Neutral Citation Number: [2021] EWHC 2770 (QB).

Case No: F90MA188

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY

The Civil Justice Centre
1, Bridge Street West,
Manchester

Date: 15 October 2021

Before :

HIS HONOUR JUDGE BIRD sitting as a Judge of this Court

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Between :

RO
(by his litigation friend MI) **Claimant**

- and –

(1) FREDDY GRAY
(2) THE MOTOR INSURERS' BUREAU **Defendants**

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Mr Christopher Melton QC (instructed by **Potter Rees Dolan Limited**) for the **Claimant**
Mr Stephen Grime QC (instructed by **Keoghs LLP**) for the **Second Defendant**

Hearing dates: 20 and 21 July 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Introduction

1. In the early hours of 4 July 2016, the claimant and his passenger were seriously injured when the Ford Transit van he was driving struck a wall at speed. The claimant's case is that Mr Gray, the first defendant, was pursuing him at the time and that the collision, and so his injuries, were caused by Mr Gray who:

> "*drove his vehicle at speed on the offside of the Ford Transit partially overtaking the same and thereafter deliberately swerved towards and in contact with the rear offside of the Transit van striking it on or about its rear offside wheel with the intention of and, result, that the Claimant lost control of the vehicle which left the carriageway to the offside and collided with a substantial brick wall, destroying the vehicle and causing serious injury to the Claimant*."

2. As a result of these actions, Mr Gray was convicted of causing serious injury by dangerous driving, dangerous driving and driving whilst disqualified. He was sentenced to a total of 42 months imprisonment and disqualified from driving for 6 years. He was not insured to drive at the time and so the second defendant, the Motor Insurer's Bureau (MIB) effectively stands in his shoes. As there is no practical distinction between the defendants, I will refer to the first defendant in this judgment as the defendant. Mr Gray was not represented at the trial and did not appear.

3. In the run up to the events complained of, the claimant and the defendant (with others) had been involved in a series of unpleasant exchanges, some violence and some property damage. The claimant was not prosecuted in respect of any of the events which took place in the 30 minutes or so immediately preceding the incident. I have seen no evidence that sheds light on the decision not to prosecute.

4. The claimant pleads his case against the defendant in assault and battery rather than negligence. This is a trial of liability only. The defendant relies on the common law defence of illegality as a complete defence to the claim. No issue of contributory negligence arises if liability is established. Both parties accept that *Pritchard v Co-operative Group Limited* [2011] EWCA Civ 329 makes it clear that contributory negligence is not available as a partial defence to an intentional tort such as battery.

5. The defence pleads illegality as follows:

> *"The Claimant's wrongdoing and turpitude precludes him from any entitlement to recover damages. The Second Defendant relies upon the maxim "ex turpi causa non oritur actio ". The Claimant by his own actions and in conjunction with [his passenger] engaged in aggressive and violent behaviour which constituted, at the very least, one or more public order offences and criminal damage…... The Claimant deliberately chose to provoke and antagonise others, including the First Defendant to respond aggressively…."*

The claim

6. The claimant suffered a severe traumatic brain injury, lacerations to his spleen and liver and various broken bones. The damages claimed are substantial, but as yet unspecified. The heads of claim are those often seen in cases involving similar injuries and no doubt the majority of any award will be in respect of future care and possibly accommodation needs. As a result of his brain injury the claimant lacks litigation capacity and so he brings this claim through his mother who is his litigation friend. A claim brought by the claimant's passenger (his then partner) has been settled. In those proceedings she was anonymised and referred to as LXK. I will refer to her in the same way.

The issue of liability (subject to the illegality defence)

7. Mr Grime QC did not formally concede that (subject only to my determining the illegality defence) liability should be entered.

8. I am satisfied for the reasons I set out below, that the defendant's actions were deliberate. I need look no further than his convictions to be satisfied of that. I am in any event satisfied on the evidence before me as set out below that the defendant acted deliberately to force the claimant off the road.

The evidence

9. Before setting out the facts, it is helpful to say a little about the evidence and to set out a brief summary of the submissions. My findings in respect of "turpitude" follow and I then turn to the law before finally applying the law to the facts as I have found them.

10. There was a large measure of agreement between Leading Counsel about the facts. I heard no live evidence but had the opportunity to consider a number of witness statements, some of which were prepared for the police investigation and some for these proceedings. None of the factual evidence was challenged. I had the great benefit of a good deal of CCTV footage and a police accident report. I have watched the footage with care and the chronology I have recorded is derived from that footage. The CCTV images have no sound and so witness accounts help to explain the prevailing atmosphere when the images were captured.

11. I have an unsigned witness statement prepared for the defendant following an interview with the MIB's solicitor, Joy Gilbert together with a statement from her and her contemporaneous note of that interview which took place on 6 June 2018.

Submissions in Brief

12. Both sides made incisive and helpful submissions about the evidence and the law. Each accepted that I was required to apply a policy based test in accordance with the template provided by the Supreme Court in *Patel v Mirza* [2016] UKSC 42.

13. I am grateful to both Leading Counsel for their assistance.

14. In order properly to carry out that exercise it will be necessary to consider both the facts and recent developments in the law in some detail.

The facts

15. I record below my findings of fact.

16. The events leading to the claimant's injuries took place over a 35-minute period between about 11.55pm on 3 July 2016 and 12.30am on 4 July and in three principal locations: a petrol station on the A58 the main road into Rochdale from the west, on Packer Street in Rochdale town centre and then over various roads between Packer Street and High Level Road on the way out of Rochdale heading towards Oldham where the collision occurred.

Location 1: The Petrol Station and the drive to Packer Street

17. Shortly before midnight the claimant and LXK pulled into a petrol station just outside Rochdale town centre. As the claimant was filling the van with fuel, a taxi pulled up outside the petrol station. It was on its way to Packer Street. The front seat passenger got out and headed across the petrol station forecourt to the kiosk to buy cigarettes. It appears that the claimant and the passenger struck up a conversation at the kiosk window. LXK no doubt observed the exchange and may have heard it. It seems that she became jealous as a result of what she saw and heard. As the passenger headed back to the taxi, LXK got out of the van and remonstrated with her. Mr Zia, the taxi driver, recalls that LXK was shouting and swearing in an aggressive manner. He recalls that the claimant was protesting that he did not know the passenger and was becoming increasingly angry.

18. CCTV footage shows that a second female passenger ("the second passenger") got out of the taxi as LXK was shouting. Mr Zia recalls she shouted to LXK words to the effect of "*if you're going to carry on, then let's have it*." The passengers got into the taxi, and it drove off. There was a third passenger, a young man. He played no part in the exchanges.

19. The claimant and LXK chased the taxi from the petrol station towards Rochdale town centre along the A58. The claimant was driving. When the taxi stopped at traffic lights the van pulled along aside. Mr Zia recalls that the claimant harangued the passengers and shouted for the front seat passenger to get out of the taxi. As the taxi pulled away the van followed. Shortly before arriving at Packer Street the van cut in front of it and forced it to stop. The claimant got out of the van and tried to open the rear taxi door, he punched the taxi and was shouting and acting aggressively. He kicked the taxi with force and fell over.

20. Mr Zia managed to drive away at speed. He soon reached Packer Street and dropped his three passengers outside the Flying Horse Pub ("the pub"). CCTV captured the drop-off at a little after 12.12 am. It is obvious from the footage that the passengers were agitated and concerned. They were clearly aware that the van was only a short distance behind them and appeared anxious to get inside to the relative safety of the pub.

Location 2: Packer Street

The layout

21. Packer Street lies a little off the A58 about 2 miles from the petrol station. It runs roughly north to south. Most of it is a one-way street. Driving from north to south down Packer Street on the left-hand side there are pubs and clubs. There is a club called "Koko's" at the northern end of the street and the pub is at the opposite end. Rochdale Town Hall stands with its eastern aspect towards Packer Street. Between the pubs and the clubs and the Town Hall there is an open car park. A single row of spaces runs parallel to Packer Street so that cars can be parked facing the pubs and clubs. By the time the taxi arrived at the pub, the defendant's car was parked facing the pubs and clubs on Packer Street and the defendant with his friend Mr Loveridge were inside the pub.

22. The car park can be entered by turning to the right at the bottom of Packer Street. There is a double row of spaces in the middle of the car park and then another single row adjacent to the Town Hall. The car park can be exited to 2 roads running along the front of the Town Hall. Each road is called The Esplanade and each leads directly to the southbound carriageway of the A58.

Outside the pub

23. The evidence of what happened on Packer Street is derived from CCTV footage, the evidence of Mr Thomas Green, a doorman at KoKo's and the evidence of Mr Matthew Vennard a doorman at the pub.

24. As the passengers were leaving the taxi, the van arrived. It parked about halfway along Packer Street between the pub and KoKo's. The passengers rushed to the pub but the doormen would not let them in. Mr Vennard's evidence is that the young man from the taxi asked for some assistance, saying "*there's a lad in [that] van who's going to kick my head in*".

25. The claimant and LXK got out of the van and walked towards the taxi passengers who were outside the pub. CCTV shows both pointing with an outstretched arm towards the passengers as they advanced. Mr Vennard's evidence is that the claimant was shouting "*who do you think you are kicking off with me?*" and LXK was shouting "*who do you think you are?*". The CCTV footage appears to show the second passenger moving closer to the claimant and LXK. The three became involved in a heated discussion. The other passengers stayed close to the entrance of the pub and closer to the relative safety afforded by the doormen.

26. One doorman approached the claimant and spoke to him. There is no evidence about what was said. LXK continued to remonstrate with the second passenger. At this time the defendant and his companion and friend Mr Loveridge came out of the pub. They had been inside since about 11.30pm. They stood to one side and observed events unfolding.

27. The claimant headed back to the van and got in. LXK followed him. She continued to point back at the passengers and behave aggressively but got back into the van. The defendant and Mr Loveridge then spoke to the passengers who had been joined by the second passenger. As they did so, the second passenger once again moved away from the group and towards the van. At the same time, the claimant got out of the van and confronted her. LXK then got out

of the van. The claimant kicked out at the second passenger who backed away from them both but continued to remonstrate.

28. Doormen arrived from KoKo's to assist. Doormen from the pub were speaking to LXK and appeared to be keeping her away from the second passenger. The claimant turned and moved back towards the van. The second passenger remained close by. LXK appeared to become more angry and attempted to lash out at the second passenger. The claimant moved back towards LXK and momentarily restrained her by putting his hands on her arms. They both headed back to the van. LXK looked back and continued to point and shout.

