

tort law

DIRECTIONS

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The tort system

Learning objectives

By the end of this chapter you should be able to:

- understand the function of tort as a form of compensation for loss;
- have an overview of the recent historical development of the tort system of compensation;
- place tort in the context of other forms of compensation; and
- analyse current debates concerning possible high levels of personal injury litigation.

2.1

The origins of tort as a system of compensation

You saw in Chapter 1 that the overall function of tort law is to address the consequences of loss. This is accomplished in two primary ways:

(1) *Compensation*: making good the loss which would otherwise have been suffered.

If A negligently damages B's car and it will cost £1,000 to repair, tort law may provide that instead of that cost falling upon B (who is innocent of any wrongdoing) that cost should be borne by A, due to his fault or responsibility for what has befallen B. This is *loss shifting*.

Because of compulsory third party insurance for drivers, it is very unlikely that A will be digging into his own pocket for the £1,000. Instead his motor insurers will be compensating B—using funds provided by the insurance premiums which A (and many others) have been paying for many years. The loss is not borne by any one person. This is *loss spreading*.

(2) *Deterrence*: preventing a loss in the first place by influencing behaviour.

If the *Daily Camera* fears that publishing a libellous article about a celebrity may result in extensive damages liability, lawyers will be consulted to screen articles for potentially *defamatory* material.

Another way in which deterrence may operate is through the remedy of the injunction. If neighbour A's building works are causing sleepless nights for neighbour B, an injunction obtained for the tort of *nuisance* may stipulate that no work should take place between the hours of 10pm and 6am.

Tort law has a third aim which is no less important than those above. In fact it may be said that *justice* is a fundamental aspect of tort's aims—that is, there is a recognition that a wrong has taken place, and that this must be acknowledged and righted. We will see that some torts are actionable without proof of damage. For instance, in the case of a neighbour dispute concerning B taking an unauthorized short-cut across A's garden, a successful action in *trespass to land* by A may firmly establish the wrongfulness of this conduct, despite the absence of any tangible damage. Characterized by bilateral rights and duties, this aspect of tort is known as *corrective justice*. Tort law was summarized by Lord Bingham in *Fairchild v Glenhaven Funeral Services* (2003) as defining 'cases in which the law may justly hold one party liable to compensate another'.

There are alternative means of accomplishing the above aims:

- compensation for loss of earnings for those injured in accidents may come from occupational sick pay schemes or state benefits;
- criminal penalties may be more successful in ensuring workplace safety than the law of employers' liability; and
- social responsibility or self-interest may effectively deter dangerous driving.

The focus of this chapter will be upon the compensation aim of tort law, particularly in the area of personal injury caused by accidents. We will consider whether this aim has been successfully accomplished: considering the recent history of the tort system, what is known about how it operates, and any changes or developments which may address any apparent drawbacks. It is also important to consider the relative merits of other forms of compensation.

Insurance

Contrary to appearances, the opponents in most tort cases are in reality insurers who are disputing which of them will subsidize the loss in question. Under a process known as subrogation insurers can take on the rights of the insured in order to pursue compensation. Insurance significantly supports the tort system and without it there would be little point in bringing the majority of tort claims. The prevalence of insurance as a factor in most tort claims is often cited as significantly undermining any deterrent value which tort law might have. This is certainly the view of PS Atiyah, perhaps the leading authority on law and policy regarding accident compensation **subrogation**.

subrogation

.....
 this process enables an insurer to sue a wrongdoer by taking on the rights of the insured party.

Insurance will generally be one of two types. Put simply, first party (or 'loss') insurance exists to compensate the insured party for damage or injury to himself or his property howsoever caused. Third party (or 'liability') insurance provides protection when the insured party is liable for injury done to the person or property of someone else. Liability insurance expanded in the late nineteenth and early twentieth century in parallel with the development of the tort of negligence. In 1930, legislation first required drivers to have third party insurance (see now the Road Traffic Act 1988). The Employers' Liability (Compulsory Insurance) Act 1969 imposes similar requirements upon employers regarding work-related accident and disease. It is not surprising, therefore, that the vast majority of tort claims concern road traffic accidents and injuries sustained at work. It is presumed that the existence of insurance means that the defendants in these situations are likely to have 'deep pockets'. Insurance is now widespread and it is likely that householders, schools, sports coaches, manufacturers, and professionals such as doctors will be similarly insured in respect of many situations in which tort claims could be made.

