APPLYING THE *EX TURPI CAUSA* PRINCIPLE IN TORT ACTIONS

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Abstract: An appropriate basis for denying the recovery of damages in tort on the ground that the plaintiff has been guilty of illegal wrongdoing has for long been a matter of debate in the common law courts. We can find a number of different justifications in the cases, with significant contributions being made by the House of Lords and the UK Supreme Court, the High Court of Australia, and the Supreme Court of Canada. The article examines the various arguments, makes suggestions as to what is helpful and what is not, and concludes by identifying the key questions to ask in any case where the illegality issue is raised.

Keywords: *criminal responsibility, duty of care, illegality defence, justifications, negligence, tort liability, volenti non fit injuria.*

I. Introduction

Sometimes a claim by a litigant who suffers harm whilst committing a criminal offence is barred by the application of the common law doctrine known as *ex turpi causa non oritur actio*. This may be translated as "no cause of action arises from a shameful cause". A convenient way of expressing the doctrine or maxim is to say that in certain circumstances a litigant's claim may fail on account of his own unlawful or illegal conduct. Although often referred to as a defence, the doctrine also can operate as a denial of an element of a plaintiff's cause of action.[1] The question may have significant implications, for example as regards the burden of proof.

An appropriate basis for denying the recovery of damages in tort on the ground that a party, usually the plaintiff, has been guilty of illegal wrongdoing has for a long time been a matter of debate. A recent formulation in the Court of Appeal in England treated the core of the principle as not criminality but causation — whether what the claimant himself did was the cause of the harm he suffered, even if there was also wrongful conduct on the defendant's part without which the harm would not have occurred.[2] Yet it was said in a joint judgment in the High Court of Australia that developing the law relating to the significance of a plaintiff's illegal conduct to recovery by that

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1 Goudkamp, *Tort Law Defences* (Hart Publishing, 2013) analyses the different ways in which the doctrine can operate. See, especially, paras.3.4.6, 3.6.5 and 5.3.1.10.

2 *Al Hassan-Daniel v Revenue and Customs Commissioners* [2011] QB 866, [22].

plaintiff in negligence by reference only to notions of causation would inevitably lead the law into a "logical and legal labyrinth".[3] Indeed, in *Gray v Thames Trains Ltd*,[4] Lord Hoffmann recognised that the maxim *ex turpi causa* expressed not so much a principle as a policy, and also that the policy was not based upon a single justification but on a group of reasons, which varied in different situations. Certainly, the scope of the maxim remains disputed and its application frequently is unpredictable.

There are at least eight justifications or arguments to be found in the cases. First, there is a reliance test; so a plaintiff who needs to rely on his own illegal conduct is barred. Second, illegal conduct by the plaintiff may be seen as going to the question whether in the circumstances the defendant owes the plaintiff a duty to take care. Third, assuming a duty, the question arises whether the courts can lay down a standard of care in respect of conduct which is unlawful. Fourth, the plaintiff's illegality may be a bar to his claim where its recognition would lead to inconsistency with other principles of law. Fifth, the illegality may bear upon a determination as to the cause of the plaintiff's loss. Sixth, the plaintiff's claim may be seen as "closely connected" or "inextricably linked" with his criminal behaviour. Seventh, the turpitude of the plaintiff's conduct may be such as to raise a bar on him recovering damages. And finally, the courts may embark upon a policy analysis, balancing the policy involved in allowing the claim with that involved in denying it.

These various justifications or arguments may overlap, possibly entirely and often to a substantial extent. We will examine them and then consider what conclusions may be drawn.

II. Plaintiff's Reliance on Illegal Conduct

In *Holman v Johnson*,[5] in a famous statement, Lord Mansfield CJ said:

> 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.

This may be called the "reliance" test, because it bars the plaintiff if he is forced to rely on his own illegality. It was applied in the House of Lords in *Tinsley v Milligan*,[6] where the parties contributed to the purchase of a home together, but fraudulently had the legal title conveyed to one of them solely in order to enable the

3 *Miller v Miller* (2011) 242 CLR 446, [21].
4 [2009] 1 AC 1339, [30].
5 (1775) 1 Cowp 341, 343, 98 ER 1120, 1121.
6 [1994] 1 AC 340.

other to claim social security benefits. The majority found that because the claimant (Miss Milligan) could make out her claim without reference to her illegal acts, *ex turpi causa* did not apply.

