

Illegality as a Defence to Negligence in English Law

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Introduction

The common-law tort of negligence arises when a person, who owes a duty of care to another,¹ breaches that duty² and reasonably foreseeable harm or loss is caused by the breach of duty.³ Illegality is a general defence. It is, therefore, a defence available to a defendant in a negligence action. This is shown by cases like *Ashton v Turner*,⁴ *Pitts v Hunt*⁵ and *Chunis v Camden and Islington Health Authority*.⁶

This paper considers its application to negligence in English law. Although the defence is to be applauded because of its very appealing justification, which centres around public policy (in terms of preserving the integrity of the legal system and preventing affront to the public conscience), it seems now to be a troubled concept because of the controversy generated by the stern approach to it. The courts have, therefore, imposed limitations on it and there have been calls for reform of the law relating to it. This paper is aimed at contributing to the literature⁷ by exposing this troubled concept again but with particular reference to negligence in English law because the majority of recently decided cases on the application to tort of this general defence are cases on negligence. The paper looks,

¹ *Donoghue v Stevenson* [1932] AC 562; *Caparo Industries plc v Dickman* [1990] 1 All ER 568.

² *Condon v Basi* [1985] 2 All ER 453; *Latimer v AEC Ltd.* [1953] AC 643.

³ *The Wagon Mound* [1961] AC 388; *Pickford v Imperial Chemical Industries* [1998] 3 All ER 462; *Chester v Afshar* [2004] UKHL 41; [2005] 1 AC 134.

⁴ [1981] QB 137.

⁵ [1990] 3 All ER 344.

⁶ [1998] 3 All ER 180. Contributory negligence and consent (*volenti*) are also defences to negligence.

⁷ See, eg, T Hervey, "Caveat Criminalis", (1981) 97 *LQR* 537; C Debattista, "*Ex turpi causa* returns to the English Law of Torts: Taking advantage of a wrong way out", (1984) *Anglo-Am LR* 15; K Williams, "Defences for Drunken Drivers: Public Policy on the Roads and in the Air", (1991) 54 *MLR* 745; B Rodger, "*Ex Turpi*: A Location-driven Defence?", (1998) *Jur Rev* 201; R Glofcheski, "Plaintiff's Illegality as a Bar to Recovery of Personal Injury Damages", (1999) 19 *LS*, 6; and The Law Commission, *The Illegality Defence in Tort*, Consultation Paper No 160 (London: The Stationery Office, 2001).

inter alia, at the relevant leading cases in this jurisdiction and argues, as regards negligence, that it would be inappropriate for the defence of illegality to be replaced by contributory negligence or consent, and that the defence ought to be retained and refined rather than be abolished. It is divided into six parts, namely: (a) the meaning of the defence, (b) its basis, (c) its application to negligence, (d) the various approaches to it, (e) its limits and (f) suggestions for reform.

(a) Meaning of the defence

Put simply, the defence of illegality means that a person cannot rely on their illegal act or conduct to found an action against another person. The Latin maxim, “*ex turpi causa non oritur actio*”,⁸ meaning “out of an illegal act there can be no cause of action”, sums it up.⁹ Therefore, for example, where in the course of blowing a bank safe, one of the burglars is negligent and the ensuing explosion injures his fellow burglar, the latter’s claim against the former ought not to succeed¹⁰ (although the claim could also be denied on the basis of voluntary assumption of risk, ie, *volenti*).

But, then, does the claimant’s act/conduct have to be criminal? The defence seems to be not limited to criminal acts by the claimant because in *Kirkham v Chief Constable of Greater Manchester Police*¹¹ the Court of Appeal stated that it could apply to immoral behaviour, too. In *Euro-Diam Ltd v Bathurst*¹² Kerr LJ also used the expression, “immoral conduct,” when referring to the defence. In

⁸ An equivalent Latin phrase, “*ex dolo malo non oritur actio*,” was used by Lord Mansfield in *Holman v Johnson* (1775) 1 Cowp. 341, 343; 98 ER 1120, 1121. His Lordship had said earlier, in *Montefiori v Montefiori* (1762) 1 Wm Bl 364, that “no man shall set up his own iniquity as a defence, anymore than as a cause of action.” Similarly, Wilmut LJ, in *Collins v Blantern* ((1767) 2 Wilson 341, 350; 95 Eng. Rep. 847, 852 (KB)), said: “No polluted hand shall touch the pure fountains of justice.” Another related maxim is “*allegans suam turpitudinem non est audiendus*” (“a person alleging his own wrongdoing is not to be heard”).

⁹ Although Tony Weir loosely interprets the maxim as “bad men get less”, we would replace “get less” with “should get nothing” because “get less” seems to take it for granted that they should get something, which does not always happen (see, eg, *Ashton v Turner* and *Clunis*).

