Ex Turpi Causa and an Insurer's Anti-Fraud Initiative

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The doctrine of *ex turpi causa* provides that a person cannot pursue a legal remedy if it arises in connection with the person's own illegal act.

For example, you cannot commit murder and then seek to recover under the victim's life insurance policy. As another example, two thieves who disagree over the division of stolen property are not allowed to settle their dispute in court.

Ex Turpi Causa and Tort Claims

In tort law, a duty of care is owed to all people who may reasonably be foreseen to be injured by negligent conduct, unless there are statutory exceptions.

The doctrine of *ex turpi causa* generally does not operate to preclude an injured party from seeking compensatory damages relating to his or her injury, notwithstanding that the injury occurred during the commission of an offence.

Compensatory damages are not awarded as compensation for an illegal act, but only as compensation for personal injury. Regardless of whether a plaintiff was engaged in an illegal act, the question to be asked is whether he or she suffered a recognized injury, at the hands of someone who owed him or her a duty of care and who caused reasonably foreseeable damage by falling below the standard of care.

Compensatory damages are intended to compensate a plaintiff with enough money to cover the actual amount of the injury or loss. They are supposed to put a plaintiff in the position he or she would have been in had the tort not occurred, not provide a plaintiff with a profit or windfall.

Courts can bar recovery in tort based on a plaintiff's immoral or illegal conduct only in very limited circumstances.

In the leading case of *Hall v. Hebert*, [1993] 2 SCR 159, a majority of the Supreme Court of Canada stated that these limited circumstances can arise where a damage award in a civil suit would, in effect, allow a person to profit from illegal or wrongful conduct, or would permit an evasion or rebate of a penalty prescribed by the criminal law.

A plaintiff engaged in wrongdoing may not succeed in all aspects of a tort claim. In *Hall v. Hebert*, the majority of the Court stated that, in some cases, courts may disallow a particular head of damages if such damages would permit the plaintiff to profit indirectly from his or her crime, in the sense of obtaining remuneration for it.

As an example, the majority indicated that a claim for loss of future earnings, where the claimed earnings are based on an illegal occupation, will not be allowed because it would amount to the court's rewarding the plaintiff for an illegal activity and would permit the plaintiff to profit from his or her wrong.

The majority noted that courts in other jurisdictions have refused to award loss of future earnings in claims by a burglar, a bookie's clerk, a vendor of illegal patent medicines, a fisherman using an unlawful net, and an operator of an illegal gambling den.

Recent Anti-Fraud Case

The doctrine of *ex turpi causa* was considered in *Aviva Canada Inc. v. 1843538 Ontario Inc. et al*, 2019 ONSC 3874, which arose out of a very interesting fact scenario.

Aviva undertook a study of the auto collision industry based on suspicion of fraudulent activity. Aviva incorporated a numbered company and purchased and insured two vehicles. Aviva intentionally damaged the vehicles.

An independent appraisal of the two damaged vehicles was arranged by Aviva. The vehicles were then towed to a body shop. They were equipped with hidden, video recording devices.

Aviva alleged that the body shop completed repairs which were not necessary and that the body shop deliberately damaged the vehicles in order to require further repairs.

Aviva commenced a lawsuit against the body shop, the principals of the body shop, and an appraiser at the body shop. The defendants sought a dismissal of the lawsuit.

One of the arguments advanced by the defendants is that Aviva could not rely on its own wrongdoing to ground a claim. Aviva responded that damaging its own vehicles and sending them out for repair was not immoral or illegal.

Justice Sossin held that it was not plain and obvious that the *ex turpi causa* doctrine relating to Aviva's intentional damage to the vehicles operated to prevent Aviva's claim. As a result, the claim was not struck.

Justice Sossin also stated that, even if the *ex turpi causa* doctrine could be invoked by the defendants based on Aviva committing mischief by intentionally damaging the vehicles, it does not preclude Aviva's claim for its actual losses in relation to the repairs. He noted that Aviva does not seek to profit from its claim relating to its actual losses.

The defendants also argued that Aviva should not be permitted to pursue its claim due to an abuse of process and entrapment. The defendants stated that, if Aviva had suspicions of fraud, it should have pursued its investigations in collaboration with a law enforcement agency. They asserted that Aviva should not be permitted to use the civil justice system to enforce its own anti-fraud initiative.

Justice Sossin rejected the argument, indicating that the claim should be permitted to proceed.

In addition, Justice Sossin dismissed a summary judgment motion by one of the defendants, stating that there are genuine issues for trial.

Conclusion

In summary, the *ex turpi causa* doctrine will generally not operate to deny damages in tort lawsuits because such lawsuits are usually based in claims for compensation, not as a means to make a profit.

Liability arises in tort from a duty predicated on foreseeable consequences of harm. This duty of care is owed to all people who may reasonably be foreseen to be injured by negligent conduct, absent statutory exceptions. The legality or morality of a plaintiff's conduct is an extrinsic consideration.

However, courts may disallow certain heads of damages if such damages would permit a plaintiff to profit indirectly from illegal conduct.

Although the doctrine of *ex turpi causa* has limited application in tort law, it can apply to some claims, and it is something to be mindful of.