

The Social Cost of Litigation

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SUMMARY

- The financial and social costs of litigation to the public services have been a growing cause for concern, prompting a number of official investigations, policy proposals and legislative attempts designed to halt the growth of 'a US-style litigation culture' over here.
- Demanding recompense for accidents is now perceived, not only as a common-sense way of gaining financial compensation, but as a way of holding public services to account.
- Far from increasing safety and accountability, today's culture of litigation has resulted in significant costs to the quality of services, the experiences of those who use them, and the role of professionals.
- As of March 2011, the NHS Litigation Authority estimated its potential liabilities at £16.8 billion, of which £16.6 billion relate to clinical negligence claims.

- Of the 63,800 claims for medical negligence made since 2001, only about 2,000 (3.2%) have had damages approved or set by the Court. A further 28,700 were settled out of court.
- The increasing fear of litigation is also extremely damaging to the professionalism of doctors, nurses and teachers: it erodes professional autonomy, stifles innovation, leads to defensive practices in both hospitals and schools and encourages greater bureaucracy. 'Best practice' is now defined as having checked all the boxes in a quality assurance form rather than doing what is best of the patient or pupil.
- A genuine return to respecting the principles of professional judgement would have a humanising effect on public services.
- Attempting to rein in ambulance-chasers and greedy lawyers will only deal with the symptom of a deeper problem. In particular, we need to challenge the expectation that professional best practice in the public sector should be measured by the absence of complaints or litigation. Some of the best experiences a child can have at school are those facilitated by teachers prepared to 'think outside the box', just as the most responsible and effective healthcare interventions are often made by those professionals prepared to act on their training and experience in the face of the least risky course of action.
- It is important to separate compensation in the public sector from tort law. Policy makers need to consider how a scheme of no-fault liability can be devised to deal with those who have suffered harm or negligence.

1. THE COSTS OF LITIGATION CULTURE

The headteacher of a Primary School in Warwickshire described the following incident:

A few weeks ago a child in the school was running on the playground and fell into a bench. He had a deep gash just above his eye about an inch long that was bleeding profusely. We stopped the blood flow and phoned for an ambulance – it was obvious that it needed stitches at the very least and we contacted his parents. The ambulance arrived and waited for the dad. It was very upsetting for the boy but he was brave.

It was probably two days later that I noticed something very odd, that I hadn't had happen for many years. I didn't receive a letter from the parents asking for a written account of the incident, witness statements, the contact details for the school's First Aider, the name of the Local Authority's Health and Safety officer, the school's policies for 'Phoning the emergency services', 'Dealing with Emergencies', how many other hospitalisations had occurred in the last two years, why a bench was on the

playground, the supervision ratios at lunchtimes and their training and qualifications, etc etc.

And then something even odder – the dad brought in chocolates for the staff for looking after his boy. This took me completely by surprise. For nowadays we expect the opposite to happen.

The Centre for Policy Studies published *Courting Mistrust*, my report on the effect of Britain's litigation culture, 13 years ago.¹ Since then, the financial and social costs of litigation to the public services have been a growing cause for concern, prompting a number of official investigations, policy proposals and legislative attempts designed to halt the growth of 'a US-style litigation culture'² over here.

These include proposals to restrict the use of no-win, no-fee agreements by ambulance-chasing lawyers; curbing the activities of claims management companies; and attempting to streamline the system of financial redress for clinical negligence problems. Such proposals are motivated by an acute sensitivity to the way in which the routine process of 'name, blame and claim' can damage the ability of businesses and services to innovate, and even to carry out their daily activities.

Is it working? Unfortunately, new research conducted for this paper suggests that, so far at least, it is not. Indeed, the narrow focus on ambulance-chasing lawyers has distracted attention

¹ Frank Furedi, *Courting Mistrust: The hidden growth of a culture of litigation in Britain*, Centre for Policy Studies, April 1999.

² Former health minister Jane Kennedy, quoted in '£20,000 for NHS victims – and no need to sue', *The Daily Mail*, 14 October 2005.

from the more pernicious effect of litigation culture on British society. For litigation culture has become institutionalised into the workings of the public sector life, and ingrained in the national psyche as a warped form of normal behaviour.

The rush to litigation is a symptom of the breakdown of trust in our society: another example of this is the staggering level of Criminal Record Bureau checks: since its launch in March 2002, the Criminal Records Bureau has issued more than 31 million certificates and has received more than £868 million in fees.³

The headteacher's story, recounted above, is a disturbing indication of how far things have gone. Today, headteachers are surprised when parents of children injured at school do *not* immediately begin down the route of litigation. Demanding recompense for accidents is now perceived, not only as a common-sense way of gaining financial compensation, but as a way of holding public services to account. From this standpoint, suing is not seen as the selfish act of the 'have a go' parent, but a selfless, responsible act to stop other children from having similar accidents.

Joanna, a mother of three, was recently in the local park with her five-year-old daughter, Florence, who was playing on some outdoor gym equipment designed to promote adult fitness. Florence caught her finger in one of the handles, leaving it (in Joanna's words) 'completely mashed up'. Once the shock of the accident had abated, Joanna began to be surprised by the reactions of other parents.

³ Answer from Lord Henley, Hansard, 23 March 2012.

I've lost count now of the number of times I've been asked if I'm planning to sue. When I laugh and say no, people tell me I've got a moral responsibility to sue, that it's not about me getting money but about making sure no other children suffer similar fate in the future.

In refusing to follow the route of 'blame and claim' Joanna, like the grateful father of the injured boy at Paul's school, has become the exception rather than the norm. Litigation has become constructed, not only as an appropriate response to accidents, injuries or errors, but as an act of responsible citizenship: holding services to account for their perceived failings, and thus helping to protect other citizens from experiencing these problems.

In this report, we examine the effect of constructing litigation as an act of responsible citizenship upon the everyday workings of public services. We focus in particular on healthcare and education, two areas in which litigation has emerged as a significant cost and area of concern. Our research leads us to contend that, far from increasing safety and accountability, today's culture of litigation has resulted in significant costs to the quality of services, the experiences of those who use them, and the role of professionals. These costs can be seen as:

- Financial costs
- Professional costs
- Social costs.

Taken together, the combination of an engrained compensation culture and litigation avoidance is bleeding the health and education services dry: both financially, and in terms of their public sector ethos and professional role.

Financial costs

Public services now spend a considerable proportion of their limited financial resources on dealing with litigation. The most striking of these are the costs of insurance, and of risk management.

These costs are sometimes straightforward to quantify. For example, the NHS Litigation Authority (NHSLA) was established in 1995 to deal with litigation across the NHS, and runs a total of five schemes that are funded variously by health trusts or centrally by the Department of Health. The NHSLA's transparent accounting presents a clear picture of the direct costs of litigation for the NHS, and also some of the indirect costs. For example, its Annual Report and Accounts 2010-2011 reveal that staffing the Authority alone costs £7 million a year, and that the Authority spends a further £2 million a year contracting an external risk management company.⁴

In healthcare alone, pay-outs made by the NHS Litigation Authority (NHSLA) have trebled over the last decade, standing at £911 million in 2010/11; of which £863 million was paid in connection with clinical negligence claims. As of March 2011, the NHSLA estimated its potential liabilities at £16.8 billion, of which £16.6 billion relate to clinical negligence claims.⁵ This is

⁴ NHSLA, *Report and Accounts 2010–2011*, 2011.
<http://www.nhsla.com/NR/rdonlyres/3F5DFA84-2463-468B-890C-42C0FC16D4D6/0/NHSLAAnnualReportandAccounts2011.pdf>

⁵ NHSLA, *Factsheet 2: financial information*, Accessed 1 March 2012.
<http://www.nhsla.com/NR/rdonlyres/465D7ABD-239F-4273-A01E-C0CED557453D/0/NHSLAFactsheet2financialinformation201011.doc>

NHSLA, *Key facts about our work*, accessed 1 March 2012.
<http://www.nhsla.com/home.htm>

equivalent to about 16% of annual healthcare spending.⁶ In January 2012, the burden on the NHSLA's coffers made the headlines when the government was forced to give the Authority a £185 million bail-out to cover the cost of claims and legal fees until the following April.⁷

The idea of a 'litigation culture' conjures up images of lawyers battling in court. However, one of the most interesting features of the direct costs of litigation is the large proportion of cases that never reach the court. One factsheet produced by the NHSLA reveals the outcome of claims for medical negligence received since 1 April 2001, as at 31 March 2011. Of a total of 63,804 claims, 38% were abandoned by the claimant, and 45% were settled out of court, with a further 14% yet to settle. Only 2,016 cases – 3% of the total – have had damages approved or set by the court.⁸

⁶ Department of Health, *Business Plan 2011-2015*, November 2010. http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/@ps/documents/digitalasset/dh_121413.pdf

⁷ '£185m bailout for NHS claims fund,' BBC News Online, 12 January 2012. <http://www.bbc.co.uk/news/health-16533313>

⁸ NHSLA, *Factsheet 2: financial information*. Accessed 1 March 2012. <http://www.nhsla.com/NR/rdonlyres/465D7ABD-239F-4273-A01ECOCED557453D/0/NHSLAFactsheet2financialinformation201011.doc>

Table 1.1: Outcome of claims for medical negligence made against the NHS received since 1 April 2001⁹

| Outcome | Number | Percentage |
|-------------------------------|---------------|-------------------|
| Abandoned by Claimant | 24,050 | 37.7% |
| Settled out of Court | 28,714 | 45.0% |
| Damages Approved/Set by Court | 2,016 | 3.2% |
| Yet to Settle | 9,024 | 14.1% |
| Total ('files opened') | 63,804 | 100.00% |

Most of the high-profile cases reported focus on the size of compensation awards, which in some cases can reach six figures. But a significant feature of today's hidden culture of litigation is the number of claims that are unsuccessful or abandoned – yet still manage to chew up significant financial and other resources in the process. For example, data published by the NHSLA reveals that claims closed in 2010/11 incurred a total of £257 million in legal costs, of which £196 million were claimant costs and £61 million were defence costs.¹⁰ These figures do not include claims where no liability was established, or damages paid – but which nonetheless incur significant sums. The NHSLA states that in 2010/11, 2,922 clinical claims were closed without any damages being paid; the total costs incurred for these claims were £10.9 million.

⁹ NHSLA, *Factsheet 2: financial information*, Accessed 1 March 2012. <http://www.nhsla.com/NR/rdonlyres/465D7ABD-239F-4273-A01E-C0CED557453D/0/NHSLAFactsheet2financialinformation201011.doc>

¹⁰ Ibid.

In addition, organisations that operate outside of the NHS but are contracted to provide services on its behalf do not fall within the remit of the NHSLA, and must purchase their own insurance and legal services. This results in yet another hidden cost to the taxpayer. If insurance premiums rise as a result of an increase in litigation, the NHS will presumably have to incorporate those increases into its funding of the independent health services that it commissions. This is significant in the context of the current health service reforms, which will allow for the greater scope to commission services from outside the NHS: whatever the merits or otherwise of these reforms, cost savings should not necessarily be assumed, as the taxpayer will end up funding litigation against whomever it is directed.

