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Humanity in Tort: Does Personality Affect Personal Injury Litigation?

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***Abstract:** This article examines whether the character of people involved in personal injury claims affects their outcome irrespective of the legal rules. For example, does the personality or background of the litigants or their lawyers influence whether an action succeeds and how much damages are then paid?*

A rise in the number of claims is noted here as part of a contested 'compensation culture' in personal injury. In a demographic analysis, the article identifies typical claimants and the injuries from which they suffer. Claims have been gathered in increasing numbers by law firms in response to market pressures encouraging them to process minor injury cases in bulk. The firms have changed their structure and created 'settlement mills' where there may be little scope for individuals to affect the routine processing of small claims. By contrast, in more serious injury cases character and personality are more likely to make a difference. These findings are suggested by the author's empirical study of the views of lawyers on the operation of the claims system: practitioners who have been interviewed are given voice here.

The article challenges traditional perspectives of tort where it is often implicit that claims are resolved only in court on the basis of textbook rules on liability and damages. There has been a failure to take account of other factors which may influence both the settlement of claims and the few cases that go to trial. In this wider context the article forms part of a literature revealing that the operation of the tort system in practice differs markedly from that in theory. It calls into question those philosophies of tort liability which fail to consider how claims are actually determined.

Keywords: Tort, personal injury, litigation, socio-legal, empirical, negotiation, bargaining, compensation culture, legal profession, liability insurance, settlement mills, accident statistics.

Introduction

This article considers whether claims for compensation for injury may be influenced by the character and personality of individuals involved in the litigation process irrespective of what the legal rules prescribe. The possibility was acknowledged by a barrister interviewed as part of a wider project which provided a key source for this article. He was asked: “Apart from the black-letter law, what are the main factors which might influence whether a claim succeeds?” His immediate response was:

It's the personal stories, it's the people involved, it's the humanity. EW24

This concise reply encapsulates the theme for this article. It was expanded upon by other respondents to the survey. They gave various illustrations of how the personality of claimants, in particular, could be important to the process. Other parties said to have an influence included, as might be expected, the lawyers and insurance representatives involved in handling the claim. However, also mentioned were potential witnesses and the claimant's family. In some cases the particular defendant could make a difference but this was exceptional. For the few cases that went to trial, the particular judge was recognised as important. Overall, one interviewee concluded:

I think there's always going to be a dichotomy between the letter of the law and the practice of the law. There is bound to be, for this reason: you cannot envisage the letter of the law applying simply because the practice of the law brings into the mix other things like human resources, ability of people, subjectivity.... EW5

Although almost all personal injury claims are disposed of by negotiations which are conducted out of court,¹ there has been only limited research into factors other than the formal law that may affect these settlements. However, a major study was conducted by Laurence Ross in the USA in 1970.² He showed that there were various pressures upon insurance company negotiators which helped to determine the outcome of their claims. These

¹ Judges determine less than 1% of all cases. P. Cane and J. Goudkamp, *Atiyah's Accidents, Compensation and the Law* (Cambridge University Press, 9th ed 2018) 10.1. Out of 943 cases only two went to trial in the data supplied by insurers to Lord Justice Jackson for the *Review of Civil Litigation Costs: Final Report* (2010) chapter 2 paras 3.3 and 3.4. In the specialised area of clinical negligence only 0.7% of cases went to trial in 2016-17 according to the National Audit Office Report, *Managing the Costs of Clinical Negligence in Trusts* (2017, HC 305 session 2017 - 19) para 3.14. For earlier similar general findings see *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* (1978, cmnd 7054, chairman Lord Pearson) (the Pearson Report) vol 2 table 12, and the Lord Chancellor's Department, *Report of the Review Body on Civil Justice* (1988, cm 394). H. Genn, *Judging Civil Justice* (Cambridge University Press, 2009) chapter 2.

² H. L. Ross, *Settled Out of Court: The Social Process of Insurance Claims Adjustment* (Aldine, 2nd ed 1980) at 234. Earlier empirical work is noted by H. Kritzer, 'The (Nearly) Forgotten Early Empirical Legal Research' in P. Cane and H. Kritzer, *The Oxford Handbook of Empirical Legal Research* (OUP, 2010) 887.

pressures derived from the structure of their organisation and their working environment. Important for present purposes, the study also revealed how outcomes were affected by the attitudes and values of the people involved in the process. Similarly, Hazel Genn's pioneering study in the UK thirty years ago emphasised the importance of the people involved in settling tort claims.³ She identified 'situational factors' affecting the outcome which included the personality and claims philosophy of the negotiators as well as the ability of claimants themselves to withstand the stress of litigation.⁴ Both studies, in effect, subscribed to the thesis that

To understand the legal system and the nature of rights and duties, it is not sufficient to know the formal rules; one must know the law in action.⁵

Relying upon this approach, in a recent publication I explored how the tactics used by lawyers when conducting personal injury cases could affect their outcome.⁶ These tactics are being used in a litigation environment which has changed significantly since Genn's study was conducted. Here I now turn away from tactics to consider how personality may also affect claims.

Despite limited academic study of the settlement of injury claims,⁷ practitioners are very ready to agree with the thesis that the reality of the law often differs from how it is supposed to operate in theory. Indeed, this may not be a surprising revelation even to a layperson. However, it is rarely acknowledged by writers of legal textbooks on tort. Students are left to gain an understanding of how the law operates by reading texts founded upon case law from which much of the humanity has been removed: they must arrive at an objective, principled decision which can be reconciled with precedent and used as a guide for the future. The cases studied are primarily drawn from appellate decisions and are very unrepresentative of the mass of claims. The nuanced findings of fact made by the trial judge based on the evidence

³ H. Genn, *Hard Bargaining: Out of Court Settlement in Personal Injury Actions* (Clarendon Press, 1987) and, more generally, D. R. Harris, M. Maclean, H. Genn, S. Lloyd-Bostock, P. Fenn, P. Corfield, and Y. Brittan, *Compensation and Support for Illness and Injury* (OUP, 1984).

⁴ Genn above n 3 at 16.

⁵ Introduction to Ross above n 2.

⁶ R. Lewis, 'Tort Tactics: An Empirical Examination of Personal Injury Litigation Strategies' (2017) 37 *Legal Studies* 162.

⁷ However, for the UK see R. Dingwall et al, 'Firm Handling: The Litigation Strategies of Defence Lawyers in Personal Injury Cases' (2000) 20 *Legal Studies* 1, A. Boon, 'Co-operation and Competition in Negotiation: The Handling of Civil Disputes and Transactions' (1994) 1 *Int J of the Legal Profession* 109, A. Boon, 'Ethics and Strategy in Personal Injury Litigation' (1995) 22 *J Law & Society* 353 and S. Halliday, J. Ilan and C. Scott, 'Street-Level Tort Law: The Bureaucratic Justice of Liability Decision-Making' (2012) 75 *MLR* 347.

presented are rarely explored. The true effect of the injury upon the day to day life of a claimant is never revealed. The convoluted process through which the case may have progressed via civil procedure rules is not exposed, and how and why the case arrived in court and was not settled beforehand is not explained.

Elsewhere I have catalogued various myths perpetuated in one way or another by these texts.⁸ They include views such as the following: that tort actions for personal injury are of universal application in as much as they can be founded upon any type of injury whereas, in practice, they are almost all confined to the discrete areas discussed further below; that individuals who are defendants have control over whether and how defences are implemented whereas, in fact, it is insurance companies who almost exclusively determine how the litigation proceeds; that cases are determined predominantly by judges in court as opposed to being informally settled by representatives, many not being legally qualified; that proof of fault lies at the heart of litigation whereas the truth is that it is unusual for fault to be contested; that the facts are fully investigated and determined with due process whereas, in practice, costs dictate that rough and ready ‘rules of thumb’ are applied to dispose of most claims with minimal investigation; that most of the compensation that is paid out by the system is for the financial losses which result from serious injury, whereas two thirds of all the damages that are awarded are for pain and suffering and the cases usually concern only very minor injury; and, finally, that the damages award provides full compensation for any loss suffered whereas, in fact, there has been a history of substantial under-compensation in the minority of cases which involve serious injury,

When it comes to accounting for character and personality there is a wide literature which could be considered relevant. A few examples only will be given here. Already discussed are the studies by academics of the process by which tort claims are settled. There are accounts of particular actions which add the necessary colour, for example, to the Thalidomide tragedy⁹ or to tobacco litigation.¹⁰ More broadly, for example, the work of Brian Simpson in placing cases in their historical context gave new life to the characters involved and revealed

⁸ R. Lewis and A. Morris, ‘Tort Law Culture: Image and Reality’ (2012) 39 *J Law & Society* 562 and ‘Challenging Views of Tort’ [2013] *J Personal Injury Law* 69 – 80 and 137 - 150.

⁹ H. Teff and C. R. Munroe, *Thalidomide: The Legal Aftermath* (Saxon House, 1976) and Sunday Times Insight Team, *Suffer the Children: The Story of Thalidomide* (Andre Deutsch, 1979).

