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MAGNA CARTA AND COMPENSATION CULTURE
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(1) Introduction¹

1. My first idea was to give a lecture about the so-called Compensation Culture: what is it and should we be concerned about it? That is a topical subject which the organisers of the lecture thought would be of interest. But as we all know, 2015 is the 800th anniversary of Magna Carta and it was pointed out to me that the Bodleian Library has no fewer than 4 of the 17 surviving pre-1300 engrossments of Magna Carta? So I was asked whether I could introduce a Magna Carta theme into my lecture? I did not want to give up on Compensation Culture. Hence the somewhat Delphic title of the lecture “Magna Carta and the Compensation Culture”. The title was the easy bit.
2. On Christmas Eve 1166, Henry II's youngest son John was born at Beaumont Palace in this great city. The Palace no longer exists, but set into a pillar on the north side of Beaumont Street is a stone which bears the inscription “near to this site stood the King's Houses later known as Beaumont Palace”. John was not a good king. According to one historian he was not even a good ‘bad’ king’. Unlike his Angevin predecessors who were ‘effective tyrants’, John did not even qualify to earn that doubtful accolade. As we approach the end of 2015,

¹ I wish to thank John Sorabji for all his help in preparing this lecture.

we do not need to be reminded that the most enduring consequence of John's reign is Magna Carta.

3. Magna Carta, or – as it was originally known – the Charter of Runnymede, started life as a peace treaty between John and his barons, a significant number of whom could no longer tolerate the way in which he abused his powers as King. A particularly egregious example was his misuse of the justice system. In the words of McKechnie, he used it to satisfy '*his lust and greed*'.² The machinery of justice was nothing more than '*instruments of extortion and outrage*'³ by which he could channel the flow of ever increasing amounts of money into the royal coffers.
4. One of the ways in which John achieved this was by selling justice to the highest bidder. Since 1209, the Court of Common Pleas had followed the King around the country. Cases were decided by the King's Court. In addition to John, it included '*the whole body of counsellors, ministers, knights, clerks and domestic servants who (accompanied the King)*.' Not an independent court, as we would know it.⁴ Decisions were made either by the King himself or, if by others, they were heavily influenced by him.
5. This system provided the perfect environment for the making of what were known as 'proffers'. Proffers were payments of money made by litigants to the King in order to obtain favourable decisions. And if one litigant was willing to make a proffer, his opponent might consider that he had to make a higher proffer in order to win the case. In other words, justice was sold to the highest bidder on the basis that they would receive a pay-out if

² Cited in J.C. Holt, *Magna Carta* (2nd ed) at 179.

³ Ibid.

⁴ D. Carpenter, *Magna Carta*, (Penguin) (2015) at 157.

judgment was obtained in their favour.⁵ Money was not only paid to secure favourable decisions at the end of a hearing. It was also paid to halt justice in its tracks. In order to secure support for his war efforts, in 1206 John offered the incentive to his knights that, if they joined the army, claims against them would be stayed.⁶

6. In view of John's predilection for deciding disputes involving his barons which would previously have been dealt with by a Court of Barons – that is by the barons' peers--it is hardly surprising that in 1215 abuse of justice featured prominently in the list of the barons' grievances and consequently in the clauses of Magna Carta.
7. Thus chapter 17 provided: "*ordinary lawsuits shall not follow the royal court around, but shall be heard in a fixed place*". The Court of Common Pleas was to resume sitting at Westminster Hall. Chapter 45 guaranteed that the King would only appoint '*such men that know the law of the realm and are minded to keep it well*' as judges. No longer were claims to be decided by those unqualified in the law. Chapter 39 provided that '*No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will we proceed against or prosecute him, except by lawful judgment of his peers or by the law of the land.*' The barons were to be judged by their peers in the Barons' Court or by the law of the land. No longer were they to be subject to the capricious rulings of the King and his court. And Chapter 40 guaranteed that '*To no one will we sell, to no one will we deny or delay, right or justice.*' The age of the proffer, of abuse of the justice system as a means of swelling the Exchequer's coffers, was to be brought to an end.

(2) From Magna Carta to compensation for harm

⁵ Cited in J.C. Holt *ibid* at 179.

⁶ J.C. Holt *ibid* at 84.

