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Challenging Views of Tort¹

Richard Lewis and Annette Morris²

Tort; Personal injury claims; Accidents; Damages; Compensation culture; Conditional fee agreements; Road traffic; Employer's liability; Clinical negligence; Liability insurance

Abstract

This article examines images of how the law of tort is supposed to operate and then it contrasts the reality of personal injury practice. In doing so it challenges accepted views not only about the scope of tort law and what it achieves, but also about the 'compensation culture.'

This article challenges many accepted views about how the tort system of personal injury litigation operates. It is written in two parts. In the first part we consider images of tort deriving from traditional portrayals of justice. We set out seven commonly held views about the system and then we contrast what actually happens in practice. We note the rhetoric and the social attitudes derived from long-held views of how the law

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is supposed to operate and we then compare the reality. We start by reflecting upon the basic scope of tort principles. Next we consider who brings and defends personal injury cases and what role is played by courts and judges in their resolution. We then consider how the key principle of fault is interpreted in practice and how the operation of insurance affects traditional perceptions of how justice is delivered. Finally, we look at the reasons why damages are awarded and what amounts are paid. Overall, we set out the seven commonly held views of tort and then, by examining the actual practice of personal injury, we undermine and challenge them.

In the second part of this article we look at another set of images which contrast with those set out in the first part. These images portray the tort system in a very critical way, depicting it as a burden that undermines rather than underpins society. It is widely perceived that tort has encouraged a damaging compensation culture. Our propensity to claim is said to have increased to such an extent that we can no longer accept personal responsibility for our misfortunes. The system is thought to be awash with unmeritorious claims which have been prompted by an ambulance-chasing entourage offering to work on a 'no-win no-fee' basis. Exaggeration and fraud are to the fore and non-existent or trivial injuries are compensated. As in the first part of the article, although with less force, we then show how these images have become distorted from reality. In particular, the majority of injured people still do not go on to claim compensation despite being encouraged to do so through widespread 'no-win no-fee' advertising. The exception arises in the context of road traffic accidents where there is a strong culture of claiming. The significant increase in the number of personal injury claims over the last forty years is largely attributable to such accidents. We examine the reasons for this. Whilst the extent of fraudulent claiming has generally been exaggerated, again the complaints have more foundation in the road traffic context. In conclusion, having revealed how traditional and modern portrayals of tort differ from the reality, we show how tort in practice is heavily influenced by institutional arrangements.

A. TORT AND THE TRADITIONAL PORTRAYAL OF JUSTICE

1. Tort Law is Universal and Applies to All Accidents and Injuries

A powerful image of the traditional portrayal of justice is that of the universal application of the law to all citizens. All are equally subject to the law and all can equally benefit or be penalised by it. To law students this is reinforced early in their study of tort by the analysis given of the negligence formula. They are told that one of the reasons for the success of that cause of action is that it can potentially apply to all sorts of accidents and injuries. In addition, the formula itself is a relatively simple one. As a result, instructions to juries based upon finding liability using the ‘reasonable man’ formula were easy to give and understand no matter how complex the situation. Similarly, the ‘neighbour’ test used by judges to determine whether a duty of care was owed has a superficial simplicity and appears capable of being used in very diverse circumstances.

In reality the actual scope of actions in tort for personal injury is severely limited. Only certain types of injury are likely to attract compensation. This is because the claims brought are much affected by the incidence of compulsory insurance so that the accidents that are compensated closely match the areas where liability insurance is to be found. Road and work accidents predominate largely because those are the two major areas where insurance is compulsory.³ In 2011 - 12 they constituted 88%⁴ of all the claims that were brought for personal injury, with motor accidents comprising 80% of the total and employer liability 8%.⁵ They dominate the practice of tort even though they constitute, at best, only about a half of all accidents,⁶ and some surveys

³ The lack of coherent policy behind compulsory insurance was traced in R. Lewis, ‘The Duty to Insure’ (2004) 154 *NLJ* 1474 and C. Parsons, ‘Employers Liability Insurance - How Secure is the System?’ (1999) 28 *ILJ* 109.

⁴ Department for Work and Pensions, *Compensation Recovery Unit – Performance Statistics* <http://www.dwp.gov.uk/other-specialists/compensation-recovery-unit/performance-and-statistics/performance-statistics>

⁵ *id.* The Pearson Commission 35 years ago similarly recorded that road and employment claims comprised 88% of all claims. *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (1978, cmd 7054, chairman Lord Pearson) vol 2 table 11. Atiyah suspected that the relative proportion of claims had not changed twenty years later. P. S. Atiyah, *The Damages Lottery* (1997) 99. However, employment claims have since declined considerably falling from 45% of all claims in 1973 to 8% now. By contrast, road accidents have increased considerably, expanding from 41% to 80% of all claims.

⁶ *id.* vol 2 table 57.

suggest that they are much less important than this.⁷ More common accidents are those in the home, or suffered in the course of leisure activities or in playing sport, and yet very few of these result in any damages award.⁸ It was estimated that there were 7.8 million accidents in the home in 1999 but in only 0.5% of these was there the potential for a successful tort claim.⁹ This is not only because fault is less readily apparent but also because, in the absence of insurance, we are less inclined to think of seeking a remedy in tort. Overall, although work and transport injuries dominate the tort system, they are not representative of accidents in general.

All this means that the place where you are injured is crucial. Accidents in areas not covered by liability insurance are extremely unlikely to be compensated. According to one study conducted over thirty years ago whereas 1 in 4 road accident victims and 1 in 10 work accident victims were compensated in tort, only 1 in 67 injured elsewhere did so.¹⁰ Overall, only one accident victim in 16 who was incapacitated for three days or more was compensated by the tort system. However, if we concern ourselves only with serious injuries, tort was much more important: where an accident caused incapacity for work for six months or more, almost a third of victims received tort damages. However, this increased significance of tort was then severely undermined: the importance of the tort system is reduced tenfold if account is taken of those suffering disablement not from accidents alone, but from all causes, including congenital illness and disease. For a variety of reasons this group is much less able to claim in tort than accident victims,¹¹ and common law damages plays an even more limited role in their compensation.

The limited scope of tort compensation can be contrasted with the much wider ambit of the welfare state. Although only a small part of public expenditure upon

⁷ In Australia they are less than a fifth. H. Luntz and D. Hamby, *Torts: Cases and Commentary* (5th ed 2002) 4.

⁸ D. Harris et al, *Compensation and Support for Illness and Injury* (1984) table 2.1.

⁹ Datamonitor, *UK Personal Injury Litigation* (2003) 79.

¹⁰ Pearson Commission op. cit., n. 5 vol 1 table 5 and D. R. Hensler et al, *Compensation for Accidental Injuries in the United States* (1991) 122.

¹¹ J. Stapleton, *Disease and the Compensation Debate* (1986).

welfare is paid to accident victims,¹² the amount greatly exceeds the total damages paid by the tort system. In reality tort is very much the ‘junior partner’ of the social security system.¹³ The Pearson Commission in 1978 found that seven times as many accident victims received social security payments as opposed to tort damages for their injuries, and the total benefit obtained by them was double the sum of all damages awarded.¹⁴

These figures must not be taken to imply that the tort and social security systems are mutually exclusive; in fact they are closely linked. The person who succeeds in his damages claim is more likely to be in receipt of a wider range of welfare benefits than the more typical accident victim who is unable to claim in tort.¹⁵ The existence of the welfare state has provided injured people with the basic sustenance needed to undergo the sometimes lengthy process of pursuing a claim for damages at common law. If accident victims had not been able to obtain this immediate support from the benefit system it is unlikely that the action for common law damages - with all its delays, costs and complexity - would have survived long into the twentieth century. For that reason the tort system can be seen as parasitic upon the welfare state. As we shall see, it is similarly dependent upon liability insurance.¹⁶ This is far from the image of tort as an independent ‘natural’ system of rules of universal application supposedly

¹² The Pearson Commission op.cit., n. 5 vol 1 para 87 roughly estimated that in 1978 only about 6% of public expenditure upon welfare was directed towards accident victims. This represented about 2% of total public expenditure at that time (welfare provision then being a third of the total).

¹³ Id., vol 1 para 1732.

¹⁴ Pearson Commission op.cit., n. 5 vol 1 para 1732 and table 4 suggested that in 1977 there were about 215,000 recipients of damages totalling £200 million whereas the social security system paid out £420 million to 1½ million people. By 1988 although more people were receiving tort damages, the relative importance of the schemes remained about the same. Lord Chancellor’s Department, *Report of the Review Body on Civil Justice* (1988, cm 394) para 391.

¹⁵ In a survey nine out of ten recipients of damages of £20,000 or more also received, on average, three different social security benefits. Law Commission Report No 225 (1994) *Personal Injury Compensation: How Much Is Enough?* Table 901.

¹⁶ J. Steele, *Risks and Legal Theory* (2004) 36: “‘Insurance ‘technology’” underlies the whole practice of tort law.’ Without insurance, it is probable that tort liability itself could not survive. J. G. Fleming, *The American Tort Process* (1988) 21, and R. Lewis, ‘How Important are Insurers in Compensating Claims for Personal Injury in the UK?’ (2006) 31 *The Geneva Papers on Risk and Insurance* 323.

forming the foundation of a just society. Tort in practice is limited in its scope, partial in its application and very dependent upon existing systems of welfare and insurance administration.

2. Tort Claims for Personal Injury are often Brought and Defended by Individuals

This image seems largely self-evident insofar as corporations cannot suffer personal injury, only individuals can. Although many claimants will seek to attribute responsibility to their employer or the state or other complex body, the majority will name another individual as liable for their injury. Tort case names are replete with the surnames of individuals; organisations appear much less frequently. This individualism is said to be one of the most distinctive features of tort. When combined with a subjective approach in the assessment of loss and claimant need, this individualism is said to make tort distinct from the provision for injury made by the welfare state. However, this image of tort again needs to be qualified considerably when viewed from the perspective of practice.

Defendants

Let us first consider those who are the real defendants in the great majority of cases: the insurers. They are the paymasters of the tort system and are responsible for 94% of tort compensation for personal injury.¹⁷ Although not named in the law reports and therefore rarely mentioned in tort textbooks, they are the ‘elephant in the living room.’¹⁸ That is, they are almost always present and dominate proceedings, and yet judges and jurists rarely discuss this fact.¹⁹ Their reluctance helps create one of the great legal fictions of modern times: that claims are defended by individuals. Although it is true that in the majority of claims it is an individual that is nominally sued, almost all of these people are insured against their liability. Similarly, most employers, companies and organisations who are sued are also insured. Even where local authorities fund damages awards directly, they may still employ private

¹⁷ Pearson Commission op.cit., n. 5 vol 2 para 509.

¹⁸ R. Lewis, ‘Insurers and Personal Injury Litigation: Acknowledging “The Elephant in the Living Room”’ [2005] *JPIL* 1.

¹⁹ R. Lewis, ‘Insurance and the Tort System’ (2005) 25 *Legal Studies* 85.

insurance company personnel to handle the claims made against them.²⁰ The result is that in nine out of ten cases the real defendants are insurance companies, with the remainder comprising large self-insured organisations or public bodies such as government departments and health authorities. It is extremely rare indeed for an uninsured individual to be the real defendant.