¹⁰ C. Mollenkamp et al, *The People vs Big Tobacco* (Bloomberg Press, 1998) and M. A. Derthick, *Up in Smoke: From Legislation to Litigation in Tobacco Politics* (CQ Press, 3rd ed, 2011).

how their personal circumstances influenced the litigation.¹¹ Many authors have attempted a similar analysis of the parties involved in the most famous case in civil law, *Donoghue v Stevenson*.¹² Films have been made in an attempt to bring the case even more to life.¹³ There are books written by and about judges and these may cast light on what happened in individual cases. Judges in the highest appellate court have merited detailed study¹⁴ and there is an increasing literature on the extent that judges may be influenced by factors in their personality.¹⁵ The humanity of judges, barristers and solicitors has been the subject of recent investigation.¹⁶ More generally, we could turn to the classic legal realist literature to reinforce this approach. However, there is very little reference to such materials in the tort texts.

What effect this has upon students of tort law is uncertain. More generally, it has been suggested that the abstract nature of legal study comes as something of surprise to many students in their first year. The ideals with which many entered law school are changed or abandoned. Their motivation shifts from interest in the subject to the professional success that may follow. The study of law has been compared to medicine in as much as it has been

¹¹ A. W. B. Simpson, *Leading Cases in the Common Law* (Clarendon Press, 1995), D. Sugarman, 'Brian Simpson's Approach to Legal Scholarship' (2012) 3 *Transnational Legal Theory* 112. Similarly, R. Rabin and S. Sugarman, *Tort Stories* (Foundation Press, 2003).

¹² [1932] AC 562. See the extensive literature cited in M. Chapman, *The Snail and the Ginger Beer* (Wildy, Simmonds and Hill, 2009), J. Thomson (ed), *Donoghue v Stevenson: The Paisley Papers* (W. Green, 2013), P. T. Burns, *Donoghue v Stevenson and the Modern Law of Negligence* (Continuing Legal Education Society of British Columbia, 1991), Resources of the Scottish Council of Law Reporting <http://www.scottishlawreports.org.uk/resources/dvs/donoghue-v-stevenson.html>

¹³ The Scottish Council of Law Reporting <https://vimeo.com/29950972> The Justice Society of British Columbia <https://www.youtube.com/watch?v=ogm1URzhTjA>

¹⁴ A. Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing, 2013).

¹⁵ See the references in K. Burns, 'In this Day and Age: Social Facts, Common Sense and Cognition in Tort Law Judging in the United Kingdom' (2018) 45 *J Law & Society* (forthcoming), R. Cahill-O'Callaghan, 'The Influence of Personal Values on Legal Judgments' (2013) 40 *J Law & Society* 596 and by the same author 'Reframing the Judicial Diversity Debate: Personal Values and Tacit Diversity' (2015) 35 *Legal Studies* 1. P. Laleng, 'Winners and Losers in the Court of Appeal: An Empirical Study of Personal Injury Cases (2002-16)' [2018] *J Personal Injury Law* (forthcoming).

¹⁶ Research on 'the humanity of law' has been conducted by the Information Law and Policy Centre of the Institute of Advanced Legal Studies. From 2014 - 16 conferences were held on the humanity of judging, judgecraft and emotions, and the humanity of barristers. <http://ials.sas.ac.uk/research/research-centres/information-law-policy-centre/research/humanity-law> Cf the obituary of the torts scholar and later Ontario Supreme Court Justice, Allen Linden: 'He was able to humanize the law unlike anyone I've ever seen.' *The Globe and Mail*, 16 September 2017. More generally, see the emergence of studies in emotion and the law. S Bades, *The Passions of Law* (NYU Press, 2001) and H. Conway and J. Stannard, *Emotional Dynamics and Legal Discourse* (Hart Publications, 2016). The considerable increase in clinical legal education and pro bono work in UK law schools in recent years may also indicate a desire to bring students closer to the humanity of legal practice.

accused of being a de-humanising experience.¹⁷ To an extent this article seeks to counter the abstract nature of legal study by stating the obvious: that law is made and affected by people.

As evidence of this, reliance is placed on the experience of a group of lawyers who were interviewed about how personal injury litigation operates in practice. Much of the first part of the article is taken up with the words of these lawyers to show how and where personality may affect claims. However, the second part of the article makes a major qualification to the first: the influence of individuals is shown to be severely limited where minor injury cases are processed in bulk. Statistics are analysed to determine who are typical litigants and from what injuries they suffer. To an extent these figures make the system less abstract and place more flesh on the bones of litigation. However, they also reveal that most claims are brought for only for very minor injury. The article then describes how law firms have changed their business structures to process such claims with maximum efficiency. In these run-of-the-mill cases the character and personality of those involved in litigation is much less likely to affect matters. In this second part of the article, therefore, we describe elements of an impersonal and mechanised process which applies to many claims. We begin, however, by describing how the qualitative research was carried out.

The Interviews and the Wider Project

The survey involved conducting 29 structured interviews of lawyers in England and Wales which were recorded, transcribed and made anonymous. Each interview lasted on average ninety minutes and in total they produced a text of 258,000 words. The interviews were carried out in 2014 by a field worker who had previously been employed as a personal injury solicitor for 14 years. Although the interviews were closely structured, they ranged over many issues and extended far beyond the scope of the present article. This was because the questions were devised to cover matters relating to a wider project which compared personal injury litigation in three jurisdictions across four countries: Norway and the Netherlands were to be compared to England and Wales. Funding for this project came from the Institute for European Tort Law based in Vienna. In looking at how ‘the law in the books’ is translated into ‘the law in action’ and the factors which affect that transition a range of common

¹⁷ <https://www.cuttingedgelaw.com/page/humanizing-legal-education> and M. Schwartz, ‘Humanizing Legal Education: An Introduction to a Symposium Whose Time Came’ (2008) 47 *Washburn LJ* 235. More generally, A.T. Kronman, *Education’s End: Why Our Colleges and Universities Have Given Up on the Meaning of Life* (Yale UP, 2008).

questions were devised to be used for each country. General and specific questions covered such matters as the lawyers' objectives when given notice of a potential claim; the tactics that are used by both sides to achieve those objectives; the pressures that arise during the litigation including, for example, the effect of the costs recovery rules; and the effect of procedural reforms such as the adoption of streamlined processes and the increasing use of judicial case management. Therefore, although there was discussion about the personality, character and background of those involved in litigation, it was only as part of the wider study.

Among the interviewees there were 13 claimant solicitors and one claimant legal executive. On the other side there were 9 defendant solicitors and an insurer. However, 7 solicitors had represented the other side when working elsewhere and may have been better placed to appreciate the perspectives of both. In addition, 5 barristers with mixed practices were interviewed. There were 8 women in total. The interviewees had various levels of experience and seniority. They covered a wide area of personal injury work. This included high volume routine road traffic claims as well as more individual work-related liability although this also included large scale occupational disease claims. Some interviewees had dealt with public liability claims, many of them involving trips and slips and usually resulting in only minor injury. Among the more experienced lawyers were those who had done a variety of work but were now involved only with higher value claims. Some of them concentrated exclusively on catastrophic injuries. Among the specialists were 4 clinical negligence lawyers and one solicitor who now only worked on product liability claims. The lawyers were selected in various ways: most were chosen from personal injury firms' websites to reflect the need for diversity in age, experience and nature of work; others were recommended by those interviewed; and a few were personally known to the researchers. All except 4 were based in cities in the southwest.

The interviews were structured, and open questions were used to investigate individual topic areas. For present purposes, they were specifically asked what they considered to be the main factors influencing whether a claim succeeds and how much damages are then paid. They were also asked their opinion about whether the system was fair and efficient. The relationship they had with their client and others in the litigation process was investigated. Various open questions relating to specific parts of the project also produced discursive answers that were relevant to the personality and character of the parties in litigation. The

quotations from the interviews were therefore drawn from a range of responses across the project area.

When Personality and Character May Influence Claims

1. Claimants

It has been suggested that claimants are in a weak position to control the conduct of their litigation.¹⁸ They are very much in the hands of their solicitor when it comes to the strategy that is to be adopted and they are heavily reliant upon the advice given when deciding whether to accept or reject an offer of settlement. Claimants are unlikely to challenge the level of settlement, no matter how meagre. Nor will they dispute discontinuance of the claim. In this sense, Genn suggests that claimants make no appreciable impact on the outcome. Whilst it may be true that they have little or no input with regard to strategy, it is argued here that claimants can significantly affect the claim in other respects.

a. The Good Claimant

Respondents to the survey indicated a variety of ways in which claims could be influenced. Most important is whether a claimant is able to explain clearly what happened and give a full account of how the injury affects their everyday living. Is the claimant articulate, presentable and convincing so as to influence other people encountered in the course of the litigation? Those influenced could include, for example, the medical personnel who examine the claimant and later give expert evidence upon the injury suffered. Ultimately the claimant may encounter a judge who has to understand the evidence that he gave and assess its persuasiveness and veracity.

You start with the claimant – what do I think of the claimant? What do I think will be the impression made by this claimant before a judge? EW3

You get chatting to a client on the telephone and sometimes from having a conversation with the client you can get a vibe as to whether ... if we were to run this all the way to trial, they need to obviously come across well. Sometimes whether they're at fault or not - if they're unable to explain clearly exactly what happened - then that could go against them. EW26

¹⁸ Genn above n 3 at 39 citing earlier studies and Harris above n 3 at 125 and 320.

