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Social Action, Responsibility and Heroism Bill

Bill No 9 of 2014-15

RESEARCH PAPER 14/38 8 July 2014

The Coalition Agreement included a commitment to encourage volunteering and involvement in social action. The Government intends that the *Social Action, Responsibility and Heroism Bill* will help to fulfil this commitment by reassuring volunteers (and others) that the courts will consider the context of their actions in the event that they are sued for negligence or breach of statutory duty. The Bill is one of a number of initiatives being pursued by the Government to tackle the perception of a "compensation culture" which, among other things, may deter people from volunteering or getting involved in activities of benefit to the community.

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Research Paper 14/38

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Summary

It has been argued that factors such as the lifting of laws banning solicitors from advertising; the growth of claims management companies; increased awareness about the right to claim compensation; and the availability of "no-win, no-fee" agreements, have given rise to a "compensation culture" in England and Wales, or at least to the perception that such a culture exists.

The Government has pointed to evidence which indicates that the fear of being sued may deter some people from volunteering, helping others, and from intervening in an emergency. The Coalition's *Programme for Government* (May 2010) stated that it would take a "range of measures to encourage volunteering and involvement in social action". The Government intends that the *Social Action, Responsibility and Heroism Bill* will help to fulfil this commitment by reassuring volunteers (and others) that the courts will consider the context of their actions in the event that they are sued for negligence or breach of a statutory duty.

The Bill would require the court, when considering what steps the defendant should have taken in a specific case, to have regard to whether:

- the alleged negligence or breach of statutory duty occurred when the defendant was acting for the benefit of society or any of its members;

- in carrying out the activity in the course of which the negligence or breach of statutory duty occurred, the defendant had demonstrated a generally responsible approach towards protecting the safety or other interests of others;

- the alleged negligence or breach of statutory duty occurred when the defendant was acting heroically by intervening in an emergency to assist an individual in danger and without regard to the defendant's own safety or other interests.

The Bill would not change the existing overarching legal framework, or leave victims without protection, and the courts would still be able to find that a person had been negligent or in breach of a statutory duty in relevant circumstances. However, the Government has said that it would provide reassurance and send a strong signal to the courts.

The Bill has received a mixed reaction. For example, it was welcomed by the NCVO and the British Safety Council; whereas the TUC had concerns about its potential adverse effect for employees injured at work; and a number of lawyers have questioned its necessity.

1 Introduction and background

1.1 Why is this Bill being introduced?

The Government has published a Fact Sheet on the *Social Action, Responsibility and Heroism Bill* which sets out the purpose of the Bill.[1]

The Coalition Agreement included a commitment to take measures to encourage people to volunteer and to play a more active role in society.[2] The Government has pointed to evidence which suggests that some people are deterred from taking such action because of concerns that they might be sued if something goes wrong. The Bill is intended to address these concerns and also to reassure people, including employers, that, if they are sued for negligence or certain breaches of statutory duty, the courts will take account the context of their actions:

> 1. There is evidence to suggest that people are deterred from volunteering, helping others or intervening in an emergency due to the fear of risk and/or liability. "Helping out: a national survey of volunteering and charitable giving" in 2006/2007 found that this was one of the significant reasons cited by 47% of respondents to the survey who did not currently volunteer. This Bill is designed to address those concerns. It will provide reassurance that if something goes wrong when people are acting for the benefit of society or intervening to help someone in an emergency, the courts will take into account the context of their actions in the event they are sued.
>
> 2. This will help to support the Government's broader aims of encouraging and enabling people to volunteer and to play a more active role in civil society. The Coalition Agreement contained a specific commitment to "take a range of measures to encourage volunteering and involvement in social action".
>
> 3. The Bill is also intended to reassure people, including employers, that if they demonstrate a generally responsible approach towards the safety of others during a particular activity, the courts will take this into account in the event they are sued for negligence or for certain breaches of statutory duty.

Chris Grayling, Lord Chancellor and Secretary of State for Justice, elaborated in a blog post, speaking of the effect of the fear of being sued, even if that fear is not justified:

> All too often people who are doing the right thing in our society feel constrained by the fear that they are the ones who will end up facing a lawsuit for negligence.
>
> Take the responsible employer who puts in place proper training for staff, who has sensible safety procedures, and tries to do the right thing. And then someone injures themselves doing something stupid or something that no reasonable person would ever have expected to be a risk. Common sense says that the law should not simply penalise the employer for what has gone wrong.
>
> Or the member of our emergency services who feels that they can't come to the rescue of someone in difficulty because of the fear that they will end up in trouble for breaching health and safety rules.
>
> Or the person who holds back from sweeping the snow off the pavement outside their house because they are afraid that someone will then slip on the ice and sue them.

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1 Gov.UK, *Social Action, Responsibility and Heroism Bill: fact sheet,* 13 June 2014

2 HM Government, *The Coalition: our programme for Government*, May 2010

> Of course courts do apply common sense, and very often throw out the most absurd cases. But that's not before the individuals involved have been through incredible stresses and strains when they think they have just done the right thing.

Chris Grayling then spoke of needing a system rooted in "common sense" and of the new law being a "signpost from Parliament to the courts":

> We need a system that is rooted in common sense. Of course those who are negligent, or who act in a way that is foolish or reckless should be able to be punished by the law. But those who are trying to do the right thing should believe that the law will be on their side.
>
> And that is precisely what SARAH[3] will do. The best way to describe the proposed Bill is that it will serve as a signpost from Parliament to the Courts. It will set out very simple protections for those people who act in the interests of society, responsibly or heroically. It will say to the Courts that we want their decisions clearly to take into account whether people have been trying to do the right thing or not. And in particular we want the Bill to serve as a deterrent to jobsworths trying to punish people for doing so.
>
> A handful of simple clauses, but what we hope will be a powerful message about how we want the law to be applied. Judicial discretion will of course remain, but it will be exercised in these cases against the background of a clear message from Parliament.[4]

1.2 Volunteering

What is volunteering?

The National Council for Voluntary Organisations (NCVO) defines volunteering as "any activity that involves spending time, unpaid, doing something that aims to benefit the environment or someone (individuals or groups) other than, or in addition to, close relatives".[5]

This definition is similar to that used in the Compact *Volunteering Code of Good Practice*[6] and in the Cabinet Office's 2007 report, *Helping Out: a national survey of volunteering and charitable giving*.[7]

Importantly, volunteering is understood to be "freely undertaken and not for financial gain".[8]

How many people volunteer?

According to figures on the NCVO website, taken from the Cabinet Office's Community Life Survey 2013, between August 2012 and April 2013, 29% of adults in England said that they had formally volunteered (ie through a group or organization) at least once a month in the previous year, and 44% said that they had volunteered at least once in that year.[9] This equates to an estimated 12.7 million people volunteering in England once a month, and 19.2 million once a year.[10] The Community Life Survey estimated that UK adults who formally

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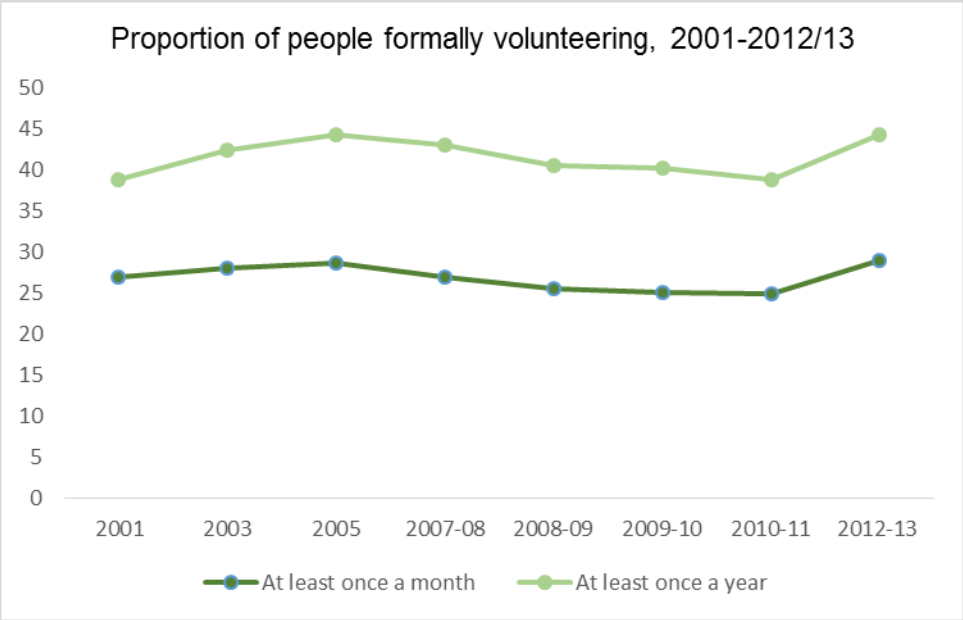
3 This is the acronym used for the Bill
4 Consevativehome, *Chris Grayling MP: Our Bill to curb the Elf and Safety Culture,* 2 June 2014 [accessed 7 July 2014]
5 NCVO website, *Volunteering* [accessed 7 July 2014]
6 Cabinet Office, *Compact Volunteering Code of Good Practice*, rev ed 2005 (reprinted 2008)
7 Cabinet Office, *Helping Out: a national survey of volunteering and charitable giving*, 2007
8 Cabinet Office, *Compact Volunteering Code of Good Practice*, p4
9 NCVO website, *How many people regularly volunteer in the UK?* [accessed 7 July 2014]
10 *Ibid*

volunteered at least once a month spent more than 2.1 billion hours volunteering in 2012/13.[11]

Rates of formal volunteering peaked in 2005, when 44% of respondents to the Citizenship Survey reported that they had volunteered in the past year. This rate declined slowly to 39% by 2010/11.[12] The most recent statistics available, summarized in the table below, show rates returning to peak level figures.