The litigation 'obstacle race'

The fact that the wrongdoer may have the means to compensate an injured party is only relevant if a successful tort claim is made. Studies done in the 1970s revealed that only 6% of personal injuries in the United Kingdom resulted in the award of tort damages and, of those cases, roughly 2% were the result of a court decision. All the other awards were the result of the process of negotiation and settlement, which will be discussed further later.

The process of obtaining compensation has been likened to a very challenging obstacle race, full of hurdles which may trip up the innocent competitor, ensuring that he never reaches the finishing line.

Donald Harris in the Oxford Survey (an extensive survey of accident victims in the 1970s and published in 1984) described tort litigation this way:

... a compulsory long-distance obstacle race. The victims, without their consent, are placed at the starting line, and told that if they complete the whole course, the umpire at the finishing line will compel the race-promoters to give them a prize; the amount of the prize, however, must remain uncertain until the last moment because the umpire has the discretion to fix it individually for each finisher. None of the runners is told the distance he must cover to complete the course; nor the time it is likely to take.



thinking point

Why might medical negligence claims have been exempted from the conditional fee agreement system and retained within the scheme of state-provided legal services?

Some of the obstacles in the race are fixed hurdles (rules of law), while others can, without warning, be thrown in the path of a runner by the race-promoters, who obviously have every incentive to restrict the number of runners who can complete the course... In view of all the uncertainties, and particularly the difficulties which could be presented by the unknown, future obstacles, many runners drop out of the race at each obstacle... and most runners accept an offer and retire. The few hardy ones who actually finish may still be disappointed with the prize money.

A significant number of those who are injured do not even embark upon this race. Many accidents are not due to the fault of a third party, and therefore a tort claim would not be successful. The Oxford Survey revealed a number of reasons why those who could bring tort claims did not pursue them. A key one was ignorance that making a claim was even a possibility. This could be compounded by difficulties in obtaining legal advice, including the lack of the means to do so. Awareness of any or all of these obstacles would be discouraging to some victims. There may be a reluctance to bring a legal action against an employer or neighbour or a psychological need to move on following an accident. Injuries may be relatively insignificant or the victim may feel that alternative compensation provision is preferable or adequate.

What are the obstacles and hurdles encountered by those who choose to enter the race?

- **Legal rules** The victim may be unable to establish one of the key elements of the relevant tort. We will see that a successful action in negligence is dependent on the claimant being able to establish three things: that the defendant had owed him a duty of care; that he had, in fact, been careless; and that this carelessness had caused the claimant's injury or loss. Satisfying only two out of three of these elements will not be enough. In some cases, victims will come up against statutory restrictions and limitation periods that will make a legal claim impossible.
- **Access to legal services** A sound legal case is not enough. The victim must have the financial means to pursue the case, which will usually involve obtaining legal advice. Some claimants may have legal expenses insurance and, despite falling availability, a small minority of claimants may go first to a local law centre or charity or be entitled to legal advice as a union member. Consulting a solicitor became more difficult for many with the Access to Justice Act 1999, when state-funded legal aid in personal injuries cases was abolished in all but clinical negligence cases. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) came into force in April 2013 and further reduced the availability of civil legal aid, making inroads into legal aid for some clinical negligence cases. These comprise only 1% of personal injury claims and often carry the greatest potential for high damages awards but are amongst the hardest for claimants to win.

The ongoing reductions in legal aid have been, to some small extent, countered by conditional fee agreements (CFAs), sometimes referred to as 'no win no fee', which were gradually introduced during the 1990s. A solicitor who decides to take on a case may agree to require no fee or a reduced fee if the case is lost, but if the case is successful, his fee will be owed, plus an agreed 'success fee'. This is paid by the winner of the case and is calculated according to the amount of financial risk which was involved for the solicitor in taking on the case. Under LASPO the success fee can be up to 100% of the basic fee, but in personal injuries cases it can amount to no more than 25% of the damages awarded, excluding damages for future care and loss. The loser may still have to pay the other side's costs and so will usually take out insurance to cover the possibility of loss. CFAs are now used, not only for personal injury, but a wide range of civil litigation.

cross reference

the Campbell case is discussed in Chapter 17.