At times this assessment could tip the balance as to whether an action was brought in the first place. It may even mean that a claim would be brought despite weakness in the evidence:

Even ... where the case still might not be in your favour, if you know you've got a good client who would come across well, then that might be a case that you might take a punt on. EW10

Good claimants were also recognised as those who could help obtain evidence and identify witnesses. They would respond efficiently to requests for documents and be prepared to offer other help in support of the claim. It was also thought that those that kept in touch with their solicitor and monitored closely the progress of the claim were more likely to obtain more damages:

It very much depends on how helpful the claimant is.... It's getting the evidence and sometimes the claimant doesn't have that evidence.... They seem to think sometimes that once we know about their claim, that's their involvement done and that they don't need to do anything more and the work is all done by the firm. Unfortunately, that's not the case. We need their help to bring that evidence. EW21

A particular aspect of helping to supply evidence is the attitude of the claimant to disclosing intimate details of his life and relationships. For example, the psychological effects of the injury may not be readily apparent, and the claimant may be reluctant to disclose how relationships with spouses, family and friends have been impaired:

Where you might want to investigate the psychiatric side of the tragedy, my practice would be to give the client a choice and say, 'well, do you want us to open up that side of your life? If we do, we might add a few thousand pounds to your claim but if we don't I can still get a settlement for you.' So, what the client hopes to achieve is sometimes relevant to the damages we recover. EW1

One barrister contrasted the effect of having a seriously injured claimant who was keen to give evidence at trial with the difficulties in giving sometimes faced by a defendant put into the witness box:

[One trial involved] a young lad who'd been rendered blind as a result of the Road Traffic Accident and he was actually quite bullish about the whole process, not in an aggressive way, but he just wanted to go and give his evidence, not that he could actually say that much but he gave his evidence. The defendant – the woman who'd run him over - was terribly nervous and upset and distressed, and so I think the insurers knew that she was going to be a pretty awful witness, and so the boot was on the other foot. Liability can be like that: the claimant is not confident but has a feeling as to what their case is and how they want to advance it, whilst the poor old defendant is normally shattered by having destroyed someone's life. EW25

Similarly, the tragic personal circumstances of the case could be brought home to the defendant's representatives if they were to meet the claimant before trial. This could happen in a joint settlement meeting. The parties have been increasingly encouraged and sometimes judicially directed to arrange such meetings to help resolve matters.¹⁹ Various tactical issues then arise in relation to when such a meeting should be held, what should be negotiated and who should be present. A claimant solicitor emotively saw an advantage in his client being present at such meeting because his view of the other side was a very negative one:

I don't think they have any emotion at all. They're heartless basically, whatever they may say.... When we have these [meetings] the last thing they want to do is meet our client just in case it tugs on their heartstrings at all. I think that they generally view our clients as lead swingers and fraudsters who are just laying it on, and they're looking for that at every available opportunity. And I just think it helps them sleep at nights because otherwise ... 'What did you do today, Daddy?' 'Oh, I just kept some seriously injured man out of a couple of million pounds he was entitled to by hoodwinking the system.' EW9

The natural sympathies that lawyers may have for those who are seriously injured may influence how a case is dealt with and ultimately determined. By contrast, if the claimant remains anonymous this may help harden the defence. Although such factors may be well understood by lawyers in practice, there is no discussion in tort texts of sympathy and emotion as being relevant to tort claims.

b. The Good Claimant's Family

It is not only the claimant who might make a favourable impression. There could also be family members involved in the litigation. For example, they may be witnesses of the accident or they may provide evidence of the effect of the injury upon the claimant and the extent that care and assistance are now required:

What won it was ... the judge fell in love with the family. Loads of family members were called and they just came across as entirely genuine, entirely supportive of their relative.... It was just a whole load of colourful characters who were actually quite funny, naturally so, when they gave evidence. And it went down so well. EW9

c. The Bad Claimant

In contrast to claimants whose personality or circumstances generated sympathy, there were other claimants who were thought not to possess the required abilities or who had an

¹⁹ Lord Justice Jackson above n 1 chapter 36.

unattractive personality. This might affect how ready the solicitor was to take on their case or then to pursue it with full determination. A difficult claimant's case may be settled prematurely:

Some clients are absolutely lovely to talk to on the phone, they're an absolute pleasure to work with, and some are just nightmares and you ... think, I can't wait to get your claim settled. EW21

One solicitor was keen to ensure that a case involving such a claimant should not come to court

...because the judge may hate the claimant. We had a case that we settled here recently, and we knew that if the claimant went into the witness box the judge would take such a dislike to him – he's such an unattractive individual that you wouldn't want to let him anywhere near the witness box. And when you advise them about settling, to actually tell him that EW9

A barrister pointed to some specific features which might influence a court. He thought it was important to consider whether the claimants are

... decent [people] who come across well or whether they are looking a bit dodgy and have a history of alcohol and drug abuse. EW16

Other claimants could be penalised for not being in a position to fully co-operate with their solicitor. They might be reluctant to disclose the true effects of their injury or they may be unable to help furnish evidence of wrongdoing or the extent of loss. They may not keep adequate records or promptly respond to requests for assistance, or they may be reluctant to keep on top of their case by pressing their solicitor for information. Most important, perhaps, was the claimant's ability to communicate effectively with his own solicitor and with others in the litigation process.

There are people who will just come across much worse. It's not their fault. Unfortunately, perhaps, the law penalises those who are stupid, inarticulate, and nervous, and people say stupid things in witness boxes under pressure. EW3

d. The Claimant's Resources and Attitude to Risk

Those who can withstand the pressures of litigation do better than those who cannot, with the result that those from a particular class or background may be more likely to succeed.²⁰ Where the pressure is financial, it is clear that those with money to sustain them during what

²⁰ Ross above n 2.

may become a very long period of litigation will be better protected and less ready to settle for a low sum. Claimant lawyers recognised this:

If you get somebody who's got very good resources - say they've been off ill for a long time but they've got good sickness pay and benefits and stuff like that - then of course it might not be such a big deal to hang on and hold out. But if you've got somebody who's got very poor sick provision or huge financial pressures on them, then an offer of half the value of their claim is far more effective. EW7

If they're unemployed, [the insurer] may put forward a lower offer to try and tempt the client to settle. They know the claimant may be in need of money, as opposed to a high earner. EW28

Offers to settle are more likely to be made at a time when claimants are most vulnerable. A solicitor noted that an offer had been made shortly before his client's wedding, whilst several recognised a seasonal element to offers:

From the end of October ... right up until mid-December, we'll have quite a few offers coming in, just trying to tempt them to settle before Christmas. EW14

More generally, the typical case often used to illustrate the general inequalities in the legal system involves a 'one-shotter' accident victim suing a 'repeat player' insurer.²¹ The insurer can group together the cases it defends and, whilst a tactic may succeed in one case, it may not in another. The risk taken in a particular case can be matched against others and a long view can be taken of the success of litigating groups of cases. By contrast the claimant has no such luxury and is acutely aware that success or failure depends upon his immediate claim. An offer could be a sum of money larger than otherwise would be encountered in a lifetime. If the case is pressed to the limit and offers of settlement refused there is a danger that the claimant might be penalised by having to pay the legal costs of both sides. This could substantially reduce any damages awarded. Faced with such a risk, claimants are likely to take a very conservative attitude to any offers put on the table. They are very ready to put an end to the litigation. The inequality of arms between the parties was recognised by a barrister:

I think, generally speaking, defendants are insurers and insurers have big wads of money and can take views as to indemnities and risk assessment across groups of cases. But for the claimant it's their only case and they're the one who's injured. So... I don't think the playing field is level at all. EW19

²¹ The seminal article is Galanter, 'Why the 'Haves' Come Out Ahead' (1974) 9 *Law & Society Rev* 95. However, Dingwall et al above n 7 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 & Society Rev* 795.

The eagerness of claimants and their solicitors to get something from the system is reflected in the fact that they have been found to be very keen to accept any formal offer made to them by the 'risk neutral' insurer. One study found that two thirds of claimants accepted the very first offer made by a defendant.²² The idea that personal injury litigation is punctuated by a series of offers and counter-offers does not therefore reflect the typical case.

The pressures of litigation are not only financial. The mental resilience needed to sustain a claim to what may be a bitter end can be considerable. Uncertainty, delay and the need to concentrate on making a good recovery are all reasons for settling early for a lower sum. The defendant can take advantage of these pressures:

I always have a number of cases every year where I say: 'Don't accept, I'm sure I can get you more.' And they say ... 'I just want an end to it because it's hanging over me.' EW17

The lack of resilience may even stem from the accident itself:

If [the insurer] were to receive a psychological report which shows the impact that the claim is really having on the client - they've been diagnosed with either stress or a depressive disorder as a result of this and it's clear in the report that the client just wants this case resolved - I wouldn't be surprised if we then received an offer very shortly after disclosing that. They're really going to effectively dangle that carrot in front of the client. EW14

A defendant admitted he made use of other weaknesses which he thought existed not only in the claim itself but also in claimants personally. In particular, the threat of driving the case to trial could be a very effective weapon:

I'm pretty sure that the vast majority of [claimants] have no intention of going anywhere near a courtroom and just want what they can get. And often it's not so much what they can get, it's how quickly they can get it. So I do think in the volume claims arena - say up to £50,000 - I think that's a key factor and one which any decent defendant will try and exploit. EW18

2. Defendants

Although most defendants in tort are individual people, they play only a limited part in tort claims: they have only a 'walk on' role.²³ This is because they are almost all insured. It is

²² According to D. Harris et al above n 3 table 3.3. However, T. Goriely, R. Moorhead and P. Abrams, *More Civil Justice? The Impact of the Woolf Reforms on Pre-Action Behaviour* (The Law Society and the Civil Justice Council, 2002) at 154 found more incidence of bargaining: only a third of cases settled after one offer, but almost two thirds did so after two and ninety per cent after three offers.

