

CHAPTER SEVEN DEFENCES

7.3. ILLEGALITY

7.3.3. ENGLISH LAW

Introductory Note

(a) “[T]he fact that a plaintiff was engaged in an illegal activity which brought about his injury does not automatically bring about that his claim for personal injury ... must be dismissed”, per Dillon LJ in *Pitts v. Hunt*.¹ The illegality or immorality of a plaintiff’s own actions gives rise to a defence only where the conduct is directly relevant to the harm of which the plaintiff complains.² The defence, called *ex turpi causa non oritur actio*, applies mainly in contract but also in restitution³ and exceptionally in tort cases.⁴

In tort, the nature of the test remains unclear. Two theories compete. According to one, the defence is based on an overriding consideration of public policy: to compensate the plaintiff in certain cases would either affront the ‘public conscience’ or promote criminal acts and other behaviour deemed contrary to the general good. According to the other theory, the defence is based on a negation of liability in a situation where the plaintiff’s conduct makes it impossible for the court to set the appropriate standard of care. It becomes a nonsense for instance to suggest a “reasonable” standard appropriate to determine the duty owed by one speeding joy-rider to another, or one fleeing burglar to his partner in crime.⁵ The second test is regarded to be “more precise and, in most contexts, easier to be applied than the open-ended test of public policy”.⁶ Both formulations of the defence are enunciated in *Pitts v. Hunt*.⁷

¹ *Infra*, 7.E.28.

² *Clerk & Lindsell on Torts* at 64.

³ Thus in *Tinsley v. Milligan* [1994] 1 AC 340 (HL) where two women had bought a house together as joint owners but registered the title in the name of the plaintiff alone so that the defendant could obtain higher social security payments by pretending to have no assets. When the parties fell out and the plaintiff sought possession on the basis of her registered ownership, the counterclaim of the defendant to sell the house and have half of the proceeds paid to her, was met by the defence *ex turpi causa non oritur actio*. The defence was rejected by both the Court of Appeal and the House of Lords, though not without dissent.

⁴ T. Weir, *Casebook on Tort*, 7th ed. (London: Sweet & Maxwell, 1992) at 256.

⁵ *Clerk & Lindsell on Torts* at 65.

⁶ Markesinis and Deakin at 669.

⁷ See the excerpts from Beldam LJ’s and Balcombe LJ’s judgments *infra*, 7.E.28.

b) Many of the cases in which *ex turpi causa non oritur actio* is pleaded as a defence relate to situations where both the defendant and the plaintiff were engaged in criminal activity. However, the defence can also be relied on in a situation where the plaintiff is engaged in criminal activity but the defendant is not, and also where the plaintiff is engaged in reprehensible activity which is however not a criminal offence.⁸ For such situations, there can be no blanket rule any more than in the case of joint participants in crime, and here, more than elsewhere, the defence⁹

“ultimately rests on a principle of public policy that the courts will not assist a plaintiff who has been guilty of illegal (or immoral) conduct of which the courts should take notice. It applies if, in all the circumstances, it would be an affront to the public conscience to grant the plaintiff the relief which he seeks because the court would thereby appear to assist or encourage the plaintiff in his illegal conduct or to encourage others in similar acts ...”.

Thus, in *Kirkham v. Chief Constable of Greater Manchester*,¹⁰ Lloyd LJ held that to afford relief to the plaintiff, whose husband committed suicide while in a remand centre, against the police for failing to take steps to prevent the suicide would not “affront the public conscience” or, as he preferred to say, would not “shock the ordinary citizen”.

There seems to be no clear authority as to whether *ex turpi causa non oritur actio* can also be raised as a defence against a claim of a plaintiff for compensation of lost income derived from illicit professional activities, eg in the case of a prostitute being injured in a traffic accident.¹¹ However, in the case of a person running an illicit business, it was held in *Columbia Pictures Industries v. Robinson*¹² that that person cannot claim damages from a tortfeasor who interferes with it. In a case like the German prostitute’s case, the plea of *ex turpi causa non oritur actio* might fail anyway under English law, as the prostitute’s conduct, although reprehensible, is without sufficient connection with the personal injury of which she complains.¹³

c) There will be many instances where a plea of *ex turpi causa non oritur actio* may overlap with defences of contributory negligence and/or of *volenti*, if those defences are available, e.g. have not been excluded by statutory provisions in a specific area.¹⁴ Conduct insufficiently grave or insufficiently connected with the

⁸ Rogers at 743-744.