It is questionable whether CFAs have improved overall access to justice, particularly for those whose claims do not have at least a 70% chance of winning. There are concerns that the CFA system has contributed significantly to the extensive legal costs currently being borne by the National Health Service (NHS). In 2010–11 the NHS Litigation Authority (NHSLA) paid £863 million in connection with clinical negligence claims, an increase of almost 60% from 2005–06. Legal fees paid to claimants' lawyers were significantly increased due to 'success fees' owed under CFAs. These totalled almost half the amount paid out in damages. In January 2010 Lord Jackson published his extensive Review of Civil Justice Litigation Costs in which he made a number of recommendations for reducing legal costs. The European Court of Human Rights (ECHR) in *MGN v UK* (2011) considered the CFA system in relation to the leading privacy case brought by Naomi Campbell in 2004. It concluded that the 'success fee' owed by the losing defendant newspaper in respect of Miss Campbell's legal costs was disproportionate and in breach of the Article 10 right to freedom of expression and thus unenforceable. The ECHR strongly criticized the UK's CFA regime and recommended its revision, albeit in somewhat non-specific terms. One of Lord Jackson's recommendations which was implemented in LASPO was that lawyers' 'success fees' are no longer to be paid by the losing side.

- *Delay* The 'race' may prove to be a long one. Research published in *Access to Justice* revealed that in the early 1990s medical negligence cases took an average of 5½ years from first consultation to resolution and in personal injury generally the time was 4½ years. Some of this time will have been spent in gathering necessary evidence and other forms of preparation of the case. At the same time, however, it must be remembered that insurance companies as defendants have been referred to as 'repeat players'. This means that they are experienced in litigation and in some cases know that prolonging the process may cause some claimants to drop their case or to settle for considerably less than they would recover in court.
- In 1998, new Civil Procedure Rules (CPR) were introduced in order to address these delays, as well as to make the civil justice system more user-friendly. Pre-action protocols now ensure greater openness between parties as well as encouraging out-of-court settlements. The courts are required to take a more proactive approach to litigation. Judges now take a leading role in managing the conduct of a case and have the power to impose sanctions on parties who unreasonably cause delay. It is not possible to say conclusively whether the problem of delay has improved under the CPR. It is apparent that litigation is now more likely to be regarded as a last resort; however, when litigation does take place, it is possible that delays and costs have just been transferred from the point targeted by the CPR to other stages in the process.
- *Uncertainty* Research shows that of the small number of those who begin a tort claim, the majority will receive at least some payment but they may receive considerably less than they had hoped. Part of the reason for this is the process of out-of-court settlement. This involves ongoing negotiation between solicitors, with those for the defendant making an offer to resolve the claim, which may be accepted, rejected, or result in a counter-offer by the claimant. As we have seen, the experienced 'repeat player' will often be at an advantage in this procedure. It is risky because the claimant may settle for less than he would have received at trial—on the other hand, he might have lost totally. Similarly, the defendant may pay more than he would have had to, but could also have won his case in court. The settlement process is also risky because it is underpinned by costs sanctions: he who unreasonably refuses a sum offered in settlement, and is then awarded less than that sum at trial, may be penalized at the costs stage. Settlement has increased under the new

pre-action protocols because the parties are better informed about each other's position and are therefore more willing to come to an agreement on the known position rather than await adjudication.

- The obstacle of *uncertainty* must be added to those of the *legal rules*, *cost* and *delay* to provide ample deterrence to all but the most committed litigants!