²³ Ross above n 2 at 66 noting that, after the accident, defendants rapidly fade from the scene and seldom reappear.

insurers who pay out 94 per cent of tort compensation.²⁴ In nine out of ten cases the real defendants are not individuals but insurance companies, with the others being public bodies or large self-insured organisations. A handful of insurers dominate the market.²⁵ Although they are not named in the law reports and therefore rarely mentioned in tort textbooks, insurers are the ‘elephant in the living room.’²⁶ That is, they are almost always present and dominate proceedings, and yet judges and jurists rarely discuss this fact.²⁷

In practice, therefore, it is very rare indeed for an individual to be the real defendant controlling the case and ultimately paying any damages due. Instead defendant policyholders cede control over to their insurer and thereafter usually play little or no part in the litigation process. For example, Harry Street, a Professor of Law at Manchester University and founding 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.²⁸ He had played no 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,²⁹ and they can settle cases in spite of objection from the policyholder.³⁰

In the survey, therefore, the personality of the individual who was the defendant and caused the injury was rarely raised as a relevant factor. A barrister contrasted the attitude of the defendant with that of the insurer who ultimately called the tune:

Defendants vary enormously. I don't think that people are necessarily irresponsible in the sense that as individual defendants they want to do people out of proper compensation. Even a company ... will happily see a person that they hold in regard who has been injured in their employment well compensated for their injury. But, of course, the problem is that it is not them who are actually making the decisions. It is the insurers. EW19

²⁴ The Pearson Commission above n 1 vol 2 para 509.

²⁵ R. Lewis, ‘Litigation Costs and Before-The-Event Insurance: The Key to Access to Justice?’ (2011) 74 *MLR* 272.

²⁶ R. Lewis, ‘Insurers and Personal Injury Litigation: Acknowledging “The Elephant in the Living Room”’ [2005] *J Personal Injury Law* 1.

²⁷ R. Lewis, ‘Insurance and the Tort System’ (2005) 25 *Legal Studies* 85.

²⁸ D. W. Elliott and H. Street, *Road Accidents* (Penguin, 1968) 209.

²⁹ T. Goriely et al above n 22 at 90.

³⁰ 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.

Despite this, some respondents noted that in rare cases there were certain individual defendants who might influence the outcome. In clinical negligence claims, for example, the reputation of a doctor may be at stake and as a result the case may be defended much more vigorously by the organisation offering indemnity against liability. Being accused of negligence in a caring profession may therefore provoke a much stronger defensive response than, for example, where the accusation relates to bad driving.

[Some doctors] are so upset if a claim is made against them ... [that] the defence organisations ... are very, very cautious with them and very supportive They won't just go, 'well, it's obvious, let's admit'. It's not like that, it's really difficult EW8

Even though medical insurers may therefore be more prepared to run the risk of incurring increased costs in mounting a defence in an uncertain case, there are still limits on the extent that the doctor involved can influence what is done:

If they start influencing the ... process of the claim too much, then [the insurer] will exercise their control clause. EW8

Another example in the survey of where the views of an individual defendant could affect the outcome concerned employer's liability claims:

You do get cases where you know that the manager of the factory just doesn't like your client and no matter what you say or do it is not going to settle. He is not going to get that extra £10,000 because they just don't like him You can't negotiate in those circumstances. EW7

This was seen as a particular problem in some cases involving stress at work where the employer may be especially keen to end the work relationship.

You often find that the employer is actually quite closely involved and ... that they really don't want these people who have been given a breakdown [to return to work]. There is a big problem with personalities within the organisation (to put it neutrally) coming back. They are at risk again obviously of causing more damage to them. So they are very keen to see an end to the employment relationship. EW4

3. Lawyers and Claims Handlers

In general terms, it may be common knowledge that successful litigation is dependent upon the experience and ability of those handling the case. However, it remains the case that the most important advice that can be given to a potential tort claimant is to employ a good lawyer. Similarly, the skill of the claims handler representing the defendant will determine how the case proceeds. In Genn's study thirty years ago it was found that there were various structural and situational inequalities between the parties which placed insurers at a

considerable advantage in defending claims. A key factor was whether the claim was brought by an experienced lawyer who specialised in such litigation.³¹ Since that time there has been increasing specialisation within firms.³² However, there has also been market pressure to acquire and process bulk claims and this has resulted in many smaller claims being left in the hands of inexperienced paralegals.

Paralegals don't have the same level of experience and you get a turnover of them, so they stay 18 months and go off to pastures greener and so there's a danger they won't build up the experience that you would have got through the usual route. EW17

As a result

Sometimes you will get quite stupid responses which you think, 'well, they clearly don't understand what's been going on here' or they clearly don't know the law frankly. And that's because it's being dealt with by someone incredibly junior who's probably running a huge number of other cases and is doing it as a real sausage factory. EW7

One solicitor emphasised her skill level could make a real difference to the result:

In these days of rank on rank of paralegals being employed, the defendants will take advantage.... There's an element of panic - let's get this settled - and another one bites the dust. Well, with us old hacks, we know when we're being spun a line and we will get more compensation. EW10

Elsewhere I have described in detail how the tactics adopted by lawyers could affect the outcome of individual cases irrespective of their legal merits.³³ Again the particular character of solicitors was shown to be relevant. Although their overall management of claims was largely dictated by organisational and structural pressures, it was also affected by individual personality.³⁴ For example, how ready are solicitors to accept the additional pressures of going to trial? Our responses indicated that whilst some may relish the excitement and adrenalin produced at trial, others fear the loss of control and the uncertainty which resulted.

³¹ Genn above n 3 at 164.

³² ICF Consulting Services, *An Assessment of the Market for Personal Injury* (2016), a report for the Solicitors Regulation Authority <https://www.sra.org.uk/sra/how-we-work/reports/pi-report.page>. The founding of the Association of Personal Injury Lawyers in 1990 and its subsequent activity reflects the increasing abilities and resources of claimant lawyers. Melville Williams, 'A. P. I. L.' (1991) 19 *Civil Justice Q* 103. The Association now has 3,300 members, employs 25 people, and has a turnover of £2.35 million with reserves of over a million pounds. It is extremely well organised, and has its own Press, Parliamentary and Research officers as well as other administrators. APIL, *Annual Report and Accounts 2016*.

³³ Lewis above n 6.

³⁴ Similarly, Genn above n 3 at 38.

Only two further examples of how tactics relate to the personality of the litigators are given here. The first concerns the controversial question whether to take a combative or conciliatory approach in conducting negotiations. Psychological factors involving the background of the solicitor could influence this,³⁵ as reflected in a comment from a senior defendant lawyer:

I come from a background of doing things that make me potentially quite combative. For instance, I spent a lot of years doing martial arts. So, in a way, when you read around subjects like that, there's all kinds of pseudo philosophical stuff that gets transmitted into American corporate structures.... Therefore, you can become very good at mind games.... [Y]eah, you can do all the usual tricks.... There are ... a lot of claimant lawyers who seem to run things on the basis of: 'This is a points exercise and every time I get one over on you I will.' Now the difficulty with that situation is – as one of my old bosses used to say to me – if you're going to put the boot in, make damn sure your laces are done up. EW5

The second example relates to the analogy between conducting negotiations to settle an injury claim and the playing of a card game. Both can be marked by the exaggeration of the strength of one's hand and by the use of bluff to gain the desired position. Not everyone is good at this and the influence of personality is clear:

I think people have difficulty in negotiating, particularly if they're trying to drive a better deal than they've actually got authority to drive. So, the poker player – there's not a poker player in all of us – some are better at it than others. EW11

Cases can also be influenced by factors other than the skill and experience of the representatives or the tactics that they use. For example, in the USA it was suggested that insurance claims adjusters came from a conservative political background and this was reflected in the moderate offers of settlement they made.³⁶ In contrast, it might be expected that claimant lawyers would have more liberal political views and develop a greater sympathy with their clients. In the present survey one solicitor noted that her employment in a firm which was closely aligned to a trade union gave not only job satisfaction but also energised her work. Another respondent similarly acknowledged that his approach to litigation was influenced by his wider view of the world:

I'm driven personally by the desire to make a difference to help people. That is why I am a personal injury lawyer.... That is why I spend a lot of time outside the cases campaigning, trying to make a difference in people's

³⁵ Psychological factors affecting negotiations are considered by C. Menkel-Meadow, 'Lawyer Negotiations: Theories and Realities – What We Learn from Mediation' (1993) 56 *MLR* 361 at 377.

³⁶ Ross above n 2 at 41 et seq.

lives ...including contributing to a political context or sharing my knowledge and expertise with others to bring them on. EW03

It may be, therefore, that the political views or wider social attitudes of practitioners influence how they approach their work. However, the survey did not directly investigate this and produced only limited evidence in support.

4. Judges

Most interviewees said that they did not relish going to trial. There were several reasons for this, the most common being fear of the uncertainty that would result.

