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Dirty Deeds

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Ex turpi causa non oritur actio

No cause of action may be founded upon an immoral or illegal act

- Where P has committed a criminal act in the course of events leading to his/ her injury
- As a matter of public policy, a claimant cannot recover compensation for loss suffered in consequence of his own criminal act
- *A complete* defence



Pitts v. Hunt [1991] 1 QB 24

“It is clear for a start that the fact that a plaintiff was engaged in an illegal activity which brought about his injury does not automatically bring it about that his claim for damages for personal injury as a result of the negligence of the defendant must be dismissed.”

Dillon LJ at 53

Something more precise is needed.



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Gray v. Thames Trains

[2009] 1 AC 1339



Gray v. Thames Trains

[2009] 1 AC 1339

- HL reversed CA
- Ld Hoffman: *ex turpi causa* excluded a claim not just for damage flowing from the criminal conviction, but from the criminal act.
- The issue was “simply one of causation” (at [54])
- The severity of the criminal acts outweighing arguments on the logic of causation

Gray v. Thames Trains

[2009] 1 AC 1339

- *Ex turpi* is not so much a principle but a policy based on a group of reasons which vary in different situations.
 - (i) A person cannot recover damages for a loss suffered in consequence of his or her own criminal act;
 - (ii) Civil courts should not make awards which are inconsistent with the decision of a criminal court.



Gray v. Thames Trains

“it is offensive to public notions of the fair distribution of resources that a claimant should be compensated ... for the consequences of his own criminal conduct.”

Is the criminal conduct a cause of the loss or the occasion for the loss?



Gray v. Thames Trains

“Can one say that, although the damage would not have happened but for the tortious conduct of the defendant, it was caused by the criminal act of the claimant? ... Or is the position that although the damage would not have happened without the criminal act of the claimant, it was caused by the tortious act of the defendant?”

Lord Hoffmann

Joint criminal enterprise

- *Delaney v. Pickett* [2012] 1 WLR 2149: drug dealing
- *Pitts v. Hunt* [1991] 2 QB 24: Reckless joyriding
- *Clarke v. Clarke & MIB* [2012] EWHC 2118: Fighting

Joyce v. O'Brien [2014] 1 WLR 70



Joyce v. O'Brien [2014] 1 WLR 70

“Where it is foreseeable that a party may be subject to unusual or increased risks of harm as a consequence of the activities of the parties in pursuance of their criminal enterprise, and the risk materialises, the injury can properly be said to be caused by the criminal act of the claimant even if it results from the negligent or intentional act of another party to the illegal enterprise.” per Elias LJ at [29]

Claimant's own criminal conduct

- *Vellino v. Chief Constable of Greater Manchester Police* [2002] 1 WLR 218: escaping from the police



Claimant's own criminal conduct

Beaumont v. O'Neill & Ferrer [2014] EWHC 2398:
jumping from a taxi





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Claimant's own criminal conduct

McCracken v. Smith [2015] EWCA Civ 380





Claimant's own criminal conduct

McCracken v. Smith [2015] EWCA Civ 380

- *D's defence of ex turpi causa would have far reaching consequences*
- *C precluded from recovering damages from friend driving bike, but entitled to damages from D, less contributory negligence*

Causation or public policy?

- Causation test: a rule-based approach
- Public policy: a range of factors test



Recent Supreme Court decisions

- *Hounga v. Allen* [2014] 1 WLR 2889
- *Les Laboratoires Serviers v. Apotex* [2015] AC 430
- *Bilta (UK) Ltd v. Nazir (No. 2)* [2016] AC 1
- *Patel v. Mirza* [2016] 3 WLR 399



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Patel v. Mirza [2016] 3 WLR 399



Patel v. Mirza [2016] 3 WLR 399

- Rationale for *ex turpi causa* is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system
- Majority: Lord Neuberger, Baroness Hale, Lord Kerr, Lord Wilson, Lord Toulson and Lord Hodge



Patel v. Mirza [2016] 3 WLR 399

- Assess whether the public interest would be harmed by allowing the claim:
 - (i) The underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by refusing the claim;
 - (ii) Any other relevant public policy on which the denial of the claim may have an impact;
 - (iii) Whether denial of the claim would be a proportionate response to the illegality, bearing in mind punishment is for the criminal courts.



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Patel v. Mirza [2016] 3 WLR 399

- BUT: the court is not free to decide the case in an unprincipled way.