8. Chapters 39 and 40 are famous to this day. They have a resonance which continues to thrill. They remain on the statute book, in slightly revised language, as section 29 of the 1297 version of Magna Carta. While they were born out of the barons' immediate concerns to put an end to John's abuse of the justice system at their expense and to restore their privileges⁷, they have, over the centuries, taken on a life far beyond that narrow self-interest. They stand today as a symbol of our commitment to equality before the law, access to justice and the rule of law. In the 17th century they were an inspiration for Lord Coke CJ and the Parliamentarians in the struggle between the Stuart Kings and Parliament. Later they inspired the American revolutionaries in their battle against the English.
9. One tenet of Magna Carta that remains as valid now as it was in 1215 is its statement that justice shall be done by *'the law of the land'*. It is not surprising that our view of what the law of the land should be today differs markedly from what the barons thought it should be in 1215. But the principle that justice should be done according to the law of the land is as important today as it was in 1215. Establishing and preserving the rule of law is a vital pillar of our democratic system. To use the language of a later version of Magna Carta, justice must be determined according to *'the due process of law'*⁸.
10. Our common law has developed over the centuries in response to changing social and economic circumstances. Sometimes it has developed slowly and almost imperceptibly; sometimes it has taken large strides forwards. All of this is entirely consistent with the rule of law provided that the developments are visible, applicable to all who wish to have access to the law and disputes as to the application of the law continue to be determined fairly by independent judges.

⁷ W. McKechnie, *Magna Carta*, (1912) (2nd Edition) (Maclehose & Sons) at 449.

⁸ Magna Carta 1354, 28 Edw. 3, c. 3, '*. . . no man of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of law.*'

11. A well-known example of a giant leap forward of the common law in this country is the famous 1932 case of *Donoghue v Stevenson*.⁹ The alleged facts are probably well known to many of you. Two people went into a café in Paisley, near Glasgow. One bought the other a bottle of ginger beer. Half the contents of the bottle were poured into a glass and consumed. The rest of the ginger beer was then poured into the glass. A rather strange-looking object fell out of the bottle. On close inspection it appeared to be the decomposing body of a snail. Shortly afterwards the woman who drank the ginger beer developed a severe stomach upset. She started proceedings claiming compensation from the manufacturer of the drink.
12. She could not claim damages for breach of contract because she had no contract with the manufacturer or with the owner of the café. She framed her claim in tort. But at that time it had not been established that such a claim could be made. In one of the most far-reaching and important cases in the development of our law, the House of Lords decided that such a claim could in principle be brought in the tort of negligence. Thus, provided that the manufacturer owed the woman a duty of care and she had suffered loss as a result of a breach of that duty, she would be entitled to compensation for her loss. The House formulated the rule for determining whether a duty of care was owed. The essence of the rule was enshrined in the “neighbour principle”. This was a far cry from simply asserting that, provided that the woman had suffered loss as a result of consuming the ginger beer, she would be entitled to compensation. This was a principled development by our independent judges of the law of the land as expressed in our common law. It was made in response to the perceived social and economic needs of the time. In its essentials, it was a natural application of the principles of Magna Carta.

⁹ [1932] AC 562.

13. It is time to turn to the issue of compensation which lies at the heart of this lecture. The so-called compensation culture has been criticised as a form of abuse with as much passion as the barons complained of John's abuses. An article by Professor Frank Furedi in 2012 complained about it '*poisoning our society*'.¹⁰ A number of academic, government and Parliamentary studies have made recommendations as to how it should be tackled.¹¹ Parliament has twice passed legislation aimed at eliminating or at least reducing it: the Compensation Act 2006 and the Social Action, Responsibility and Heroism Act 2015.
14. There is nothing new in the idea that, where a right is infringed, monetary compensation is the primary means by which the law makes good any loss caused by the infringement. It was present in the first English law code, issued by King Æthelberht, King of Kent, in about 602 CE.¹² It set out a detailed set of fines and compensation. If, for example, a freeman was found to have committed adultery he would be required to pay the injured party a '*wergeld*' – the value of the injured party's life. He would also have to '*provide another wife with his own money, and bring her to the other*'.¹³ More prosaically: loss of an eye required payment of fifty shillings compensation;¹⁴ loss of a thumb, twenty shillings;¹⁵ and loss of the shooting finger – the one needed to use a bow and arrow effectively – eight shillings.¹⁶ If you cut someone's ear off you were required to pay compensation of twelve shillings¹⁷ If you merely mutilated

¹⁰ F. Furedi, *The compensation culture is poisoning our society*, (Daily Telegraph, 9 September 2012).

¹¹ F. Furedi & J. Bristow, *The Social Cost of Litigation*, (Centre of Policy Studies, September 2012); Better Regulation Task Force, *Better Routes to Redress*, (2004); Lord Young, *Common Sense, Common Safety* (2010); *Compensation Culture*, House of Commons, Constitutional Affairs Committee, (Third Report of Session 2005–06) (HC 754–I); Ministry of Justice, *Legal Aid Reform in England and Wales: the Government Response*, (2011); Ministry of Justice, *Reducing the number and costs of whiplash claims – A consultation on arrangements concerning whiplash injuries in England and Wales* (2012).