29. Mr Green's obviously accurate perception of these events was that the claimant and LXK "*were the instigators as they kept shouting and swearing*".

30. The van drove away. Its way out of Packer Street was blocked by a taxi that had just arrived and so it stopped directly in front of the pub, close to the doormen and the defendant and Mr Loveridge. Mr Vennard's evidence is that the claimant shouted to him from the van: "*Are you looking out for [the taxi passengers]? I will bang you out as well*". Mr Vennard said that he and his colleagues "*are used to hearing this kind of thing so just laughed it off*".

31. Mr Vennard recalled that the defendant and Mr Loveridge shouted over to the claimant in the van "*why are you starting with these [doormen]? They have nothing to do with these lads, they are good door lads*". Mr Vennard's recollection is that the claimant then started to threaten the defendant and Mr Loveridge saying: "*I'll slice you up, I'll carve your family up*". Mr Vennard told the claimant to "*get gone*" otherwise he would "*end up getting hurt*". The claimant continued to threaten the defendant and Mr Loveridge saying, "*I'm going to slash you up*".

32. In an interview with the MIB's solicitor on 6 June 2018, the defendant said that at this point LXK was calling him and Mr Loveridge "*pikey bastards*". He said that she had beckoned both of them over to the van. CCTV clearly shows the defendant and Mr Loveridge approach the van. It also shows that LXK hits the defendant. The defendant told the MIB solicitor that she "*lashed out and punched me straight in the face*" as a result of which he had "*a bloody lip and his teeth were messed up*". By now it was 12.19am. Only 7 minutes had passed since the taxi arrived at the pub.

33. The van moved away and turned left at the end of Packer Street onto Nelson Street. It then stopped so that it remained in clear view of the passengers outside the pub. The defendant and Mr Loveridge went up to the van again. There was almost certainly some further aggressive interaction before the van then drove away. CCTV suggests that the defendant had to lean back to avoid another slap or punch.

Outside KoKo's

34. The evidence about the events outside KoKo's comes from CCTV footage and from the evidence of Mr Green.

35. The taxi passengers, no doubt deeply relieved that the claimant and LXK had left, eventually moved from the pub, up Packer Street to KoKo's. They were outside at 12.26am. At about 12.28am the defendant and Mr Loveridge arrived. The passengers appeared to have entered KoKo's. They played no further part in the events that were ahead, and the atmosphere

appeared to be calm.

36. A few seconds after the defendant and Mr Loveridge arrived at KoKo's, the van appeared on Fleece Street which runs perpendicular to Packer Street. The defendant and Mr Loveridge noticed it. The claimant drove the van onto Packer Street and stopped outside Koko's with the obvious intention of engaging again with the defendant and Mr Loveridge. The defendant and Mr Loveridge approached the van. For a short while things appeared to be relatively calm. Mr Green says that the defendant or Mr Loveridge at some point "*tried to reach in the van and punch* [LXK]". The defendant then rushed to the driver's side of the van and appeared to try to open the driver's door. The door was locked, and the van pulled away down Packer Street.

37. The defendant and Mr Loveridge ran to the defendant's car ("the Citroen") which was parked just opposite KoKo's in the Packer Street car park facing onto Packer Street. It was now 12.29am.

38. At the end of Packer Street, the van turned right into the car park where the defendant and Mr Loveridge were still sitting in the Citroen, trying to start it. The claimant drove to the Citroen and deliberately drove into the rear of it. Some damage was caused, but the car remained driveable. The defendant and Mr Loveridge rushed out of the car and ran to the van in what appeared to be an attempt to open its doors to get at the claimant and LXK. The van drove away at speed, turning onto the Esplanade and back towards the A58. It was on the Esplanade and about to pass the Town Hall at 12.30am.

Location 3: The route between Packer Street and High Level Road

The layout

39. From the Esplanade, the claimant drove the van to the A58 southbound carriageway. He took the first exit from the A58 along the A640 Drake Street heading east. He would then turn right onto Milnrow Road which continued to the south and became the A671 Oldham Road. The road has a 30-mph speed limit. High Level Road forks off to the right from Oldham Road and is just 1.15 miles from Packer Street.

40. Mr Qadir Ahmed observed the van and the Citroen in the latter stages of what I find was the pursuit of the van by the claimant. There is some brief and disjointed CCTV footage.

The Pursuit

41. At 12.30am, when the van was out of sight having driven onto the Esplanade, the defendant had managed to start the Citroen. He and Mr Loveridge pursued the van, driving for a short distance at speed the wrong way up Packer Street to reach the Esplanade. By the time they passed the Town Hall the van was about 20 seconds ahead. The road is quite straight and there appears to have been little traffic around. It is likely that the defendant (who was driving) could see the van ahead. He continued the pursuit onto Manchester Road and then onto Drake Street. As the vehicles turned onto Drake Street the defendant was about 1 second behind.

42. Mr Ahmed was driving on Drake Street at the time. He says he saw the van "*speed up behind me*" and then overtake him followed by the defendant's car. Mr Ahmed thought each was travelling at "*75 to 80 mph*". I do not accept that as an accurate estimate of speed, but I do find that the vehicles were driving fast and well in excess of the speed limit.

43. A little further down Drake Street CCTV footage shows that the defendant caught up with the van and appeared to be driving almost next to it, but on the wrong side of the road. Mr Ahmed recalls that the Citroen struck the van three times; once as the vehicles drove down Milnrow Road, again at traffic lights at the junction of Wood Street and Oldham Road (near to the Eagle pub) and finally on the approach to Higher Level Road causing the collision. After observing the first strike, Mr Ahmed said; "*I thought at first, they were racing, but when I saw the car hit the van [for the first time] I thought it was more than that*".

44. The helpful and focussed police report into the collision concludes that in the third strike described by Mr Ahmed, the defendant overlapped the front nearside quarter of his car with the rear offside quarter of the van and steered suddenly to the left into the van. This had the effect of rotating the rear of the van through some 42 degrees from the direction of travel. It continued to move forward at the speed it had been travelling assessed by the Police to be 53mph. The van collided with a solid brick wall some 18 m from the point at which the manoeuvre was executed. The force was very considerable. The van collided with the wall at a little after 12.32am.

45. The police report allows me to make the following further findings of fact:

    a. When the claimant drove into the back of the defendant's car the rear bumper was damaged as was the rear offside light cover.

    b. On the approach to High Level Road a bottle of beer had been thrown from the defendant's car at the van. The bottle hit the rear door and broke. Fragments of bottle glass were found on Oldham Road.

    c. At some point between Packer Street and High Level Road the front offside of the defendant's car had come into contact with the rear nearside of the claimant's van. The police report describes this as "contact of a similar nature" to that which forced the van off the road. From this I conclude that the defendant had tried a similar side swipe manoeuvre on the opposite side of the van.

A summary of the facts

46. I formed the clear view that the events of the night fell into 3 distinct stages.

    Stage 1

47. In the first stage the claimant acted aggressively, violently and in an intimidating manner towards the three taxi passengers. He had kicked the taxi and driven in a dangerous manner chasing the taxi and cutting it up. On Packer Street, he clearly struck out at one passenger. For the most part, and leaving aside the chase of the taxi, when he was acting in that way he was not in the van. Realistically, none of those passengers posed any threat to him and the claimant may well have been putting on a show of bravado to make a favourable impression

on LXK who appears to have been in a jealous rage following the claimant's interactions at the petrol station.

Stage 2

48. In the second stage of the night, the claimant's aggression was directed towards the defendant and Mr Loveridge. He remained locked in the van throughout that period, not leaving it at all. Twice, once outside KoKo's and once in the car park, the defendant and Mr Loveridge had tried to open the doors of the van but had failed to do so. The threats he made to the defendant and Mr Loveridge were made from the safety of the van and across LXK his passenger who was always closest to them. Only LXK struck the defendant. I am however prepared to assume that the claimant encouraged her to act in that way and so bears a joint responsibility. When the claimant drove into the Citroen, I think it likely that he had concluded that it would not start.

Stage 3

49. I formed the clear view that when the defendant pursued the van (the third part of the night) the claimant was doing everything he could to get away. Had he not wanted to get away he could have got out of the van in the car park before the chase began or stopped the van at any point between the Esplanade and High Level Road. There is no indication during the chase that the claimant was trying to damage the Citroen or run it off the road. The claimant's driving was, it seems to me, designed to get him and LXK away from the defendant and Mr Loveridge. Both of whom (unlike the taxi passengers, and particularly after he had deliberately driven into the Citroen) presented a considerable apparent threat to both LXK and the claimant. I am satisfied that when Mr Vennard told the claimant to "get gone" before someone was hurt (immediately after the claimant had threatened the defendant and Mr Loveridge) that he was warning the claimant that the defendant and Mr Loveridge were not likely to react well to the threats.

Findings in respect of turpitude or wrongs

50. The first and obvious step is to identify what illegality on the part of the claimant is said to warrant the application of the illegality defence (to put it another way: what is the "turpitude" or *turpi causa* relied upon). In many of the reported cases the answer to that question is clear: in *Patel* the agreement between Mr Patel and Mr Mirza amounted to a conspiracy to commit an offence of insider dealing under section 52 of the Criminal Justice Act 1993 (see Lord Toulson at paragraph 12) although there was no prosecution and so no conviction. In *Gray* Mr Gray pleaded guilty to manslaughter on the ground of diminished responsibility (see Lord Toulson in *Patel* at paragraph 28) and in *Henderson* the same plea was accepted (see Lord Hamblen in *Henderson* at paragraph 15).

The claimant's conduct

51. On the facts of the present case, Mr Grime QC submits that the claimant was guilty of dangerous driving, affray and assault and battery. I agree. I also agree that the claimant's conduct is serious enough to justify consideration of the illegality defence.

52. Dangerous driving is an offence under section 2 of the Road Traffic Act 1988. There are 2 elements to the offence (see Archbold Magistrates' Court Criminal Practice 2021 at paragraph 30-26): the first part (sect.2A(1)(a)) requires that the manner of driving falls "far below" that of a competent and careful driver. This is an objective test. The second part (sect.2A(1)(b)) requires proof that it would have been obvious to a competent and careful driver that driving in the way the defendant drove would be dangerous. Dangerous refers to "danger either of injury to any person or of serious damage to property".

53. Affray is an offence under section 3 of the Public Order Act 1986. A person is guilty of affray if he uses or threatens unlawful violence towards another and his conduct is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety. For the purposes of section 3 (see section 3(3)) a threat cannot be made by the use of words alone.