A reliance approach may be applied in property cases where the plaintiff seeks to rely on his ownership rights, for the courts will not on grounds of *ex turpi causa* refuse to enforce those rights. Let us take a few examples. In *Gordon v Chief Commissioner of Metropolitan Police*,[7] the police seized money from the plaintiff which he had obtained from unlawful gambling activities. The plaintiff sought to recover it via an action in detinue, and the English Court of Appeal held unanimously that the claim was not defeated by the principle of *ex turpi causa*. Fletcher Moulton LJ stated that he knew of no principle of law, or decision, or even dictum, which rendered money which had become the property of an individual liable to be taken and kept with impunity by any person who chanced to get hold of it, merely because it had been acquired by some wrongful or prohibited act. Similarly, in *Bowmakers Ltd v Barnet Instruments Ltd*,[8] where certain contracts for the hire of machine tools were tainted by illegality, the English Court of Appeal declined to apply *ex turpi causa* to the owner's claim against the hirer for conversion. However, in so deciding du Parcq LJ recognised that it should not be supposed that there were no exceptions to the general rule. One obvious exception was where the goods claimed were of such a kind that it was unlawful to deal in them at all, for example, obscene books. A third example is *R v Collis*,[9] where a convicted drug dealer succeeded in obtaining a court order that cash found during the police search of his property be returned to him. The court pointed out that his claim rested only on his ownership of the money, and said also that refusing the request would extend police powers of confiscation beyond those contemplated by Parliament. A qualification added by Casey J was that the court should not lend its aid to recover a claimant's goods if it appeared they were wanted to further an illegal purpose. His Honour gave as an example the returning of his jemmy to a burglar. Again, in a colourful example from Australia, a knife may be taken by force from the grasp of an intending murderer even though it is the knife he uses lawfully to carve the family dinner, and its return may be refused at least while he retains that purpose.[10]

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7 [1910] 2 KB 1080.

8 [1945] KB 65. *See* also *Singh v Ali* [1960] AC 167.

9 [1990] 2 NZLR 287.

10 *Gollan v Nugent* (1988) 166 CLR 18, [16]. In *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390, the High Court of Australia held that a licensee who had, by agreement, taken control of a patron's motorcycle and keys owed no duty to the patron to refuse to return them when, after an evening's drinking, he demanded them back, and accordingly the licensee was not liable for the patron's death in a crash on his way home. One of the reasons given for the decision was that the claimed duty clashed with the duty of the licensee as a sub-bailee to hand over the keys to the patron as bailee for his wife. Yet certainly there would have been a defence to any hypothetical claim for conversion, and by returning the keys the licensee arguably aided and abetted the commission of the criminal offence of drunken driving. See, generally, Hawes, "The Publican, the Customer, his Motorcycle and the Key" (2010) 10 *Oxford University Commonwealth Law Journal* 255.

In each of the above examples, the argument based upon the *ex turpi causa* principle was rejected. Let us now compare *Stone & Rolls Ltd v Moore Stephens*,[11] where it succeeded. Stojevic (S) was a fraudster who owned and controlled Stone and Rolls (S & R) and used it as a vehicle for defrauding banks, with the Komercni Banka (KB) being the principal victim. Moore Stephens (MS) were accountants employed by S & R to audit the company's accounts. After the fraud by S was discovered, both S & R and S were successfully sued for deceit by KB. S & R thereafter brought proceedings for damages against MS, alleging that MS had been negligent in carrying out their duties as auditor and in failing to detect and prevent S's dishonest activities. In reply, MS contended that the claim could not succeed, because it was founded on S & R's own fraud and, accordingly, was met by the *ex turpi causa* defence. The question for determination was whether the responsibility for the fraud committed by S should be attributed to S & R for the purposes of S & R's action for damages. In a majority decision,[12] their Lordships held that S & R was to be imputed with awareness of S's fraudulent activities, that it was directly liable for them, and that in all the circumstances, MS could rely on the defence of *ex turpi causa* to debar the company's claim.

The case is complex and what precisely it decides is not entirely clear.[13] However, the essence of the majority reasoning seems to be that the claim should fail because to allow it would have been to say that what was recoverable from the company in the action against it for fraud was damage to it for the purposes of its claim against the auditor.[14] The minority view,[15] by contrast, was that the dishonesty of S ought not to be attributed to S & R for the purposes of an action by S & R against its auditors, and that MS should, therefore, be liable for any failure to take care in performing its duties as auditor.

Stone & Rolls can fairly be understood as a decision involving an application of the reliance principle, although the claim was not by an owner seeking recovery of its property. The company's loss was its liability to the victim of the fraud, and in order to establish that loss, it would necessarily have to rely on proof of the fraudulent conduct by S. So the company's claim was barred unless, as the minority thought, that fraud was not attributed to the company for the purpose of its claim against the auditors. In this case, of course, *ex turpi causa* would not need to be considered.