Sources: Citizenship Survey and Community Life Survey

Who volunteers?

People of all ages volunteer. Between around a quarter and a third of people in a number of age ranges (from the 16 to 25s through to the over 75s) report volunteering at least once a month. The number of people volunteering less frequently is higher, with between 40-50% of those across most age ranges volunteering at least once in the last year.[13]

The Cabinet Office's 2007 survey of volunteering and charitable giving found that women were significantly more likely to volunteer than men, either on a regular basis or at all. Levels of formal volunteering did not vary significantly by ethnic origin. However patterns of formal volunteering were found to vary by religious group. The overall proportion of formal volunteers was lowest among those not working, although levels varied according to the reasons for not working.[14]

According to the most recent data, the highest rates of volunteering - those who said that they had volunteered at least once in the previous year – are in southern England: 49% in the South East and 50% in the South West.[15]

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11 Quoted on NCVO website, *What is the sector's contribution to the economy?* [accessed 7 July 2014]
12 NCVO website, *How has the number of people volunteering changed over time?* [accessed 7 July 2014]
13 NCVO website, *Who volunteers in the UK?* [accessed 25 June 2014]; Cabinet Office Community Life Survey [accessed 7 July 2014]
14 Cabinet Office, *Helping Out: a national survey of volunteering and charitable giving*, p19
15 NCVO website, *Who volunteers in the UK?* [accessed 7 July 2014]

Volunteering activity and its benefits

The Compact *Volunteering Code of Good Practice* sets out some of the ways in which people may offer their time:

- helping within a voluntary or community organisation;
- community activism, campaigning and action to identify and tackle unmet needs;
- befriending and mentoring;
- organising sports and physical recreation;
- taking part in running a voluntary or community organisation as a trustee or member of a board or committee;
- serving as a non-executive member of a public body or participating in civic governance;
- leading a voluntary initiative, usually as part of a voluntary organisation or community group, to improve the quality of life for people in a neighbourhood or community of interest;
- group activity, within a neighbourhood or community of interest, providing a community service, or campaigning for a public cause;
- helping raise funds for an organisation.[16]

The NCVO identifies some of the benefits of volunteering as follows:

- having a positive impact on health and wellbeing;
- providing opportunities to meet new people;
- providing a way for people to give back to their communities and make a difference;
- helping to develop new skills or build on existing experience and knowledge;
- providing a route to employment[17]

Barriers to volunteering

The Cabinet Office's 2007 survey of volunteering and charitable giving found that the main reason for people not formally volunteering was a lack of spare time: 60% of respondents said this applied a lot; 23% said it applied a little.[18] On being putting off by bureaucracy, 17% said this applied a lot, 32% said it applied a little. Another factor was a worry about risk/liability: 16% said this applied a lot; 31% said it applied a little.[19] In his October 2010 report on health and safety law and practice, Lord Young of Graffham referred to people being deterred from "engaging in organised voluntary activities in the mistaken belief that

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16 Cabinet Office, *Compact Volunteering Code of Good Practice*, p6
17 NCVO website, *What we believe about volunteering* [accessed 7 July 2014]
18 Cabinet Office, *Helping Out: a national survey of volunteering and charitable giving*, p68
19 *Ibid*

they can be sued should anything go wrong". He went on to say that people "who seek to do good in our society should not fear litigation as a result of their actions".[20]

Other factors that have been identified as barriers to volunteering include:

- work commitments;
- looking after children/the home;
- studying commitments;
- not knowing of opportunities to help;
- not knowing of groups needing help;
- looking after someone elderly or ill;
- feeling too old or too young.[21]

What has the Government done to encourage volunteering?

The Coalition's *Programme for Government* (May 2010) stated that it would take a "range of measures to encourage volunteering and involvement in social action".[22] The Government has said that the *Social Action, Responsibility and Heroism Bill* will help with this commitment by reassuring volunteers (and others) that the courts will consider the context of their actions in the event that something goes wrong and they are sued for negligence or breach of statutory duty.

Some of the other steps taken by the Government to encourage volunteering are summarised on the Gov.UK website[23] and in Library Standard Note SN/HA/5883, *The voluntary sector and the big society* (21 March 2013).

1.3 The law of negligence and breach of statutory duty

If somebody causes loss or injury to another person during the course of an activity, it may be open to the injured party to sue them in the civil courts for damages for negligence or, in some circumstances, breach of a statutory duty.[24]

Liability for negligence

In order for a claim in negligence to be successful, a number of elements must be present:

- There must be a duty to take care; this is decided in relation to the facts at issue in a particular case, or in other words, did this defendant owe a duty of care to this claimant. This involves the court considering whether it was reasonably foreseeable that the conduct of the defendant would cause damage to a class of persons including the claimant; whether there was a relationship of "proximity" between the parties (this may consist of various forms of closeness); and whether the situation was one in which the

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20 HM Government, *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 the compensation culture,* October 2010, p23

21 Cited on the NCVO website, *What are the barriers to volunteering?* [accessed 7 July 2014]

22 HM Government, *The Coalition: our programme for government*, May 2010, p30

23 Gov.UK website, *Promoting social action: encouraging and enabling people to play a more active part in society* and *Making it easier to set up and run a charity, social enterprise, or voluntary organisation* [both accessed 7 July 2014]

24 Gov.UK, *Social Action, Responsibility and Heroism Bill: fact sheet,* 13 June 2014, paragraph 4

court considers it fair, just and reasonable that the law should impose a duty of a given scope upon one party for the benefit of the other.[25]

- There must be a breach of that duty. The question of whether there has been a breach of the duty of care involves two elements: how much care is required to be taken (the standard of care) and whether that care has been taken. The court will consider what a reasonable person should have done in the circumstances. What amounts to reasonable care in any particular case will vary according to the circumstances. For example, in the case of a professional person, the defendant would be expected to show the skill and care which would be expected of an ordinary competent person with those particular professional skills.[26]

- There must be actual damage caused as a result of the breach of the duty to take care.

- The damage to the particular claimant must not be so unforeseeable as to be too remote a consequence of the breach of duty.

This is an area of law governed mainly by common law (case law), and, as such, it has evolved largely through a series of court judgments. When considering the nature of a particular standard of care, and the liability of any party, several factors may need to be considered including, for example, the age, experience and expertise of the persons concerned; the dangers of the particular activity; the risks and foreseeability of the damage occurring; whether adequate steps were taken to prevent the incident; the gravity of the consequences and the effect of a finding of negligence. In short, the court will consider whether the defendant acted reasonably in all the circumstances of the case. The court will also consider the similarity or otherwise of any proposed duty situation to others that have already been recognised.

Breach of statutory duty

A breach of a statutory duty may also give rise to a civil claim. An example of statutory duty is occupiers' liability which is the duty owed by the owner or occupier of land to visitors and trespassers under the *Occupiers' Liability Act 1957* and the *Occupiers' Liability Act 1984.*

In some cases there may be an overlap with the tort of negligence, because the existence of a statutory duty may indicate that a risk ought to have been foreseen. However, if a statute imposes strict liability, the defendant may be liable even if (s)he has not been negligent. Strict liability means that liability is conferred simply by carrying out a particular action, or being in a particular place; an intention to act, or any blameworthy conduct, does not have to be shown.

The standard of care which applies in a claim for breach of statutory duty depends on the wording of the duty in question. The court takes into account all the relevant circumstances when determining whether a defendant was in breach of a duty of care imposed by statute.

Compensation Act 2006

Section 1 of the *Compensation Act 2006* provides that, when considering a claim in negligence or breach of statutory duty, the court may take into account the deterrent effect of potential liability:

> A court considering a claim in negligence or breach of statutory duty may, in determining whether the defendant should have taken particular steps to meet a

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[25] *Caparo Industries plc v Dickman* [1990] 2 AC 605

[26] See *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118

> standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might—
>
> (a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or
>
> (b) discourage persons from undertaking functions in connection with a desirable activity.