2.4

No-fault liability

In 1961 it was discovered that the drug Thalidomide could cause severe birth defects in unborn children when it was taken by pregnant women. Eight thousand children worldwide were affected by it, some 450 of whom lived in Great Britain. The difficulties they had in pursuing legal remedies, in part because of the stringent requirements for proving negligence but also because of the cumbersome nature of tort litigation, gained a wide measure of public awareness. In 1973 the Royal Commission on Civil Liability and Compensation for Personal Injury, chaired by Lord Pearson, was appointed to study the system of personal injury compensation and to make recommendations for reform. The Pearson Commission conducted an impressive in-depth investigation into all aspects of the tort system, and many of the statistics produced in its 1978 Report are still of value today. It also contained international comparisons of alternative types of compensation systems. In terms of outcomes, the Pearson Report was disappointing. It held back from recommending wholesale reform of the tort system and its cautious proposal for a no-fault scheme regarding road traffic accidents was never implemented.

2.4.1 What is no-fault liability?

We will see that the foundation of legal liability in the tort of negligence is the ability to establish that the claimant's injury was caused by the defendant's carelessness. Someone must be at fault in order for the claimant to obtain tort compensation. The burden is on him to prove this fault and if he fails he will be reliant on some alternative form of compensation. Fault was a basic component of the tort of negligence as it evolved during the latter half of the nineteenth century and the early part of the twentieth, prompted by a complex interplay of social and economic factors. It has been observed by WVH Rogers that 'the notion of responsibility is a powerful intuitive factor in people's attitudes to accidents and there is a deep-seated idea that those who have caused damage to others should pay'.

Linked to justifications of a moral nature are the economic considerations: it may be efficient for those who benefit financially from risks that they create to pay the price when this causes loss to an innocent party. But is it truly economically efficient? The tort system brings costs of its own. The Pearson Commission estimated that it took 85p in legal and administrative costs to recover every £1 in tort compensation payments. Twenty years later costs had increased. Woolf's *Access to Justice* reported that for claims under £12,500, for every £1 claimed there was a cost of £1.35. In 2009–10 NHS patients' legal costs exceeded the damages that they received in more than one in five cases.

In 1974, the government of New Zealand adopted a radical new approach to compensation. The tort system was abolished for all personal injuries arising out of accidents. Instead a state

compensation scheme was established, contributed to by employers, car owners, and the government, which enabled payments to be made on an administrative basis without proof of fault. The level of payment was partially earnings-related and originally only slightly less than that of tort. The New Zealand Accident Scheme is still a key aspect of the compensation system there; however, plans that the scheme might be extended to cover other types of personal injury have never been realized and there has been some reduction in the level of payment made. It remains, however, the most extensive no-fault scheme in the world, with extremely low administrative costs. A number of states in the United States have limited no-fault approaches to motor accidents. Germany and Sweden similarly operate partial no-fault schemes relating to drug injury compensation.



thinking point

Liam is 35 years old and has recently lost his sight due to an inherited medical condition. Tariq, also 35, was blinded in an accident at work two years ago, due to his employer's negligence. Liam's only source of financial assistance is social security benefits. Tariq, however, is in receipt of tort compensation from his employer, worth considerably more than state benefit. What differences in their needs might justify these different levels of financial support?

No-fault compensation is attractive in many ways, particularly because of its economic efficiency. There are drawbacks, however, as described by J Henderson:

A New Zealand-type system can be criticised on several fairness grounds. First, citizens would no longer have some of the traditional methods of vindicating individual rights in our legal system... Second, the anomalies are open to attack. For example, distinctions drawn between illness and accidental injury under the system cause persons similarly disadvantaged to be treated differently. Third, the measures of recovery include a number of arbitrary limits that cause persons similarly disadvantaged to receive essentially the same benefits. Finally, the procedures under the system reflect a willingness to sacrifice the interests of the individual to the greater good.

2.5

Alternative schemes

2.5.1 Social security

In Britain we have what is described as a 'mixed system' of compensation. The main source of compensation for accidents and work-related disease is that of state benefit (social security) because it is relatively quick, cheap, and accessible to many. The tort system, underpinned by liability insurance, is seen as supplemental to state benefit. The objectives of compensation provided by non-industrial social security benefit differ from those in tort. The tort system is committed to the principle of full compensation, as far as is possible, and has a significant earnings-related component. Basic social security, instead, makes no pretence of full compensation. That said, you should note that it is estimated that tort payouts account for little more than 25% of the monetary amount of all accident compensation in this country. Diagram 2.1 compares the tort and social security systems.

