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FOIL UPDATE

3 November 2020



No change to the law on ex-turpi causa

Henderson (A Protected Party) v Dorset Healthcare University NHS Foundation Trust (2020) UKSC 43

The claimant/appellant suffered from paranoid schizophrenia or schizoaffective disorder. In August 2010, she was under the care of a body which was managed and operated by the defendant/respondent. On or around 13 August 2010, the claimant's condition began to deteriorate. On 25 August 2010, she stabbed her mother to death whilst experiencing a serious psychotic episode. The claimant was convicted of manslaughter by reason of diminished responsibility.

Following the criminal trial at which the claimant was sentenced to a hospital order under S37 and an unlimited restriction order under S41 Mental Health Act 1983, the claimant brought a negligence claim against the defendant, seeking damages for personal injury and other loss and damage. The defendant admitted liability for its negligent failure to return the claimant to hospital when her psychiatric condition deteriorated. It accepted that, if it had done this, the killing of her mother would not have taken place.

IN BRIEF

The claimant failed to satisfy the Supreme Court that the facts of her case distinguished it from those in *Gray (2009)*.

She had killed her mother and been convicted of manslaughter and claimed damages from the defendant. The defendant had admitted that it should have returned the claimant to hospital before the incident in question.

At first instance and on the claimant's first appeal, the defendant successfully argued that the claim was barred for illegality, because the damages claimed resulted from: (i) the sentence imposed on her by the criminal court; and/or (ii) her own criminal act of manslaughter. The Supreme Court (UKSC) was asked to decide whether the claimant/appellant, could claim from the defendant/respondent damages for loss she had suffered as a result of her conviction for her mother's manslaughter.

Dismissing the claimant's further appeal, the UKSC found that *Gray (2009)* should not be distinguished. The claimant argued that the reasoning in *Gray* did not apply or could be distinguished, because *Gray* concerned a claimant with significant personal responsibility for his crime. In contrast, in this claimant's criminal trial, the judge said that there was no suggestion that she should be seen as bearing a significant degree of responsibility for what she had done. This argument was rejected, as the crucial consideration in *Gray* was that the claimant had been found to be criminally responsible for his conduct, not the degree of personal responsibility which that reflected.

The UKSC also refused to depart from *Gray* on three grounds put forward by the claimant in reliance on *Patel (2016)*. The essential reasoning in *Gray* was consistent with *Patel*, and so remained good law. The fundamental policy consideration relied on in *Gray* was the need for consistency so as to maintain the integrity of the legal system, which was the underlying policy question in *Patel*.

The majority in *Gray* had considered that an inconsistency would arise between the civil and criminal law regimes if a claimant was allowed to recover damages resulting from a sentence imposed on them for an intentional criminal act for which they had been held responsible: that would be to treat an offender under the criminal law as a victim under tort law, and entailed a clear risk of inconsistent decisions being reached in the criminal and civil courts. That conclusion was not altered by the fact that the sentence imposed by the criminal court, such as a hospital order, might not entail a penal element; such an order did not mean that the claimant was blameless. Moreover, a sentencing judge would not be specifically addressing the issue of significant personal responsibility, which raised questions of great complexity.

In *Patel*, a 'trio of considerations' were said to be (i) the underlying purpose of the prohibition which had been transgressed and whether that purpose would be enhanced by denial of the claim; (ii) any other relevant public policy on which denial of the claim might have an impact; and (iii) whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment was a criminal court matter.

An important purpose of the prohibition transgressed was to deter unlawful killing in order to protect the public. There was also a public interest in the condemnation and punishment of unlawful killing. Other policy considerations raised by the claimant did not begin to outweigh those which supported denial of the claim, particularly the effect of inconsistency in the law on the integrity of the legal system. In terms of proportionality, the offence was of a very serious nature and was central to all heads of loss claimed. The killing was intentional, regardless of the degree of personal responsibility.

Finally, the claimant could not claim damages for loss of liberty or for loss of amenity during her detention in hospital because these heads of loss resulted from the sentence imposed on her by the criminal court. The other heads of loss could not be recovered because they resulted from the claimant's unlawful killing of her mother. It would be inappropriate for the court to subvert the operation of the Forfeiture Act 1982, which prevented the claimant from recovering her full share of her mother's estate.

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