54. Assault and Battery are common law offences. An assault occurs (see Archbold *op.cit*. at paragraph 25-3) when the defendant intentionally or recklessly causes another to apprehend immediate unlawful violence. A battery is committed when a person intentionally or recklessly applies unlawful force to the complainant.

55. Mr Melton QC did not suggest that these offences had not been committed. He accepted that the claimant could have been prosecuted for careless driving in respect of the deliberate ramming of the Citroen and criminal damage in respect of the damage caused. I am satisfied that the claimant's conduct amounted to dangerous driving on 2 occasions: when he pursued and cut-up the taxi and for at least the early parts of his intended escape from Packer Street before the pursuit began. I am satisfied the claimant's conduct amounted to either dangerous driving or careless driving when he deliberately drove into the Citroen when the defendant and Mr Loveridge were inside. His driving may have been careless or dangerous as he initially drove away from the car park. For the reasons I have already given, I have concluded that once the defendant was chasing the claimant the claimant was doing his best to get away. In those circumstances he may not have been committing any driving offence. His conduct (at least) outside the pub towards the taxi passengers, in the van remonstrating with the doormen and with the defendant and Mr Loveridge and in the van outside KoKo's towards the defendant and Mr Loveridge in my view amounts to an affray or other public order offence. The claimant's kick toward the second passenger would be an assault and battery if his blow landed and his conduct generally towards the taxi passengers amounted to an assault.

56. Against that factual background, and my findings in respect of turpitude, I come to consider the law of illegality as a defence.

The Law

57. The generally accepted starting point for any investigation of the law as it relates to illegality is the speech of Lord Mansfield in *Holman v Johnson* (1775) 1 Cowp 341. The case, like almost all of the early cases and like many of the later cases, is concerned with the extent to which rights arising under a contract tainted by illegality, can be enforced.

58. The claimant, who was based at Dunkirk, sold and delivered a quantity of tea to the defendant knowing that it would be smuggled into England and taxes due on it avoided. The defendant refused to pay and defended the claimant's action on the basis of illegality. The claim was allowed (and the defendant required to pay for the goods he had taken delivery of) because

there was no sufficient connection between the contract (which was a lawful contract concluded in Dunkirk) and the defendant purchaser's intention to avoid duties (contrary to the Tea Act of 1773). Lord Mansfield said:

> "*The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; ex dolo malo non oritur actio. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff*."

59. Four points of general application arise from this passage:

    a. First, in practice the rule operates as a form of judicial "abstention".
    b. Secondly, it is not aimed at furthering "real justice" between the parties.
    c. Thirdly it is based on wider public policy and
    d. Fourthly, there needs to be a sufficient connection between the claim and the wrong for the rule to operate.

60. Most of the cases concerning illegality have, until recently, concerned contract claims, agreements and claims concerning property rights rather than claims for personal injury. There are perhaps 2 reasons for that: firstly, the modern law of negligence was made by 19th century judges and so is a relatively recent development and secondly even after the possibility of applying the defence to a negligence claim had arisen, before 1945 a finding of contributory negligence on the part of the claimant was a complete answer to the claim so that the doctrine would often be redundant.

61. Even since 1945, the courts have shown no great enthusiasm to embrace illegality as an answer to a claim in tort and in particular a claim for damages arising in respect of personal injury. In 1954, Lord Porter (in *National Coal Board v England* [1954] AC 403) speaking of *ex turpi causa* said:

> "*the adage itself is generally applied to a question of contract and I am by no means prepared to concede where concession is not required that it applies also to the case of a tort*."

    As recently as 2001 the Law Commission expressed "*serious doubts as to the appropriateness of the illegality doctrine operating in the context of personal injury cases*". It has long been accepted that the consequences of applying the rule to a claim based in tort are likely to be far more serious (and so less palatable) than the consequences of applying it to a claim based on an agreement.

62. To illustrate the point, it is useful to consider the broad aim of an award in damages. Both in tort and in contract the law will aim to put the claimant in the position he would have been in if there had been no wrong. Because the law of contract and the law of tort protect different

interests, this common aim plays out differently. Tort might be described as backward looking; it aims to restore the claimant to the position he was in before the wrong was done to him. Contract might be described as forward looking; it aims to put the claimant in the position he would have been in if the contract had been fulfilled.

63. It follows that if the illegality defence succeeds in a personal injury claim, the claimant is likely to be left uncompensated for the loss of something that was his by right (for example, his bodily integrity). If it applies in a contract claim, the claimant generally only loses the benefit (the fruits) of a commercial transaction. The latter is far more palatable than the former. Evans LJ in *Revill v Newbery* [1996] QB 567, comparing these different outcomes, put it like this:

> "*it is one thing to deny to a plaintiff any fruits from his illegal conduct, but different and more far-reaching to deprive him even of compensation for injury which he suffers and which otherwise he is entitled to recover at law*."

64. The Court of Appeal has noted that to deprive a wrongdoer of a remedy in a personal injury claim is tantamount to treating him as an "outlaw" (a person outwith the protection of the law). In *Cross v Kirkby* [2000] EWCA Civ 426, Judge LJ (as he then was) said:

> "*The medieval concept of outlawry is unacceptable in modern society. An outlaw forfeited the protection of the law. He could not invoke the assistance of the court to enforce non-existent rights. In the United Kingdom today there are no outlaws. However abhorrent the crime, whatever the subsequent conviction, the protection of the law extends to the criminal who enjoys rights not only in theory but enforceable in practice. This is the context in which the application in tort of the principle encompassed in the maxim falls to be examined*."

65. Whether the claim is one in contract or in tort, as Bingham LJ (as he then was) said in *Saunders v Edwards* [1987] 1 WLR 1116 (a contract case) the law must steer a middle course between alternative unacceptable positions: on the one hand, it would be unacceptable to permit a claimant to enforce through legal action an agreement which the law has classed as unlawful. On the other hand, it would be unacceptable "*on the first indication of unlawfulness affecting any aspect of a transaction*" for the law to "*draw up its skirts and refuse all assistance to the plaintiff, no matter how serious his loss nor how disproportionate his loss to the unlawfulness of his conduct*".

66. Finding that middle course has been a far from straightforward endeavour. Sedley LJ said in a dissenting judgment in *Vellino v Chief Constable of Greater Manchester* [2002] 1 WLR 218 (paragraph 55) that the authorities were not reconcilable. Nourse LJ and Millett LJ had made much the same point in *Tribe v Tribe* [1996] Ch 107, a case about the transfer of shares to avoid the consequences of a potential future judgment.

67. One reason that the search for unifying principles across all claims (and the general quest for certainty, consistency and predictability) has proved difficult is that the doctrine of illegality is not designed to secure justice between the parties. Lord Mansfield made the point in *Holman* (see above) and in *Les Laboratoires Servier v Apotex* Lord Sumption (after citing the passage set out above) noted that the doctrine was based on policy "*and not on the perceived balance of merits between the parties to any particular dispute*" and said that it: "*necessarily operates harshly in some cases, for it is relevant only to bar claims which would otherwise*

have succeeded. For this reason, it is in the nature of things bound to confer capricious benefits on defendants some of whom have little to be said for them in the way of merits, legal or otherwise". Etherton LJ made a similar point in the Court of Appeal in Laboratoires Servier with which Gloster LJ agreed in her highly influential judgment in the Court of Appeal in *Patel v Mirza*.

68. Generally speaking, the law seeks to determine claims on the merits, uphold meritorious claims and avoid conferring benefits on those whose case has no legal merit. The overriding objective of the civil procedure rules is to enable courts to deal with cases "justly" and the overall aim of any system of law is to further the aims of justice. The perceived inability to "do justice" is one reason that rules in this area developed in a faltering and piecemeal fashion with different principles being applied in different areas of law.

69. Whilst a full survey of the authorities would not be appropriate here, it is helpful to consider how the law has changed between 1994 and the present day. The cases will illustrate how early attempts to apply a general discretion (the public conscience test) were rejected and replaced by the application of strict fixed rules in tort (the "inextricable link" test) and in contract (the reliance principle). The cases will also illustrate how the application of fixed rules came to be regarded as unsatisfactory and how a gradual return to policy considerations and the development of an approach that allowed a range of factors to be taken into account has gone a long way to establishing certainty, consistency and predictability.

Tinsley

70. The starting point is the decision of the House of Lords in *Tinsley v Milligan* [1994] 1 AC 340. This was a claim concerning property rights and trusts. Stella Tinsley and Kathleen Milligan had together bought a house at 141, Thomas Street, Abertridwr in Mid-Glamorgan using joint money. The house was registered in the name of the claimant but on the mutual understanding that that the two were joint beneficial owners. The fact that she was not a registered owner of the house allowed the defendant, with the knowledge of the claimant, to claim benefits fraudulently. The couple fell out and the claimant brought a possession claim against the defendant who counterclaimed for a declaration the property was held by the claimant on trust for herself and Miss Milligan in equal shares.

71. At first instance, the county court judge, dismissed the claim for possession and made the declaration sought. The Court of Appeal allowed the appeal. The majority applied the (essentially discretionary) "*public conscience test*" which required the Court to weigh the adverse consequences of granting relief against the adverse consequences of refusing relief.

72. In the House of Lords, Lord Goff said the approach taken by the Court of Appeal was:

> "*little different, if at all, from stating that the court has a discretion whether to grant or refuse relief. It is very difficult to reconcile such a test with the principle of policy stated by Lord Mansfield C.J. in Holman v. Johnson…..It is important to observe that, as Lord Mansfield made clear, the principle is not a principle of justice; it is a principle of policy, whose application is indiscriminate and so can lead to unfair consequences as between the parties to litigation*".

73. Lord Goff (like Lord Sumption in later years) was clear that the application of the doctrine must be governed by strict rules which left no room for discretion. The principle to be applied

in that case was the strict and longstanding principle that "*if A puts property in the name of B intending to conceal his (A's) interest in the property for a fraudulent or illegal purpose, neither law nor equity will allow A to recover the property, and equity will not assist him in asserting an equitable interest in it*". Lord Goff (in the minority on this point) recognised that the application of that rule would lead to hardship. He did not "*disguise [his] own unhappiness at the result*", but felt that any change in approach towards a discretion "*should only be instituted by the legislature, after a full inquiry into the matter by the Law Commission*".

74. The House of Lords rejected the public conscience test and, by a majority, decided that the claimant could enforce her equitable interest notwithstanding any illegality in the arrangement, provided that the claimant did not need to plead or lead evidence of the illegality to prove the interest. This is referred to as the "reliance principle".

