
CLAIMABILITY OF ILLEGAL EARNINGS IN TORT: A PERPETUAL CASE FOR EQUITY TO INTERVENE

Loss of earnings is one of the heads of damages allowed by tort law in relation to personal injury and fatal accident claims. However, neither the common law based tort law nor the related provisions in the Civil Law Act 1956¹ provide us any guidance regarding the recoverability of earnings from illegal sources. This issue surfaced before the local courts in several cases. Recently in *Chua Kim Suan*,² it was observed by our Supreme Court that “the claim for that part of damages as related to earnings from illegal sources should be disallowed because of *ex turpi causa non oritur actio*, or in other words, such claim would be against public policy”.³ The court was, further, of the view that “we should not make a distinction between income earned from a very minor transgression of law and income resulting from commission of serious crime” as such a distinction in reality turns on the question of degree of criminality which will not alter the basic nature of criminality of such conduct.⁴ *Chua Kim Suan* was followed by *Tay Lye Seng*⁵ and *Rosli Md. Nor*⁶ wherein the courts allowed claims based on illegal earnings, in utter disregard of *Chua Kim Suan*, by differentiating their cases from it. We are of the opinion that the decision in *Chua Kim Suan* leaves hardly any scope for differentiation and it is the injustice and hardship resulting to the claimants from *Chua Kim Suan* with

¹Civil Law Act 1956, sections 7(3)(IV) and 28A(2)(c).

²*Chua Kim Suan v Government of Malaysia* [1994] 1 CLJ 32.

³*Ibid*, at page 325.

⁴*Ibid*.

⁵*Tay Lye Seng v Nazori Teh* [1998] 3 CLJ 466.

⁶*Wakil Diri Bagi Harta Pusaka Atas Rosli Md. Nor (Simati) v TP Safeer* [1998] 4 CLJ 241.

which the learned judges in *Tay Lye Seng* and *Rosli Md. Nor* could not reconcile that prompted them to engage themselves in a 'differentiation' exercise.

It is a known truth that equity originated, *inter alia*, in view of the deficiency in common law in the form of non-availability of legal remedies or superiority of equitable remedies; better suitability of procedure in equity than available at common law and better adjusting ability of the equitable remedies to the needs of the parties. Although some deficiencies created by the non-availability of legal remedies have been made up through legislative measures, yet we are still in the dark about the claimability of illegal earnings in tort. Hence equity has impliedly so far intervened in this matter and would continue to intervene till the issue is legislatively settled. The ends and aims of equity, however, will be well served when the nature of the illegal source of income in each and every case is taken into consideration. We fully endorse the viewpoint in *Tay Lye Seng* that:

While public policy would defeat any claim based on illegality, a balance has to be drawn based on the peculiar facts and circumstances of each case.⁷

As such, we favour the classification of illegal earning claims into two broader groups, that is, personal injury claims and dependency claims.

In relation to personal injury claims, two viewpoints have emerged in judicial circles globally. One viewpoint is that if the activities from which the claimant obtained earnings were of a criminal nature, then public policy should prevent such person from obtaining compensation for the loss of such illegal income. But where the claimant breaches some licensing or regulatory rule, the propounders plead for leniency because the breach lacks an anti-social dimension of criminality.⁸ If this differentiation of illegal and criminal activity could have been considered in *Chua Kim Suan*, then the deceased, if alive, would have succeeded in a personal injury claim, not to talk of his dependents. Running an unlicensed taxi without a license is, at the most, an illegal

⁷*Supra*, note 5, at pages 472-473.

⁸McMahon & Binchy, *Irish Law of Torts* (Dublin, 1990), at page 738.

act which hardly justifies the exclusion of a dependant from a dependency claim on an *ex turpi causa* principle.

The other viewpoint is that a disabled claimant in personal injury cases should be allowed damages although his earnings come from illegal activities including activities of a criminal nature. The reason is that compensation is not mainly for loss of earnings but for loss of earning capacity. No principle entitles the court to deprive a person of compensation for a real loss on the ground that the court disapproves of his past conduct.⁹ However, the adherents of this viewpoint contend that the measure of damages should correspond with what the plaintiff could have earned lawfully, for it is only for loss of capacity to earn lawfully that the plaintiff can legitimately complain.¹⁰ The Singapore High Court in *Ooi*,¹¹ without referring to the above viewpoint, adopted it when it observed:

... the assessment of first plaintiff's loss of earnings should be based on an estimate, however difficult and imprecise this might be, of what he would have earned in Malaysia; had there been no accident to him.¹²

Personally we prefer this viewpoint because it involves no conflict with public policy, even if the illegality is a serious one. In the case of trivial illegality, this viewpoint would even enable the court to ignore the illegality on the ground of the plaintiff's lawful earning capacity being equivalent to his unlawful earning capacity.¹³

The emerging viewpoint in relation to dependency claims is to outrightly ignore the illegality of the source of income. The logic is that the dependency claim is a separate cause of action conferred upon the dependants of the deceased which is not necessarily tainted with

⁹S.M. Waddhams, *The Law of Damages* [Toronto, 1983], at page 237.