The important centres of personal injury practice are therefore insurers' buildings, rather than courts of law, or even lawyers' offices. In the last decade the number of such insurance centres has declined because of company mergers and greater specialisation. The work has been concentrated in particular localities. Consolidation in the general liability insurance market has resulted in it being dominated by only eight major companies, although there are more than fifty other smaller firms issuing policies.²¹ More than half of the larger general insurers are foreign owned.²² For motor insurance there were over 350 companies authorised to transact motor insurance, but only 65 companies and 11 Lloyd's syndicates actively did so. The ten largest motor insurers control three quarters of the market.²³ Therefore, when just over a million people suffered personal injury last year and brought their tort claim, they came up against very few real defendants.

Policyholders in practice cede complete control over their case to their insurer and thereafter usually play little or no part in the litigation process. For example, Harry Street, the late Professor of Law at Manchester University and author of *Street on Torts*, revealed that he was once a defendant in a case but only discovered that it had been determined on appeal when he read about it in a newspaper.²⁴ He had played no

²⁰ S. Halliday, J. Ilan and C. Scott, 'Street-Level Tort Law: The Bureaucratic Justice of Liability Decision-Making' (2012) 75 *MLR* 347 at 356.

²¹ C. Parsons, *An Analysis of Current Problems in the UK Liability Insurance Market*, Office of Fair Trading Report (OFT659a, 2003) para 5.6.

²² IMAS Corporate Finance (on behalf of TheCityUK and UK Trade & Investment), *UK Financial Services: Ownership, Value and M&A Developments* (2012).

²³ Ernst and Young, *Bringing Profitability back from the Brink of Extinction: A Report on the UK Retail Insurance Market* (2011) 17. The Association of British Insurers (ABI) found the percentage to be two thirds in *Response to the Greenaway Review of Compulsory Motor Insurance and Uninsured Driving* (2004) annex B.

²⁴ D. W. Elliott and H. Street, *Road Accidents* (1968) 209.

part in the proceedings. Insurers in practice determine the litigation tactics that are used and how any defence is to be conducted. This means, for example, that they commonly make admissions without the consent of the insured,²⁵ and they can settle cases in spite of objection from the policyholder.²⁶ Further examples of the insurer's control over a personal injury case are given below.

Claimants

When we consider claimants, it is axiomatic that the individual named in the lawsuit is the person who has suffered injury. However, bringing a tort action is also very much influenced by the insurance background to the claim. Here we concentrate upon claimants' abilities to appoint their own legal representation in order to bring the claim. We know that most tort defendants are liability insurance policyholders and have no choice in the law firm appointed to defend them; if they wish to take advantage of the indemnity provided by the policy they must accept the representation provided. It might be thought that claimants, in contrast, have complete freedom to choose their own lawyer. However, this is far from the case.

The reason for the limited choice lies in the rapid expansion in recent years of before-the-event (BTE) insurance.²⁷ This is the claimant's own insurance against future legal costs that he took out before the accident which caused him injury. It is sometimes referred to as legal expenses insurance. Almost 3 in 5 adults now have some form of this insurance.²⁸ Over 18 million drivers hold it as part of their motor insurance, and 14 million householders as part of their buildings and contents insurance. In total these number about 22 million people.²⁹ In addition, for example, about 7 million workers are entitled to BTE benefits resulting from their trade union membership, although this is a declining number. This wide penetration of the market

²⁵ T. Goriely, R. Moorhead and P. Abrams, *More Civil Justice? The Impact of the Woolf Reforms on Pre-Action Behaviour* (2002) 90.

²⁶ However, this very wide discretion given to insurers to conduct the litigation behind the insured's back is subject to some limit as recognised in *Groom v Crocker* [1939] 1 KB 194.

²⁷ R. Lewis, 'Litigation Costs and Before-The-Event Insurance: The Key to Access to Justice?' (2011) 74 *MLR* 272.

²⁸ FWD Group, *The Market for 'BTE' Legal Expenses Insurance* (2007) para 3.3.

²⁹ Mintel International Group, *Legal Expenses Insurance* (2008).

has been achieved largely because BTE has been sold as an additional benefit to be included in existing motor liability or household insurance. In effect, there has been a great deal of inertia selling. Few people opt to take out stand alone BTE policies, but they commonly accept legal expenses cover as part of a wider package.

BTE limits the freedom to choose one's own lawyer because claimants are directed by the insurer to use firms which are on the insurer's approved panel.³⁰ In return for limiting their costs and ensuring that the cases are dealt with efficiently, panel firms are guaranteed a constant flow of work by the insurer. Until recently, firms also paid the insurer a referral fee for each case received. Significant sums have thus been received by insurers, but the referral arrangement may not be of similar benefit to the claimants. The designated low-cost law firm may be located a considerable distance from the injured person's home and resort must then be had to electronic and written communications. In practice, therefore, the firms are not only the choice of the insurer rather than the claimant but they also may not facilitate the personal help and contact that the claimant may need. In spite of this, injured people in practice are pressured into accepting a panel solicitor,³¹ and the claim is thus brought through an insurance sponsored lawyer. Whatever the merits of this arrangement,³² we can see that it is far from the case that claims in tort are either brought or defended by individuals as the traditional view implies.

3. Tort Claims are Determined in Court by Judges aided by Lawyers and Juries

An enduring image of tort law contained in popular views of justice is that of bewigged judge, aided by similarly adorned barristers carefully sifting the evidence to come to a just decision. The judge and barristers are invariably male with the latter

³⁰ H. Blundell, 'Free to Choose? BTE Legal Expenses Insurance and Freedom of Choice' [2004] *JPIL* 93. The freedom is supported by Directive 87/334, Legal Expenses Directive (1987) OJ L185/77, the Insurance Companies (Legal Expenses Insurance) Regulations 1990 (SI No 1159) and *Brown-Quinn and another v Equity Syndicate Management Limited and Motorplus Limited* [2011] EWHC 2661.

³¹ P. Abram, *In Sure Hands?* (2002).

³² For a robust defence see M. Harvey, 'Before the Event Legal Expenses Insurance – Why do so Many Seek to Close This Access to Justice Gate?' [2010] *JPIL* 93, and P. Smith, 'Panel Solicitors: the Legal Expense Insurer's Perspective' (2004) 14 (3) *APIL PI Focus* 15.

distinguished by the finery of their robes. They sit in the formal surroundings of a courtroom, often wood-panelled, which affects in many ways the justice that is delivered.³³ Behind the barristers sit a phalanx of sober suited solicitors. Some people may also conjure up a box of twelve people good and true to form a jury by which their peers are to be judged. The formality is at once respected and feared. Although helping to ensure impartial adjudication untainted by emotional response, the atmosphere is so alien to many claimants that they will do almost anything to avoid it. Fear of having to appear in court and face cross-examination is a major reason for claimants being too ready to accept the very first offer of settlement that is put to them.³⁴ This also explains why some claims are not even pursued at all. However, it is a fear with little foundation because cases today are never decided by a judge and jury in court. The involvement of these symbols of justice is very limited when we consider how tort cases are actually determined.

We have already seen that the great majority of cases are really defended by insurance companies. The high cost of litigation, when combined with the small size of claims, ensures that it is simply not economic to utilise the legal profession and its accoutrements in the way that the popular imagination conceives. In practice, it is insurers who decide whether a case merits the very exceptional treatment of being taken to a court hearing. A key statistic of the tort system reveals how unusual it is for a court to become involved: 98% of cases are settled before they are even set down for trial, and of the few that do receive a trial date, most are concluded before that formal hearing takes place.³⁵ In one survey only 5 out of the 762 'ordinary' cases went to trial.³⁶ In effect, insurers allow trial judges to determine only one per cent of all the claims made. In these rare cases the judge receives no assistance from that other major symbol of popular justice, the jury. Although juries remain an important feature of personal injury litigation in the USA, they were abolished in the UK in all

³³ L. Mulcahy, *Legal Architecture: Justice, Due Process and the Place of Law* (2011).

³⁴ See below n. 53

³⁵ Pearson Commission op. cit., n. 5 vol 2 table 12, Lord Chancellor op. cit., n. 14.

³⁶ P. Pleasence, *Personal Injury Litigation in Practice* (1998) 12. Earlier D. Harris et al op. cit., n. 8 suggested that as many as 3% of cases might go to trial. See also P. Cornes, *Coping with Catastrophic Injury* (1993) 20.

but very exceptional cases in 1933 having fallen into disuse many years before. A *Runaway Jury* simply cannot happen in a personal injury case in the UK.³⁷

If a case does reach court and is determined by a judge, the decision is unlikely to be challenged further. Few cases are appealed to a higher court. The result is that when the senior judiciary are called upon they are left to adjudicate upon a small fraction of what are, by then, very untypical cases indeed. Whether an appeal court is to be given an opportunity to examine a point of tort law may depend upon the insurer because, if it serves the insurer's purpose for doubt to remain, the claimant can be paid in full and threatened with a costs award if the action is continued.³⁸ By their control of settlement tactics and which cases are taken to appeal, insurers have shaped tort principles and what happens in practice. This is far from the popular image of how tort law has been created and what effect it has.

If we turn our attention to cases that are settled out of court, as opposed to formally adjudicated, we find that it is still insurers that determine the extent that lawyers and formal procedures become involved. Increasingly they are seeking to settle cases at an early stage without resorting to the issue of court documents. In one survey of major insurers it was estimated that, because of earlier settlement, the number of cases disposed of only after the issue of formal proceedings had declined by a third.³⁹ Of course, it has always been the case that the great majority of claims are settled informally: over thirty years ago 86% of cases were being settled without formal proceedings, then in the form of a writ, being issued.⁴⁰ Now even more cases are being settled at an early stage.

³⁷ John Grisham, *The Runaway Jury* (1996). The residual power to order trial by jury in personal injury cases after the Administration of Justice (Miscellaneous Provisions) Act 1933 was very rarely exercised. After *Ward v James* [1966] 1 QB 273 juries were even more confined.

³⁸ *Davis v Johnson* [1979] AC 264 at 278 and *Fairchild v Glenhaven Funeral Services Ltd* [2002] 1 AC 32. But see the failed attempt to prevent the House of Lords considering important causation issues in relation to asbestos liability in *Fairchild v Glenhaven Funeral Services Ltd* [2002] 1 AC 32 discussed by K. Oliphant in H. Koziol and B. C. Steininger (eds), *European Tort Law 2002* (2003) 148.

³⁹ T. Goriely, et al, op. cit., n. 25, 159.

⁴⁰ Pearson Commission op. cit., n. 5 vol 2 table 12. However, in 2013 in a study conducted by the Association of Personal Injury Lawyers (APIL) out of 322 cases involving whiplash only 76% settled

Insurers are avoiding not only judges, courts, and court procedures but also lawyers. Defence lawyers are being bypassed. The handling of claims against local authorities for failures in road maintenance is made 'largely in isolation from the input of lawyers.'⁴¹ More work is being done in-house by insurers. In addition, in an effort to increase specialisation and cut costs insurers have tried to ensure that fewer law firms act for them. For example, in 2004 AXA insurance company announced that it had reduced by half the number of law firms defending its cases. Similarly over a period of four years the Zurich insurance company decimated the number of firms representing its policyholders in catastrophic cases: only four firms now defend such cases for this large insurer. Much of the work being done in personal injury law firms is now being carried out by unqualified or partly qualified paralegal personnel. It is feared that, as a result of recent reforms, non-lawyers at claims management firms could be left in charge of even complex personal injury claims.⁴² The image of tort law as being regularly administered by highly trained lawyers in a formal environment is thus very far from the reality.

