

PERSONAL INJURY BRIEFING

Ex Turpi Causa

"All human actions have one or more of these seven causes: chance, nature, compulsion, habit, reason, passion, and desire"

Aristotle, 384BC-322BC

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Ex Turpi Causa: An Analysis of the Decision in *Gray v Thames Trains Limited* [2009] UKHL 33 By Sarah Prager

All lawyers of a certain age are familiar with the Latin tag *ex turpi causa non oritur actio*, or, post-Woolf reforms, the maxim that one knowingly engaged in an illegal activity may not profit from it. Historically, as a matter of public policy, such a person who was injured in the course of his criminal endeavours could not recover damages from the responsible tortfeasor. The principle derives originally from the judgment of Lord Mansfield in *Holman v Johnson* (1775) 1 Cowp 341, in which it was said that 'no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act'. Bingham LJ in *Saunders v Edwards* [1987] 1 WLR 1116 overlaid the principle with the following gloss:

"Where the claimant's action in truth arises *ex turpi causa* he is likely to fail. Where the claimant has suffered a genuine wrong to which the allegedly unlawful conduct is incidental, he is likely to succeed."

In *Vellino v Chief Constable of Greater Manchester* [2001] EWCA Civ 1249, Sir Murray Stuart-Smith took the principle a step further when he said:

"The operation of the principle arises where the claimant's claim is founded upon his own criminal or immoral act. The facts which give rise to the claim must be inextricably linked with the criminal activity. It is not sufficient if the criminal activity merely gives occasion for tortious conduct of the Defendant."

It is rare that the higher courts consider questions of *ex turpi causa*, but last year just such a question arose in the Court of Appeal before Sir Anthony Clarke MR, Tuckey LJ and Smith LJ. The facts of the case were tragic. The Claimant had been involved in the Ladbroke Grove rail disaster on 5th October 1999, and, although not seriously physically injured, had developed severe post traumatic stress disorder as a result. He underwent a significant personality change, becoming socially withdrawn and anxious, suffering from angry outbursts and shunning physical contact. He received psychiatric treat-

ment but continued to experience frequent nightmares, flashbacks and panic attacks. He began to drink heavily and suffered from depression. On 19th August 2001 a total stranger, Mr Boulwood, stumbled into the road in front of Mr Gray's car, causing him to stop. Mr Boulwood was very drunk, and punched the windows of the car, causing Mr Gray to feel frightened and reminding him of the shattered windows he had seen in the course of the rail crash. He went home, took a knife, and, finding Mr Boulwood in the street, stabbed him to death. On 22nd April 2002 he pleaded guilty to manslaughter on the grounds of diminished responsibility, and was ordered to be detained in hospital under ss.37 and 41 of the Mental Health Act 1983.

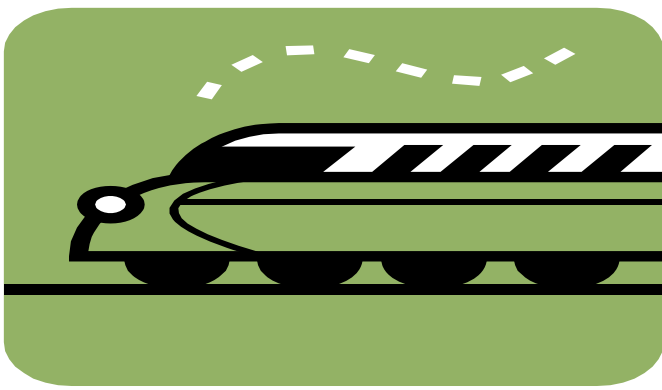
Mr Gray sued Thames Trains Limited and Network Rail Infrastructure Limited as the operator of the train and as the entity responsible for the rail infrastructure respectively. The Defendants admitted liability for the Claimant's injuries and for his losses prior to 19th August 2001, but contended that thereafter they bore no liability as a result of the operation of the doctrine of *ex turpi causa*. Initially the claim for the latter was struck out by the Master, but was reinstated, only to be rejected by the trial judge on that basis.

It is important to note that the Claimant did not claim compensation for the consequences of being detained in hospital, since to do so would certainly fall foul of the *ex turpi causa* principle. However, he submitted that he was able to claim for loss of earnings on the basis that as a result of the consequences of suffering from post traumatic stress disorder he was unable to earn as much as he would have done but for the occurrence of the accident.

The trial judge rejected the claim for loss of earnings arising after the date of the manslaughter. He held that the claim was so closely connected with or inextricably bound up with the crime that it should not succeed.

