Law Commission: fraud by victims of personal injury

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1. An unnecessary enquiry

The Law Commission says that the subject of their 11th programme was "suggested to us". To Thompsons, reviewing an issue that has been decisively and recently dealt with by the courts suggests that the Law Commission has been influenced by those who peddle what has been repeatedly shown to be the myth of a compensation culture. We would ask - in the interests of transparency and accountability - that the Law Commission disclose publicly by whom it was 'suggested' and by what means.

This is not, in our view, an appropriate area for examination by the Law Commission. Taking this step runs perversely counter to previous activities of the Law Commission.

Why is the Law Commission thinking of looking into an issue on which the Supreme Court – the highest court in the land - has made a recent, unanimous and unambiguous judgment (Fairclough Homes Limited v Summers, 27 June 2012)?

All the issues raised in the Law Commission's short note on this are directly addressed in the Summers judgment. The case has changed the law by indicating that a Court does have the power to completely strike out a statement of case if there is fraud (see Paragraph 33 of the judgment) albeit (in our view correctly in the interests of justice) that that power should be exercised rarely.

Given the Supreme Court's detailed consideration, it is not clear why the Law Commission feels the need to propose a possible change in the law. Essentially, the Law Commission's paper is asking whether it should interfere with the law in a single Supreme Court decision, to overturn the specific guidance on how a particular power should be exercised. This seems to us to be extraordinary.

The Law Commission states that "this position [the judgment of the court of appeal] has been criticised by both academics and practitioners for failing to deter fraudsters". We would ask which academics and practitioners, as we suspect they will not be a cross-section of the legal community.

As leading practitioners in this field, we find no evidence whatsoever of any deficiency in the current law or its interpretation. All the necessary legal and institutional mechanisms exist to deter fraud and have sanction against it on the rare occasions that it occurs.

Our experience, and that of colleagues in other firms representing personal injury victims, is that the judgment of the House of Lords in Summers is sound and that outright fraud in personal injury cases is extremely rare. We are not aware of any significant body of independent academic research to the contrary. Anecdotal comment and conjecture from the insurance industry (whose primary concern is their shareholders, not the interests of justice) and their lawyers is not 'evidence'. Lists of "fraud hotspots", produced annually by a leading Defendant solicitors firm, are almost without exception nothing of the sort. The number of cases where fraud is alleged - let alone proved - is in fact a tiny proportion of personal injury claims. On closer examination, such lists turn out to be based solely on insurers' reports of claims notifications which, on their own (unspecified) criteria are in some way 'suspicious'. It is worrying if this is the kind of "evidence" to which the Law Commission is "responding".

The Law Commission notes the Irish Parliament's introduction of an express provision in the Civil Liability and Courts Act 2004 which directs the courts to dismiss fraudulently exaggerated claims. We find this to be a bizarre allusion. The Irish Parliament does not have jurisdiction in the UK; our Supreme Court has explicitly and recently ruled that it wishes to retain the flexibility precluded by such a provision; and the UK Parliament has made no suggestion otherwise. Thus the relevance of this Irish allusion is at best tangential and at worst deliberately obtuse.

2. An effective current system

We wholly agree with the Supreme Court that sufficient deterrents against fraud already exist. In the rare cases where fraudulent exaggeration occurs, sanctions which are routinely applied include:

- **Harsh, deterrent judgments,** for example, the 15 month sentence handed down explicitly as a deterrent in R v Mckenzie (21 August 2013) and upheld on appeal;
- **Lower damages for the non-fraudulent part of the claim,** routinely imposed for punitive/deterrent reasons;
- **Adverse cost orders** in most cases either wiping out or often exceeding the value of any award;
- **Contempt of court applications** leading to imprisonment;
- **Criminal proceedings** leading to heavy fines and imprisonment.

The above constitutes, as the court of appeal concluded in *Summers,* an effective array of deterrent sanctions. Yet the Law Commission states that the above sanctions "may not be as effective as forfeiture of the whole claim". This is a preposterous hypothesis, which is not supported by argument or evidence of any kind.

In addition to that impressive and punitive array of sanctions, the court retains the power to strike out entire claims, though it should be exercised only, as the Supreme Court rightly held in *Summers,* in exceptional circumstances.

The Law Commission paper refers to the duty of full disclosure in insurance contracts. In our view, this confuses two entirely separate issues and suggests an inappropriate blurring of the lines between tort and contract law. In fact, Paragraph 29 of the House of Lords *Summers* judgment addresses precisely this point and rejects it out of hand.

3. Sinister consequences

To change the law in the manner suggested would not just be unnecessary and incoherent, but sinister and likely to impede fair settlements, access to justice and the efficient functioning of the courts.

It is inherent in the fact of a personal injury claim having come to court that some elements of dispute and uncertainty exist. Claimants will often themselves be unable to be self-analytical about the "objective" levels of their own pain and incapacity.

The threat of forfeiting an entire claim will simply be used by the insurance industry as a mechanism to frighten personal injury victims into underestimating the extent of their pain and incapacity, lest they subsequently be accused (in matters often unprovable) of overestimating them, and thus forfeit awards to which they are entitled and often in desperate need.

The proposed change would be little more than a licence to bully personal injury victims and drive down settlement levels below what is fair and reasonable.

And that is precisely why the insurance industry and its representatives have included it in their ever-widening agenda of erosion.

In terms of court process too, the effects of such a change would be entirely deleterious. Virtually everything would be appealed by insurance companies hoping to get entire claims wiped out. A judicial backlog of cases would be the likely result.

4. Summary conclusion

This is certainly not an appropriate matter for the Law Commission to examine. Indeed, it is so inappropriate a line of enquiry that, in the interests of transparency and propriety, we hope that the Law Commission will disclose the processes by which it became minded to consider it.

This is a matter that should be left to the courts, which have dealt with it recently, unambiguously, comprehensively and well. There is no need for "reform".

There is no "reform" in this field which could improve the State's ability to recover the cost of NHS services and/or benefits (this is an incoherent point in the Law Commission note).

The only interests served by statutory intervention would be the commercial interests of insurance companies and their lawyers. Justice, fairness, access to justice and the efficient functioning of the courts would be grievously undermined.

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