4. Tort Liability is Largely Dependent upon Proof of Fault and Findings of Law

The extent that popular culture requires fault to be established in order for liability to be found is uncertain. It is clear that wrongdoing has been the fundamental force which has justified the continued expansion of the law of tort. However, the notion of responsibility goes far beyond that of fault and this is reflected in the strict liability regimes found in the law of tort. These areas of non-fault liability are usually limited in their practical effect but have widespread popular support especially in the area involving injuries at work. For example, it has been shown that people commonly think that employers should pay for injuries caused to their workforce even in the absence of any fault on their part.⁴³ However, overall the fault principle plays a major

before issue. Response to the Ministry of Justice Consultation, *Reducing the Number and Costs of Whiplash Claims* (2013) appendix B.

⁴¹ S. Halliday et al, op. cit., n. 20, 365.

⁴² 'Case Conundrum?' (2011) 161 *N LJ* 1569.

⁴³ S. Lloyd-Bostock, 'Commonsense Morality and Accident Compensation' in D. P. Farrington et al (eds), *Psychology, Law and Legal Processes* (1979).

role in determining the popular response as to whether compensation should be paid. In the absence of fault, for example, property owners are rarely found liable. The fault principle has a great effect upon students of the law of tort because of the disproportionate emphasis it receives in tort textbooks. Common law negligence is the core element of tort teaching; strict liability, especially if deriving from statute, is a neglected area of study. As a result, the standard response to the inquiry ‘is compensation payable?’ very often is ‘it depends whether fault can be proven.’

However, the hold that fault maintains over the popular and student response to compensation in tort is not reflected in the actual practice of law. Via liability insurance, tort in practice provides a structure for processing mass payments of small amounts of compensation. In processing these routine claims insurers decide which elements of damage they will accept or contest. The key fact here is that it is unusual for them to contest liability: one study revealed that insurers’ files ‘contained remarkably little discussion of liability,’ finding it initially denied in only 20% of cases.⁴⁴ Most claims are of low value and not worth contesting and, as a result, insurers make at least some payment in the great majority of them.⁴⁵ Only very rarely do they insist upon staging a gladiatorial contest to determine whether a particular defendant was in the wrong. Contrary to the impression gained from tort textbooks, duty of care, causation of damage, and even breach of duty are generally not in dispute in cases processed by the system.

Another element in establishing liability, at least in law student consciousness, is the importance of findings of law. Appeal cases are read one after another in order to distil the essence of what may be required to advise a client correctly and succeed in a claim. However, in practice, reference to the refined discussions of law which take place in the appellate courts rarely features in the everyday work of the personal injury practitioner. In road accident cases it has been shown that driving skills and common sense exercised within the scope of the ‘rules of the road’ are of much more importance than any legal principle. To emphasise this further, we can say that it is the facts rather than the law that are much more likely to determine the case. One barrister surveyed memorably exaggerated the point: he commented that an excuse for

⁴⁴ T. Goriely et al, *op. cit.*, n. 25, 103.

⁴⁵ Citizens Advice Bureau, *No Win, No Fee, No Chance* (2004) para 4.31.

not reading the papers for the case in detail in advance of a hearing was that the facts revealed in court would inevitably change.

‘You can only say how it looks on the evidence you have got at the initial stage, which is very rarely the picture that will emerge at the trial. There used to be a chap in these chambers whose motto was, “Never mind about the law, it will all be decided on the facts, and never mind the facts because that will all have changed by the time your client comes out of the witness box anyway.”’⁴⁶

5. Tort Cases Reflect the Justice Requirements of Due Process and Fairness

As we have already seen the popular image of the delicately balanced scales of justice held by the goddess of justice needs close examination when what happens in the typical tort case is considered. The right to representation and to control the way in which a claim is litigated have already been discussed. Here we consider further the factors that are influential in disposing of a claim and contrast them with the traditional portrayal of justice.

We have seen above that it is the facts found rather than the law in the books that are more important in determining the result of a claim. But how are those facts found? The traditional image is of a rigorous, impartial, and detailed investigation into what happened. In a road accident we might imagine there will be a careful forensic examination of the scene by experts in determining the cause of injury. The effects of speed, weather, the road surface and layout, vehicle design and so on will be carefully weighed. Witness statements from many potential parties will be taken and police reports will be scrutinised. Thereafter this evidence will be subject to cross examination in court to assess its probative value, this being done according to the strict rules of evidence. At each juncture the parties will be able to question and test the views put forward and submit their alternative views within the limits of the rules of civil procedure which aims at providing a fair hearing for all.

The reality is very far from this idealised image. Classic empirical studies reveal that, in practice, it is insurance bureaucracy that largely dictates what facts are accepted, how the litigation proceeds, and whether, when, and for how much, claims

⁴⁶ H. Genn, *Hard Bargaining* (1987) 74.

are settled.⁴⁷ Ross, in particular, found that the rules of tort were transformed when they came to be used in the system in three ways: firstly, they were simplified; secondly, they were made more liberal; and thirdly, they were made more inequitable. Let us explain each of these features in turn, and reflect upon how the facts in most cases are actually found.

In practice, the rule that fault must be proven is too uncertain to apply to the individual circumstances of particular accidents. The rule has to be *simplified* and the facts found easily in order to process the claim. For reasons of cost and administrative efficiency, insurers have been forced to substitute other criteria for the theoretical tort analysis. Mechanical rules of thumb replace any detailed investigation into blame. For example, in practice the driver of the car that runs into the back of another is invariably found to be the one who is negligent. Similarly, the driver of the car emerging from the junction is the one presumed to be at fault for the ensuing collision. There is neither the time nor resources to instruct experts to analyse the scene of each road accident and precisely calculate the series of events leading to the accident: what really happened, what the parties did and might have done, receives little examination. Ross concludes:

‘The price paid is reduction of any meaningful consideration of fault and the substitution of mechanical presumption for scientifically based investigation.’⁴⁸

Economic pressures mean that cases are disposed of on the basis of very limited paperwork alone, and this may bear only a limited relationship to what actually occurred. Even if a case gets to court it has been argued that the findings of fact are likely to be so uncertain that you might as well toss a coin to determine the result.⁴⁹ Although these generalisations about how the facts are found and how litigation is

⁴⁷ See H. Genn *id.*, D. Harris *et al op. cit.*, n. 9 and, in the USA context, H. L. Ross, *Settled Out of Court* (1980). The major findings are supported by more recent empirical studies and, in particular, by T. Goriely *et al, op. cit.*, n. 25. But see the critique of Genn’s work in R. Dingwall *et al*, ‘Firm Handling: The Litigation Strategies of Defence Lawyers in Personal Injury Cases’ (2000) 20 *Legal Studies* 1.

⁴⁸ Ross *id.* 100 discussed in T. Baker, ‘Liability Insurance as Tort Regulation: Six Ways that Liability Insurance Shapes Tort Law in Action’ in G. Wagner, *Tort Law and Liability Insurance* (2005). See also the influence of bureaucratic as opposed to legal rules in S. Halliday *et al, op. cit.*, n. 20.

⁴⁹ D. W. Elliott and H. Street *op. cit.*, n. 24, 243.

conducted do not apply to all insurers for every type of case,⁵⁰ they reveal that the basis upon which claims are decided is very different from the image of justice which emphasises due process considerations in determining what really happened.

One effect of these pressures upon insurers to dispose of cases efficiently is that the system is very much more *liberal* than it may appear. Ross revealed that many more claims succeeded than the strict rules of tort - emphasising the need to prove fault - would allow. Often insurers pay something for claims which, if they were to be fully investigated, would be without legal foundation. As a result

‘... wherever there is insurance there is ... a closer approximation to the objectives of social insurance in fact than the doctrines of tort law would lead one to suppose.’⁵¹

However, Ross also found that this liberality is but part of a system which overall is weighted in favour of insurers and results in much *inequality*. Indeed the case often used to illustrate the general inequalities in the legal system involves a ‘one-shotter’ accident victim suing a ‘repeat player’ insurer.⁵² Delay, uncertainty, financial need and other pressures cause claimants to accept sums much lower than a judge would award. The eagerness of claimants and their solicitors to get something from the system is reflected in the fact that, in the past, in two out of three cases they accepted the very first formal offer made to them by the ‘risk neutral’ insurer.⁵³ Those claimants who can withstand the pressures of litigation do better than those who cannot, with the result that those from a higher social class or wealthier background are more likely to succeed.⁵⁴ Those who suffer most are the severely injured. Although in the greatest need, they will find their high value claim scrutinised in

⁵⁰ R. Dingwall et al, op. cit., n. 47.

⁵¹ F. V. Harper and F. G. James, *The Law of Torts* (1956) s 13.7.

⁵² The seminal article is M. Galanter, ‘Why the “Haves” Come out Ahead’ (1974) 9 *Law and Society Rev* 95. However, Dingwall et al op. cit., n. 47 emphasise that not all defendants in personal injury cases are ‘repeat players’ and they should not be treated as a homogenous group. Other limits of the article were examined in an anniversary special issue in (1999) 33 *Law and Society Rev* 795.

⁵³ D. Harris et al, op. cit., n. 8 table 3.3. Although a more recent study discloses more bargaining, almost a third of cases still settled after only one offer, and two thirds settled after two. T. Goriely et al op. cit., n. 25, 154. C. Leech reports that her firm accepted only a quarter of the first offers made in 540 settled cases. ‘Better in than out’ [2005] *Law Society Gazette* 10 (January 6).

⁵⁴ L. Ross op. cit., n. 47.

detail and processed very differently from the average case which typically involves but a minor upset and little, if any, financial loss. Those seriously injured are much less likely to receive 'full' compensation than those suffering minor injury. By contrast, the great majority of claimants quickly recover from their minor injury and, for a variety of reasons, are likely to emerge over-compensated for their pecuniary loss.⁵⁵

The overall result of the settlement system is that rough and ready justice is dispensed, much influenced by insurance company personnel and procedures, and driven by the needs of the insurance industry and the cost of the legal process. The system produces arbitrary results that bear only a limited relationship to the portrayal of justice contained in the traditional tort textbook.

6. Tort Focuses upon Compensating Financial Loss and Serious Injuries

One image of tort is of a caring system that compensates those who are especially needy when they are suddenly struck down by misfortune. Following a serious injury, the claimant may become very short of money. He may be unable to work. Sooner or later, depending upon his work status, any support from his employer will be withdrawn and he may lose his job. Savings, if any, will run out and reliance only upon the meagre resources provided by the welfare state could prove difficult. He may be unable to support his family, the mortgage may not be paid and the home may then come under threat. The claimant's loved ones indirectly may then be among the sufferers. In addition, the claimant's injury may need continuing care. Certain medical equipment and rehabilitation treatment may not easily be obtained from the National Health Service. The cost of providing it privately can be very high. Without financial assistance, nursing support may be reduced to a minimum, recovery may be delayed, and pain increased. To relieve these concerns about money there is the tort system. One image of tort is that it is a system which provides direct financial support which is much needed by recipients of compensation who are seriously injured. Who could possibly question this basic humanitarian function of tort law and deny its efficacy?

⁵⁵ D. Dewees, D. Duff and M. Trebilcock, *Exploring the Domain of Accident Law: Taking the Facts Seriously* (1996) 19. P. A. Bell and J. O'Connell, *Accidental Justice: The Dilemmas of Tort Law* (1997) 63.