Diagram 2.1

A comparison
between the tort
and social security
systems

| | Tort system | Social security system |
|--|-------------|------------------------|
| Speed | | ✓ |
| Admin costs | | ✓ |
| Periodic payment | (✓) | ✓ |
| Flexible | (✓) | ✓ |
| Predictable | | ✓ |
| Higher compensation for serious injuries | ✓ | |
| No industrial preference | ✓ | |
| Higher awards for bereavement | ✓ | |
| Full replacement for lost earnings | ✓ | |

The low cost of administering the social security system was confirmed by Lord Woolf's *Access to Justice* in 1996, which calculated costs of between 8p and 12p to deliver £1 of benefit (compared, as we have seen, to as much as £1.35 for some tort claims). A distinct advantage in receiving state benefit is, of course, the lack of need to prove any fault and, unlike most tort compensation, social security is paid on a periodic basis. Social security will provide 'safety net' benefits for those in low-paid or no employment, mainly in the form of income support, housing benefit, and working tax credit, which are means-tested and may contain additional premiums for the disabled. These will often be of assistance to those who would otherwise have claimed through the tort system. You should keep in mind that there is a policy of minimizing the likelihood of double compensation and that statute provides that successful tort claimants must repay most social security benefits which they have received for up to five years after the accident.

Social security also includes the Industrial Injuries Scheme (IIS) for injuries and some diseases sustained due to employment. A fundamental development in the mixed system of compensation was the Workmen's Compensation Act 1897, which, for the first time, legislated for a scheme providing for liability of employers for workers' injuries at work, without the need for proof of fault. This was evidence of an approach to compensation characterized by 'industrial preference', that is, creating as a special class of the injured and ill those whose loss can be linked to employment. The industrial preference has been maintained into the twenty-first century, despite both the overhaul of the benefit system following World War II when the welfare state was pioneered, and the doubts which were expressed about it in the Pearson Report.

The IIS provides short-term, long-term, and bereavement benefits for those injured (or who develop certain 'prescribed' diseases such as asthma or deafness) 'arising out of' employment. This is a complex area of entitlement but it is clear that those entitled to state benefits under the IIS will be better provided for than those without the 'industrial preference'. Financial comparisons with the tort system are equally difficult, as they depend on many different factors such as the severity and duration of the disablement, the employment status of the victim,

and age. Entitlement under the tort system is not always preferable to the IIS, especially taking into account the fact that tort claimants often settle for less than they would eventually have been awarded in court.

2.5.2 Charity

Although not normally thought of as compensation, it is important not to overlook the role of charity. Before the late nineteenth century, voluntary help provided by the church, community, and individuals was the main source of support for the injured and bereaved. Today, high profile victims may be beneficiaries and we have seen the emergence of such efforts, particularly in relation to disasters such as the Paddington rail crash and London bombings. Many anonymous victims will also receive *ad hoc* or informal help. Charity comes from a sense of public obligation or involvement and is a form of targeted help which may provide quick payments for those facing a long wait for tort or criminal injuries scheme compensation.

cross reference

Criminal injuries compensation is discussed at 2.6.1.

The NHS itself, funded by central government out of taxation, is another benefit which UK residents may forget when comparing their situation with those under other systems. The need to subsidize the cost of their medical care is thought to be a major motivating factor in the high level of tort litigation undertaken by accident victims in the United States. The high cost to the NHS of accidents necessitated the passage of the Road Traffic (NHS Charges) Act 1999, which enables the NHS to claim back a proportion of the costs of patient care in cases when someone is liable to pay compensation. Also known as 'recoupment', this has recently been extended beyond injuries caused by motor accidents; significantly including those at work.

