Compensation Culture

The compensation culture has been defined as “an ethos, the tenets of which are that all misfortunes, short of an act of God, are probably someone else’s fault, and that the suffering should be relieved, or at any rate marked by the receipt of some money”\(^1\). Thus, the compensation culture can be seen as a sociological phenomenon; it need not be mirrored in legal rules and statistics. A litigation crisis occurs when “this shift in social attitudes is translated into undesirable levels of formal disputing”\(^2\).

Statistics have been used in many contexts to prove or disprove the existence of a compensation culture in the UK. As Williams points out, none of these can tell us what proportion of claims is fraudulent, exaggerated or otherwise lacking in merit\(^3\). He also questions how many is too many claims? As Lewis, Morris and Oliphant note, the obvious rise in the number of claims since the 1970s is also consistent with there having been significant under-claiming at that time, the increase being down to a greater social awareness of one’s rights\(^4\). Another problem with the use of statistics based on court settlements is that the huge majority of cases are settled out of court. Payments are made on the basis of decided cases, and independent medical advice.

Myth or Reality – the figures

*The Institute of Actuaries*\(^5\)

The estimated total compensation payout in 2001 is £10 billion, which amounts to 1% of the GDP. Of this 30% is swallowed up by legal costs and administration expenses. This has increased at 15% per year recently; and is set to continue rising at 15% per year.

Marshall points out that the figures may be distorted by the inclusion of the ‘exceptional’ BSE compensation paid out by the government\(^6\). In addition, the Report

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\(^1\) Ronald Walker QC, *Compensation Culture, Myth or Reality?* The Times, 7\(^{th}\) October 2003
\(^2\) K Williams *State of Fear: Britain’s ’Compensation Culture’ Reviewed* (Sept 2005) LS 499, p 500
\(^3\) Ibid, p 505
\(^5\) The Institute of Actuaries Working Party *The Cost of a Compensation Culture* (December 2002)
notes that their calculated cost of the compensation culture is largely due to
guesswork and ‘heroic assumptions’.

*The Better Regulation Task Force*  
The Task Force’s statistics underline their conclusion that the compensation culture is
a misperception. They use a comparative statistic: in 2002, UK expenditure on tort
claims was lower than that of 10 other industrialised countries, including Canada,
Australia, the US and Germany. The Task Force also assesses the percentage of the
UK GDP spent on tort claims, but reaches a different figure to the actuaries, 0.6% of
the annual GDP.

In terms of the size of awards being made, the Task Force notes that in 2002, of all the
claims issued by County Courts, 55% were less than £3000, i.e. the majority were
small claims.

*The Citizen’s Advice Bureau*  
The report by the Citizen’s Advice Bureau found that only 31% of people entitled to
claim compensation actually do so.

*Trade Union Congress Figures 2005*  
In terms of liability in the workplace, the TUC found that less than 1/10 people made
ill or injured by their work receive any compensation. The payouts were an average of
£10,000 each, with a half of this going on legal fees and costs.

*Lewis, Morris & Oliphant*  
An article published in 2006 by these academics drew statistics from the
Compensation Recovery Unit between 2000 and 2005; the Insurers’ Bodily Injury

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8 The Citizen’s Advice Bureau *No Win, No Fee, No Chance* (December 2004)  
9 (2005) NLJ 816  
The CRU statistics show that the number of claims has increased only by three per cent in the last five years. Accident claims have declined by five per cent, the overall increase is caused by a substantial rise in claims for disease. Clinical negligence claims; employers’ liability claims and public liability claims have all fallen, with motor claims remaining stable. On the other hand, disease claims were 42% higher in 2005 than five years previously. Discounting the disease claims, the CRU statistics show that tort claims have actually declined in number.

The reason for this huge increase in disease claims is the Coal Health Compensation Schemes for vibration white finger and respiratory disease – this accounted for almost all new disease claims to the CRU in that period. These have been referred to as the “biggest personal injury schemes in British legal history and possibly the world”\(^{11}\), and “significantly skewed total personal injury claims figures in recent times”\(^{12}\).

