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Insurance surgery: Tackling fundamental dishonesty

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Stratos Gatzouris considers the implications of the forthcoming obligation on courts to strike out PI claims found to be fundamentally dishonest

On 13 April 2015, s 57 of the Criminal Justice and Courts Act 2015 (CJCA 2015) will come into force. It places an obligation on courts to strike out personal injury claims which are found to be fundamentally dishonest.

What is fundamental dishonesty?

The concept of fundamental dishonesty was introduced by CPR 44.16(1) as an exception to qualified one way costs shifting (QOCS) in personal injury claims. A claimant will not benefit from QOCS if, on application by the defendant, the claimant is found to have been fundamentally dishonest. In such circumstances, an order for costs may be enforced against the claimant.

The term has since been incorporated into section 57 of CJCA 2015 and will apply to all proceedings issued on or after 13 April 2015.

What does the new law say?

Section 57 places a duty on courts to strike out a personal injury claim, if, on application by the defendant, the court is satisfied on a balance of probabilities that the claimant has been fundamentally dishonest, unless by doing so there would be substantial injustice.

Points to bear in mind:

- Personal injury includes any disease or impairment of a person's physical or mental condition and therefore extends beyond whiplash or soft tissue injury claims.

- The dishonesty can relate to the primary claim, or a related claim. A related claim is defined as one for damages in respect of personal injury which is made either in connection with the same incident or series of incidents with which the primary claim is made, and is made by a person other than the person who made the primary claim.
- The section will therefore capture linked claims by those supporting fundamentally dishonest primary claims including those of phantom claimants such as bogus passengers.
- Dismissal of the claim under s 57 will only be considered if the defendant makes an application.
- In considering the application, the court is afforded some discretion in cases where a strike out would cause the claimant to suffer substantial injustice. "Substantial injustice" is not defined.
- If a claim is struck out under this section, the court must record the amount the claimant would have received for any genuine element of the claim had it not been dismissed. The claimant will be ordered to pay the defendant's costs, but the amount recorded for the genuine element will be deducted from the amount that the claimant will have to pay.

What constitutes fundamental dishonesty?

There is no definition of fundamental dishonesty in CJA 2015. However, the concept was considered in the context of QOCS in the county court case of *Gosling v Hailo & Screwfix* (unreported, 2014):

- Dishonesty that is "incidental" or "collateral" to the claim is not fundamental.
- Dishonesty that goes to the "whole or a substantial part" of the claim is fundamental.
- Significant exaggeration and/or misrepresentation of the extent of on-going symptoms is dishonesty, but only exaggeration or misrepresentation that equates to around half the value of the claim is likely to constitute fundamental dishonesty.
- You do not need to plead fraud for the court to make a finding of fundamental dishonesty (*Oana v O'Duinn and Aviva* (unreported, 2015)).

It remains to be seen whether fundamental dishonesty for the purposes of CJA 2015 will be applied in the same way. During the House of Lords debate regarding s 57, Lord Faulks suggested that judges: "Will know exactly what the clause is aimed at—not the minor inaccuracy about bus fares or the like, but something that goes to the heart. I do not suggest that it wins many prizes for elegance, but it sends the right message to the judge." (Hansard, 23 July 2014)

Conclusion

There are some considerable question marks over the definitions of "fundamental dishonesty" and "substantial injustice"; arguably, there are also difficulties with how exactly "personal injury" will be defined and as to how the "related claim" will fit with that definition.

CJA 2015 nevertheless represents a major step forward in discouraging fraudulently exaggerated personal injury claims.

For now, those seeking to strike out a fraudulent claim must consider what is the most appropriate and effective action to take and when to take such action: An application in terms of CJCA 2015 and/or a full strike out for abuse of process in accordance with *Summers v Fairclough Homes* [2012] UKSC 26, [2012] 4 All ER 317, and/or contempt of court proceedings or even prosecution in terms of the Fraud Act 2006. Interestingly, CJCA 2015 also refers to the outcome of these proceedings being made known to the judge presiding over any subsequent criminal proceedings. It remains to be seen whether this is to be considered an aggravating or mitigating factor.

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