The Explanatory Notes published with the Act set out the limitations of the provision and state that section 1 is intended to provide reassurance rather than to change the law:

> 10. This provision is intended to contribute to improving awareness of this aspect of the law; providing reassurance to the people and organisations who are concerned about possible litigation; and to ensuring that normal activities are not prevented because of the fear of litigation and excessively risk-averse behaviour.
>
> 11. This provision is not concerned with and does not alter the standard of care, nor the circumstances in which a duty to take that care will be owed. It is solely concerned with the court's assessment of what constitutes reasonable care in the case before it. It only affects statutory duties which involve a standard of care, such as those owed under the Occupiers' Liability Acts of 1957 and 1984. It does not extend to other forms of statutory duty, such as cases where there is an absolute statutory duty involving strict liability in the event of failure; cases which concern what is reasonable in a context other than carelessness; or cases where infringement of a right is actionable as a breach of statutory duty which does not depend on carelessness.[27]

The Explanatory Notes also state that this provision "reflects the existing law and approach of the courts as expressed in recent judgments of the higher courts".[28] The Constitutional Affairs Committee commented that "this is apparently meant to reflect the reasoning of the House of Lords in *Tomlinson v Congleton Borough Council*",[29] and this case was referred to a number of times in debates on the Bill.[30]

The Tomlinson case concerned a claim for damages for breach of a statutory duty. Mr Tomlinson had suffered severe injuries following his shallow dive into a lake in a council-run country park, after he had ignored prominent warning signs. The House of Lords[31] found in favour of the Borough Council, deciding that, on the facts of the case, it was not reasonable to expect the Council to protect Mr Tomlinson from his own actions.

Lord Hoffman spoke of the court having to take account of the social value of an activity:

> 34. ...the question of what amounts to "such care as in all the circumstances of the case is reasonable" depends upon assessing, as in the case of common law negligence, not only the likelihood that someone may be injured and the seriousness of the injury which may occur, but also the social value of the activity which gives rise to the risk and the cost of preventative measures. These factors have to be balanced against each other.
>
> (...)

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27 Paragraph 11

28 Paragraph 17

29 Constitutional Affairs Committee, *Compensation Culture*, 1 March 2006, HC 754 2005-06, p20. Footnote 50

30 See, for example, HL Deb 15 December 2005 c190GC

31 That is, the Appellate Committee of the House of Lords, which was the highest court of appeal at that time, before the creation of the Supreme Court

> 37. This is the kind of balance which has to be struck even in a situation in which it is clearly fair, just and reasonable that there should in principle be a duty of care or in which Parliament ... has decreed that there should be. And it may lead to the conclusion that even though injury is foreseeable ... it is still in all the circumstances reasonable to do nothing about it. [32]

Further information about section 1 is provided in a Library research paper prepared for second reading of the Bill which became the *Compensation Act 2006.*[33]

Section 1 has been considered by the courts in a number of cases. In 2011, in the Court of Appeal, Lady Justice Smith said, in that case, "it was common ground that section 1 of the Compensation Act 2006 did not add anything to the common law position":

> Section 1 requires the court, when considering a claim in negligence or breach of statutory duty and when determining whether the defendant should have taken particular steps to meet a standard of care, to have regard to whether a requirement to take those steps might prevent or discourage people from undertaking desirable activities. At least since Tomlinson v Congleton Borough Council [2004] 1A.C. 46, if not before, the common law has required the court to take such matters into account.[34]

In another case, in the High Court, Mr Justice Owen made a similar point:

> Section 1 of the Compensation Act is plainly engaged in this case, but it does not seem to me that section 1 adds anything to the common law. Some risk is inherent in many socially desirable activities. .... As Janet Smith LJ put it in admirably succinct terms, the question in any individual case is whether the social benefit of any activity is such that the degree of risk that it entails is acceptable.[35]

1.4 The legal position of people who intervene to help in an emergency

In the absence of a special relationship or specific assumption of a duty of care, there is no general duty to come to the rescue of others. Nevertheless, some people (sometimes referred to as "good Samaritans") do voluntarily intervene in an emergency to assist or rescue (or to try to assist or rescue) an injured or imperilled stranger. If something goes wrong, the court will generally take these circumstances into account when determining the appropriate standard of care.

In a Court of Appeal decision in 1954, Denning LJ spoke of the courts' balancing act in such circumstances, adding that "the saving of life or limb justifies taking considerable risk":

> It is well settled that in measuring due care one must balance the risk against the measures necessary to eliminate the risk. To that proposition there ought to be added this. One must balance the risk against the end to be achieved. If this accident had occurred in a commercial enterprise without any emergency there could be no doubt that the servant would succeed. But the commercial end to make profit is very different from the human end to save life or limb. The saving of life or limb justifies taking considerable risk, and I am glad to say there have never been wanting in this country men of courage ready to take those risks, notably in the Fire Service.[36]

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32 [2003] UKHL 47
33 RP 06/28, 19 May 2006
34 *Uren v Corporate Leisure (UK) Ltd* [2011] EWCA Civ 66
35 *Wilkin-Shaw v (1) Fuller (2) Kingsley School* [2012] EWHC 1777
36 *Watt v Hertfordshire County Council* [1954] EWCA Civ 6

However, a legal textbook makes the point that "an emergency does not exonerate the defendant from displaying any level of care at all; it merely reduces the standard demanded".[37]

1.5 "Compensation culture"

It has been argued that factors such as the lifting of laws banning solicitors from advertising; the growth of claims management companies; increased awareness about the right to claim compensation; and the availability of "no-win, no-fee" agreements, have given rise to a "compensation culture" in England and Wales, or at least to the perception that such a culture exists.

What does the term "compensation culture" mean?

There is no commonly agreed definition of the term "compensation culture". In 2003, a Working Party of the Institute of Actuaries defined it as being:

> The desire of individuals to sue somebody, having suffered as a result of something which could have been avoided if the sued body had done their job properly.[38]

In 2005, the then Lord Chancellor, Lord Falconer of Thoroton, commented on the lack of consensus on the definition and offered his own:

> 'Compensation culture' is a catch-all expression. It means different things to different people.
>
> It's the idea that for every accident someone is at fault. For every injury, someone to blame. And, perhaps most damaging, for every accident, there is someone to pay.[39]

"Compensation culture" has also been referred to as a "claims culture" or a "'have a go' culture". The collapsed claims management company, The Accident Group, used the advertising slogan, "where there's blame, there's a claim".

Is there a "compensation culture" in England and Wales?

The question of whether a compensation culture really does exist, the costs associated with the perception of its existence, and what should be done to address the issue, have been considered on a number of occasions.

Institute of Actuaries

In its 2002 report, *The Cost of Compensation Culture*, the Institute of Actuaries estimated the cost of compensation in the UK, at that time, as approximately £10bn per year, over 1% of GDP.[40]

Better Regulation Taskforce, Better routes to redress

In May 2004, the Better Regulation Taskforce (BRTF) published its Report, *Better Routes to Redress.* The Report focused on the "commonly held perception that the United Kingdom is in the grip of a 'compensation culture'", which it considered to be a myth. However, the BRTF acknowledged that it was people's perception of the existence of a "compensation culture" which caused the real problem:

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37 John Murphy and Christian Witting, *Street on Torts,* 13th ed, 2012, p116

38 Julian Lowe (Chairman), *The Cost of Compensation Culture,* 8 October 2002

39 Speech by Lord Falconer at a Health and Safety Executive Event, *'Compensation Culture',* 22 March 2005 [accessed 7 July 2014]

40 Julian Lowe (Chairman), *The Cost of Compensation Culture,* 8 October 2002

> … the fear of litigation impacts on behaviour and imposes burdens on organisations trying to handle claims. The judicial process is very good at sorting the wheat from the chaff, but all claims must still be assessed in the early stages. Redress for a genuine claimant is hampered by the spurious claims arising from the perception of a compensation culture. The compensation culture is a myth; but the cost of this belief is very real.
>
> It has got to be right that people who have suffered an injustice through someone else's negligence should be able to claim redress. What is not right is that some people should be led to believe that they can absolve themselves from any personal responsibility for their actions and then expect someone else to pick up the pieces when something goes wrong. . .[41]

In its response to the BRTF's report, the previous Government stated its determination to deal with the problems associated with the perception of a compensation culture, whilst ensuring that those with a genuine claim could access their rights.[42]

Constitutional Affairs Committee report

On 1 March 2006, the House of Commons Constitutional Affairs Select Committee published its report, *Compensation culture.*[43] The Committee found that, although the evidence did not support the view that increased litigation had created a "compensation culture", there was "plenty of evidence" of excessive risk aversion and a mistaken perception that it was caused by litigation.[44] The Report commented that risk aversion also affected the willingness of individuals to volunteer.

The Select Committee considered that clause 1 of the *Compensation Bill*[45] (which was then before Parliament) was unlikely to provide any additional service to volunteers:

> 65. Volunteers are an important interest group that the Clause is aimed to protect. In order to ensure legal certainty, the Government should make plain whether it wishes to aid the efforts of volunteers by providing them with some kind of defence to negligence or not. Simply re-stating the common law in a statute will not provide any additional service to them. If the Government opts for this, it should state that preference clearly and should openly address the difficulties that would follow from allowing such a defence. In those circumstances, some form of first party insurance cover might be required by persons undertaking potentially dangerous activities while supervised by volunteers. Otherwise, where people were severely injured, they would have no recourse to any form of compensation.