The Insurers’ Bodily Injury Awards’ most recent report was in 2003. This report shows increases in both the number of claims against insurers, and the average amount claimed – this led to an increase in the average claim cost per policy. These statistics only cover claims made against certain insurers, and only for those injuries involving a motor vehicle. Interestingly, it was found by the study that legal costs throughout the period studied (1991-2000) averaged 30% of the total payments.

The NHS statistics evidenced a great increase in clinical negligence claims in the last 30 years. However there has been a recent downward trend in claims numbers, which are “now close to the lowest estimate for the year 1990-1991, coming down from a peak in the period 1997-2002”\(^{13}\).

The article does also look at increases over a longer period. Whereas employers’ liability claims have fallen overall, motor vehicle claims, public liability claims and clinical negligence claims have all risen dramatically since the Pearson Commission

\(^{11}\) www.dti.gov.uk/coalhealth/01.htm
\(^{13}\) Ibid, p 94
Report\textsuperscript{14}, with clinical negligence claims at about 100 times the 1973 level. A number of factors are identified:

- Increased social understanding of injuries and their causes
- Legal developments have extended the number of people who qualify for compensation through the tort system (e.g. the development of liability for psychiatric harm)
- Service personnel can now claim against the MoD in tort\textsuperscript{15}
- Increased specialisation of lawyers in personal injury claims
- Founding of the Association of Personal Injury Lawyers
- Greater social awareness of the possibility of claiming compensation has provided both the opportunity and motivation for making a claim\textsuperscript{16}

Williams, looking at the statistics above, argues that the statistical evidence is “incomplete and equivocal, counting as it does different things across different timescales”\textsuperscript{17}

The government has accepted the approach of the Task Force; in the response to the Task Force Report, the government referred to the ‘misperception of the compensation culture’\textsuperscript{18}. However it also referred to the harmful effects that this misperception has:

- Undermining personal responsibility and respect for the law
- Creation of unnecessary burdens through an exaggerated fear of litigation

In addition the government noted the elements that most needed tackling in challenging this misperception. It noted the culture where people believed there is always someone else to blame for their injury, and the encouragement of the belief that it is always worth having a go, the raising of false expectations that there is easy money to be had in personal injury advertising.

\textsuperscript{14} The Royal Commission on Civil Liability and Compensation for Personal Injury, Cmnd. 7054-I (1979)
\textsuperscript{15} The Crown Proceedings (Armed Forces) Act 1987
\textsuperscript{17} Williams, ibid, p 504
\textsuperscript{18} Government Response to the Better Regulation Task Force, Tackling the Compensation Culture (2004)
Similarly Lord Falconer LC in a recent speech noted that the main tasks for the government in relation to the compensation culture are:

- Tackling perceptions
- Discouraging and resisting bad claims
- Improving the system for those with a valid claim

What constitutes a compensation culture?

Expansion of tort liability

Two recent developments in tort law should be mentioned here, both of which have relaxed the requirement of causation in negligence. The first is the case of *Chester v Afshar*\(^{20}\), which, in a bid to bolster a patient’s right to autonomy, held that where a doctor negligently fails to advise a patient of a risk involved in a procedure, and that risk eventuates, the doctor will be liable to compensate the patient for all the loss flowing from the eventuation of the risk. This is so even if the claimant cannot show that she would not have had the operation if she had been advised of the risk. In that particular case, the doctor was liable for all the losses flowing from his patient’s paralysis, even though he performed the operation competently, and cannot in that sense be said to have caused the injury. This is unlikely to lead to an explosion in liability. The new doctrine has been confined strictly to its facts in Chester\(^{21}\), and most doctors employ a standard form warning patients of any risks involved in procedures, which the patient then signs.