Unfortunately the truth of the matter is again far removed from the picture that has just been painted. Firstly, it is not the case that damages in tort are predominately awarded to those who have been seriously injured. The great majority of claimants suffer only very minor injury, although it is true that those seriously injured receive a substantial portion of the total damages awarded. Secondly, financial loss comprises but a small part of the overall damages bill. Instead it is non-pecuniary loss that accounts for a disproportionate amount of damages. Pain and suffering and loss of amenity comprised two thirds of the total awarded thirty years ago,⁵⁶ and it has remained at about that level.⁵⁷

The extraordinary importance given to pain and suffering, as opposed to financial loss, reflects the fact that most awards are for minor injury and involve relatively small sums. The average payment is less than £5,000⁵⁸ which is approximately two month's average salary. In these minor cases claimants suffer very little, if any, loss of earnings and rarely incur medical costs. Future financial loss occurs in only 7% of cases and amounts to less than 9% of the total damages bill.⁵⁹ Over half of all claims

⁵⁶ Pearson Commission op. cit., n. 5 vol 2 table 107.

⁵⁷ For example, the Health and Safety Executive estimated that the cost of including pain and suffering would increase payroll costs from 1% to 2.5% in an integrated compensation scheme for work injury. Greenstreet Berman, *Changing Business Behaviour - Would Bearing the True Cost of Poor Health and Safety Performance Make a Difference?* (2002). In the USA pain and suffering has been found to constitute 84% of damages for non-fatal injury resulting from medical malpractice. J. Hersch, J. O'Connell. and W. Kip Viscusi, 'An Empirical Assessment of Early Offer Reform for Medical Malpractice' (2007) 36 J Legal Studies S231, S239-44.

⁵⁸ The median figure was £2,500 in the survey of 81,000 cases receiving legal aid and closed in 1996-97 in P. Pleasence, op. cit., n. 36, fig 3.17. P. Fenn and N. Rickman, *Costs of Low Value Liability Claims 1997-2002* record average damages of only £3,000 for employers' liability accident claims. In a survey of conditional fee claimants in 2011 half of them received less than £5,000. Insight Delivery Consultancy, *No Win No Fee Usage in the UK* appendix 5 of the Access to Justice Action Group, *Comments on Reforming Civil Litigation Funding* <http://www.accessjusticeactiongroup.co.uk/home/wp-content/uploads/2011/05/NWNF-research.pdf>

⁵⁹ Pearson Commission op. cit., n. 5 vol 2 para 44 and table 107. However, ten years ago the ABI estimated that 46% of the value of claims between £100,000 and £250,000 comprised future loss. Lord Chancellor's Department, *Courts Bill: Regulatory Impact Assessment* (2002) table 8.

are made by those who have suffered a whiplash injury in a road accident.⁶⁰ Although the effects of whiplash in some cases can be very disabling, for the majority the pain and discomfort is temporary. Claimants are often left with symptoms which are difficult to disprove.⁶¹

In practice, therefore, the claimants in tort who suffer catastrophic effects as a result of their accident are very unusual. Instead nearly all suffer very minor injuries and soon make a full recovery. They are not left with any continuing ill effects. In most cases the accident does not even result in a claim for social security benefit.⁶² It is these minor injury cases which account for the extraordinarily high costs of the system compared to the damages it pays out.⁶³ But the essential point to note here is that the image of the tort system as caring for the immediate financial needs of mostly severely injured people in society is far from the reality.

7. Tort Awards Full Compensation for Losses Suffered

Although most injuries compensated by tort are minor, a few are much more serious and account for a substantial amount of the damages paid. In 2002 insurers estimated that only 1% of all cases in the tort system resulted in a payment of £100,000 or more. However, these few cases were responsible for 32% of the total

⁶⁰ For 2011-12 the Compensation Recovery Unit recorded 540,000 such claims out of a total which just exceeded a million. Para 1.10 of the Impact Assessment of Consultation Paper CP 3/2013 *The Damages Act 1996: The Discount Rate*. Whiplash injury accounts for 70% of all road traffic claims. Ministry of Justice, Consultation Paper CP17/2012 *Reducing the Number and Costs of Whiplash Claims* para 18.

⁶¹ Ministry of Justice, Consultation Paper CP17/2012 para 6.

⁶² The Compensation Recovery Unit issues a nil certificate in 70 per cent of cases. R. Lewis, *Deducting Benefits from Damages for Personal Injury* (1999) para 14.05.

⁶³ The Pearson Commission op. cit., n. 5 vol 1 para 256 estimated that the cost of operating the tort system amounted to 85% of the value of tort payments distributed to claimants. The Lord Chancellor's *Civil Justice Review* (Cm 394, 1988) para 432 estimated that the cost of the tort system consumed 125% to 175% of damages awarded in the County Court. Lord Justice Jackson also found evidence of disproportionately high costs in his *Review of Civil Litigation Costs: Final Report* (January 2010). Data collected for one survey showed that for 280 cases which had come before the District Court the claimant costs alone amounted to £1-80p for every £1 of damages paid. On average, costs exceeded damages for cases settled up to £15,000 in the 'fast track' procedure.

damages paid out by the system.⁶⁴ It is these serious injuries that are more likely to come to public attention, partly because they are more likely to go to court and be reported in newspapers. These accounts in the press are often written so as to suggest that the damages award is akin to a very large pools win. They may even give rise to feelings of envy because of the amount of the ‘windfall.’ Perhaps this response is understandable in the case of a reader who has suffered a disability and is unable to claim in tort. However, it is less easy to excuse inducing jealousy in other people. What is rarely explored by the press is the suffering and loss of the victim and how his day-to-day life has dramatically changed. The newspapers only rarely couple the compensation paid with details of the problems faced by those who have suffered, for example, spinal injury or brain damage. Instead the impression that is often left is that these tragic victims are exceptionally well cared for by society and that many of them are among the growing number of new millionaires.

It is certainly true that the recipients of tort damages are much better treated than the majority of accident victims for the latter are left to rely upon their own resources as supplemented by the safety net of the welfare state.⁶⁵ However, it is misleading to suggest that victims of serious injury will have all their needs met by the tort system. Compensation has traditionally been awarded in the form of a lump sum and the experience of past decades has proven that, for those who need long term care and support, it will prove insufficient. There are many reasons for this.

One major factor causing erosion of the lump sum is that, in effect, too much allowance is made for the return on investment of the damages. A discount rate is used to allow for the fact that the claimant will receive compensation earlier than he would have had done so, for example, if he had been required to work for the wages now lost. The discount recognises that investment income can be obtained from this accelerated receipt of money. However, the discount used to calculate the damages has consistently been wrongly set; the rate has never reflected the true rate of return

⁶⁴ Lord Chancellor’s Department, *Courts Bill: Regulatory Impact Assessment* (November, 2002) table 1.

⁶⁵ Even where an accident causes incapacity for work for six months or more only a third of victims receive tort damages. Pearson Commission op. cit., n.56 vol 1 table 5.

that the claimant can actually achieve.⁶⁶ At present a claimant is expected to achieve a real rate of return above inflation and after taxation of 2.5%. With inflation at 3% and taxation costs at a further 1%, the claimant must obtain a return of 6.5% at a time when the best secure savings rate is far below that figure. It is inevitable that any lump sum awarded will be eroded much more quickly than the court presumed.

Nor have courts made enough allowance for the substantial increase in life expectancy that we can now expect. In contrast, too much allowance has been given for the prospective potential earning capacity of the disabled person.⁶⁷ All this is likely to result in the money proving insufficient in the long term. A final reason for under-compensation is that the lump sum is likely to be agreed out of court and, because of the uncertainties of litigation, will reflect a substantial discount from what a judge would award. A sum less than the actual loss suffered is thus what is normally paid. It is true that there has been a sharp increase in the cost of damages awards in the last decade.⁶⁸ However, overall it remains the case that for a variety of reasons, claimants obtaining lump sum damages are still very unlikely to receive 'full' compensation and in practice are not returned to the position they were in before the accident.⁶⁹ Most serious injuries are very much under-compensated.

⁶⁶ The introduction to the Government Actuary's Department, *Actuarial Tables For Use In Personal Injury And Fatal Accident Cases* (5th ed 2004) para 15 notes that the set discount rate has never been within 0.5% of the correct rate of return. The resulting substantial under-compensation is illustrated in the introduction to R de Wilde et al, *Facts and Figures* (13th ed 2008 - 9) and A. Lewis, 'Discount Rates' [2012] *JPIL* 40. The Ministry of Justice is presently investigating reform. See its Consultation Papers CP12/2012 and CP3/2013.

⁶⁷ R. Lewis, R. McNabb and V. Wass, 'Court Awards of Damages for Loss of Future Earnings: An Empirical Study and an Alternative Method of Calculation' (2002) 29 *J Law & Society* 406.

⁶⁸ R. Lewis, A. Morris and K. Oliphant, 'Tort Personal Injury Statistics: Is There a Compensation Culture in the UK?' (2006) 14 *Torts Law Journal* 158 and [2006] *JPIL* 87. The reasons include the rise in the real value of earnings; a reduction in the discount rate from the extraordinary 4.5% level which was used for thirty years until 1998; and the increase in awards for non-pecuniary loss as discussed in R. Lewis, 'Increasing the Price of Pain' (2001) 64 *MLR* 100.

⁶⁹ Those receiving periodical payments are much better treated. R. Lewis, 'The Indexation of Periodical Payments in Tort: The Future Assured?' (2010) 30 *Legal Studies* 391, and R. Lewis, 'The Politics and Economics of Tort: Judicially Imposed Periodical Payments of Damages' (2006) 69 *MLR* 418.

B. TORT AND THE MODERN PORTRAYAL OF A COMPENSATION CULTURE

1. The ‘Compensation Culture’

Competing with the idealised, and often misleading, images of tort law considered above is the widespread perception that tort has contributed to a damaging ‘compensation culture’.⁷⁰ Our propensity to claim is thought to have increased to such an extent that we are now seeking personal injury compensation on a routine basis regardless of fault. The media regales us with entertaining but worrying tales of claims for pure accidents and for trivial injuries. Spurious and fraudulent claims are thought to be commonplace though complaints are also levelled at legitimate claims. Increased claiming is thought to represent a decline in stoicism and personal responsibility. As such, claimants are depicted not as the victims of wrongdoing but as ‘scroungers’ and ‘self-pitying milksops’.⁷¹ For some, this state of affairs is thought to stem from longer-term developments within tort law, namely the expansion of tortious liability and the dilution of the fault principle to which the British are culturally tied.⁷² Concerns about the compensation culture are more frequently associated, however, with shorter-term developments within the tort system since the 1990s: the emergence of widespread claims advertising and direct marketing; the introduction of ‘no-win no-fee’ agreements; and the practice of paying for the referral of claims.

⁷⁰ Compensation culture generally is considered by R. Lewis, A. Morris and K. Oliphant, *op. cit.*, n. 68, K. Williams, ‘State of Fear: Britain’s “Compensation Culture” Reviewed’ (2005) 25 *Legal Studies* 499, R. Mullender, ‘Negligence Law and Blame Culture: A Critical Response to a Possible Problem’ (2006) 22 *Professional Negligence* 2, A. Morris, ‘Spiralling or Stabilising? The Compensation Culture and our Propensity to Claim Damages for Personal Injury’ (2007) 70 *MLR* 349 and J. Hand, ‘The Compensation Culture: Cliché or Cause for Concern?’ (2010) 37 *J Law & Society* 569.

⁷¹ P. Toynbee, ‘A compensation culture makes victims of us all’, *The Guardian*, 21 April 1999.

⁷² P. S. Atiyah *op. cit.*, n. 5, F. Furedi, *Courting Mistrust: The Hidden Growth of the Culture of Litigation in Britain* (1999), D. Lloyd, ‘The Compensation Culture: A New Legal Paternalism?’ in E. Lee (ed), *Compensation Crazy: Do We Blame and Claim Too Much?* (2002), C. Harlow, *State Liability: Tort Liability and Beyond* (2004).