2.5.3 NHS Redress Act 2006

Medical negligence claims, while comprising only about 1% of all personal injury claims, receive a lot of attention, because they often result in the highest damages awards. In 2005–06, compensation payments totalling a record £591.59 million were made on behalf of the NHS. These are difficult for claimants to pursue for several reasons. Many medical negligence claims concern birth injuries suffered by babies, and they cannot sue in their own right until they are 18 years old, although for under 18s an action can be brought on their behalf by a 'next friend'. Often the information held about the relevant event is in the possession of the NHS Trust and it may be very difficult for the claimant to obtain the necessary evidence: first, to establish that he has a cause of action in law and, secondly, to substantiate that action. Both liability and causation may be fiercely contested, leading to high costs. Receiving a compensation award may not be the prime motivation of the claimant in these cases. The bigger concern may be simply to find out what happened, to feel reassured that any lapses have been addressed, to receive any needed remedial care, and, most of all, to receive an apology. The debilitating process of a tort action may not be the best means of achieving this.

The NHS Redress Act 2006 provided for the establishment of a redress scheme which would allow the offer of compensation up to an upper limit of £20,000, the giving of an explanation and an apology, and the details of action taken to prevent future similar cases. It would be managed by the NHSLA, the body responsible for handling negligence claims against the NHS. Many patient complaints are already dealt with within a hospital trust by alternative dispute resolution (ADR) or mediation and there are some expectations that the new redress

procedure would not be an appreciable improvement on existing provision and the Act has not yet been implemented.

2.5.4 First party insurance

Many losses suffered will be covered by 'first party' or personal insurance, taken out for his own benefit by the person who suffers the loss. Research in the mid 1990s revealed that the most common form is life insurance, which is held by over half the households in the UK, often in connection with mortgage requirements. More than 75% of households held home contents insurance.

Drivers with comprehensive motor insurance will be able to claim directly from their own insurer for damage to their car, which is particularly important when no one else is responsible for the damage. Why, then, does any driver pursue a claim in tort as an alternative? One reason is that personal insurance, such as that described above, rarely covers personal injury and loss of earning capacity. At the time of the Pearson Report, only 6% of accidents were covered by personal accident insurance. Another reason is that, in the absence of a 'knock-for-knock' agreement, the victim's insurer may choose to recover his losses against the liability insurer of a negligent defendant.

The Motor Insurers' Bureau, established by the insurance industry, provides compensation for those who suffer personal injury or property damage at the hands of uninsured or untraceable drivers.

The majority of those who are employed will be covered by occupational schemes, where their employer provides sick pay and they continue to receive all or part of their pay during periods of incapacity. Pensions, either occupational or personal, may provide cover if work becomes altogether impossible due to injury or if death occurs.

2.6

Ex gratia compensation schemes

ex gratia

payment made as a favour, rather than on the basis of a legal obligation.

2.6.1 Criminal injuries compensation

Many crimes, particularly violent ones, are at the same time torts. An obvious example would be a physical attack which is likely to constitute the tort of battery. It would be very unlikely that the offender would be worth suing, and although the criminal courts have the power to make a compensation order against the defendant in favour of his victim, this amount would not approach full compensation. To provide for victims of violent crime the government established the Criminal Injuries Compensation Scheme (CICS) in 1964. The main motivation for the establishment of this scheme was to demonstrate society's sympathy for the victims of crime. Itself a form of no-fault compensation, it provides a fund to which victims of violent crime can apply and, providing that the criteria for entitlement are satisfied, payment will be made by a statutory body, the Criminal Injuries Compensation Authority (CICA). Compensation will be paid even if no one is convicted of the crime and although its main focus is physical



thinking point

It has been discovered that the numbers who claim under the CICS are significantly lower than the estimates of victims of violent crime. Why might victims not be taking advantage of this opportunity?

injury, there is some provision for compensation for mental injury as well and dependants of deceased victims are included in the scheme. There are some significant exclusions, including most domestic violence and road traffic accidents. In some cases, the conduct and even character of the victim himself will disqualify him, for instance if he was injured in a fight in which he had voluntarily participated.

Prior to 1994, criminal injury payments were calculated on a similar basis to personal injury claims under the tort system. However, since then, assessment is according to a 'tariff' system under which the maximum award is £500,000. This is significantly less than that which might be awarded to a successful tort claimant with serious injuries; however, it must be noted that the vast majority of victims are claiming for relatively low sums. In 2001, 86% of applicants received £5,000 or less, with £1,000 being the minimum amount which can be claimed. Social security benefits, past and future, are deducted in full as is compensation which the offender may have been ordered to pay.