The second development originates in the case of *Fairchild v Glenhaven*\(^{22}\), and has been developed in the recent case of *Barker v Corus*\(^{23}\). Victims of the disease mesothlioma, which is caused by exposure to asbestos, are faced with a huge scientific difficulty when trying to sue those who have negligently exposed them to asbestos. The etymology of the disease is unknown; hence it is impossible to prove that a negligent exposure to asbestos caused the disease in the claimant. In *Fairchild* it was held that justice to the claimant required that the law allow his to ‘leap the

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19 Lord Falconer, *Risks and Redress: Preventing a Compensation Culture*, 17th November 2005
20 [2004] UKHL 41
21 *White v Paul Davidson & Taylor* (Court of Appeal)
22 [2002] UKHL 22
23 [2006] UKHL 20
evidentiary gap’. In other words, if the claimant could show that the defendant negligently exposed him to asbestos; and that he had contracted mesothelioma, it would be presumed that a causal link existed. This is the *Fairchild* doctrine. It was also held in that case that defendants would be jointly liable. The claimant need only sue one defendant who had negligently exposed him to asbestos, and that defendant would be liable to compensate the claimant entirely, even if the claimant had been exposed to asbestos by a number of different tortfeasors. The risk of these others being insolvent or untraceable therefore lay on the defendant.

This latter element of the judgment was overruled in *Barker*. Lord Hoffman developed the *Fairchild* doctrine in a number of ways. Firstly, he held that the doctrine would only apply where a single agent was responsible for the injury suffered. If the defendant could point to another agent that could have caused or contributed to the claimant’s injury, the claimant would not be able to rely on *Fairchild*. It was also held that each defendant who negligently exposed the claimant to asbestos would only be severally liable. Lord Hoffman altered the doctrine, holding that it was contribution to the risk of injury for which the defendant was liable (and not contribution to the injury itself). This meant that each defendant would be liable only for the risk created by his period of exposure. He would not be liable to compensate the claimant for the entirety of his injury, only for a proportion of it, determined by the relative exposure to asbestos that he was responsible for. The risk of insolvent and untraceable tortfeasors fell squarely back on the claimant.

Unlike Chester, this development has had a huge effect on liability, especially of employers. Many businesses and insurers have gone out of business over the issue of compensating employees for mesothelioma, largely because it takes a long time to develop, and the policies covering the negligent parties did not foresee such actions being brought.

Williams makes the point that the effect of these developments on the behaviour of defendants and liability insurance is uncertain and disputed. Some claim that the scope of legal rules have less influence than, for example, increases in the sizes of

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24 Williams, ibid, p 510
awards. However, what is true is that new and uncertain liabilities being developed by the courts may have a psychological impact on defendants and their insurers.

It should also be noted that the House of Lords has sent out forceful anti-liability messages in recent decisions, both in contexts where public authorities were defending claims.25

Other legal factors
The following have all been highlighted as factors contributing to the ‘compensation culture’ in the US:26

- Jury awards: in the US it is the jury that makes decisions on facts, and decides the size of the awards in personal injury cases. This does not happen in the UK, where judges will hear and decide personal injury cases, and quantify damages.
- Punitive damages: juries in the US are able to make awards above and beyond that which is required to compensate the claimant fully, by awarding extra damages in order to punish the defendant. This is often the explanation for multi-million dollar awards in the States.
- Legal costs: in the UK the losing party is required to pay the costs of the successful party. This acts as a deterrent against bringing spurious claims, and an incentive to defend such claims. No such rule exists in the US.

Increase in the amount of paid out by insurers in respect of individual claims
There is a general agreement that the amounts paid out in the average award of damages are increasing. This can be attributed to a number of factors:

- In *Heil v Rankin*27 the Court of Appeal increased the amount of damages that would be awarded to claimants in respect of their non-pecuniary loss.
- In *Wells v Wells*28 the discount rate applied to the lump sum awarded to the claimant (to account for the fact of accelerated receipt of the money) was

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26 For example by the Institute of Actuaries, ibid
27 [2000] 3 All ER 138
28 [1999] 1 AC 345
reduced by the House of Lords. Both of these cases resulted in an increase in individual awards made to claimants.

- The NHS is now able to recoup the costs of accidents from defendants\(^{29}\), and the state can recoup social security benefits paid out to the claimant\(^{30}\). Previously the defendant was able to offset the social security benefits from the damages he was liable for.

- Defendants are now liable for costs if they lose a case even if the claimant’s solicitor is acting under a Conditional Fee Arrangement. This means the defendant is paying the normal level of costs; a success fee for the solicitor and possibly the premium for the after-the-event insurance that the claimant purchased to cover the cost of the solicitor should he lose the case (and therefore be liable for the solicitor’s fee).