In its response to the Select Committee's report, the previous Government disagreed with the Committee's conclusion that clause 1 should not be in the Bill and considered that it would have a range of different benefits:

> It will reassure those concerned about possible litigation about how the law in this country works, and will help counter the view that organisations should cease activities

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41 Better Regulation Taskforce, *Better Routes to Redress, 2004,* p3

42 *Tackling the "Compensation Culture" Government Response to the Better Regulation Task Force Report: 'Better Routes to Redress'*, 10 November 2004

43 Constitutional Affairs Committee, *Compensation Culture*, 1 March 2006, HC 754 2005-06

44 *Ibid* p13

45 Now section 1 of the *Compensation Act 2006*

> because of a fear of litigation. It will also ensure that all courts are fully aware of the guidance given by the higher courts which is reflected in the clause.[46]

Common Sense, Common Safety

In October 2010, Lord Young of Graffham, who was then the Prime Minister's adviser on health and safety law and practice, published his report *Common Sense, Common Safety*.[47] The report followed a Whitehall-wide review of the operation of health and safety laws and the growth of the "compensation culture". The Prime Minister and the Cabinet accepted all of the recommendations put forward by Lord Young.[48]

Lord Young spoke of a "blame culture" as having developed "in which, rather than accepting that accidents can and do happen, somebody must always be at fault and financial recompense is seen to make good any injury." He said that those injured as a result of negligence should receive adequate damages, but that the legal process must be "proportionate and not unduly costly".[49]

Lord Young spoke of the effect of the fear of being sued:

> Despite the success of the [Health and Safety at Work etc Act 1974], the standing of health and safety in the eyes of the public has never been lower, and there is a growing fear among business owners of having to pay out for even the most unreasonable claims. Press articles recounting stories where health and safety rules have been applied in the most absurd manner, or disproportionate compensation claims have been awarded for trivial reasons, are a daily feature of our newspapers.
>
> (…)
>
> Businesses now operate their health and safety policies in a climate of fear. The advent of 'no win, no fee' claims and the all-pervasive advertising by claims management companies have significantly added to the belief that there is a nationwide compensation culture. The 'no win, no fee' system gives rise to the perception that there is no financial risk to starting litigation; indeed some individuals are given financial enticements to make claims by claims management companies who are in turn paid ever-increasing fees by solicitors. Ultimately, all these costs are met by insurance companies who then increase premiums. However, any employer not covered by accident insurance faces bankruptcy, which encourages them to follow every recommendation of their health and safety consultant, no matter how absurd. [50]

Lord Young considered that the "compensation culture" was a perception rather than a reality but that there was a fear of litigation:

> Britain's 'compensation culture' is fuelled by media stories about individuals receiving large compensation payouts for personal injury claims and by constant adverts in the media offering people non-refundable inducements and the promise of a handsome

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46 Cm 6784, *Government Response to the Constitutional Affairs Select Committee's Reports: Compensation culture and Compensation culture: NHS Redress Bill,* May 2006, paragraph 9

47 HM Government, *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 the compensation culture,* October 2010

48 Gov.UK press release, *Lord Young restores common sense to health and safety* [accessed 7 July 2014]

49 HM Government, *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 the compensation culture,* October 2010, p19

50 *Ibid* p11

> settlement if they claim. It places an unnecessary strain on businesses of all sizes, who fear litigation and are subjected to increasingly expensive insurance premiums.
>
> The problem of the compensation culture prevalent in society today is, however, one of perception rather than reality. The number of claims for damages due to an accident or disease has increased slowly but nevertheless significantly over recent years. Furthermore, there is clear evidence that the public believes that the number of claims and the amount paid out in damages have also risen significantly.[51]

The report highlighted "one of the great misconceptions, often perpetuated by the media", that there could be liability for the consequences of any voluntary acts:

> During winter 2009/10, advice was given on television and radio to householders not to clear the snow in front of their properties in case any passer by would fall and then sue. This is another manifestation of the fear of litigation. In fact there is no liability in the normal way, and the Lord Chief Justice himself is reported as saying that he had never come across a case where someone was sued in these circumstances.
>
> Yet this belief is particularly pernicious, as it may deter people from engaging in organised voluntary activities in the mistaken belief that they can be sued should anything go wrong. People who seek to do good in our society should not fear litigation as a result of their actions.[52]

Lord Young recommended that, among other things, there should be clarification, through legislation if necessary, that "people will not be held liable for any consequences due to well-intentioned voluntary acts on their part":

> Popular perception is that it could be dangerous to volunteer, largely because in the USA good samaritans are often liable (and in fact doctors and other medical professionals are instructed by their insurance companies not to stop at an accident). It is important to have clarity around this issue and at some point in the future we should legislate to achieve this if we cannot ensure by other means that people are aware of their legal position when undertaking such acts.
>
> There is no liability in such cases unless negligence can be proved.[53]

Unshackling Good Neighbours

The Civil Society Red Tape Task Force was led by Lord Hodgson of Astley Abbotts at the request of Nick Hurd, the Minister for Civil Society, and Mark Prisk, then Minister of State for Business and Enterprise. In May 2011, it published a report, *Unshackling Good Neighbours.*[54] Among other things, the report considered the reasons people were deterred from giving their time to good causes, which included the fear of becoming involved in litigation:

> Rightly or wrongly the fear of becoming involved in litigation is a major preoccupation. We emphasise the use of the word "fear" – ask an individual about practical examples involving people they know and there are few responses. More often it is about "friends of friends" or "read in the newspapers". Lawyers with whom we have discussed this have focused very much on this point of myth rather than reality. Further, they point out that the law is there to protect "reasonable people". In our view this latter argument

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51 *Ibid* p19
52 *Ibid* p23
53 *Ibid*
54 Report of the Task Force established to consider how to cut red tape for small charities, voluntary organisations and social enterprises., *Unshackling Good Neighbours,* 2011

> fails to address this perception of risk – the time it takes, the potential cost exposure and the associated psychological pressure.

The Report noted that, although some progress had been made, volunteers were not being provided with the reassurance they sought:

> Those affected could be either individuals carrying out a voluntary act or individuals engaging in formal volunteering eg in a charity. Some progress has been made in providing reassurance. For example, as noted earlier albeit in negative terms, the Ministry of Justice worked with the Department for Transport to produce guidance on clearing snow and the Health and Safety Executive has produced guidance on health and safety and civil law. However, these specific responses are unlikely to provide volunteers, including charity trustees, with the general reassurance they seek. The Ministry of Justice has said it does not intend to undertake any further work directly on this. Instead, it will work with relevant government departments to provide advice to the public when appropriate.
>
> This seems to fall short of the recommendation in Common Sense, Common Safety to "clarify (through legislation if necessary) that people will not be held liable for any consequences due to well-intentioned voluntary acts on their part". [55]

The Task Force argued for the development of a "reasonableness test" for volunteers, and set out how this could be achieved:

> - The Attorney General should immediately refer the issue of volunteer, including charity trustee, liability, to the Charity Tribunal with a request to examine whether a reasonableness test for voluntary activity could be established. While any determination would affect charities only and would not bind courts generally, it could serve as a marker and, more importantly, send a signal to the wider public about the direction of travel on this important issue.
>
> - Subsequently the Law Commission should be asked to examine these issues to see whether there are statutory changes that could usefully be made.
>
> If neither of these approaches proves fruitful, the Government should consider how this issue can be best addressed.

The Report acknowledged that some "sections of the law" might regard the recommendations as being "entirely superfluous" but argued that "society needs to find ways to reassure the would be Good Neighbour and this is a way of achieving that".

Lord Hodgson spoke of people being afraid to help one another:

> [O]ver recent years we've seen a real devaluation of common sense and trust through a tangle of rules and guidance which aims to eliminate risk from our lives but instead creates a risk of a society where people are afraid to help each other. As long as volunteers behave reasonably they should not be liable if something goes wrong – the legal framework must make this clear.[56]

Nick Hurd agreed to take forward all of the main recommendations made in the Report and invited Lord Hodgson to return in a year's time to review the progress made.

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55 *Ibid* p10, footnotes omitted

56 Civil Society Red Tape Task Force News Release RT/01, *Red Tape Task Force calls for clearer legal protection for volunteers,* 17 May 2011 [accessed 7 July 2014]

In May 2012, the Cabinet Office published an update on the implementation of the Task Force's recommendations.[57] Referring to the evidence provided to the Task Force which showed that some people were reluctant to volunteer because of the perceived risk of being sued, the update stated that "This situation should change because in recent years both case[58] and statute law[59] have changed and recognise that, sometimes tragic, accidents do happen".[60]

The Government also referred to the changes to civil litigation funding:

> ... a further change to come is that the Legal Aid, Sentencing and Punishment of Offenders Act 2012, when in force, will reduce prosecuting lawyers' fees in negligence cases by requiring them to be paid out of the damages awarded and capped at 25% of the award. Its intention is that this will make litigation a less attractive financial proposition for prosecuting lawyers as it reduces the profit they can make from such cases.[61]

The Government acknowledged, however, that evidence to the Task Force suggested "very clearly" that there was still a public perception of it being easy for volunteers to be sued. It pointed to other work which was intended to address the issue:

> To begin to counter this, the Insurance Working Group, established under recommendation 3, has developed a volunteer code of practice to provide clarity on when there is risk and insurance is genuinely needed. The work has been coordinated by Volunteering England and they have also brought the Local Government Association (LGA) into the discussion, with the intention of ensuring that local authorities are made aware of this work, together with the Sport and Recreation Alliance to ensure coverage of sports organisations as well as Community Service Volunteers and the National Association of Citizens Advice Bureaux.
>
> The code is also supported by guidance 'Celebrate – An ABI guide to planning an event" from the Association of British Insurers that signposts for organiser of community events how to assess risk and where to seek various insurances that may be sensible and what they will cover.[62]

The Social Cost of Litigation

In September 2012, the Centre for Policy Studies published a report, *The Social Cost of Litigation.*[63] This highlighted the high financial and social cost of the "culture of litigation" on health and education services. One of the authors, Professor Frank Furedi, commented on the effect of the fear 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.