2.6.2 Specific schemes

Occasionally situations occur involving widespread loss or injury, in which the government takes on the role of compensating its victims. A scheme is established to provide compensation at a level which, in some cases, compares favourably to what might have been obtained through the courts. Those who claim under such schemes must undertake to forego any tort action. There is no admission of fault on behalf of the government but they indicate a level of possible responsibility which makes it both politically and economically expedient for the tort system to be bypassed. Currently, such schemes apply to vaccine damage sustained by children and for those who have contracted Hepatitis C and the HIV virus from the NHS supply of contaminated blood products.

In the United States, Congress established the September 11th Victim Compensation Fund for those affected by the attacks on the World Trade Center and Pentagon. Victims of the 7 July 2005 bombings in London were compensated, some claim inadequately, by the CICS, social security, and charity.

2.7

A compensation culture?

'Bonkers conkers ruling' The Times, 5 October 2005

SO WHAT else can we do to scare the living daylight out of our children? One serious contender for the 2004 prize for contributing to the project of boring the pants off childhood must surely be Shaun Halfpenny, the headmaster of Cummersdale Primary School in Carlisle. Mr Halfpenny decided that enough is enough, something had to be done to protect Britain's children from the scourge of that dreaded threat to our way of life—conkers.

Clearly raising awareness of this public health issue has not worked. Far too many children, it seems, still suffer from the life-long trauma of grazing their knees while looking for conkers.



thinking point

Is a 'compensation culture' necessarily a bad thing? What might be its benefits?

Setting up a helpline to support victims of conkering is clearly beyond the resources available to a local primary school, so Mr Halfpenny did the next best thing.

Children in his primary school have been banned from playing conkers unless they wear two pairs of safety goggles. And just to show that he is no ordinary killjoy, the headmaster went out and bought safety goggles for his pupils to wear while engaging in this highly risky adventure. To be exact, two safety goggles were purchased from the school's limited funds. It appears that children now queue up and wait for their turn to wear the goggles before they can get their hands on those risky chestnuts. No more free-for-alls as children rush off to be the first to find that extra large shiny conker—this is safe and responsible activity at its best.

The story above is typical of many press reports about unusual policies, which have been apparently motivated by fears of legal action. Responsible for these fears are tales such as that of the mortuary technician who was reported as having been awarded £15,000 against her employer after developing a morbid fear of death; or the Scottish police dog handler who recovered £2,000 from his employers after being bitten by his own dog.

In 2004, the government's Better Regulation Task Force reported on its inquiry into the 'compensation culture'. This is a complex phenomenon to study, involving the analysis of many conflicting statistics, leading to no easy or obvious answers. The Task Force did find that the overall cost of tort claims in the UK was lower than ten other comparable economies. However, concerns continued to be raised by the insurance industry about steadily increasing numbers of claims; a rise which is mirrored by increasing insurance premiums. Certainly we have seen that the NHSLA reports a significant year on year increase in medical negligence claims. Assuming that this trend is real, there could be a number of different explanations. Maybe legal advice is more readily available under CFAs? Some believe that the advent of the Human Rights Act has promoted the concept of 'rights', leading to a 'claims consciousness' growing throughout society. Have judges modified legal principles in such a way as to favour claimants' cases? One possibility which must not be forgotten is that perhaps there has actually been an increase in the number of accidents and medical mishaps.

As you come to learn the details of tort law, you will see that bringing a legal action is not the same thing as winning it. The fact that people consider or attempt to recover compensation for an injury does not mean that they will be successful even if they stay the litigation course. However, perceptions (even if unfounded) of excessive or frivolous claims can have a significant impact on behaviour. For example, doctors may be reluctant to practise in certain fields, such as obstetrics, and adventure outings for school children may become a thing of the past.