¹⁰ A similar example was given by Mason CJ in *Gala v Preston* [1991] 100 ALR 29, 36. See also *Pitts v Hunt* [1990] 3 All ER 344.

¹¹ [1990] 3 All ER 246, 251 (*per* Lloyd LJ).

¹² [1988] 2 All ER 23

fact, according to the Law Commission, there are three possible interpretations of “illegal conduct” in this respect, namely: (a) a breach of the criminal law, (b) a breach of the civil law and (c) immoral behaviour.¹³ So, the wrongdoing in question is clearly not restricted to a criminal wrong because it also includes a civil wrong and immoral behaviour.

(b) Basis of the defence

What, then, is the basis of the maxim, *ex turpi causa non oritur actio*? In other words, why should a person, who, for example, is injured by the negligent act of another person while he himself is doing an “illegal” act, not be allowed to sue that negligent person successfully? It is public policy, which justifies, and is the *raison d’être* of, the maxim. This may be explained in two ways at least. First, allowing a claimant to profit from his/her illegal conduct would constitute an affront to the public conscience¹⁴ – it would be tantamount to aiding or rewarding a criminal and would, therefore, bring the law into disrepute.¹⁵ Secondly, the defence preserves the integrity of the legal system for the same reason, ie, the desirability of not allowing a claimant in a civil action to obtain “profit” from an illegal act.¹⁶

A good illustration is *Pitts v Hunt*, a case involving two youths, who had been drinking, had set off home on a motorbike (driven by one of them with the claimant riding pillion and encouraging the driver, whom he knew was drunk, under-age, unlicensed and uninsured, to drive so recklessly as to frighten other road-users). An accident occurred, as a result of which the claimant was seriously injured and the driver/defendant was killed. The claimant’s action failed because of the defence of illegality. Whereas Balcombe LJ thought that the nature of the joint illegal enterprise made it impossible for the court to determine the standard of care appropriate in the circumstances, Dillon LJ considered that the

¹³ Law Comm., *op cit*, para 3 (1.12).

¹⁴ *Pitts v Hunt*; see also *Vellino v Chief Constable of Greater Manchester Police* [2001] EWCA Civ 1249; [2002] 1 WLR 218.

¹⁵ See T. Hervey, *Caveat Criminalis*, (1981) 97 LQR 537, 539.

¹⁶ This is in line with the maxim, “*nullus commodum capere potest de injuria sua propria*” (“no one should be allowed to profit from his own wrong”).

action should fail because it arose directly *ex turpi causa* and Beldam LJ thought that to allow the claim would be contrary to public policy and an affront to the public conscience.

The two aspects or expressions of the justification for the defence can be seen clearly in the following statement by Kerr LJ in *Euro-Diam Ltd v Bathurst*:¹⁷

The *ex turpi causa* defence 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 relief which he seeks because the courts would thereby appear to assist or encourage the plaintiff in his illegal conduct or to encourage others in similar acts.

Six years after that case, however, in *Tinsley v Milligan*¹⁸ the House of Lords disapproved of the notion of affront to the public conscience being relied on as the basis of the maxim, *ex turpi causa non oritur actio*. Nevertheless, a few years later, Kerr LJ's statement was described in *Reeves v Commissioner of Police for the Metropolis*¹⁹ by Buxton LJ as still "a valuable guide to the basis of the defence."²⁰

The exposition of Kerr LJ in *Euro-Diam Ltd. v Bathurst* also concerns the issue of deterrence as a goal of the defence: the courts would like people to be discouraged from doing, and then relying on, unlawful acts in order to make a claim against others.²¹ The problem with deterrence here, however, is whether it can be claimed with certainty that the defence of illegality will deter criminal acts by claimants or that the abolition of that defence will deter criminal or

¹⁷ [1988] 2 All ER 23 at 28-29; [1990] 1 QB 1 at 35.

¹⁸ [1994] 1 AC 340.

¹⁹ [1998] 2 All ER 381.

²⁰ It must be noted that in *Reeves* the House of Lords ([2001] AC 360) did not deal with the *ex turpi* defence.

²¹ Indeed, long ago in 1938, in *Beresford v Royal Insurance Co Ltd* [1938] 2 All ER 602 at 607, [1938] AC 586 at 598-599, Lord Atkin said that the effect of the maxim was "to act as a deterrent to crime".

negligent acts by defendants.

Another problem facing deterrence as a goal of the defence of illegality is that most criminal actors do not expect, while doing the criminal act, to be injured by someone else's negligence etc; they would, therefore, hardly be influenced by the thought of the defence barring their claim. In the case of minors, acting on impulse, this would surely seem to be true.²²

It may well be argued that the law of tort should not interfere with the role of the criminal law, which includes punishment, deterrence, etc.²³ However, considering that the criminal law does not deter in all cases, if the law of tort can, in certain circumstances, complement the criminal law, that should be deemed appropriate. Although the same may be said of the goal of retribution or punishment, the problem with the latter is that strict application of the defence in order to punish claimants for their unlawful act so as to deny their claim would mean treatment of them as outlaws²⁴ even if the unlawful act is not a crime, eg, trespass to another's land.