- Legal and medical costs have been rising faster than inflation. Between 1997 and 2002 medical and legal costs increased by 50\(^{\%}\)\(^{31}\).

The Actuaries’ Report included a survey of actuarial practitioners. The top three reasons given by the practitioners for increased personal injury costs were firstly, increased Ogden multipliers (the figures used to determine the quantum of damages by the courts); secondly the introduction of conditional fee arrangements and finally, an increasingly litigious

**Rise in liability insurance premiums**

In some quarters, the publicity concerning the compensation culture is seen as a ploy used by insurance companies to justify rising insurance premiums to their customers. The rise in premiums is not just a result of the number of the claims, or the amounts being paid out on these claims. Pre-9/11 motor and employers’ liability policies were sold knowingly as a massive loss in order to gain or retain market share. According to David Marshall (former President of the Association of Personal Injury Lawyers)\(^{32}\), insurers have now changed to a commercial basis of selling policies with premiums that cover the costs of claims, from a starting point of more than £1 billion down.

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29 The Road Traffic (NHS Charges) Act 1999
30 Social Security (Recovery of Benefits) Act 1997
Another reason for rising premiums, identified by Kennedy LJ extra-judicially\textsuperscript{33}, is the obligation on insurers to pay damages in respect of unforeseen risks, such as mesothelioma manifesting itself years after the claimant’s employment (the \textit{Barker} case has surely exacerbated this).

In 2002, the average cost of employer’s liability insurance was 0.25\% of total payroll costs, the lowest in Europe\textsuperscript{34}. One problem with insurance premiums in the UK is that there is little economic incentive for employers to take action to reduce the number of injuries and illnesses they cause, as premiums within this sector vary only marginally between good and bad employers. Linking premiums to risk management was cited as a reform that should be pursued by the Better Regulation Task Force. The Task Force suggested that such a scheme could also be extended to other sectors such as schools, and applauded other initiatives where similar organisations learn from each other about good techniques for managing risk.

\textbf{Conditional Fee Arrangements}

Conditional fee arrangements, or no win, no fee agreements were introduced in order to replace legal aid in personal injury claims – they would enable those of limited means to pursue an action against someone who had negligently caused them injury without having to pay in advance, or at all if they lose the case. They were introduced in 1995.

The Access to Justice Act 1999 introduced recoverability. This meant that the success fee and insurance premium that the claimant had previously paid if successful could now be recovered from the defendant should he lose.

Some see the introduction of such arrangements as being at least a factor in the development of the compensation culture\textsuperscript{35}. However as Williams points out, if frivolous and spurious claims were taken to court under this arrangement, solicitors and claims management firms would go out of business, as low chances of success translate into low rates of fee recovery and unaffordable after-the-event insurance

\textsuperscript{33} P Kennedy \textit{Is This the Way We Want to Go?} (2005) JPI Law 117
\textsuperscript{34} Greenspan Bergman Report for ABI, \textit{Workplace Compensation}, 2002
\textsuperscript{35} For example, the Actuaries’ Report, ibid
(this is taken out in case the claim should fail, to cover the costs of the claimant’s solicitor, and the legal costs of the defendant which must be paid by the claimant)\textsuperscript{36}. Indeed, research shows that 93\% of cases taken on a no win no fee basis are successful\textsuperscript{37}. The implication is that only strong cases are likely to be taken up, and the problem of have a go vexatious litigants is likely to be small. They may however have an influence on the size of awards, and consequently cost of insurance. If the defendant has to pay the claimant’s costs, this will include the solicitor’s fees; the success fee (estimated at an average of 40\% of the award in personal injury cases, with a maximum of 100\%)\textsuperscript{38} and the insurance which the claimant had to take out to cover the eventuality of losing. The courts have been regulating the situation. In \textit{Callery v Gray}\textsuperscript{39}, the House of Lords held that the success fee should be limited to 20\% except in unusual circumstances. The Supreme Court Costs Office further held in \textit{Sarwar v Alam}\textsuperscript{40} that where the claimant already had insurance covering legal costs; further insurance should not be sold to cover the risk of defeat. If the insurance was sold to a claimant who was already covered, then it could not be recovered as costs. Indeed the CFA as a whole may be unenforceable (i.e. no costs can be recovered). This is because under regulation the solicitor taking a case under a CFA must make sure that the claimant does not already have insurance covering his legal costs\textsuperscript{41}.