In its report, *Better Routes to Regulation*, the Task Force concluded, 'the compensation culture is a myth, but the cost of this belief is very real'. Kevin Williams has explained it this way:

There is good evidence that some sorts of accident claims have risen (from a relatively low base) and that the overall cost of personal injury settlements has gone up. But there is virtually no reliable evidence about the number of bogus or exaggerated claims or whether they constitute a grave (or increasing) problem.... The Task Force analysis seems to be that if we are suffering from a crisis, it is largely one of confidence arising from misplaced fears of potential defendants and their insurers, rather than from a culture which 'blames and claims' too much.

(*Legal Studies*, pp 499, 514)

2.7.1 Compensation Act 2006

In 2005, the Constitutional Affairs Committee considered all the evidence which has been collected about the so-called 'compensation culture' and resolved to address the issue in legislation. The result was the Compensation Act 2006 which, in addition to s 1, also deals with regulation of claims managers and asbestos-related damages actions.

Section 1 is a reminder to judges to consider carefully the impact that decisions about negligence liability might have in potentially deterring the organization in pursuit of certain types of activities.

Section 1 Deterrent effect of potential liability

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

- (a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or
- (b) discourage persons from undertaking functions in connection with a desirable activity

case close-up

Cole v Davis-Gilbert (2007)

This case provided an early illustration of the way s 1 of the Compensation Act 2006 was to be applied by the courts. Yvonne Cole was walking across a Sussex village green on her way to a pub. She stepped into a hole hidden in the long grass and broke her ankle. Mrs Cole brought an occupier's liability action against the owners of the green and the Royal British Legion, who had organized a village fete, which had been held on the green some months ago. The hole had been made, for the purpose of supporting a maypole, by a veteran soldier using his souvenir bayonet. He had returned to the green following the fete and filled in the hole. It seems that this hole had somehow become exposed again shortly before the accident. The trial judge ruled in favour of Mrs Cole in 2005 but the Court of Appeal, subsequent to the introduction of the Compensation Act 2006, found for the defendants. According to Scott Baker LJ:

Accidents happen and sometimes they are what can only be described as 'proper accidents', in the sense that the victim cannot recover damages because fault cannot be established... If the law courts were to set a higher standard of care than what is reasonable, the consequences would quickly be felt. There would be no fetes, no maypole dancing and no activities that have come to be a part of the English village green for fear of what might go wrong.

The cases of *Bourne Leisure v Marsden* (2009) and *Tomlinson v Congleton BC* (2004) provide additional examples of the judicial reaction against the 'compensation culture'. The Compensation Act was also applied in *Hopps v Mott MacDonald Ltd* (2009) in the case of a consultant electrical engineer working in Basra who was injured in an explosion. He claimed that because of the threat levels in the aftermath of the war in Iraq his employer was negligent in not providing him with armoured transport. In determining whether the employer had

cross reference

both these cases are discussed in Chapter 9.

cross reference

see 2.3 The litigation 'obstacle race'.

done what was reasonable in the circumstances to take care of his safety the court made an analysis of the risks and considered the potential deterrent effect of a finding of liability on the employer. In the particular and unusual circumstances the employer was not negligent and s 1 of the Act applied since a finding of liability would prevent the desirable activity of the reconstruction of Iraq being undertaken and would contribute to an increasing humanitarian crisis.

One side effect of the introduction of CFAs was the growth in claims management companies. These 'claims farmers' can be seen advertising on television for clients seeking legal advice, often in relation to personal injuries, who are then referred to solicitors. Concerns have been raised about 'ambulance chasing' behaviour by some of these companies as well as the use of high pressure selling tactics. There are also reports of their clients losing some or all of the compensation they have recovered in fees. The collapse of companies such as Claims Direct received much publicity, and tarnished the reputation of the legal profession. Part 2 of the Compensation Act 2006 outlined a new regulatory regime for CFAs and accordingly there is now a body concerned with claims management regulation.

Summary

- The tort system is an expensive, uncertain, and time-consuming method of obtaining financial support.
- No-fault and *ex gratia* compensation is an alternative which is used selectively but there does not appear to be the political or popular will to abandon tort.
- The main alternative to the tort system is social security.
- Despite its drawbacks, there is evidence that the tort system is alive and well, and its use appears to be growing, although reports of a 'compensation culture' have been exaggerated.

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