In the 1970s personal injury claims were handled by general practice solicitors who waited passively for clients' instructions. By the late 1990s, however, personal injury had become a specialist area of practice and lawyers were advertising for work.⁷³ Seeing the potential in the market, claims management companies (CMCs) emerged.⁷⁴ CMCs realised that they could make money by recruiting clients and selling them on to lawyers. They engaged in mass claims advertising on television, on the radio, in newspapers and on billboards. They also made direct approaches to people on the streets, in housing estates and outside schools.⁷⁵ Some even offered financial inducements to claim. Solicitors' conduct rules which prevented them from paying CMCs for the referral of claims were flouted on a regular basis and so the ban on such payments was lifted in 2004.⁷⁶ In response to concerns about unethical practices, the government began to regulate the operation of CMCs in 2007.⁷⁷ Whilst such companies can no longer make direct approaches in person, they have adapted by sending unsolicited text messages and making unsolicited phone calls.⁷⁸ There are now 2,500 CMCs registered for personal injury work, and over three-quarters of the population have reported being contacted about a claim.⁷⁹ Lawyers commonly paid between £600 and £800 for each referral, and although this practice has now been

⁷³ R. Abel, *English Lawyers between Market and State: The Politics of Professionalism* (2003) and H. Kritzer, 'The Fracturing Legal Profession: The Case of Plaintiffs' Personal Injury Lawyers' (2001) 8 *International Journal of the Legal Profession* 225.

⁷⁴ Boleat Consulting, *The Claims Standards Council* (December 2005).

⁷⁵ National Association of Citizens Advice Bureaux, *Door to Door: CAB Clients' Experiences of Doorstep Selling* (2002).

⁷⁶ P. Rohan, 'Law Society Votes to Allow Referral Fees', *LS Gazette* (9 January 2004). Vanilla Research, *Referral Arrangements Research* (2010), Charles River Associates, *Cost Benefit Analysis of Policy Options Related to Referral Fees in Legal Services* (2010), Legal Services Board, *Referral Fees, Referral Arrangements and Fee Sharing: Decision Document* (2011) and A. Higgins, 'Referral Fees – The Business of Access to Justice' (2012) 32 *Legal Studies* 109.

⁷⁷ The Compensation Act 2006 s 4 and the Compensation (Claims Management Services) Regulations 2006 (SI No 3322).

⁷⁸ M. Boleat, (2010), Ministry of Justice, *Claims Management Regulation Annual Report 2010/2011* (2011). Lord Young raised concerns about the inadequacy of claims management regulation in *Common Sense Common Safety* (2010).

⁷⁹ ABI, *News Release 29/12*, 19 June 2012.

banned, there are reservations as to whether the ban will be effective.⁸⁰ Overall, the market in claims has become big business.

This growth in claims advertising, CMCs and payments for referrals was fuelled by the privatisation of funding for personal injury claims in 2000. Legal aid was largely abolished and the use of conditional fee agreements (CFAs) was expanded.⁸¹ Under these agreements claimant lawyers could secure an increase in their fees in each case that they won. They could recover up to double their costs if they were successful but nothing at all if they lost.⁸² Claimants themselves were encouraged to litigate under these ‘no-win no-fee’ deals because the only financial risk to which they were exposed was liability for the defendant’s costs if the case was lost. Even though in most cases this risk was only a remote one, further protection was at hand: for a suitable premium, insurance could be arranged so as to relieve the claimant of any concern over funding his claim. Damages could thus be sought at no financial risk to the claimant. It is widely perceived that this gave claimants every reason to ‘have a go’.⁸³ As such, tort is thought to have become a moral hazard.

The unrestrained culture of claiming thought to have stemmed from these developments has led to widespread concerns that tort has become a burden which is undermining rather than underpinning society. Organisations, businesses, public bodies and individuals are said to have become increasingly risk averse for fear of

⁸⁰ R. Jackson, *op. cit.*, n. 56 para 3.18, and the Consultation Response of the Ministry of Justice, *Extension of the Road Traffic Accident Personal Injury Scheme: Proposals on Fixed Recoverable Costs* (2013) para 25. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 s. 56 prevents payments for referrals.

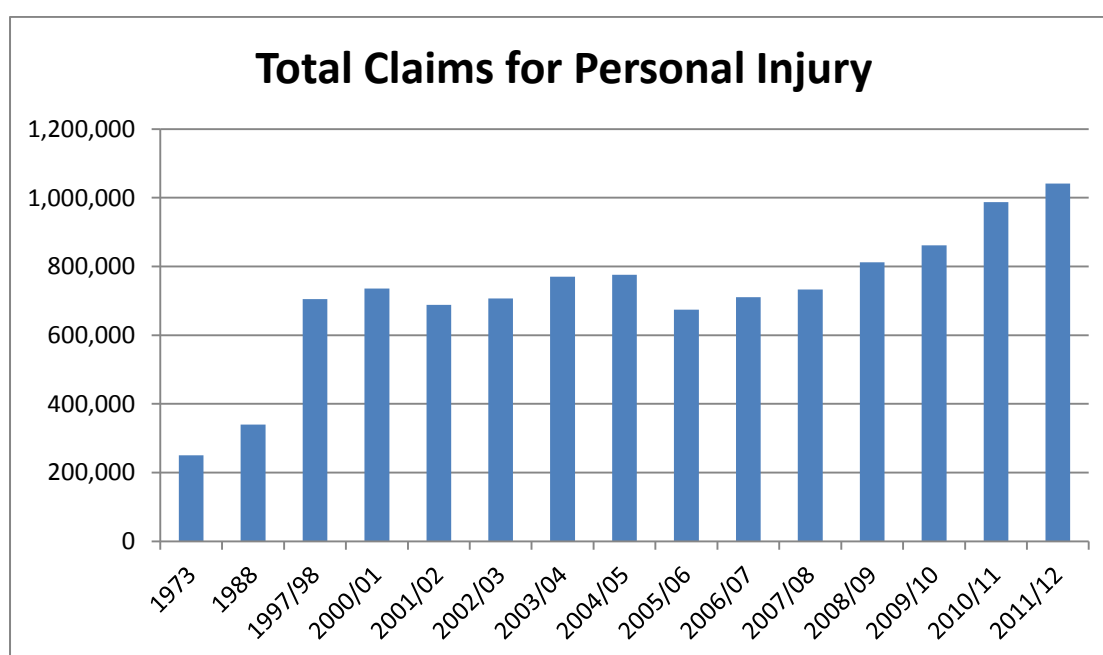
⁸¹ The Access to Justice Act 1999 s 27 and s 29. R. Moorhead, ‘Conditional Fee Agreements, Legal Aid and Access to Justice’ (1999) 33 *University of British Columbia Law Review* 471, R. Abel, ‘An American Hamburger Stand in St Paul’s Cathedral: Replacing Legal Aid with Conditional Fees in English Personal Injury Litigation’ (2001) 51 *DePaul Law Review* 253.

⁸² In practice in nine out of ten personal injury cases the uplift in fees was limited by industry wide agreements. In road traffic accidents it was generally restricted to 12.5%, in employment accident cases to 25% and in employment disease cases to 27.5%. V. G. Wignall (ed) *Conditional Fees, A Guide to CFAs and Litigation Funding* (2008).

⁸³ In response to such concerns the Legal Aid, Sentencing and Punishment of Offenders Act 2012 s. 44 makes claimants liable to pay the uplift in fees out of their damages. However, they can still initiate a claim without incurring any expense.

being sued. The papers carry stories of councils felling trees, teachers refusing to take children on school trips, and volunteering in decline. Mounting claims are also thought to have affected the availability and affordability of liability insurance. The compensation culture is said to be ‘plundering the UK economy’ and ‘cutting a swathe through public service budgets’.⁸⁴ As such, in stark contrast to the traditional portrayal, the modern image of tort is very critical. In common with the traditional portrayal, however, we can point to a dissonance between perceptions of tort in culture and the reality in practice.

2. Trends in Our Propensity to Claim Personal Injury Compensation



Overview

Whilst historical data are in short supply, those which are available support the view that there over the long-term there has been a very substantial increase in the number of personal injury claims. They appear to have arisen four-fold since the 1970s. In 1973 the Pearson Commission estimated that there were about 250,000 claims.⁸⁵ In 1988 it was thought that claims had grown to around 340,000.⁸⁶ However,

⁸⁴ ‘Dead budgies and muddy boots cost us a fortune’, *The Times* 15 July 2003.

⁸⁵ Pearson Commission op. cit., n. 5 vol 2 para 59.

⁸⁶ *Civil Justice Review* op. cit., n. 14 para 391. This estimate is given with no indication of the facts upon which it is based and seems not to be derived from the research from Inbucon Management Consultants, *Civil Justice Review: Study of Personal Injury Litigation* (1986).

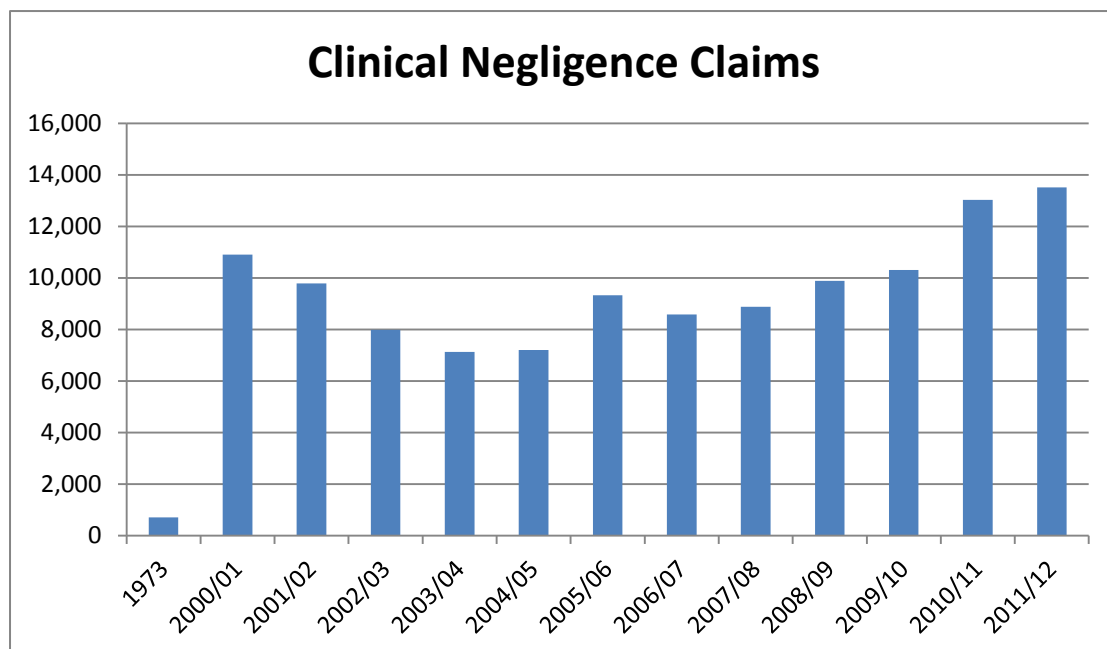
by 2012 claims had multiplied to over a million.⁸⁷ The exponential increase in the annual claim rate is such that today an action is brought for every 60 people in the UK. To arrive at this figure we no longer need to rely on estimates. This because we have detailed statistics compiled by the Compensation Recovery Unit (CRU). This organisation was set up by government in 1989 in order to recover from damages any social security benefit that the claimant receives as a result of his injury. Reliable data is generated on the number of claims, no matter whether successful or unsuccessful, settled or disposed of by a court hearing. Unfortunately, CRU's data has only been publicly available since 2000,⁸⁸ and as a result it is not possible to track the effect of the increase in claims advertising throughout the 1990s.