⁹ Kerr LJ in *Euro-Diam Ltd. v. Bathwick* [1988] 2 All ER 23.

¹⁰ *Kirkham v. Chief Constable of Greater Manchester* [1990] 2 QB 283, 3 All ER 246 (CA).

¹¹ As in the German case discussed *supra*, 7.G.27.

¹² *Columbia Pictures Industries v. Robinson* [1987] Ch 38, [1986] 3 WLR 542, [1986] 3 All ER 338.

¹³ See *infra*, 7.E.28., Note (2).

¹⁴ *Ibid.*, Note (3).

ultimate injury¹⁵ to give rise to a successful defence of *ex turpi causa non oritur actio*, may still constitute contributory negligence.¹⁶

*Court of Appeal*¹⁷
Pitts v. Hunt

7.E.28.

PARTICIPATING IN REPREHENSIBLE CONDUCT

Irresponsible pillion passenger

A plaintiff who was playing a full and active part in encouraging the commission of criminal offences is precluded from obtaining compensation for personal injury sustained in the accident caused as a result.

Facts: On their way back from a disco at which they both drank far too much, the 18-year old plaintiff was riding pillion on a motorcycle driven by his mate, two years younger, who was unlicensed and uninsured. Encouraged by the plaintiff, the driver drove in a reckless, irresponsible and idiotic manner, slaloming across the white lines and deliberately frightening some pedestrians. They provoked an accident in which the driver was killed and the plaintiff seriously injured.

Held: The Court of Appeal held that the plaintiff's claim was barred by the maxim *ex turpi causa non oritur actio*. It agreed with the court of first instance that the defence of *volenti* was barred by s. 148 (3) of the Road Traffic Act 1972.

Judgment: BELDHAM LJ: "In defence to a claim in tort based on negligence or breach of statutory duty, public policy based upon the rule *ex turpi causa non oritur actio* has not often been raised..."

[The plaintiff's view was] that, on the whole, the courts had tended to adopt a pragmatic approach... seeking where possible to see that genuine wrongs were righted so long as the court did not thereby promote or countenance a nefarious object or bargain which it was bound to condemn. So [the plaintiff] argued... that the court should take a pragmatic approach and, in deciding whether the public conscience would be shocked by allowing the plaintiff to recover damages in the circumstances of this case, the court should have regard to the serious injuries which he had suffered and from which he would suffer for the rest of his life and should regard the public conscience as being as greatly shocked by the idea that he would recover no compensation for those injuries as it would be by the thought of allowing him to recover by basing his claim on the unlawful escapade in which he suffered the injuries. ...

On the facts found by the judge in this case the plaintiff was playing a full and active part in encouraging the young rider to commit offences which, if a death other than that of the young rider himself had occurred, would have amounted to manslaughter... Thus on the

¹⁵ *Ibid.*, Note (2).

¹⁶ *Clerk & Lindsell on Torts* at 67-68 who refer to *Murphy v. Culhane* [1977] QB 94 where the plaintiff's husband had voluntarily participated in a violent affray.

¹⁷ [1991] 1 Q.B. 24; [1990] 3 WLR 542; [1990] 3 All ER 344.

findings made by the judge in this case I would hold that the plaintiff is precluded on grounds of public policy from recovering compensation for the injuries which he sustained in the course of the very serious offences in which he has participating. On a question on which, as Bingham L.J. said in *Saunders v. Edwards* [1987] 1 WLR 1116, 1134, the courts have tended to adopt a pragmatic approach, I do not believe that it is desirable to go further in an attempt to categorise the degree of seriousness involved in offences which will preclude recovery of compensation. I would, however, add that the public attitude to driving a motor vehicle on a road when under the influence of drink has, I believe, changed markedly with the increasing number of serious accidents and the dreadful injuries which are the consequence of such driving. The public conscience is ever increasingly being focused not only on those who commit the offence but, in the words of recent publicity, those who ask the driver to drink and drive.