Across the public sector, many claims are settled out of court or behind the scenes. For example, as Graham Farrant, CEO of Thurrock Council, explains, small-scale compensation pay-offs have now become a standard procedure for dealing with complaints:

When people complain and things go to through the local authority complaints procedure or all the way to the local government ombudsman, the ombudsman has issued guidance on appropriate levels of compensation to be paid when the Council is at fault.

Increasingly, says Farrant, the ombudsman makes financial compensation a routine feature of his judgement. Perhaps this is not surprising as even the resources required to deal with litigation cases that are being prepared – even if they never go near court – are substantial.

Farrant notes that the enormous increase in Freedom of Information (FOI) requests, which are often used to prepare the

basis for a defence case. 'For example, if someone slips, they will use FOI to find out when the pavement was last repaired, whether anyone else has claimed, etc, so anyone wanting to claim will get the defence case before they claim,' Farrant explains. 'This can mean a significant workload. Birmingham Council has estimated they spend £750,000 per year on FOI responses [in total]. In Thurrock it's more like £50,000 per year, which may appear to be insignificant in the whole budget of £120 million net, but at a time of service cuts is still a lot of money and impacts on the cost of services.'

A similar process is underway in education. State schools currently pay a Service Level Agreement for legal services from their local authority, which provides them with legal support based on deep experience in the area of litigation and education. But as more schools are encouraged to set themselves up as Academies, they will have to find their own legal support: and as one deputy headteacher told us, 'A host of law firms are now setting up to capture this business'. Thus far, schools have been assisted by central government funding in converting to the new legal arrangements. But the shift raises interesting questions about how Academy schools may succeed in negotiating their way through this new situation, and how the costs of litigation – and defence against litigation – may be calculated.

Professional costs

For small organisations, the time cost of defending a litigation case can be huge for those who run the organisation. Candy, the headteacher of a nursery school in Sussex, discussed with us the impact of defending a recent case where a child had an accident whilst on nursery premises. In what she describes as a fishing trip by the claimants' lawyers, acting on a no-win no-fee

basis and trying to find evidence of liability, the nursery school has received several letters demanding copies of policies, risk assessments and so on. 'Every time we get one of these letters, it's at least a week's work,' she says.

It is a common complaint of doctors, nurses, teachers and other professionals working within the health and education sector that there is 'too much paperwork' these days, and that bureaucracy provides an endless distraction from the vocation of the job – healing the sick, or educating the young. As the examples above illustrate, dealing with litigation is not just something that can be farmed out to lawyers, or to administration assistants employed for the task.

When faced with a complaint, or a threat of litigation, it is often the headteacher, CEO, clinical director or healthcare professional himself or herself who finds their time gobbled up finding and filling in the paperwork to defend themselves or their organisations against claims. Worse, this process is now institutionalised into everyday practice, where professionals have to spend countless hours completing procedures motivated by the imperative of *litigation avoidance* – or, in common parlance, 'covering your back'. This is experienced by professionals, not as a sensible measure designed to ensure the professional running of the service, but as a detrimental distraction from what should be the real job at hand.

Thus Candy, whose Sussex nursery school has consistently received the mark of 'Outstanding' from the schools' inspection body Ofsted, explains that Ofsted has a list of policies that you have to have, covering areas such as health and safety, child protection, and so on. Ofsted can inspect at any time, with just a few days' notice – so 'we need to demonstrate, not only that we have the government policies, but that parents have seen them,'

says Candy. 'I hate the culture of creating policies in fear of getting sued. I want to have a health and safety policy to keep the children healthy and safe, not to cover my back.'

'I try not to let the risk of being sued limit what we do with pupils, but we do spend a great deal of time on policies and health and safety, which feel like a self-protection exercise,' says Margaret, head of a special school in Essex. 'So, I am sure I am much more risk averse than I was 20 years ago. Getting to the end of the day without an incident is always a great relief.'

This kind of bureaucracy-driven paperwork is not only a strain on professionals' time and emotional energy. It also reveals the extent to which the relationship between the professional and the client (in this context, the patient, pupil, or parent of pupil) has undergone a transformation in recent years, with professional autonomy being increasingly challenged by its confrontation with an agenda of consumer rights.

Simon, deputy head of a boys' grammar school in Kent, described the changes that have taken place since he began teaching in 1995: 'One of the big changes has been the pupil voice element: the link between accountability and responsibility has become much more vague.' The 'pupil voice element' means the increasing orientation of a school's management priorities around listening to the desires and opinions of pupils and their parents, and working to meet those demands.

For example, Simon's school continually 'self-reviews' its teaching practice, getting children to fill out questionnaires. 'The results are taken extremely seriously,' he says.

We also run surveys of parents – checking that they are happy, if their child is happy, and we hold parent surgeries once a fortnight where they can talk about their concerns.

Parent complaints can be a contributing factor to competency procedures, so keeping them involved and satisfied has become a crucial component of the management of the school. As discussed in Chapter 3, the schools inspection body Ofsted has elevated the concern with the pupil/parent voice to a national level, with the development of online tools to monitor satisfaction levels and trigger inspections should a school appear to have too many dis-satisfied clients.

‘We have become considerably more hesitant – I suppose the other way of putting it is “more professional”’, says Simon. What is interesting here is the use of the term ‘professional’ to denote a teacher-pupil relationship that seems to be grounded more in the principles of bureaucratic monitoring than in the ethos of public service.

As we discuss in this report, both in healthcare and education, attempts to use a consumer rights framework as a mechanism for holding public services to account actively feeds a culture of litigation, as it shoehorns people’s understandable (and often legitimate) desire for explanations when things go wrong into a bureaucratic and legalistic framework that prevents straightforward, undefensive engagement between the pupil/parent or patient and the professional. This process both incites individuals to seek formal redress for problems, and frustrates them to bring in the hired legal guns when they find the process unsatisfactory.

Parents' and pupils' sense that teachers should be directly responsible for wider aspects of children's safety, happiness and well-being. This encourages complaints when things go wrong – which, in turn, can lead to litigation. Teachers' awareness of this broadened responsibility fosters a risk-averse approach, adopting practices designed to avoid the likelihood of formal complaints and litigation, rather than activities designed around educational benefit.

A similar trend can be seen to operate within healthcare. Doctors routinely complain of the growing burden of paperwork and bureaucracy and, as with teachers, this complaint is not rooted in laziness, but in the sense that this represents a distraction from their core work and a constant need to justify themselves to extrinsic objectives. It is widely recognised that the increase in record-keeping is motivated less by a clinical need than by the awareness of keeping records that, as one GP put it to us, 'will stand up in court'. As a newer generation of doctors comes through, for whom completing detailed records is par for the course, this time-consuming litigation-avoidance practice becomes institutionalised.

Social costs

In the continuing debate about Britain's compensation culture, some argue that individuals' ability, and willingness, to 'name, blame and claim' is genuinely empowering, providing one avenue of redress for the 'little guy' against faceless bureaucracies and heartless corporations. Other voices are critical of the rise of 'compensation culture', yet promote the view that the incorporation of the patient/pupil voice is an important mechanism for holding public services to account, and absorbing potential litigation.

We disagree with both these accounts, because they fail to appreciate the broader social and cultural costs that litigation culture, and litigation avoidance – its evil twin – have on people’s experiences on public services more broadly. The fantasy that suing teachers or doctors can undo the pain of what has gone wrong has one outcome: the distortion of the service and ethos in the health and education services.

In schools, this is evident in particular in the extent to which particular activities – often of great importance to children’s education, enjoyment, or life experience – are routinely truncated because of a preoccupation with litigation. ‘The big difference in the last few years is the increases in the blame culture – there is no such thing as an accident, it has to be someone’s fault and someone has to “pay”,’ explains primary school headteacher Paul.

There are two ways that this manifests itself in schools. The first is that when there is an accident the first concern is ‘law suit’ – it used to be the child. The second is a long term issue, that of the damaging effect that this has on play. Without sufficient challenge some children don’t get fulfilment and contact with earthly reality that they need to.

Genuine concerns about the extent to which pupils’ development is being stifled by an over-weening preoccupation with ‘health and safety’ have led to a number of official pronouncements about the importance of outdoor play, and indeed the importance of risk-taking for children in general. Back in 2004 the schools watchdog Ofsted published a report bemoaning the tendency for schools to shy away from running

outdoor trips for fear of being sued by parents after an accident.¹¹ On publication of the report David Bell, chief inspector of schools, wrote an impassioned article¹² arguing that:

Over the past decade, inspectors have noticed a marked narrowing of the curriculum in outdoor education as some teachers shy away from certain activities. One teaching union, the NASUWT, is even advising its members not to take part in outdoor activities because of the risk of litigation should an accident occur...

I think it would be a great tragedy if the tremendous opportunities offered by outdoor education became lost to all but a minority of pupils because teachers were concerned about their legal position.

I sympathise with teachers who have these fears. But I believe this position is seriously mistaken, and I have a real concern that children might miss out as a result. The benefits of outdoor education are far too important to forfeit, and by far outweigh the risks of an accident occurring.

Bell went on to call for greater training of teachers in risk management skills, so they are not 'put off by what they see as

¹¹ Ofsted, *Outdoor education: Aspects of good practice*, 2004
<http://www.ofsted.gov.uk/sites/default/files/documents/surveys-and-good-practice/o/Outdoor%20education%20-%20Aspects%20of%20good%20practice.pdf>

¹² David Bell, 'Chance discovery: Outdoor pursuits teach valuable lessons about risk, despite teachers' fear of litigation', *The Guardian*, 28 September 2004.

the dire paraphernalia of risk-management, including endless form-filling', and greater trust placed by parents in teachers' professional judgment, on the grounds that 'Parents have to accept that if their children take part in outdoor activities, there is always going to be some element of risk'.

It is perhaps not surprising that the teaching union NASUWT, having been singled out for attack, responded to Bell's article by accusing the schools inspector of being 'unsympathetic and dismissive' over schools' fear of litigation. 'He has failed to grasp the reality of what actually happens when accidents occur,' said Chris Keates, the union's General Secretary. 'As NASUWT casework has demonstrated time and time again, following the procedures and guidance is no protection against litigation.'

It should be recognised that teaching unions have played an active role in promoting both litigation and litigation avoidance as part of their remit to protect the interests of their individual members against their employers. That a teaching union should issue guidance advising teachers not to expand their pupils' horizons beyond the classroom walls because this may invite a potential litigation claim is indeed a disturbing sign of the times, if not an institutionalised form of moral cowardice. This was highlighted in April 2012, where the teaching unions, renowned for their complaints about being overloaded with paperwork, attacked as 'reckless' the official reduction of a 150-page document on health and safety guidance to eight pages, with teachers expected to rely on their common sense.¹³

But it is also easy to understand why the NASUWT would react defensively to a demand by Ofsted that schools allow more risk-

¹³ 'Bring back red tape for trips, say teachers.' *The Times*, 9 April 2012

taking, when schools or individual teachers who do experience litigation cannot count on the support of either the authorities or the public. It is also worth noting the extent to which Ofsted's own inspection procedures encourage risk-aversion, as related by Candy above, and is apparent in every Ofsted inspection of schools.

The same goes for parents. We may agree wholeheartedly with David Bell's sentiment, that children need to take risks and parents 'should trust the teacher's professional judgment' in managing potentially hazardous activities. However, we also note that parents are continually instructed by other official sources that their children's safety is paramount, that accidents should be viewed with suspicion, and that it is their role to challenge schools about activities and initiatives that they feel are inappropriate.