75. The Law Commission accepted Lord Goff's invitation to consider reform at a time when Professor Burrows (as he then was) was Commissioner for Commercial and Common Law. In 1999 the Law Commission published "*Illegal Transactions: the Effect of Illegality on Contracts and Trusts*" (Consultation Paper No 154). The paper identified various policies which support the application of the illegality doctrine (upholding the dignity of the court; preventing plaintiffs profiting from their wrongdoing; deterrence; and punishment) and noted that "*none of these policies is coherently reflected in the "reliance principle"*". It was noted that the reliance principle was both uncertain and difficult to apply. The Law Commission therefore proposed that it should be abandoned.

Revill

76. The year after *Tinsley* was reported, the Court of Appeal decided *Revill v Newberry* [1996] QB 567.

77. William Newbery, the defendant (who was 76 years old) had a brick shed on his allotment in which he stored what the trial judge described as "*a good many items….of considerable attraction to a burglar*". He was anxious to protect those items and so had taken to sleeping in the shed. The claimant and an accomplice went to break into the shed and woke the defendant in the process. The defendant fired a shotgun through a small hole in the door hitting the claimant and injuring him. The claimant brought an action relying on assault, breach of statutory duty (the duty owed to trespassers under section 1 of the Occupiers Liability Act 1984) and negligence. The claimant was convicted on a guilty plea of various charges, the defendant was prosecuted on charges of wounding but acquitted. The defendant raised the illegality doctrine and pleaded contributory negligence. At first instance the plea of illegality was rejected, and the Judge found that the claimant was two-thirds responsible for his own injuries. He was awarded damages of £4,100.

78. At first instance (see the judgment of Neill LJ), Rougier J found on the authorities that the illegality doctrine could only apply "*if the injury complained of was so closely interwoven in the illegal or criminal act as to be virtually a part of it or if it was a direct uninterrupted consequence of that illegal act.*" He found that Mr Newbery's actions were disproportionate to the threat and so the required connection was absent.

79. *Tinsley* was cited to the Court of Appeal but only referred to in the judgment of Evans LJ and then only in passing. He concluded, by reference to Lord Goff's dissenting judgment, that the

application of the illegality doctrine in a tort claim gives rise "*to different considerations from those where an illegal transaction is involved*" so that a different test was required.

80. The Court of Appeal (Neill LJ, Evans LJ and Millett LJ) dismissed the appeal. Neill LJ concluded that the illegality doctrine would be inconsistent with the will of Parliament which had provided for an occupier to owe a duty of care to a trespasser (section 1 of the Occupiers Liability Act 1984). Evans LJ felt that it was "*abundantly clear*" that a burglar in the circumstances of the case was entitled to the protection of the law if force used against him was disproportionate and Millett LJ, felt that there was "*no place for the doctrine*" where excessive force had been used against an intruder.

81. On one view, the refusal to apply the illegality doctrine here was firmly grounded in the absence of a sufficiently close connection between the claim and wrongdoing. The link between the wrongdoing and the claimant's injury had been broken by the disproportionate and overly violent reaction of the defendant. The overreaction was the true cause of the claimant's injury, not the claimant's illegal activity. The mere fact that "*but for*" causation was established was not enough. As is often the case "but for" is a preliminary and exclusionary test. If "but for" causation is established the court will consider legal causation.

Cross

82. In 2000 the Court of Appeal considered the case of *Cross v Kirkby* [2000] EWCA Civ 426.

83. The claimant attacked the defendant with a baseball bat after threatening him. The defendant wrestled the bat from the claimant and struck him with a single blow to the side of the head. The claimant was seriously injured and commenced an action for damages. The Court of Appeal concluded that he had acted in self-defence (the trial judge had rejected the point and found that the defendant had used excessive force) but in any event his claim was barred by the defence of illegality.

84. Beldam LJ (with whom Otton LJ agreed) recognised that the rule established in *Tinsley* was limited to cases concerning "property or contractual rights". He accepted that there had to be a causal connection between the claim and the wrong of the claimant. He said:

> "*In my view the principle applies when the claimant's claim is so closely connected or inextricably bound up with his own criminal or illegal conduct that the court could not permit him to recover without appearing to condone that conduct…. The claimant's injury in respect of which he brought his action originated and arose (oritur) from the claimant's own criminal conduct*."

85. Judge LJ (as he then was) agreed. He said, noting in the following paragraph that this principle was "succinctly encapsulated" by Rougier J in *Revill*.:

> "*In my judgment, where the claimant is behaving unlawfully, or criminally, on the occasion when his cause of action in tort arises, his claim is not liable to be defeated ex turpi causa unless it is also established that the facts which give rise to it are inextricably linked with his criminal conduct. I have deliberately expressed myself in language which goes well beyond questions of causation in the general sense*".

86. The Court of Appeal in *Cross* therefore re-emphasised the point in *Revill* that in personal injury tort claims there was a need to limit the application of the doctrine (because of the harshness that would otherwise arise: Lord Judge referred to the terrible consequence of treating the claimant as an outlaw- see above) to claims where there is a close (as opposed to a tenuous) connection between the wrong and the claim.

87. Turner J put the second point (and the difficulties it raises) in this way in the 2019 Annual Lecture to the Personal Bar Association ("*The Decline and Fall of the Defence of Illegality in Personal Injury Law*"):

> "*In personal injury claims involving proof of negligence, in contrast to the position in contract, the cause of action is not usually, if ever, parasitic upon an illegal transaction and so some judgment must be exercised as to the extent to which the illegality must be proximate to the claim in the context of the infinite permutations of circumstances which are liable to arise*".

88. The inextricable link test is difficult to apply in all but the most obvious cases. As Lord Sumption said in *Patel v Mirza* (albeit when championing the reliance test, see paragraph 240):

> *"The difficulty about inextricable linkage as a test of connection is that it is far from clear what it means. On the face of it, the only link between the illegal act and the claim which is truly "inextricable", is a link based on causation and necessary reliance. So far as the test of inextricable linkage broadens the required connection more widely, it seems to me to be contrary to principle"*

Vellino

89. In 2001, the Law Commission published "*The Illegality Defence in Tort*" (Consultation Paper No 160). Tort claims had been excluded from the 1999 consultation paper. A number of respondents to the 1999 paper suggested that "*it would be desirable to have the same principles relating to illegality applying in all branches of the law*". The Law Commission had decided to extend the consultation to tort and so had changed its mind. The Court of Appeal heard argument in *Vellino v Chief Constable of the Greater Manchester Police* [2002] 1 WLR 218 before the paper was published but (see paragraph 29 of the decision) reserved judgment in order to be able to consider it.

90. The inextricable link test was followed by the majority of the Court of Appeal in *Vellino*. The claimant was injured in consequence of jumping from a second-floor window to escape from the custody of the police. He sued for damages, claiming that the Police had not taken reasonable care to prevent him from escaping. Attempting to escape from lawful custody is a criminal offence. The Court of Appeal (Schiemann LJ and Sir Murray Stuart-Smith; Sedley LJ dissenting) held that, assuming the police to have been negligent, recovery was precluded because the injury was the consequence of the plaintiff's own unlawful act. Sir Murray Stuart-Smith said:

> "*The operation of the principle arises where the claimant's claim is founded upon his own criminal or immoral act. The facts which give rise to the claim must be inextricably linked with the criminal activity. It is not sufficient if the criminal activity*

merely gives occasion for the tortious conduct of the Defendant." (emphasis added).

91. The criminal conduct of Mr Vellino did not merely "give occasion" for the tortious conduct of the defendant, rather as Lord Hoffman would put it in *Gray* "*recovery was precluded because the injury was the consequence of the plaintiff's unlawful act*".

92. *Vellino* could have been decided by the application of general principle, without the need to resort to illegality. Schiemann LJ acknowledged the point at paragraph 35. He said (referring to his own judgment in an early case and noting that the Law Commission had cited the passage):

> "*Whether one expresses the refusal of a remedy as being based on absence of causation…. or as being based upon the application of a wider principle that a plaintiff as a matter of policy is denied recovery [in] tort when his own wrongdoing is so much part of the claim that it cannot be overlooked… is perhaps a matter of jurisprudential predilection on the part of the judge*". (emphasis added)

93. *Vellino* then continued to emphasise the need for a clear connection between the relevant wrong and the claim. Although the decision is broadly consistent with *Cross* (and with *Revill*) and refers to the need for an "inextricable link" (which Lord Judge had said went beyond usual consideration of causation) the Court of Appeal uses language with which we are familiar from causation issues in tort. At page 70 of "Causation in the Law" Hart and Honoré give the example of a forest fire which breaks out after A had discarded a lighted cigarette into the bracken at the edge of the forest which caught fire. A breeze (subsequent to A's action, independent of it and a "common recurrent feature of the environment") blew and fanned the flames in the direction of the forest. The breeze is not seen as an intervening force but as "*merely part of the circumstances in which the cause operates*". For "merely part of the circumstances" the words "merely gives occasion for the tortious conduct of the Defendant to operate" could be substituted.

94. This was followed in 2009 by "The Illegality Defence: A Consultative Report" (Consultation Paper No 189).

Gray

95. In 2009 the House of Lords decided *Gray v Thames Trains* [2009] UKHL 33. The cases cited above demonstrate three things: first, different tests were applied to different circumstances to determine if the illegality defence should apply: there was one rule for tort claims (inextricable link) and another for non-tort claims (reliance). Secondly, neither rule was satisfactory (the inextricable link rule because it was unclear and the reliance test because it had nothing to do with policy and was vague) and thirdly, attempts to employ a general discretion (the public conscience principle) had come to nothing.

96. *Gray* represents the first real step to a unified and fresh approach to the doctrine of illegality. James Goudkamp (in "*A Long hard Look at Gray v Thames Trains*" chapter 4 of "*The Jurisprudence of Lord Hoffmann*" ed. P Davies and J Pila 2015) describes Lord Hoffmann's speech (the main speech) as "*a triumph in more ways than one*". It makes clear that a rules-based approach is unsatisfactory and that any consideration of the illegality doctrine must be policy based.