The second ground upon which the judge held that the plaintiff's claim failed was because in the circumstances of the case the law would not recognize the existence of a duty of care owed by the rider to the plaintiff. As this ground is also based on public policy, it is not I think in the circumstances of this case significant. That both the plaintiff and rider owed a duty to other road users to exercise reasonable care is clear. I am not convinced of the wisdom of a policy which might encourage a belief that the duty to behave responsibly in driving motor vehicles is diminished even to the limited extent that they may in some circumstances not owe a duty to each other, particularly when those circumstances involve conduct which is highly dangerous to others.

As to the defence raised that the plaintiff voluntarily undertook to run the risk of injury by taking part in such a foolhardy, risky and illegal activity, I would have been prepared to say that it was obvious from the description of the plaintiff's behaviour whilst he was participating that he had done so. However, the judge accepted that the effect of s. 148(3) of the Road Traffic Act 1972 was that any agreement or understanding that the risk of injury would be the plaintiff's was of no effect... I think that the words of s. 148(3) clearly mean that it is no longer open to the driver of a motor vehicle to say that the fact of his passenger travelling in a vehicle in circumstances in which for one reason or another it could be said that he had willingly accepted a risk of negligence on the driver's part, relieves him of liability for such negligence."

BALCOMBE LJ: "In a case of this kind I find the ritual incantation of the maxim *ex turpi causa non oritur actio* more likely to confuse than to illuminate. I prefer to adopt the approach of the majority of the High Court of Australia in the most recent of the several Australian cases to which we were referred – *Jackson v. Harrison* 138 CLR 438. That is to consider what would have been the cause of action had there been no joint illegal enterprise – that is, the tort of negligence based on the breach of a duty of care owed by the deceased to the plaintiff – and then to consider whether the circumstances of the particular case are such as to preclude the existence of that cause of action..."

DILLON LJ: "It is clear for a start that the fact that a plaintiff was engaged in an illegal activity which brought about his injury does not automatically bring it about that his claim for damages for personal injury as a result of the negligence of the defendant must be dismissed..."

So much is common ground between the parties, but it raises questions... as to whether a line can be drawn between different grades of illegality...

[T]he plaintiff founds on certain recent authorities in this country which he relied on

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as establishing a 'conscience test' to be applied in cases of illegality...

I find a test that depends on what could or would not be an affront to the public conscience very difficult to apply, since the public conscience may well be affected by factors of an emotional nature, e.g. that these boys by their reckless and criminal behaviour happened to do no harm to anyone but themselves. Moreover if the public conscience happened to think that the plaintiff should be compensated for his injuries it might equally think that the deceased driver of the motor cycle, had he survived and merely been injured, ought to be compensated, and that leads into the much-debated question whether there ought to be a universal scheme for compensation for the victims of accidents without regard to fault.

Beyond that, appeal to the public conscience would be likely to lead to a graph of illegalities according to moral turpitude ...

Bingham L.J.'s dichotomy in *Saunders v. Edwards* [1987] 1 W.L.R. 1116 between cases where the plaintiff's action in truth arises directly *ex turpi causa* and cases where the plaintiff has suffered a genuine wrong to which allegedly unlawful conduct is incidental avoids this difficulty, in that it does not involve grading illegalities according to moral turpitude. ..."

Notes

(1) As stated in the introductory note, two tests compete to explain the nature and scope of the *ex turpi causa non oritur actio* defence: public conscience would be shocked by allowing the plaintiff to recover damages in the circumstances of the case *or* impossibility, because of the plaintiff's conduct, to set the appropriate standard of care to determine the duty owed by the defendant to the plaintiff. In the annotated case, Beldham LJ adopts the first test and rejects the second as it "might encourage a belief that the duty to behave responsibly in driving motor vehicles is diminished even to a limited extent and that they may in some circumstances not owe a duty to each other..." Balcombe LJ prefers the second, as well as Dillon LJ who finds "a test that depends on what would or would not be an affront to the public conscience very difficult to apply, since the public conscience may well be affected by factors of an emotional nature..."

