Blame games

Statistically, the 'compensation culture' is a myth but it is hard to dispel perceptions that it is growing, says **Alexandra Carn**

A Department of Trade and Industry (DTI) report of May 2004 stated: "The government is determined to scotch any suggestion of a compensation culture where people believe that they can seek compensation for any misfortune that befalls them, even if no one else is to blame.

"This misconception undermines personal responsibility and respect for the law and creates unnecessary burdens through the exaggerated fear of litigation."

Three years on, has the government curtailed the rise of compensation culture? Or is the UK drifting closer towards a US-style litigation free-for-all?

In comparing the UK and the US, one must understand the different ways that claims are funded. The US uses what are called Contingency Fee Agreements and the UK Conditional Fee Agreements (CFA). There is a subtle but important difference.

In the US, successful lawyers are paid a percentage of damages. Under a CFA in the UK, the successful lawyer receives his normal fees with an additional percentage uplift on those fees. This uplift, or premium, is essentially payment for the risk that the lawyer carries that he will not win and in that event not be able to recover his fees.

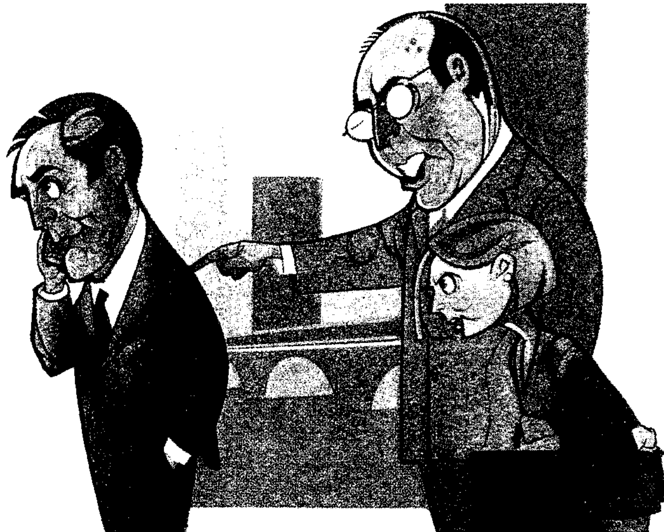
A lawyer employed under a UK CFA simply has to "win" to be paid his premium. The amount of compensation awarded does not affect what he will be paid. Therefore the UK lawyer has no personal interest in the amount of damages received.

The US contingency fee lawyer, however, has a wage packet determined by the settlement figure. The US system also allows punitive damages, which are linked to the value of the defendant's assets and which generate yet more profits for lawyers. Furthermore, the rules on recovery of legal costs differ. The "loser pays" rule does not automatically apply in the US.

The ethical code of European lawyers considers there is an inherent conflict in lawyers having an interest in the amount of damages. However, contingency fees can be used in the UK for types of work considered non-contentious, which include corporate and some employment tribunal work. But CFAs remain the norm for mainstream litigation.

> Advertising by 'claims farmers' suggests that a mere phone call will produce compensation

The large-scale use of CFAs (introduced in anticipation of the reduction in legal aid) has created the impression that it is possible to sue without risk. This in turn leads to a rise in unmeritorious claims. The situation is made worse by the actions of the "claims farmers", whose advertising suggests that all one needs to do to receive compensation is to make one telephone call and that there is no requirement for anyone to be at fault.



CFAs are often referred to by the moniker "no win, no fee" but this is a misnomer. In an unsuccessful case there may be no liability for the claimant's own costs but there is still an extant liability for the other side's costs. Insurance to cover this liability can be purchased but this can be expensive, particularly if liability is likely to be heavily contested.

However, if the claimant has limited resources the prospect of the defendant recovering (often very substantial) legal costs remains small, thus providing a commercial impetus for settlement whatever the likelihood of a successful defence.

It is indisputable that in one respect CFAs have been responsible for an increase in court work, in that they have generated a new field of litigation regarding the recoverability of the success fee.