The government in 2004 stated that it believed that CFAs should remain the principal form of private contingent funding in the civil justice system, with the primary focus on making them work better\textsuperscript{42}.

Dr Frank Furedi has said that the principal trigger for the rise in compensation cases was the lifting of laws banning solicitors from advertising\textsuperscript{43}, the result being that some solicitors firms have gone on the offensive. One oft-cited example is the leafleting of

\textsuperscript{36} Williams, ibid, p 509  
\textsuperscript{37} S Yarrow \textit{Just Rewards: The Outcome of Conditional Fee Cases} (London: Policy Studies Institute 2001)  
\textsuperscript{38} Yarrow, ibid  
\textsuperscript{39} [2002] UKHL 28  
\textsuperscript{40} [2003] All ER (D) 162  
\textsuperscript{41} Conditional Fee Agreement Regulations 2000; Regulation 4  
\textsuperscript{42} Government Response to the Better Regulation Task Force, \textit{Tackling the Compensation Culture} (2004)  
\textsuperscript{43} F Furedi \textit{Courting Mistrust} Centre for Policy Studies 1999
council tenants by firms offering to take up claims for repairs that have not been carried out. The government has also shown concern over personal injury advertising. The problem is that ‘advertisements can play a useful role in disseminating information about legal entitlements to compensation financial arrangements in place for obtaining advice’. The government has largely shifted responsibility for access to justice into the private sector, and advertising plays an important role. The issue seems to be how personal injury litigation is advertised and not whether it should be advertised or not. As Morris notes, ‘legal representatives should provide responsible legal advice and filter out unjustified claims’.

Advertising on NHS premises, and even on appointment cards; and a particular advert which depicts a woman gazing at a sports car and saying ‘I’ve always wanted one of those and now I’ve had an accident I can afford one’ have been the target of particular criticism.

The increased incidence of advertising seems to fanning the flames of a ‘compensation culture’ largely caused by word of mouth and media coverage, with people believing that increased advertising must be matched with increased claiming. The DCA has also found that

> “aside from raising awareness of claiming as an option, and communicating the message of ‘no win, no fee’, ads are doing little to educate consumers about the subject of pursuing compensation for personal injuries”

Two areas were felt to have particularly misled consumers. The first is the actual meaning of no win, no fee, and the liabilities that potential claimants may incur; the other is the fact that most adverts do not highlight the fact that another party needs to have caused the injury through his fault. However there is also a concern not to make advertising so confusing that it discourages genuine potential claimants.

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45 A Morris *Claims Advertising: access or excess* (2005) NLJ 345
46 Ibid
48 Ibid
The AON Report\(^49\) has noted that 56\% of those surveyed wanted stricter controls on advertisements.

**Claims Management Companies**

The Actuaries’ Report estimated that about 60,000 cases per month are taken on by Accident Management companies\(^50\). They advertise for accident victims, and then sell their names onto personal injury law firms. Essentially they operate as conduits between claimants and a wide range of service providers, but primarily solicitors specialising in personal injury and clinical negligence. The introduction of CFAs shifted the burden of funding personal injury claims from the public to the private sector, therefore increasing the demand on private sector providers. This led to the rapid growth of the claims management sector. The companies earn their money through a non-transparent and complex system of referral fees and charges, and it is the losing side in a personal injury claim which now picks up this cost.

The Better Regulation Task Force cited the advent of claims management companies as one of the reasons for the perceived compensation culture, and noted that they did feed an enormous number of claims into the system. However, the two largest such companies went into receivership in 2002. The Actuaries’ Report cited a lack of cases and cashflow problems whilst the new regime was tested in court as the main reasons for this. The Task Force notes that people are still encouraged to ‘have a go’ by the more unethical of these companies when their claim has a remote chance.

