

Defences - Illegality (Ex Turpi Causa Non Oritur Actio)

Ecila Henderson v Dorset Healthcare University NHS Trust Foundation [2020] UKSC 43

Facts:

The appellant, who suffers from paranoid schizophrenia or schizoaffective disorder, stabbed her mother to death in 2010 during a serious psychotic episode whilst under the care of the Defendant's community mental health team. She pleaded guilty to manslaughter and was sentenced to a hospital order under s.37 Mental Health Act 1983. The Defendant health authority admitted negligence in failing to return the appellant to hospital when her psychiatric condition had deteriorated. The appellant claimed a range of heads of damages, but the Defendant trust argued that the claim was barred for illegality.

Issues:

Was the claim barred for illegality?

The Supreme Court's answer was yes; there was a very close connection between the claim and the illegality so the claim was barred. The general rule was clarified, that whilst Claimants can recover damages for the personal consequences of self-harm as a result of negligent health care, they cannot claim for the personal consequences of causing criminal harm to others. This results in a bar to damages resulting from a criminal sentence, whether general damages for the detention and consequent loss of earnings, or for feelings of guilt consequent upon the criminal act.

Lord Hamblin giving the Court's judgment, confirmed that the illegality defence is justified in 2 ways, firstly the need to ensure consistency between the law of tort and the criminal law, in that it would be inconsistent for a criminal Court to imprison someone only for the law of tort to compensate them. In this Lord Hamblin referred to Lord Sumption in *Patel*, who himself cited Lord Hughes in *Hounga v Allen* [2014] 1 WLR 2889, "*the law must act consistently; it cannot give with one hand what it takes away with another, nor condone when facing right what it condemns in facing left*". Secondly, he emphasised the need to maintain public confidence in the legal system; that a claimant should not be compensated for the consequences of their own criminal conduct.

Despite the fact that the appellant was convicted of manslaughter on the grounds of diminished responsibility, her responsibility was not completely removed, and so the Court held that to allow recovery in civil proceedings would be inconsistent with the criminal sentence.

The Court was also mindful of the public interest in NHS funding and Lord Hamblin noted that, "*if recovery is permitted, funds will be taken from the NHS budget to compensate the appellant for the consequences of her criminal conviction for unlawful killing*" (paragraph 127). The gravity of the appellant's wrongdoing heightened the significance of the public confidence considerations.

Was the Court bound by the House of Lords' decision in *Gray v Thames Trains Ltd* [2009] UKHL 33?

The Supreme Court held that *Gray* remains good law and is consistent with the policy-driven approach in *Patel v Mirza*.

Whilst following the decision in *Gray*, the Court did leave open the exceptional possibility that illegality may not apply where the criminal act would not constitute "turpitude", for example where the criminal act was trivial or a strict liability offence (paragraph 112), which would be consistent with the more flexible approach in *Patel*.

Vicarious Liability

Chell v Tarmac Cement and Lime Ltd [2020] EWHC 2613 (QB)

Facts:

The Claimant was the target of a practical joke by one of the Defendant's employees, while he was a site fitter sub-contractor working for the Defendant on their premises. The Claimant was injured when the Defendant's employee hit explosive pellet gun targets with a hammer close to the Claimant's head causing a loud explosion. The Claimant suffered a perforated eardrum, tinnitus and noise-induced hearing loss. There had been tensions between the employees and sub-contractors and the Claimant argued that the Defendant should have undertaken a risk assessment for the foreseeable risk of injury arising from those tensions, and otherwise were vicariously liable for the employee's actions.

Issues:

Was an employer vicariously liable for an employee's practical joke?

Spencer J, dismissing the Claimant's appeal, agreed with the first instance judge that the employee was engaged on a frolic of his own, and could not properly be held to be acting in the ordinary course of his employment. The pellet gun target was not work equipment and did not form part of his work. The employee's actions did not further the objectives of the employer, nor was it an act directly against the employer so the employer would not be held vicariously liable.

An employer's risk assessment would not be expected to include horseplay, ill-discipline and malice. Existing health and safety procedures on conduct would be sufficient, and it would be unreasonable to extend the employer's duty to cover horseplay.

Damages

Swift v Carpenter [2020] EWCA Civ 1295

Facts:

The Claimant had suffered a serious injury in a road traffic accident requiring a below-knee amputation and significant leg injury. The cost of suitable accommodation was estimated to be £900,000 more than the value of her existing home. The trial judge, bound by the established law from the case of *Roberts v Johnstone* (1989) awarded the Claimant no damages under this head of accommodation claims – a nil award – to avoid over-compensating her, but granted her permission to appeal.

The Court of Appeal had to decide whether it could depart from the *Roberts v Johnstone* basis for calculating an accommodation claim.

