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Claimant illegality as a defence to negligence: Gray v Thames Trains and others

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Claimant Illegality as a Defence to Negligence.

Gray v Thames Trains and others

[2009] UKHL 33; [2009] 3 WLR 167

House of Lords

Lord Phillips of Worth Matravers, Lord Hoffmann, Lord Scott of Foscote, Lord Rodger of Earlsferry, Lord Brown of Eaton-under-Heywood

17 June 2009

Negligence – personal injury damages – loss of earnings – post-traumatic stress disorder – *ex turpi causa* – public policy – causation.

On 5 October 1999, Kerrie Gray (G) was a passenger on a train operated by Thames Trains whose admitted negligence was responsible for the Ladbroke Grove rail crash in which 31 people were killed and some 500 injured. Although G's physical injuries were only minor, he suffered severe psychiatric damage in the form of post-traumatic stress disorder (PTSD) and depression. This had the effect of transforming a normal, healthy individual with a good employment record and no history of violence into an anxious and socially withdrawn personality liable to angry outbursts. Almost two years later, on 19 August 2001, and while still receiving treatment for his condition, G became involved in an altercation with a drunken pedestrian who had stumbled into the path of his car. G drove to the house of his girl-friend's parents nearby, got a kitchen knife, tracked down the pedestrian, and stabbed him to death. The following day, G gave himself up to the police and was remanded in custody. In April 2002, the Crown accepted his plea of guilty to manslaughter on the ground of diminished responsibility caused by the PTSD. He was sentenced to indefinite detention in hospital under the terms of the Mental Health Act 1983.

While in detention G sued for negligence. In addition to losses incurred before the killing (which were not really in dispute), G claimed special damages for continuing loss of earnings from the date of his detention onwards. He also sought general damages for his detention, feelings of guilt and remorse and damage to reputation, together with a claim to be indemnified against any claims that might be brought against him by dependents of his victim.

Flaux J, [2007] EWHC 1558, rejected the latter three claims, relying on the principle *ex turpi causa non oritur actio*, a public policy-based rule of law that precludes recovery of losses consequent on the claimant's own criminal act. The Court of Appeal [2009] 2 WLR 351 disagreed in part, saying that while it was bound by the authority of *Clunis v Camden and Islington HA* [1998] QB 978 to hold that the claim for general damages must fail, the claim for loss of earnings was not precluded. The House of Lords unanimously allowed an appeal against that finding, rejected the claimant's cross-appeal, and restored the decision of the trial judge.

Their Lordships held that:

- 1. the Court of Appeal had rightly applied *Clunis* and dismissed G's claim for general damages, but had been wrong to find that G was nonetheless entitled to be compensated for loss of earnings following his arrest. Both losses equally fell within the policy-based rule that prevented recovery for damage that was the consequence of a court sentence properly imposed for that crime. The claimant bore personal, albeit diminished responsibility for his actions and it would produce inconsistency in the justice system if a civil court were to compensate him for such losses. It was true that even if G had not killed his victim his earning capacity would have been impaired by the negligently caused PTSD, yet *Jobling v Associated Dairies* [1982] AC 794 dictated that the sentence, which effectively precluded him from earning at all, could not be ignored. He was unable to earn because he had been detained for manslaughter.**
- 2. Although the claims for general damages for feelings of guilt and remorse and for an indemnity were not themselves a consequence of the conviction (but rather arose out of the lethal stabbing) nonetheless the *ex turpi causa* rule against recovery applied to defeat them also. They were the result of G's deliberate criminal act.**
- 3. There might be exceptional cases where the criminal court's decision to impose a hospital order was solely due to a defendant's mental condition rather than a consequence of his criminal conduct (albeit that without the commission of an imprisonable offence no hospital order could be made), in which event *ex turpi causa* might not apply (per Lord Phillips, Lord Rodger and Lord Brown).**

Commentary

The question when a person's involvement in some form of unlawful conduct should prevent them from enforcing their normal rights may arise in many areas of the law, including contract, trusts, unjust enrichment, as well as in tort. It has not proved easy to answer, as the publication of three Law Commission consultation papers in ten years testifies. *The Illegality Defence. A Consultative Report* (CP 189, January 2009) is the latest; a final report is expected later this year. Surprisingly it was not referred to in *Gray*. The two earlier Commission papers had suggested that the common law rules should be replaced by a statutorily defined discretion. However, this recommendation was dropped in 2009 (except as regards the use of trusts to conceal the true ownership of illicit assets) in favour of leaving the question to the judges who, it was said, can improve matters by focusing more explicitly on the underlying policy issues. To the extent possible given the limits imposed by the facts, this is what the House has sought to do in *Gray*.