¹² The Laws of Æthelberht < <http://legacy.fordham.edu/halsall/source/560-975dooms.asp#The%20Laws%20of%20%C3%86thelberht> >.

¹³ Ibid. clause 31, '*If a freeman lie with a freeman's wife, let him pay for it with his wergeld, and provide another wife with his own money, and bring her to the other.*'

¹⁴ Ibid. clause 43, '*If an eye be (struck) out, let bot be made with fifty shillings.*'

¹⁵ Ibid. clause 54 '*If a thumb be struck off, twenty shillings. If a thumbnail be off, let bot be made with three shillings. If the shooting [i.e. fore] finger be struck off, let bot be made with eight shillings. If the middle finger be struck off, let bot be made with four shillings. If the gold [i.e. ring] finger be struck off, let bot be made with six shillings. If the little finger be struck off, let bot be made with eleven shillings.*'

¹⁶ Ibid.

¹⁷ Ibid. clause 39, '*If an ear be struck off, let bot (reparation) be made with twelve shillings.*'

it, you would only have to pay six shillings.¹⁸ If, however, you cut the ear off and your victim was deaf in the other ear, you would have to pay twenty-five shillings.¹⁹ Compensation was proportionate to the harm; a requirement that was later echoed in Magna Carta's treatment of criminal offences: it required punishments to fit the crime – to be proportionate to the offence.²⁰

15. By the 19th Century, the idea of compensation for harm was as well established as it had been in the 7th Century. Records held by Aviva, the insurance company, provide some fascinating detail. A grocer who slipped while playing blind man's buff was awarded the equivalent of £724 compensation. A travelling salesman who was watching an accident, while on the top deck of an open-topped tram and was hit by a pole received the equivalent of £401 compensation. A wedding guest who was hit in the eye with rice thrown presumably over the happy couple received the equivalent of £2,994. And, for slipping on orange peel whilst shopping, a bank clerk received the equivalent of £8,901 compensation.²¹

16. The level of compensation may have changed over time, but the principle underpinning the Anglo-Saxon and Victorian approaches was the same: if one person was legally responsible for causing harm to another, he was required to pay the victim compensation to vindicate his rights and make good the harm caused.²² This principle continues to apply today. We have our own version of Æthelberht's code which indicates the level at which compensation should be awarded. *The Judicial College Guidelines for the Assessment of General Damages in Personal*

¹⁸ Ibid. clause 40, 'If the other ear bear not, let bot be made with twenty-five shillings.'

¹⁹ Ibid. clause 42, 'If an ear be mutilated, let bot be made with six shillings.'

²⁰ Magna Carta 1215, chapter 20, 'For a trivial offence, a free man shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly, but not so heavily as to deprive him of his livelihood. In the same way, a merchant shall be spared his merchandise, and a villein the implements of his husbandry, if they fall upon the mercy of a royal court. None of these fines shall be imposed except by the assessment on oath of reputable men of the neighbourhood.'

²¹ All as detailed in J. Insley, 'Compensation culture: a history of bizarre personal injury claims in Britain' (The Guardian, 14 July 2011) <<http://www.theguardian.com/money/blog/2011/jul/14/compensation-culture-personal-insurance-claims>>

²² Clerk & Lindsell on Torts (21st ed, 2014) at 1-12.

Injury Cases is a distillation of typical awards of damages made by judges for various personal injuries. For example, it states that loss of an eye now attracts between £40,300 and £48,200 compensation; and minor or transient eye injuries, such as that which the Victorian wedding guest suffered, would attract compensation of between £1,620 and £6,400.

(3) From Compensation to Compensation Culture

17. There is therefore nothing new about the idea that the law requires the payment of fair compensation for harm which results from civil wrongs. It is long established. It is one of the hallmarks of the rule of law and of the law of our land. But what is compensation culture and how does it fit in to all of this? Lord Falconer, who was Lord Chancellor at the time, gave an apt definition in 2005. He put it this way:

“Compensation culture’ is a catch-all expression. . . It’s the idea that for every accident someone is at fault. For every injury, someone to blame. And, perhaps most damaging, for every accident, there is someone to pay.”²³

It is the idea that for every accident and every resultant injury or loss, someone other than the victim of the accident is to blame. The victim must, therefore, always be compensated. It is important not to confuse compensation culture with no fault compensation. No fault compensation is a legal principle according to which a person (C) is entitled to compensation for loss caused by another person (D) regardless of whether D was in any way at fault. This is an intellectually respectable principle which society may choose to embrace. But in doing so, it must face up to its costs and economic consequences.