97. The importance of the decision is underlined by the conclusions set out in the 2010 Law Commission final report "*The Illegality Defence*". It noted that the courts had attempted to lay down rules to govern illegality but that such rules were "*complex and confused*". It concluded:

> *"In our 2009 consultative report, we argued that it was open to the courts to develop the law in ways that would render it considerably clearer, more certain and less arbitrary. Instead of purporting to apply rigid rules, the courts should consider each case to see whether the application of the illegality defence can be justified on the basis of the policies that underlie that defence…. All that was required was an incremental change, as courts became more prepared to articulate the policy reasons behind their decisions…. The decision in Gray v Thames Trains shows that this incremental change is already taking place. As Lord Hoffmann explained, the illegality defence is based upon a group of reasons, which vary in different situations. In each case, the policy reasons must be considered against the facts of the case. ….In view of these trends within the case law, we do not think that legislative reform is needed outside the area of trust law."*

98. The claimant (described as "*a 39-year-old local authority employee who had led a relatively uneventful life*") had developed post-traumatic stress disorder after being injured in the Ladbroke Grove train crash in October 1999 and as a result of the defendant's negligence. Whilst under the effects of PTSD Mr Gray took a knife from the home of his girlfriend's parent and stabbed to death a drunken pedestrian with whom he had an altercation. Mr Gray was detained under a hospital order with restrictions.

99. Mr Gray claimed (1) damages for personal injury (mental and physical) suffered in the accident (2) damages for loss of earnings up to the date of the killing. These were conceded. He also claimed (3) damages for loss of earnings after the killing (4) an indemnity in respect of any claim the relatives of the deceased make against him (5) damages in respect of his feelings of guilt and remorse he suffered as a result of the killing and (6) damages for loss of reputation as a result of the killing.

100. In *Henderson v Dorset Healthcare University NHS Foundation Trust* [2020] UKSC 43, Lord Hamblen divided claims (3) to (6) into 2 categories: the wide claim (claims (4) and (5)) and the narrow claim (claims (3) and (6)). The wide claim was for damages which were the result of the killing, and the narrow claim was for damages which were the result of the sentence imposed on him. It is convenient to adopt that shorthand.

101. At first instance ([2007] EWHC 1558 (QB)), Flaux J (as he then was) rejected both the narrow and the wide claim on the ground that recovery was precluded by public policy. He relied on the Court of Appeal's decision in *Cross* that in a tort claim, there was a need for close or inextricable connection between the loss claimed and the wrong done. He concluded that the claims met this test of connection and that those claims relied and were founded upon the commission of a serious criminal offence.

102. The Court of Appeal rejected claims (4) to (6) and allowed claim (3). As James Goudkamp has pointed out ("*A Long hard Look at Gray v Thames Trains*") "*No reasons were given for this differential treatment of items (4) – (6) on the one hand and item (3) on the other*". The defendant (the appellant) appealed against the decision to award damages in

respect of claim (3) and Mr Gray appealed the decision to refuse claims (4) to (6).

103. The appellant invited the Supreme Court to accept that "*a special rule of public policy*" which could be expressed in a wider and a narrower form precluded recovery. The narrow form is that "*you cannot recover for damage which flows from loss of liberty, a fine or other punishment lawfully imposed upon you in consequence of your own unlawful act*." The wider form is "*you cannot recover compensation for loss which you have suffered in consequence of your own criminal act*".

104. The parties spent what Lord Hoffmann described as "*a good deal of time*" trying to extrapolate from earlier cases rules which governed the application of the illegality doctrine and apply them to the facts of the case. Lord Hoffmann concluded that this approach missed the point. He emphasised that the doctrine was not a fixed concept and said that it was not appropriate simply to extrapolate rules applicable to one type of situation and apply them in another: "*the questions of fairness and policy are different, and the content of the rule is different*." In a key passage, Lord Hoffmann said (Lord Phillips, Lord Scott and Lord Rogers agreed) (paragraph 30):

> "*The maxim ex turpi causa expresses not so much a principle as a policy. Furthermore, that policy is not based upon a single justification but on a group of reasons, which vary in different situations*."

105. Having rejected this rules based approach to the application of the doctrine, Lord Hoffmann instead considered what the policy rationale (or justification) for the rule of public policy (in its wider and narrower form) was (as Lord Sumption said in *Laboratories Servier* "*A court will commonly examine the policy rationale of a rule of law in order to discover what the rule is*"). He concluded that the narrow form of the rule was justified (see paragraphs 33 to 49) by the need to avoid an inconsistency in the law. This rationale was well established by authority (see the Court of Appeal decision in *Clunis v Camden and Islington Health Authority* [1998] QB 978 described as the leading English authority and *British Columbia v Zastowny* [2008] 1 SCR 27 described as "high authority" in the Commonwealth). The wide form was justified (see paragraphs 51 to 55) on the ground that it is offensive to public notions of the fair distribution of resources that a claimant should be compensated (usually out of public funds) for the consequences of his own criminal conduct.

106. Having accepted that there was a "special rule of public policy", the next question to be determined was whether the special rule in fact applied to the narrow claim, the wider claim or both.

107. Both forms of the special rule of public policy raise causation questions. In the wider rule the question is: when does a claimant suffer loss in consequence of his own criminal act? In the narrow rule, the question is when does damage flow from a lawfully imposed punishment? (emphasis added).

108. The causation question as it applies to the narrow rule is generally not difficult to apply. It is a simple matter to identify the punishment imposed as a result of the criminal act and then identify if losses flow from that punishment. As Lord Hoffmann put it (at paragraph 29) where the narrow rule applies: "*it is the law which, as a matter of penal policy, causes the damage and it would be inconsistent for the law to require you to be compensated for that*

damage".

109. The application of the causation question in the wider rule can be more difficult. Lord Hoffmann explained that in approaching the question: "*It might be better to avoid metaphors like "inextricably linked"* [from *Cross* and *Vellino*] *or "integral part"* [From *Revill* at first instance] *and to treat the question as simply one of causation*." (words in [square brackets] added). Framing the causation question, Lord Hoffmann said:

> "*Can one say that, although the damage would not have happened but for the tortious conduct of the defendant, it was caused by the criminal act of the claimant? (Vellino v Chief Constable of the Greater Manchester Police [2002] 1 WLR 218). Or is the position that although the damage would not have happened without the criminal act of the claimant, it was caused by the tortious act of the defendant? (Revill v Newbery [1996] QB 567*)".

110. It was not therefore sufficient for the wide form of the policy rule to apply if the "criminal activity" (or wrong) of the claimant has "*merely provided the occasion for someone else to cause something*", the criminal activity must have been the operative legal cause of the loss. If the wrong is simply incidental to the claim the link between the wrong and the claim is not enough to justify the application of the policy. As Lord Hoffmann put it, the distinction:

> *"…between causing something and merely providing the occasion for someone else to cause something, is one with which we are very familiar in the law of torts. It is the same principle by which the law normally holds that even though damage would not have occurred but for a tortious act, the defendant is not liable if the immediate cause was the deliberate act of another individual."*

111. As Lord Sumption suggested in a speech to the Chancery Bar Association ("Reflexions on the Law of Illegality" 23 April 2012) Lord Hoffmann's clear view was that "*if 'inextricable linkage' was just a synonym for causation it was redundant, and if it meant more than that it was wrong*".

112. It follows that in *Gray* the House of Lords rejected a rules-based approach to illegality and applied instead a pure policy based approach. In essence the House of Lords asked 2 questions: does the special rule contended for exist and if so, does it apply? The first question was answered by an inquiry into the justification of the rule and the second by the application of standard principles of causation. Lord Hoffmann (see paragraph 27) framed the causation question in this way: "*the question in this case is in my opinion whether the intervention of Mr Gray's criminal act in the causal relationship between the defendants' breaches of duty and the damage of which he complains prevents him from recovering that part of his loss caused by the criminal act*".

113. The result in *Gray* was that the defence applied to the narrow claims because on the facts of the case the narrow version of the rule was engaged. It would be inconsistent to compensate the claimant for losses which had been caused, not by the negligence of the defendant, but by imposition of a penalty after trial. The defence also applied to the wider claims because the wide rule was engaged. Although the damage would not have happened but for the tortious conduct of the defendant, it was caused by the criminal act of the claimant. The defendant's negligence simply provided the occasion for the loss.

114. Both the Law Commission and subsequent cases make clear that Gray represented a mere step in the right direction and not a complete answer to the long-established difficulties posed by the illegality defence. As Lord Sumption was to make clear in *Les Laboratoires Servier v Apotex* [2014] UKSC 55, 5 years after *Gray* the law remained in a "*dis-ordered state*".

Hounga

115. After the Law Commission's report was published in 2010 the illegality defence was first considered by the Supreme Court in the case of *Hounga v Allen* [2014] 1 WLR 2889. *Gray* did not figure prominently in the reasoning of the Court. It was mentioned only once and only in Lord Wilson's opinion. Nonetheless the decision is important because it determined the application of the doctrine on policy grounds and considered not only policy that supported the application of the doctrine, but policy that suggested that it should not be applied, as Lord Wilson put it: public policy "*to which its application is an affront*".

116. The claimant was a Nigerian national. At the relevant time she was 14, had a learning disability, a developmental age much lower than her chronological age and was illiterate. She entered the United Kingdom on the pretence of visiting her grandmother and misled immigration officials as to the purpose of her visit. In fact, she had come to work for Mr and Mrs Allen as a housekeeper and childminder. Although she had been promised a wage and an education neither materialised. She was subjected to physical and psychological abuse and eventually ran away. She commenced proceedings against Mr and Mrs Allen in the Employment Tribunal. She sought (amongst other claims) compensation for injury to feelings arising out of unlawful discrimination under the Race Relations Act 1976. The claim was successful but set aside on appeal to the Court of Appeal on the ground that the claim was tainted by illegality.

117. As Lord Hoffmann had in *Gray*, Lord Wilson (with whom Lady Hale and Lord Kerr agreed) explained that in order to determine if the defence of illegality applied in any given situation it was necessary to understand what policy considerations were engaged on the facts of the case to justify the defence. He went further by suggesting that it was also necessary to understand what policy considerations were engaged on the facts of the case which would support the rejection of the defence. He expressed these points in this way:

> "*So, it is necessary, first, to ask, "What is the aspect of public policy which founds the defence?" and, second, to ask "But is there another aspect of public policy to which application of the defence would run counter*?"

118. The answer to the first question was taken by Lord Wilson from the majority judgment of McLachlin J in the Canadian Supreme Court case of *Hall v Hebert* [1993] 2 SCR 159.

> "*The basis of this power, as I see it, lies in [the] duty of the courts to preserve the integrity of the legal system, and is exercisable only where this concern is in issue. This concern is in issue where a damage[s] 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. The idea common to these instances is that the law refuses to give by its right hand what it takes away by its left*

hand"

119. Lord Wilson dealt with his consideration of the public policy which militate in favour of applying the defence briefly in paragraph 44. The rational of the policy was the concern to preserve the integrity of the legal system. To determine if an award to Miss Hounga would violate that policy he posed and answered 4 questions:

a. Did the award allow her to "profit" from her wrongful conduct? The answer was no, the award was for injury to feelings.
b. Did the award permit evasion of a penalty? The answer was no.
c. Did the award compromise the integrity of the legal system? The answer was no (and the idea described as "fanciful").
d. Would the application of the defence encourage those in the position of Mrs Allen to break the law? Lord Wilson thought this was a possibility.