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57 Office for Civil Society Cabinet Office, *Unshackling Good Neighbours – One Year On Implementing the recommendations of the Civil Society Red Tape Task Force,* May 2012

58 Footnote: *Tomlinson v Congleton Borough Council* (2003) at www.bailii.org/uk/cases/UKHL/2003/47.html, other examples *are Poppleton v Trustees of the Portsmouth Youth Activity Committee* (2008) at www.bailii.org/ew/cases/EWCA/Civ/2008/646.html and *Harry Bowen and others v The National Trust* (2011) at www.judiciary.gov.uk/media/judgments/2011/bowen-others-v-national-trust-27072011

59 Footnote: Section 1 of the *Compensation Act 2006* at www.legislation.gov.uk/ukpga/2006/29/contents

60 Office for Civil Society Cabinet Office, *Unshackling Good Neighbours – One Year On Implementing the recommendations of the Civil Society Red Tape Task Force,* May 2012, p4

61 *Ibid*

62 *Ibid* pp4-5

63 Frank Furedi and Jennie Bristow, *The Social Cost of Litigation,* Centre for Policy Studies, September 2012

> But 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.[64]

Tim Knox, Director of the Centre for Policy Studies, commented on the hidden costs associated with the "compensation culture":

> This rise in the compensation culture has huge – if largely hidden – costs. In particular, it has created a climate in which professionals will prioritise litigation avoidance above what is best for their pupils or patients. So many schools have reduced the extra-curricular activities that enrich children's experience while at school, from school trips to outdoor play, while doctors are incentivised to follow 'best practice' rather than follow their professional judgement…[65]

Speech by Lord Dyson, Master of the Rolls

In March 2013, the Master of the Rolls, Lord Dyson, gave a speech entitled, *Compensation culture: fact or fantasy?.*[66]

Lord Dyson gave examples of cases featured in the press:

> I am sure you are all familiar with the types of stories in which it features. They tend to involve the payment of large amounts of money to individuals for seemingly trivial injuries. There was, for instance, the story that ran in June and July 2011, of the school pupil who received nearly £6,000 compensation. His hand had been burnt at school during his lunch break. The burn was the result of spilt custard.[67] Last July a cleaner was reported to have received just over £9,000 in compensation for pulling a groin muscle after 'stumbling over a mop handle' and falling over.[68] And last November, it was reported that a teaching assistant received £800,000 compensation. She was said to have suffered a finger and elbow injury that occurred after she had tripped over the waist strap attached to a wheel chair.[69] Stories such as these give rise to the perception that something has gone seriously wrong with civil justice in this country.[70]

Lord Dyson went on to consider the problems caused by the perception of a "compensation culture":

> 6. (…) Compensation is being sought improperly because the claims do not rest on the application of any legal principles, such as the need to establish a duty of care, negligence or causation. On the contrary they rest on the idea that all an individual need do is rush to litigation irrespective of the legal merits of a claim and riches will follow. This people can do because no matter how trivial, vexatious or spurious the claims are, they can afford to litigate because of no win – no fee agreements. Just as significantly, the potential costs to employers, businesses etc of defending such claims are so prohibitive, due to the nature of the no win – no fee agreements, that they have no real choice but to concede claims irrespective of their legal or factual merit.

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64 Centre for Policy Studies, *The Social Cost of Litigation* [accessed 7 July 2014]

65 *Ibid*

66 Lord Dyson MR, *Compensation Culture: Fact or Fantasy?,* Holdsworth Club Lecture, 15 March 2013 [accessed 7 July 2014]

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

68 Footnote: http://www.dailymail.co.uk/news/article-2179757/Council-cleaner-given-9-000-compensation-tripping-MOP.html

69 Footnote: http://www.dailymail.co.uk/news/article-2231196/Compensation-claims-4m-schools.html

70 Lord Dyson MR, *Compensation Culture: Fact or Fantasy?,* Holdsworth Club Lecture, 15 March 2013, paragraph 3 [accessed 7 July 2014]

> 7. As a consequence, the perception is that as a society we have witnessed a cultural shift. No longer is British society characterised by a somewhat philosophical and accepting approach to life. The growth of compensation culture has seen a shift in this approach, with more and more individuals suing at the drop of a hat for any injury; as the media reports are taken to demonstrate. More perniciously, this has been accompanied by a growing burden on employers, businesses, schools, the NHS and local and central government of costs (both in respect of compensation and even worse legal costs, which often substantially exceed the amount of compensation). All of this is also said to give rise to defensive practices on their part. Schools are said, as a consequence of compensation culture, to ban conker fights in schools, ban playing football with leather footballs. School trips no longer take place. And so on.[71]

Lord Dyson found that the perception of a compensation culture was not "as grounded in reality as had been suggested". He noted that there had been no developments in substantive law which could be said to encourage a compensation culture. The elements required to establish liability had not changed and judges applied the law rigorously:

> …The law requires fault. It requires a duty of care, breach and causation of loss. These are not always straightforward matters to establish. The courts have certainly not taken an approach which has lowered the standard of care, made it easier to establish negligence or introduced a test which allows claims to succeed in the absence of fault (except, of course, where the law imposes strict liability). For a compensation culture properly to take hold, there would have to be a major shift in our substantive law. As neither the Supreme Court nor Parliament appears to be moving towards such a realignment of the substantive law, it does not appear likely that we have in fact laid what would be the one true foundation of a compensation culture.
>
> Our courts are very aware of the dangers of contributing to a climate of encouraging the idea that anyone who suffers an injury must have a remedy in damages. The judges apply the law rigorously…[72]

Lord Dyson acknowledged that many cases were settled and did not reach court and that the damage was caused by the perception of the existence of a compensation culture. The cost of litigation was an on-going problem which could pressurise a potential defendant to settle "even an unmeritorious claim" because it was cheaper to buy off a claim through settling it, than properly contest it. There had also been an increased emphasis on the imperative to settle claims through alternative dispute resolution.

However, Lord Dyson thought that changes to litigation funding, introduced by the *Legal Aid, Sentencing and Punishment of Offenders Act 2012,* together with procedural reforms, should reduce the pressure on defendants to settle unmeritorious claims: "as a consequence, I hope that we shall discourage any misguided sense that, simply by raising a claim no matter how hopeless, a claimant will receive compensation and costs". He said that there might need to be "a substantive educative effort" on the part of Government, the courts and the legal profession "to counter-act the media-created perception that we are in the grips of a compensation culture", and also greater public legal education.

Number of civil claims

The Ministry of Justice has published statistics for the total number of money claims in civil courts which show a generally downward trend in recent years:

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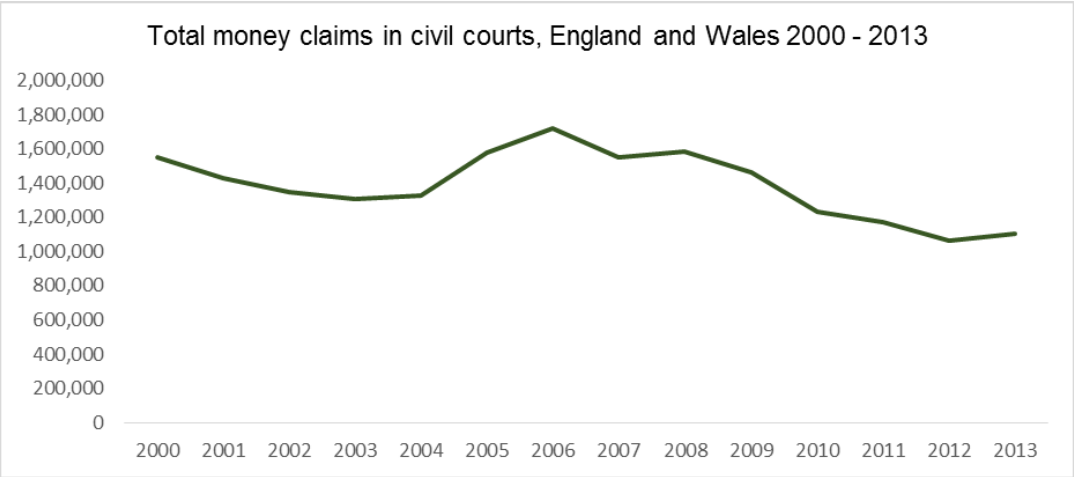
71 *Ibid,* footnotes omitted

72 *Ibid* paragraph 33



Source: Ministry of Justice quarterly court statistics

However, the impact assessment for the *Social Action, Responsibility and Heroism Bill* states that it is difficult to assess the number of specific types of claim:

> In 2012/13, there were over 1 million[73] compensation claims brought to the courts, although it is not possible to distinguish from these statistics which relate to negligence, or even to break these down further to those where volunteers or those acting for the benefit of society or its members were involved. In addition, some negligence cases are settled out of court, so it is not possible to have a full picture of the numbers and values involved.[74]

1.6 Private Members' Bills aimed at addressing the risk of being sued

The Promotion of Volunteering Bill

The *Promotion of Volunteering Bill* was a Private Member's Bill, presented by Julian Brazier (Conservative) on 7 January 2004.[75] The Bill had its second reading on 5 March 2004 and was considered by Standing Committee, but was talked out at Report stage.