Kerr LJ's statement, in *Euro-Diam Ltd. v Bathurst*, that the defence will apply "if in all the circumstances it would be an affront to the public conscience if, by affording him the relief sought, the court was seen to be indirectly assisting the plaintiff in his criminal act," suggests that the criminal conduct in question must be, not a trivial one but rather, a serious one, capable of constituting an affront to the public conscience in the event of a successful claim by the wrongdoing claimant. This is supported by the words of Sir Murray Stuart-Smith in *Vellino v Chief Constable of Greater Manchester*: "Generally speaking a crime punishable with imprisonment could be expected to qualify".²⁵

Although the defence runs counter to one of the aims of damages in tort (ie, compensation of the claimant) since its application has the effect of cancelling out the claimant's action or making it unsuccessful, the appeal of its justification cannot be

²² See, eg, J H King Jr, "Outlaws and Outlier Doctrines: The Serious Misconduct Bar in Tort Law", 43 (2002), *Wm and Mary L. Rev.*, p 1045.

²³ See, eg, the Criminal Justice Act 2003, s 142, which identifies the purposes of sentencing as punishment of offenders, reduction of crime by deterrence etc, reform and rehabilitation of offenders, protection of the public and reparation by offenders to their victims.

²⁴ This issue is discussed below in the section on limits of the defence.

²⁵ [2002] 1 WLR 218 at 236.

ignored. The public conscience is generally so highly esteemed that not much support, if any, is likely to be given to anyone who outrages it.²⁶

One interesting question, in relation to public policy, is whether the defence (of illegality) should apply where, owing to the defendant's negligence, the claimant is unable to do something that is illegal. That issue arose in *Rance v Mid-Downs Health Authority*.²⁷ In that case the claimants, a married couple, alleged that, owing to the negligence of the defendants, a foetal abnormality was not detected during the course of the woman's pregnancy, and that deprived her of the opportunity of having an abortion. It was held that abortion of a foetus capable of being born alive would have been unlawful under the Abortion Act 1967 then applicable and, so, it was not possible to found a cause of action against the hospital. Accordingly, it would be contrary to public policy to allow the claimants to recover in those circumstances. This decision ought to be applauded because the circumstances in question were such that the claimants had lost the opportunity to violate the provisions of a statute then in force and their claim had been based on their having been deprived of that opportunity.

(c) Application to negligence

There are two aspects of the defence's application to negligence. The first is where the claimant is the only person who did the illegal/immoral act, and the second where both the claimant and the defendant are involved in a joint criminal enterprise.

i) Criminal/immoral act by claimant only

Two clear illustrations of this are *Clunis v Camden and Islington Health Authority*²⁸ and *Sacco v Chief Constable of South*

²⁶ Therefore, it was not surprising when, after the Court of Appeal had decided in *Revill v Newbery* ([1996] 1 All ER 291) that the defence of illegality did not apply, the damages payable by the defendant to the claimant were paid by a newspaper fund, promptly and willingly contributed to by members of the public. That case was decided on the basis of the Occupiers' Liability Act 1984.

²⁷ [1991] 1 All ER 801.

²⁸ [1988] 3 All ER 180; [1998] 2 WLR 902.

Wales Constabulary.²⁹ In *Clunis* a former mental patient, after discharge from hospital, had stabbed a man to death in a place to which the public had access, Finsbury Park Underground Station in North London. His negligence claim against the responsible health authority (for breaching their duty to him by failing to give him after-care, which he needed) was not entertained by both the High Court and Court of Appeal because of the maxim, *ex turpi causa non oritur actio* – his claim arose out of a criminal offence which he himself had committed.³⁰

Sacco concerned a 17-year-old claimant, who had been arrested following a brawl. While he was being taken to the police station in a police van, travelling at 25 miles per hour, he kicked open the door of the van and jumped out. He hit his head on the road and sustained injuries. His action failed because of his own illegality, ie, attempting to escape from lawful custody. He was simply the author of his own injury or misfortune.

Sacco was followed and applied in *Vellino v Chief Constable of Greater Manchester*.³¹ The facts in *Vellino* were similar to those in *Sacco* in that the claimants in both cases were injured while attempting to escape from lawful custody. However, the claimant in *Vellino*, unlike the claimant in *Sacco*, was a known burglar with a history of escaping from custody and the Court of Appeal held there that the police did not owe him a duty to take care that he did not get injured in his attempt to escape from lawful custody.

(ii) Claimant and defendant involved in a joint criminal enterprise

In *Sacco*³² Schiemann LJ restated this aspect nicely in the following way:

²⁹ (1998) Unreported.

