Safety first?

Geoffrey Bindman QC condemns the government's "compensation culture" campaign

Targeting lawyers has a long history and it is very tempting for politicians to make them the scapegoats for social problems which they have failed to tackle adequately themselves. Safety for the public and redress for those injured by the fault of others is a good example. On 5 January the prime minister gave strong support to insurers in their perennial effort to minimise the cost of compensating those harmed by dangerous or irresponsible actions. When viewed alongside the changes recommended by Lord Justice Jackson in his recent report on costs in civil proceedings—which the government has accepted—the hardship of accident victims could increase dramatically.

Moral matters

Since the industrial revolution, the protection of workers from the risk of injury has been a constant struggle. Governments and employers have used all their economic and political power to avoid the cost of safety measures. Since the development of the internal combustion engine, there has been similar resistance to the protection of the public from injury on the highways. Yet, the moral imperative is indisputable: those who cause accidents and those who profit from the conditions in which they are likely to occur should pay the cost of reparation. In modern times, the moral duty has an important financial consequence for the taxpayer: if those responsible do not pay, the cost of medical and other care falls upon the public purse. Mr Cameron may have been misled into endorsing the popular myth of a "compensation culture". In fact, the majority of accident victims do not pursue claims.

Over the centuries there has been progress—now in jeopardy—towards a twofold translation of the moral obligation into a legal one: regulation of the workplace and the movement and construction of vehicles on the one hand; compensation for injury on the other. The introduction of health and safety legislation is credited to the efforts of the Victorian aristocrat and leading Tory, the seventh Earl of Shaftesbury, who promoted the first Factory Acts and the "Ten Hours Bill". Regulation has been enforced by government using the civil and the criminal law. Compensation was largely the province of the common law torts of trespass and, later, negligence, but until 1948 was severely restricted by the Workmen's Compensation Acts, which replaced the tort remedy with low fixed rates of payment for those injured at work. The ability to secure compensation was also limited by the disastrous doctrine of common employment, which excluded claims based on the actions of a fellow worker. It derived from a decision of Lord Abinger in *Priestley v Fowler* (1837) 3 M & W 1 following which it was said "Lord Abinger planted it, Baron Alderson watered it, and the Devil gave it increase." Poverty and the absence of legal aid were also major barriers to redress.

After 1948, when Workmen's Compensation and common employment were abolished by the reforming Attlee government, compensation claims greatly increased. Legal aid was introduced but excluded trade union members who could rely on their unions to fund legal representation. The unions were content with this arrangement, because the provision of an excellent compensation service was a powerful recruitment attraction. It was also inexpensive because the legal costs of successful claims were mainly paid—applying the moral principle referred to earlier—by the defendants.

Withdrawal of legal aid

In 1999, the Labour government rashly withdrew legal aid from personal injury claims and substituted the conditional fee. While the saving to the public purse was modest (about £27m a year), it was argued that many people whose means were too great to qualify them for legal aid were now enabled to pursue claims. The lawyers took the risk of failure in return for which in successful cases they were permitted to charge the defendants a success fee of up to an additional 100% of the costs they could in any event recover from the defendant.

Undoubtedly these developments greatly increased the number of claims and

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hence the burden on insurers and their clients. Solicitors have enthusiastically used their freedom to advertise their services to encourage the public to make claims on a "no win, no fee" basis, and Cameron is doubtless right to point out that in some cases costs have exceeded the amount of compensation obtained for the client. This can be the fault of insurers who pursue expensive and unjustified challenges or delaying tactics before settling meritorious claims.

Cameron also says that excessively strict and petty health and safety regulations have added to costs and have undermined the common sense and responsibility of people generally to take reasonable care for their own safety. He gives no verified illustrations. He also ignores contributory negligence. A claimant who has also been at fault will suffer reduced compensation in proportion to that fault. And the courts have shown that they will not allow health and safety legislation to stifle personal responsibility. In 2005, the Hampstead Heath Winter Swimming Club successfully challenged the decision of the Corporation of London, which manages Hampstead Heath, to ban unsupervised swimming on safety grounds. The High Court held that it was up to the swimmers to decide whether they were prepared to take any risk there might be. The absence of supervision would not justify a prosecution under the Health and Safety Act, even if there were an accident. While it may be that some regulations could be dispensed with, Cameron is wrong to peddle fictitious illustrations of alleged absurdities—such as the notion that children are required to wear goggles to play conkers, or that trainee hairdressers cannot use scissors. To "take the brakes" off business by "waging war against the excessive health and safety culture which has become an albatross around the neck of British business" hugely distorts the vital role of government in protecting the public from injury, and—if implemented—would be the height of irresponsibility.

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Absurd suggestions

Cameron has also said that his government would remove strict liability on employers who violate the Health and Safety Act and would extend the cap on the amount that can be recovered in small-value personal injury claims. The aim, apparently, is to address "the fear of being sued". He said "It is simply much too easy for no-win no-fee lawyers to encourage trivial claims against businesses, which end up settling out of court because it's too expensive to fight the case." He had been consulting insurance companies which predictably make such claims but it is absurd to suggest that lawyers habitually pursue claims at their own expense which are without merit. It is much more likely that they will not pursue cases which should be pursued because they are unwilling to incur the cost of a case which may fail. Furthermore, claimants need to have their own insurance to protect them against liability for the defendant's costs if the claim should fail. Ironically, the insurers in such cases demand a success rate of about 60%, as a condition of granting insurance cover. That means there are very few cases pursued where there has not truly been negligence or breach of duty.

Of course, there are valid concerns about our current system. The conditional fee produces a conflict of interest between the lawyer and client. The Jackson recommendation to relieve defendants of liability for success fees is justifiable if lawyers do not in fact undertake cases which are not assured of success, but giving lawyers the right to deduct a success fee from the client's damages is problematic. That would be to deny the client proper compensation and most solicitors will not take advantage of it. There is also a problem about the style and content of much advertising by solicitors, which is not properly monitored.

From the point of view of the injured person, the loss is the same whether the injury has been caused by the fault of another or not. That is why "no fault" compensation schemes have been introduced in other countries, such as New Zealand. Our system seems to reflect a culture of accountability which one might expect Cameron to favour. Inevitably, it carries a cost when each claim needs separate investigation and evaluation. If the government seeks to reform the system it needs more than populist rhetoric. Cameron's views, shallow and based on inadequate investigation, will not do. If he has in mind the reform of the compensation system, a properly informed review is essential. NLJ

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