18. On the other hand, the compensation culture is not a legal principle at all. It has not displaced the principles of the law of negligence, whose essential elements remain as they

²³ Lord Falconer, *Compensation Culture*, (22 March 2005) at 1 – 2.

were propounded in *Donoghue v Stevenson*. Rather, to the extent that it exists, it is evidence of an attitude borne of an expectation as to how in particular defendants will behave in their approach to the application of the principles of the law of negligence. In short, an expectation that defendants will pay up rather than fight and risk losing. This has led to the idea that the compensation culture implies that there is no need to establish that a duty of care was owed to the injured party by whoever is viewed as being responsible; and there is no need to establish a breach of duty and causation of loss. All that the injured person has to do is to litigate (or even merely threaten to litigate) irrespective of the legal merits of the claim, and compensation will follow.

19. One consequence of this is the view that as a society we have undergone a cultural shift. No longer is British society characterised by a somewhat philosophical and accepting approach to life. On the contrary, the view is taken that we are becoming more American in our approach; more ready to rush into litigation. To borrow from Tony Weir, we have become a '*wondrously unstoical and whingeing society with (an) endemic compensation neurosis*', and which rather than sees us '*grin and bear it*' sees us '*grit (our) teeth and sue*'.²⁴

20. Perhaps even more dangerously, this shift in approach has been accompanied by a growing concern that an unjustified burden is now being placed on employers, businesses, schools, the NHS and local and central government (as regards payment of compensation and, even worse, legal costs which often substantially exceed the amount of compensation). To make matters worse, all of this is said to be giving rise to defensive practices on the part of such bodies. It is said that, as a consequence of the compensation culture, schools now ban

²⁴ T. Weir, *Governmental liability*, P.L. 1989, Spr, 40 at 76.

conker fights on health and safety grounds;²⁵ and school trips no longer take place. I should say that the conker story rests on a misunderstanding of the law by a no-doubt well-meaning head-teacher and has been described by the Health and Safety Executive as '*a truly classic myth*'.²⁶

21. Media stories to this effect are commonplace. They tend to be about payments of large amounts of money for seemingly trivial injuries; not unlike those mentioned in Aviva's records from the 19th Century. In June 2011 a school pupil was reported as having received nearly £6,000 in compensation. He had burnt his hand at school during his lunch break. Spilt custard was the cause.²⁷ In 2013 a police officer was reported to have received £10,000 in compensation for injuries caused by a fall from a chair.²⁸ More recently, a payment of £12,000 was reported to have been made to someone who was injured by a '*toilet lid while flushing*'²⁹. Someone else was apparently paid £12,566 compensation for injuries caused as a result of a foot becoming stuck in a Henry Hoover.³⁰ A Google search will no doubt reveal many more such stories, each of which furthers the perception that something has gone badly wrong with civil justice in this country.

22. All of this acts as a spur to enterprising solicitors to encourage clients to launch speculative claims on a no-win no-fee basis. Clinical negligence claims are a good example. Some solicitors advertise their services on boards close to hospitals informing patients that, if they have not been satisfied with their treatment, they can sue the hospital authority at no cost to

²⁵ <<http://www.dailymail.co.uk/news/article-1378251/One-schools-ban-conkers-elf-n-safety-fears--leapfrog-marbles-threat.html>>; <<http://www.telegraph.co.uk/education/educationnews/8458526/Schools-banning-conkers-and-leapfrog-over-safety-fears.html>>

²⁶ <<http://www.hse.gov.uk/myth/september.htm>>

²⁷ See <http://www.mirror.co.uk/news/uk-news/schools-hand-out-cash-for-classroom-134505> ; <http://www.dailymail.co.uk/news/article-2011131/Pupil-awarded-6-000-custard-splash-playground-compensation-culture-costs-taxpayers-2million.html>

²⁸ See <http://www.dailymail.co.uk/news/article-2308088/Compensation-culture-gone-mad-Police-officer-claims-10-000-compensation-falling-chair-London-Underground.html>

²⁹ See <http://www.lincolnshireecho.co.uk/1-800-payout-hit-market-stall-pole-Lincolnshire-s/story-27448276-detail/story.html>

³⁰ Ibid.

themselves. But many unsuccessful treatments are not the result of negligence. Patients may die despite the best possible surgery. The harsh commercial reality is that the legal costs to the NHS of defending a clinical negligence claim are often out of all proportion to the amount of damages that it will have to pay if the claim is successful. For this reason, the NHS is often willing to pay a claimant a sum to buy off a claim, even one which it considers is likely to fail. Claimant solicitors are only too aware of this.