A report published by the Countryside Alliance Foundation in 2010¹⁴ stressed that neither a high risk of hazards nor a high risk of litigation are itself the basis for teachers' fears: rather it is the *perception* of hazard, and the perception of the likelihood of litigation, that drives our risk-averse culture. Finding that '76% of teachers said concerns about health and safety is the main barrier to outdoor education', the Countryside Alliance Foundation attempted to temper these concerns with the findings of its own research, based on responses from 138 local authorities in England and Wales to a Freedom of Information request.

¹⁴ The Countryside Alliance Foundation, *Outdoor education: the countryside as a classroom*, March 2010.
<http://www.countrysideclassroom.org.uk/OutdoorEducation-FullReport.pdf>

This found that 'only 364 legal claims were made over a ten year period and under half of the cases were successful and resulted in a payout. In fact, on average just over £290 was paid out per year by each local authority.' The Countryside Alliance Foundation used these findings to stress the point: 'Well managed outdoor education visits pose a low risk to student welfare.'

There is some merit to the argument that fear of litigation is a greater problem than litigation itself.¹⁵ However, the problem with this argument is, first, that it ignores the extent to which litigation is a real, measurable problem; and second, that it tends to view litigation consciousness as something that could be willed away, if only people were braver or the newspapers reported fewer litigation stories. As our report demonstrates, the institutionalisation of litigation avoidance at various levels within the health and education services means that solutions to this problem are more complex and thorough-going than simply targeting greedy lawyers, or demanding that individual teachers take more risks.

While the limiting of outdoor play and adventures because of litigation has received the most attention, it should be stressed that litigation culture is having a significant impact on even the most basic functions of education. As we note in Chapter 3, recent media stories about litigation in schools have included cases where pupils are bringing claims against schools based on poor exam results, or other complaints about educational provision.

¹⁵ Also see Annette Morris, 'Spiralling or Stabilising? The Compensation Culture and our Propensity to Claim Damages for Personal Injury,' *The Modern Law Review*, May 2007 pp349-378; and James Hand 'The Compensation Culture: Cliché or Cause for Concern?' *Journal of Law and Society*, December 2010, 569-591.

Such a response would have been unthinkable in previous eras, but in a climate where the school-pupil relationship is increasingly being moulded along the lines of consumer rights and expectations, the idea that schools have a duty to ensure their pupils' academic success or face litigation is a logical next step. As one deputy Head teacher told us, a key priority within schools today is the tracking of pupils to ensure that they reach their expected grades. While this has not yet resulted in litigation, the fact that schools have so clearly accepted their own responsibility to monitor and achieve targeted grades indicates that it is not farfetched to expect compensation claims based on a child's failure to achieve his targeted grade.

Similarly in healthcare, there is a real sense that the NHS risks engaging in an impressions-management exercise, rather than a genuine attempt to treat the patients in its care. In part this takes the form, discussed above, of the erosion of professional autonomy, where concerns about accurate paperwork absorb time and energy that might hitherto have been spent on the patient, or more patients. At a more disturbing level, it can actively come to shape the form that medical treatment takes.

Mike has practised as a GP in inner London for over 25 years. He describes the encouragement of 'defensive forms of practice', where interventions are made – or not made – 'not because of what's in the patient's interests, but because of what's needed to cover the doctor's back'. For example, the sensitivity to the possibility that people may sue if there is a delay in a cancer diagnosis leads to a standard practice of 'over-referral, over-investigation and over-treatment'. This both has time costs across the sector, which translate into financial costs that have to be met by the NHS budget; and social costs, in that an individual undergoing investigations that are clinically

(probably) unnecessary will have to expend their own time (including time off work) and experience possible physical discomfort and mental anxiety.

This process of constantly seeking a second opinion, or another investigation, relates to the broader problem of declining trust between doctor and patient; which, we argue, is only intensified by a 'culture of complaint' that seeks to encourage patients to be on the lookout for less-than-perfect care, and to seek formal redress via the complaints mechanism. When incidences of litigation do happen, a constant refrain is that the individual does not want financial recompense; they want to ensure that other individuals do not suffer from the perceived negligence that they have. As with the story of Joanna's daughter and the 'mashed-up' finger, recounted above, preparedness to litigate has been absorbed by the patient population as an act of responsible citizenship.

In hospital care, too, anecdotal evidence points to a concern about the balance between bureaucracy and care. Routine aspects of care work, such as the lifting of elderly patients, can become flashpoints for disputes over who is to blame when accidents happen. Lorraine, an auxiliary nurse, had been off work for several months after injuring her back when catching an elderly patient as he fell off the toilet. She is irritated by the reaction of her managers: 'They say you shouldn't catch patients. But what are you supposed to do, let them fall on the ground?' Amy, a stroke nurse in a Northern hospital, confirms: 'everyone catches a patient at some time. It's human nature.'

That official policy and medical training should dictate that healthcare professionals should routinely stand back and allow an injury to a patient to happen, rather than running the risk of minor injury to themselves in the process of trying to help,

indicates a rather peculiar set of priorities, and certainly one that runs counter to the traditional perception of nursing as a 'vocation'. Yet in a litigious climate, it is not surprising that managers should make such recommendations, not least because it prevents them from having to shoulder the blame when members of staff take them to court on health and safety grounds.

In 2005, care worker Kimberley Doyle, 27, sued for £50,000 damages after she hurt her back trying to help a frail elderly patient onto her bed.¹⁶ Her claim, lodged at court, stated: 'She had received no manual handling training. The defenders had a duty to take reasonable care for the safety of their employees'; while the care home owner countered by claiming that Doyle herself was to blame for the accident. This unedifying game of blaming and counter-blaming is a familiar feature of litigation culture, and confirms the sober reality that, for all the talk of 'empowerment' and 'accountability', nobody save for a few lawyers and claims-farming companies gains from our culture of litigation and litigation avoidance. At a macro level, health and education managers, and those responsible for national budgets, are forced to expend an ever-increasing amount of money on defending litigation cases and creating the infrastructure for litigation avoidance, involving added staff time, extra staff costs, and the involvement of external agencies – for example, legal firms and risk management consultancies.

At an everyday level, professionals working in the public services feel constantly monitored, with their professional judgement undermined. And patients and pupils are provided with a service that increasingly meets bureaucratic demands

¹⁶ 'I'll sue for OAP lift back pain', *The Mirror*, 14 April 2005.

rather than actual needs, in which defensive practices lead both to a failure to provide important, 'risky' experiences or interventions, and an over-investigation of potential problems, taking time and resources away from other problems.

Bleeding the public services dry

Litigation culture has an important impact on private companies, which can face reputational and financial damage: sometimes to the point of being pushed to bankruptcy by aggressive litigation claims. But the cost of litigation has the potential to be that much more ruinous when it relates to a public service – one that is paid for by the taxpayer, who will have to go on paying as long as there are claims, and who, individually, has no choice in the matter. Whatever the impact of the reforms on the way that the public services operate, from the transition to Academies in schooling to the commissioning of more independent healthcare services by the NHS, the bill for litigation will continue to be footed by the public.

This is the perverse outcome of the modern fantasy of redress through litigation: every time we bring a claim against our health or education services, we are in effect suing ourselves. And every time we are encouraged to 'name, blame and claim' as an act of responsible citizenship, to stop other people sharing our bad experiences, we end up contributing to the worsening of these very services.

The shift away from professional self-regulation towards a litigation-wary model of customer satisfaction has resulted in a reconfiguration of professional standards, where 'best practice' comes to be defined as having checked all the boxes on the quality assurance form. In this regard, best practice in healthcare and education becomes measured in terms, not of professional standards of care or even outcomes for the patient

or pupil, but in the extent to which litigation has been avoided, and claims can be defended. This is a disturbing departure from a genuinely patient-centred approach to medicine, or approach to education that sees the goal as the development of a pupil's abilities and his or her achievements.

This defensive approach to medicine and teaching also has serious consequences in terms of innovation: faced with a difficult case, a surgeon is now more likely to stick to what is currently considered to be 'best practice'. If the patient fails to recover fully, then the surgeon can defend himself on the grounds that he was following 'best practice' and so only doing what could be expected of him. But if the surgeon were to take a more innovative approach – which he might well judge to be in the best interests of the patient – no such defence would be available to him. Similarly, the fear of litigation drives teachers to stay within accepted norms of behaviour. Out go eccentricity, innovation and excitement.

In acknowledging the problem of Britain's growing compensation culture, official reports and legislative reports have focused on the clear villains of the piece: the lawyers who make fat fees from bringing cases; the parasitical claims management companies that incite individuals to call a hotline and lodge a claim the minute they have experienced an accident, or perceived injustice.¹⁷ But unscrupulous as many of

¹⁷ For example, Right Honourable Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report*, The Stationery Office. 2009. <http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf>

Cabinet Office, *Common Sense, Common Safety: a report by Lord Young of Graffham to the Prime Minister following a Whitehall-wide review of the operation of health and safety laws and the growth of*

these practices may be, the problem of litigation culture cannot be solved through populist quick-fixes or simple legislative reform.

For example, one proposal that has recently been discussed by official reports¹⁸ as a way of reducing the legal bill is that low-value clinical negligence claims could be processed in a similar way to Road Traffic Accident (RTA) claims, which are often processed by insurance companies without contestation, and using inexpensive lawyers or legal secretaries. Yet, as has recently been highlighted by former Justice Secretary Jack Straw, there are major problems with the RTA model – particularly in the extent to which the processing of claims has allowed dubious ailments such as ‘whiplash’ to become a major source of claims and compensation.

Noting that ‘whiplash costs the British motorist more than £2 billion a year in compensation, adding £90 to the average insurance premium’, Straw has pointed to the negligible cost to the NHS of actually treating this condition: ‘a negligible £8 million – or 0.007547% of the total NHS budget in England and Wales of £106 billion’.¹⁹ In other words, a condition that, in clinical terms, ‘scarcely shows up on the radar’, can carry a disproportionate financial cost to the public when it becomes the basis for litigation. Indeed, the fact that 1.2 million motorists – about 1 in 25 of the total – are now reportedly driving without

the compensation culture, 2010. http://www.number10.gov.uk/wp-content/uploads/2010/10/402906_CommonSense_acc.pdf

¹⁸ See for example House of Commons Health Committee, *Complaints and Litigation*, Sixth Report of Session 2010–12, 22 June 2011.

¹⁹ Jack Straw, ‘Only changing the law will halt whiplash fraud,’ *The Times*, 2 May 2012.

insurance²⁰ can be seen as a worrying indication of how drivers are finding themselves priced out of legality by a culture that encourages those who are claimed against to pay up rather than argue back.

If we wish to reduce the burden of litigation on Britain's public services, we need to put an end to the fantasy that litigation avoidance can be a solution to the problem of litigation. All of the evidence to date suggests that the more that organisations operate to reduce the likelihood of being sued, through a bureaucratic process of 'best practice' that ensures every policy is shared and every box is ticked, the more this stifles the service that is being offered at the same time as implicitly inviting the prospect of further litigation. Put simply, there is nothing that enrages the patient, pupil or relative so much as being confronted with a bureaucrat waving policies to prove they have covered their backs. This merely increases the aggrieved individual's sense of powerlessness, and desire to 'take them to the cleaners' via a law firm promising punitive damages on a no-risk basis.