³⁰ His mental state did not justify a verdict of not guilty by reason of insanity (in fact he had pleaded guilty to manslaughter on the ground of diminished responsibility and been sent to a special hospital) so that he had to be presumed to have known what he was doing (ie, killing a person) and that it was wrong. This case is further discussed under "Approaches to the concept in negligence", below.

³¹ [2002] 1 WLR 218.

³² (Unreported) 15 May 1998, a case which concerned criminal/immoral conduct by only the claimant.

It is common ground that the policy of the law is not to permit one criminal to recover damages from a fellow criminal who fails to take care of him whilst they are both engaged on a criminal enterprise. The reason for that rule is not the law's tenderness toward the criminal defendant, but the law's unwillingness to afford a criminal plaintiff a remedy in such circumstances.

An earlier example is *Ashton v Turner*,³³ where the claimant and the defendant, both involved in a burglary, were leaving the scene of the crime in a car, driven by the defendant, with the police in hot pursuit when the defendant negligently crashed the car and the claimant was injured. The claim was met successfully with the defence of illegality. Another example of this is *Pitts v Hunt*.³⁴ Regarding these decisions, it is worth pointing out that it may be too harsh to deny every claim on the first indication of wrongful conduct. However, it is undesirable and unacceptable for the law to be seen as assisting a wrongdoing claimant.

Nevertheless, in a Canadian Supreme Court case, *Hall v Hebert*,³⁵ where the facts were broadly similar to those in *Pitts v Hunt* (the defendant and the claimant were both drunk at the time of the injury and the claimant sued the defendant for negligence in allowing him in a drunken state to drive the defendant's car, which went off the road and rolled over, as a result of which the claimant suffered head injuries), the court allowed the claim but found the claimant 50% contributorily negligent. So, there the defence did not apply. According to McLachlin J, the defence, *inter alia*, ought to apply in tort only where the integrity of the legal system must be preserved and, so, it should not apply to personal injuries actions since in those cases a claimant does not seek profit. The Law Commission, also, in its Consultation Paper on the Defence, for the same reason, expressed doubt about the application of the defence to personal injury cases.³⁶

³³ [1980] 3 WLR 736, QBD; [1981] QB 137.

³⁴ See section on "Basis of the defence", above.

³⁵ (1993) 2 SCR 159.

³⁶ See Law Commission, *The Illegality Defence in Tort*, No 160, 2001, paras 4.36-4.47 and 5.24-5.34.

It must be said, with respect, however, that there are problems with that view. First, that view presents no answer to the situation where, for example, an illegal worker is injured at his workplace as a result of the negligence of a co-worker. In such a situation the injury and the illegality are closely connected and, so, even though the claim is a personal injuries one, the defence should apply so as to bar it; its basis is the unlawful conduct (working illegally). If the defence does not apply in such circumstances, then the result is likely to be, in our opinion, an affront to the public conscience because the law would then be, or be seen to be, giving assistance to the wrongdoer. That would affect negatively the good name of the law. Another difficulty with that view, as, indeed, pointed out by Jones, is that, given that all tort damages, except exemplary damages, are aimed at compensating the claimant, “logically, if the defence is only relevant where the court is seeking to deprive the claimant of a ‘profit’, it would never apply in tort”.³⁷

(d) Approaches to the concept in negligence

Two broad approaches to the defence in relation to negligence³⁸ may be identified from the decided cases: (i) the stern, traditionalist approach (variations of which are the negation-of-negligence approach and the reliance-on-the-illegality approach), and (ii) the flexible approach (which expressly permits judicial discretion in individual cases).

(i) The stern, traditionalist approach

This is the uncompromising approach, the one favoured by public moralists. It is that, traditionally, a claimant’s illegal act automatically disqualifies their claim. It is evident, especially, where both claimant and defendant are involved in a joint criminal enterprise and the claimant is injured in the course of that enterprise, as happened in *Ashton v Turner*.³⁹ Support for this viewpoint may be found in two cases reported in 1977, both involving Lord

³⁷ M A Jones, *Textbook on Torts*, 8th ed (Oxford Univ. Press, 2003), p 614.

³⁸ As well as other torts.

³⁹ [1981] QB 137.

Denning. In the first case, *Cummings v Grainger*,⁴⁰ Lord Denning suggested that the claim by a burglar, bitten by a guard dog, might be barred by the defence of illegality. Moreover, His Lordship made, in *Murphy v Culhane*,⁴¹ a similar statement:

... suppose a burglar breaks into a house and the householder, finding him there, picks up a gun and shoots him – using more force, maybe, than is reasonably necessary. The householder may be guilty of manslaughter ... But I doubt very much whether the burglar’s widow could have an action for damages. The householder might well have a defence ... on the ground of *ex turpi causa non oritur actio* ...