¹⁰*Union Gas Co of Canada Ltd. v Brown* (1968) 67 D.L.R. (2d) 44.

¹¹*Ooi Han Sun v Bee Hua Meng* [1991] 3 MLJ 219.

¹²*Ibid.*, at page 324.

¹³*Supra*, note 9, at page 237.

the illegality which affects the deceased. It is a claim not for loss of earnings but for loss of maintenance out of earnings. In *Mak Yuk-Kiu*,¹⁴ Robert C.J., of the Hong Kong High Court observed:

The dependants have been deprived of their support by the negligence of the defendant. The latter should not be relieved of his liability because of the tainted source of the dependant's earlier income.¹⁵

Had the Supreme Court in *Chua Kim Suan* taken this aspect of the dependant's claim into consideration, surely the deserving dependants would not have been denied damages simply on the ground that the deceased was running an unlicensed taxi at the time of accident. However it is suggested that a claim by the dependants may be barred where they had taken a direct part as partners in the illegal activities which gave rise to the income¹⁶ or knew that the deceased's activities were felonious but did nothing to stop them.¹⁷ After all, the principles of *ex turpi causa non oritur actio* and public policy have not emerged with the object of achieving redundancy.

As such, so long as the issue of claimability of illegal earnings is not addressed by the legislature, equity would continue to play its role in dealing with this issue. Equity demands each case to be decided on the basis of its peculiar facts. There seems, it is respectfully submitted, no merit in the observation of Peh Swee Chin SCJ in *Chua Kim Suan* that 'it is an irrelevant exercise at the present times to draw the line between minor offences and the serious ones'.¹⁸ Retrospectively¹⁹ and

¹⁴*Mak Yuk-Kiu v Tin Shing Auto Radio CTR Ltd* [1981] HKLR 77.

¹⁵*Ibid.*, at page 83.

¹⁶*Ibid.*

¹⁷Kemp & Kemp, *The Quantum of Damages in Personal Injury and Fatal Accident Claims*, Volume 1, 25006 (Fourth Edition, 1982).

¹⁸*Supra*, note 2, at page 325.

prospectively,²⁰ in essence,²¹ *Chua Kim Suan*, up to this time stands alone in Malaysia wherein a claim based on illegal earnings was denied.

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¹⁹See *Kang Bark Teng v Lee Kwee Lim* [1952] MLJ 27; *Tan Chooi Thin v Teo Whee Hong* [1953] MLJ 203 and *Yaakub Foong v Lai Mun Keong* [1986] 2 MLJ 317.

²⁰*Supra*, notes 5-6.

²¹In *Yaakub* (*supra*, note 19), the court would have discounted damages based on the amount earned illegally in contravention of his work permit but there was no cogent evidence in this regard. So, for practical purposes, the plaintiff did not suffer any financial loss.

THE CONCEPT OF IMPLIED LICENCE TO USE - IS THERE ROOM FOR EQUITABLE ESTOPPEL BY CONDUCT?

Smith Kline & French Laboratories Ltd v Salim (Malaysia) Sdn. Bhd.

Parallel imports occur when non-authentic - not counterfeited - products are imported cheaply without the consent of the authorised dealer or licensee in a particular jurisdiction.¹ Generally, intellectual property owners possess a number of exclusive rights over their intellectual product. One of them is the distribution right.² This means that an intellectual property owner is authorised to control the distribution of their goods either by sale, lease or rental. In normal circumstances, the goods will be distributed locally within a particular jurisdiction. In such an instance, the task of controlling the sale, supply and price of goods do not pose many problems to the intellectual property vendor. However, it is most likely that these goods may be disposed off outside the jurisdiction in which they were earlier released. A legal issue then arises as to whether the intellectual property owner can still exercise his rights over the goods despite departing with his physical ownership over them earlier.

The normal property principle predicates that the vendor has exhausted his rights once he no longer has physical control over his goods.³ In this case, the law will not step in to deny the new owner from exercising his possession over the goods. Needless to say, however, those normal property principles do not apply in an intellectual property

¹Herman Cohen Jehoram, *Prohibition of Parallel Imports through Intellectual Property Rights*, IIC, Volume 30, No. 5/1999.

²For example, see section 13(1) of the Copyright Act 1983.

³Generally, there are various types of exhaustion theory: national, community and international. The nature of these theories and their importance in intellectual property law would be outside the purview of this article.