I would far rather a sensible settlement than a trial because you don't have any control when you get to trial: witnesses say things you wouldn't expect them to; claimants say something differently; who knows what the judge is going to react like? I think it's a lottery that I don't need to join. EW6

As part of the unpredictability it was noted that the sympathies of individual judges could vary considerably and have an effect of the outcome of the case:

Judges are human beings, so they will view things in different ways. EW4

It's a tightrope.... Much still depends on which judge you get. EW9

There were similar comments about decisions made by lower courts:

It very much comes down to the judge that you get on the day.... Counsel that work with these Masters day in, day out, know which ones tend to be more claimant friendly, which ones tend to be defendant friendly.... And again, more locally, if you instruct local counsel, they will generally have an idea which approach a District Judge is going to take to it before you actually go into the courtroom. EW14

A couple of barristers agreed with this, and the only insurer interviewed suggested:

You pretty much know how it's going to land when you know which judge you're going to draw. EW29

However, one lawyer thought judges less predictable and suggested that they had 'good' and 'bad' days when their temperament might affect the outcome:

Even where I have got a client where I believe them, I have done enough trials to know that four out of ten judges on a grumpy day probably would not. So, it is worth factoring in something to try and get it settled.... EW10

This lawyer also thought that a judge might be influenced by the media, especially in relation to compensation culture:

I think that the judges are affected by the media as well - all the business about local authorities having no money. They do not like slipping and tripping cases.... You just need one judge who has a crazy-paved footpath

and they are not going to accept your client's case. It is a lottery in that way.
EW10

By contrast certain claimants were thought to be more likely to attract the sympathy of the court. One lawyer suggested a possible reason for him losing a case was that

... it was a litigant in person. I turned up with a high-powered suit and a case, and she turned up with a handbag. I think the sympathy element was in the judgment. EW13

The sympathy of the court was also thought to depend sometimes upon the nature of the injury suffered:

If you have a claimant of a particular demographic, they are in my experience more likely to succeed both in terms of breach of duty and success in terms of quantum than another type of claimant.... For instance, it is exceedingly difficult to defend mesothelioma claims because it is widely viewed – rightly or wrongly – that the use of asbestos is something that requires compensation to be paid to all of the individuals who have suffered as a result of that use of asbestos. I won't say regardless because that would be unfair but with little weight being given to issues like breach of duty and the state of knowledge at the time that the materials were in use.... EW5

Asbestos victims who contract mesothelioma were also cited as examples by two other defendant lawyers:

I am not suggesting for a moment it is nothing but a horrendous diagnosis and it is a death sentence and it is a horribly painful death by all accounts, but I think it does colour judicial decisions. I think claimants with mesothelioma or their dependents that are bringing the claim do have the sympathy of the court. EW12

There is a perception in many corners that actually the burden of proof in mesothelioma claims ... has disappeared – well that 20 -30 per cent is now good enough.... The judiciary often will bend over backwards ... to find in favour of the claimant. EW11

A barrister added a word of caution and denied that judges were generally sympathetic to claimants merely because they had suffered injury:

I don't think that the fact that the individual is injured will necessarily influence judges. I think by and large judges are quite objective about that.
EW15

However, he did go on to say:

What will potentially influence a judge ... is how a person comes across in evidence and, I think while judges will try their best not to do so, if they like a particular witness, or a particular person, or dislike them, then that may influence the outcome. EW15

Who are Tort Claimants and What Injuries Do They Suffer?

In this second half of the article we move away from the survey to consider a broader picture of personal injury litigation. We use statistics to determine who are likely to be personal injury litigants and from what injuries they suffer. 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. In reality, there is only limited scope for actions in tort for personal injury. Only certain people suffering particular injuries are likely to attract compensation. However, there is very little acknowledgement in tort texts of the factors discussed below.

Based on official statistics,³⁷ there are almost a million claims brought for personal injury every year. This means that annually there is a claim made for every 67 people in the UK. Whether claims are made very much depends on the incidence of insurance for they are largely found in the areas where it is compulsory to be covered against tort liability.³⁸ As a result, road and work accidents predominate. In 2016 - 17 they constituted 86% of all claims with road traffic injuries comprising 79% of the total and employer's liability accounting for another 7%.³⁹ These two categories have traditionally dominated personal injury litigation even though they may account for only a minority of all the possible causes of injury.⁴⁰ Accidents commonly result, for example, from activities in the home or in the course of leisure activities or as a result of health care. However, very few of these result in a damages award.⁴¹ Injuries are very unlikely to be compensated if they occur in areas not covered by liability insurance or where there is no other 'deep pocket' such as that provided by a government body or a large self-insured company. Those suffering as a result of a disease

³⁷ In 1989 the Compensation Recovery Unit (CRU) was set up by Government to recover from damages certain social security benefits paid as a result of the tortious injury to the claimant. Reliable data has been generated on the number and types of claims and settlements that are made irrespective of whether cases reached trial or were settled out of court. 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> The figures are discussed in more detail in R. Lewis, A. Morris and K. Oliphant 'Tort Personal Injury Claim Statistics: Is there a Compensation Culture in the UK?' (2006) 14 (2) *Torts Law Journal* 158 and R. Lewis and A. Morris above n 8.

³⁸ The lack of coherent policy behind compulsory insurance was traced in C. Parsons, 'Employers Liability Insurance - How Secure is the System?' (1999) 28 *Industrial LJ* 109.

³⁹ Department for Work and Pensions above n 37.

⁴⁰ The Pearson Report above n 1 vol 2 table 57 and P. Cane above n 1 at 1.4 and 8.1.3

⁴¹ Harris et al above n 3 table 2.2.

find it much more difficult than an accident victim to sue in tort:⁴² for each disease claim made there are 29 based on accident.⁴³ Overall, therefore, although work and transport injuries dominate the tort system, they are not representative of injuries or disabilities in the general population. It is clear that, irrespective of the need to establish liability, tort in practice covers some groups much better than others and it ignores the plight of many. Where and how you get injured is all important.

Apart from location, it also matters from which section of society you come. People from certain demographic groups are more likely to sue than others. For example, claims can be subject to a gender and age analysis, although there is almost no reference to this in tort texts.⁴⁴ On average, settlements are somewhat more likely to be obtained by men: women receive only 43% of the total despite constituting 51% of the population.⁴⁵ This difference is accentuated for work injuries where women obtain less than a quarter of all settlements.⁴⁶ However, women are more likely to be the recipients of compensation for clinical negligence: they obtain 56% of all the settlements in this area, although medical claims are relatively few being only 2% of the total.⁴⁷ If we look at age differentials it appears that those under 35 are a little more likely to receive damages: they account for half of all settlements even though they comprise only 44% of the population. By contrast the youngest are less likely to be recipients: those under 18 receive only 9% of awards despite constituting about 23% of the population.⁴⁸ Similarly, older people do not receive settlements in proportion to their number: those aged 65 or more obtain only 6% of the total despite comprising about 17% of the population. Finally, again the few medical claims differ from the average with less than a

⁴² J. Stapleton, *Disease and the Compensation Debate* (Clarendon Press, 1986).

⁴³ In the four years from 2012 - 16 almost four million accident claims were registered but there were only 136,000 disease claims. Response to a Freedom of Information Request from the author by the Department for Work and Pensions, July 2016.

⁴⁴ Harris et al above n 3 chap 2 found in a detailed demographic survey that women, the elderly, the young and unemployed were less likely to seek legal advice about the possibility of claiming.

⁴⁵ Compensation Recovery Unit figures for the three years 2009 - 12 as supplied for a Ministry of Justice Analytical Report, the Ipsos Mori Social Institute Report, *Discount Rate Research* (2013) at 3.3. The author directed the research for this report.

⁴⁶ Ibid and the Department for Work and Pensions, *Accessing Compensation: Supporting People Who Need to Trace Employers Liability Insurance* Consultation Paper (2010) at 40 para 46 citing unpublished statistics of the Compensation Recovery Unit. Reasons for women gaining less compensation are examined in R. Lewis, 'Industrial Injuries Compensation: Tort and Social Security Compared' (2017) 46 *Industrial LJ* 000 (forthcoming).

⁴⁷ CRU figures above n 37.

⁴⁸ Above n 45 table 3.3 contrasted with the age structure figures for the general population in the Office for National Statistics, *2011 Census* table 3a.

third of claimants being under 35 years old, and with 18% being at least 65. This may simply reflect that fact that elderly people are more likely to receive medical treatment. In contrast, the elderly are less likely to be injured in motor vehicles and therefore generate only 4% of the settlements in those cases.

