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Fundamentally for the good

11 March 2015 | By Nick Parsons

Nick Parsons looks at whether or not concerns around section 57 of the Criminal Justice and Courts Bill were justified.

Claimants' representatives cried foul over section 57 of the *Criminal Justice and Courts Bill* making its way through Parliament. The Bill is now an Act with section 57 intact. Were their concerns really justified?

By virtue of section 57, in a personal injury claim, where a court is satisfied that a claimant has been fundamentally dishonest in relation to his primary claim then, (unless the court is satisfied the claimant would suffer substantial injustice if the claim were dismissed), the primary claim must be dismissed.

Until now, courts were reluctant to strike out claims even where it had been proved there had been substantial dishonesty on behalf of a claimant. Often, even if the untainted part of claim was a fraction of the total claim, claimants were allowed to keep that part of their damages.

However, defendants were concerned that, in the absence of real sanctions, claimants could feel emboldened to concoct part of a claim without fear of punishment should they be found to be dishonest.

Claimant criticisms coalesce around two issues. First, complaints of ambiguity surrounding the definition of fundamental dishonesty and the consequent prospect of satellite litigation. Second, concerns about unscrupulous insurers taking unreasonable advantage of the legislation, deterring legitimate claims.

The term ‘fundamental dishonesty' is not defined in the legislation. That said, case law develops incrementally, on a case-by-case basis, and in that sense the position is no different from many other pieces of legislation.

More importantly, I believe judges will be able to recognise and categorise claims which are fundamentally dishonest. The definition of dishonesty is straightforward; a party intending to mislead or cheat is a dishonest party. The word ‘fundamental'

may be more problematic. In practice I suspect that will be recognised when encountered. Dishonesty is fundamental if it goes to the heart of the liability issue, either breach or causation. Similarly, if there has been significant dishonesty in relation to quantum that too should see the dismissal of the claim.

There has been some suggestion that exaggeration rather than concoction would not be fundamental dishonesty. That misses the point. The emphasis is on dishonesty. If the exaggeration of the claim is such as to be fundamentally dishonest then why shouldn't it be dismissed?

Concern that insurers will take undue advantage of the legislation is also misplaced. Only a judge can dismiss a claim, on the application of the defendant. This would either require an application during the course of the case, or alternatively at trial. This is not done lightly - pleading fraud is a serious matter. It is far-fetched to suggest the legislation would be used to deter honest claimants.

The Act should finally give the defendant the means to entirely defeat a dishonest claimant. It should deter anyone tempted to dishonestly embellish or concoct part of an otherwise genuine claim. Once the message hits home we may well see few applications under the Act as it will have succeeded in deterring those tempted to be dishonest. I believe it is a welcome addition to the rules and should help reduce the incidence and cost of fraudulent claims to the benefit of insurers, insureds and society in general.

By Nick Parsons, president of the Forum of Insurance Lawyers and a partner with Browne Jacobson

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Foil condemns MoJ court fees hike

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The Forum of Insurance Lawyers has criticised a Ministry of Justice decision to raise court fees in order to subsidise other parts of the court service.

Under the changes, fees will be increased for all claims valued at more than £10,000 so that the court fee is 5% of the amount of the claim, subject to a maximum fee of £10,000 which would be reached on a claim with a value of £200,000 or more.

Fees in claims worth £10,000 or less would remain unchanged.

Foil president Nick Parsons said: "Many individuals and SMEs will struggle to pay the new level of fee to start a claim. Ready access to the courts should be a right for every citizen, not a privilege only for those who can afford the entrance price."

"Foil also sees the law of unintended consequences coming into play. This decision has been taken as a revenue-raising measure by the state, yet many of the defendants who will eventually end up footing the bill are themselves public bodies; local authorities and the NHS, for instance. These are institutions that can ill afford such increased costs in these straitened times. The Government may end up robbing Peter to pay Paul," Parsons added.

"It is clear from the consultation now under way that further increased court fees may well be on the cards. In time, claims below £10,000 might be seen as a fruitful area from which to raise income. This would be an ill-advised course to take."

Foil's concerns are shared by the Civil Justice Council and the Association of Personal Injury Lawyers, it said.

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