The position we have reached is that a claimant who is obliged to rely on illegal conduct in order to prove that he has suffered a loss of property or other loss, or incurred a liability, may fail by reason of the *ex turpi causa* principle. But must such

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11 [2009] 1 AC 1391.

12 Lord Phillips, Lord Walker and Lord Brown.

13 See The Illegality Defence, Law Commission for England and Wales, Report No 320 (2010), paras.3-27–3-32 and Po Jen Yap, "Rethinking the Illegality Defence in Tort Law" (2010) 18 *Tort Law Review* 52, 58.

14 *Winfield & Jolowicz on Tort* (18th ed., 2010) para.25-21.

15 Lord Scott and Lord Mance.

a claim *necessarily* fail? In *Stone & Rolls*, Lord Phillips said that he did not believe that it was right to proceed on the basis that the reliance test could be automatically applied as a rule of thumb. It was necessary to give consideration to the policy underlying *ex turpi causa* in order to decide whether the defence was bound to defeat the claim.[16] This view was confirmed by Lord Wilson in *Hounga v Allen*,[17] a recent decision of the UK Supreme Court which will be examined later on.

The ambit of the reliance rule also is uncertain quite apart from any policy overlay. The decision of the England and Wales Court of Appeal in *Patel v Mirza*[18] well illustrates both the difficulty in determining what exactly it means to say that a plaintiff must "rely" on his illegality, and assuming that the plaintiff does so rely, in determining the circumstances when a court might still allow an action to proceed. The plaintiff (P) paid £620,000 to the defendant (M) for the purposes of an illegal agreement for insider dealing in shares in the Royal Bank of Scotland. In the event, the agreement could not be and was not carried out, because the expected inside information was not forthcoming. P sued for the return of the money, but the trial judge held that the claim was barred by illegality. The position would have been different, he said, if P had withdrawn from the agreement before its implementation became frustrated, but he had not. P thereupon appealed.

Rimer LJ, with the express agreement of Vos LJ, said that it was clear that P was positively relying on the illegal agreement in order to make good his claim for the return of the money. His case deliberately advanced, and relied upon, the illegal agreement. It had to be so advanced and reliant since how else could P have made a case based on right of recovery and based on total failure of consideration or a failure of the purpose for which the money was paid? Yet Gloster LJ disagreed. Her Ladyship thought that what mattered was whether, viewed objectively, the illegality "of necessity" formed part of P's case — ie was it an essential element of his cause of action, and asked whether, on analysis, this was in reality a situation where it was the defendant who had to rely on the illegality to resist repayment. P founded his case on his entitlement to have a sum equivalent to the money which he had paid, repaid in circumstances where the contract had not gone ahead, and M, as agent, no longer had any entitlement to retain it. Here the pleading of the illegal purpose was not an essential element, and the fact that the illegal cat was let out of the bag by P did not matter. Although P did plead and in one sense rely upon the illegal purpose of the agreement, there was no necessity for him to have done so in circumstances where his entitlement to repayment arose simply as a result of M's obligation as an agent to account for the sum paid, this in circumstances where M had received it for a particular purpose (speculating in shares) which he had not carried out. The fact that the rules of court arguably might have required P to have pleaded every term of the contract, or the fact that he gave evidence about the

16 *Stone & Rolls* (n.11), [25].
17 [2014] 1 WLR 2889, [30], [42]–[52].
18 [2014] WTLR 1567.

illegal purpose, did not lead to the conclusion that, "of necessity", he had to rely on any illegality in order to get his money back. Nor was there some sort of moral or ethical reason why in the circumstances P should be punished for having pleaded, and adduced evidence of, the illegal purpose of the transaction. Further, while P had to demonstrate that the money had not been transferred by way of gift or pursuant to an enforceable contract that entitled M to retain the funds, absent those factors, proof of payment imported a prima facie obligation to repay. So in reality, it was M who needed to rely upon the underlying illegal purpose of the arrangements.

Even on the majority view, it was held unanimously that P's claim succeeded on the application of the *locus poenitentiae* doctrine. Rimer LJ recognised that the authorities showed clearly that if P had withdrawn before he learnt that his venture with M could not be carried out, he would have been entitled to recover the money.[19] The question was whether it made any difference if the claimant's withdrawal was not because of a change of mind but because the agreement was no longer capable of being performed. The authorities showed that voluntary withdrawal from an illegal transaction when it ceased to be needed was sufficient,[20] and his Lordship was satisfied that distinguishing the instant case would not be justified. Any such distinction would depend on holding that "genuine repentance" on the part of the withdrawer was required. But it was sufficient that the illegal agreement had not been carried into effect.

