



Compass Chambers

Ex Turpi Causa:
Strict Liability and the Recovery of Fines

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Ex Turpi Causa

- For something seemingly quite rare, has produced surprising amount of recent litigation at the highest level.
- Purpose today to discuss one recent decision regarding its application in strict liability.
- Relevant to highly regulated fields, of which Health and Safety is one. Particularly when expert work is outsourced.



D Geddes (Contractors) Ltd v Neil Johnston Health and Safety Services Ltd [2017] CSOH 42 – Lord Tyre

- Operator of Quarry
- Employee died during a tipping operation
- HSE investigation revealed inadequacy in “stop-block” at the relevant location
- Insufficient height and problem with “ramping”



SUITABLE EDGE PROTECTION BERM PROFILE



UNSUITABLE EDGE PROTECTION BERM PROFILE

Geddes v Johnson

- Operator prosecuted under the Quarries Regulations 1999, Reg 6 – Strict Liability
- Pled guilty and fined £200,000
- Operator had detailed H&S policy
- Took independent H&S advice from Neil Johnson
- The advice included the conduct of annual safety inspections and the provision of written reports

Geddes v Johnson

- Action for damages raised, encompassing the £200,000 paid as the fine
- Preliminary Issue — Whether, because of the operation of the *ex turpi causa* principle, the pursuer's claim was barred from proceeding?
- In effect, the argument was that because the damages were the fine, they could not be recovered

Gray v Thames Trains [2009] AC 1339

- “[33] *It follows that they are both authority for the proposition that, where a claim or a head of claim depends upon the claimant's criminal act it cannot succeed on the public policy ground that ex turpi causa non oritur actio or ex turpi causa non oritur damnum, as the case may be.*”

Lord Hoffman

- Leads to wide application of the rule and narrow application of the rule

Gray v Thames Trains [2009] AC 1339

- “[77] Likewise, in the present case, when considering the claim for loss of earnings, a civil court should bear in mind that it is desirable for the criminal and civil courts to be consistent in the way that they regard what the claimant did. As Samuels JA observed in *State Rail Authority of New South Wales v Wiegold* 25 NSWLR 500 , 514, failure to do so would generate the sort of clash between civil and criminal law that is apt to bring the law into disrepute.”

Lord Rodger

- Defender's position was that this action was an application of Lord Hoffman's "narrow rule" and that awarding damages would create the type of inconsistency contemplated by Lord Rodger.
- Pursuer's response was that, whilst it accepted the application of the rule for cases involving *mens rea*, it did not necessarily apply to strict liability.
- No Scottish authority on the issue and only brief English consideration.

- *Les Laboratoires Servier v Apotex* [2015] AC 430
- “[29] It is right to add that there may be exceptional cases where even criminal and quasi-criminal acts will not constitute turpitude for the purposes of the illegality defence. In *Gray v Thames Trains Ltd* [2009] AC 1339 , para 83, Lord Rodger of Earlsferry suggested that some offences might be too trivial to engage the defence. In general, however, the exceptional cases are implicit in the rule itself. This applies in particular where the act in question was not in reality the claimant's at all.



- *Leaving aside questions of attribution which arise when an agent is involved, and which are no part of the present appeal, there is a recognised exception to the category of turpitudinous acts for cases of strict liability, generally arising under statute, where the claimant was not privy to the facts making his act unlawful: see Stone & Rolls Ltd v Moore Stephens [2009] AC 1391 , paras 24, 27, per Lord Phillips of Worth Matravers. In such cases, the fact that liability is strict and that the claimant was not aware of the facts making his conduct unlawful may provide a reason for holding that it is not turpitude.*

Lord Sumption



- “[13] The question for determination in the present case, however, is whether a “strict liability” exception of the kind described by Lord Sumption in Les Laboratoires Servier applies to narrower form cases, ie where the loss that the claimant seeks to recover arises as a consequence of a punishment (or other disposal) imposed by a criminal court.”