Issues:

Accommodation Claims in Damages

Upon appeal, the Court decided upon a new approach, which will presumably be named a *Swift v Carpenter* award as the old formula did not meet the objective of fair and reasonable compensation. The Court of Appeal held that it had the power to intervene to revisit and alter its previous guidance as it was ineffective in achieving full compensation without over-compensation.

The new calculation is made by awarding the additional capital cost of the new property less the present market value of the reversionary interest in that property (ie. giving credit for the value of the increase at the time of death).

Using the Claimant's figures as an example:

Cost of new property = £2,350,000

Value of existing property = £1,450,000

Capital shortfall = £900,000

Less the value of the reversionary interest = £900,000 x (1 + 5% discount rate applied to Claimant's life expectancy) = £98,087

Damages Awarded = £900,000 - £98,087 = £801,913

The Defendant is seeking leave to appeal to the Supreme Court.

Topic: Damages

Whittington Hospitals v XX [2020] UKSC 14

Facts:

The Claimant developed cervical cancer after 2 cervical smear tests and cervical biopsies which were wrongly reported by the Defendant hospital. When the errors were finally detected, the Claimant's cervical cancer was too advanced to enable her to have surgery to preserve her ability to have children. The Claimant therefore froze embryos prior to undergoing the necessary chemo-radiotherapy treatment. The Claimant and her partner wanted to have 4 children and wished to do so through surrogacy arrangements. Evidence showed that it was likely that they could have 2 children using her eggs and her partner's sperm and 2 further children using donor eggs and her partner's sperm. Surrogacy in the UK cannot be offered on a commercial basis and such arrangements are unenforceable, and the Claimant's preference was for commercial surrogacy arrangements to be undertaken in California, failing that to use non-commercial arrangements in the UK.

The Defendant hospital admitted liability. The first instance judge rejected claims for the cost of commercial surrogacy as contrary to public policy (following *Briody v St. Helen's & Knowsley Area Health Authority* [2000] EWCA Civ 1010), but allowed damages for the Claimant's own-egg surrogacies on a non-commercial basis in the UK, but not for those using donor eggs.

The Court of Appeal heard cross-appeals and found in favour of the Claimant to allow claims for commercial surrogacy and the use of donor-eggs. The Defendant hospital then appealed to the Supreme Court.

Issues:

Recovery of damages for surrogacy arrangements following the Defendant's negligence:

Lady Hale gave the majority judgment dismissing the Defendant hospital's appeal, confirming that *Briody* is not binding on the Court, and its persuasiveness is reduced by changing social attitudes to surrogacy and developments in the law since that case was decided.

The Court confirmed that whilst damages in tort seek to put the Claimant back in the position as if she had not been injured unless it is contrary to legal or public policy, it was reasonable to seek to remedy the loss of a womb through own-egg surrogacy if the chances of a successful outcome were reasonable. Seeking surrogacy in California does not involve a criminal offence either in the UK or abroad so is not contrary to law or public policy.

In relation to the donor-egg surrogacy claim, contrary to *Briody* this should be allowed, as this is the closest it is possible to get to putting the Claimant in the position she would have been in if she had not been injured. Damages for the reasonable costs of donor surrogacy would therefore be recoverable if the arrangement has reasonable prospects of success. Lady Hale emphasised the developments in what the law considers constitutes a family (paragraph 30).

Finally, Lady Hale confirmed that awards of damages for foreign commercial surrogacy arrangements are no longer considered contrary to public policy. Factors limiting the availability and extent of such awards are that the costs involved and treatment programme must be reasonable and it must be reasonable for the Claimant to seek foreign commercial surrogacy arrangements rather than non-commercial arrangements in the UK.

On this final point Lord Carnwarth dissented (and Lord Reed agreed), he felt that there was a principle of legal coherence and whilst there were developments in the law, commercial surrogacy remained illegal in the UK, which led to the refusal of damages in *Briody*, and legal coherence therefore required damages to be refused (paragraphs 55-68).

Negligence/Breach of Statutory Duty – Breach of Duty – Burden of Proof

Smithson v Lynn & North Yorkshire County Council [2020] EWHC 2517 (QB)

Facts:

The Claimant was a passenger in the First Defendant's car when he skidded on ice and lost control before colliding with a tree. The First Defendant blamed the Second Defendant local authority for failing to prevent the formation of ice on the road and issued Part 20 proceedings seeking a contribution/indemnity under s.1(1) of the Civil Liability (Contribution) Act 1978.

On the night of the accident, 5 accidents occurred on the same road (which is approximately 3 miles long), the police gave evidence at trial that 2 of the previous accidents occurred on the same bend as the final accident in which the Claimant was injured. Prior to this index accident the police had made 2 requests that night to the Second Defendant local authority to grit the road, as there was black ice, possibly due to a water leak. The Second Defendant refused to grit the road as it was not a priority route and would not agree to an ad hoc spot gritting.