Lord Brown observed that it was difficult not to feel 'the greatest sympathy' for the claimant. It was 'inconceivable' that this decent and previously law-

abiding citizen would, but for his negligently inflicted injuries, 'ever have killed anyone' (at [89]). Moreover, *Corr v IBC Vehicles Ltd* [2008] AC 884 established that merely because a tort victim's own voluntary and deliberate act results in a further adverse outcome need not break the chain of causation between a defendant's negligence and a claimant's losses and so is not necessarily a reason for excluding a defendant's liability, at least where that act itself is not a crime. Nor, as counsel for G pointed out, is there anything unlawful or even base or immoral about the claimant's right of action; that right arose on 5 October 1999 when the train company tortiously injured him in the crash. The 'real objection', as Lord Rodger put it (at [62]), is not to the lawfulness of the *action* as such, but rather to the heads of claim concerning the losses that occurred on or after the day of the killing, which it was held arose *ex turpi causa*. This so-called 'defence', whatever its effect in practice, is not designed to benefit individual tortious defendants. It is a special rule of public policy, which Lord Hoffmann helpfully described in the following way:

'In its wider form, it is that you cannot recover compensation for loss which you have suffered in consequence of your own criminal act. In its narrower and more specific form, it is that you cannot recover for damage which flows from loss of liberty, a fine or other punishment lawfully imposed on you in consequence of your own unlawful act. In such a case it is the law which, as a matter of penal policy, causes the damage and it would be inconsistent for the law to require you to be compensated for that damage' (at [29]).

In the past, depending on the context and nature of the claim, various policy purposes have been suggested for the *ex turpi* maxim. Lord Hoffmann in *Gray* (at [30]) noted that the policy it expresses is not 'based on a single justification but on a group of reasons', warning that it is not possible 'simply to extrapolate rules applicable to a different kind of situation' (at [31]). Thus, while in some property or contractual disputes courts may be exercised by the possibility that a wrong may be the occasion for profit, this is an unlikely consideration where a claimant seeks compensation for personal injury.

As regards claims in tort involving a prior criminal conviction, the House has now opted for an 'inconsistency' justification – 'the underlying rationale in this context', per Lord Brown (at [93]). This reason was advanced in the current, and in the earlier Law Commission report (CP 160, *The Illegality Defence in Tort*, 2001, at para 4.100), as well as having been relied on by courts in Australia and Canada. In *State Rail Authority of New South Wales v Wiegold* (1991) 25 NSWLR 500, Samuels JA rightly declined to follow the English decision in *Meah v McCreamer* [1985] 1 All ER 367, which must now be regarded as having been wrongly decided. He said that if offenders were not to be regarded as responsible because they were entitled to be compensated by some prior tortfeasor whose act was causally connected to their offence then that 'would generate the sort of clash between the civil and criminal law that is apt to bring the law into disrepute' (at 514). In *British Columbia v Zastowny* [2008] 1 SCR 27, (at [23]), Rothstein J said that 'preventing

inconsistency in the law is a matter of judicial policy that underlies the *ex turpi doctrine*'. Both decisions were cited with approval in *Gray*.

Other justifications must be sought as regards losses that do not arise as a result of *conviction* (such as G's claim for damages for remorse or entitlement to an indemnity). The 'wider' rule, suggested Lord Hoffmann (at [51]), might be supported on the basis that it is 'offensive to public notions of the fair distribution of resources' that such a claimant should be compensated. His Lordship described the decision in *Vellino v Chief Constable of the Greater Manchester Police* [2002] 1 WLR 218) simply as 'based on sound common sense' (at [53]). The claimant, who had been injured while attempting to evade lawful arrest, alleged that the police had failed to take reasonable care to prevent him from escaping. A majority of the Court of Appeal rejected his claim because the injury was the consequence of his own unlawful act.

Both Lord Hoffmann and Lord Rodger thought it better to avoid metaphors about the illegality and the loss being 'inextricably linked' if only because opinions are likely to differ as to what is or is not so linked. After all, the trial judge and the Court of Appeal reached different conclusions about the present facts. Their Lordships suggested that the question might be treated simply as one of causation (at [54] and [74]). Similarly, asking whether the claimant should fail because his claim 'relied' on an illegality was regarded as vague and unhelpful (cf. *Tinsley v Milligan* [1994] 1 AC 340, a contract dispute). In the present case, of course, it was Thames Trains who relied on the killing while G relied on the company's negligence in causing the accident and his injury.

Further developments in the illegality doctrine will likely result from a case-by-case analysis. The purpose of the illegality rule in the present context is not to teach claimants that crime doesn't pay, to punish them, or to deter others (though fortuitously it may sometimes have one or more of these effects). Nor is it there to forestall media-manipulated moral outrage. According to *Gray*, its overriding objective is to maintain confidence in the integrity of the legal system. For tort law to be seen to be achieving this objective, its response must be carefully explained and proportionate. This will require courts to evaluate the degree of 'turpitude' necessary to defeat a claimant, denying recovery only to those whose losses arise from their complicit participation in seriously reprehensible (usually criminal) conduct.

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