Lord Tyre

Some Helpful Dicta

“...as to cases where the person fined was under an absolute liability, it appears that such fine can be recovered in circumstances such as the present as damages unless it is shown that there was on the part of the person fined a degree of mens rea or of culpable negligence in the matter which resulted in the fine. The onus in cases such as the present is on the defendants, who were the true cause of the sequence of events leading to the fine, to show that there are circumstances which make that fine irrecoverable as damages by the plaintiff”

Sachs LJ — *Osman v J Ralph Moss*



Some Helpful Dicta

“Here is a case of absolute liability. This man incurred that liability through no fault, no negligence or dishonesty on his part. He incurred it because he was grossly misled by the insurance brokers whose duty it was to advise him. It would, as I think, be quite wrong in such circumstances if he was not able to recover the amount of this fine as a just debt.”

Phillimore LJ — *Osman v J Ralph Moss*

...and some Unhelpful...

“I confess that when first I saw the nature of this action I formed and indicated a strong opinion that it was misconceived, on the broad ground that a person convicted of a criminal offence could never have the assistance of a civil Court to ease himself of the punishment by the recovery over either of the amount of any fine or costs or of damages to compensate him for any imprisonment, and that there could be no difference between cases where the Legislature had made an act or default punishable as a crime without the existence of a guilty mind and any other class of offence.”

Rowlatt J— *R Leslie Ltd v Reliable Advertising Agency*



...even some confused?...

“In Safeway Stores Ltd v Twigger, Longmore LJ observed at paragraph 18 that “it has not been expressly decided whether the maxim (in either its narrower or wider version) applies where the criminal act is one of strict liability and the claimant may not have been at fault at all”. This is somewhat curious because, as noted by Pill LJ in the same case at paragraphs 49-50, the point had been decided in Osman”

Lord Tyre

Some Clarity – Lord Tyre

“[17] I conclude from the foregoing review that there is no authority for the proposition that recovery of a loss consisting of a criminal penalty or the consequences of imposition of a criminal sanction is necessarily excluded by the in turpi causa principle...”

Some Clarity – Lord Tyre

...The decision in Gray appears to me to support rather than cast doubt upon the proposition that responsibility for commission of the offence, rather than the nature of the loss claimed, is the most important factor to be considered. It is certainly true that the courts have placed emphasis, in narrower form cases, on the need to avoid inconsistency between the criminal and civil law so that the law does not, as it was put by McLachlin J in the Supreme Court of Canada in Hall v Hebert [1993] 2 SCR 159 at 178, give with one hand what it takes away with the other.”

Some Clarity – Lord Tyre

But all of these observations were made in the context of a claimant who was, or was at least presumed to have been, aware of what he was doing when he committed the offence. When one is considering the position of a person with no such awareness but who has nevertheless been punished for commission of an offence, it seems to me that a different balancing of policy considerations is required.

Some Clarity – Lord Tyre

I, for my part, am satisfied that the court in Osman reached a decision which is entirely supportable in terms of policy and which does not give rise to unacceptable difficulties of inconsistency between civil and criminal law. On the contrary, to have refused a right of action to the “innocent” motorist convicted of driving without insurance because of the negligent conduct of the broker would, in my view, have been more likely to bring the law into disrepute than to allow it.”



In what circumstance?

“[18] What the authorities make clear, however, is that intentional wrongdoing on the part of the claimant is not the only basis upon which a right of recovery of criminal penalties may be excluded by the ex turpi causa principle. Use of the term mens rea may be appropriate in, for example, cases concerning mental disorder such as Gray v Thames Trains Ltd , but it is insufficient, in my opinion, to cover the whole range of circumstances in which a defence based on the principle may be available. The key concept, as it seems to me, is responsibility rather than mens rea.”



In what circumstance?

“[19] It is important to note that in a case where a person convicted of an offence seeks to recover the penalty from a third party on grounds of, say, fraud or negligence, and the defence is that the claimant was himself guilty of negligence, the court's task is not one of weighing up the parties' respective culpability. If negligence on the part of the claimant is established, the ex turpi causa principle excludes his claim altogether.”

Conclusion

- Strict Liability offences, even where recovery is under the narrow rule, are not necessarily barred by *ex turpi causa*
- The whole facts and circumstances need to be considered
- If the defender can show any responsibility on the pursuer, the defence will operate
- When it operates, it bars the claim altogether

Why Relevant?

- Fines rising
- Many large companies take external expert advice, building it into their H&S policies. Given proliferation in offences and guidance, unsurprising.
- The potential for a right to recover may be something to take into account at the outset of an instruction in a criminal case.
- If it is even a potential, then that might affect the way the matter pleads. Obviously, need to accept responsibility, but H&S advice may be relevant