The rise of an apparent claims culture does not

spring from the introduction of CFAs alone. Claims under employment legislation are burgeoning. Particularly for the City, equal pay claims have become the mode. Morgan Stanley has recently settled more than 2,700 such claims totalling over $46m, which arose from claims by female employees over pay and promotion prospects.

These equal pay claims are often perceived as evidence of "sexism in the City" but because equal pay claims are based on discrimination, the claimant must identify someone of the opposite sex. A woman cannot compare herself with another woman, as there is no breach of a legal obligation to pay one woman more than another when they are doing the same job.

The bringing of unmeritorious claims is not an attractive prospect; equal pay claims are brought in the Employment Tribunal, where costs do not follow the event. Win or lose, costs are borne by the individual parties. Due to these rules on recovery of costs, CFAs are seldom available for such proceedings. Complex claims under the Equal Pay Act 1980 can easily run into six figures for one side alone.

Another reason for apparently increasing claims is that new laws create new problems. For example, the Protection From Harassment Act 1996 was designed to provide a civil and criminal remedy for victims of stalkers.

However, this has been used in the workplace to advance claims of bullying, particularly in cases where there is no evidence of the bullying being on any proscribed discriminatory grounds. For the defendant there is the prospect of a costs award against them and the risk of conviction for a criminal offence as an incentive for settlement.

One reason why claims seem to be increasing is that new laws create new problems

So are claims on the increase statistically? According to a TUC report, nine out of 10 workers who are injured or made ill by their jobs do not receive any compensation. Furthermore, it is reported that the number of claims for civil compensation is in decline. As for the value of claims, the UK's record is good: the average claim in 2005 was less than £7,500.

Although the funding arrangements in the UK differ from the US, this alone may not hold back the UK from following the US in the long term. So what can be done to prevent the culture developing further? For Tony Blair, who has just stepped down as prime minister, the solution is to "replace compensation culture with common sense culture". But most individuals will take a view that if a remedy (money) is there they will take advantage of it.

The DTI is in the throes of another consultation on the law on damages. But is another consultation and further regulation really the answer?

The government responded to expanding employment claims with the Employment Act 2002 (Dispute Resolution) Regulations 2004. This provided a mandatory three-stage process (statement in writing, meeting, appeal) that results in financial penalties if not followed and in some cases claims cannot be issued unless the relevant process has been followed. This vision of employers and employees resolving disputes outside of court has not been borne out in practice.

First, experience shows that once an employee has raised a formal complaint, the relationship between employer and employee is often irreparable. Second, the regulations have produced a vast amount of satellite litigation to determine what does and does not comply with the regulations. Third, the extra statutory layer has increased the opportunity for "technical" defences, the opposite of what was intended.

Consequently, the DTI has launched a consultation on the regulations, considering whether the regulations are unworkable or have served to put greater stress on a strained tribunal system and whether they should therefore be repealed.

For unions, claims are avoided by addressing health and safety in the workplace. This "handrail around Britain" is not popular with businesses. It can erode the competitive edge; Europe generally has lower health and safety standards than the UK. Outside Europe, such controls may be virtually non-existent.

Compensation payments must mirror a loss accurately and fairly. This is a matter for government and the courts. Some controls exist: in unfair dismissal claims the maximum compensatory award is set by the secretary of state and is currently £60,600 (raised in line with the retail price index in February of each year). There is also a judge-made limit of £25,000 on the amount to be claimed for "injury to feelings" in discrimination claims.

However, the perception is that payouts for stress and depression are disproportionately large compared with the actual damage sustained.

Lastly, the issue of proportionality needs to be addressed in that the legal costs of actions often drastically outstrip the damages recovered, perhaps most notably in libel and slander cases.

Statistically, the "compensation culture" remains a myth but governments must address perceived problems as well as actual ones.

Perhaps the solution lies not in more regulation but in restraining the belief – fuelled by a misconception about "no win, no fee" – that compensation is easily available. It can thus be prevented from becoming a reality.

Alexandra Carn is a solicitor specialising in employment law at Edwin Coe