Sacco is another case which clearly illustrates this rigid approach although, in that case, only the claimant was involved in the illegal act, on which his claim was based, as already stated.

The negation-of-negligence approach is a variation of the stern, rigid approach. It places an automatic bar on a claimant’s claim against the defendant where the two are involved in a joint criminal enterprise. This, in effect, reduces judicial discretion. A typical example is where a duty of care is denied. Thus, according to Eubank J in *Ashton v Turner*,⁴² the courts, in certain circumstances, may not, because of public policy, “recognise the existence of a duty of care by one participant in a crime to another participant in the same crime, in relation to an act done in connection with the commission of that crime.”⁴³ A further example is where the appropriate standard of care cannot be set and, therefore, no negligence is found, as in *Pitts v Hunt*.⁴⁴

Another variant of the rigid approach is the reliance-on-the-illegality approach. Does the claimant have to rely on the illegality

⁴⁰ [1977] 1 All ER 104, 109.

⁴¹ [1977] QB 94, 98.

⁴² [1981] QB 137.

⁴³ See also the two Australian cases, *Smith v Jenkins* (1970) 44 ALJR 78, and *Progress and Properties Ltd v Craft* (1976) 51 ALJR 184.

⁴⁴ See also *Jackson v Harrison* (1978) 19 ALR 129, and *Gala v Preston* (1991) 100 ALR 29 (High Court of Australia).

to assert his claim? If so, the claim will fail. Thus, in *Clunis* the Court of Appeal held, *inter alia*, that, because the claimant's claim had been based essentially on his own illegal act of manslaughter, public policy dictated that the claim should not be allowed to succeed.

This is, however, challengeable in the light of the Court of Appeal's decision in *Reeves*.⁴⁵ There, Buxton LJ's approach was that stated by Kerr LJ in his exposition in *Euro-Diam Ltd v Bathurst*.⁴⁶ If the Court of Appeal had adopted that approach in *Clunis*, it would have been faced with the question whether it would be an affront to the public conscience and appear to encourage the claimant or others if the court held that the maxim did not apply. According to Kennedy, since *Clunis* was severely mentally disordered and, "*ex hypothesi*, beyond rational encouragement," there might not have been an affront to the public conscience had the maxim not been applied. Just as, in *Reeves*, the alleged turpitude (suicide) was exactly the act which the defendants, the "Police", had a duty to prevent, in *Clunis* the alleged act of turpitude (uncontrolled aggression resulting in homicide) was what the defendants were arguably under a duty to prevent by providing the claimant with after-care. Therefore, just as the maxim was held not to apply in *Reeves*, it might not have been held to apply in *Clunis* if the Court of Appeal had considered this argument based on Kerr LJ's statement in *Euro-Diam Ltd v Bathurst*.⁴⁷

Other objections to the defence in negligence are that (a) it results in double jeopardy and (b) it is self-defeating where the claimant and the defendant are involved in a joint criminal venture. The defence results in double punishment where, for example, A and B are co-burglars and B's negligence in the course of the burglary causes serious personal injuries to A and A sues B. If the defence is applied, A's first punishment will be that his action will fail and he will get no damages for his negligently caused injuries; his second punishment would then be having to live without any compensation or spending the rest of his days in a wheelchair if B's negligence

⁴⁵ [2001] AC 360, where, as already noted, the *ex turpi* defence was not dealt with by the House of Lords.

⁴⁶ *Ante*.

⁴⁷ See I Kennedy, "Negligence: Duty of Care", *Med Law Rev*, (1998), vol 6, no 1, pp 108-112.

causes him to be paralysed.⁴⁸

The defence may also be self-defeating because, if the justification for it is the desirability of not allowing a person to profit from his crime/wrong or not assisting a criminal in his civil suit where the crime and injury are inextricably intertwined, then, in the example above, whereas A's claim will be disallowed, B will be rewarded in a way by not being held liable for his negligent act, done during the commission of a crime.⁴⁹

(ii) The flexible approach

This is the approach which allows judicial discretion in individual cases (of negligence, etc.). It bases the *ex turpi* defence on the broad concept of what would be an affront to the public conscience or that of the court. It is a forceful one and also appealing because, instead of restricting the court, it enables it to consider all relevant circumstances and, therefore, to make sensible and just decisions, thereby avoiding arbitrary and disproportionate ones. *Kirkham v Chief Constable of Greater Manchester* illustrates this approach. There the claimant's husband, a suicidal alcoholic, killed himself while on remand in custody. Even though his wife had informed the police that he had attempted to kill himself previously, the police failed to notify the prison authorities. His widow sued the police in negligence. The Court of Appeal held that the police were liable and that the *ex turpi* defence did not apply, suicide being no longer an offence. Similarly in *Reeves v Metropolitan Police Commissioner*, where, as already mentioned, the *ex turpi* defence was not dealt with by the House of Lords, the Court of Appeal held that the deceased's suicide did not bar a claim based on his death.

