

CRIMINAL JUSTICE AND COURTS BILL

Clause 45 - Personal injury claims: cases of fundamental dishonesty



A parliamentary briefing from the Association of Personal Injury Lawyers (APIL)

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About APIL

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers to represent the interests of personal injury victims. APIL is a not-for-profit organisation with 24 years' history of campaigning for changes in the law to help injured people gain the access to justice they need. APIL currently has around 4,000 members, comprising solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of claimants.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- to promote full and just compensation for all types of personal injury;
- to promote and develop expertise in the practice of personal injury law;
- to promote wider redress for personal injury in the legal system;
- to campaign for improvements in personal injury law;
- to promote safety and alert the public to hazards wherever they arise; and
- to provide a communication network for members

It is important to note that Clause 45 was inserted into the Bill at House of Commons report stage and that there has, therefore, been no parliamentary scrutiny of the clause to date due to limited time at report stage.

Clause 45 - unintended consequences

The introduction of the power for blanket dismissal of a case for 'fundamental dishonesty' will lead to three things: an increase in satellite litigation as lawyers argue over what is meant by 'fundamental dishonesty' and 'substantial injustice'; an increase in spurious allegations of fraud (or 'fundamental dishonesty') by unscrupulous insurers; an increase in the number of genuine claimants who either underplay their symptoms or who fail to bring valid cases at all, for fear of being falsely accused.

In its most recent briefing on this issue, the Government has referred to dishonest behaviour, gross exaggeration and fraud, as if all three were synonymous. Apart from fraud, which is actually a crime, the other references are very much open to interpretation.

In addition, in a written ministerial statement of 9 June, justice minister Lord Faulks QC, said the provision is '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....'

Fraud is a criminal offence, with criminal penalties. Exaggeration is not a crime, but is open to a wide range of interpretations. In a personal injury case, a defendant may argue that a claimant is exaggerating a part of his claim when the reality may simply be that a perfectly legitimate argument is unsuccessful in court.

An example is when a claimant argues for compensation for loss of a chance of a future career. It is very difficult to prove that what is fairly routine work at the time of the injury could be the first step of a glittering career, and this is well supported by case law. In *Leesmith v Evans*¹, for example, Mr Leesmith suffered the loss of a leg two weeks after he started working at a warehouse from where he hoped to develop a career as a lighting technician for major rock bands. In this case he won his argument and his compensation included almost £600,000 for future loss of earnings as a lighting technician.

There are, however, many cases where the argument about loss of chance of a future career has been lost, such as *Doyle v Wallace*², where the claimant argued there was a fifty-fifty chance of becoming a teacher rather than a typist. At the moment, where the argument is lost, the compensation is simply reduced. Clause 45, however, invites defendants to make an accusation of 'fundamental dishonesty' in such circumstances and, as the test is only that the court must be convinced 'on the balance of probabilities', this presents a very real danger to a genuine claimant that the claim will be dismissed in its entirety.

¹ *Leesmith v Evans* [2008] EWHC 134 (QB)

² *Doyle v Wallace* [1998] EWCA Civ 1030

The rule of law

Clause 45 aims the charge of ‘fundamental dishonesty’ wholly at the claimant. The rule of law, however, dictates that everyone is equal before the law so, surely, defendants should be held to the same standards as claimants so that ‘fundamental dishonesty’ can be alleged and a defence dismissed in its entirety.

In *Nicholls v Ladbrokes Betting & Gaming Ltd*³ Ladbrokes won its appeal (in a split decision) against a decision that it was liable to an employee for failing to take steps to prevent a robbery occurring. The quality of Ladbrokes’ evidence was, however, severely criticised. In his conclusion, Lord Justice Jackson said: “Before parting with this case I wish to express my concern about the manner in which the defendant has conducted its defence. The defence of any personal injury case is a serious task, to be undertaken in a fair and responsible manner. It is inappropriate to serve witness statements which refute every allegation, whether right or wrong.”

In this instance the defendant was deprived of 20 per cent of its costs “to reflect the unsatisfactory conduct of the litigation”.

In these circumstances, it would not be unreasonable for the claimant to allege that the defendant had been ‘fundamentally dishonest’ yet there is no provision in this clause for the defence to be dismissed. The rule of law demands a level playing field – clause 45 tilts that playing field firmly in favour of defendants and their insurers who pay compensation to injured people.

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³ *Nicholls v Ladbrokes Betting & Gaming Ltd* [2013] EWCA Civ 1963

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