A genuine return to the principles of professional judgement would have a humanising effect on public services, which can go a long way to reducing the knee-jerk recourse to the courts. We should also encourage the development of a culture in which we support the taking of brave decisions. We should remember that, for most people, the desire for 'an easy life' is a powerful imperative, particularly when it is backed up with a concern that taking risks might lead to being sued. Even if a doctor, or teacher, never has to face the threat of an actual

²⁰ Ian Cowie, 'Garage "spies at the pumps" could cut off fuel supply for uninsured drivers,' *Daily Telegraph*, 13 March 2012

litigation claim, the fact that he or she is encouraged by the diktat of 'best practice' to be boring in the classroom rather than run the risks involved in engaging their pupils in outdoor activities, or to refer a patient for a battery of tests at the local hospital rather than reassure her that she is probably worrying about nothing, is testament to the power of litigation culture in dimming our collective experience of life.

A mature and confident society accepts that accidents happen, that casting blame is not 'empowering', and that the biggest problem is not the making of a mistake but the moral cowardice that prevents doctors and teachers from acting in accordance with their professional judgement. Only then can we contain and undermine the influence of compensation culture on the public sector.

2. THE NHS:WHEN 'BEST PRACTICE' MEANS LITIGATION AVOIDANCE

I've got really good blood pressure for a fat chick. But the family planning clinic still won't prescribe me the pill – they just refuse to believe the blood pressure reading.

The stories we read about in relation to litigation in the NHS are usually heart-rending tales of clinicians making mistakes, and consequently finding themselves sued by the patients or, in the most tragic cases, their bereaved families. What we don't hear about those medical interventions which are provided (or not provided) in response to the imperative of litigation avoidance. As one health care manager told us:

We work according to this idea that 'if it hasn't been written down, it hasn't been done'. In practice that means that in the completion of patient case-notes, nurses or doctors will be looking as much to document that they have done something as they will be providing information that is clinically necessary.

This manager explains that, when it comes to risk assessment procedures, 'the risks of litigation linked to the perception of treatment are as important to consider as the risks caused by treatment itself' – the issue being, 'how would this look if...?'

For clinical staff, this performance of impressions management means an emphasis on procedure and paperwork, often experienced as ‘drowning’ in bureaucratic and administrative demands. ‘I feel like seeing patients has become one tenth of my job – but that’s why I became a doctor in the first place,’ complained one GP. But while the explosion of health service bureaucracy attracts much criticism on the grounds of a waste of money and resources, less widely appreciated are the harmful consequences upon the quality of healthcare that are provoked by the imperative of litigation avoidance.

The financial costs of defensive medicine have been studied in the US, where it has been claimed that tests and treatments ordered for this purpose account for a quarter of the total annual healthcare costs.²¹ Defensive medicine has been defined as ‘medical practices designed to avert the future possibility of malpractice suits’, where ‘responses are undertaken primarily to avoid liability rather than to benefit the patient’; and while this phenomenon has been less researched in Britain than in the US, our interviews suggest that the trends towards defensive medical practice follow a similar pattern.²²

Certainly, patients’ experiences of being sent for precautionary scans and blood tests are commonplace, and many of those whom we spoke to highlighted the extent to which they felt that they needed to undergo screening for one disease or another before accessing the treatment they required in the first place.

²¹ ‘Defensive Medicine Costs Billions’. DefensiveMedicine.org, 29 September 2011. Accessed 25 April 2012
<http://defensivemedicine.org/category/statistics/>

²² Defensive Medicine Homepage, Health in Wales website. Accessed 25 April 2012. <http://www.wales.nhs.uk/sites3/home.cfm?orgid=733>

As one woman in her thirties put it, 'I find now that there's no point going to my GP, because he just sends me for blood tests that make me anxious, and by the time the results are back I've got over whatever was actually wrong with me.'

Defensive medicine results in over-intervention. It also results in exclusion from treatment, for reasons that cannot ultimately be to the patient's own benefit. The story recounted above, about one woman's difficulty of obtaining a prescription for the contraceptive pill because of her weight – despite the absence of any other clinical contra-indications – has some parallels with the exclusion of obese women from abortion care, where women who cannot access adequate contraception are likely to end up.

Many abortion clinics situated outside NHS hospitals operate according to guidelines giving a maximum limit for Body Mass Index, because of the higher risks posed by the procedure in obese women. This might seem like a sensible guideline – except when the principle of litigation avoidance means that clinicians become incapable of overriding the guidance where they feel it is necessary. In such cases, obese women – who also face greater risks than non-obese women in carrying the pregnancy to term and giving birth – can find themselves forced to wait to have treatment at a specialist unit, meaning that their pregnancy will be more advanced and the procedure potentially more complicated. This has led to the perverse situation of women trying to lose weight so that they can have an abortion.

The field of obstetrics and gynaecology as a whole is dominated by fears about litigation. Obstetric claims are noted to be the ‘the most costly type of medical negligence claim’,²³ and maternity services are treated as a distinct area by the NHS Litigation Authority.²⁴ This is not surprising: childbirth is a naturally hazardous experience, which affects everybody at least once; and in a cultural context where there is a high degree of expectation of both safety and exhilaration from the ‘birth experience’, we might expect that people seek redress when something goes wrong.

However, maternity services also provide the starkest example of the clash between a humane culture that seeks to save lives and values medical intervention as a part of that, and a litigious imperative that seeks to cast blame and attach financial costs to accidents and errors. For example, in January 2012 it was revealed that the NHSLA lacked sufficient funds to pay for the rising number of clinical negligence claims, and needed a government ‘bailout’ of £185 million. ‘The rise [in claims] has been blamed on a boom in no-win, no-fee cases,’ reported the BBC. But it added that another factor in the spiralling costs was ‘the increasing survival rates of brain-damaged babies’, for

²³ ‘Families fight for justice over birth injuries: Health service is sued for £65m after mistakes in childbirth left children with paralysed arms,’ *Observer*, 1 June 2008. ‘NHS compensation costs rise to £807m,’ *Guardian*, 19 August 2009.

²⁴ The Stationery Office, *The National Health Service Litigation Authority Report and Accounts 2010–2011*, July 2011. <http://www.nhsla.com/NR/rdonlyres/3F5DFA84-2463-468B-890C-42C0FC16D4D6/0/NHSLAAnnualReportandAccounts2011.pdf>

whom 'compensation settlements can often reach £6 million' to cover the lifetime costs of care.²⁵

In this way, the combination of the spiralling cost of clinical negligence claims, the routine use of clinical negligence compensation to fund care for babies with brain damage and other birth-related complications, and the imperative of litigation avoidance leads to a certain grim logic that, as one news report suggests, 'the increasing survival rates of brain-damaged babies' comes to be described as a problem. One lawyer described to us the 'depressing churn' of compensation claims to do with cerebral palsy cases within the NHS, and the stark legal reality: 'A dead baby is very cheap. If the baby survives, the financial costs are huge.'

'To give doctors their due, they are generally motivated more by the desire to avoid the harm to the patient that may result in litigation than by fear of litigation itself,' wrote Dr Gerard Panting, communication and policy director at the Medical Protection Society, after it was claimed in 2005 that an increase in rates of caesarean section has been motivated by a desire to avoid litigation rather than by clinical judgement. If fear of litigation makes doctors cautious, he asked, 'would that be so bad?'²⁶ The simple answer is – yes, it would.

The quest for better, safer health services is a worthy goal in its own right. Of course, improvements in maternity services should be made to prevent babies being damaged at birth, just as

²⁵ BBC News Online, '£185m bailout for NHS claims fund.' 12 January 2012. <http://www.bbc.co.uk/news/health-16533313>

²⁶ Dr Gerard Panting, 'Doctors on the defensive.' *Guardian*, 1 April 2005. <http://www.guardian.co.uk/society/2005/apr/01/health.comment>

society should find ways of funding the care of those babies who do suffer from brain damage. But attempting to resolve these issues in the sphere of litigation subverts the concern away from finding actual improvements in clinical practice, towards bureaucratically demonstrating that problems have been monitored. Innovation is stifled in the name of 'best practice'.

It can also lead to an unpleasant stand-off between clinicians and patients. For example in April, it was reported that the NHS Litigation Authority set aside £235.4 million to settle 60 cases in which hospital staff failed to spot hypoglycaemia in newborn babies, often caused by feeding problems and, in the most severe cases, resulting in brain damage or death.²⁷ While one positive outcome of this problem coming to light might be to improve care procedures so that such problems do not occur, the way this issue has often been dealt with is by wrangling over liability, which always contains the potential for transforming a tragedy into a lawsuit.

One mother told us how, after her newborn baby was hospitalised with dehydration and jaundice a few years ago, the midwife came to visit the family in hospital. 'We'd had no sleep for 48 hours. The midwife sat on the bed and said, "I just wanted to check that you didn't think it was anything I'd done?" I'd thought she'd come to see if we were all right, but it became obvious she was mainly concerned that we wouldn't sue her.

²⁷ 'NHS Litigation Authority sets aside £235.4m to settle 60 cases in which hospital staff failed to spot hypoglycaemia in newborns', *Guardian*, 9 April 2012
<http://www.guardian.co.uk/society/2012/apr/09/nhs-blunders-babies-brain-damage>

Which had never actually occurred to us.’ The baby recovered and the family did not sue, but ‘it left a bitter taste. Our baby nearly died, and the midwife’s main concern was to cover her back.’

The NHS: a timeline of soaring costs

The health service is an area in which the financial costs of litigation culture are readily demonstrable, and soaring. Official documentation produced by the NHS Litigation Authority (NHSLA) confirms that:

- Claims against the NHS are rising year on year
- Huge sums of money are being paid out in compensation
- A substantial proportion of these claims goes to meet lawyers’ costs
- Merely administering the system of compensation costs a substantial amount.

The NHSLA’s Report and Accounts 2010–2011 presents the information very clearly. NHSLA Chief Executive Steve Walker notes that ‘After large increases in previous years we saw new claims volumes for newly reported clinical claims rise by around 30% in 2010-11 and by around 6% for non-clinical’.²⁸ Further detail provided by the NHSLA’s Annual Report and accounts reveals that:

²⁸ The Stationery Office, *The National Health Service Litigation Authority Report and Accounts 2010–2011*, 5 July 2011.

<http://www.nhsla.com/NR/rdonlyres/3F5DFA84-2463-468B-890C-42C0FC16D4D6/0/NHSLAAnnualReportandAccounts2011.pdf>

- The number of clinical claims recorded by the NHSLA has increased from 5,697 in 2005/06 to 8,655 in 2010/11 (an increase of 52%)
- The NHSLA's payments for clinical claims have increased from £560.3 million in 2005/06 to £863.4 million in 2010/11 (up 54%)
- The NHSLA's payments for non-clinical claims have increased from £31.3 million in 2005/06 to £47.9 million in 2010/11 (up 53%)
- Claimant lawyers incur disproportionate legal costs: in the 5,398 clinical negligence claims closed by the NHSLA with a damages payment in 2010/11, the NHSLA paid over £257 million in total legal costs, of which almost £200 million was paid to claimant lawyers.²⁹

These official figures reveal a reality in which claims against the NHS are running at about £1 billion per year; and this figure is only set to increase. Indeed, the NHSLA's accounts show that it increased its provision for known claims in 2010/11 to £2 billion; and that the total expenditure for 2010/11 was £2.7 billion.

