Case Comment

Beaumont v Ferrer

(CA (Civ Div), Moore-Bick LJ, Longmore LJ, Beatson LJ, 19 July 2016, [2016] EWCA Civ 768)

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Case:
Beaumont v Ferrer [2016] EWCA Civ 768; [2016] R.T.R. 25 (CA (Civ Div))

J.P.I.L. C5 David Ferrer was a very experienced, self-employed licensed taxi driver in Salford. He owned and drove a Nissan Serena minivan. He received work from Swan Taxis. In the early evening of 27 July 2009 Ferrer received a call from his control room, asking him to collect a fare from No.109 Tootal Drive, Salford.

The booking had been made from the house of the parents of Connor Emery, then aged 11. David Ferrer arrived at the address, and found six youths waiting for him at the bus stop across the road. They were the first claimant, Joseph Beaumont, then aged 17, the second claimant, Lewis O'Neill, also then aged 17, plus two boys aged 13, one aged 14 and another 17-year-old, Luke Bullcock. Ferrer was asked to take the youths to "Urbis", in Manchester city centre.

The six youths had in fact already agreed among themselves that none of them would pay the eventual taxi fare. The plan was to "jump the taxi", at an appropriate opportunity at or near their destination and make off without paying the fare.

When they reached the city centre, three of the youths got out of the taxi and ran off without paying. Ferrer then drove on. Beaumont and O'Neill exited from the taxi as it was moving, fell and sustained serious injuries. The two claimants brought a claim in negligence against the defendant taxi driver. Their case was that Ferrer owed a duty of reasonable care to his passengers, all comparatively young people, to ensure their safety and well-being.

The claimants also argued that the doctrine of ex turpi causa did not apply, as there was no relevant turpitude: no offence under the Theft Act 1978 s.3 [1] had been committed, as Ferrer left the scene before***J.P.I.L. C6*** he gave the group time or opportunity to pay the fare. Finally they stated that even if they were engaged in criminal conduct leading to their injuries, the doctrine of ex turpi causa did not apply in the circumstances of the case in particular because their offending was not of such gravity that it should engage the public policy of ex turpi causa.

Kennet Parker J[2] held that Ferrer had done nothing to put either claimant in the position where they were poised to exit the taxi, and he did nothing to lead to their decisions to leave the moving taxi. He accepted that the execution of the criminal joint enterprise, with three youths already having left the taxi and run away, put Ferrer in a dilemma. He concluded that he drove on partly because he wanted to do something to impede the youths left in the taxi from exiting and making off without payment. However, fear also played a part (he had been stabbed during an attack by another group of youths).

For the claimants it had been argued that at that point Ferrer should have allowed all the youths to leave the taxi and resigned himself to the inevitable loss of the fare and the great unlikelihood of any of the offenders being apprehended and sanctioned for their wrongdoing. The judge held that even if he should have followed that course and in not doing so was at fault, the failure followed from the criminal intentions and actions of the youths. His view was that any degree of fault was simply overwhelmed by those intentions and actions.

In addition, the judge found that even if Ferrer was in breach of his duty of care by driving on as he did, that breach did not cause the injuries suffered by the claimants. The conduct of each of them in jumping or stepping out of the taxi broke the causal connection between such fault and the damage. He concluded that this was a case where justice was served by holding that the claimants in substance brought about the injuries themselves.

The judge also held that the two claimants had committed an offence under s.3 of the 1978 Act by participating in a joint enterprise pursuant to which their co-conspirators had already

taken off without payment. He concluded that the correct approach to deciding whether the doctrine of ex turpi causa applied was to ask whether the criminal act was no more than the occasion for the damage or whether the damage was caused by the criminal act in which case the doctrine would apply.[3]

Parker J concluded that this was a plain case where the damage was caused by the criminal conduct of the claimants. That conduct was not carried out on the spur of the moment. There was a plan jointly to "jump" the taxi, and that plan was put into effect. Three of the group had already left the taxi and taken off before the defendant drove on. Both claimants had at that point every opportunity to recognise their dishonest intent, to reseat themselves in the taxi and to travel on safely. Instead, they deliberately chose to follow their companions in the carrying out of the joint criminal enterprise, and in each case chose to jump or step out of the moving taxi. Their only reason for doing so was to evade payment of the fare.

