

Ex Turpi Causa: An Analysis of the Decision in *Gray v Thames Trains Limited* (2008) PIQR P20

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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 rarely 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 He underwent a significant personality change, becoming socially withdrawn and anxious, suffering from angry outbursts and shunning physical contact.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 treatment 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 s.37 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 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 has 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 that 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 be 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 Boulton, 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 decision in *Gray* makes it clear that, in circumstances such as those arising in that case, the court will ask itself whether the losses for which the Claimant claims are so bound up with his conduct that the court should refuse to permit him to recover them. The Court of Appeal answered that question by addressing the issue of causation; did the Claimant's blameworthy conduct break the chain of causation, or was it itself caused by the tortious act of the Defendant? It is for the Defendant to show that there has been a break in the chain of causation, which in such cases can only be done by reference to medical evidence regarding the origins and causes of the mental disorder which led to the crime. However, it is not all bad news for Defendants; the court may apportion responsibility for the crime, and if it does, the Defendant will only be liable in respect of a proportion of the losses incurred thereafter. It is thought that this principle is likely to be the real battleground in future in cases in which *ex turpi causa* arises.

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