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### The common law defence of illegality

*RO (Protected Party) v Gray and another (2021) EWHC 2770 (QB)*

In the early hours of the morning, the claimant and his passenger were seriously injured when the Ford Transit van he was driving struck a wall at speed. The claimant's case was that the first defendant, was pursuing him at the time and that the collision, and so his injuries, were caused by the first defendant.

The first defendant was convicted of causing serious injury by dangerous driving, dangerous driving and driving whilst disqualified. He was not insured to drive at the time and so the second defendant, the Motor Insurer's Bureau (MIB) effectively stood in his shoes.

In the run up to the events complained of, the claimant and the first defendant (with others) had been involved in a series of unpleasant exchanges, some violence and some property damage. In the first two stages, the claimant acted aggressively, violently and in an intimidating manner towards the first defendant and the others. In the third stage, the claimant was doing everything he could to get away from them.

The claimant was not prosecuted in respect of any of the events which took place in the 30 minutes or so immediately preceding the incident

The claimant pleaded his case against the first defendant in assault and battery rather than negligence. The second defendant relied on the common law defence of illegality as a complete defence to the claim.

#### IN BRIEF

Notwithstanding the claimant's deplorable, disgraceful and illegal conduct earlier in the series of events, it was not the cause of his loss.

The cause was the first defendant's deliberate execution of an inherently dangerous manoeuvre which caused the claimant's vehicle to crash and resulted in life-changing injuries for the claimant.

Having considered the relevant authorities in detail, the High Court Judge held that the fundamental question was whether allowing the claim would damage the integrity of the law by permitting incoherent contradictions or, produce inconsistency and disharmony in the law and so damage the integrity of the legal system. There was a trio of considerations to be drawn from *Patel (2016)*: potentially relevant factors included the seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was marked disparity in the parties' respective culpability.

The claimant's conduct on the evening in question was deplorable and disgraceful. It fell well below the standards that could be expected in a law-abiding and decent society and it could have been expected to warrant criminal sanctions. However, the gravity of the claimant's wrongdoing (taken in its totality or considered only to the extent that it concerned the first defendant) was not at the top of the range but was closer to the bottom of the range than it was to the middle. The claimant's illegality did not (in the sense required) cause his own loss. The claimant's wrongdoing "merely provided the occasion" for the first defendant to do harm. Certainly, in the instant case, the claimant did not need to rely on his own wrongdoing to make good his claim.

This was not a case in which the claimant stood to make a profit from his wrongdoing. If his claim was allowed, he would receive compensation designed to put him in the position he was in before he was injured. It seemed highly unlikely that this consideration would be engaged in tort claims where damages were sought in respect of personal injury. The question was much more likely to be useful in contract claims. In such claims the parties had bargained for a benefit. In tort claims (zero-sum claims) there was no bargain and no possibility of a benefit. It followed that the policy that the court should not assist a claimant to benefit from his wrong was not engaged.

The claimant argued that the policy considerations which favoured allowing the claim easily outweighed those that favoured upholding the defence. The overwhelming consideration was that the tortfeasor whose actions were the operative cause of loss should be required to compensate his victims. A linked consideration was that if the defence was upheld, the burden of providing care, support and perhaps rehabilitation would fall on the State and in particular come out of the NHS budget. The public policy of discouraging those who (like the first defendant) took the law into their own hands and acted like vigilantes also supported allowing the claim.

The points identified by the Law Commission in 2001 that it was undesirable that the claimant should need to fall back onto State benefits in respect of, for example, an inability to work as a result of the injury and the possibility of a transfer of the financial responsibility from the first defendant tortfeasor to the public purse or the Criminal Injuries Compensation Authority were important factors which supported the rejection of the defence.

The judge dealt with each of the points raised in *Patel*.

- a. The seriousness of the conduct: the claimant's wrongdoing was serious but was at the lower end of the scale of criminal conduct.
- b. The centrality of the conduct to "the transaction" (here, the loss): the claimant's conduct played a part in the train of events that led to his injuries. That conduct was however peripheral and not central. The operative causative factor of the claimant's injuries was the first defendant's deliberate action.
- c. Whether the conduct was intentional: the claimant's wrongs were obviously deliberate, and he was aware that his conduct was criminal.

d. Whether there was a marked disparity in the parties' respective wrongdoing; this was the key consideration when considering proportionality in the present case. The claimant engaged in deliberate criminal conduct towards the bottom end of the scale. That conduct resulted in some property damage and (over its full course) some general public disorder and fear of the type that an experienced doorman found to be nothing out of the ordinary. The claimant was jointly responsible with another for blows struck to the first defendant. On the other hand, the first defendant deliberately executed an inherently dangerous manoeuvre which resulted in life-changing injuries for the claimant. Further, the first defendant was sentenced to more than three years in prison whilst the claimant was not prosecuted. It would be wholly disproportionate in the present case to refuse any relief to the claimant. Such a course, rather than promoting harmony and consistency on the legal system would bring it into disrepute and be obviously offensive to the public interest.

The full judgment is to be found at: [RO v Gray & Anor \[2021\] EWHC 2770 \(QB\) \(15 October 2021\) \(bailii.org\)](#)

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