Julian Brazier had made it clear that he wished to promote a bill to reduce the burden of legislation and the risks of litigation for charities and voluntary organisations. The intention was to protect volunteers from being sued; if they were sued, the court would have had to take sufficient account of special factors such as the relationship between a volunteer and the person for whom the volunteer was providing a service, and the risks inherent to certain activities.

More information about this bill is provided in Library Research Paper 04/21.[76]

Compensation Act 2006 (Amendment) Bill

Another Conservative Member, Jeremy Wright, put down a Ten Minute Rule Bill in February 2010 proposing to amend the *Compensation Act 2006* in order to protect from liability people who carried out a "public spirited" activity like clearing the snow and ice from the pavement outside their homes:

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73 Footnote to text: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270928/Number_of_cases_registered_to_Compensation_Recovery_Unit.csv/preview

74 IA No: MoJ013/2014, 25 April 2014

75 Bill 18 of 2003-04

76 RP 04/21, 3 March 2004

> I propose that we amend section 1 of the 2006 Act so that when a court considers a claim of negligence against someone who has done something for the benefit of their community, it will not simply regard their public-spiritedness as one factor among many that it may or may not take into account. Instead, there should be a presumption that someone who has engaged in that sort of desirable activity has satisfied the relevant standard of care. The court would not be prevented from finding someone negligent if they had gone about that desirable activity in a wholly incompetent or irresponsible way, but it would start from the premise that those who act to help their community should get a very strong benefit of the doubt. I believe that that will succeed in sending to the public the message that section 1 of the 2006 Act seems to have failed to send.[77]

The Bill did not make any further progress.

1.7 What Government action has been taken in connection with civil claims?

On 18 June 2014, in answer to a Parliamentary question, junior Justice Minister, Shailesh Vara, spoke of the Government having introduced "a raft of measures to discourage unnecessary or frivolous claims and tackle inflated costs".[78]

A Government press release provided information about steps taken to tackle the growth of compensation culture:

> ... the Ministry of Justice has:
>
> - Transformed no win, no fee deals so lawyers can no longer double their fees if they win, at the expense of defendants and their insurers
> - Banned "referral fees" paid between lawyers, insurers, claims firms and others for profitable claims – which have driven the growth of compensation culture
> - Reduced by more than half the fees lawyers can charge insurers for processing basic, uncontested claims for compensation for minor injuries suffered in road accidents – from £1,200 to £500
> - Banned claims management companies from offering cash incentives or gifts to people who bring them claims. Recommend a friend deals also banned, along with contracts agreed only over the phone
> - Changed the law so that regulated companies which breach Claims Management Regulation Unit rules can be fined (as well as the existing sanctions of being suspended of closed down). We have recently consulted on the level of the fines – which are proposed at up to 20 per cent of the annual turnover of companies - for offences including using information gathered by unsolicited calls and texts, providing bad services or wasting time and money by making spurious or unsubstantiated claims. This will mean fines of hundreds of thousands of pounds, and potentially millions in some cases.[79]

Further information about some of the legislative and non-legislative measures dealing with a range of areas connected to civil claims is set out below:

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77 HC Deb 2 February 2010 cc171-3

78 HC Deb 18 June 2014 c642W

79 Gov.UK, press release from Ministry of Justice, The Rt Hon Chris Grayling MP and Robert Goodwill MP, "Bogus claims to be thrown out as government steps up insurance fraud crackdown, 7 June 2014 [accessed 7 July 2014]

Reforms to civil litigation funding

Part 2 of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*, which largely came into effect on 1 April 2013, reformed the way that civil cases are funded, and the costs involved in bringing those cases. The reforms apply across civil litigation, but the Government considers that they will have a particular impact in personal injury cases, where no win, no fee (conditional fee) agreements (CFAs) have been used significantly. Further reforms were effected by secondary legislation including changes to procedural rules.

The Government has summarised the key changes:

- No win no fee CFAs remain available in civil cases, but the additional costs involved (success fee and insurance premiums) are no longer payable by the losing side.
- No win no fee [damages based agreements (DBAs)] are available in civil litigation for the first time.
- Referral fees are banned in personal injury cases.
- The introduction of new protocols extending the Road Traffic Act personal injury scheme to £25,000.
- A new fixed recoverable costs (FRC) regime.
- Claimants' damages are protected: the fee that a successful claimant has to pay the lawyer - the lawyer's 'success fee' in CFAs, or 'payment' in DBAs - is capped at 25% of the damages recovered, excluding damages for future care and loss[80]
- General damages for non-pecuniary loss such as pain, suffering and loss of amenity are increased by 10%
- A new regime of 'qualified one way costs shifting' (QOCS) is introduced in personal injury cases which caps the amount that claimants may have to pay to defendants. Claimants who lose, but whose claims are conducted in accordance with the rules, are protected from having to pay the defendants costs.
- A new sanction on defendants to encourage earlier settlement of claims.[81]

Further information is provided in a Library research paper prepared for second reading of the Bill which became the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*.[82]

Enterprise and Regulatory Reform Act 2013

Section 69 of the *Enterprise and Regulatory Reform Act 2013* amended the *Health and Safety at Work Act 1974*, reversing the position on strict liability, so that it is possible to claim compensation in relation to breaches of relevant health and safety legislation only where it can be proved that the duty holder (usually the employer) has been negligent. The provisions were brought fully into force on 1 October 2013.

The Government has stated that the reforms were necessary in order to tackle 'unfairness' to employers. A policy paper printed alongside the Bill as it was making its way through Parliament provides further information on the changes and the Government's rationale:

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80 In personal injury cases

81 Ministry of Justice, *Civil Justice Reforms,* updated 13 September 2013 [accessed 7 July 2014]

82 RP 11/53, 4 July 2011

8. Civil Liability and Health and Safety at Work Regulations

> Announced by the Chancellor (2012 Budget), this measure will remove the right of civil action against employers for breach of statutory duty in relation to health and safety at work regulations. This will address the potential unfairness that arises where an employer can be found liable to pay compensation to an employee despite having taken reasonable steps to protect them. This unfairness was identified by Professor Lofstedt in his independent review of health and safety, 'Reclaiming Health and Safety for All' (March 2011) and arises where health and safety at work regulations impose a strict duty on employers, giving them no opportunity to defend themselves on the basis of having done all that was reasonable to protect their employees. The inability of employers to defend themselves in these cases helps fuel the perception of a compensation culture and the fear of being sued is driving businesses to over-comply with regulations, resulting in additional unnecessary costs.
>
> At present, compensation claims for workplace injuries or illnesses can be brought by two routes: breach of statutory duty in which failure to meet a particular standard in law has to be proved, or breach of common law duty of care in which negligence has to be proved. The Bill will amend the law so that in future compensation claims can only be made where negligence or fault on the part of the employer can be proved.
>
> This change will help redress the balance of the civil litigation system in respect of health and safety at work legislation. It will help employers' confidence, allowing them to focus on a sensible and practical approach to health and safety and keeping costs down by avoiding over-compliance. Employees will continue to have the same level of protection as the standards set out in criminal law will not change and they will still be able to claim compensation where an employer has been negligent.[83]

Paragraphs 464-476 of the *Explanatory Notes* to the Act offer a fuller technical explanation of the statutory changes.

Personal injury claims involving fundamental dishonesty[84]

In recent years the insurance industry has taken a rather tougher stance on cases where it believes there is deliberate and substantial inflation of claims, arguing that in such cases the whole of the claim, and not just the fraudulent part, should be dismissed. Zurich Insurance took action against a policy holder to the Supreme Court in 2102. The claim for £838,000 damages had been reduced by a County Court to just £88,716, covering the genuine part of the claim. The insurer/respondent took the case to the Supreme Court and argued that the whole claim should be dismissed. The Supreme Court dismissed their claim saying:

> We have reached the conclusion that, notwithstanding the decision and clear reasoning of the Court of Appeal in *Ul-Haq*, the court does have jurisdiction to strike out a statement of case under CPR 3.4(2) for abuse of process even after the trial of an action in circumstances where the court has been able to make a proper assessment of both liability and quantum. However, we further conclude, for many of the reasons given by the Court of Appeal, that, as a matter of principle, it should only do so in very exceptional circumstances.[85]

The industry argued that without the expectation that the complete claim would be rejected if the fraud is discovered, there is no deterrent to making inflated claims in the first place. The judgement commented on this view:

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83 Department for Business Innovation and Skills, *Enterprise and Regulatory Reform Bill Updated Policy Paper*, January 2013, pp 24-25

84 Contributed by Tim Edmonds, Business and Transport Section

85 Supreme Court; *Fairclough Homes Limited v Summers* [2012] UKSC 26

> 50. It was submitted on behalf of the defendant that it is necessary to use the power to strike out the claim in circumstances of this kind in order to deter fraudulent claims of the type made by the claimant in the instant case because they are all too prevalent. We accept that all reasonable steps should be taken to deter them. However, there is a balance to be struck. To date the balance has been struck by assessing both liability and quantum and, provided that those assessments can be carried out fairly, to give judgment in the ordinary way. The reasons for that approach are explained by the Court of Appeal in both *Masood v Zahoor* and *Ul- Haq v Shah.*
>
> 51. We accept that such an approach will be correct in the vast majority of cases. Moreover, we do not accept the submission that, unless such claims are struck out, dishonest claimants will not be deterred. There are many ways in which deterrence can be achieved. They include ensuring that the dishonesty does not increase the award of damages, making orders for costs, reducing interest, proceedings for contempt and criminal proceedings.