The judge held that applying ex turpi causa here tended strongly to promote the public policy that underpinned the doctrine. Dishonest evasion of a taxi fare should not be dismissed as just another inevitable expense of the driver, but should be seen for reasons of public policy as a pernicious and reprehensible practice that tended to erode the efficiency, and raise the costs, of a service that was valuable to the community. It could also risk public disorder if taxi drivers, responding to a crime that was easily perpetrated but difficult to police, resorted to their own counter measures.

Unsurprisingly he concluded that in the circumstances, both claimants were in any event precluded by the doctrine of ex turpi causa from succeeding in their claims. The claims were dismissed and judgment entered for defendant. The claimants appealed.

The Court of Appeal confirmed that the taxi driver had been in breach of his duty of care to his passengers. His choice was either to let the remaining three of his passengers out of his vehicle or to drive***J.P.I.L. C7*** them to the nearest police station. Although it was entirely understandable that he did not want to lose his comparatively modest fare that was not an excuse for driving off with an open door when the claimants were not wearing their seat belts.

In the circumstances, the judge below had been wrong to say that it was not reasonably foreseeable that the claimants would position themselves with a view to jumping out of the taxi. They held that was regrettably all too foreseeable once the first three youths had put their part of the criminal enterprise into effect.

They then turned to causation and the ex turpi causa maxim. Lord Hoffmann had suggested in *Gray v Thames Trains Ltd* [4] that it might be preferable to treat the issue as simply one of causation:

- could one say that, although the damage would not have happened but for the tortious conduct of the defendant, it was caused by the criminal act of the claimant; or
- was the position that, although the damage would not have happened without the criminal act of the claimant, it was caused by the tortious act of the defendant?

The Court of Appeal had no doubt that the former proposition applied here. Even it if could be said that the claimants' injuries would not have happened but for the tortious conduct of the defendant, they were in reality caused by the claimants' own criminal acts of making off without payment.[5] Accordingly, there should be no recovery. The appeal was dismissed.

Comment

I commented on the first instance decision in an earlier edition of this publication.[6] Given the circumstances of the clearly unacceptable joint enterprise in the course of which the claimants were injured, and given the trial judge's findings of fact, it was perhaps surprising that an appeal was pursued. However, on appeal the Court of Appeal found, contrary to the trial judge, that the taxi driver had himself been negligent by driving off when he ought to have known it was not safe to do so because his passengers were not properly seated and belted, and a side door was still open. The fact that the claimants might choose to try and jump was "regrettably all too foreseeable once the first three youths had put their part of the criminal enterprise into effect".[7] However, this reversal of the trial judge's finding did not alter the overall conclusion regarding the application of the ex turpi causa maxim.

Given the Court of Appeal's finding of prima facie negligence against the taxi driver, the principal issues remaining to be decided were: (1) causation; and (2) whether the maximum *ex turpi causa* should apply to factual the circumstances of the case. The Court reviewed a number of authorities including *Sacco v Chief Constable of South Wales Constabulary*,[8]