23. I should also mention whiplash claims. These are claims for damages for whiplash injuries usually sustained in motor accidents. It has been said that whiplash is a peculiarly UK disease. It accounts for about 80% of car accident injury claims. In other countries, the figure is far lower. There is no doubt that there has been something of a whiplash industry in our country in recent years and our Government is rightly trying to do something about it. The problem is that insurers usually pay up because the cost of contesting the claims is simply too high. All of this would tend to suggest that litigation is out of control and that we are in the grips of compensation fever. Is this really the case? As I shall now explain, the situation is not straightforward.

(4) Compensation Culture – Perception and Reality

24. Let us take the case of the school child who was reported as having received almost £6,000 for the burn that he sustained from hot custard. It is easy to see how this could be portrayed by the media as an example of the compensation culture running riot. £6,000 may seem a ridiculous amount of money to pay by way of compensation for a burn caused by custard. But how hot was the custard and how serious the burn? If it caused no real pain or lasting harm, then the payment was clearly exorbitant. But if the burn was severe and painful and left permanent scarring, the position would have been quite different. In other words, one's

perception of the reasonableness of compensation is coloured by the way in which the story is presented.

25. The difference between perception and reality is well illustrated by two famous examples drawn from America. They were relied on by Anthony Hilton in an article he wrote in the Daily Mail in 2003. He said:

'The claims culture and the compensation culture have taken root [here]. . .

*It is not as bad yet as in the United States, for which we should be grateful. McDonald's had to pay out for not telling a customer the coffee she bought and then spilled was hot, but a similar claim here was tossed out because coffee is meant to be hot. That is as nothing, however, when compared with the Winnebago case where the driver left the wheel of his mobile home while his vehicle was speeding down the freeway and went into the back to brew a coffee. With no-one steering, the vehicle crashed, but the owner sued successfully because no-one had told him it was unsafe to leave the driver's seat when doing 70mph.'*³¹

26. The facts alleged in the Winnebago case were that a woman was awarded \$1.7M in compensation after putting her motor vehicle on cruise control at 70 mph, and then getting up to make herself a cup of coffee in the back. She claimed that Winnebago (the manufacturer) should have warned her that she could not leave the driver's seat after putting the cruise control on. The basis of the claim was that it had failed to put a warning in the driver's manual explaining that cruise control was not an auto-pilot device. This is an extraordinary tale and, if true, would have been a good example of the wilder excesses of the compensation culture. But the problem with the story is that it is simply not true. As the Los Angeles Times described it, it was "*a complete fabrication*"³²

27. As portrayed by the media, the spilt coffee case involved a woman who foolishly placed cup of hot coffee between her legs while she was driving a car. She had bought the coffee from a

³¹ A. Hilton, *Reforms the Insurers Must Risk*, Daily Mail (10 September 2003) <<http://www.dailymail.co.uk/money/news/article-1520339/Reforms-the-insurers-must-risk.html>>; also see Vanessa Feltz, Daily Star, 15 November 2003 cited in Better Regulation Taskforce (May 2004) at 13.

³² M. Levin, *Legal Urban Legends Hold Sway*, LA Times (14 August 2005) <<http://articles.latimes.com/2005/aug/14/business/fi-tortmyths14>>

drive-thru McDonald's. She had to brake the car suddenly and the coffee spilt over her legs. She sued McDonalds. They were to blame for her burnt legs. A court agreed and she was awarded many millions of dollars in damages. That is the story; the reality is rather different.

28. The case was a real case, namely *Lieback v McDonald's Restaurant*.³³ Stella Leiback, the injured party, was in a car. But she was not driving. She was a passenger. And the accident did not occur when the car suddenly stopped. It happened when it was stationary. She had not placed the coffee between her legs because that was convenient whilst she was driving. She placed it there to hold it still while she tried to take the lid off. The coffee was extremely hot. In fact, it was between 180 – 190 degrees fahrenheit. It did spill and burn her. It caused third-degree burns to various parts of her body, resulting in a hospital stay of eight days for treatment, skin grafts. It caused her to suffer permanent scarring and two years' partial disability. She did not rush to the courts. She only sued McDonalds after it had rejected her request for payment of her medical expenses and her daughter's lost wages (her daughter had had to take time of work to look after her). In total she had asked for \$10,000 to \$15,000. In the face of that refusal, she issued proceedings not in negligence, but under a certain strict liability statutory provisions³⁴.