On 9 June 2014, Lord Faulks, Minister of State for Justice, announced the Government's intention to legislate to deal with unjustified personal injury claims, first where the claimant had been fundamentally dishonest, and secondly to introduce a statutory ban on the offer of inducements by lawyers in personal injury cases:

> First, we intend to introduce legislation to require the court to dismiss in its entirety any personal injury claim where it is satisfied that the claimant has been fundamentally dishonest, unless it would cause substantial injustice to the claimant to do so. These provisions are particularly relevant both to cases where the claimant has grossly exaggerated his or her own claim, and to cases where the claimant has colluded with another person in a fraudulent claim relating to the same incident (for example, a "phantom passenger" case where a claimant is genuinely injured in a car accident, but colludes with another person who dishonestly claims to have been in the vehicle and also injured).
>
> Under the current law, the courts have discretion to dismiss a claim entirely for fraudulent behaviour, but will only do so in very exceptional cases, and will generally still award the claimant compensation in relation to the "genuine" element of the claim. We intend to strengthen the law so that dismissal of the claim in its entirety should become the norm in such cases.
>
> Secondly, the Government intends to introduce a statutory ban on the offer of inducements by lawyers in personal injury cases. Examples abound of solicitors offering money or gifts such as iPads to clients for pursuing a personal injury claim. This encourages unnecessary claims, and suggests that lawyers are making too much money out of the process and seeking to offset the effect of the Government's much needed ban on the payment and receipt of referral fees.
>
> On 1 April 2013 the Ministry of Justice banned claims management companies from offering cash inducements to consumers to make claims, and we propose to introduce a similar prohibition to cover lawyers as soon as legislative time allows.[86]

At Report stage in the House of Commons of the *Criminal Justice and Courts Bill* amendments were agreed (without debate) which would require a court to dismiss in its entirety any personal injury claim where it is satisfied that the claimant has been fundamentally dishonest, unless it would cause substantial injustice to the claimant to do so.[87] A Government Fact Sheet, *Criminal Justice and Courts Bill Personal injury claims*

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86 HL Deb 9 June 2014 cc26-7WS
87 HC Deb 17 June 2014 cc1066-9

involving fundamental dishonesty provides further information.[88] The Bill is still before Parliament.

Snow code

In October 2010, the Department for Transport published a snow code which advised householders about how to clear snow safely and cautioned against people being afraid of doing this:

> Don't be put off clearing paths because you're afraid someone will get injured. Remember, people walking on snow and ice have a responsibility to be careful themselves.
>
> Follow the advice below to make sure you clear the pathway safely and effectively.
>
> And don't believe the myths - it's unlikely you'll be sued or held legally responsible for any injuries if you have cleared the path carefully.[89]

The Civil Society Red Tape Task Force report, *Unshackling Good Neighbours* commented on the equivocal nature of the reassurance provided by this advice:

> The Government's Snow Code is an excellent guide about how members of the public can and should clear snow from pavements, in their neighbourhood. However, it opens with the following equivocal statement (our underline) that could create doubt in people's minds about whether or not they are running the risk of being sued:
>
> There's no law stopping you from clearing snow and ice on the pavement outside your home or from public spaces. It's unlikely you'll be sued or held legally responsible for any injuries on the path if you have cleared it carefully. Follow the snow code when clearing snow and ice safely.
>
> We suggest that the opening statement is changed to be more positive and the warning that the job needs to be done properly placed in the main body of the text. [90]

Whiplash claims

The Government has committed to tackling the number and cost of claims for whiplash, which, it is claimed, have contributed to an increase in average motor insurance premiums.[91] In October 2013, following consultation on the issue,[92] and a report by the House of Commons Transport Committee,[93] the Government published a combined response.[94] It focussed on

- better medical evidence;
- action to challenge fraudulent or exaggerated claims;
- reforms to the small claims track threshold; and

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88 Gov.UK, *Criminal Justice and Courts Bill: fact sheets* [accessed 7 July 2014]

89 Directgov (Archived Content), *Clearing snow and ice from pavements yourself* [accessed 7 July 2014]; the code is now available at: Met Office, *The Snow Code* [accessed 7 July 2014]

90 Gov.UK, *Unshackling Good Neighbours,* 2011

91 HC Deb 6 November 2013 c258W

92 Ministry of Justice, *Reducing the number and costs of whiplash claims*, 11 December 2012, Cm 8425

93 House of Commons Transport Committee, *Costs of motor insurance: whiplash,*31 July 2013, HC 117

94 Ministry of Justice, *Reducing the number and costs of whiplash claims: A Government response to consultation on arrangements concerning whiplash injuries in England and Wales Cost of motor insurance – whiplash: A Government response to the House of Commons Transport Committee,* October 2013, Cm 8738

- data sharing of whiplash claims.

Further information is provided at:

- Gov.UK press release from Ministry of Justice, The Rt Hon Chris Grayling MP, Robert Goodwill MP and Department for Transport, *New measures to help hard working families with the cost of driving,* 23 October 2013;[95]
- Ministry of Justice, *Personal injury claims*;[96]
- Gov.UK, press release from Ministry of Justice, The Rt Hon Chris Grayling MP and Robert Goodwill MP, "Bogus claims to be thrown out as government steps up insurance fraud crackdown, 7 June 2014;[97]
- Library standard note, *Motor car insurance*[98]
- House of Commons Transport Committee: *Driving Premiums Down: Fraud and the cost of motor insurance.*[99]

Low value road traffic accident personal injury scheme

The low value road traffic accident personal injury claims process was implemented on 30 April 2010 for claims valued between £1,000 and £10,000, with the intention of reducing costs and improving efficiency.[100] With effect from July 2013, the procedure was extended to include personal injury claims relating to road traffic accidents, and also to accidents at work and in public places (employers' liability and public liability), with a value of between £1,000 and £25,000. There was an accompanying regime of fixed recoverable costs.[101] Further information is provided at:

- Ministry of Justice, *Extending the Road Traffic Accident Personal Injury Scheme*.[102]

2 The Bill

The *Social Action, Responsibility and Heroism Bill* (the Bill) was introduced in the House of Commons on 12 June 2014 as Bill 9 of 2014-15. The Government has also published:

- Explanatory Notes;[103]
- a fact sheet to accompany the Bill;[104]
- an impact assessment;[105]

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95 Accessed 7 July 2014
96 Ministry of Justice website, updated 3 July 2014 [accessed 7 July 2014]
97 Accessed 7 July 2014
98 SN/BT 6061, last updated: 10 June 2014
99 House of Commons, Transport Committee, *Driving Premiums Down: Fraud and the cost of motor insurance* First Report 4 July 2014, HC 286 2014/15
100 A detailed summary of the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents is provided in Annex A of *Solving disputes in the county courts: creating a simpler, quicker and more proportionate system - a consultation on reforming civil justice in England and Wales,* March 2011, Cm 8045
101 *The Civil Procedure (Amendment No.6) Rules 2013* SI 2013/1695
102 Updated 1 August 2013 [accessed 7 July 2014]
103 Bill 9-EN
104 Gov.UK, *Social Action, Responsibility and Heroism Bill: fact sheet,* 13 June 2014
105 25 April 2014

- a European Convention on Human Rights memorandum;[106] and

- a delegated powers memorandum.[107]

The Bill has five clauses and would extend to England and Wales only. It would require the court, when considering what steps the defendant should have taken to meet a standard of care in a specific case, to have regard to whether:

- the alleged negligence or breach of statutory duty occurred when the defendant was acting for the benefit of society or any of its members (**clause 2**); a Government press release gave as examples of the "good deeds" this might cover: volunteering, running an event or trip, or helping out by clearing snow;[108]

- in carrying out the activity in the course of which the negligence or breach of statutory duty occurred, the defendant had demonstrated a generally responsible approach towards protecting the safety or other interests of others (**clause 3**); "to make sure the court will give consideration to the fact people may have taken care when organising an activity but an accident has happened";[109]

- the alleged negligence or breach of statutory duty occurred when the defendant was acting heroically by intervening in an emergency to assist an individual in danger and without regard to the defendant's own safety or other interests (**clause 4**) (and something went wrong).

The Bill is general in its application so it could apply to claims against individuals or organisations, including employers.[110] The courts would still be able to find that a person had been negligent or in breach of a statutory duty in relevant circumstances. The impact assessment notes that "the courts are already very experienced in dealing with these cases, and the provisions will support them in continuing to reach fair and just decisions".[111] The Bill would not affect criminal liability.