Is this a lot of money? In the context of expenditure on the NHS in total, £2.7 billion is 'only' 2.5% of total Department of Health spending of £105.9 billion (a figure which is set to increase £114.4 billion by 2014/15).³⁰

²⁹ Ibid

³⁰ Department of Health, *Business Plan 2011-2015*, November 2010. http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/@ps/documents/digitalasset/dh_121413.pdf

There are three reasons why this already huge bill should concern us. First, it can only go up. This is the experience of the past decade – and indeed, the starkest increases in compensation claims have taken place over the past three years. The NHS is not a limited company that can declare bankruptcy when the compensation bill becomes too much: as long as taxpayers exist, so do the resources to pay the lawyers.

Secondly, suing a publicly-funded institution such as the NHS amounts to a spectacular own goal for citizens of Britain. Whatever we ‘make’ from a claim against the NHS, we – or our friends and family – have to pay back to the service somehow to cover the cost of the claim. It is one thing to invest billions of pounds in something you need and want; it is another thing entirely to spend that money to support a process that is actively damaging to the service you are helping to fund.

Thirdly, the publicly-recorded £2.7 billion is only a fraction of the cost of litigation in the NHS. As this report demonstrates, the direct costs of claims are underpinned by a number of indirect costs, ones that are often quite difficult to quantify but which have a very real impact. These include the costs of risk management and training, the institutionalisation of bureaucracy to cover members of staff in the event of a claim, and the involvement of additional members of staff in monitoring or decision-making.

Arguably the most disturbing cost of litigation avoidance in the NHS is the extent to which clinical procedures may not be carried out, or medications not prescribed, because of the fear of litigation; or where unnecessary defensive medical practices are employed for the purposes of avoiding a lawsuit; or where innovation is stifled for fear of moving away from ‘best practice’.

It is hard to think of a better example of the waste of taxpayers' hard-earned money.

Claims-farmers and ambulance-chasers

'If you've been injured in an accident that wasn't your fault, we'll help you take on the big guys and get the compensation you deserve.' This is the happy message offered by the homepage of the National Accident Helpline, 'No Win No Fee Specialists'. If you're in any doubt what might be in it for you, this claims management company offers a handy 'Compensation calculator',³¹ which helps you to put a price on the various parts of your body. After selecting your gender, you choose one of six areas of your body: head, neck, upper body, arm, lower body, foot. Clicking on one of these areas immediately converts your injury into pounds.

So for lower body injuries, we find that a hip or pelvis injury could be worth between £2,175 and £76,350; a leg fracture (with incomplete recovery) between £10,500 and £16,300; and severe knee injuries between £15,500 and £56,000. For back injuries, potential compensation ranges from up to £7,125 for minor injuries to between £22,650 and £98,500 for severe injuries, and so on. After using this compensation calculator, there is a pop-up box inciting people to 'Claim online': 'If you have been injured in an accident that wasn't your fault, fill in your details below and one of our friendly advisors will call to discuss making a compensation claim on a no-win no-fee basis'. If you don't want to fill in the simple form, the website also provides you with a freephone number to call.

³¹ National Accident Helpline. Accessed 29 March 2012
<http://www.national-accident-helpline.co.uk/claims-calculator/>

There is something obviously seedy about this money-grabbing approach to litigation, and it is not surprising that Claims Management Companies (CMCs) like the National Accident Helpline or Claims Direct have attracted opprobrium in recent years. Indeed, these protagonists of compensation culture in 2006 became the targets of statutory regulation by the Ministry of Justice.³² However, the fact that CMCs operate within tighter regulations and a formal code of ethics has not reduced their basic distasteful message: tell us your injury, and we'll make a lot of money for you.

Nor has regulation prevented the vultures from descending on the latest health concerns. For example, in the wake of the recent scare about silicone breast implants manufactured by the French company Poly Implant Prothese (PIP), a host of websites for law firms and claims farmers have sprung up offering such services as 'legal advice on making a successful breast implants claim'.³³ The website www.pipbreastimplantclaims.co.uk encourages anxious women to 'Call our specialist team now', on a dedicated freephone number. Meanwhile, the website www.pipimplantscompensation.co.uk³⁴ states:

³² 'Claims management regulation'. Ministry of Justice website. Accessed 29 March 2012 <http://www.justice.gov.uk/claims-regulation>

³³ Russell Jones & Walker. Accessed 29 March 2012 <http://www.rjw.co.uk/legal-services/clinicalmedical-negligence/cosmetic-surgery-claims/breast-implants-claims/#axzz1p66Wa5HZ>

³⁴ PIP implants compensation. Accessed 29 March 2012 <http://www.pipimplantscompensation.co.uk/>

We are currently taking enquiries from dozens of concerned women on a daily basis. Our claims handlers where possible are passing cases to our specialist lawyers for further investigation and starting the process to recover compensation. In those cases where it is unclear as yet as to whether the implants have ruptured or not or indeed if any trauma has taken place we are compiling a list of peoples (sic) details and will remain in contact whilst the legal situation unfolds as to your current legal rights for making a claim. Please contact us to establish whether you are entitled to claim.

The rapid establishment of claims handling companies to take advantage of a health scare and encourage individuals to make claim – even where it is ‘unclear ... if any trauma has taken place’ – is as good an example as any of how the kind of actors and activities notoriously involved in a US-style litigation culture have flourished in Britain too. The rhetoric of inflation – ‘dozens of concerned women’ – is familiar from US class action claims, and seeks both to reassure a woman that she would not be alone in bringing a claim, and to suggest to her that she would be foolish to miss out on the chance of compensation.

While it could be argued that websites mainly play the role of a ‘pull factor’ for individuals already considering making a claim (by, for example, typing in a search term such as ‘breast implant compensation’), other forms of advertising seek to entice individuals to make a claim out of the blue, as it were: airing on television networks during the daytime, to catch those out of work due to an accident, and on channels shown in hospital Accident and Emergency (A&E) departments; sending text messages or automated telephone calls

randomly to individuals' mobile phones; running adverts next to popular music videos on YouTube.

The central message is: 'if you have a grievance, we can make you a fast buck'; and it is not surprising that many find this message distasteful. Indeed, in recent years the British authorities have gone further, targeting ambulance-chasing as a key factor in the spiralling cost of litigation culture, and promoting legal mechanisms to rein this practice in. Unfortunately, these legal reforms provide a weak defence against the cultural power of the compensation culture.

Empowerment rhetoric

If Claims Management Companies promoted their services simply in terms of making a fast buck, they would be rather less successful in their mission. But the other striking feature of the work of CMCs is the way that they embroider their get rich quick rhetoric in the language of consumer empowerment, persuading individuals that 'starting your claim now' could not only be financially beneficial, but is also your right and your moral duty.

Claims Management Companies play on the desire for sympathy by individuals who feel they have been harmed or wronged. For example, the Claims Direct website carries a section titled 'People we have helped', where individuals give testimony of the speed and sympathy provided by the claims-making process:

'I looked up Claims Direct in the Yellow Pages and they did everything for me, I didn't have to do anything.' Derek

'The letters were very good, in plain English...on the phone, they were very clear.' Desmond

'They re-assured me about everything, they were really, really nice – kind.' Stacy

The appeal of such testimonials is not only that they offer perceived victims a sympathetic ear, though this is important. It is also that, through claiming, individuals are offered a voice themselves – the opportunity to stand up and be counted against the 'big guys' that have wronged them. The National Accident Helpline presses this point:

There's no need to feel like an underdog when making a no win no fee claim – even if you are claiming against large organisations or local councils – National Accident Helpline will be with you every step of the way.

The word 'underdog' is hyperlinked to the website address www.underdog.co.uk – which is owned by the National Accident Helpline.³⁵

The rhetoric of claiming goes beyond individual rights and personal sympathy, to make grand statements about the moral and political importance of taking the big guys to court. The website www.pipbreastimplantclaims.co.uk even goes so far as to encourage visitors to the site also to 'sign our official PIP Implant petition asking that the Prime Minister properly investigates and acknowledges the damage to health, both existing and potential, to all women in Britain affected by the fraudulent manufacture of PIP Breast Implants.'

³⁵ <http://www.underdog.co.uk/>. Accessed 31 March 2012.

The use of empowerment rhetoric to encourage claims-making is a clever sleight of hand that would make marketing or advertising executives proud. Yet ironically, this rhetoric is merely borrowed from the National Health Service itself, which has encouraged both the practice of claims-making, and the idea that litigation should be viewed as an important mechanism of accountability.

The institutionalisation of complaint

Lawyers and healthcare professionals alike described to us a significant cultural shift within the health service to patient complaints. This shift – ‘from the closing of ranks and the batting off of complaints as necessarily wrong, to a general mentality of openness about when mistakes are made’, as one lawyer expressed it – have been driven by the NHSLA, but are also ingrained in the approach taken by healthcare regulators, and the NHS complaints process. Indeed, they are enshrined within the Pre-Action Protocol for the Resolution of Clinical Disputes, which states that the protocol: ‘encourages a climate of openness when something has ‘gone wrong’ with a patient’s treatment or the patient is dissatisfied with that treatment and/or the outcome. This reflects the new and developing requirements for clinical governance within healthcare.’³⁶

The extent to which a culture of complaint is now positively encouraged by the NHS is revealed by the 2011 House of Commons Health Committee report, *Complaints and*

³⁶ ‘Pre-Action Protocol for the Resolution of Clinical Disputes Clinical Disputes Forum.’ Ministry of Justice website. Accessed 29 March 2012. http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_rcd#IDAVJOHC

*Litigation.*³⁷ The Committee noted that the recent rise in complaints about the NHS has been ‘variously attributed to the 28% rise in demand for healthcare over the last ten years, greater consumer awareness of the complaints process and also a deterioration in the standard of care delivered by the NHS’: and that ‘organisations that are proactive on their complaints policy and see complaints as useful intelligence on patient satisfaction will often encourage more complaints and consequently have higher complaints figures’.³⁸

What the Health Committee seems to be describing here is a process whereby the health service proactively seeks complaints from patients, as a means of identifying problems with its service and improving the service. But complaint begets complaint, to the point where it is not clear (to the Committee, at least) to what extent complaints are motivated by a decline, or even by actual problems, in the service being delivered; and to what extent they are motivated by the institutionalisation of a culture of complaint and litigation.

Over the past two decades, the NHS has introduced a number of institutional measures that take for granted the everyday reality of litigation, and the assumption of liability. The first, and arguably most important, of these was the establishment of the NHS Litigation Authority itself in 1995. The NHSLA was established ‘to defend actions against the NHS “robustly” but, where negligence was proven, to settle actions “efficiently”’, and it seeks to ‘balance these two competing pressures’. The NHSLA also manages a ‘risk pool’ on behalf of the NHS to minimise the

³⁷ House of Commons Health Committee, *Complaints and Litigation*, June 2011.

³⁸ *Ibid.*

impact of large claims on individual organisations and to spread the cost of claims over time'.³⁹

While the value of the NHSLA can be appreciated in pragmatic terms, its function can also be seen as highly symbolic of the institutionalisation of litigation and litigation avoidance within the public sector. The authority operates according to a powerful assumption of its own liability and the expectation that it should compensate for this – not in all cases (those which are defended 'robustly'), but in those that are settled 'efficiently'. And it incorporates the dictates of litigation avoidance seamlessly into its mission, viewing the avoidance of litigation as synonymous with the development of better practice.

