of the total bill for compensation goes in legal and administrative expenses.

11. What, if anything, should be done? Sir Liam Donaldson’s proposals regarding claims against the NHS in *Making Amends** include the following:

Doctors obliged to report mistakes

Teams of investigators to assess claims; patients right to legal proceedings lost on compensation

Lessons of errors to be learnt nationwide

Improved rehabilitation for victims of negligence

£30,000 maximum compensation in most cases

Regular payments to replace large lump sums

Trust boards to deal with complaints of negligence

Medication offered before legal proceedings

Special training for judges in negligence cases

Braindamaged children to get payment regardless of negligence

* At the very end of *A Midsummer Night’s Dream* it was Puck who said, “We will make amends ere long”.

12. It should be noted that it is not always desire for compensation which triggers litigation. Many claimants are aggrieved rather than injured. They may not even want vindication, just ventilation. Whether this is a proper function for a tort suit, and whether a court is the proper place, may be a question. The Strasbourg Court insists that there is often a right to a public inquiry where death or serious injury has occurred, especially where a public body is involved, and indeed has awarded damages to the parents of a person killed in prison where no proper inquiry was held. More widely, see *R v. Sec’y of State* [2003] UKHL 51.