Claimants are far more likely to make a claim today than they were forty years ago.⁴⁹ Whilst historical data are in short supply, those which are available support the view that over the long-term there has been a very substantial increase in personal injury claims. They appear to have risen four-fold since the 1970s. In 1973 the Pearson Commission estimated that there were about 250,000 claims.⁵⁰ In 1988 it was thought that claims had grown to around 340,000.⁵¹ This figure then doubled by the new millennium. However, the rising trend in claims has not been a consistent one. Indeed, numbers actually fell slightly between 1998 and 2006 but they have since risen again and are now a third more than they were at the start of the millennium. The notable figure of a million was exceeded in 2013 since when claims have declined by 6% to fall just short of that figure.⁵² However, these overall claims figures disguise major changes which have taken place in relation to particular kinds of injuries. These changes are revealed in the following table.⁵³

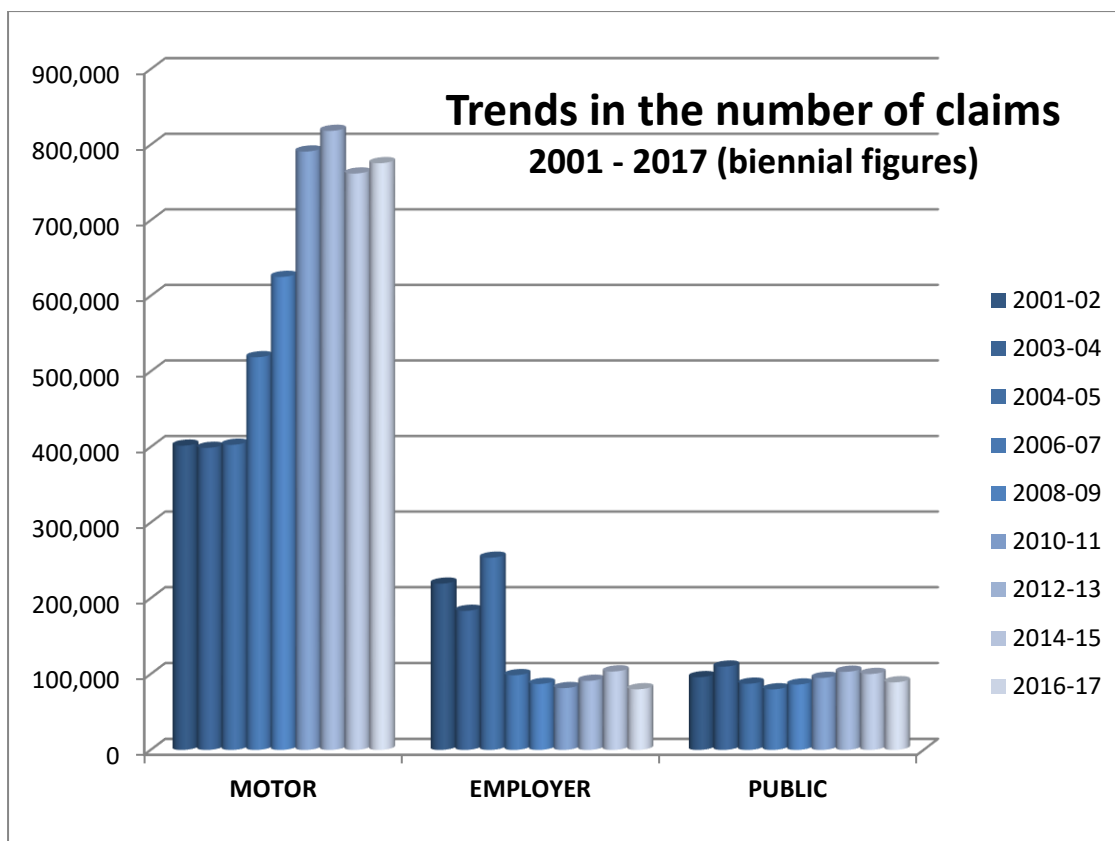
⁴⁹ See generally A. Morris 'Tort and Neo-Liberalism' in K. Barker, K. Fairweather and T. Granham (eds) *Private Law in the 21st Century* (Hart Publishing, 2017) chap 24. Reasons for the increase are traced in R. Lewis, 'Structural Factors Affecting the Number and Cost of Personal Injury Claims in the Tort System' in E. Quill and R. Friel (eds), *Damages and Compensation Culture* (Hart Publishing, 2016) chap 2 and R. Lewis, 'Compensation Culture Reviewed: Incentives to Claim and Damages Levels' [2014] *J Personal Injury Law* 209.

⁵⁰ Pearson Commission above n 1 vol 2 para 59 and generally P. Cane above n 1 at 8.1.3.

⁵¹ Lord Chancellor's Department above n 1 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* (Lord Chancellor's Department, 1986).

⁵² CRU figures above n 37. For more detail see Lewis and Morris (2012) above n 8.

⁵³ The table has been compiled by the author using the annual statistics published by CRU, above n 37.



As can be seen, public liability claims have remained constant, hovering around 100,000 a year. By contrast between 2000 and 2007 the number of employers' liability claims fluctuated considerably, reaching a peak of 291,000 in 2004. This was largely due to the creation of temporary special schemes of compensation for coalmining diseases.⁵⁴ These schemes closed in 2004 and since then the annual number of employers' liability claims has fallen by almost two thirds to less than 100,000. There are now fewer such claims than there were in 1973.⁵⁵ They have declined in relative importance to such an extent that they account for only 7% of all claims whereas in 1973 they represented 45%.⁵⁶

⁵⁴ 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>

⁵⁵ Considered in more detail in Lewis above n 46.

⁵⁶ Only one in seven workers suffering disease or injury make a claim according to the Trades Union Council and the Association of Personal Injury Lawyers, *The Compensation Myth: Seven Myths about the 'Compensation Culture'* (2014). For examination of why so many injured people do not make a claim in the USA see D. Engel, *The Myths of a Litigious Society: Why We Don't Sue* (University of Chicago Press, 2016).

In stark contrast to other types of claim, those involving motor vehicles have doubled since 2004. They number 780,000 today.⁵⁷ As discussed elsewhere,⁵⁸ this substantial increase is responsible for the long-term rise in the total of all personal injury claims. In 1973 motor claims constituted 41% of all personal injury claims; by 2001 this had increased to 54%; and for 2017 they constituted 79% of all claims. A notable feature has been the growth of claims involving whiplash injury which now constitute well over half of all the motor claims that are made.⁵⁹ This figure rises to 87% if the separate categories of neck or back injury is added to whiplash. It has been controversially suggested that by 2004 the UK had substantially more whiplash cases than any other European country. Since then the number of claims may have doubled.⁶⁰

How disabling is the injury suffered by the typical tort claimant? In practice, the injury is rarely serious: claimants suffer very little, if any, loss of earnings and they rarely incur medical costs or feel the need to claim any social security benefit.⁶¹ Tort damages for future financial loss are only awarded in 7% of cases and the amount is less than 9% of the total damages bill.⁶² In contrast, the largest component of the damages award is the payment for pain and suffering: it is rarely acknowledged that two thirds of the total compensation paid to claimants by the tort system is for non-pecuniary loss.⁶³ This head of damages is so

⁵⁷ CRU statistics above n 37.

⁵⁸ Lewis and Morris above n 8 and Lewis n 49.

⁵⁹ 58% according to CRU figures supplied to the Transport Committee, Eleventh Special Report, 2013-14, *Cost of Motor Insurance: Whiplash: Further Government Response to the Committee's Fourth Report of Session 2013-14* (HC 902) 4 and table 1 annex B Contrast the lower figures supplied by CRU to APIL following a Freedom of Information Act request. J. McGlade 'No Basis for Reforms?' [2017] *J Personal Injury Law* 63. However, these figures fail to take account of the threefold rise in injuries classified as either 'neck' or 'back' injuries and excluded from the 'whiplash' figures.

⁶⁰ European Insurance and Reinsurance Federation (CEA), *Minor Cervical Trauma Claims* (2004) 4. In its response to the Ministry of Justice Consultation CP17/2012 APIL emphasised the European data is unreliable and outdated, and in its response the Law Society similarly doubted the insurers' figures. For more trenchant criticism of the figures see K. Oliphant, 'The Whiplash Capital of Europe? European Perspectives on Compensation Culture' in E. Quill and R. Friel above n 49 chap 1. It has also been argued that, based on insurers' own statistics, the cost of whiplash claims actually fell by 17 per cent between 2007-16. Capital Economics, *Boosting Insurers' Profits* (2017) <https://accesstojusticeactiongroup.co.uk/ce-report/>

⁶¹ The Compensation Recovery Unit were issuing a nil certificate in 70 per cent of cases. R. Lewis, *Deducting Benefits from Damages for Personal Injury* (OUP, 1999) para 14.05.

⁶² Pearson Commission above n 1 vol 2 para 44 and table 107. However, in 2002 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.

⁶³ Pearson Commission above n 1 vol 2 table 107. The Health and Safety Executive similarly 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).

prominent because the tort system overwhelmingly deals with small claims where there is no other head of loss to be compensated. As a result, the great majority of cases in practice settle for less than £5,000⁶⁴ which is the equivalent of about two month's average salary.

We have seen that the typical claim in four out of five cases is for a whiplash or a neck injury following a road traffic accident. The symptoms can be difficult to disprove.⁶⁵ Although whiplash in exceptional cases can be very disabling, usually the pain and discomfort is temporary. These claimants soon make a full recovery and are left with no continuing ill effects. Often, therefore, the only financial incentive to sue for personal injury lies in the availability of non-pecuniary loss. It is the engine that drives the tort system.⁶⁶ It should also be recognised that these minor injury cases account for the extraordinarily high costs of the system when compared to the damages it pays out.⁶⁷ However, the essential point to note here is that those claimants in tort who suffer significant injury are very much the exception rather than the rule. Their cases are litigated very differently. For present purposes, it is in their cases that personality and character is more likely to affect the outcome of the claim. By contrast, we now turn to consider how minor claims are processed.

⁶⁴ Capital Economics analysed 171,000 motor cases settled in 2016 and found compensation was below £5,000 in 80% of them. *Legal Futures*, 4 July 2017. 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*. More generally, P. Cane above n 1 at 1.4.6.