The Court of Appeal ([2009] 2 WLR 351) formulated the question before it as being whether the relevant loss was inextricably linked with the Claimant's illegal act, or so closely connected or inextricably bound up with his criminal or illegal conduct that the court could not permit him to recover without appearing to condone that conduct.

The Court found that it was not. It took the view that



'the Claimant's case is simply that he had suffered a loss because, but for the tort, he would have earned money both before and after 19th April 2001 and that he is therefore entitled to recover the whole of his loss of earnings from the defendants. The manslaughter is not inextricably bound up with that claim.'

Although the legal burden of establishing causation in respect of each head of loss remained on the claimant, the evidential burden of showing that the manslaughter and the claimant's incarceration amounted to a break in the chain of causation was on the defendants. In such circumstances, it was a matter for the trial judge to decide whether the crime broke the chain of causation or not. If it did, the claim would fail for that reason. However, the court could not so hold in Mr Gray's case because the psychiatric evidence showed that he would not have committed the manslaughter but for the defendants' negligence. In these circumstances there could be no break in the chain of causation, the true cause (alternatively *a cause*) being the PTSD caused by the tort. If the manslaughter did not break the chain of causation between the tort and the loss of earnings, it could not fairly be said that the loss of earnings after 19th April 2001 was inextricably linked with the claimant's illegal act, or so closely connected or inextricably bound up with his criminal or illegal conduct that the court could not permit him to recover without appearing to condone that conduct.

The Court went on to consider whether the Law Reform (Contributory Negligence) Act 1945 applied to the case on the basis that the manslaughter was 'fault' within the meaning of section 1(1) of the Act. In such a case the resulting loss of earnings would have been partly caused by the tort and partly caused by the deliberate act of the claimant in stabbing Mr Boulwood, both being blameworthy. There was no reason in principle why Mr Gray could not recover for that part of the loss apportioned to the Defendants' tort. However, the Court felt unable to consider the question and remitted it for the consideration of the High Court.

The Defendant appealed to the House of Lords, which handed down its opinion on 17th June 2009. The appeal was allowed. Their Lordships held that it was the criminal act of manslaughter which had led to the imposition of the hospital order, thus preventing the Claimant from working, and that for public policy reasons the Claimant should not recover damages arising as a result of this criminal act. Unlike the Court of Appeal, they did not treat the case as being concerned only with issues of causation, but as being concerned

with public policy issues.

Lord Hoffman formulated the question for the House as follows:

"Whether the intervention of Mr Gray's criminal act in the causal relationship between the defendants' breaches of duty and the damage of which he complains prevents him from recovering that part of his loss caused by the criminal act. On the one hand, but for the accident and the stress disorder which it caused, Mr Gray would not have killed and would therefore not have suffered the consequences for which he seeks compensation. On the other hand, the killing was a voluntary and deliberate act. The stress disorder diminished Mr Gray's responsibility but did not extinguish it. By reason of his own acknowledged responsibility, Mr Gray committed the serious crime of manslaughter and made himself liable to the sentence of the court. The question is whether these features of the causal relationship between the injury and the damage are such as to prevent Mr Gray from recovering."

His Lordship identified two rules of public policy; a wider rule that a Claimant cannot recover compensation for loss suffered in consequence of his own criminal act, and a narrower and more specific rule that a Claimant cannot recover for damage which flows from loss of liberty, a fine or other punishment lawfully imposed upon him in consequence of his own unlawful act. In the latter 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 the Claimant to be compensated for that damage.

Lord Hoffman concluded that Mr Gray's claims for loss of earnings after his arrest and for general damages for his detention, conviction and damage to reputation were all claims for damage caused by the sentence imposed upon him for manslaughter and therefore fell within the narrower version of the rule, rendering them irrecoverable. There were also some additional claims, such as the claim for an indemnity against any claims which might be brought by dependants of the dead pedestrian and the claim for general damages for feelings of guilt and remorse consequent upon the killing, neither of which was a consequence of the sentence of the criminal court, but which fell within the ambit of the wider rule and were therefore also irrecoverable.

Following the decision of the House of Lords, it will be necessary for practitioners to consider claims potentially falling within the ambit of the doctrine *ex turpi causa* and to differentiate between those aspects of such a claim which would fall within the narrower doctrine, and those which would fall within the wider doctrine. The former will fail as a result of the operation of the public policy against compensating a Claimant in the civil courts for the consequences of the operation of the criminal courts. The latter will fail if the court considers, as in this case, that it was the Claimant's own criminal act which caused his loss.

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