Taking the second issue first, Gloster LJ noted that the concept of repentance is vague and subjective and its practical application would lead to all kinds of difficulties. However, the purpose of the *locus poenitentiae* doctrine presumably is to encourage people to withdraw from illegal transactions. There is no incentive to do so if the wrongdoer can nonetheless recover his money even where the illegal purpose has been carried out or cannot be achieved. And the possible implications of this view are startling: can the hirer recover his payment from the hitman on the target dying before the hit can be carried out? Perhaps, then, instead of watering down the *locus poenitentiae*, we should turn to the question when *ex turpi causa* can be invoked in the first place. The contrasting views on this, the first issue, illustrate how opinions can differ on what it means to say that a person must rely on his own illegality. Here the stricter view of Gloster LJ is preferable. A plaintiff may have more than one cause of action, each with different elements, and the application of the *ex turpi* principle should not depend upon which is asserted. Nor should pleading or similar rules determine the matter. Sometimes indeed a plaintiff may embark on a criminal enterprise of some kind and suffer harm which has nothing to do with the enterprise beyond it being a sine qua non. A simple example would be a car accident on the way to commit a criminal offence.[21] Clear cases of this kind suggest that the test should be whether the plaintiff *necessarily* has to rely on the

19 See, in particular, *Tinsley* (n.6), 356, 374.
20 In particular, *Tribe v Tribe* [1996] Ch 107.
21 *Delaney v Pickett* [2012] 1 WLR 2149.

illegality rather than has to rely on it only in the sense that he needs to provide some explanation of the circumstances in which the damage was suffered. So if, in *Patel*, the plaintiff had been claiming profits from speculation based on illegal insider information, such reliance could have been shown.

Leason v Attorney-General,[22] a recent decision in New Zealand, illustrates the limits of a reliance-based approach. The defendants entered the New Zealand Government Communications Security Bureau (GCSB) facility in Waihopai Valley and deflated a satellite dome cover by cutting it. They claimed that they were motivated by a desire to expose and prevent the harm caused by the second Iraq war, and in particular the deaths of civilians, to which they believed the operation of GCSB Waihopai was contributing. The Attorney-General sued them for trespass and sought summary judgment. The defendants argued, inter alia, that their actions were protected by the principle of *ex turpi causa*. The trial judge, proceeding for the purpose of the application on the assumption that the facts relied on by the defendants were correct, gave summary judgment in the plaintiff's favour, and the defendants appealed.

The defendants claimed that it was reasonably arguable that the principle of *ex turpi causa* applied, on the bases that the operation at Waihopai was wrongful due to its role in supplying intelligence to the USA, that the use of that intelligence implicated the GCSB in the wrongful conduct of the USA, and that Waihopai did not adhere to the regulatory requirements of relevant legislation.[23] Stevens J, giving the judgment of the Court of Appeal, noted that no single formulation for the *ex turpi causa* defence had emerged from the cases, and saw merit in Lord Hoffmann's observation in *Gray* that the application of the defence will depend on the particular situations in which it was sought to be applied. His Honour accepted, on the basis of established authority, that where an individual was able to assert a proprietary or possessory title, it was not relevant that the title might be derived from an illegal contract. Accordingly, to the extent that the defence of *ex turpi causa* rested on the argument that the land and facilities at GCSB Waihopai were acquired illegally, it could not succeed. That was because the plaintiff's claim for trespass to the facilities on the land at Waihopai was based on the GCSB's ownership of the land, the radome and the satellite communications equipment. The plaintiff did not need to rely on any aspect of the alleged illegality contended for by the defendants to make it out. However, his Honour recognised that part of the plaintiff's alleged illegality went beyond how the property in question was originally acquired and instead related to the ongoing use of the land and facilities. For example, the defendants submitted that the activities carried out at Waihopai were in breach of both New Zealand and international law. So his Honour recognised that it was necessary to consider the application of other, broader, principles underlying the *ex turpi causa* defence.

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22 [2014] 2 NZLR 224.

23 Citing the Public Works Act 1981 (NZ), the Building Acts 1991 and 2004 (NZ), the Resource Management Act 1991 (NZ) and the Defence Act 1990 (NZ).

We will, therefore, be returning to *Leason*. As will be explained, the court held that the defendants could not succeed on any alternative formulations either.

III. No Basis for Imposing a Duty or for Determining a Standard of Care

We will consider the questions of duty and of breach together, as they are closely related.