Therefore, apart from the fact that suicide is morally wrong, the flexible approach, adopted by the court in *Kirkham*, actually enabled the court to exercise its discretion in considering whether allowing the claim, based on the deceased's suicide, would constitute an affront to the public conscience or not. In the event the court decided that it would not affront the public conscience.

⁴⁸ See R A Prentice, "Of Tort Reform and Millionaire Muggers: Should An Obscure Equitable Doctrine Be Revived To Dent the Litigation Crisis?", 32 *San Diego L. Rev.*, Winter 1995, p 118.

⁴⁹ *Ibid.* In this example we see also that the defence can discourage commencement of negligence actions by criminals. They would be very unlikely to bring a claim if it meant owing up to a serious crime or if the action is based on their criminal act.

(e) Limits of the defence

Strict application of the maxim could, however, lead to injustice at times, thereby posing a problem for the law.⁵⁰ For this reason certain limitations have been imposed on the defence by the courts. The limitations on it (which apply to other torts as well as negligence) are: (i) the injury must be closely connected with the claimant's illegal act, and (ii) the defendant must not have used excessive force.

The injury and the claimant's illegal act must be closely linked

The injury must be closely connected with the illegal act so as to be virtually a part of it (or must be a direct, uninterrupted consequence of the illegal act). So, it is not enough that the claimant's conduct is technically wrongful. There must be some close connection between his conduct and his injury. Thus, in *Hall v Woolston Hall Leisure Ltd*⁵¹ Peter Gibson LJ stated that the right approach:

... should be to consider whether the applicant's claim arises out of or is so clearly connected or inextricably bound up or linked with the illegal conduct of the applicant that the court could not permit the applicant to recover compensation without appearing to condone that conduct.

This close connection may be illustrated by *Vakante v Addey and Stanhope School*.⁵² In that case the appellant, who had been precluded from working without a permit while his application for asylum was being considered, went to work illegally as a graduate trainee teacher, contrary to the Immigration Act 1971, section 24; he also made fraudulent statements about his employment status so as to receive state benefits. The Court of Appeal, therefore, held that his complaint of unfair dismissal and discrimination was barred by

⁵⁰ Automatic application of the maxim would also be tantamount to displacement of judicial discretion.

⁵¹ [2001] ICR 99, at 111-2.

⁵² [2004] EWCA Civ 1065; [2004] 4 All ER 1056.

illegal conduct, which was clearly connected or inextricably bound up with his claim.⁵³ As regards negligence, specifically, such a link was also evident in *Clunis, Ashton v Turner* and *Pitts v Hunt*, etc.

However, in *Revill v Newbery*,⁵⁴ there was a different result. There the claimant and his friend were about to burgle the defendant's shed on his allotment when the claimant was shot by the defendant, who was then sleeping in that shed. The Court of Appeal held that the defendant breached his duty to the claimant by the use of unreasonable, disproportionate force, and also that the claimant was contributorily negligent. The Court, however, did not directly answer one relevant question: What was the claimant doing at the time of the injury? If the Court had considered that question, the answer would have been, most probably, "an illegal act" (attempting to burgle). A further pertinent question would have been whether he would have been shot by the defendant if he had not attempted to burgle the defendant's shed.⁵⁵

The defendant must not have used excessive force

Where excessive force is used by the defendant, the defence should not apply.⁵⁶ Without this limitation all claims by trespassers or criminals will be barred, irrespective of how excessive or unreasonable the force against them is. So, for the defence to succeed, there must be proportionality between the claimant's conduct and the defendant's act.⁵⁷ In other words, the force used by the defendant should not be out of all proportion to the claimant's unlawful conduct.

In fact, in *Revill v Newbery*,⁵⁸ it was in the judgement of the High Court (rather than of the Court of Appeal) that we see both limits of the defence of illegality restated: the close interweaving of

⁵³ To allow his claim would be to condone the illegality. It is thought, for the same reason, that the same result would have been reached if he had been injured by his employer's negligence.

⁵⁴ [1996] 1 All ER 291.

⁵⁵ That apart, what did not help the defendant was the fact that he anticipated burglars and, therefore, waited, equipped with a gun, which is totally different from the position of a surprised householder.

⁵⁶ See the judgement of Millett LJ in *Revill v Newbery*.

⁵⁷ Bingham LJ made a similar statement in *Saunders v Edwards* [1987] 2 All ER 651, 665-6.