29. The claim went to trial before a civil jury. Jurors can comment on their experience in the US. Some of them were reported as having commented that they were '*insulted*' to be asked to hear such a case, that it '*sounded ridiculous*', and that it was a waste of time over a '*cup of coffee*'.³⁵ It seems that these jurors thought that this was a case of compensation culture run wild. But their view changed during the trial. The evidence showed that between 1982 and 1992, more than 700 claims had been brought against McDonalds arising out of coffee burns, some of

³³ No. 93-02419 (1995 WL 360309) (D. N.M. Aug. 18, 1994); see further C. Forell, *McTorts: The Social and Legal Impact of McDonald's Role in Tort Suits*, [2011] Loyola Consumer Law Review [Vol. 24:2] 105 at 134ff.

³⁴ C. Forell at 135 – 136.

³⁵ C. Forell at 136 – 137.

them third-degree burns. McDonalds knew that the coffee, which it insisted on serving at a temperature of between 180 and 190 degrees, was dangerous. Its quality assurance manager admitted that the coffee was not *'fit for consumption'* and that it would scald the throat. Its expert witness accepted that coffee served at more than 130 degrees could produce third degree burns, and that coffee served at a temperature of 190 degrees would burn skin in two to three seconds. It is, therefore, not surprising that the jury was willing to find that the coffee was a defective product, and that McDonalds had sold it in breach of the implied warranty of merchantability and of fitness for purpose.³⁶

30. The jury found in Ms Leiback's favour, albeit with a reduction of 20% for contributory negligence on her part. She was awarded \$160,000 for the injuries and \$2.7 million in punitive damages, which was intended to represent two days' profits earned by McDonalds from coffee-related sales. The judge reduced this aspect of the award to \$480,000. Despite the judgment, the claim was subsequently settled for an undisclosed sum, no doubt in the face of a possible appeal. It can therefore be seen that the portrayal of this case by Mr Hilton in his article was a caricature. This was a serious claim which amply justified an award of compensation.

(5) Compensation Culture in England and Wales

31. So what is the position in England and Wales? The perception is clear: compensation culture has taken firm root here and unwarranted and excessive compensation is routinely paid to claimants. This perception seems to persist despite studies and reports showing, as a Parliamentary enquiry put it, that the *'evidence does not support the view that increased litigation has*

³⁶ K. Cain, *The McDonald's Coffee Lawsuit*, Journal of Consumer and Commercial Law 15 at 15 - 17.

created a “*compensation culture*”.³⁷ It is worth asking whether the behaviour of our courts has contributed to this perception. Let me give you some examples which show that our judges are astute not to do anything to encourage the bringing of unjustified claims.

32. My first example is an English version of the US McDonald’s coffee case. In 2002, thirty-six claimants, the majority of whom were children aged between four and sixteen, sued McDonalds. The claims were all for personal injuries which were said to have been caused by spilled hot drinks. Some of the claims were based on alleged negligence; others were brought under consumer protection legislation. As Field J put it, there ‘*was a risk that a visitor might be badly scalded and suffer a deep thickness burn by a hot drink that is spilled or knocked over after it has been served.*’³⁸ Unlike Ms Liebeck, the claimants failed on all issues. McDonald’s was held not to have been negligent in serving coffee at high temperatures. The judge held that the cups and their lids had not been designed and manufactured negligently and there had been no breach of consumer protection law.

33. My second example is *Tomlinson v Congleton Borough Council & Others*³⁹ which was decided by the House of Lords in 2003. One hot bank holiday in 1995, the claimant decided to go for a swim. He and friends were in the local park. They had been there many times before. In the park there was a flooded sand quarry, which had been made into a place for families to sunbathe and paddle in the water. As it was such a nice day and he was hot, the claimant decided to dive into the water to cool off. This was not the first time he had done this. Tragically however he hit his head on the bottom of the quarry. He broke his neck and, as a consequence was left a tetraplegic. He sued the local council. The House of Lords rejected

³⁷ *Compensation Culture*, House of Commons, Constitutional Affairs Committee, (Third Report of Session 2005–06) (HC 754–I) at 13; and see, for instance, Better Regulation Taskforce, *Better Routes to Redress*, (2004) at 3; Lord Young, *Common Sense*, Common Safety (2010).

³⁸ [2002] EWHC 490 (QB) at [16].

³⁹ [2003] UKHL 47, [2004] 1 AC 46.

the claim. In doing so Lord Hoffmann reiterated a principle that is entirely at odds with the idea that our courts are promoting a compensation culture. He said:

‘ . . . the law does not provide such compensation simply on the basis that the injury was disproportionately severe in relation to one's own fault or even not one's own fault at all. Perhaps it should, but society might not be able to afford to compensate everyone on that principle, certainly at the level at which such compensation is now paid. The law provides compensation only when the injury was someone else's fault.’⁴⁰

The law is fault-based. It requires a claimant to establish a duty of care, breach and causation of loss. These are not always straightforward matters and if a claimant fails to establish any one of them, his claim fails. The courts have not in recent years lowered the hurdles that a claimant must surmount.