It is claims management companies who have engaged in the majority of the advertising complained of above. This has been paired with direct marketing, bringing the whole sector into disrepute. Lord Falconer in a recent speech referred to cases where successful claimants were left with large debts because of costs deductions (although this is less likely to be the case since the 1999 reforms)\(^51\). The Citizen’s Advice Bureau describes such a case, of a woman who had tripped and suffered cuts.

\(^51\) Lord Falconer, *Risks and Redress: Preventing a Compensation Culture*, 17\(^{th}\) November 2005
and bruises. Three years later, she was offered £500 compensation from the company concerned, but on the advice of a claims management company she turned down and was encouraged to borrow money to pursue the claim. She eventually won £1,200 but that was deducted from her loan, leaving a shortfall of £950 which is still accruing interest. Lord Falconer goes on to say that cases involving awards of less than £2000 have been known to incur costs of £4500-£7000 because of the charges laid down by claims management companies. The government has used the new Compensation Bill to regulate the area (see below).

Media
The media do seem to be responsible for fuelling the perception of a compensation culture. Articles will often give the impression that huge payouts are available if claimants sue in tort. Such stories will often not report the outcome of the ludicrous cases they report, or acknowledge that cases from different jurisdictions are unlikely to succeed in the UK because of different legal rules. As Tony Blair has noted,

“People are entitled to sue. And often the most outlandish cases that are brought are dismissed. But their headlines live on, create a myth and the myth is acted upon”

In other words, such stories and headlines are relied upon by people who see themselves as potential defendants, leading to defensive and risk-averse behaviour.

Public Perceptions
A report commissioned by the Department of Constitutional Affairs has found that four-fifths of those surveyed believe “there is a culture in the UK of people making false claims for personal injuries” and 50% of respondents believe a lot more people are now making false claims for personal-injury compensation than they were five years ago, compared with 39% for state benefits and 22% for home-contents insurance.

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52 Citizen’s Advice Bureau, No Win No Fee No Chance (2004)
54 T Blair, speech to the Institute of Public Policy Research, 26th May 2005
55 DCA, Effects of advertising in respect of compensation claims for personal injuries (2006)
AON has conducted a recent report into public perceptions of compensation\textsuperscript{56}, finding that:

- 75\% of those surveyed see that current growing trend (towards a compensation culture) as creating an unsustainable burden for industry, commerce and public services.
- 60\% believed that the fear of the compensation culture was hampering business by distracting management time
- 49\% believed that this fear diverts financial resources

AON also took figures from a Norwich Union Report (2004), which claimed that 96\% of those surveyed believed people in Great Britain were more likely to seek compensation now than 10 years ago.

The ill effects of a compensation culture

As the Task Force points out, whatever the actual likelihood of irresponsible litigation, many do believe themselves to be at heightened risk of being unfairly sued. One of the disadvantages of the ‘compensation culture’, real or perceived, is the ‘defensive practice’ adopted by potential defendants (for example, public bodies, doctors, pharmaceutical companies); in other words, such potential defendants adopt risk-averse behaviour, which can be socially and economically damaging. As Lord Falconer has noted, the compensation culture can stultify reasonable risk taking, hit organisational efficiency and competitiveness and prevent worthwhile activity\textsuperscript{57}.

Ennis and Vincent\textsuperscript{58} describe defensive practice in the medical context as involving:

- More meticulous records
- Unnecessary diagnostic tests
- Withholding high risk procedures
- Avoiding ‘litigation-risk’ patients

Although often relied by courts, academics and the media in order to argue against the imposition of tortious liability, the precise nature and magnitude of the impact of defensive practice is largely speculative. What is interesting is that in their study of

\textsuperscript{56} AON Report, \textit{Blame, Claim and Gain: The Compensation and Blame Culture, Myth or Reality?} (2004)

\textsuperscript{57} Lord Falconer, \textit{Risks and Redress: Preventing a Compensation Culture}, 17\textsuperscript{th} November 2005

\textsuperscript{58} Ennis & Vincent \textit{Medical Accidents and Litigation} (1994) 16 Law and Policy 97
defensive practice, the numbers of those engaged in such practice were the same amongst those who had been sued, as amongst those who hadn’t. In other words the perceived threat of litigation has almost as much impact as an actual lawsuit. They note that a Harvard Study from 1990 found that the perceived risk of being sued was three times higher than the actual risk. This seems to suggest that the important thing is to tackle the perception of a compensation culture. It should also be remembered that compensation claims actually can play a part in improving health and safety, and raising standards.\textsuperscript{59}