120. In posing the final question, Lord Wilson was (in effect) asking if the application of the defence would undermine the purpose of the prohibition breached. This is an important factor which would be emphasised in *Patel*.

121. The appeal was allowed. Applying the policy identified by McLachlin J, by posing and answering the questions set out, Lord Wilson concluded that the Tribunal's award of damages had not compromised the integrity of the legal system and that the "*considerations of public policy which militate in favour of applying the defence so as to defeat Miss Hounga's complaint scarcely exist*". In expressing his view on the outcome, Lord Wilson said:

> "*The public policy in support of the application of that defence, to the extent that it exists at all, should give way to the public policy to which its application is an affront*".

122. Lord Wilson did not fully support the reasoning in *Gray*. He expressed himself (at paragraph 36) "*not convinced*" that Lord Hoffman's view on causation (and avoidance of the inextricable link metaphor) would be "*any more likely to secure consistency of decision-making*." He felt that "*every formulation of a requirement to identify the active or effective cause of an event—or an act to which it is inextricably linked—has a potential for inconsistent application driven by subjective considerations*". He noted that the Court of Appeal in that case had concluded that there was an "inextricable link" but pointed out that he would have reached a different decision. The same might have been said of the difference of views between the Court of Appeal and the House of Lords in *Gray* on "inextricable link".

123. These points re-emphasise the unsatisfactory nature of the "inextricable link" test, the fact that different courts could (legitimately) come to different conclusions on the central questions destroyed the utility of the test.

124. Lord Carnworth and Lord Hughes concluded that there was no sufficient connection between the claimant's illegality and the tort to bar the claim. In doing so they agreed with Lord Wilson and the majority. However, as Goudkamp has pointed out ("A Long Hard Look at *Gray v Thames Trains*") Lord Wilson posed the question as "*whether the inextricable link test is applicable*" but did not expressly provide an answer. Instead, Lord Wilson instead went on to answer the 2 questions he had posed earlier: "What is the aspect of public policy which

founds the defence?" and "But is there another aspect of public policy to which application of the defence would run counter?". It appears clear that Lord Wilson felt that there was no need to determine if the inextricable link test was applicable. The policy he identified as applicable (and the questions he posed) did not require causal questions to be answered. The application of the doctrine did not therefore lie in the response to a question of causation (the approach criticised by Lord Wilson as unlikely to "*secure consistency of decision-making*") but in a balance of policy considerations.

Les Laboratoires Servier

125. Four months after the decision in *Hounga* the Supreme Court decided *Les Laboratoires Servier v Apotex* [2014] UKSC 55. The issue of illegality arose in the context of a claim to enforce a cross-undertaking in damages given as a condition of an interlocutory injunction in proceedings which ultimately failed. The claim was therefore akin to a claim in contract. Lord Toulson in *Patel* described the facts of the case as "somewhat complicated". It is not necessary to set them out. The Court of Appeal (at [2012] EWCA Civ 593) had considered whether public policy considerations merited applying the doctrine of illegality to the facts of the case. In so doing it had adopted a similar approach to that advocated by the Supreme Court in *Hounga*. Etherton LJ said (paragraph 73):

> *"It is clear, then, that the illegality defence is not aimed at achieving a just result between the parties. On the other hand, the court is able to take into account a wide range of considerations in order to ensure that the defence only applies where it is a just and proportionate response to the illegality involved in the light of the policy considerations underlying it. As Lord Hoffmann said in Gray at [30]:*
>
> *"The maxim ex turpi causa expresses not so much a principle as a policy. Furthermore, that policy is not based upon a single justification but on a group of reasons, which vary in different situations.""*

126. In the Supreme Court, Lord Sumption gave the leading judgment. He acknowledged that the law was in a state of disarray and suggested the reason for the "dis-ordered state of the case law" was "*the distaste of the courts for the consequences of applying their own rules…… The only rational way of addressing this problem, if these consequences are regarded as intolerable, is to transform the rule into a mere power whose actual exercise would depend on the perceived equities of each case*". Lord Sumption felt that approach was inappropriate because the doctrine by its very nature is apt to bring injustice.

127. Lord Sumption felt that Lord Hoffmann's observation in *Gray* that the policy underlying the illegality defence is based on a group of reasons which vary in different situations would "*not bear the weight that has been placed on it*". He felt that the "narrow rule" suggested by Lord Hoffmann (you cannot recover damage which is the consequence of a sentence imposed upon you for a criminal act) would operate automatically and the "wider rule" (you cannot recover compensation for loss which you have suffered in consequence of your own criminal act) was "*simply a matter of causation*". Like Lord Goff in *Tinsley* he advocated a strict non-discretionary approach which took no account of "*the court's assessment of the significance of the illegality, the proportionality of its application or the merits of the particular case*". He disagreed with the Court of Appeal's approach but reached

the same result.

128. Lord Toulson in a dissenting judgment referred to Lord Wilson's judgment in *Hounga* and agreed with the Court of Appeal's approach. He noted that the Supreme Court had not been invited to carry out a detailed re-analysis of *Tinsley* and said:

> "*There may come a case where it is necessary for this court to carry out a detailed re-analysis of* Tinsley v Milligan *[1994] 1 AC 340, in the light of subsequent authorities and the consultative and final reports of the Law Commission…. in which the case has not for the first time been criticised*".

Patel

129. The opportunity to carry out the detailed re-analysis came with the case of *Patel v Mirza*. In an article entitled "*A New Dawn for the Law of Illegality*" (chapter 2 of "Illegality after Patel v Mirza" ed Green and Bogg, Hart Studies in Private law) Professor Andrew Burrows (as he then was) said:

> "*I regard Patel v Mirza as a triumph. Effectively it wipes the slate clean of the existing rules (or purported rules) and requires the courts overtly to reach the best decision on illegality by transparently applying and balancing a range of factors culled from past cases and from the work of the law commission*".

130. Mr Patel paid £620,000 to Mr Mirza for the purpose of spread-betting on the price of RBS shares and in the expectation that Mr Mirza expected to obtain inside information from RBS which would affect the share price. Mr Mirza in fact never came into possession of the relevant information and so the intended betting did not take place. Mr Mirza refused to repay the money to Mr Patel who brought a claim for the recovery of the £620,000. The claim was dismissed at first instance. The underlying agreement was contrary to the prohibition on insider dealing set out at section 52 of the Criminal Justice Act 1993.

131. The Court of Appeal (at [2014] EWCA Civ 1047) allowed the appeal. Judgment was given on 29 July 2014 the day before the Supreme Court's decision in *Hounga* and some time after the Court of Appeal's decision in *Laboratoires Servier*. The majority found that Mr Patel had to rely on his own illegality to make out his claim and so, relying on *Tinsley* found that the illegality was prima facie made out. However, because Mr Patel had withdrawn from the scheme before it was put into effect, he was entitled to rely on the principle that a claimant who withdraws from an illegal contract before it has been performed is not barred by public policy grounds from recovering money paid under it (the *locus poenitentiae* doctrine).

132. Gloster LJ dissented on the first point and so disposed of the appeal on that footing but went to agree that if it was necessary to do so, she would have agreed on the second point. She noted that in *Gray* the Supreme Court had considered the underlying policy rationale to determine if the defence applied. At paragraph 58 she said:

> "*It is also clear from other authorities that, in order to decide whether the ex turpi causa principle applies, the degree of connection between the wrongful conduct and the claim made is an important consideration, as is the question of how disproportionate the claimant's loss is to the unlawfulness of his conduct*".

133. Gloster LJ also agreed with the judgment of Etherton LJ (as he then was) in *Laboratoires Servier* in particular citing paragraph 73 of his judgment, set out above. The judgment of Gloster LJ in the Court of Appeal is the only one to make any reference to *Gray*.

134. A nine Justice panel handed down the Supreme Court's judgment in *Patel* on 20 July 2016. Of the 9 Justices, Lord Wilson, Lady Hale and Lord Kerr had made up the majority in *Hounga* and Lord Sumption, Lord Neuberger, Lord Mance, Lord Clarke and Lord Toulson had made up the Court in *Laboratories Servier*. The Supreme Court was now invited to consider if *Tinsley* should be followed.

135. Lord Toulson undertook a comprehensive review of the authorities (in tort, contract and property cases) including a number of Commonwealth decisions. He noted (paragraphs 50 to 54) that in *Nelson v Nelson* [1995] HCA 25 the High Court of Australia had declined to follow *Tinsley* opting instead to consider if the refusal to enforce a right was proportionate to the seriousness of infringing conduct. In that case Toohey J noted that:

> "*Although the public policy in discouraging unlawful acts and refusing them judicial approval is important, it is not the only relevant policy consideration. There is also the consideration of preventing injustice*...".
>
> McHugh J noted that:
>
> "*It is not in accord with contemporaneous notions of justice that the penalty for breaching a law or frustrating its policy should be disproportionate to the seriousness of the breach*"

136. At paragraph 92, accepting that the illegality defence is not designed to achieve justice between the parties, but strongly influenced by the decision in *Nelson*, Lord Toulson said:

> "*that does not mean that any result, however arbitrary, is acceptable. The law should strive for the most desirable policy outcome, and it may be that it is best achieved by taking into account a range of factors*."

This is an important point. Putting it in this way, Lord Toulson appears to accept that "preventing injustice" is a relevant policy consideration. Justice in this context is not justice "between the parties" but justice of a broader kind which ensures that the policy outcome (rather than the result) is in all the circumstances appropriate.

137. Lord Toulson said the law was "at a crossroads". Describing the alternative routes forward he adopted the descriptions used by Professor Burrows (as he then was) in his "Restatement of the English Law of Contract": namely, the "range of factors approach" (which would require a departure from *Tinsley*) and the "rules-based approach" (which would involve confirming *Tinsley*).

138. He concluded that the "range of factors approach" represented the correct way forward. Lady Hale, Lord Kerr, Lord Wilson and Lord Hodge agreed, and Lord Neuberger noted that his analysis may be slightly different from Lord Toulson's but felt there was no significant difference between them in practice and agreed with Lord Toulson's "*framework for arriving at an outcome*". Lord Clarke, Lord Sumption and Lord Mance dissented,

maintaining a preference for clear rules over an essentially discretionary remedy. The rationale for the decision in Patel and guidance on how to apply it, is to be found between paragraphs 99 and 110 of Lord Toulson's judgment.

