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Journal of Professional Negligence

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Contents

Insanity and illegality

Lewis-Ranwell v G4S Health Services (U.K.) Limited and others

[2022] EWHC 1213 (QB)
Garnham J
20 June 2022

Illegality defence – insanity and diminished responsibility

Introduction

In *Gray v Thames Trains*[1] the claimant's personality had been changed by involvement in a bad railway accident to such an extent that he killed a man in the street. He was charged with murder, but the prosecution accepted a plea of guilty of manslaughter on the ground of diminished responsibility. He was detained in prison and later, when a place was found, in hospital. He claimed damages for negligence against the railway company, including for his conviction and detention, loss of earnings, feelings of guilt and remorse and loss of reputation. The House of Lords rejected all his claims on the grounds that some of the loss flowed from the sentence of a criminal court (the 'narrower ground') and that the rest was the consequence of the claimant's own criminal act (the 'wider ground'). In doing so, the House of Lords approved similar decisions of the Court of Appeal in *Worrall v British Railways Board*[2] and *Clunis v Camden and Islington Health Authority*,[3] and the decision in *Gray* was itself followed in *Henderson v Dorset Healthcare University NHS Foundation Trust*.[4] In *Clunis* and *Henderson* the negligence alleged was failure to look after a mentally ill patient.

Both in *Clunis* and in *Gray*, the question whether the decision would be different if the claimant had been acquitted on the ground of insanity was left open.[5] In *Traylor v Kent and Medway NHS Social Care Partnership*,[6] Johnson J held that the illegality bar did not apply where the claimant was insane, but since he found that there had been no negligence on the facts this was *obiter*. In the New South Wales decision of *Hunter Area Health Authority v Presland*,[7] which was another insanity case, the Court of Appeal unanimously held that the claim was not barred by illegality but a majority held that it was barred 'as a matter of common sense' or by 'legal policy ultimately based on community values'.[8]

The fundamental principle in illegality cases

In most of the recent illegality cases, it has been emphasised that the main consideration where the defendant seeks to bar a claim on the ground of the claimant's illegal conduct

1 [2009] UKHL 33.
2 [1999] CA Transcript 634.
3 [1998] QB 978.
4 [2020] UKSC 43.
5 [1998] QB 978 at 989E-G; 2009 UKHL 33 at [42] per Lord Hoffmann.
6 [2022] EWHC 260 (QB).
7 (2004-5) 63 NSWLR 22.
8 See per Shellar JA at [300] and per Santow JA at [315].

was consistency so as to maintain the integrity and coherence of the law.[9] For example in *Henderson* Lord Hamblen JSC said:[10]

> … the fundamental policy consideration relied upon in *Gray* was the need for consistency to maintain the integrity of the legal system, the very matter that was held in *Patel* to be the underlying policy question.

It is well recognised that there is a range of cases which, while not involving criminality, do involve moral 'turpitude' which public policy requires to be treated as 'quasi-criminal' for the purpose of the illegality bar. These have been most recently analysed by Lord Sumption in *Les Laboratoires Services v Apotex Inc.*[11] They include unlawful contracts, contracts for immoral purposes, cases of completion or fraud or other illicit business practices: in such cases the public policy requires that the claimant should not recover. There is no suggestion in this case or any other that conduct involving neither illegality nor any other form of moral 'turpitude' should bar a claim.

The application in *Lewis-Ranwell*

In *Lewis-Ranwell*, the issue arose directly for decision. The claimant, who was schizophrenic and psychotic, killed three men. He was charged with murder, but was found by the jury to have been insane and acquitted. He was sent to Broadmoor under provisions of the Mental Health Act 1983. He alleged a negligent failure to look after him against all four defendants and claimed damages. Three of the defendants sought to have the claim struck out on the ground of illegality, and Garnham J dealt with the application on the basis that the facts pleaded were assumed to be true. The application was made only in relation to the common law negligence claim, not a separate claim for breach of the claimant's rights under articles 3 and 8 ECHR.

The statutory provisions

Given the emphasis on maintaining the coherence of the law, Garnham J was right to start with the relevant statutes. As Lord Toulson observed in *Patel*:[12]

> The courts must obviously abide by the terms of any statute.

As regards diminished responsibility, by section 2 of the Homicide Act 1957 as amended by section 52(1) of the Coroners and Justice Act 2009, a defendant who would otherwise be convicted of murder can invoke the partial defence of diminished responsibility by establishing that he or she was suffering from abnormality of mental function arising from a recognised mental condition which substantially impaired the ability (a) to

9 See *Patel v Mirza* [2016] UKSC 42 at [99, 120] per Lord Toulson; *Stoffel & Co. v Grondona* [2020] UKSC 42 at [26].
10 [2020] UKSC at 94.
11 [2014] UKSC 55 at [23–9].
12 Ibid at [109].

understand the nature of the conduct and/or (b) to form a rational judgment and/or (c) to exercise self control and that this caused or significantly contributed to the killing of the deceased.

Thus by definition, before any question of diminished responsibility arises, the defendant must have killed with murderous intent and, even if the partial defence is established, remains guilty of manslaughter, a serious criminal offence. This is the cause of the injury and loss on which the civil claim is based, and it runs straight into the illegality bar because of the inconsistency between allowing such a claim and the prohibition against unlawful killing.