⁶⁵ Ministry of Justice, Consultation Paper, *Reducing the Number and Cost of Whiplash Claims* CP17/2012 (Cm 8425 2012) para 6.

⁶⁶ By contrast, non-pecuniary loss also accounts for much of the disproportionate cost of the tort system. It also provides opportunities for exaggeration of losses and fraudulent claims. It is thus a root cause of many of the concerns about compensation culture. Lewis (2016) above n 49 at 54 – 56. For acknowledgement of the case for abolishing or limiting such claims see Lord Sumption, 'Abolishing Personal Injuries law – A Project' (2017) Personal Injuries Bar Association Annual Lecture, November 17.

⁶⁷ P. Cane above n 1 at 16.1. The Pearson Commission above n 1 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 Review above n 1 at para 432 estimated that the cost of the tort system consumed 125% to 175% of damages awarded in the County Court. Lord Justice Jackson in his report in 2010, above n 1, also found evidence of disproportionately high costs. 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. C. McIvor, 'The Impact of the Jackson Reforms on Access to Justice in Personal Injury Litigation' (2011) 30 *Civil J Q* 411. In clinical negligence cases in 2016 - 17 claimant legal costs exceeded the damages awarded in 61% of claims according to the National Audit Office Report above n 1.

‘Settlement Mills’ and the Mechanical Disposal of Claims

Reasons for the rise in the number of claims described above have been examined in detail elsewhere.⁶⁸ However, it is suggested here that there is a connection between the increase and the ways in which litigation is now financed.⁶⁹ An outline is given of how changes in finance have affected the way in which solicitors obtain and then deal with new claims.

Conditional fees were introduced to replace legal aid in personal injury cases in 1995.⁷⁰ As a result, the financial risk of litigating now falls predominantly on claimant lawyers. ‘No-win, no-fee’ may attract clients but firms must pay disbursements and maintain their cash flow until they are able to recover their litigation costs. Although it is relatively unusual for a claimant’s case not to succeed,⁷¹ a firm’s failure to recover these costs can prove very expensive. In addition, the costs themselves have been limited in various ways. A series of measures have reduced the exposure of defendants to legal costs which are disproportionate to the value of the claim.⁷² The ‘success fee’ has also been abolished insofar as the increased fee formerly payable by defendants if they were to lose a case has now been removed.⁷³ However, the most important change has been the introduction fixed fees. Progressively, since 2010, fees have been set for various classes of work especially where the claim is of low value. Many such claims are now processed by the electronic ‘Claims Portal’ which streamlines procedures and limits legal fees accordingly.

Overall, the reforms have led to a substantial reduction in the financial return on personal injury work.⁷⁴ The changes have had widespread consequences. They have affected, for

⁶⁸ See Lewis (2016) above n 49 at 39 - 51.

⁶⁹ For detailed analysis see Jackson LJ above n 1, see A. Morris, ‘Deconstructing Policy and Costs and Compensation Culture’ in E. Quill and R. Friel above n 30 chap 7 and J. Sorabji, *English Civil Justice after the Woolf and Jackson Reforms* (CUP, 2014).

⁷⁰ Courts and Legal Services Act 1990 extended by the Access to Justice Act 1999.

⁷¹ Insurers admitted that liability is not even partially contested in 90% of road traffic claims and 80% of work claims. Jackson LJ, *Review of Civil Litigation Costs: Preliminary Report* (2009). As a rough check, using the Compensation Recovery Unit figures, above n 18, for the seven years from 2010 - 17 the author found that the number of settlements recorded were 97% of the number of claims made. However, this figure makes no allowance for the fact that costs are not always recoverable in full even though a claim succeeds.

⁷² Lewis, above n 49.

⁷³ The Legal Aid, Sentencing and Punishment of Offenders Act 2012 s 44. A success fee now can only be obtained from the lawyer’s own client instead of from the defendant. The fee can be deducted from the damages obtained. A further limit on claimant recovery is that defendants no longer have to reimburse the cost of insurance premiums paid by the claimant to indemnify them against being liable for costs should their action fail.

⁷⁴ A. Morris, above n 69 at 129.

example, the tactics used in litigation and how claims are processed.⁷⁵ They have also affected how personal injury law firms are structured and how lawyers interact with their clients. The structure of law firms began to change when, in response to the changes in finance, they saw the need to solicit claims in bulk. They capitalised on initiatives first taken by claims management companies to trawl for clients: they used advertising and other methods to pursue potential claimants much more vigorously than in the past.⁷⁶ Business models have been devised which argue that firms must increase the number of claims they process and manage them more efficiently. Firms have been urged to ‘get big, get niche or get out.’⁷⁷ In other words, they need either to become larger and more efficient to deal with minor claims in bulk or they must develop specialist skills to deal with the minority of claims where more serious injury is suffered. Otherwise they will fail. In response to greater competition for claims, many firms have indeed gone out of business. Others have been lost in a series of mergers. In 2014 this led the head of Slater & Gordon to predict that just three firms would soon control up to 40 per cent of all claims.⁷⁸ Market share and efficient dealing with bulk claims have thus been said to hold the keys to survival and success.

In parallel with these changes in the structure of claimant firms there has been a consolidation in the insurance market. A handful of insurers now dominate personal injury so that in motor claims, for example, there are only four companies which share over half the market.⁷⁹ To increase efficiency, insurers have sharply reduced the number of law firms which act for them. These firms have had to survive a competitive tendering process to obtain this work and they have had to limit their costs accordingly. The significant development for present purposes is that insurers can no longer be seen as acting exclusively for defendants

⁷⁵ R. Lewis above n 6.

⁷⁶ Discussed in more detail in R. Lewis above n 49 and Lord Justice Jackson above n 1. Following concerns about market abuse especially by claims management companies, the payment of referral fees to obtain claims was banned in 2013.

⁷⁷ David Marshall, (2013) 157 *Sol J* October 16, the author being a former President of the Association of Personal Injury Lawyers.

⁷⁸ ‘Slater chief predicts rapid consolidation in PI market’ [2014] *Law Soc Gazette*, 1 May. A year later, the three leading firms controlled an estimated 22 per cent of the market. N. Rose, ‘Slater & Gordon strikes £677 million deal to buy Quindell’ [2015] *Legal Futures*, 30 March. However, as a result of this deal the firm revealed that it had suffered catastrophic losses. Offices were closed, a serious fraud investigation begun, and a class action suit was brought by shareholders. By 2017 the shares in that ‘alternative business structure’ firm had lost 98% of their value and it was recapitalised by its lenders. *Financial Times* [2017] June 30.

⁷⁹ Based on the premiums collected in 2012, the companies are Direct Line, Admiral, Aviva and AXA. Evidence of Thompsons solicitors to House of Commons Transport Committee, *Driving Premiums Down: Fraud and the Cost of Motor Insurance* (2014) First Report of Session 2014 – 15 (HC 285). Association of British Insurers, *Company Rankings 2014 - Motor*.

because they now also assist many claimants. This is because of the rapid expansion of before-the-event insurance which now covers more than half the population.⁸⁰ As a result, insurers direct injured policyholders who have this cover for their legal costs to go to one of the few law firms that have been selected and approved by them. Insurers' thus control representation not only for the great majority of defendants but also very many claimants. This has further contributed to the production of bulk litigation within specialist firms.

These demands for greater efficiency and reduced cost have encouraged law firms not only to expand but also to employ many more junior staff to deal with the increasing volume of claims. A lot of the work involving run-of-the-mill cases is now being carried out by unqualified or paralegal personnel who are paid much less than an employed solicitor.⁸¹ Partners in firms now have the difficult task of supervising a team of junior employees whilst also ensuring that the higher value claims are dealt with by more experienced litigators. At the lower level there has been what has been described as a 'dumbing down' of the industry. An insurer interviewed for the survey suggested that

There's a two-tier legal profession. The volume stuff is not dealt with by lawyers at all - it's accident management.... And then you get what I regard as proper lawyers dealing with it from mid-range up. EW29

A defendant lawyer agreed:

On both sides there has been... a 'dumbing down' because the market has driven us in that direction. Fixed fees ... means that you can't afford to ... employ vastly experienced, expensive lawyers to do the work, so you have to get paralegals in to do the work. EW11

To accompany this change in staff, firms have developed standardised procedures to ensure that inexperienced personnel deal with claims as efficiently as possible.⁸²

The only way to supervise a huge number of individuals is in a mechanistic way. The only way you're going to get them to perform (if they're not ... sufficiently experienced or qualified to make good judgment calls of their own) is via a quite confined and narrow corridor of 'this is what you do, this is what you do, this is what you do'. 'If they do that, you do this'. EW5

⁸⁰ R. Lewis, above n 25, FWD Group, *The Market for 'BTE' Legal Expenses Insurance* (2007).

⁸¹ Association of Personal Injury Lawyers, *The Impact of the Jackson Reforms on Costs and Case Management* (Evidence to the Civil Justice Council) (2014). D. Evans, 'Shifting Strategy in the Personal Injury Market' [2014] *J Personal Injury Law* 85. See also the report for the Solicitors Regulation Authority by ICF Consulting Services, above n 32.

⁸² Local authorities similarly use routinized, simplistic and bureaucratic methods when handling injury claims. S Halliday et al above n 7. Insurers are increasingly using computerised procedures not only to assess claims value via programs such as Colossus but also to deal with other matters. 'Zurich Insurance starts using robots to decide personal injury claims.' *Reuters Business News*, 18 May 2017.