139. It is interesting to reflect on the importance attached to Professor Burrows' restatement as the source of the "range of factors" test and how it was raised before the Supreme Court. Lord Sumption (in his dissenting judgment at paragraph 261) noted that "*Neither party contended for such a result, and their reticence was in my view entirely justified*." In chapter 7 of "*Illegality after Patel v Mirza*" James Lee explains that Lord Toulson raised the point himself and that counsel were offered time to reflect on the issue.

140. Dealing with the correct policy-based approach, first, Lord Toulson identified (paragraph 99 to 101) that there were two broad discernible policy reasons that justified the illegality defence:

> "*one is that a person should not be allowed to profit from his own wrongdoing. The other, linked, consideration is that the law should be coherent and not self-defeating, condoning illegality by giving with the left hand what it takes with the right hand*."

141. Because the claim was one that arose out of a contract and was a claim for restitution, Lord Hoffmann's alternative formulation referring to "compensation" was not considered. Lord Toulson went on to note that the concept of "profit" required further explanation. He concluded (agreeing with McLachlin J in ***Hall*** with whom Lord Wilson had also agreed in ***Hounga***) that the description was apt to confuse; the question was not, is the claimant "getting something out of the wrongdoing"? the question "judges should focus on" (which he described as a "valuable insight" and at paragraph 120 as "the essential rationale of the illegality doctrine") is: would allowing recovery for something which was illegal produce inconsistency and disharmony in the law and so damage the integrity of the legal system?

142. There are striking similarities here to the approach taken by Lord Hoffmann in ***Gray*** and Lord Wilson in ***Hounga***. That is not surprising as in both cases the Supreme Court was identifying justifications for "special rules of public policy" which support the illegality doctrine. The need for consistency or integrity is clearly an important justification for the illegality doctrine.

143. At paragraph 101 Lord Toulson said that in answering the question: would allowing recovery for something which was illegal produce inconsistency and disharmony in the law and so damage the integrity of the legal system?

> *"….. I would say that one cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without a) considering the underlying purpose of the prohibition which has been transgressed, b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality. We are, after all, in the area of public policy. That trio of necessary considerations can be found in the case law". (emphasis added)*

144. Lord Toulson therefore set out for the first time (he repeated the three points at paragraph 115 with a slightly different emphasis) his trio of considerations. Proportionality is dealt with at paragraph 107 (see below). Professor Burrows' list is set out at paragraph 93 of the judgment. Other factors mentioned by Professor Burrows include: how serious a sanction the denial of a remedy would be for the party who seeks a remedy and whether denial of a remedy would act as a deterrent to the illegal conduct:

> *"In considering whether it would be disproportionate to refuse relief to which the claimant would otherwise be entitled, as a matter of public policy, various factors may be relevant. Professor Burrows' list is helpful, but I would not attempt to lay down a prescriptive or definitive list because of the infinite possible variety of cases. Potentially relevant factors include the seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was marked disparity in the parties' respective culpability." (emphasis added)*

145. At paragraphs 109 and 110 Lord Toulson concluded that:

> *"….it is right for a court which is considering the application of the common law doctrine of illegality to have regard to the policy factors involved and to the nature and circumstances of the illegal conduct in determining whether the public interest in preserving the integrity of the justice system should result in denial of the relief claimed..... I agree with the criticisms made in Nelson v Nelson and by academic commentators of the reliance rule as laid down in [Tinsley], and I would hold that it should no longer be followed*."

146. At paragraph 115 Lord Toulson endorsed the approach and conclusion of Gloster LJ in the Court of Appeal and concluded at paragraph 120:

> *"The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system ….. In assessing whether the public interest would be harmed in that way, it is necessary a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, b) to consider any other relevant public policy on which the denial of the claim may have an impact and c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate."*

147. Lord Kerr described this as a "*structured approach to a hitherto intractable problem*" and at paragraph 129 said:

> *"Moreover, if the ex turpi causa axiom is itself no more than an expression of policy, the taking into account of countervailing policy considerations, in order to decide whether to give effect to it in a particular instance, is the only logical way to*

proceed. That it is, in truth, a policy-based rule has been clearly recognised"

148. At paragraph 239 Lord Sumption expressed the view that the reliance test was to be preferred. He advanced a number of reasons including that "*it establishes a direct causal link between the illegality and the claim, distinguishing between those illegal acts which are collateral or matters of background only, and those from which the legal right asserted can be said to result*".

Henderson

149. On 30 October 2020 the Supreme Court handed down judgment in *Henderson* and in *Stoffel v Grondona* [2020] UKSC 42.

150. At paragraph 76 of *Henderson* Lord Hamblen explains that the guidance set out in *Patel* applies to the common law illegality defence across all civil law claims. At paragraph 77 that previously decided cases will remain "*of precedential value unless it can be shown that they are not compatible with the approach set out in Patel in the sense that they cannot stand with the reasoning in Patel or were wrongly decided in the light of that reasoning*".

151. Confirmation that *Patel* sets out a universal approach underlines its fundamental importance. The "range of factors" approach allows the court to make "*a principled and transparent assessment*" of the case to reach a "just" policy outcome. The trio of considerations or range of factors approach represents a route-map to Lord Bingham's middle way in all claims.

152. The facts of *Henderson* were strikingly similar to those in *Gray*; the claimant sought compensation for losses which had arisen as result of her killing her mother. The question of whether Gray remained good law in the light of *Patel* and if so if it could be departed from, were the central issues. If *Gray* could not be distinguished, it was argued that the application of Lord Toulson's "trio of considerations" from *Patel* to the facts of *Henderson* would lead to a different conclusion to that reached in *Gray*. That argument is addressed at paragraph 113 to 144. Lord Hamblen concluded that applying the *Patel* considerations to *Henderson* lead to the same result reached in *Gray*; the illegality defence was successful, and the claims dismissed.

153. *Henderson* makes clear (paragraphs 89 to 93) that the decision in *Gray* was not based on the discredited "rules based" or "reliance" approach. The contrary had been argued, partly in reliance on the fact that *Gray* took no account of proportionality or the particular circumstances of the case. Lord Hamblen concluded that the "*essential reasoning*" in *Gray* was consistent with the approach adopted in *Patel*. He said (emphasis added): "even though *Lord Hoffmann endorsed a causation approach to the application of the wider rule, that involved a causal rule based on policy considerations*". It is clear that policy is key. Lord Hoffmann had (see above) considered the policy reasons for the special rule, concluded it was justified as a matter of public policy and then considered causation when applying the wider rule. As Lord Hamblen put it, that involved "*a causal rule based on policy considerations*".

154. Dealing with the mechanics of how to apply the trio of considerations, Lord Hamblen said that where policy considerations come down firmly against denial of the claim, it is not necessary to go on to consider stage 3 (proportionality). *Hounga* was cited as an example of such a case. Proportionality need only be considered if the first 2 stages would result in a denial of the claim (as Lord Hamblen explains at paragraph 123 of *Henderson*). The trio of

"necessary considerations" (see paragraph 101 of Patel) is better therefore understood as a duet of necessary considerations with the third (proportionality) sometimes acting as (as Lord Hamblen put it) "*a disproportionality check rather than a proportionality requirement*."

155. Lord Hamblen dealt with issues of connection (the link between the wrong and the claim) at stage 1 (where it is described as "closeness") and at stage 3 (where it is described, adopting Lord Toulson's description, as "centrality"). At stage 1 he noted that the closer the connection between the illegal act and the claim the greater the risk of inconsistency and harm to the integrity of the legal system (paragraph 120). As he put it:

> "*The rejection by the majority in Patel of reliance as the test of illegality did not mean that reliance was thereby rendered irrelevant to the policy-based approach. It may not provide a satisfactory test of illegality, but it will often be a relevant factor*".

156. Emphasising the point, he noted that if proportionality is considered, the link between the wrong and the relevant transaction (the issue of "centrality") will often be of particular importance (paragraph 124 and see paragraph 107 of *Patel*). In *Stoffel* (at para.43) Lord Lloyd-Jones (with whom the other Justices agreed) agreed the "question of reliance may have a bearing on the issue of centrality"

157. He concluded (as had been concluded in *Gray*) that the claimant's wrong was the effective cause of the loss. He refers twice (at paragraph 128 in relation to the first stage of the 3 considerations and at paragraph 140 dealing with proportionality) to the claimant's criminality being the "effective cause", the "immediate and effective cause" and the "sole effective cause" of the losses claimed. It follows that, on the application of the law to the facts of that case, Lord Hamblen might have concluded that the claim to the relevant heads of loss was simply not made out. *Henderson* (like *Gray*) could therefore have been dealt with "*as simply raising issues of causation*". Lord Hamblen appears to accept that:

> "*Indeed, applying Lord Hoffmann's approach to causation in Gray, with which Lord Rodger and Lord Scott agreed, [the claimant's wrong] was the sole effective cause of such loss*."

158. Lord Hamblen's resurrection of "reliance" as a factor (with which Lord Lloyd-Jones in *Stoffel* agreed), is an important part of the decision in *Henderson* which emphasises the need for a close (rather than a tenuous) connection between the wrong done and the claim made.

159. Lord Hamblen also confirmed decisively that Lord Hoffmann in *Gray* and Lord Toulson in *Patel* had in mind the same policy objective. He concluded that in fact, when properly understood, the justification for the narrow rule in *Gray* also justified the wider rule and the justification of the wider rule applied to the narrow rule.

160. On the factors to be taken into account I take the following points from the decision. Stage 2 is obviously case specific:

Stage 1

a. The first stage should not be confined to the specific purpose of the prohibition transgressed. Other general policy considerations that impact on the consistency of

the law and the integrity of the legal system also fall to be taken into account and considered first (paragraph 119).

b. Other policy considerations (beyond the key factors that are described as the rationale of the rule) can be taken into account. For example, it might be appropriate to consider that the claimant must not be allowed to profit from his own wrong (paragraph 119).

c. The gravity of the wrongdoing should be taken into account (paragraph 127)

d. When considering the underlying purpose of the prohibition transgressed, deterrence and public condemnation should be taken into account.