On 9 June 2014, in the debate on the Queen's speech, Lord Faulks said that the Bill would not change the existing overarching legal framework, or leave victims without protection, but that it would provide reassurance and send a strong signal to the courts:

> The Bill will not affect the overarching framework used by the courts when determining those sorts of claims. They will still need to look at whether a defendant met the appropriate standard of care in all the circumstances of the case. Nor will it introduce blanket exemptions to civil liability. There is an important balance to be struck between encouraging participation in civil society and being mindful of the impact that careless or risky actions could have on the very people that the defendant was trying to help. The Bill is not about removing protection and leaving victims without proper recourse in those circumstances. However, it will give valuable and needed reassurance to a wide range of people and send a powerful signal that the courts will take full account of the context of a person's actions when determining a negligence claim.[112]

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106 June 2014
107 13 June 2014
108 Gov.UK, press release from Ministry of Justice and The Rt Hon Chris Grayling MP, *Grayling: law must protect everyday heroes,* 2 June 2014 [accessed 7 July 2014]
109 *Ibid*
110 Bill 9-EN, paragraph 4
111 Ministry of Justice, *Social Action, Responsibility and Heroism Bill Impact Assessment*, MoJ 013/2014, 25 April 2014, p4
112 HL Deb 9 June 2014 c132

The impact assessment published with the Bill refers to section 1 of the *Compensation Act 2006,*[113] but states the Government's belief that further legislation is needed "to allay public concerns about this issue and to encourage participation":

> 11. In spite of the provisions in the Compensation Act 2006, there remains evidence that people are deterred from volunteering because of a perceived legal risk. "Helping out: a national survey of volunteering and charitable giving" demonstrates that there is potential to get more people into volunteering by removing barriers – such as the perceived risk from litigation – that dissuade individuals from giving up their time.

The impact assessment also acknowledges that the Bill might give rise to litigation on the interpretation of its provisions:

> 16. Any new legislation will have to be interpreted by the courts. This may in the short term generate some initial litigation costs arising from cases testing the courts' interpretation of the provisions.

3 Reaction to the Bill

The Bill has received a mixed reaction. For example, it was welcomed by the NCVO and the British Safety Council; whereas the TUC had concerns about its potential adverse effect for employees injured at work; and a number of lawyers have questioned its necessity. A selection of comments is provided below:

3.1 NCVO

The NCVO's executive director for volunteering and development, Justin Davis Smith, welcomed the Bill:

> We continue to get a lot of calls from charities and individual volunteers about risk and liability. The chances of any action being taken against them are very low but there is clearly a great concern about risk. As we celebrate the 30th anniversary of Volunteers' Week, anything that can be done to break down barriers to people getting involved in their communities is very welcome.
>
> … We look forward to seeing the legislation in place and making the spirit of its message clear to all.[114]

3.2 British Safety Council

The British Safety Council expressed support for the Bill. Alex Botha, the British Safety Council's Chief Executive, spoke of it benefitting society:

> Planned changes to the law should help society have a more sensible relationship with both everyday and extraordinary risks. All of us benefit when individuals are enabled to take heroic actions to help others when necessary or to volunteer to serve the community. Benefits come in many forms, including realising personal aspirations, improved social capital and of course financial advantages. Understanding risk is all about weighing up the benefit of taking action with the likelihood and consequence of something going wrong.
>
> We must remember that these benefits, the reason why we do anything, from building flood defensives by a community, taking school children on a field trip or rescuing

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[113] See section 1.3 of this paper above

[114] "NCVO comment on new social action, responsibility and heroism bill", NCVO press release, 2 June 2014 [accessed 7 July 2014]

> someone from a burning building, are a critical part of the risk equation. People should not be punished if they have acted in good faith for the benefit of society, their community or of one person who is in trouble. Of course we do not support reckless actions and risk education is an important part of this debate, but decisions sometimes have to be made in seconds. It is important that the context of any incident is taken into account by the courts."
>
> Great Britain's health and safety system is not a prescriptive system. It places responsibility on those who create risks and enables them to control the risk in a way that is sensible and proportionate. To sue people who act in line with this approach undermines a system that has led to great improvements to our health and wellbeing at work since the inception of the Health and Safety at Work Act, 40 years ago.[115]

3.3 TUC

Commenting in advance of the Bill being published, TUC General Secretary, Frances O'Grady, expressed concern that it might have an adverse effect for employees and make it more difficult for them to claim compensation if they were injured at work:

> While it's not clear at the moment exactly what the government is proposing, we are concerned that the Bill may let employers whose workers have been put in a dangerous situation off the safety hook.
>
> Safety laws are not needless 'red tape', nor are they part of the 'jobsworth culture'. They provide valuable protection for the UK's 30 million workers. Any attempt to lessen employer responsibility for workplace safety could put employees at risk and make it harder for them to claim compensation if they are injured at work.
>
> There is no evidence that current safety laws prevent anyone from acting heroically when someone's life is threatened, but where workers are being put into dangerous situations they must be protected.[116]

3.4 Association of Personal Injury Lawyers (APIL)

The Association of Personal Injury Lawyers (APIL) considered that there was already legislation dealing with the ground covered by the Bill and that education and not legislation was what was needed:

> Legislation to protect "everyday heroes" from the risk of being sued for negligence already exists. From what is known so far, this Bill covers old ground in the Compensation Act 2006 and is therefore a waste of parliamentary time. The courts already consider whether steps taken to provide a standard of care would have resulted in the prevention of a "desirable activity", or discourage people from taking part.
>
> The problem the Government describes lies with the perception of health and safety and civil justice, and misunderstandings about the legal system. Education, not further legislation, is the answer.[117]

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115 British Safety Council, *British Safety Council supports new law designed to protect those who step in to help others,* 4 June 2014 [accessed 7 July 2014]

116 TUC, *TUC fears government may use Heroism Bill to water down UK safety law,* 4 June 2014 [accessed 7 July 2014]

117 *Statement from the Association of Personal Injury Lawyers (APIL),* June 2014 [accessed 7 July 2014]

3.5 Lance Mason Solicitors

Writing on the Lance Mason Solicitors blog, Lesley Layton said it was hard to envisage the Bill affecting anything:

> It appears to be a solution in search of a problem and the government has not discovered a single civil action in the last 10 years which would be decided differently under this proposed legislation.
>
> (...)
>
> It is yet unclear how a judge is to determine [the factors in the Bill] or who has to prove these things. The Conservative Home commentary has quoted the example of someone sweeping snow away from outside their house and then someone falls. However, there have never been any such successful claims and this attempt to address a problem which does not seem to exist is as described before as though someone is looking for a solution to a problem that does not exist.
>
> (...)
>
> The Bill fails to recognise that people are injured, sometimes very severely as a result of a single negligent act, often of well-meaning and otherwise decent people. If there is no negligence, there is no claim.
>
> If there is provable negligence, the intentions behind the negligent act should play little part in determining whether the injured person is compensated or not.[118]

3.6 Slater and Gordon Lawyers

Fraser Whitehead, Group Litigation Lawyer at Slater and Gordon, dubbed the Bill "pointless and potentially dangerous". He said that the *Compensation Act 2006* already provided the protection needed and that the Government was perpetuating the myth of a compensation culture in Britain:

> "In all my years as a lawyer frivolous cases such as the ones Chris Grayling seems to think are common place have not been taken on – lawyers simply won't risk it and a Court would drop it," Fraser said.
>
> "More worrying is Mr Grayling's small mention about how this could impact Health and Safety at work. Any erosion of workers' rights must be resisted as strongly as possible."
>
> The Social Action, Responsibility and Heroism Bill will not guarantee that defendants in such cases are cleared, as it will remain up to the Courts to conclude whether they were negligent.[119]

3.7 Civil Society Governance Blog

Writing on the *Civil Society Governance* blog, Sarah Bull, a charity lawyer and senior associate at Bates Wells Braithwaite, questioned whether the Bill is necessary, and how it might have any different effect from the *Compensation Act 2006*:

> ....The definition of negligence is a failure to take reasonable care. If an employer does everything that [Chris Grayling] describes, they cannot be successfully sued. Special

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[118] Lance Mason blog, *Is the Social Action, Responsibility and Heroism Bill a solution for a problem that does not exist?*, posted 18 June 2014 [accessed 7 July 2014]

[119] Slater and Gordon Lawyers, *The Social Action, Responsibility & Heroism Bill is Pointless & Dangerous*, 5 June 2014 [accessed 7 July 2014]

considerations already exist for firefighters and other emergency personnel, who often have to take momentous decisions in a split second. Small employers are under less onerous burdens than larger ones, and their size is explicitly to be taken into account in negligence cases. The "elf and safety culture" that Grayling describes is, in legal terms at least, non-existent, and the British courts have been forthright in avoiding opening the floodgates to American levels of negligence litigation.

In his article on Conservative Home, Grayling seems to admit this, saying "Of course the courts do apply common sense, and very often throw out the most absurd cases…The best way to describe the proposed Bill is that it will serve as a signpost from Parliament to the Courts… a powerful message…"

This might be laudable, but it is rendered pointless by the fact that in 2006, the Compensation Act was passed, with exactly the same aim, and wording that is similar to what it may be presumed Mr Grayling will propose. Either that Act worked, in which case SARAH is unnecessary, or it did not, in which case it is difficult to see how SARAH will be any different. In any event, the practical impact of this Bill is likely to be small, if it is noticeable at all.[120]

[120] "Is a volunteer protection bill a useful tool or a complete waste of time", *Civil Society.co.uk,* 16 June 2014 [accessed 7 July 2014]