Beaumont v. Ferrer & O'Neill

[2016] EWCA Civ 768

- The criminal conduct of the claimants was integral to the claim itself and any negligence on the part of the driver (per Longmore LJ at [24])
- *Hounga* (public policy approach) is not inconsistent with *Les Laboratoires* (rules based approach) because both cases hold that if criminal conduct is collateral, that is the same as saying public policy is not engaged, and is outweighed by other policy considerations.



What is the current position?

- *Patel v. Mirza* postdated *Beaumont* by one day. The public policy approach has prevailed over causation.
- In practice, P may well have to satisfy the causation test set out in *Gray v. Thames Trains*
- The decision in *Patel* leaves open the possibility of arguing proportionality and public policy – arguments rejected in the past.



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The Limitation (Childhood Abuse)(Scotland) Act 2017

David Sheldon QC*

*With grateful thanks to Richard Pugh, Compass Chambers



The pre-2017 landscape

- Prescription and Limitation (Scotland) Act 1973, ss.17 and 19A
- Pre-1964 – no claim
- Post- 1964 – s.17(2) - theoretical route for historic abuse victims, but generally unlikely to succeed (see eg *G v Glasgow City Council 2011 SC 1, para 18*)



In Practical Terms

- Pursuer had to rely on s.19A, - onus on him/her
=> mixed success
- If defender could establish prejudice the discretion would likely *not* be exercised (*B v Murray (No.2)* 2008 SC(HL) 146, paras 23-25); *F v Quarriers* [2015] CSOH 82.)
- Compare (*A v N* 2009 SC 449 and [2013] CSOH 161, affirmed [2015] CSIH 26)



A changing landscape?

- Historic abuse inquiries in England & Wales, and Scotland
- Developments in vicarious liability – *Lister v Hesley Hall* [2002] 1 AC 215 and now
- *Armes v Nottinghamshire CC* [2015] UKSC 60
- Acknowledgement of psychological element in limitation where delay - *A v Hoare* [2008] 1 AC 844



The 2017 Act

Limitation (Childhood Abuse) (Scotland) Act 2017

S.1 brought into force on 4 October 2017

PDF of Act and explanatory notes attached to these slides.

Amends 1973 Act, by inserting new ss.17A to 17D



Highlights

- 3 year limitation period removed for “abuse”, which commenced before the age of 18 (s.17A(1)(b) and (c))
- S.17A(1)(c) requires that “the act or omission to which the injuries were attributable constitutes abuse of the person who sustained the injuries”
- “Abuse” includes sexual, physical, and emotional abuse, and abuse in the form of neglect

.



Operation

- Applies to right of action accruing before Act came into force (s.17B)
- Applies where the claim was disposed of due to s.17, or if there has been a “relevant settlement” (s.17C).
- NB new provisions extend to cases where decree of absolvitor granted.



Exceptions

- The court retains a power to prevent an action from proceeding, if not possible to have a fair hearing or if the operation of ss.17B or C would create “substantial prejudice” (s.17D)
- NB- no change in pre-1964 position as right expired due to prescription, not disposed of due to s.17.



- What constitutes “abuse”? Some examples obvious, others less so. Boundaries of e.g. “emotional abuse”?
- How does court test the “reasonable belief” and monetary provisions of the “reasonable settlement” provision?
- When is a “fair hearing” no longer possible? Need for reliance on decisions in criminal cases?



More Questions

- What is “substantial prejudice” due to the operation of s.17B and 17C? What does this mean?
- Relevance of authorities under s.19A? Does there remain a place for the “alternative remedy” discussion?
- What about claims against local authorities? Whose “act or omission”?



Legislative competence

- Is the Act beyond the legislative competence of the Scottish Parliament? Could it be a breach of A1P1?
- See *AXA General Insurance Co Ltd v Lord Advocate* 2012 SC(UKSC) 122 – legitimate aim, reasonably proportionate, fair balance, special justification for interference with existing legal rights?



The Ministers' View

- “The bill is about striking a balance, and the issue of previously raised cases is one of the issues where special care has to be taken. The bill already goes further than other jurisdictions that have implemented similar legislation. Those other jurisdictions either do not allow relitigation at all or restrict relitigation to cases determined by the court. I noted earlier the Justice Committee’s concern about including the decree of absolutor in the bill and whether doing so would be ECHR compatible. However, the suggestion mooted by the committee of off-setting any compensation previously paid against any new compensation that would be awarded would take the ECHR to a whole new level and would significantly tip the balance away from the special justification and proportionality that are required in respect of potential interference with ECHR, in particular article 1 protocol 1.” (SP Stage 1, 27th April 2017.)



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