'A particular emphasis has been upon learning lessons about adverse incidents in the NHS, which can damage patients and lead to claims,' explains NHSLA Chair Professor Dame Joan Higgins, in her contribution to the 2011 Report and Accounts. 'Our role has always been to support NHS organisations to improve their practice and to reduce the number of incidents.'⁴⁰

In addition to the NHSLA, the incitement to complain is built into the NHS Constitution, which contains the pledge: '[...] when mistakes happen, to acknowledge them, apologise, explain what went wrong and put things right quickly and effectively'.⁴¹

³⁹ The Stationery Office *The National Health Service Litigation Authority Report and Accounts 2010–2011*, July 2011.
<http://www.nhsla.com/NR/rdonlyres/3F5DFA84-2463-468B-890C-42C0FC16D4D6/0/NHSLAAnnualReportandAccounts2011.pdf>

⁴⁰ Ibid.

⁴¹ House of Commons Health Committee, *Complaints and Litigation*. June 2011.

Indeed, over the past decade, there has been a concerted effort to incite a 'culture of complaint' amongst users of the National Health Service, which seems to be borne out of the (misguided) idea that this promotes a greater sense of accountability. As indicated above, one result of this culture has been to encourage the very litigious sentiments that public officials now see as a major problem.

'The patient is increasingly referred to as a consumer and encouraging them to comment and/or complain is entrenched and now just considered good practice,' explains Brid, a former nurse and head of engagement and community involvement in the NHS, who continued:

Complaints are supposed to be viewed positively, as they give the professionals an opportunity to address whatever deficiency is identified and if necessary, change their practice. Most complaints used to be about professionals not treating patients with dignity and respect however, so they became wary, unwilling to challenge 'difficult' patients in particular – fearful that if they did, it would result in a complaint against them.

One clear outcome of this process has been the development of defensive practices among healthcare professionals. 'Many understandably took the easy way out, keeping meticulous notes in case they might be needed in future if called on to defend their actions or practice,' says Brid. 'Having a complaint investigated is a horrible business where professionals often felt guilty until proven innocent. Yet, ironically, they were expected to hand out leaflets to all new patients explaining how they could comment and complain about the service.'

The myth of ‘professionalisation’

One paradox of the move to encourage and institutionalise a ‘culture of complaint’ amongst patients of the NHS is the extent to which it actively alienates patients from healthcare professionals. The measures discussed above are, at least in part, motivated by a genuine desire to give patients a greater ‘voice’ in their care, and to help them gain a sense of redress when things go wrong. Of course patients are entitled to feel angry about inadequate treatment, and it is right that their concerns and experiences are listened to when this can improve clinical practices and standards of care. But formalising this process through litigation-conscious form-filling and bureaucratised ‘pathways’ has the effect of disempowering the disgruntled patient even more.

As we were researching this report, a number of people recounted their frustrations at visiting relatives in hospitals where nursing staff were shuttered away completing paperwork, and simple requests for drinks of water or clean bed-linen were met with a reaction of harassed wariness, where it was tacitly made clear that the nurse’s preoccupations lay elsewhere than in the basics of patient care. It is this sense of nurses being ‘too busy to care’ that led recently to the shrill media debate about whether it should actually be the job of nurses, rather than relatives, to feed and otherwise cater for the basic needs of patients in a hospital.

What is going on here is a reaction to the so-called ‘professionalisation’ of nursing, where gaining qualifications and filling in forms has come to be seen as the central nursing role. The net effect of this is to pull medical staff away from the job they signed up to, and to create an uncomfortable distance between them and their patients – who, as Brid indicates, come to be

seen as a 'problem' to be managed. 'By the time I left the NHS, it had become like the London Underground – everything would be fine if it were not for the patients!' she remarks wryly. Whereas from a patient's point of view, what is needed in times of accident or illness is somebody with the compassion, skill and courage to help make things better – not somebody prepared to turn their backs and pass the buck.

3. EDUCATION – LEARNING TO LITIGATE

The culture of litigation and compensation within the education system has also attracted many headlines over the past decade, but their focus is slightly different to those focusing on clinical negligence. Whilst reports of litigation against the NHS emphasise staggering sums of money, the education sector is notable for the absurdity of the *types of claim* that are brought – often successfully – against schools by disgruntled pupils.

The nature of the claims that have actually been brought against schools in recent years can be broken down into a number of categories. We examine some of the key litigation trends below:

- Accidents and incidents
- School sports
- Bullying
- Student satisfaction
- School admissions.

Accidents and incidents

In September 2010, it was reported that ‘as many as 10 children a week are securing pay-outs after suing schools for injuries

picked up in classrooms, sports fields and playgrounds', citing figures released under the Freedom of Information Act showing that '£2.25million in compensation was awarded to pupils last year after councils admitted liability for school accidents.'⁴²

Results from a series of Freedom of Information requests conducted in 2011 similarly reveal that 'compensation culture' within schools is very much in evidence, with some bizarre and costly results. In response to these requests, councils revealed they paid out a total of more than £2 million in 2010 as a result of 347 claims that were successfully brought against them by injured children.⁴³

The impact of these kinds of claims is seen to materialise in excessive risk-aversion within schools, which often takes the form of an inflated concern with 'health and safety'. This has taken the form of banning playground games, or restricting school trips: to the point where some teachers have been taking their pupils on 'trips' in the school playground because of litigation fears, despite the fact that 'only 156 recorded legal actions have ended in compensation in the past decade'.⁴⁴

⁴² *Daily Telegraph*, 'Councils paying out millions to injured pupils,' 27 September 2010.

⁴³ *Daily Mail*, 'Pupil awarded £6,000 for custard splash as playground "compensation culture" costs taxpayers £2million,' 4 July 2011.

⁴⁴ *Sunday Times*, 'Schools ban running over lawsuit fears,' 30 May 2004; *Sunday Express*, 'Children will suffer legal threat, says Ofsted chief; why we need school trips,' 29 August 2004; 'Why a school trip means a visit to the playground.' *Daily Mail*, 29 November 2006; *Guardian*, 'National: Teachers put off school trips by litigation fear: Children being denied chance to leave classroom: Few cases end in legal action, research reveals', 3 October 2009.

Table 3.1: Pupil compensation: Accident claims

| Amount | Detail of claim | Council |
|---------------|--|----------------------|
| £3,000 | Pupil suffered cuts from rose bushes | Doncaster |
| £11,000 | Pupil fell off climbing frame | Greenwich, London |
| £25,000 | Student hurt falling out of a tree | Knowsley |
| £2,500 | Pupil hurt hand cutting up fruit | Bradford |
| £2,500 | Student had fire extinguisher sprayed in eye | South Gloucs. |
| £7,000 | Student fell through roof of air raid shelter after climbing over a fence to retrieve a ball | Brighton & Hove |
| £30,000 | Pupil injured falling off a bench | Cornwall |
| £2,000 | Student hurt when hit by a ball kicked by a teaching assistant | |
| £40,000 | Pupil broke a leg on a school trip | Derbyshire |
| £5,000 | Child injured swinging on a tree | Cambridgeshire |
| £14,150 | Pupil injured after chemistry experiment went wrong and a test tube shattered | Plymouth |
| £4,300 | Pupil hit in the mouth with a school bell | Staffordshire |
| £6,000 | Pupil slipped on some spilt food | Norfolk |
| £7,000 | Pupil put hand through a window that had been painted black for a drama class | Norfolk |
| £16,000 | Child tripped over while running | Haringey, London |
| £2,000 | Pupil injured finger on a rubbish bin | Haringey, London |

By September 2004, there were signs of a backlash against excessive risk-aversion in relation to children's activities.⁴⁵ But as we can see from the examples above, despite the recognition of the need for children to be allowed the freedom to take everyday risks, and despite the well-articulated concern about compensation culture for accidents having gone 'too far', accidents and injuries incurred at school continue to form the basis for claims – often resulting in substantial pay-outs.

Given this reality, few head teachers will put a philosophical appreciation of the importance of risk-taking above the fear of litigation. This is particularly the case at a time of financial constraints, where school managers are more concerned to avoid any additional cost; and where it becomes even more tempting to justify cutting back on the interesting, 'risky' activities in favour of those that seem safer, more boring, cheaper and less open to litigation claims.

Teachers against schools and pupils

Litigation within the education sector is not limited to pupils suing their schools. A further series of Freedom of Information requests found that councils paid out an estimated £6.7 million in 2010, in cases where teaching staff took legal action for injuries they picked up while at work.⁴⁶ As with the NHS, the

⁴⁵ Ofsted, *Outdoor education: Aspects of good practice*, 24 September 2004

⁴⁶ In total, 130 of the 150 education authorities in England provided responses in relation to a Freedom of Information survey about the amount of compensation and associated costs for teacher injury compensation in 2010. Those that responded revealed the total of compensation and costs came to £5.8 million. When estimates for the missing 20 councils are factored in the overall total of compensation and costs comes to £6.7 million.

striking factor in these findings is the proportion of money that ends up being paid, not to the claimant, but to lawyers.

This survey of local authorities found that *for every pound paid as compensation to staff, another £1.25 went to lawyers and legal fees*. In 2010, there were just over 400 successful claims for compensation, with the average cost to councils of £16,600 each. Yet of that cash, the injured teacher on average collected £7,300 and the legal fees amounted to £9,300.⁴⁷

In 2012, almost £1 million was paid in personal injury claims brought against schools by the teachers' union NASUWT on behalf of about 250 teachers. The largest payment, of £158,000, was to a teacher who slipped on a muddy floor during a fire drill, injuring her back; payments amounting to just over £100,000 were made to another 11 teachers who were attacked by pupils and claimed compensation from the Criminal Injuries Compensation Authority.⁴⁸ In the wake of these figures, concerns have been raised about the likelihood of schools facing increased insurance premiums as they become academies and take over responsibility for their employees and insurance.

⁴⁷ *Daily Mail*, 'How a £500 pay-out to a teacher hurt restraining a pupil cost £60,000 in legal fees,' 30 December 2011.

⁴⁸ *The Times*, 'Sharp increase in payouts for teachers who are injured or persuaded to resign,' 6 April 2012.

Table 3.2: Teacher compensation

| Amount | Legal costs | Nature of claim | Council |
|---------------|--------------------|---|--------------------|
| £2,000 | £14,300 | Member of staff stubbed toe on box | Wirral |
| £547 | £17,040 | Teacher injured in slip at school | Staffordshire |
| £1,500 | £14,888 | Teacher injured falling over | Walsall |
| £12,000 | £26,900 | Staff member injured by timber from circular saw | Calderdale |
| £1,650 | £11,000 | School employee slipped on posters left lying around, and was injured | Dorset |
| £500 | £61,464 | Teacher injured while restraining a pupil | North Lincolnshire |
| £13,500 | £75,800 | Teacher assaulted by special needs pupil | Southend-on-Sea |
| £15,000 | £25,500 | Pupil fractured teacher's thumb | Windsor |
| £6,000 | £12,250 | Teacher assaulted by autistic child | Enfield, London |

As can be seen from the table above, some of the claims made by teachers against schools are the kind of health-and-safety claims that we might expect against any employer. Yet there are two notable points about these compensation claims:

- First, they reinforce the idea, so apparent in pay-outs to pupils, that schools should be liable for accidents that happen on the premises, as part of everyday school life.

