

**The Law Commission**

**Consultation Paper No 189**

**The Illegality Defence**



**A response by the Association of Personal Injury Lawyers**

**April 2009**

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. The association is dedicated to campaigning for improvements in the law to enable injured people to gain full access to justice, and promote their interests in all relevant political issues. Our members comprise principally of practitioners who specialise in personal injury litigation and whose interests are predominantly on behalf of injured 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;
- To provide a communication network for members.

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:

Stephen Lawson	Secretary	APIL Executive Committee
Muiris Lyons	Member	APIL Executive Committee
John McQuater	Vice-President	APIL Executive Committee

Any enquiries in respect of this response should be addressed, in the first instance, to:

Helen Anthony

Legal Policy Officer

APIL

11 Castle Quay, Nottingham NG7 1FW

Tel: 0115 958 0585; Fax: 0115 958 0885

E-mail: [helen.anthony@apil.org.uk](mailto:helen.anthony@apil.org.uk)

## Executive Summary

APIL believes that there is no place for fraudulent claims in the legal system and we fully support a tough stance by the courts, both in respect of fraudulent claims themselves and in respect of heads of damages that are tainted by illegality. We are committed to working with insurers to prevent fraud.

Consistency is of paramount importance in relation to the illegality defence and the law must be certain and understandable. The drafting of a 'statutory discretion', however, that would apply universally across all branches of the law is difficult and may well lead to continued uncertainty.

As far as judicial reform is concerned, the House of Lords has recently been given the opportunity of considering the illegality defence in two cases - *Moore Stephens v Stone & Rolls Ltd*<sup>1</sup> and *Gray v Thames Trains*.<sup>2</sup> We hope that these cases will enable the House of Lords to lay down clear and transparent guidelines for the application of the illegality defence in tort but if they fail to do so, then the Law Commission should revisit this issue and reconsider the drafting of a 'statutory discretion'.

## Introduction

APIL welcomes the opportunity to respond to the Law Commission's consultation paper on the illegality defence.

APIL's interest is in protecting the needs of people injured through the negligence of others. In the circumstances we do not feel that it is appropriate for us to submit a response to every section of the paper and our response concentrates on Part 7 and the illegality defence in tort, insofar as it applies to personal injury cases.

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<sup>1</sup> [2008] EWCA Civ 644

<sup>2</sup> [2008] EWCA Civ 713

## Illegality defence in tort

APIL believes that there is no place for fraudulent claims in the legal system and we fully support a tough stance by the courts, both in respect of fraudulent claims themselves and in respect of heads of damages that are tainted by illegality. Public confidence in the legal system must be maintained by ensuring that dishonesty is not seen to be 'rewarded' in any way.

We note that the Law Commission's initial stance, in consultation papers 154 and 160, was to propose a 'statutory discretion' applicable to all branches of the law to ensure consistency.<sup>1</sup> Consistency is of paramount importance here but can only be achieved, in our opinion, by the law being certain and understandable. We appreciate, however, that the wide range of factual situations that can arise in tort make it difficult for the Law Commission to draft a statutory discretion that would apply universally across all branches of the law and understand why they concluded that any proposed statutory discretion would potentially add to the uncertainty of the present law.<sup>2</sup>

The Law Commission did consider the alternative case for judicial reform but felt that the chances were limited of a suitable case reaching the House of Lords.<sup>3</sup> That situation has, however, now changed as the House of Lords has been given the opportunity in two cases – *Moore Stephens v Stone & Rolls Ltd*<sup>4</sup> and *Gray v Thames Trains*.<sup>5</sup> We share the Law Commission's hope that these cases (both of which, we believe, were correctly decided by the Court of Appeal) will enable the House of Lords to lay down clear and transparent guidelines for the application of the illegality defence in tort. If the House of Lords fail to do so, then the Law Commission should revisit this issue again and we reserve the right to comment further at that stage, if appropriate.

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<sup>1</sup> Law Commission Consultation Paper No 189, paragraphs 7.56 – 7.58

<sup>2</sup> *Ibid*, paragraph 7.63

<sup>3</sup> *Ibid*, paragraph 7.57

<sup>4</sup> [2008] EWCA Civ 644

<sup>5</sup> [2008] EWCA Civ 713

## Association of Personal Injury Lawyers

- ▶ 11 Castle Quay, Nottingham, NG7 1FW ● T: 0115 958 0585
- W: [www.apil.org.uk](http://www.apil.org.uk) ● E: [mail@apil.org.uk](mailto:mail@apil.org.uk)