However, the figures we now have are of especial value in one particular respect: they seem to show that the removal of legal aid and the expansion of CFAs had no immediate effect on the number of claims brought. Indeed it is clear that between 2000 and 2006 when the media, politicians and representative groups were bemoaning our ever increasing propensity to sue, claims remained relatively stable. In fact between 2003 and 2005 there was actually a decline in the number of accident claims, as opposed to those for disease. It is true that since 2006 claims have increased year on year but it would be misleading to talk about a general increase in our propensity to claim because, as we shall see, different types of injury have different claim patterns.

Clinical Negligence

⁸⁷ The Compensation Recovery Unit op. cit., n. 5 records 1,041,150 claims. The reliability of the figures is discussed in R. Lewis, A. Morris and K. Oliphant op. cit., n. 68.

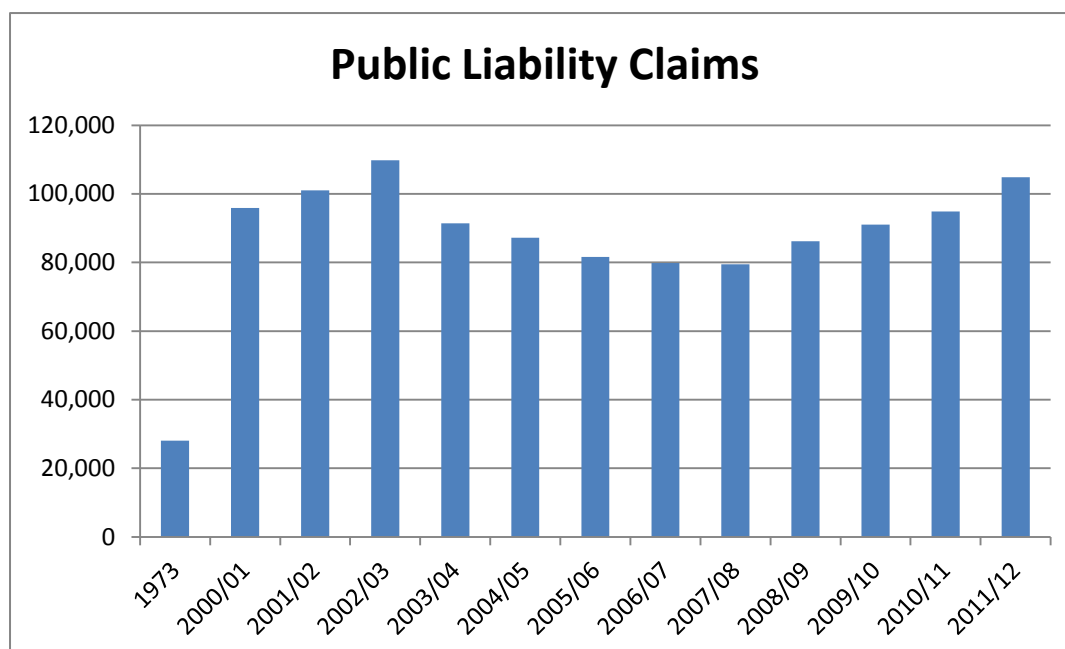
⁸⁸ However, data for 1997-98 derived from an internal memorandum of the Department of Social Security were uncovered by R. Lewis during his research for *Deducting Benefits from Damages for Personal Injury* (1999) chapter 14.



From 2000 until 2010 the number of clinical negligence claims fluctuated at around 10,000 a year but did not increase overall. However, claims had significantly increased from 1973 when the Pearson Commission estimated that there were only about 700. In the past two years claims have markedly increased by almost a third to over 13,000, and are now 87% more than they were seven years ago. Despite this they continue to constitute only 1% of all personal injury claims. Moreover, there appears to be a strong culture of not claiming in this context. The Department of Health has suggested that there are in the region of 850,000 ‘adverse events’ annually in the National Health Service, half of which may be avoidable.⁸⁹ Whilst a crude measure, this suggests that only 2% of people with grounds for complaint go on to pursue a claim.

Public Liability

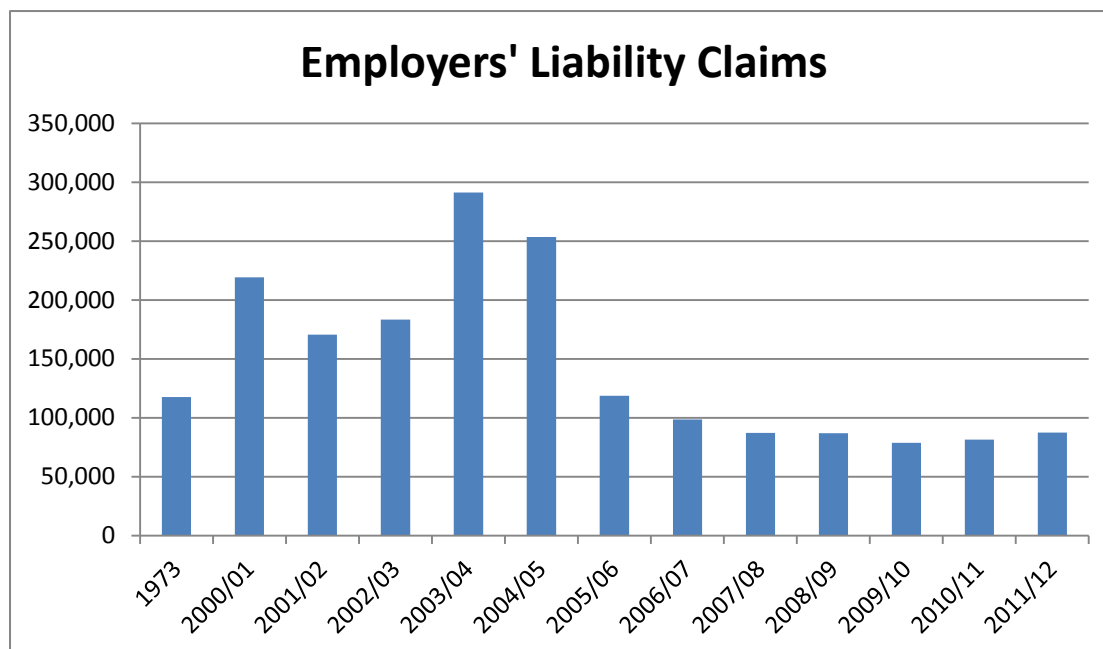
⁸⁹ Department of Health, *An Organisation with a Memory: Report of an Expert Group on Learning from Adverse Events in the NHS* (2000). T. Baker, *The Medical Malpractice Myth* (2005) chapter 2 reviews several USA studies all finding a substantial failure to claim.



The Pearson Commission did not estimate the number of public liability claims in 1973 though, at most, they stood at 28,000. Again, in the long term, there has been a very significant increase in claims. There are now around 100,000, being about 10% of the total. However, in the short-term, although numbers have fluctuated, there has been no substantial increase. It is difficult to capture data on the potential number of claims in this context as compared with the actual number of claims. However, in 2002 there were over 5 million home and leisure accidents that caused a serious enough injury to warrant a visit to hospital.⁹⁰ Whilst it is impossible to estimate the number of such accidents involving an element of negligence, it is clear that the number of accidents occurring in public spaces is very much larger than the number of public liability claims.

Employers' Liability (Accident and Disease)

⁹⁰ This includes approximately 520,000 accidents on an urban road, street or pavement (excluding RTAs), 58,000 accidents in a shopping area, 22,500 accidents in business or leisure public buildings, 244,500 accidents in school, 38,000 in public playgrounds and 44,000 accidents in public houses. These estimates are derived from the Home Accident Surveillance System (HASS) and Leisure Accident Surveillance System (LASS) run by the Department of Industry, both of which closed in 2003. The data are now available from the Royal Society for the Prevention of Accidents: <http://www.hassandlass.org.uk/query/reports.htm>



Between 2000 and 2005 the number of employers' liability claims fluctuated considerably, reaching 291,000 in 2004. This was largely due to the establishment in 1999 of temporary special schemes of compensation for coalmining diseases.⁹¹ These schemes closed in 2004 and since then the annual number of employers' liability claims has fallen by two thirds to less than 90,000. Whilst there was a 7% increase in 2011-12, there are still fewer claims made today than in 1973. They now account for only 8% of all claims whereas in 1973 they represented 45%. Arguably this accords with increased health and safety at work. However, according to the Health and Safety Executive there were over 115,000 injuries resulting in 3 or more days off work as reported by employers in 2010-11. In addition, 1.2 million working people were said to be suffering from a work-related illness, half a million arising that same year.⁹² On the basis of these statistics the Trades Union Congress estimates that only 1 in 10 people injured at work go on to claim compensation.⁹³

⁹¹ The claims of miners in respect of, firstly, respiratory disease, and secondly, the use of vibrating tools led to settlement schemes which were called 'the biggest personal injury schemes in British legal history and possibly the world.' From 1999–2004 about 760,000 claims were registered. Department of Trade and Industry, *Coal Health Claims* <http://www.dti.gov.uk/coalhealth/01.htm>

⁹² <http://www.hse.gov.uk/statistics/>

⁹³ S. Pickvance, 'A Little Compensation' (2005) *Hazards*, www.hazards.org/compensation/alittlecompensation.pdf.

3. The Dissonance between the Modern Image of Tort and Reality

A dissonance has arisen between the modern image of tort and reality in several respects. Firstly, whilst there has been a moderate long term increase in the number of clinical negligence and public liability claims, this increase has not been sustained in the employers' liability context where claims are less than they were forty years ago. Secondly, the perception that claims advertising, 'no-win no-fee' agreements and payments for referrals have led to increasing numbers of claims since the late 1990s is misplaced. In view of the number of accidents that could lead to claims, the culture of claiming in the UK is relatively weak in the clinical, employment and public context. Thirdly, the notion that we are more willing to claim for trivial injuries than in the past is unsupported by evidence. Although it is true that the majority of claims involve minor injuries with a value of less than £5,000, this has long been the case. Fourthly, concerns that spurious claims are commonplace are exaggerated. Inevitably there are fraudulent claims within the system. There have been particular concerns in respect of public liability claims. In a 2004 survey 68% of councils reported an increase in the number of tenuous and fraudulent claims for compensation.⁹⁴ Such evidence is anecdotal, however, and the extent of such claims remains unclear. Public liability claims have not increased substantially since 2000 and this implies that developments within the tort system itself have not led to widespread spurious claiming.

In light of this, it is difficult to support complaints that tort in recent years has become a burden as a result of increasing numbers of claims, as opposed to the increasing cost of claims.⁹⁵ Indeed a government review found that complaints about the availability and affordability of employers' liability insurance had been exaggerated in the media. Increases in premiums were largely due to non-tort related factors, including the under-pricing of insurance, a fall in investment income and the

⁹⁴ Local Government Association, *Suing the Council – Helping the Citizen or Harming the Community* (2004). Contrast findings that claims against councils for failures in highway maintenance have not significantly increased in S. Halliday, J. Ilan and C. Scott, 'The Public Management of Liability Risks' (2012) 31 *OJLS* 527, 536.