A related problematic response to a perceived compensation culture, as pointed out by Tony Blair in a recent speech is to regulate – public bodies introduce more and more regulations, in order to avoid the eventuation of risks:

\begin{quote}
“We lose out in business to India and China, who are prepared to accept the risks. We are unable to exploit our scientific discoveries. We seek protection from risks that are exaggerated or even imagined. We allow the conspiracy theorists to dictate the argument without a basis in fact.”\textsuperscript{60}
\end{quote}

He has proposed minimising public regulation; regulating only after reflection.

The AON Report contains quotes from business managers such as:

\begin{quote}
“Because of the claims culture we now always look to automate all processes and reduce the number of employees wherever possible”.

“The risk of troublesome claims is one factor which makes outsourcing manufacturing to overseas third parties increasingly attractive.”\textsuperscript{61}
\end{quote}

Potential defendants are also accused of fuelling the compensation culture by settling cases out of court, even where the case against them is weak. The reasoning behind this is that they will avoid paying legal costs and damage to their reputation if they settle. However it is possible that ‘nuisance’ claimants are encouraged to bring

\textsuperscript{59} Lord Falconer, \textit{Risks and Redress: Preventing a Compensation Culture}, 17th November 2005
\textsuperscript{60} Tony Blair, speech to the Institute of Public Policy Research, 26th May 2005
\textsuperscript{61} AON Report, \textit{Blame, Claim and Gain: The Compensation and Blame Culture, Myth or Reality?} (2004)
speculative claims by this behaviour, confident that the defendant will settle before their case is tested. This is backed up by a survey by the employment law firm Peninsula, which found that nine out of ten people would be prepared to lie if it meant winning a case against their employer. The need to resist bad claims was identified as a method in the battle against the compensation culture by the government in *Tackling the Compensation Culture*\(^{62}\). The AON Report\(^{63}\) suggested that insurers insist on settling spurious claims, even when the true defendant wishes to contest them.

Morgan has argued that the courts have recently confused the ideas of tort as a system of individual responsibility and deterrence (its traditional role) and of tort as a system for compensating accident victims and loss-spreading. In a compensation culture tort will fulfil the latter system. Morgan recommends tort returning to its roots as a system of individual responsibility, not least because this is the role that the major doctrines were intended to fulfil. Trying to fit them to a different purpose has resulted in incoherence\(^{64}\)

Another problem is that if, as suggested by the phrase compensation culture, the courts are witnessing an increase in spurious and frivolous claims, this will be clogging up the system for those with a genuine claims. The rule of law demands that citizens have access to courts to vindicate their rights, and that includes those with a genuine claim for compensation because of a personal injury.

Finally as Lord Hobhouse points out in *Tomlinson v Congleton BC*:

> “The pursuit of an unrestrained culture of blame and compensation has many evil consequences and one is certainly the interference with the liberty of citizens”\(^{65}\).

Another is surely the demise of responsibility for ourselves as we increasingly seek others to blame for our misfortunes.

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\(^{64}\) Morgan *Tort, Insurance and Incoherence* [2004] 67 MLR 384

\(^{65}\) [2003] UKHL 47, p 81
Compensation Bill

Clause 1 of the Compensation Bill provides that:

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

(a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or

(b) discourage persons from undertaking functions in connection with a desirable activity.66

The explanatory notes accompanying the Bill provide that this provision does not change, but merely reflects the existing law67. The Parliamentary Under-Secretary of State for Constitutional Affairs has said that the clause is to reassure people who are concerned about being sued that if they act reasonably they will not be found liable68. However one can question the extent to which this concern is adequately addressed by legislation. As Alan Gore QC notes:

“There is a real need for education to make it clear that compensation is only available where there has been avoidable injury, and not for accidents”69.

Legislation itself does not tackle the rumours and fears of litigation, as Lane notes70. Defendants must become more robust to spurious claims, and the media must take responsibility for fuelling the compensation culture.