A line of authority developed in Australia has treated the question whether there can be recovery in negligence between persons involved in a joint criminal enterprise as turning on whether in all the circumstances there was a duty to take care or whether there was a breach of any such duty. For example, in *Smith v Jenkins*,[24] the High Court refused to recognise any duty of care in circumstances where the plaintiff and defendant were engaged jointly in an illegal activity, in this case the theft and driving away of a car. Again, in *Gala v Preston*,[25] a majority of the High Court concluded that a duty could arise only where there was a relationship of proximity between the parties, and here the taking of a car for a joy-ride, being an activity fraught with risk, meant that the participants could not have had any reasonable basis for expecting that the driver would drive according to ordinary standards of competence and skill.

These and certain similar cases in England[26] suggest that the relationship between parties engaged in joint wrongdoing in driving a car is not such as to give rise to a duty to take care or that the joint wrongdoing means that the court is unable to set an appropriate standard of care. But neither reason is at all convincing. The fact that the passenger may be engaged with the driver on an illegal enterprise does not prevent the relationship between the driver and the passenger giving rise to a duty to take care, and the standard required of the driver is simply that of the reasonable driver. A brief excursus into cases involving a defendant's incompetent or drunken driving where the plaintiff passenger is not guilty of illegal misbehaviour will make this clear.

In *Insurance Commissioner v Joyce*,[27] Dixon J in the High Court of Australia suggested, although did not decide, that the ordinary standard of care expected of a car driver may be modified in circumstances where there was prior contact between the parties, and the plaintiff knew that the defendant lacked the capacity of the reasonable person and did not expect that ordinary care would be taken. Subsequently in England, in *Nettleship v Weston*,[28] the Court of Appeal cast doubt on this reasoning and affirmed that a learner driver who was sued by her passenger

24 (1970) 119 CLR 397.
25 (1991) 172 CLR 243.
26 For example, *Pitts v Hunt* [1991] 1 QB 24.
27 (1948) 77 CLR 39.
28 [1971] 2 QB 691.

(in this case her driving instructor) following an accident was required to meet the standard of care expected of an ordinary, reasonable driver, notwithstanding that she may have been incapable of attaining that standard. Then in *Cook v Cook*[29] the High Court of Australia, faced with these differing principles, opted to follow the principle in *Joyce*. Here the owner of a car allowed an unlicensed and inexperienced person (her sister-in-law) to take over the controls and was injured when the car ran into a concrete post. The court held that the driver's known incompetence and inexperience as a driver controlled the relationship of proximity between the parties and took it out of the ordinary relationship of driver and passenger, so that the standard of the duty arising was that of an unqualified and inexperienced driver. Actions resulting from that inexperience and lack of qualification, rather than from carelessness, did not of themselves constitute a breach of duty by the driver. To apply the standard of the ordinary driver would, the court thought, be "unreal" and "contrary to common sense".

The decision in *Cook* was open to various objections.[30] First, the defendant's conduct would be subject to differing standards of care according to who was bringing the action. Clearly the defendant would have been liable for failing to measure up to the ordinary standard of the reasonable driver had she run down a passer-by. Second, the decision confused the question whether the defendant was in breach of a duty of care with the question whether she had a good defence to the claim. By classifying the claim as involving a modified standard of care the court was able to ignore the very restricted nature of the *volenti* defence (requiring that the plaintiff be fully aware of the factual circumstances and of the danger to which they gave rise and freely and voluntarily decided to incur the danger[31]) and in effect to equate the plaintiff's knowledge of a risk with her acceptance of it. Third, the standard expected of the defendant would vary according to the plaintiff's knowledge of the degree or amount of skill and competence possessed by the defendant. For how long, to the plaintiff's knowledge, had the defendant been learning to drive? Indeed, the theory of a variable standard of care proved impossible to apply in the case of a drunk driver,[32] raising as it did the need to identify the standard of care that could be expected of such a driver in light of the passenger's knowledge of the degree of his drunkenness. *Cook* offered no satisfactory solution to these difficulties. It was said that cases involving special standards would be "rare" and "exceptional", but "it was neither possible nor desirable to identify in advance the circumstances which would transform the relationship".

Eventually, in *Imbree v McNeilly*,[33] the High Court held that *Cook* should no longer be followed. In this case, the appellant allowed the respondent to drive a

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29 (1986) 162 CLR 376.

30 As to which *see* Todd, "The Reasonable Incompetent Driver" (1989) 105 *Law Quarterly Review* 24.

31 *Osborne v London and North Western Railway Co* (1888) 21 QBD 220, 223–224 (Wills J).