34. My next example concerns occupiers' liability as well as negligence. It is the case of *West Sussex County Council v Pierce*,⁴¹ which I heard in the Court of Appeal, and which the Daily Telegraph reported could have led to water fountains being ‘*banished*’ from schools.⁴² The claimant was a nine-year-old boy. He and his seven-year-old brother were in the school playground. They went over to the newly fitted stainless steel water fountain. It was of a type that is common throughout schools in England and Wales. The younger brother sprayed the claimant with water from the fountain. He retaliated and tried to punch his brother, who was cowering underneath the fountain. He missed, and his punch hit the underside of the fountain. He sustained ‘*a laceration to the dorsal aspect of his right thumb and associated tendon damage.*’⁴³ Apart from a small scar to his thumb, he made a full recovery. The claim was brought against the school on the basis that the water fountain had a sharp underside edge, which posed a ‘*real and foreseeable risk of children coming into contact*’ with it. It

⁴⁰ 2003] UKHL 47, [2004] 1 AC 46 at [4].

⁴¹ [2013] EWCA Civ 1230.

⁴² ‘*Water fountains may be banned in schools as 'unsafe'*’ (Daily Telegraph, 10 October 2013) <<http://www.telegraph.co.uk/news/uknews/law-and-order/10369098/Water-fountains-may-be-banned-in-schools-as-unsafe.html>>.

⁴³ [2013] EWCA Civ 1230 at 3.

was said that the school had failed to consider the risk or take steps to mitigate it. At trial, having examined the water fountain, the judge held that it was sharp and that the school was liable for failing to consider the risk. The Court of Appeal overturned the decision. It too examined the water fountain, but did not agree that it could properly be described as sharp. It also held that the wrong legal test for liability had been applied by the judge. The legal question was whether, viewed objectively, the school was reasonably safe to those on the premises bearing in mind that children ‘are inclined the lark around.’ It was, and as Sharp LJ put it,

‘The School was not under a duty to safeguard children against harm under all circumstances. Each case is of course fact sensitive, but as a matter of generality, the School was no more obliged as an occupier to take such steps in respect of the water fountain than it would be in respect of any of the other numerous ordinary edges and corners or surfaces against which children might accidentally injure themselves whilst on the premises. The law would part company with common sense if that were the case, and I do not consider that it does so.’⁴⁴

35. Espousal of the compensation culture might suggest that any injury caused in the course of games or sporting activities ought to result in an award of damages. If correct, this would have a seriously adverse effect on professional sport as well as school and amateur sports. In 2004 in the case of *Blake v Galloway*,⁴⁵ if you will forgive reference to another case in which I was involved, the Court of Appeal was asked to consider the question of liability for such injuries in a somewhat unusual context. The claimant was with a group of friends practising as part of a jazz quintet. They decided to take a break from their rehearsal. They went outside and started playing a rather bizarre impromptu game. It involved picking up and throwing twigs and bark at each other. The claimant picked up and threw a four-centimetre piece of bark at one of the others which hit him on the leg. His friend picked it up and threw it back at the claimant. It hit him in the right eye and caused a significant injury. The claimant issued proceedings alleging that the injury was caused by the defendant’s negligence and/or battery.

⁴⁴ [2013] EWCA Civ 1230 at [17] – [18].

⁴⁵ [2004] 1 WLR 2844.

The defendant, amongst other things, contended that the fact that they were playing a game meant that any liability was vitiated by the claimant's consent.

36. To rely on a consent-based defence it is however necessary first to establish liability. The Court of Appeal held that liability had not been established. In an informal game such as that in which the claimant and his friends had engaged (like in organised sport), liability was not established unless the offending conduct amounted to either reckless conduct or exhibited a very high degree of carelessness.⁴⁶ If the defendant had, for example, chosen to throw a stone rather than a twig (contrary to the conventions of the informal game in which they were involved), that might have been reckless and sufficient to amount to a breach of duty of care. But what happened in this case was simply an unfortunate accident. There was no actionable negligence. What about the claim in battery? The general rule in sporting activities that involve the risk of physical contact is that the participants impliedly consent to such contact as can reasonably be expected in the course of the game. There was such implied consent here, as long as the participants did no more than throw twigs according to the tacit rules of their informal game. The defendant had done no more than this. The claimant accordingly had given his consent and could not establish liability for battery either. His claim was, therefore, rejected. This is another example of our courts adopting a robust, common sense approach to claims for compensation which is inconsistent with the idea that they are giving encouragement to the advancement of a compensation culture.