The section has been criticized. The APIL stated that it is “unlikely to result in clarification of the law”, whilst personal injury firm Thompsons Solicitors noted that

66 http://www.publications.parliament.uk/pa/cm200506/cmbills/155/2006155.pdf
67 http://www.publications.parliament.uk/pa/cm200506/cmbills/155/en/06155x--.htm#index_link_2
68 Hansard 8th June 2006
69 (2005) NLJ 816 Responses to the Compensation Bill
70 C Lane Watch this space, but mind the gap (2005) NLJ 978
“the Bill…confuses the law on negligence [and] introduces a vague notion of a desirable activity”71. There are fears that ‘desirable activity’ will lead to litigation about the objective legal definition of such a subjective notion. There is also a danger that the clause results in an unlevel playing field. What if the claimant is also engaged in a desirable activity when he is injured? Why is the claimant injured through the fault of another denied compensation because the defendant is engaged in a desirable activity?72

The second part of the Bill provides for the regulation of claims management companies:

- Aims to protect the public from aggressive hard sell tactics; misleading advertising and poor advice about the merit of claims
- Provides a mechanism for public complaints about claims management companies
- Requires companies to be authorised by a regulator and comply with rules or a code of practice or risk two years imprisonment.

The proposed legislative framework is flexible and would allow the Secretary of State to designate a body to regulate claims management services, to establish a body to regulate (where he thinks that no existing body is suitable for designation) or to regulate himself. The Bill also provides the outline regulatory framework to authorise providers who would be required to comply with rules and codes of practice. The Bill also includes power for the Regulator to investigate unauthorised activities and to prosecute those who try to evade regulation73.

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71 (2005) NLJ 1703
72 D Kitchener The Compensation Bill Clause 1: an undesirable deterrent? (2005) NLJ 1793
73 http://www.publications.parliament.uk/pa/cm200506/cmbills/155/en/06155x--.htm#index_link_5
Annex 1: Total number of claims notified since 2000 (Source: CRU)

<table>
<thead>
<tr>
<th>Year</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000/2001</td>
<td>735,931</td>
</tr>
<tr>
<td>2001/2002</td>
<td>688,315</td>
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<tr>
<td>2002/2003</td>
<td>706,697</td>
</tr>
<tr>
<td>2003/2004</td>
<td>770,243</td>
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<tr>
<td>2004/2005</td>
<td>755,875</td>
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</tbody>
</table>
Annex 2: Number of accident claims notified since 2000 (Source: CRU)

<table>
<thead>
<tr>
<th>Year/Year</th>
<th>Medical</th>
<th>Employer</th>
<th>Public</th>
<th>Motor</th>
<th>Other</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>00/01</td>
<td>10,980</td>
<td>97,675</td>
<td>94,000</td>
<td>401,740</td>
<td>7,815</td>
<td>612,120</td>
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<td>01/02</td>
<td>9,773</td>
<td>97,004</td>
<td>100,663</td>
<td>400,434</td>
<td>6,252</td>
<td>614,126</td>
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<tr>
<td>02/03</td>
<td>7,973</td>
<td>92,915</td>
<td>109,441</td>
<td>398,870</td>
<td>6,347</td>
<td>615,546</td>
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<tr>
<td>03/04</td>
<td>7,109</td>
<td>79,286</td>
<td>91,177</td>
<td>374,740</td>
<td>4,874</td>
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<tr>
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<td>77,765</td>
<td>86,966</td>
<td>402,892</td>
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<td>579,282</td>
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Annex 3: Number of disease claims notified since 2000 (Source: CRU)

<table>
<thead>
<tr>
<th></th>
<th>Medical</th>
<th>Employer</th>
<th>Public</th>
<th>Motor</th>
<th>Other</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>00/01</td>
<td>11</td>
<td>121,508</td>
<td>1,883</td>
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<tr>
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<td>73,550</td>
<td>326</td>
<td>11</td>
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<td>74,189</td>
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<tr>
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<td>90,427</td>
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<td>22</td>
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<td>91,151</td>
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<tr>
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<td>21</td>
<td>824</td>
<td>213,057</td>
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<tr>
<td>04/05</td>
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<td>32</td>
<td>544</td>
<td>176,603</td>
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