32 *Radford v Ward* (1990) Aust Tort Rep 81-064 and *Joslyn v Berryman* (2003) 214 CLR 552, [30].

33 (2008) 236 CLR 510.

vehicle knowing that he was aged 16 years, that he had little driving experience, that he was not licensed to drive and that he did not hold a learner's permit. The respondent lost control of the vehicle and it overturned, seriously injuring the appellant. It was held that the standard of care which the respondent owed to his passenger was the same as any other person driving a motor vehicle — to take reasonable care to avoid injury to others. The standard thus invoked was the standard of the reasonable driver. That standard was not to be further qualified, whether by reference to the holding of a licence to drive or by reference to the level of experience of the driver.

The decision in *Imbree* emphasised that there is just one, objectively determined, standard of reasonable care. There is no doctrine of varying standards. This must equally be so in cases like *Gala* where the plaintiff is complicit in the defendant's illegal wrongdoing. The concern in these joint wrongdoing cases really is not with the conduct of the *defendant* or his relationship with the plaintiff, but with whether the conduct of the *plaintiff* is such as to raise a bar against his recovering damages. The plaintiff's illegal misbehaviour is best seen as relevant to the question whether there is a good defence to liability for conduct which would otherwise be actionable. Furthermore, any supposed difficulty in determining an appropriate standard of care can only arise in the case of joint enterprises, yet the problem of the plaintiff's illegal conduct certainly is not confined to cases where the plaintiff acts in league with the defendant.

In *Miller*,[34] its most recent decision, the High Court recognised that the "standard of care" reasoning was not convincing, there being a readily identified standard of care that could be engaged in driving cases. Rather, the central policy consideration at stake was the coherence of the law — whether it would be incongruous for the law to proscribe the plaintiff's conduct and yet allow recovery in negligence for damage suffered in the course of that unlawful conduct. The statutory purpose of a law proscribing dangerous or reckless driving or illegal use of a vehicle[35] was not consistent with one offender owing a co-offender a duty to take reasonable care. The inconsistency or incongruity arose from the recognition that the purpose of the statute was to deter and punish using a vehicle in circumstances that often led to reckless and dangerous driving. In the instant case, it was held that a passenger travelling in a stolen car initially was engaged in a joint illegal enterprise with the driver, but she withdrew from that enterprise when, prior to the accident, she asked to be allowed to get out. So when the driver ran off the road, he owed the passenger who was not then complicit in the crime which he was committing a duty to take reasonable care.

It is apparent that if the passenger had not asked to get out of the car, the driver would have owed her no duty, because she would have been complicit in the joint illegal purpose. So, according to *Miller*, the focus should be on the purpose or

34 *Miller* (n.3).
35 Criminal Code (WA), s.371A.

purposes of the relevant legislation. Their Honours said that "the application of the relevant principle is the consequence of the proper application of the statute" and that "the balance of advantage or disadvantage to criminal participants is a matter for the legislature". In debating the question, they observed that the legislative history showed that the offence of illegal use of a motor vehicle soon passed from a relatively minor offence to more serious crime, and also that an association between the illegal use of a motor vehicle and reckless or dangerous driving was reflected by the introduction of aggravated forms of the offence. They observed also that, by statute, when two or more persons formed a common intention to prosecute an unlawful purpose, and as a probable consequence of its prosecution a further offence was committed, each party was deemed to have committed the offence.[36] A probable consequence of two or more persons joining in the illegal taking and using of a motor vehicle was reckless and dangerous driving. Their Honours added that whether one participant should be held to owe the other a duty to take reasonable care in the performance of the common purpose of using the car illegally could not depend upon whether the possibility of reckless or dangerous driving in fact eventuated. It would be absurd to hold that one owed the other a duty to take reasonable care unless and until he departed markedly from observing that standard of care.

The *Miller* approach certainly has significant consequences. The focus is simply on whether the plaintiff has committed a criminal offence where the statutory purpose is seen to be inconsistent with a duty of care. So anyone "complicit" in a joint illegal enterprise with such an inconsistent purpose is barred. At least in the circumstances of *Miller*, such complicity apparently could be established on the basis that reckless or dangerous driving was a probable consequence of the unlawful taking of the vehicle. More generally, the question will turn on the requirements for establishing criminal participation in the commission of a qualifying offence. Suppose now that a passenger accompanies a driver in a car which is not stolen but the driver is drunk. An accident occurs. Seemingly the injured passenger is barred from suing the driver if complicit in the offence of drunken driving. The passenger may well be complicit, depending on his knowledge of the driver's condition and, certainly, whether he assisted in or encouraged such driving. If so, *Miller* takes the view that the statutory purpose prevents the claim.