Issues:

Reasonable Practicability

HHJ Gosnell (sitting as a Judge of the High Court) held that if the road was not due to be gritted until the following morning, it might be said to be foreseeable that another accident might occur during the intervening time. It was not reasonably practicable though for the Second Defendant to grit every mile of public highway that it was responsible for every time that temperatures were likely to fall below freezing.

He held that it was clear from the 5 accidents on the road that night that the Second Defendant (as the relevant highway authority) had not ensured safe passage along the road due to the snow and ice. The only issue was whether the local authority had done what was reasonably practicable, and the burden of proving that fell upon the local authority, and on the facts they had failed to do so.

The quantum of risk was identifiable as the possibility of a serious road traffic accident may occur if the road was not gritted, but the likely cost (both financial and in terms of manpower) to ameliorate that risk did not seem particularly significant. On the balance of probability the local authority was in breach of their statutory duty under s.41(1A) of the Highways Act 1980.

Apportionment of Liability

In the circumstances the First Defendant was negligent, driving too fast for the wintery conditions. If he had driven more slowly then it is likely that he would not have lost control of his car and the Claimant would not have been injured. Equally, if the local authority had spot gritted the accident scene then it is unlikely that the First Defendant would have lost

control of his car. The Court found that the local authority Second Defendant was two thirds to blame, and the First Defendant one third to blame. Liability was apportioned accordingly.

Defences - Contributory Negligence

Campbell (A protected party who proceeds by his father and litigation friend Donald Campbell) v Advantage Insurance Company Ltd [2020] EWHC 2210 (QB)

Facts:

The Claimant had been drinking alcohol at a nightclub with 2 brothers, Dean and Aaron Brown. The Claimant was assisted to get into Dean's car and placed in the front passenger seat. The Brown brothers returned to the club continuing drinking for an hour or so. Evidence on the balance of probabilities was that Dean had assisted the Claimant from the front passenger seat into the back seat before driving and then crashing into an articulated lorry killing Dean. The Claimant, who was most likely lying down, survived but suffered serious injuries. The Defendant admitted primary liability but alleged contributory negligence on the basis that the Claimant had knowingly allowed himself to be driven by Dean who he knew, or ought to have known, was too intoxicated to drive, and because the Claimant was not wearing a seatbelt.

Issues:

How should contributory negligence be assessed in a case of self-induced intoxication?

The case was heard by HHJ Robinson (sitting as a High Court judge) who considered whether the Claimant had capacity to consent to being moved into the back seat of the car and to being driven by Dean. He determined that the question of capacity is both time and issue specific. The Court decided that if the Claimant had capacity to consent to changing position within the car, then he also had capacity to consent to being driven in the car, knowing that it was Dean's car and Dean was likely to drive it.

The judge held that self-induced intoxication was a different situation to someone being ill or of unsound mind for whom contributory negligence would not apply.

The judge considered that the Claimant had capacity to decide whether to wear a seatbelt and had decided not to do so. He then considered the famous seatbelt case of *Froom v Butcher*, but the evidence did not show that wearing a seatbelt would have made a considerable difference to the injuries.

The judge assessed contributory negligence at 20% on the basis that there was no evidence of prior agreement that Dean would drive the Claimant home, that the Claimant was not present throughout the time of Dean drinking alcohol, and that the decision to be driven by Dean was taken without a great deal of thought.

Damages – Fatal Accidents Act 1976

Fatal Accidents Act 1976 (Remedial) Order 2020

https://www.legislation.gov.uk/ukdsi/2020/9780111193136/pdfs/ukdsi_9780111193136_en.pdf

This remedial order came into force on 6th October 2020. The Order amends s.1A of the Fatal Accidents Act 1976 to extend the scope of the statutory bereavement award to cohabittees.

Section 1A FAA 1976 provides a fixed sum of bereavement damages in the event of a fatal accident which is caused by wrongful act, neglect or default. This Order extended the categories of people who could be awarded bereavement damages to cohabiting partners.

Cohabiting partners were defined in the new s.2A FAA 1976 as a person who was:

- (a) “living with the deceased in the same household immediately before the date of the death; and”
- (b) “had been living with the deceased in the same household for at least two years before that date;”

This Order was required following the Court of Appeal decision in Jacqueline Smith v Lancashire Teaching Hospitals NHS Foundation Trust & others [2018] EWCA Civ 1916. In that case the Court of Appeal made a declaration of incompatibility, on the basis that limiting damages to married couples or civil partners and not extending the awards to cohabiting partners was contrary to Article 14 and Article 8 of the European Convention of Human Rights.