⁹⁵ For references see A. Morris, 'The Compensation Culture and the Politics of Tort' in T. T. Arvind and J. Steele (eds), *Tort and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (2012).

increasing cost of reinsurance following the terrorist attacks in September 2001.⁹⁶ In addition, the extent of risk aversion appears to have been exaggerated and stems to a large extent from perceptions surrounding tort practice rather than tort practice itself.⁹⁷ Finally, complaints that claiming represents a decline in personal responsibility choose to privilege anecdotal critical accounts: long-term increases in claiming could equally be presented as a desirable increase in access to justice and defendant accountability.

The fact that recent developments within the tort system have not increased levels of claiming is certainly surprising. Felstiner *et al* explain that claims are socially constructed through a process of naming, blaming and claiming.⁹⁸ In accordance with this process an individual transforms an unperceived injurious experience into a perceived injurious experience (names); attributes that injurious experience to the fault of another individual or entity (blames); and then voices that grievance to the person or entity believed to be responsible (claims). The authors stress that each stage of the transformation is ‘subjective, unstable, reactive, complicated and incomplete’. Individuals name, blame and claim by perceiving, interpreting and reacting to circumstances and events in particular ways and a wide variety of factors will affect an individual’s response to injury.⁹⁹ Moreover, to move through this naming, blaming and claiming process, the injured must be able and willing to do so, which will not always be the case. Individuals may name but not blame or blame but not claim. Levels of claiming, therefore, depend on the prevalence of external factors (which affect our ability and willingness to transform injuries into

⁹⁶ Department for Work and Pensions, *Review of Employers’ Liability Compulsory Insurance, First Stage Report* (2003).

⁹⁷ This was the main finding of the Better Regulation Task Force, *Better Routes to Redress* (2004) p. 3. For example, Bury St Edmunds won a ‘Flowers in Bloom’ award despite reports that its council was taking down its’ hanging baskets for fear of being sued: K. Williams, ‘Politics, the Media and Refining the Notion of Fault: Section 1 of the Compensation Act 2006’ [2006] *JPIL* 347.

⁹⁸ W. Felstiner, R. Abel and A. Sarat, ‘The Emergence and Transformation of Disputes: Naming, Blaming and Claiming’ (1981) 15 *Law & Soc Rev* 631.

⁹⁹ M. Galanter, ‘Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) About Our Allegedly Contentious and Litigious Society’ (1983) 31 *UCLA Law Rev* 4, 61.

claims), and upon our legal consciousness (which shapes our perceptions of our ability to claim, and informs our willingness to do so).

Research has demonstrated that, in the past, potential claimants were unable to claim because they were not aware they could do so or did not know how.¹⁰⁰ In addition, their willingness to claim was reduced by concerns that claiming would be stressful, expensive and intimidating and by doubts about the utility of claiming. We would expect widespread ‘no-win no-fee’ advertising, fuelled by payments for referrals, to change this.¹⁰¹ Most obviously, advertising raises our awareness not only of the possibility of claiming after an accident but also how to claim. Advertising also seeks to increase our willingness to claim in several ways. Firstly, it may reduce concerns we have about claiming and seeking legal advice. The public are able to receive anonymous advice through phone lines, thereby removing the fear of dealing with lawyers face-to-face. Adverts convey the impression that claiming is quick, easy and stress-free by avoiding images of judges and court scenes. The claims process is portrayed as routine, depersonalised and administrative rather than adversarial in nature. In addition, using the ‘no-win no-fee’ tagline, adverts seek to reassure the public that it will be both free and easy to obtain legal advice and representation. Secondly, adverts seek to reinforce the utility of claiming. They give examples of compensation awarded for various injuries sustained in different contexts, thereby highlighting the financial worth of pursuing a claim. They also imply that claims are frequently successful. Finally, adverts seek to create a sense of entitlement and talk of ‘rights’ to compensation.¹⁰²

Nevertheless, claim rates remain low for most injuries. It is not clear from the limited data available whether claims’ advertising has simply not been effective in increasing our general ability and willingness to claim or, alternatively, whether it has been effective in encouraging us to seek legal advice, but that levels of claiming are

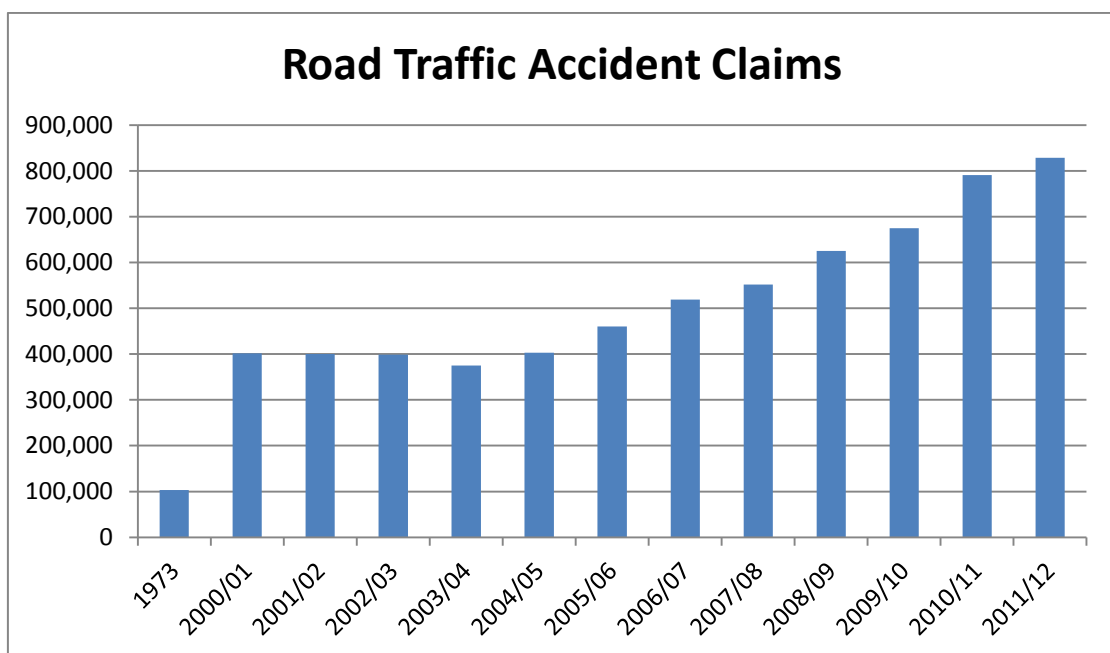
¹⁰⁰ D. Harris et al, op. cit., n. 8, 65 and H. Genn, op. cit., n. 46 at 50.

¹⁰¹ See A. Morris op. cit., n. 70, 372, and A. Morris, ‘Claims Advertising: Access or Excess?’ (2005) 155 *NLJ* 345. General attitudes to claims advertising are considered by Millward Brown, *Effects of Advertising in Respect of Compensation Claims for Personal Injury* (2006).

¹⁰² It has been suggested that feelings of entitlement are one reason for the higher rates of claiming in the United States compared with the UK. B Markesinis, ‘Litigation-Mania in England, Germany and the USA: Are we so Very Different?’ (1999) 49 *CLJ* 233, 254.

being restrained by lawyers on economic grounds. Whilst CFAs may remove the financial risk of claiming from claimants, they transfer that risk to the lawyer. Lawyers working on a ‘no-win no-fee’ basis must have sufficient resources to invest in a claim until its conclusion and take the risk of not getting paid if the claim fails. There is some evidence of CFA lawyers screening out economically unattractive claims as a result, although our knowledge and understanding of CFA practice is limited.¹⁰³ Whatever the reasons for most types of injury having low claim rates, that fact is at odds with modern perceptions of tort.

4. The Exception in Relation to Road Traffic Accidents



In stark contrast to other types of claim, there has been both a long-term and short-term increase in the number of road traffic accident (RTA) claims involving personal injury. Between 2000 and 2004 the number of RTA claims actually declined but since 2004 there has been an increase every year with the result that over the last six years the total has doubled to 828,000. This increase is largely responsible for the long-term increase in the total of all personal injury claims. In 1973 RTAs constituted

¹⁰³ P. Fenn, A. Gray and N. Rickman, *The Impact of Conditional Fees on the Selection, Handling and Outcome of Personal Injury Cases* (2002), P. Fenn, A. Gray and N. Rickman, *The Impact of Sources of Finance on Personal Injury Litigation* (2002), and R. White and R Atkinson, ‘Personal Injury Litigation, Conditional Fees and After-the-Event Insurance’ (2000) 19 *CJQ* 118.

41% of all personal injury claims. By 2001 this had increased to 54% and by 2012 RTAs constituted 80% of all claims.

Other statistics make the rise in RTA claims appear anomalous. The increase has occurred despite the fact that the number of casualties reported to the police is falling: just over 222,000 road casualties were reported in 2009 being less than a third of the number of claims pursued that year.¹⁰⁴ From 2006-10 although the reported number of road accidents fell by 20%, RTA claims rose by 60%.¹⁰⁵ In addition, during that period claims for damage to vehicles alone fell, partly because people drove less as a result of rising fuel costs. However, the proportion of RTA claims with a personal injury element continued to rise.¹⁰⁶ One conclusion is clear: a large majority of people injured in road accidents go on to seek compensation and there is a strong culture of claiming in this context.

It is generally accepted that the increased number of RTA claims in recent years is causing problems with the affordability and availability of car insurance,¹⁰⁷ although this can be exaggerated. In addition, there are concerns about the quality and seriousness of RTA claims. Their increasing number is largely attributable to the rise in whiplash injuries. These now constitute 70% of all RTA claims.¹⁰⁸ Supposedly, by 2004 the UK had substantially more whiplash cases than any other European country and since then the number of claims has doubled.¹⁰⁹ Although whiplash can result in

¹⁰⁴ <http://www.dft.gov.uk/statistics/series/road-accidents-and-safety/>. The Department for Transport *Reported Road Casualties in Great Britain: 2010 Annual Report* (2011) acknowledges that not all casualties are reported to the police and estimate the annual actual number of road casualties as 730,000. However, even using this figure the number of RTA claims appears anomalous.

¹⁰⁵ Ministry of Justice Consultation Paper CP17/2012 *Reducing the Number and Cost of Whiplash Claims* para1.

¹⁰⁶ D. Brown and S. MacDonnell, *Update from the Third Party and PPO Working Parties* (2012) Faculty of Actuaries.

¹⁰⁷ House of Commons Transport Committee, Fourth Report, *The Cost of Motor Insurance* (HC 591, 2011) and *Cost of Motor Insurance: Follow Up* (HC 1451, 2012). Office of Fair Trading, *Private Motor Insurance: Summary of Responses to the OFT's Call for Evidence* (OFT 1397, 2011).

¹⁰⁸ Above n. 60.

¹⁰⁹ European Insurance and Reinsurance Federation (CEA), *Minor Cervical Trauma Claims* (2004) 4. In its response to the Ministry of Justice Consultation, *Reducing the Number and Costs of Whiplash*

chronic disability, many claims result from low-impact collisions and involve only minor injury. There may be only a short period of pain with limited, if any, medical treatment sought; absence from work is unusual and social security benefit rarely claimed. We can at least conclude that claims for a minor or even trivial injury are more likely to be made after a road accident than in other contexts.