The reasoning in *Miller* is expressed to apply to a case where the plaintiff and the defendant are co-offenders. But it is not apparent that the fact of a joint enterprise has any particular connection or link with the statutory purpose of the legislation in question. Rather, a reason for denying an action by a co-offender may be that he has agreed to run the risk, as opposed to him having committed a traffic offence of some kind. Suppose there is no joint enterprise. Two drivers are driving when drunk and collide. Each seeks to blame the other. In *Miller*, it was thought that the statutory purpose of a law proscribing dangerous or reckless driving was

36 Criminal Code (WA), s.8(1).

not consistent with one offender owing a co-offender a duty to take reasonable care. Does not the same purpose bar both drivers? Does it not bar two drivers who are both driving dangerously but not drunkenly? The answer in both cases appears to be yes.

Using the *ex turpi causa* principle to prevent a dangerous driver from suing gives the principle wide application. As will be explained, it certainly goes further than the decision of the Supreme Court of Canada in *Hall v Hebert*,[37] which the High Court cited as showing the importance of achieving coherence in the law in the particular context. Surely it would be preferable to allow a dangerous driver's claim and deal with the question of his responsibility by invoking the principles of contributory negligence. Also, of course, invoking *ex turpi causa*, with the focus on the plaintiff's conduct, gives a defendant who has committed a tort the benefit of an immunity from liability and as a practical matter, although not in theory, as licensing wrongdoing. These points suggest at least that a compelling case is needed and that care should be taken to give the defence a narrow ambit.

It is notorious that, in the context of the application of the tort of breach of statutory duty, the requirement that the legislature intended the Act concerned to confer a civil right of action for its breach[38] has contributed to the degeneration of this branch of the law into one of the least principled in the books.[39] In the present context, where the court must decide whether the legislative purpose requires that there be a defence to the claim, it is not obvious that the courts will be able to do any better. Determining an unstated statutory purpose of denying a tort remedy where a plaintiff is committing, or even may commit, an offence is likely to involve comparable difficulty and uncertainty. As we shall see, the question also is likely to turn on other factors, in particular a narrower "inconsistency" argument, the application of causal principles and, perhaps, the degree of turpitude involved in the commission of the offence.

IV. Inconsistency Between Allowing a Tort Remedy and Imposing Criminal Responsibility

The need for coherence in the law in determining whether an action by a criminal plaintiff can succeed provides the foundation for the reasoning of the Supreme Court of Canada in *Hall*, but the decision in that case took a narrower, and more convincing, view of the ambit of this principle than that taken in *Miller*. McLachlin J, delivering the majority judgment, maintained that the plea of *ex turpi causa* would

37 [1993] 2 SCR 159.

38 This basis for the action was first laid down in *Atkinson v Newcastle & Gateshead Waterworks Co* (1876–77) LR 2 Ex D 441. The requirement has been confirmed in various recent cases: *see*, for example, *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057, [3].

39 Burrows, "Breach of Statutory Duty" in Todd (ed), *The Law of Torts in New Zealand* (6th ed., 2013) para.8.2.01.

bar recovery only where to allow it would undermine the integrity of the legal system, by introducing inconsistency into the law's fabric. Thus, a plaintiff would not be permitted to profit from his illegal conduct, as where a plaintiff claimed for financial loss arising from a joint illegal venture, or for exemplary damages, nor to evade a penalty prescribed by the criminal law, as where a burglar was caught due to his partner's negligence and required to pay a fine. Accordingly, a wrongdoer could still recover damages insofar as this was not compensation for an illegal act but was compensation for the loss caused by the negligence of another. In the instant case, the defendant had allowed the plaintiff to attempt to roll-start his powerful car down a hill when both were drunk and incapable, and the plaintiff was injured when the car started and he was unable to control it. It was held that the defendant owed the plaintiff a duty of care and that this was unaffected by the plaintiff's own wrongdoing, although damages should be reduced by 50 per cent on account of the plaintiff's contributory negligence.[40]

Seemingly, on the Australian view, the decision would be different. The plaintiff was guilty of the criminal offence of dangerous and drunk driving (and the defendant also appears to have been complicit in this unlawful conduct), and *Miller* appears to say that the purpose of the criminal prohibition on drunk driving is not consistent with a remedy in damages. On this basis, the claim would fail.