While we might sympathise deeply with a teacher who injures his leg or back slipping on paper left on the floor, it is hard to see why this should be grounds for compensation – rather than simply, for example, having his wages paid while he is off work, recovering. If a teacher is to get compensation following such accidents, it is hard to see how the courts would object to compensation being paid out to pupils.

- Second, some of these revolve around injuries caused by pupils. The issue of pupils injuring members of staff has emerged as a significant area of concern for some schools, particularly those with a high proportion of pupils suffering from severe behavioural difficulties. But again, it is hard to see why such cases should result in compensation by the local authority, rather than sympathetic sick leave. And the ‘teacher against pupil’ character of such cases suggests a difficult tension that results in the pupil-teacher relationship as a consequence of our litigious culture.

Finally, as in the health service, the disparity between the amount of money awarded to the injured party, and that which is spent in legal costs, is significant. This again casts doubt on the idea that anyone really wins from the compensation culture, which in awarding small amounts of cash to individuals has a largely destructive effect on other aspects of school life and culture.

School sports as hazard

The first woman head teacher of one of Britain’s oldest independent schools is bringing back rugby two years after the game was dropped amid fears of litigation. Risk of injury and compensation claims contributed to the demise of the traditional sport at King’s School, Ely. But head teacher Susan Freestone says the opportunity to take part in a range of sports and outdoor activities is vital for pupils:

It is an important part of their education. I rebel against the notion that school is a preparation for life because school is life... It is about young people finding out what they are good at and testing their limits.

The previous headmaster of King's School had told parents in June 2002 that the sport was being discontinued partly for time-tabling reasons but also because it was a game 'which is notoriously difficult to referee and increasingly subject to litigation'. One of Mrs Freestone's first actions on taking up her post was to consult parents and pupils on the reintroduction of the sport. Nine in 10 parents were in favour, as were 88% of senior pupils and 78% of juniors. Mrs Freestone said:⁴⁹

Rugby is optional and no one has to do it... We will be taking all reasonable precautions to protect pupils from injury, such as using highly qualified and experienced referees to train them in the right techniques and skills so they play as safely as possible.

Rugby is, indeed, not a sport for the faint-hearted. We may remember that Britain's former Prime Minister, Gordon Brown, lost the sight in one eye after a rugby accident at school. Andy, a father-of-two, played professional rugby in his youth and now coaches children at weekends. He sports his own 'wear and tear' injuries – muscle damage to the shoulder and knee – and tales of former team-mates who, later in life, have 'cauliflower ear' as a legacy of their time in the scrummage. But as Andy says, most of the injuries that rugby players might sustain at school – cuts, bruises, torn muscles, 'maybe the odd broken

⁴⁹ *Daily Telegraph*, 'Headmistress brings rugby back to King's,' 28 September 2004.

bone' – are the kind of injuries you might expect with any contact sport. 'When you think of the number of kids who play rugby, there are very few who sustain serious injuries, and even when adults might really hurt themselves, most kids just bounce back,' he explains.

Rugby is a sport with a long history; and it can scarcely have become more dangerous than it used to be. Andy describes the numerous courses and qualifications he undergoes as a coach, including First Aid certification and safeguarding training; and as he says, when training younger children in the sport, several years' worth of emphasis is placed on teaching them to catch, tackle and fall so they are less likely to injure themselves. What has changed in rugby, as with all competitive sports played at school, is the awareness of litigation: the idea that if a pupil is injured in a sport, the school is to pay for this.

The climate of litigation and litigation avoidance is miserable enough when it comes to clamping down on the extra-curricular activities that enrich children's experience while at school, from school trips to outdoor play. It is particularly worrying when litigation avoidance comes to affect the core activities of the school curriculum. The 2011 Freedom of Information requests discussed above also revealed that some of these claims related directly to accidents or injuries sustained during sports that form a standard part of schools' activities: football, netball, athletics and gymnastics.

Table 3.3: Pupil compensation – Sporting claims

| Amount | Detail of claim | Authority |
|---------|--|-----------------|
| £7,000 | Teacher injured pupil when demonstrating how to perform a rugby tackle | Gloucestershire |
| £13,000 | Student injured when a set of goalposts fell | Medway |
| £7,500 | Crossbar fell on pupil helping teacher to put up a set of goalposts | Wolverhampton |
| £6,000 | Netball ring fell on a pupil | Lincolnshire |
| £8,000 | Student hurt when struck in the face by a hockey stick | Lincolnshire |
| £4,500 | Pupil hurt with a javelin during lessons in the city | Derby City |
| £9,500 | Pupil broke arm in gym class | Derbyshire |

Clearly, taking part in school sports is physically more risky than sitting in a classroom with a pen and paper. But these activities, as a whole, should not be optional: they provide a crucial part of children's learning and socialisation. Susan Freestone, head of King's School, is right that say that competitive sports such as rugby are 'about young people finding out what they are good at and testing their limits.' For Andy, it's mainly about fun: 'kids love competitive sports, they just want to win'. But a game like rugby also develops 'team bonding, fitness, and it's character building – you see children emerging as leaders, and learning how to look ahead.'

The qualities associated with competitive sports have historically been prized for a reason; and the world we live in today make attributes such as competition, cooperation and physical fitness no less important than they have ever been. Schools, where large

numbers of children are brought together for the purpose of learning, remain ideal environments to instil some of these qualities through the rough and tumble of competitive sports. The biggest risk, in the twenty-first century, is cultivating an environment where children are held back from developing these qualities because we don't want them to graze a knee.

Bullying and friendship groups

Perhaps the most emotive category of claims against schools relates to bullying. Over the past few years, it has been noted that 'legal firms are touting for business in schools in relation to allegations of bullying and expulsions'.⁵⁰ While some reported cases are heart-rending tales of individual pupils' misery, others indicate a disturbing trend towards using bullying as the basis for mass claims: to the point where, in 2003, 600 children from across Wales were reportedly suing the authorities.⁵¹

In February 2005, bullying claims had achieved the status of a full courtroom drama, when it was reported that a pupil who was suing a local authority for allegedly failing to protect her against bullying claimed to have 'secretly taped a teacher telling her to "ignore" the fact that she was being physically abused';⁵² in 2009, in a case reported to have the potential to 'open floodgates', a former school pupil who brought a case against her local education authority 'because she claims they let bullies ruin her

⁵⁰ *Mail On Sunday*, 'School-bus chasers' lure parents to claim damages, 16 June 2002.

⁵¹ *The Mirror*, 'Bullying drives 600 kids to sue their school bosses; playground hell leads to court stampede.' 25 June 2003.

⁵² *Sunday Times*, 'Pupil who taped bullying to sue council for damages.' 20 February 2005.

life', said that she hoped her legal case 'will allow other victims to do the same'.⁵³

Given the cultural prominence presently attached to the problem of bullying in schools, and the misery undoubtedly experienced by children who feel they have experienced it, it is not surprising that bullying should emerge as the grounds for formal complaint. But litigation against schools brought on the basis of claims about bullying raise a host of problems. The most significant of these is the extent of a school's liability for the way children at school behave *towards one another*.

As noted above, there are a number of serious objections to the use of litigation to deal with grievances about a school's academic performance, or its provision of resources to particular children. But at least these are claims made against the school, based on decisions made by, or problems allegedly caused by, the school. Bullying claims are based on problems that are allegedly caused by one child (or group of children) to another child, often outside formal lessons and during unsupervised time. The argument that a school should have 'done more' to address the problem – presumably, by disciplining the alleged bullies and protecting the victim – presumes a duty of care for the child's welfare that goes way beyond even claims based on physical accidents or incidents.

The presumption is that a school's duty of care extends to a child's feelings, outside of formal schooling (lessons) and outside of the child articulating their feelings. The duty of care is also presumed to extend to interactions, not between the child and his/her physical environment, but within the child's

⁵³ *The Mirror*, 'Bullies case could open floodgates.' 10 August 2009

emotional world and between the child and his/her peers. In terms of any ability to draw clear boundaries around a school's responsibility, claims based on allegations of bullying are hugely problematic, laying schools open to accusations that they should be liable for anything that dents a child's general happiness. As for its effect in schools: already, children have their friendships increasingly monitored and regulated, through the establishment of stringent anti-bullying policies, 'buddy posts' in the playground, and the annual 'anti-bullying week'.

It has got to the point where some schools even try to prevent children from having 'best friends', encouraging them to play in large groups in order to avoid the exclusion of other children.⁵⁴ Russell Hobby, of the National Association of Head Teachers, argued that the practice of best-friend bans 'seems bizarre' – which indeed it is, from the perspective of understanding children's need to develop intimate relationships, and to learn the important life lesson that such relationships can and do break down. But in a climate where schools can be sued for apparently not protecting their pupils from such everyday heartbreak, it is not surprising that some seek to regulate friendship groups: not for the benefit of the children, but to indicate their adherence to the anti-bullying policy.

Student satisfaction

In January 2010, one newspaper posed the rhetorical question: 'Your child has disappointing exam results and you need someone to blame? Who better to carry the can than the school, especially if you are paying a fortune in fees?' The newspaper continued: 'More and more parents are seeking legal redress from private schools who have "let down" their

⁵⁴ *The Sun*, 'Schools ban children making best friends,' 19 March 2012.

offspring and it is expected that 2010 will see the trend intensify as cash-strapped mothers and fathers seek to maximise the return on their independent-education investment'.⁵⁵

From an educational perspective, it is bad enough that private schools should be viewed according to this consumer model, where the fees are presumed to buy children (or their parents) good grades. But how much more problematic is this assumption in relation to state schooling, for which everybody pays through taxation – including the cost of compensation claims?

Controversy surrounded the proposals by then Education Secretary, Ed Balls MP, in 2009 to 'introduce legal guarantees to give every child the right to a good school,' giving parents 15 'rights' in their child's education, and giving pupils '24 separate guarantees'. It was reported that, with these proposals, 'Parents will be able to demand detailed information about their child's school, trigger government action if they do not believe their children's classes are up to scratch and demand meetings with a named member of staff responsible for their child. By law, children who are falling behind will qualify for one-to-one tuition.'⁵⁶

Balls acknowledged that litigation was one possible outcome of introducing such 'legal guarantees', though he argued that 'Judicial review redress would be very much a last resort'.⁵⁷ Headteachers, however, did not agree, warning that schools would face an 'avalanche of litigation' should these plans go

⁵⁵ *Daily Telegraph*, 'Pay attention to legal lessons,' 9 January 2010.

⁵⁶ *Observer*, 'Schools fear Ed Balls's guarantees will trigger litigation,' 15 November 2009.

⁵⁷ *Observer*, 'Schools fear Ed Balls's guarantees will trigger litigation,' 15 November 2009.

ahead. John Dunford, General Secretary of the Association of School and College Leaders, said: 'I can't think of any other walk of life where there are guarantees in legislation. This will only serve to fuel litigation against schools by disgruntled parents... It guarantees every child a good quality education but it will generate complaints from parents because you can't define the quality of a good education in the legislation.'