Stage 3

e. In considering proportionality "centrality" will "often be a factor of particular importance". When considering the circumstances relating to the illegality, whether there is a causal link between the illegality and the claim, and the closeness of that causal connection, will often be important considerations" (paragraph 124)

Stoffel

161. *Stoffel v Grondona* concerned a claim against solicitors which arose out of a fraudulent mortgage transaction. The facts of the case do not matter. The Supreme Court was concerned to determine if the Court of Appeal had correctly applied the *Patel* test to the facts of the case. The full Court agreed with the judgment of Lord Lloyd-Jones. At paragraph 26 he said this:

> *"It is important to bear in mind when applying the "trio of necessary considerations" described by Lord Toulson in Patel that they are relevant not because it may be considered desirable that a given policy should be promoted but because of their bearing on determining whether to allow a claim would damage the integrity of the law by permitting incoherent contradictions. Equally such an evaluation of policy considerations, while necessarily structured, must not be permitted to become another mechanistic process. In the application of stages (a) and (b) of this trio a court will be concerned to identify the relevant policy considerations at a relatively high level of generality before considering their application to the situation before the court…..The essential question is whether to allow the claim would damage the integrity of the legal system. The answer will depend on whether it would be inconsistent with the policies to which the legal system gives effect. The court is not concerned here to evaluate the policies in play or to carry out a policy-based evaluation of the relevant laws. It is simply seeking to identify the policies to which the law gives effect which are engaged by the question whether to allow the claim, to ascertain whether to allow it would be inconsistent with those policies or, where the policies compete, where the overall balance lies. In considering proportionality at stage (c), by contrast, it is likely that the court will*

have to give close scrutiny to the detail of the case in hand."

The law applied to the facts and discussion

162. In applying Lord Toulson's "range of factors" approach (as modified by Lord Hamblen) I remind myself that the fundamental question which the trio of considerations is designed to answer (the true focus of the enquiry) is whether allowing the claim would damage the integrity of the law by permitting incoherent contradictions (*Stoffel*) or, produce inconsistency and disharmony in the law and so damage the integrity of the legal system (*Patel*). This is the essential rationale of the rule.

The first consideration

163. I begin with general policy considerations that "impact on the consistency of the law and the integrity of the legal system" and support "judicial abstention" in respect of the claim. I should consider (as the Supreme Court did in *Henderson*) the gravity of the claimant's wrongdoing and the closeness of the connection between the wrongdoing and the losses claimed.

164. In my judgment the claimant's conduct on the evening in question was deplorable and disgraceful. It fell well below the standards that can be expected in a law-abiding and decent society and it could have been expected to warrant criminal sanctions. The threats made to the defendant from the safety of the van and the deliberate ramming of the Citroen are serious matters. The chasing after the taxi, forcing it to stop and kicking it are serious matters. The threats to the taxi passengers and the attack on the second passenger are also serious matters. However, the gravity of the claimant's wrongdoing (taken in its totality or considered only to the extent that it concerned the defendant) is not at the top of the range (compare acts of homicide in both *Gray* and *Henderson*). In my judgment the claimant's conduct is closer to the bottom of the range than it is to the middle. As Edis J (as he then was) said in *Flint v Tittensor* [2015] EWHC 466 (QB): "*This is the kind of relatively minor criminality which is not uncommon late at night in our cities. It is deplorable and alarming and can sometimes escalate into more serious violence. In categorising it as I have, I am not condoning it. It is a fact of life which many people unfortunately have to deal with from time to time*."

165. If I could be satisfied (as was the case in *Henderson* and in *Gray*) that the claimant's wrongdoing was the "effective cause", the "immediate and effective cause" or the "sole effective cause" of his loss then I would be driven to the conclusion that Lord Hoffmann's wide rule identified in *Gray* (the court should not award compensation in respect of a loss suffered as a result of the claimant's wrongdoing) was engaged. It would be difficult to conceive of a clearer connection ("closeness") between the wrongdoing and the loss. That would not be an end of the matter because I would need to consider any countervailing considerations.

166. I am however satisfied in the present case that the claimant's illegality did not (in the sense required) cause his own loss. Whilst it is true to say that the loss would not have occurred but for the claimant's wrongdoing (there is no doubt that if he had not been involved in an altercation with the taxi passengers and then threatened the defendant, driven into his car and supported LXK's direct attack on him no harm would have come to him) it is clear that the immediate cause of the loss was the defendant's dangerous driving. The claimant's

wrongdoing "merely providing the occasion" for the defendant to do harm. Certainly, in the instant case, the claimant does not need to rely on his own wrongdoing to make good his claim.

167. Despite concluding that the claimant's losses are not in law attributable to his own wrongdoing, I accept that there is some causal connection (on a "but for" basis) between the claimant's wrongdoing and the loss he suffered. I do not regard the connection as a close one. I have found that the claimant was trying to escape from the defendant at the time of the collision. This finding emphasises the clear break in the chain of events between the claimant's wrongdoing and the loss he suffered.

168. The narrow rule identified in *Gray* (no compensation in respect of losses suffered as a result of the imposition of a lawful punishment) can have no application because the claimant was not prosecuted or otherwise sanctioned by the criminal law. This is an important consideration. The decision not to prosecute might be based on a decision that he had committed no wrong, a decision that a conviction was unlikely or a decision that a prosecution was not in the public interest. Whatever the reason, the criminal law has abstained from acting. In those circumstances it is difficult to see where any "disharmony" might arise.

169. This is not a case in which the claimant stands to make a profit from his wrongdoing. If his claim is allowed, he will receive compensation designed to put him in the position he was in before he was injured. It seems highly unlikely that this consideration will be engaged in tort claims where damages are sought in respect of personal injury. The question is much more likely to be useful in contract claims. In such claims the parties have bargained for a benefit. In tort claims (zero-sum claims) there is no bargain and no possibility of a benefit. It follows that the policy that the court should not assist a claimant to benefit from his wrong is not engaged.

170. No other general policy considerations were suggested. I then turn to consider whether the rationale for the prohibitions transgressed in this case would be furthered by upholding the defence.

171. The rationale for the general prohibition on public disorder, careless and dangerous driving and property damage is public safety, the protection of property and upholding societal values of peaceable living, community and respect for property. It is clearly in the public interest that the law acts consistently and in a way that deters commission of such offences and condemns such practices. In my judgment those purposes would not be furthered by applying the illegality defence on the facts of the present case. It is hard to see why the public policy behind the prohibitions requires the claimant to go uncompensated for his losses.

The second stage

172. Mr Melton QC suggested that the policy considerations which favoured allowing the claim easily outweighed those that favoured upholding the defence. The overwhelming consideration was that the tortfeasor whose actions are the operative cause of loss should be required to compensate his victims. A linked consideration is that if the defence is upheld, the burden of providing care, support and perhaps rehabilitation will fall on the State and in

particular come out of the NHS budget. As Lord Hamblen has pointed out, NHS funding is a matter of considerable public interest. The public policy of discouraging those who (like the defendant) take the law into their own hands and act like vigilantes also supports allowing the claim.

173. The points identified by the Law Commission in 2001 that it is undesirable that the claimant should need to fall back onto State benefits in respect of, for example, an inability to work as a result of the injury and the possibility of a transfer of the financial responsibility from the defendant tortfeasor to the public purse or the Criminal Injuries Compensation Authority are important factors which support the rejection of the defence.

Is stage 3 required?

174. In my judgment the public policy factors which support judicial abstention are all but non-existent and easily displaced by those factors that support the maintenance of the claim. The latter are clear and pressing, the former are vague and insofar as they exist insubstantial. In my judgment it is clear that the claimant would not be receiving compensation as a result of his illegal conduct but because of the violent and unexpected act of the defendant. Allowing recovery in these circumstances would not produce inconsistency and disharmony in the law and would not therefore damage the integrity of the legal system.

175. There is therefore no obligation to consider proportionality. The third stage is however a useful "*disproportionality check rather than a proportionality requirement*". I will deal with each of the points raised by Lord Toulson in *Patel*.

a. the seriousness of the conduct: I have considered the gravity of the claimant's wrongdoing. I am satisfied it is serious but is at the lower end of the scale of criminal conduct.

b. the centrality of the conduct to "the transaction" (here, the loss): the claimant's conduct played a part in the train of events that led to his injuries. That conduct was however peripheral and not central. The operative causative factor of the claimant's injuries was the defendant's deliberate action.

c. whether the conduct was intentional: the claimant's wrongs were obviously deliberate, and I am quite satisfied that he was aware that his conduct was criminal. I have considered the deliberate actions of the defendant in the context of considering causation issues.

d. whether there was a marked disparity in the parties' respective wrongdoing; in my judgment this is the key consideration when considering proportionality in the present case. The claimant engaged in deliberate criminal conduct towards the bottom end of the scale. That conduct resulted in some property damage and (over its full course) some general public disorder and fear of the type that an experienced doorman found to be nothing out of the ordinary. I am prepared to accept that the claimant is jointly responsible with LXK for the blows struck to the defendant. On the other hand, the defendant deliberately executed an inherently dangerous manoeuvre which resulted in life-changing injuries for the claimant. Further, the defendant was sentenced to more than 3 years in prison whilst the claimant was not prosecuted. It would be wholly

disproportionate in the present case to refuse any relief to the claimant. Such a course, rather than promoting harmony and consistency on the legal system would bring it into disrepute and be obviously offensive to the public interest. It is important to remember that, as Millett LJ said in *Tribe v Tribe* [1996] Ch 107 at 135 "*justice is not a reward for merit*".

176. Applying the one other potentially relevant additional matter suggested by Professor Burrows (see paragraph 93 of *Patel*) I am satisfied that the denial of a remedy would be a devastating sanction to impose. So devastating that it would put the claimant in the position of an "outlaw".

177. I am satisfied (as Gloster LJ was in the Court of Appeal when considering *Patel*) that it would be disproportionate to prevent the claimant from being compensated for the losses he suffered. Requiring the law to "lift its skirts" and refuse to act on the facts of the present case would be contrary to any sensible notion of public interest and result in a thoroughly undesirable policy outcome. A refusal to act would reward the wholly disproportionate reaction of the defendant to the claimant's wrongdoing and would render the claimant an "outlaw".

Conclusion

178. For all these reasons I find that the illegality defence has no application to the facts of this case. Judgment will therefore be entered for the claimant for damages to be assessed. As contributory negligence has no application on the facts of this case, the assessment will be on a 100% basis.

179. It is difficult to imagine (ignoring joint enterprise cases) that the integrity of the law could ever be damaged by the courts coming to the aid of a seriously injured claimant if his injuries were caused by the negligence of the defendant. In such a case the integrity of the law is far more likely to be damaged by a refusal to assist. As Hale LJ (as she then was) observed in *Parkinson v St. James and Seacroft University Hospital NHS Trust* [2002] QB 266: "*the right to bodily integrity is the first and most important of the interests protected by the law of tort*".