⁵⁸ *Per* Rougier J.

the claim/injury in the illegal act and the requirement of proportionality. There, according to Rougier J, “the discharge of a shotgun towards burglars who are not displaying any intention of resorting to violence to the person” was “out of all proportion to the threat involved” and, accordingly, “any injury” inflicted by such discharge could not be “an integral part or a necessarily direct consequence of the burglary”. That view seems logical indeed. Nevertheless, it, too, like the Court of Appeal, fails to answer the question whether, if the claimant had not attempted to burgle the defendant’s shed, he would have been shot by the defendant.⁵⁹

Today there is the principle⁶⁰ that no person becomes a “*caput lupinum*” (which literally means “outlaw”) in the eyes of the civil law simply because they were engaged in some unlawful act.⁶¹ Thus, it has been pointed out that the defence of illegality poses the danger of effectively throwing the principle aside by not allowing wrongdoing claimants to succeed in their claim⁶² and, therefore, treating them as outlaws. Accordingly, Evans LJ stated, in *Revill v Newbery*, that it was one thing to deny claimants any fruits from their illegal act, but a different and far more extensive thing to deprive them of even compensation for injuries they were otherwise entitled to recover at law (in other words, to treat them as outlaws). It must, however, be mentioned that the Court of Appeal’s decision in *Revill v Newbery* was restricted, not to negligence but, to the Occupiers’ Liability Act 1984, which does not state illegality as a defence under it.

But, why should the law protect wrongdoers just to avoid their being treated as outlaws? Wrongdoing is undeniably improper and immoral. So, why should the law support it or be seen as doing so?

⁵⁹ It is interesting to note that in one Australian case, *Hackshaw v Shaw* (1985) 3 ALR 417, on facts similar to those in *Revill v Newbery*, the *ex turpi* defence was not mentioned in the *rationes decidendi* but, instead, the claimant was held to have been 40% contributorily negligent. Similarly, in a Canadian case, *Bigcharles v Merkel* [1973] 1 WWR 324, where a security guard shot and killed a burglar on commercial premises, contributory negligence was found on the part of the burglar. Those two Commonwealth cases were not cited to the Court of Appeal in *Revill v Newbery*.

⁶⁰ Hereinafter referred to as the “outlaw principle”.

⁶¹ *Henword v Municipal Tramways Trust* [1938] 60 CLR, 438 at 466. See also T Hervey, “Caveat Criminalis”, (1981) 97 LQR 537, 541. For the origins of the concept of “*caput lupinum*” see Frederick Pollock and Frederic W Maitland, *History of English Law Before the Time of Edward I*, 2nd edn (1898), p 449 and n 1; see also William Blackstone, *Commentaries on the Laws of England* (1769) (Cambridge Univ. Press, 1919), p 315.

⁶² See, eg, Jones, *op cit* p 612.

The only exception to this is where the wrongdoing is trivial, eg, where a claimant, driving a car with faulty brakes, is injured as a result of a collision caused by another driver's negligence.⁶³

The outlaw principle ought not to be adhered to where the unlawful act in question is inextricably bound with, or connected to, the claimant's claim. This is especially so where the claimant and the defendant are involved in an illegal joint venture because, if a person is allowed by the law to rely on his unlawful act to sue successfully or to found a cause of action out of their own illegal act,⁶⁴ that would constitute an affront to the public conscience and negatively affect the integrity of the legal system.⁶⁵

So, one can say that the purpose of the requirement of a causal connection between the claimant's conduct and the defendant's negligence is to prevent harshness in the law and injustice to the defendant. This further weakens the argument that no one should become an outlaw in the eyes of the civil law simply because they have done an unlawful act.

Granted that the defence has an appealing justification and that there are limitations on it, there is now a dilemma facing the courts. First, the law must not be seen as aiding the criminal/wrong-doer (because that would undermine the integrity of the justice system). But, at the same time, the defence should not be applied rigidly, regardless of how serious or disproportionate the claimant's injury or loss is to their unlawful conduct.

Since, as shown above, it cannot be denied that the defence has some unsatisfactory features, the following section will now look at suggestions for reform of the law relating to its application to negligence.

(f) Reform suggestions

The suggestions for reform may be grouped under two headings: those not made by the Law Commission and those made by the Law Commission.

⁶³ See Sedley LJ's dissenting judgement in *Vellino v Chief Constable of Greater Manchester* [2001] 1 WLR 218.

⁶⁴ See, eg, *Pitts v Hunt*, *ante*.

⁶⁵ This argument also applies in the case of a burglar shot by a householder.

Suggestions not made by the Law Commission

In the first group of suggestions (ie, those not made by the Law Commission) are calls for abolition of the defence because of the availability of either contributory negligence or consent against claimants. Supporters of contributory negligence include Sedley LJ⁶⁶ and McLachlan J⁶⁷. The problem with this view, however, is that in English law contributory negligence is not a total defence; rather, it is only a partial defence. According to the Law Reform (Contributory Negligence) Act 1945, section 1(1), the court has power to reduce a claimant's damages "to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility of the damage". The word, "share", therefore, implies that the defence is not total. Besides, in *Pitts v Hunt* the Court of Appeal made it clear that there could not be 100% contributory negligence. Therefore, since illegality is a total defence but contributory negligence is only a partial defence, it would be inappropriate for the defence of illegality to be replaced by contributory negligence.