An established lawyer expressed regret about the opportunities to learn and develop for those now entering the industry:

I feel very sorry for people who are going in at a junior level because it can be very restrictive, and they may not be able to investigate in the way that I had the opportunities when I started out in the career. I think it is more a call centre factory line because it has to be: it is more bang, bang, bang. I think then there is less scope for development. EW20

These paralegals work in what has been identified in the USA as ‘settlement mills’ where the main features are that

Clients are rarely met; lawsuits are rarely filed; facts are rarely investigated; and settlement values are often calculated using formulaic going rates Settlement mills’ ‘assembly-line’ resolution of claims thus represents quite a departure from the intimate, individualized, and fact-intensive process thought to underlie traditional tort.⁸³

The pattern of claims handling in the UK is similar: cases are being resolved earlier and without resort to formal court documents,⁸⁴ and there is little time or money available to investigate the facts. Judges have acknowledged that they ‘need to adopt a realistic standard when assessing the performance of solicitors conducting litigation under a high volume, low cost commoditised scheme [S]olicitors cannot be expected to turn over every stone....’⁸⁵ How little might be done in certain low value claims was noted by a respondent to the survey:

We used to spend a lot of time investigating cases and liability.... Now we just chuck them straight into the portal and see if the other side simply accept it. EW6

The legal process has not only been de-skilled but also de-personalised in these new claim factories. This has affected how even experienced claims handlers interact with their clients:

⁸³ N. Engstrom, ‘Sunlight and Settlement Mills’ (2011) 86 *New York University LR* 805 at 810 and ‘Run-of-the-mill Justice’ (2009) 22 *Georgetown J of Legal Ethics* 1485. For discussion of ‘dumbing down’ of staff following implementation of the Woolf reforms in 1999 in the UK see T. Goriely et al above n 22 chap 2. The history of the adoption of mechanical processes for various types of claim in the USA is traced by S. Issacharoff and J. F. Witt, ‘The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law’ (2004) 57 *Vanderbilt LR* 1571. Their conclusion offers a major criticism of much recent tort theory: ‘The bureaucratic aggregation of our tort practice calls into question the individualized accounts of tort practice that are increasingly influential in the corrective justice literature.’

⁸⁴ T. Goriely above n 22 at 159 estimated that, because of earlier settlement, the number of cases disposed of only after the issue of formal proceedings had declined by a third. It has always been the case that the great majority of claims are settled informally: almost forty years ago 86% of cases were being settled without formal proceedings in the form of a writ being issued. The Pearson Commission, above n 1 vol 2 table 12. Although NHS Resolution deal with more complex cases which are generally of higher value, in 2016 - 17 it settled two thirds of claims before court proceedings began. National Audit Office Report, above n 1 para 3.13.

⁸⁵ Jackson LJ *Thomas v Hugh James Ford Simey Solicitors* [2017] EWCA Civ 1303 at para 46. The judge was the author of the major report on costs, above n 1.

If you think a case is only worth two or three thousand, you haven't got the time to spend two hours with the client taking a detailed statement It's mitigating against that kind of more thorough approach which ultimately helps you understand the case. EW7

A lot of the firms, they're not spending the time with the clients that they used to because they can't afford to.... People are doing more and more on the telephone. They're not having that face to face meeting and the regular contact. EW20

Limited contact with clients is especially likely when they no longer live locally. The claim may have been gathered by a call centre and then referred to a solicitor from a different part of the country to the claimant. The case is simply one on a conveyor belt to be processed with many others in a routine manner.⁸⁶ The difficulties caused by such limited contact with clients were summed up by another solicitor:

There are lots of things that you pick up from seeing a client.... You are putting injury in context. That is going to be much less likely to happen certainly in lower value claims. EW3

We need to create relationships with clients. If you have relationships with your clients, you gain their trust and they will tell you things. If you don't, it's just a process and they won't understand that they should have been telling you these things.... EW3

Overall, according to some judges, in the last ten years or so there has been a decline in the quality of work done when preparing cases for trial.⁸⁷ They suggest that a reason for this is that junior staff who are insufficiently trained may now be more commonly involved. In addition, they suspect that claimant representatives have not actually met their clients face to face.

These various features of legal practice which have resulted from processing claims in bulk may become less prominent when further changes which are planned for personal injury litigation come into effect.⁸⁸ Two new measures are among the most important of all those that have been taken to combat 'compensation culture.' Firstly, for road traffic accidents alone, the small claims court limit is to be raised from £1,000 to £5,000 whilst, for other

⁸⁶ For judicial discussion of solicitors having little personal contact with claimants and firms using extensive questionnaires and standardised letters to enable a high number of claims to be dealt with at limited cost see *Proctor v Raleys Solicitors* [2015] EWCA 400.

⁸⁷ ICF Consulting, above n 32.

⁸⁸ Following the Ministry of Justice Response in February 2017 to the Consultation on *Reforming the Soft Tissue Injury ('whiplash') Claims Process*, (Cm 9299, November 2016) reforms were set out in Part 5 of the Prisons and Courts Bill. These were lost on the dissolution of Parliament in June 2017 but were resurrected in the Civil Liability Bill in the subsequent Queen's speech to Parliament setting out the new legislative programme.

injury claims, it will be doubled to £2,000. These new thresholds radically affect the ability to recover legal costs and, as a result, will restrict access to justice for many claimants.

Secondly, new fixed low tariffs are to be established to compensate whiplash injuries where the effects last for less than two years. At the lowest level, a sum of only £225 may be available. The extent that claims will be reduced as a result is uncertain,⁸⁹ but we may be sure that, with increasing pressure on costs, law firms will continue to deal with claims as efficiently as possible. Gathering claims en masse, albeit from a more restricted pool, will still be an attractive successful business strategy no matter whether this is done in the established field of road accidents or in relatively new areas such as where hearing loss occurs, or holiday sickness is suffered.⁹⁰

With this caveat that the processing of bulk claims may diminish in importance, we conclude that it is in these run-of-the-mill cases - where investigation is limited and contact between lawyer and client restricted - that personality and character are unlikely to have an effect. This contrasts with larger value claims which are more complex, take longer to resolve and are more likely to progress further towards trial. It is in these cases that the influence of individuals upon their outcome is more likely to be found.

Conclusion

The experience of those in practice reveals that the personality and character of various parties involved in personal injury litigation can affect its outcome irrespective of the formal legal rules prescribed in the law of tort. Claimants, lawyers and insurance representatives can all influence the result. In a few cases the individual defendant can also be important and, in cases that go to trial, the judge. This conclusion is based upon interviews with practitioners: the views of solicitors and barristers provide a different perspective on the tort system from that which students usually encounter via the writings of academics and the legal opinions of judges. The study is related to earlier work which examined the importance of the tactics used

⁸⁹ But see the Ministry of Justice calculations relating to whiplash, *Impact Assessment* (MoJ 015/2016).

⁹⁰ The Association of British Insurers in *Noise Induced Hearing Loss Claims* (ABI, 2015) noted a 250% increase in claims from 2010 - 13. The Association of British Travel Agents claim that holiday sickness cases increased sevenfold from 2013 -16 but these figures are contested. *Legal Futures*, 23 October 2017. Whilst some practitioners see increased technology as a saviour leading to even more mechanical disposal of cases, others see firms abandoning such work entirely. N. Hilbourne, 'Small claims expert: personal injury tariff scheme would force me to leave market' *Legal Futures*, 28 September 2017.

by lawyers in personal injury litigation. Both areas provide examples of how the resolution of claims is dependent upon factors not confined to the application of the black letter law. They illustrate the distinction between ‘law in the books’ and ‘law in action’ and form part of a wider critique of tort scholarship and teaching.

Although personality and character may thus be relevant in litigation, this article has also described areas where it is less likely that an individual will affect the outcome of a case. For a variety of reasons, personal injury law firms have changed their structure. They have been encouraged to acquire claims for minor injury in bulk and then process them as efficiently as possible. To do this, firms have employed junior personnel and restricted their field of operation by closely directing them as to how these claims are to be dealt with. Only limited time can be spent on investigating and processing and there may be little direct contact with individual claimants. It is in these cases that the personality of those involved in litigation is less likely to affect matters. These developments within a bureaucratised framework for aggregated settlements have been examined by only a few tort scholars. Instead, many more tort academics are pre-occupied with finding theoretical bases for tort liability. Those who espouse corrective justice as the foundation for their citadel are failing to take account of how personal injury litigation is actually conducted.⁹¹ They accentuate the gap between what is taught in theory and what happens in practice. Overall, although this article has sought to restore some humanity to the study of law, it has also revealed an impersonal and mechanised process which applies to many claims. It is important to appreciate both features in order to understand the wider context of tort law and go beyond the examination of rules which often have only limited application in the real world.

⁹¹ Above n 83. For an excellent wide-ranging review of theory in tort see S. Hedley, ‘The Revolution in Liability for Negligence’ in S. Worthington, A. Robertson and G. Virgo, (eds), *Revolution and Evolution in Private Law* (Hart Publishing, 2018) chap 6 and especially p 109: ‘So the symbolic justifications given for tort grow more distant from how tort actually works, and tort faces an ongoing crisis of legitimation.’