(6) Conclusion: Compensation Culture – Perception and the Law's Shadow

37. What do these four cases illustrate? I think one answer is that our courts are well aware of the dangers of contributing to the idea that all injuries should result in compensatory awards. They are decisions that cannot be seen as encouraging the idea that anyone who suffers an

⁴⁶ Ibid. at [16].

injury has a remedy in damages. The judgment of Field J in the *Bogle* case applied conventional, well-known and well-understood principles of law. The *Tomlinson* case underscored the necessity of establishing fault. The *Pierce* case showed that the risk of injury has to be real and foreseeable; remote or fanciful risks will not suffice. And *Blake* emphasised the need for culpability to the requisite standard as a condition of liability. A common theme is that accidents can and do happen and that the law does not compensate for accidents in the absence of legal responsibility.

38. Thus the reality of what goes on in our courts does not match the perception that we are in the grip of a compensation culture. The difference between the reality and the perception is problematic. In 1979 two US scholars wrote a famous article entitled *Bargaining in the Shadow of the Law: the case of divorce*.⁴⁷ It considered the effect that the framework provided by the law had upon divorce or rather the impact that legal framework had upon ‘on negotiations and bargaining that occur *outside* the courtroom.’⁴⁸ The essential point that has been repeated by a number of scholars, including recently by Professor Dame Hazel Genn, is that the law casts a shadow far beyond the courtroom. It guides conduct. It provides the framework within which businesses operate, schools organise activities for pupils, doctors operate within hospitals, local authorities maintain pavements and so on. Moreover, it helps to create as Professor Genn puts it, ‘*the credible threat of litigation if settlement is not achieved*.’⁴⁹ We act in the shadow of the law.

39. What if the shadow is a false one? If, for instance, we have a false perception that the law prohibits certain activities or requires certain steps to be taken, we are likely to act in accordance with this perception. A perception that the law requires compensation for any

⁴⁷ R. Mnookin & L. Kornhauser, *Bargaining in the Shadow of the Law: the case of divorce*, 88 Yale L.J. 950 1978.

⁴⁸ *Ibid.* at 950.

⁴⁹ H. Genn, *Judging Civil Justice*, (2010) at 21.

accident regardless of the circumstances is likely to lead individuals, businesses and governments to act on the basis that the perception is true. This might have the consequence that nobody apologises for bumping into another person in case that is taken as an acknowledgement that an accident has occurred which attracts legal liability. Another consequence might be that schools ban certain activities as a result of their misperception of the law. More significantly perhaps, a false shadow of the law might lead to threats of litigation and then to settlements that would not have been made if the law had been properly understood. This last concern is particularly worrying. As I said earlier, defendants are probably often induced to make what they refer to as “commercial” settlements for reasons which have little, if anything, to do with their assessment of the likely outcome of a court hearing. Litigation is inherently uncertain. The behaviour of witnesses and, dare I say it, judges is unpredictable. Most troubling of all is the fact that the cost of litigation is so high. Legal fees are exorbitant. The laws of competition and the market place seem to be helpless in resisting the rising tide of the cost of litigating. Many would-be litigants simply cannot afford to go to court. The obvious solution is to introduce reasonable and proportionate fixed legal costs. Our Government is taking a long time to grasp this nettle.

40. Meanwhile, the perception that we are in the continuing grip of a compensation culture casts its false shadow. It is a shadow that should vanish if the litigation landscape is surveyed properly in the bright light of the cases that have been, and I trust will continue to be, decided in this country. I have only mentioned four such cases. There are many more. They do not attract media publicity. That is because they are balanced and sensible and therefore do not make for a good story. They do not support the existence of a compensation culture. They are applications of “the law of the land”, that precious gem which shines in clause 39 of Magna Carta and which, 800 years later, continues to be rightly valued as essential to the well-being of our system of justice.

41. The link between the compensation culture and Magna Carta may not be immediately obvious. The existence of the link would certainly not have occurred to King John and the barons. Indeed, I am certain that I would not have chosen the title of this lecture if I had not been delivering it in 2015. But perhaps the link becomes a little less Delphic when one focuses on the significance of the phrase “the law of the land”. In this year when we celebrate the 800th anniversary of Magna Carta, just as the barons demanded their right to receive justice according to the law of the land, we should remind ourselves of what the law actually requires and do what we can to explode the false perception of compensation culture.

42. Thank you.

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