Glofcheski also advocates outright abolition of the *ex turpi* defence because its role can be played by consent (*volenti*), for example.⁶⁸ As regards the tort of negligence, however, this is not a good suggestion because illegality and *volenti* are different defences⁶⁹ even if there may be certain circumstances where the same set of facts may give rise to both defences.⁷⁰

The Law Commission's proposals

There are also the proposals of the Law Commission, made in

⁶⁶ See *Vellino*, ante.

⁶⁷ See *Hall v Hebert*, ante.

⁶⁸ See R Glofcheski, *op cit*, pp 6-23.

⁶⁹ Even the maxims relating to them ("*ex turpi causa non oritur actio*", ie, "out of an illegal act there can be no cause of action" and "*volenti non fit injuria*", ie, "that to which a person consents cannot be considered an injury") clearly do not mean the same thing (See L B Curzon, *Dictionary of Law* (Pitman Publishing, 1995)).

⁷⁰ See *Vellino*, ante. For example, if, during a professional boxing contest, a boxer, who works part-time as a model, is punched in the face and sustains a cut on his lip which swells up badly, *volenti* may be pleaded against him if he sues his opponent. Illegality, however, will clearly not apply.

2001.⁷¹ In their paper the Commission recommended, *inter alia*, that the present law be replaced by a structured discretion to bar a claim arising from, or connected to, an illegal act by the claimant. The discretion to bar a claim must depend on: (a) the seriousness of the illegality,⁷² (b) claimant's knowledge and intention, (c) whether denial of relief would act as a deterrent, (d) whether denial of relief would further the purpose of the rule which renders the claimant's act illegal, and (e) whether denial of relief would be proportionate to the illegality involved.⁷³

These reform proposals by the Commission are quite laudable in the present writer's opinion because they are not against retention of the defence. It is felt that the defence ought to be retained on the grounds that the automatic bar to an action by one co-criminal against the other (eg, *Ashton v Turner*) and the limitations imposed on it make it more acceptable in the interests of justice and preservation of the integrity of the law.

It would be inappropriate, therefore, to call for judicial or legislative repeal of the defence of *ex turpi* just because there are some problems with it. To abolish the defence under such circumstances would be like throwing away the baby with the bath water just because the latter is no longer "clean". Rather, the present state of the law should be improved by making the defence much more acceptable. There are already two potent limitations on it in English law: close connection between the injury/harm and the illegality, and secondly, proportionality, as already stated. The next step is, in the interests of fairness and consistency in the future and as proposed by the Law Commission, for judicial discretion to be increased so that judges would have to take into consideration, when deciding whether the defence should apply or not, factors such as the seriousness of the offence/illegality by the claimant, and the claimant's knowledge and intention.

⁷¹ Law Commission, *The Illegality Defence in Tort* (Consultation Paper 160 (2001)).

⁷² So, eg, a driver, not wearing a seatbelt, should be able to claim damages for facial injuries caused by another driver's negligence; the illegality there, failure to wear a seatbelt, is trivial.

⁷³ Law Commission, *op cit*. This is similar to the Commission's earlier proposals relating to illegality in contract and trusts (see *Illegal Transactions: The Effect of Illegality on Contracts and Trusts*, Consultation Paper No 154), the reason being that a single regime in relation to the defence would, in the Commission's view, further their aims: "to review the law, with a view to its systematic development and reform, including the elimination of anomalies and generally the simplification ... of the law" (para 5.12, Law Commission No 160; see also the Law Commissions Act 1965, s 3(1)).

Conclusion

As already stated, the defence of illegality is a general defence. As such, it applies to the tort of negligence. The focus of this paper has been on only the application of the defence to negligence because the majority of the recent cases on its application to tort have been cases on negligence. The two broad approaches to the defence as regards negligence (the rigid approach and the flexible approach) and the limitations on the defence, necessitated by objections to its strict application, have been discussed above.

Although the defence (of illegality) undermines one goal of damages in the law of tort, ie, compensation of the claimant, because its effect is to make the claim unsuccessful, the appeal of its justification cannot be denied. Compensation of claimants should not prevail over the public conscience. In order to prevent the public conscience being affronted and to preserve the good name of the law, some personal injuries claims require application of the defence to them, as do cases where the claimant and the defendant are involved in a joint criminal enterprise.

The current law relating to the defence of illegality in tort (negligence included), as admitted, has some unsatisfactory features. But, as regards negligence specifically, it would be inappropriate to replace the defence with contributory negligence or consent; in addition, outright repeal of the defence is too extreme and is, therefore, not supported here. The better option, as suggested above, would be to retain the defence but refine it so as to make it more acceptable than it is at the moment.

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