

CHAPTER SEVEN DEFENCES

7.3. ILLEGALITY

The defence of illegality – as a complete bar to liability – is accepted in a limited number of situations only, namely where the plaintiff voluntarily participated in the illegal conduct which caused him or her harm. In such circumstances the plaintiff will normally be contributorily negligent and therefore partly liable. Only where the defence of contributory negligence is of no avail, as in the case of road traffic accidents, may it be useful, or preferable, for the defendant to rely on the defence of illegality. If accepted, that defence will have for result that the plaintiff is not allowed to have a remedy in court (*ex turpi causa non oritur actio*) or, in other words, that his or her claim will not be heard by a court of law (*nemo auditur propriam turpitudinem allegans*).

Another situation where illegality may be pleaded as a defence is where tort law might not recognize the legitimacy of the plaintiff's claim for damages, e.g. where a prostitute who has been injured in a car accident by a third party (thus without her participation in the wrongful conduct) asks compensation for lost income.

7.3.1. FRENCH LAW

Introductory Note

a) In French tort law illegality has for a long time played a major role in discarding the protection of interests held to be illegitimate. The discussion turned mainly around the admissibility of claims brought by concubines who suffered material and non-material damage as a result of their partner's death in fatal accidents. The interest of such secondary victims was long regarded as being illegitimate. However, as described before,¹ the case law of the Cour de cassation evolved, at first in respect of non-adulterous relationships, later also in respect of adulterous relationships. As a result of that evolution, the interest of unmarried partners is now regarded as legitimate for the purposes of an action in tort. Compensation will therefore be given provided that the injury is certain, which also depends on whether the relationship is regarded by the court as a sufficiently lasting relationship. Consequently, the defence of illegality is now pleaded only with regard to claims for loss of income resulting from unlawful or immoral conduct,² but only insofar as compensation would, in itself, act as a substitute for what the law or

¹ *Supra*, Chapter II, 2.F.19., Note (1).

² Viney and Jourdain, *Conditions* at 63, where a few judgments are referred to.

morality forbids.³ For instance, the defence of illegality was not accepted where a passenger without a valid transport ticket claimed compensation for bodily injury sustained in a train accident,⁴ or where a driver of a stolen car claimed damages for injury sustained in a car accident.⁵ In such cases compensation is not intended to take the place of the advantage resulting from the plaintiff's illicit conduct itself.

b) The same reserved attitude regarding the defence of illegality appears in cases where a plaintiff has participated voluntarily in the illegal conduct which caused injury to himself or herself. The opinions expressed in legal writings have long been divided,⁶ but already in 1970 there was strong support for the opinion that the maxim *nemo auditur propriam turpitudinem allegans* could not be invoked to dismiss an action in tort, and that the participation of the victim in the wrongful act was to be treated as an instance of contributory negligence which could lead to partial, or even total, exoneration of the defendant.⁷ This position has been confirmed by a judgment of the Cour de cassation of 17 November 1993, reproduced below.

*Cass. civ. Ire, 17 November 1993*⁸
Groupe Drouot v. Rumeau

7.F.25.

NEMO AUDITUR

Injured thief

The maxim nemo auditur propriam turpitudinem allegans is alien to the rules of civil liability.

Facts: Two people had stolen a car. One of them, a minor, drove the car and lost control resulting in injury of the passenger sitting next to him. The passenger, R, claimed compensation from the insurer of the car.

Held: The court of appeal's judgment granting the claim was upheld by the Cour de cassation.

Judgment: "The insurance company criticises the judgment whereby the court of appeal upheld [the victim's claims] on two grounds. Firstly..., R, in stealing the vehicle, was debarred from claiming compensation for his injuries, because of the maxim *nemo auditur propriam turpitudinem allegans*... Secondly, having established that R. stole the vehicle

³ Ibid.

⁴ Cass. civ., 2e, 19 February 1992, Bull.civ. 1992.II.54, JCP 1993.II.22170, with annotation by G. Cosile Hugues.

⁵ Cass. civ. Ire, 17 November 1993, *infra*, **7.F.25.**

⁶ For an overview, see Viney and Jourdain, *Conditions* at 64.

⁷ P. Le Tourneau, *La règle Nemo auditur...* (Paris: LGDJ, 1970) and "La spécificité et la subsidiarité de l'exception d'indignité" D 1994.Doct.298.

⁸ Bull.civ. 1993.I.326. Translation by A. Dumas-Eymard.

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involved in the accident in which he was injured, the court of appeal should have inferred that his claim for compensation was inadmissible...

However, the court of appeal considered firstly, that the fault attributed to passenger R was not the only fault that caused the accident and, secondly, that the guarantee owed by the insurer had to cover the liability of all drivers, including an unauthorised driver, even if that person had stolen the vehicle. In so holding, the court of appeal correctly applied the provisions invoked by the victim. Therefore the court was not required to rule on ineffectual arguments drawn from a maxim which is alien to the rules of civil liability. It follows that the appeal is unfounded.”

Note

In the annotated judgment the first civil chamber of the Cour de cassation rejected the application of the maxim *nemo auditur* in unequivocal terms. That does not mean, however, that the case law of the Cour de cassation is well settled. According to Viney and Jourdain, the situation is as follows. In cases where the defendant committed a criminal offence with the plaintiff, it is not unlikely that, when the plaintiff brings a claim before a criminal court in conjunction with the public prosecutor’s action (*action civile*), the criminal court will prefer to apply the defence of contributory negligence – which allows the plaintiff to obtain compensation in part – rather than the defence of *nemo auditur*, in which case the court should dismiss the plaintiff’s action entirely.⁹ That is in contrast, however, with commercial cases where the court may choose to apply the maxim, depending on the nature of the relationship and the degree to which the plaintiff was involved in the wrongful conduct.¹⁰

⁹ Viney and Jourdain, *Conditions* at 64-65, with reference to judgments of the criminal chamber of the Cour de cassation. See also P. Jourdain, “La victime indigne ou en situation illicite peut-elle encore prétendre à l’indemnisation de son dommage?” (1994) 94 RTDciv. 115.

¹⁰ See e.g. Cass. comm., 7 December 1982, Bull.civ. 1982.IV.403, (1983) 83 RTDciv. 536 with annotation by G. Durry (where the maxim is applied), in contrast to Cass. civ. 1re, 14 December 1982, Bull.civ. 1982.I.355, (1983) RTDciv. 342, with annotation by G. Durry (where the maxim is not applied). See also Jourdain, *ibid.*