Unfortunately, somewhat bureaucratic definitions of a 'good education' already operate powerfully through Ofsted inspections and school league tables; and legal claims are tacitly incited by measures that increasingly encourage parents to adopt a consumer rights approach to their children's education. One striking example is Ofsted's recently-introduced 'Parent View' facility. The Parent View webpage⁵⁸ makes its mission clear:

Parent View gives you the chance to tell us what you think about your child's school... We will use the information you provide when making decisions about which schools to inspect, and when. By sharing your views, you'll be helping your child's school to improve. You will also be able to see what other parents have said about your child's school. Or, if you want to, view the results for any school in England.

Through Parent View, Ofsted asks parents to rate the following '12 aspects of your child's school' by opting for one of five mandated 'views': 'Strongly agree; Agree; Disagree; Strongly disagree; Don't know'. Responses to each of the twelve aspects is then presented on the website in the form of a bar chart.

⁵⁸ Ofsted website: Parent View homepage. Accessed 20 March 2012.
<http://parentview.ofsted.gov.uk/>

Figure 3.1: Ofsted's '12 aspects' of a school

1. My child is happy at this school
2. My child feels safe at this school
3. My child makes good progress at this school
4. My child is well looked after at this school
5. My child is taught well at this school
6. My child receives appropriate homework for their age
7. This school makes sure its pupils are well behaved
8. This school deals effectively with bullying
9. This school is well led and managed
10. This school responds well to any concerns I raise
11. I receive valuable information from the school about my child's progress
12. Would you recommend this school to another parent?

Ofsted's aim in this endeavour is clearly to spread an engagement amongst parents with the schools' inspection body: it even encourages other websites and blogs to 'link to us', to get the word round about how parents can monitor schools.⁵⁹ Another – presumably intended – effect of Parent View is that it creates a sense of hyper-surveillance and

⁵⁹ Ofsted website: Parent View, 'Link to us'. Accessed 20 March 2012.
Link to us: <http://parentview.ofsted.gov.uk/link-to-us>

awareness within schools themselves. 'The parents' responses can trigger an inspection,' explains one deputy headteacher. 'So we have to monitor these very closely.'

The attempt by the authorities to create a quasi-customer satisfaction index of schools, where expressions of individual dissatisfaction can trigger official inspection, creates fertile ground for the transformation of customer complaint into the kind of litigation claims discussed above. When schools are presented as providing a service that has particular – indeed, 12 – obligations to satisfying the parent consumer, parents who 'strongly disagree' that the school is meeting its obligations towards their own child are hardly likely to stop at checking boxes on a website.

In higher education, too, the idea of litigating for a quality education is gaining momentum. In 2007, it was reported that disputes with staff and students were costing universities an average of £100,000 a year in legal fees.⁶⁰ Even *not* failing qualifications, it seems, has become the basis for litigation claims: in 2003, a woman who was mistakenly told she had failed an exam launched a £100,000 damages claim.⁶¹ Ofsted's 'Parent View' is mirrored in higher education by the National Student Survey, which transmits the message that universities are there to provide students with a service that they like – and not liking the service is then grounds for customer complaint.⁶²

⁶⁰ *The Times*, 'Jaw jaw is better than law,' 13 February 2007.

⁶¹ *Mail on Sunday*, 'Nurse sues SQA for telling her she had failed,' 16 November 2003.

⁶² National Student Survey. Accessed 20 March 2012.
<http://www.thestudentsurvey.com/>

Having encouraged a culture of complaint amongst students, through such mechanisms as the National Student Survey, universities are now routinely operating in such a way as to avoid students complaining about the 'service' they receive. For example Julia, a lecturer at a university in the south east of England, explains that if students on a particular module are getting lower marks than they are on other modules, the problem is considered to be lecturer's teaching style or the course content – it is 'too hard', and the lecturer ends up redesigning the module to improve the grades. 'The official line is that we are supposed to get "60 over 60" – that is, 60% of students in a module gaining over 60%,' she says.

Stuart, a senior lecturer at a red-brick university, argues that the problem is 'more subtle'.

The threat students hold against us is the threat of complaining about unfair treatment. If the average grade for my course is 56 but for all other courses it is 62 then the students will sniff that out and ask 'why?' Those kinds of complaints are not met with robustness, at best we talk about marks falling within a normal range. At worse, the errant marks are scaled upwards (never downwards). Similarly, if my course involves 32 hours of contact time but the average is 20 hours, students on other courses complain that they do not get the same support. It's the same for project supervision, feedback on work and so on. Always the claim is for fair and equitable treatment which translates into a demand for everything to be standardised and monitored to prevent variance.

Admissions wars and litigation services

The only real beneficiaries of the culture of litigation around schools are, of course, law firms. Self-styled specialist education

lawyers have jumped at the opportunity provided both by increased litigation and the new Academies' need to retain their own legal services, to offer packages covering schools in most legal eventualities. For example, the Milton Keynes-based firm of solicitors Baker Small markets itself as 'a niche public sector solicitors' practice providing support and legal advice to a range of organisations including Schools, Local Authorities, NHS Trusts, the Police and Fire Authorities'.⁶³ For schools, it offers a range of 'subscription packages', from £4,000 plus VAT to £8,000 plus VAT. 'Legal claims and challenges against schools are on the increase,' notes its brochure. 'As a consequence, Governors and headteachers need to have access to cost effective legal advice to be able to respond effectively to these challenges.'

Baker Small's subscription packages can be used for advising on a number of issues, including 'Admissions issues and policies', 'Responding to parental complaints', 'Exclusions from school and managed moves', and 'Special Educational Needs disputes'. But it is interesting that Baker Small's subscription packages expressly do not cover 'Personal injury and negligence claims', 'Barristers' fees or disbursements (unless expressly agreed)', or 'Damages/costs which a third party may seek to claim against a school' – areas which will feature highly in the concerns of schools needing to find legal representation.

On the other side of the legal fence, a host of law firms tout their services to parents. One particularly lucrative area to emerge in recent years is that of school admissions. The intensely competitive character of schooling today means that

⁶³ Baker Small website. Accessed 1 March 2012.
<http://www.bakerssmall.co.uk/home.html>

parents who do not manage to get their child into their sought-after school can take the decision hard; and there are law firms circling the web to translate their grievances into cash. For example, the Leicester-based solicitor J. A. Walker has set up the website myschoolappeal.co.uk⁶⁴ which offers potential clients 'telephone appointments at any time, including out of office hours and weekends to suit your needs'. The homepage continues:

All of our advice is confirmed by email and we can offer emergency advice if you are panicking the day before or even on the day of an appeal hearing.

We can point you in the right direction and give you practical advice about what you need to do next. Take advantage of our initial low cost consultation – only £100 plus VAT!

The Hampshire-based law firm Peyto Solicitors begins its solicitation:⁶⁵

School Admissions is a topic never far from the minds of local authorities, schools, parents and the press. As parents, what can you do to maximise the chance of securing a place at your preferred school for your son or daughter?

The Norfolk-based firm Nicholas Hancox⁶⁶ has identical advice as to what you can do 'to maximise the chance of securing a

⁶⁴ <http://myschoolappeal.co.uk/>

⁶⁵ <http://www.peytolaw.com/services/education-law/admissions/>

⁶⁶ http://www.nicholashancox.co.uk/education_school_admissions.htm

place at your preferred school for your son or daughter’, but with the preface: ‘School Admissions is an annual nightmare for some local authorities and schools – and an occasional nightmare for some parents and their children’.

The litigious character of school admissions battles of course makes the experience even more nightmarish. An article on the website teachingexpertise.com⁶⁷ begins by stating that ‘Admissions authorities and statutory appeal panels can avoid potential litigation from parents by using tactical decision making’ – giving a flavour of how the relationship between schools and new parents gets off to a start grounded in mutual mistrust, where both parties become quickly embroiled in technicalities. And the consequences tend to be unfortunate, whatever the outcome.

Parents who lose their appeal battles are left with a lingering sense of bitterness both about their chosen school and the relative inadequacy of the school to which their child was allocated; parents who win the battles often do so at the expense of the very qualities that made their chosen school sought after in the first place. As one primary school governor told us:

People like this school because it's small and cosy, and that's why the children do well. But we've had to take so many children on appeal that it's now overcrowded – the kids barely fit in the classrooms! So now we get complaints about that.

⁶⁷ Yvonne Spencer, ‘Admission appeals: how to avoid litigation,’ March 2008. See <http://www.teachingexpertise.com/articles/admission-appeals-how-to-avoid-litigation-3239>

The dangers of defensive education

The consequence of all the cases discussed above has been the institutionalisation of defensive teaching practice, which operates more with a view to covering one's back and reducing complaints than it does to promote a genuinely educational ethos. Challenging students to learn, expanding their horizons and experiences, and allowing them to form their own relationships are all crucial parts of the educational experience. Yet all of these imperatives are subverted by the diktat of litigation avoidance, which promotes a lowest-common-denominator approach to every aspect of teaching and learning.

When the aim is to avoid a lawsuit, teachers are discouraged from upsetting pupils by giving them low marks, putting them at physical risk through encouraging competitive or contact sports, and allowing them to develop their emotional relationships through friendships that are exclusive and exclusionary. If all that counts is 'fairness', brilliance is frowned upon and innovation discouraged; if what matters is that everybody stays safe, healthy risk-taking is actively squashed. And if teachers are focused on covering their backs, they lose confidence in their own professional judgement about what is best for their pupils.

4. CONCLUSION

The aim of this investigation into litigation in health and education was to explore its social and professional costs. Since the publication of my report, *Courting Mistrust*, the situation has gone from bad to worse. For example, back in 1999, when *Courting Mistrust* was published, the institutionalisation of compensation culture in education was still relatively limited. Today defensive-education has become a powerful influence in our schools and its damaging impact is comparable to the corrosive effect of litigation on the NHS.

The main aim of this report is to alert policy makers and public to the non-quantifiable but nevertheless destructive consequences of litigation culture. It is simply impossible to reconcile the ethos of public service with the institutionalisation of litigation avoidance.

If we want to put a brake on the culture of litigation and litigation avoidance in Britain, we need to look beyond ambulance-chasers and greedy lawyers to the cultural conditions that have allowed litigious sentiments to flourish as common sense. In particular, we need to challenge the expectation that professional 'best practice' in the public sector should be measured by the absence of complaints or litigation.

Some of the best experiences a child can have at school are those facilitated by teachers prepared to 'think outside the box', just as the most responsible and effective healthcare interventions are often made by those professionals prepared to act on their training and experience in the face of the least risky course of action.

As we recommended in *Courting Mistrust* it is important to separate compensation in the public sector from tort law. Policy makers need to consider how a scheme of no-fault liability can be devised to deal with those who have suffered harm. However the first step towards reducing the social costs of litigation in the public sector is to raise awareness about its social consequences. What is required is a public campaign that challenges the legitimacy of litigious attitudes towards the public sector. There is little point in endless discussions that decry the failures of our public services unless the idea of accountability is separated from the pursuit of financial claims.

Litigation is not an antidote to failures in the delivery of services and errors of professional judgments. In fact a litigious climate inexorably leads to the diminishing of the ethos of public service and a decline in the quality of care in health and in the education of our children. Recognising this reality holds the key any attempt to reform the provision of health and education to our society.



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