Vellino v Chief Constable of Greater Manchester,[9] and *Gray v Thames Trains*. In the judgment of the court, Longmore LJ mused over a comment from Beldam LJ in *Sacco* where he had said "wryly" that the era was no longer one in which common sense alone was a foundation for legal decisions. Also in *Sacco*, Schiemann LJ said of ex turpi causa that:
"Whether one expresses the refusal of a remedy as being based on absence of causation, absence of duty in these circumstances … or as being based on the application of the principle that a plaintiff as a matter of policy is denied recovery in tort when his own wrongdoing is so much a part of the claim that it cannot be overlooked … is perhaps a matter of jurisprudential predilection on the part of the judge.***J.P.I.L. C8*** "
This vagueness in the application of the ex turpi principle survives the Court of Appeal's judgment in the present case. They did not attempt to add materially to the judicial guidance already at large. What they decided, in short, was that the claimants were essentially the authors of their own misfortune by jumping from a taxi, which they knew was a dangerous act and was in furtherance of a criminal offence. Their acts can be said to have *caused* the injuries and it was not necessary to see the claimants' acts as a supervening cause obliterating the taxi driver's negligence.
In addition, the illegality was not collateral or incidental to the civil claim, but was integral to both the claim itself and any negligence on the part of the driver. And finally, there were no other public policies which could be said to outweigh the principle that those engaged in the commission of a crime should not be able to recover for the consequences of their criminal conduct. What may seem to be a useful comment of universal application from Longmore LJ's judgment was that the maxim should be applied all the stronger to claims in which the defendant is not a partner in crime with the claimant.[10]
In conclusion, it remains the case that the ex turpi causa maxim refers not so much to a principle as to a policy based upon reasons which can vary with the facts. In passing, one might also bear in mind Lord Toulson's opinion in *Les Laboratoires Servier v Apotex Inc* [11] at [57], namely that "The case law is notoriously untidy", and in the same case, Lord Sumption referred, at [14], to "a large body of inconsistent authority which rarely rises above the level of general principle".
The practice points below have not therefore changed from my first instance comments. It is to be hoped that with the advent of services such as Uber, the opportunity to "jump the taxi" (a phrase referred to rather grandly by Longmore LJ as "street patois") might in any event become a thing of the past.

Practice points

- Claims involving illegality are high risk. The application of ex turpi causa is such a "jury issue" it is often hard to predict what an individual judge will decide in any particular case. This makes litigation risky for both parties where ex turpi causa is pleaded. Therefore, if one has a case where there is a good reason for suggesting that the ex turpi causa defence should not apply, it may be worth considering applying to strike out that part of the defence under CPR r.24.2. Even if the application is not successful, one may get useful insight into the judiciary's impression as to whether the defence has merit.
- Criminal conduct which is incidental to the accident in question will not invoke the ex turpi causa defence, for example the recent case of *Delaney v Pickett* [12] where the fact that the parties were transporting prohibited drugs at the relevant time did no more than set the scene for the defendant's negligent driving.
- It should also be remembered that ex turpi causa is not a defence there for the benefit of a defendant. It is public policy for the court not to lend its aid to the immoral or illegal claimant.

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J.P.I. Law 2017, 1, C5-C8

1.
Making off without payment.
2.
Beaumont v Ferrer [2014] EWHC 2398 (QB); [2015] P.I.Q.R. P2.
3.

Gray v Thames Trains Ltd [2009] UKHL 33; [2009] 1 A.C. 1339, *Hewison v Meridian Shipping Services Pte Ltd [2002] EWCA Civ 1821; [2003] I.C.R. 766*, *Revill v Newbery [1995] EWCA Civ 10; [1996] Q.B. 567*, and *Joyce v O'Brien [2013] EWCA Civ 546; [2014] 1 W.L.R. 70* considered.
4.
Gray v Thames Trains Ltd [2009] UKHL 33; [2009] 1 A.C. 1339.
5.
Gray v Thames Trains Ltd [2009] UKHL 33; [2009] 1 A.C. 1339 considered.
6.
[2014] J.P.I.L. 211.
7.
Beaumont v Ferrer [2016] EWCA Civ 768; [2016] R.T.R. 25 at [18] per Longmore LJ.
8.
Sacco v Chief Constable of South Wales Constabulary, unreported, 15 May 1998.
9.
Vellino v Chief Constable of Greater Manchester [2001] EWCA Civ 1249; [2002] 1 W.L.R. 218.
10.
Cf. *Delaney v Pickett [2011] EWCA Civ 1532; [2012] 1 W.L.R. 2149*, and *Joyce v O'Brien [2013] EWCA Civ 546; [2014] 1 W.L.R. 70*.
11.
Les Laboratoires Servier v Apotex Inc [2014] UKSC 55; [2015] A.C. 430.
12.
Delaney v Pickett [2011] EWCA Civ 1532; [2012] 1 W.L.R. 2149.