By contrast, as regards insanity, section 2 of the Trial of Lunatics Act 1883, as amended by the Criminal Procedure (Insanity) Act 1964 provides:

> (1) Wherein any indictment or information any act or omission is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that he was insane, so as not to be responsible, according to law, for his actions at the time when the act was done or omission made, then, if it appears to the jury before whom such person is tried that he did the act or made the mission charged, but was insane as aforesaid at the time when he did or made the same, the jury shall return a special verdict that the accused is not guilty by reason of insanity. (Emphasis added)

Section 5(2) of the Criminal Procedure (Insanity) Act 1964 then provides for various forms of disposal, ranging from hospital and restriction orders to absolute discharge, where a special verdict has been returned that the accused 'is not guilty by reason of insanity.'

Thus the law states that a defendant who is insane at the time of the alleged offence, whether murder or any other, is neither 'responsible' nor guilty of any illegal act. To bar the defendant's civil claim on the ground of illegality when there is no illegality, or other moral turpitude akin to illegality such as corruption or fraud, would seem to be flatly inconsistent with the statutory provisions: it would render the law just as incoherent as to allow it in a diminished responsibility case.

There remain only the thinly argued judgments of the majority in *Hunter*, to the effect that such a claim should be barred 'as a matter of common sense'[13] so as to give effect to 'community values'.[14] The illegality principle has been much litigated over about a quarter of a millennium, and both these rationales for barring an otherwise valid claim have hitherto remained undiscovered. In any event, many might think that to deny the claim of a helpless mentally ill and irresponsible patient, where there is a negligent failure of care, reflects neither.

Garnham J's judgment

Garnham J rejected the defendants' arguments and dismissed the application on the following grounds, amounting in essence to the absence of any illegality that could justify applying the illegality bar:

13 *Hunter* (n7) above at [300] (Shellar JA).
14 ibid at [312] (Santow JA).

(1) A verdict of not guilty by reason of insanity was 'unequivocally' a verdict that the defendant was not guilty of the offence charged and bore no responsibility for it. The defendants had therefore not shown that the defendant bore criminal responsibility for the killing. He did not accept the submission that the killings were, despite the verdict, crimes.[15]
(2) There were a number of authorities referred to by Johnson J in *Traynor* to the effect that the illegality defence applied only where the claimant knew that he was acting unlawfully.[16]
(3) There was an obvious difference between the nature and quality of the intention in a defendant found guilty of manslaughter by reason of diminished responsibility and a defendant acquitted by reason of insanity:

> In the former case responsibility is diminished but not eliminated; in the latter case it is eliminated because insanity means that the defendant does not know that what he was found was wrong and that knowledge is essential to affix responsibility[17]

(4) The hospital and restriction orders made against the claimant were disposals for the protection of the public, not punishment for criminal acts, and so did not engage the 'narrower ground'.[18]
(5) The claimant was not guilty of any knowingly wrongful act involving criminality, quasi-criminality or moral turpitude capable of engaging the illegality bar.[19]
(6) To allow the claim would neither condone, nor enable the claimant to profit from, wrongdoing, because there was no wrongdoing.[20]
(7) There was nothing incoherent or inconsistent in allowing the claim of a person who was insane and therefore not amenable to the law's prohibition against killing. Nor was the claimant's liability in tort to the deceased's representatives inconsistent with his innocence as a matter of criminal law.[21]
(8) It would be unrealistic to expect the prospect of losing a claim to deter an insane person from killing.[22]
(9) Dicta of Lord Hoffmann in *Gray* concerning public notions as to the fair distribution of resources related to the position of a claimant who was guilty of manslaughter.[23]
(10) The ratio of the majority in the New South Wales case of *Hunter* was difficult to discern.[24]

Garnham J did not accept somewhat nebulous submissions, akin to the arguments in *Hunter*, to the effect that, even in the absence of criminality or quasi-criminality, to allow

15 [2022] EWHC 1213 (QB) at [47, 129, 134].
16 Ibid at [130–1,135] and *Traynor*, supra at [111].
17 Ibid at [132].
18 Ibid at [133].
19 Ibid at [135].
20 Ibid at [136].
21 Ibid at [138–9] See *Morriss v Marsden* [1952] All ER 925: presumably the claimant could include indemnification for the damages in his claim.
22 Ibid at [140].
23 Ibid at [141].
24 Ibid at [80, 85].

the claim would offend against public policy and the public's confidence in justice. Many might think that the public interest was better served by allowing the claim so as to encourage health authorities to take better care of mentally ill patients. In any event the right approach was to apply the illegality principle, which is what Garnham J. did in rejecting the application. In this writer's opinion, Garnham J's decision is correct. He refused permission to appeal, but it was granted by the single judge. The appeal is to be heard in July 2023.

Interesting issues may arise in other cases as to how the issue of insanity should be dealt with if for some reason there has been no criminal trial, and as to whether it is open to a defendant to seek to establish that, on the balance of probabilities, an acquitted claimant was not in fact insane.

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