It also appears that we are more likely to engage in fraud following a RTA. According to the ABI's own figures, the extent of fraudulent whiplash claims is about 7%. One problem is that whiplash may be established in many cases on the basis of a medical report which simply confirms that somebody has reported pain after an accident. Given the non-demonstrable nature of the injury, there are concerns about opportunistic fraud: following an accident a claimant may pretend to suffer from whiplash and manufacture or exaggerate its symptoms. There is also evidence of organised criminals arranging collisions: the Insurance Fraud Bureau estimate that there were 30,000 staged accidents in 2009.¹¹⁰ In addition, there are instances of 'phantom passengers' pretending to have been injured in a car or bus accident when in fact they were not involved at all. Whilst there is much disagreement about the extent of these different problems, claimant representatives as well as insurers recognise that fraud is an area of concern and have put forward proposals to combat it.¹¹¹

This analysis raises a number of questions. Given we are all exposed to the same 'no-win no-fee' advertising and the same funding mechanisms are available for RTAs as for other types of claim, why has such a strong culture of claiming developed after an RTA so that such claims have come to dominate the tort system? Why do we appear to be more likely to pursue trivial and/or fraudulent claims in this context? In the first part of this article we explained how compulsory insurance has influenced the types of claims pursued within the tort system. Of the two main

Claims (2013) APIL emphasise the European data is unreliable and outdated, and in its response the Law Society similarly doubts the insurers' figures.

¹¹⁰ House of Commons Transport Committee (2011) op. cit., n. 107, 17. A number of those involved in such 'crash for cash' scams have been prosecuted and imprisoned. For example, T. Thornhill, 'Crash for cash gang who staged car accidents to con insurance companies out of £3 million jailed', *Daily Mail*, 20 October 2011.

¹¹¹ APIL, *The Whiplash Report 2012: Myth or Fact?*

categories, why have road traffic claims increased significantly when those for employers' liability have actually declined?

Traditionally, one of the reasons why people were more likely to claim after an accident at work or on the road than in other contexts was because they were much more likely to come into contact with someone who advised them of the possibility of claiming. Whilst in the case of work accidents this advice usually came from a trade union, in the RTA context the advice came from a wider range of sources, including the police, breakdown companies, insurers, friends and relatives. This advice from third parties was important in providing reassurance not just about the strength of a claim but also of the appropriateness of claiming.

Arguably, those involved in an RTA may have a higher propensity to claim because the nature of the problem means they are more able and willing to move through the naming, blaming and claiming process than in other contexts. The identity of the defendant is usually clear and the cause of the accident and injury are easy to ascertain. In addition, because we are all familiar with driving, we are better able to assess whether negligence has occurred than in other contexts. We may be in a relationship with the driver at fault and any claim is less likely to damage that relationship than in the clinical or employment setting. Although the defendant in practice is an insurance company, the fact that the wrongdoer is an individual just like the claimant may make claiming less intimidating. Also, because we deal with car insurance ourselves, we are more familiar with the process if something goes wrong. All of these factors may play a role and, as a result, it may be that widespread 'no-win no-fee' advertising has been more effective in encouraging us to claim in this context. However, the strong culture of claiming can also be attributed to the following three inter-related institutional factors.

- a) *Those involved in an RTA are more likely to be contacted directly soon after the accident and encouraged to claim.*

For most types of accident the claims market usually waits for potential claimants to contact them in response to their advertising. However, it is much more pro-active in relation to RTAs. Those involved are very likely to be contacted by a CMC and/or lawyer soon after the accident and encouraged to claim. This is because it is easier for the claims market to discover who has been involved in a road accident. Garages,

breakdown companies and those involved in providing replacement vehicles sell on to CMCs the details of those who have suffered damage.¹¹² Some CMCs have also engaged in data-mining by recovering the names and addresses of people who did not make a claim at the time of their accident. They also obtain data from insurance comparison websites to pick up details of those who declared they had had an accident in the last three years.¹¹³ The largest increases in claims are in areas where claims management companies are concentrated.¹¹⁴

Surprisingly, lawyers also received details of potential claimants from liability insurers. Whilst insurers expressed concern that the payment of referral fees added to the cost of resolving claims, some decided to reduce their costs by selling on details of those motorists who were not at fault but who informed them of an accident on their policy.¹¹⁵ Indeed some insurers download their data to telesales companies who contact those involved in accidents to ascertain whether they are injured. Although the practice of paying for referrals had been in place for some time, the lifting of the ban in 2004 may go some way to explaining the increase in RTA claims since that time. The extent that claims decrease following the reintroduction of a referral fee ban in 2013 will be of interest.

‘Third party capture’ may also have contributed to this upward trend: from about 2005 insurers have tried to reduce the cost of resolving claims by making direct contact with those injured by their policyholders and offering them a settlement before they engage legal advice.¹¹⁶ It is not uncommon for accident victims to be contacted by several different sources each urging them to claim. Overall we therefore conclude that the system of encouraging people to claim after an RTA is now highly institutionalised and efficient when compared to other accidents.

¹¹² Ministry of Justice, *Claims Management Regulation Annual Report 2010/2011* (2011) 211.

¹¹³ A. Ellis, ‘Is data mining a major factor in the personal injury claims spike?’ *Post Magazine*, 1 November 2011.

¹¹⁴ Especially Manchester, Liverpool and Birmingham. D. Brown, op. cit., n. 106.

¹¹⁵ J. Straw, ‘Dirty secret that drives up motor insurance; Companies are selling drivers’ details to claims firms exploiting no-win no-fee system’ *The Times*, 27 June 2011.

¹¹⁶ Financial Services Authority, *Third Party Capture – What You Need to Consider*: http://www.fsa.gov.uk/pubs/other/third_party_capture.pdf.

b) The process for resolving RTAs is quicker, simpler and more routinised than that in place for other types of claim and has a higher rate of success.

As outlined in the first part of this article, the majority of claims are settled by insurers without the involvement of the courts. In order to process large numbers of low-value claims efficiently and economically, insurers have developed bureaucratic methods of handling claims. The role of fault has become diluted in practice and the system has become more liberal than if all cases went to court. The result is that RTA claims have a high success rate.¹¹⁷ As the number of RTA claims has increased over the years, so insurers' mechanisms for processing them have become more routinised and streamlined. This culminated in 2010 with the establishment of the 'portal' for RTA claims of up to £10,000, which provides swift, early electronic exchange of relevant claims information between claimant lawyers and insurers.¹¹⁸

Highly institutionalised remedy systems that are well known and readily available generally lead to higher rates of claiming for several reasons. They legitimise action by impliedly recognising 'the frequency and importance of a problem as well as the appropriateness of action taken in response to it'.¹¹⁹ They imply that claims are frequently successful so that it is worth having a go and they make claiming quick, cheap and stress-free and so reduce concerns about claiming. Finally, they can also encourage opportunistic and organised fraud because claims are not rigorously scrutinised or defended.

c) RTA claims are financially attractive to the legal services market.

¹¹⁷ As a rough estimate, based on CRU figures, *op. cit.*, n. 4, we calculate the average ratio of RTA settlements to claims made for the last six years as 90%. There is a time lag between claims and settlements which, given the steep recent rise in claims, makes the actual success rate somewhat higher than 9 out of 10 despite the suspected growth of unmeritorious actions which are likely to be unsuccessful.

¹¹⁸ Pre-Action Protocol for Law Value Personal Injury Claims in Road Traffic Accidents and Practice Direction 8B to the Civil Procedure Rules. J. McQuater, 'The RTA Claims Process' [2010] *JPIL* 103.

¹¹⁹ R. E. Miller and A. Sarat, 'Grievances, Claims and Disputes: Assessing the Adversary Culture' (1980) 15 *Law & Soc Rev* 525, 564. The Government planned to extend the portal to claims of up to £25,000 as from April 2013 but it has been forced to delay this measure.

The process for resolving RTA claims is very much a matter of routine. As a result they are financially attractive to lawyers because they can process them quickly and cheaply. RTA claims are particularly attractive to the CFA market compared with more complex claims. Lawyers have reported that the way to make money is to have ‘a regular throughput of small, easy cases’ requiring only low investment to proceed.¹²⁰ Because lawyers acting on a CFA basis are not paid until the conclusion of the claim it is also important that claims are resolved quickly. RTA claims fit this profile. Traditionally not only do they have a high rate of success so that the risk of ‘no-fee’ is very low, but their legal and factual simplicity means that they require only low investment and they are resolved quickly, thereby minimising problems with cash flow. In order to make money out of RTA claims on a CFA basis, however, it is necessary to process such claims in bulk using standardised documents and procedures. This increases the incentive for lawyers and CMCs to invest in generating RTA claims through direct contact and data-mining.

Overall, therefore, the process of encouraging, processing and resolving RTA claims is heavily institutionalised when compared to other types of claim. In addition, given their financial attractiveness, RTA claims have become more of a commodity. Whilst the impact of advertising is unclear, CFAs and payments for referral have certainly played a role in increasing our propensity to claim after an RTA. A circular process has occurred whereby demand has driven supply and supply has driven demand. It is clear that our propensity to claim compensation depends as much on institutionalised ways of handling different types of dispute as upon broader cultural propensities to litigate.¹²¹ Practices of claiming encouraged by this institutionalisation inevitably, however, feed into and become embedded in our wider culture. With claiming after an RTA becoming increasingly common, the experiences of other people may encourage us to claim because we feel that we are no less deserving.¹²²

¹²⁰ T. Goriely et al, op. cit., n. 25, 21.

¹²¹ M. Galanter op. cit., n. 99, 61. D. M. Engel and M. McCann (eds), *Fault Lines: Tort Law as Cultural Practice* (2009).

¹²² D. Coates and S. Penrod, ‘Social Psychology and the Emergence of Disputes’ (1981) 15 *Law & Soc Rev* 655, 658.

We may now naturally think about compensation after an accident and even come to expect it.¹²³ The overall result is that a stronger ‘cultural link’ has developed between RTAs, perception of injury and demand for compensation.

CONCLUSION

This article has outlined two sets of images of tort that predominate in the UK. The first set reflects various aspects of the traditional portrayal of justice. In contrast, the second group of images is more recent and relates to the development of a compensation culture. We have shown, in different ways and to different degrees, how these portrayals differ from the reality of tort in practice. In explaining how tort operates we have revealed significant features of the culture of tort. Tort in practice is heavily influenced by institutional arrangements. In the first part of the article we highlighted the effects of both welfare and insurance; in the second part our focus was upon the influence of the ‘no-win no-fee’ claims market which has developed in recent years. As a whole, the article shows how the operation of tort is much affected by the commercial interests and economic demands of the institutions which surround it. In relation to the modern image, the commercial imperative of the claims market is well-known, although it is much exaggerated outside the context of road traffic accidents. In relation to the traditional portrayal, however, the influence of insurance remains hidden and much under-estimated. The media ignore reality in favour of entertaining but worrying ‘tort tales’ of greedy claimants and ambulance-chasing lawyers. Tort academics, for their part, are predominantly conservative in their values and largely continue to ignore reality in favour of theory and doctrine.¹²⁴ They have done little to dispel the many myths. The images of tort we have examined fail to

¹²³ H. Kritzer, ‘Propensity to Sue in England and the United States of America: Blaming and Claiming in Tort Cases’ (1991) 18 *J Law & Society* 400, 420.

¹²⁴ D. Priel, ‘Tort, Rights and Right-Wing Ideology’ (2011) 19 *Torts LJ* 1.

reflect how the system of compensation for personal injury actually operates in practice.¹²⁵

¹²⁵ Ross *op. cit.*, n. 47, 135 says of his book: ‘This is the law as it is experienced by its clients rather than its philosophers. Perhaps in the light of some kinds of legal philosophy it is bad law. In my opinion such legal philosophy has lost contact with the reality of modern society.’