(2) Be that as it may, for the defence of *ex turpi causa non oritur actio* to apply "the defendant must establish (a) that the plaintiff's conduct was so clearly reprehensible as to justify its condemnation by the court and (b) that that conduct was so much part of the claim against the defendant as to justify refusing any remedy to the plaintiff."¹⁸

The first condition is most easily fulfilled where the plaintiff has engaged in criminal conduct, in which case the degree and culpability of the plaintiff's criminality will be weighed against the conduct of the defendant.¹⁹ In such cases the second test referred to above (plaintiff's conduct making it difficult to determine the

¹⁸ *Clerk & Lindsell on Torts* at 65.

¹⁹ See e.g. *Lane v. Holloway*, *supra*, Chapter III, 3.E.30. where the plaintiff, an elderly man, provoked a fight with a younger neighbour who then violently battered him.

defendant's duty of care) will be the most likely to be applied. However, as already stated,²⁰ also non-criminal conduct may give rise to a defence of *ex turpi causa non oritur actio*, although it will be "extremely difficult to identify categories of conduct sufficiently reprehensible or grossly immoral as to justify denial of a remedy".²¹ The first test (affront to the public conscience) is then normally the test to be applied, be it that it is difficult to apply and that its content may change over the years.²² The second condition raises the question of sufficient connection of the plaintiff's own wrongdoing with the injury of which he complains.²³ Thus, in *Jackson v. Harrison*²⁴ both the plaintiff and the defendant had been disqualified from driving and knew about their mutual disqualifications. It was held that the defendant's plea of *ex turpi causa non oritur actio* failed because the plaintiff's injury was unconnected with the criminal conduct of both parties. Furthermore, in *Saunders v. Edwards*,²⁵ the plaintiff's action in a suit for fraudulent misrepresentation in respect of the sale of a flat was allowed to proceed, since his own fraud on the Inland Revenue was independent of, and unconnected to, the fraud practised on him. By contrast in *Ashton v. Turner*,²⁶ drunken burglars made their get-away from the scene in the car belonging to one of them (the defendant), whereupon the other (the plaintiff) was injured as a result of the defendant's reckless driving. The plaintiff's claim was dismissed, as the plaintiff's wrongdoing was central to the conduct of which he complained (as it was in the annotated case).

(3) In the annotated judgment, the plea of *volenti non fit injuria*, which would otherwise have applied, according to the trial judge and the Court of Appeal, was barred by s. 148(3) of the Road Traffic Act 1972.²⁷ According to the court of first instance, if the plea *ex turpi causa non oritur actio* would have failed, the plaintiff's damages would in any case have been reduced to zero under the Law Reform (Contributory Negligence) Act 1945, but the Court of Appeal disagreed on that point.²⁸

²⁰ *Supra*, 7.3.3., Introductory Note, with a reference to *Kirkham v. Chief Constable of Greater Manchester* [1990] 2 QB 283, [1990] 3 All ER 246 (CA).

²¹ *Clerk & Lindsell on Torts* at 66.

²² *Clerk & Lindsell on Torts*, *ibid.*, cite in that respect the old case *Hegarty v. Shine* (1878) 14 Cox CC 145, where the plaintiff's action in assault was rejected partly on the ground of flagrant sexual immorality where she had contracted venereal disease from her lover. The author adds that in 1995 extra-marital intercourse may no longer be regarded as shocking but sado-masochistic practices might, even if they are not falling foul of the criminal law.

²³ The well-known cases cited below are taken from *Clerk & Lindsell on Torts* at 66.

²⁴ *Jackson v. Harrison* [1978] 19 ALR 129.

²⁵ *Saunders v. Edwards* [1987] 1 WLR 1116 (CA).

²⁶ *Ashton v. Turner* [1981] QB 137.

²⁷ Now S. 149 of the Road Traffic Act 1988. See *supra* 7.E.16, Note (3).

²⁸ See *supra*, 7.E.11.