The focus of the rule in *Hall* is on the question whether the damage suffered by the plaintiff is represented by, or is included within, a criminal penalty. The kind of case where that rule ought to apply very arguably can be found in the facts of *Meah v McCreamer*.[41] In this case, a negligent driver crashed his car, causing a serious head injury to be suffered by the plaintiff, his passenger. At a later date, the plaintiff was sentenced to life imprisonment for two violent rapes, the offences having been committed following a personality change caused by the head injury. It was held that the driver was liable for the loss suffered by the plaintiff on being imprisoned. Yet this surely creates serious inconsistency with the criminal law. A tort remedy undermines the criminal court's finding, by denying the offender's personal responsibility for his imprisonment.[42] As aptly expressed by a commentator, tort comes to play the criminal law's conscience.[43] The criminal conviction is premised on the offender's free will, and awarding damages in respect of its consequences

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40 Compare the judgment of Cory J, who thought that *ex turpi causa* should be eliminated from tort cases and that the question of illegality should be considered as part of the second stage of the *Anns* two-stage test of duty. Gonthier J agreed with both McLachlin J and Cory J that the defendant owed the plaintiff a duty of care and that *ex turpi causa* was not open to him. Sopinka J dissented, holding that no duty of care was owed.

41 [1985] 1 All ER 367.

42 Compare *Meah v McCreamer (No 2)* [1986] 1 All ER 943, where the driver was held not liable for the damages the rapist had to pay to his victims. Reconcilable?

43 Banakas, "Tort Damages and the Decline of Fault Liability: Plato Overruled, But Full Marks to Aristotle" (1985) 44 *Cambridge Law Journal* 195, 197.

jeopardises the relationship between the criminal and the civil law by subverting the objects of the criminal law.[44]

Meah may be compared with the decision of the Court of Appeal of England and Wales in *Clunis v Camden and Islington Health Authority*.[45] The plaintiff was discharged from a hospital where he had been detained as a mental patient after expressing a desire to move into the area covered by the defendant health authority. Three months later, in an unprovoked attack, he stabbed to death a complete stranger. He pleaded guilty to manslaughter on the grounds of diminished responsibility and was ordered to be detained in a secure hospital. He then brought an action against the defendant authority, arguing that he had been discharged when in need of treatment, that the defendant had negligently failed to provide such treatment and that its negligence had caused him to be convicted and detained. The claim failed, because it was founded on the plaintiff's illegal conduct. Damages would be, in effect, an evasion or rebate of a criminal penalty, the damage for which the plaintiff sought compensation being the detention resulting from the plaintiff's own criminal conduct.

In *Clunis*, the defence still applied notwithstanding that the plaintiff suffered from a mental disorder, for he was sufficiently responsible to be convicted of a serious criminal offence. It was inapplicable only where the plaintiff did not know the nature and quality of his act or that what he was doing was wrong. So there was no such bar to a claim against a mental health authority by a mental patient who had killed his father after his release but who was not guilty of murder by reason of insanity.[46]

Gray[47] is similar to the decision in *Clunis*. The claimant (G) suffered major psychological harm and post-traumatic stress disorder (PTSD) after being involved in a train accident caused by the defendant's negligence. He later stabbed a stranger to death, and was ordered to be detained in a mental hospital after pleading guilty to manslaughter on the grounds of diminished responsibility. The defendants argued that they were not liable for loss of earnings after the date of the killing, on the basis of the *ex turpi causa* plea. In the Court of Appeal,[48] it was held that the test was whether the loss was inextricably linked with the claimant's illegal act, and on the facts it was held that it was not. The manslaughter did not break the chain of causation, and the cause of the loss was the PTSD caused by the tort. In so deciding, Sir Anthony Clarke MR thought that the "traditional harsh view of public policy" as expressed in *Clunis* might be revisited, and that

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44 Goudkamp, "Can Tort Law Be Used to Deflect the Impact of Criminal Sanctions? The Role of the Illegality Defence" (2006) 14 *Torts Law Journal* 20, 46.

45 [1998] QB 978.

46 *Ellis v Counties Manukau District Health Board* [2007] 1 NZLR 196 and *Hunter Area Health Service v Presland* (2005) 63 NSWLR 22.

47 *Gray* (n.4); Goudcamp, "A Long, Hard Look at *Gray v Thames Trains Ltd*", in Davies and Pila (eds), *The Legacy of Lord Hoffmann* (Hart Publishing, 2015).

48 *Gray v Thames Trains Ltd* [2009] 2 WLR 351.

damages might be recoverable in respect of tortious acts resulting in a law-abiding citizen becoming a criminal. But the decision was reversed on appeal to the House of Lords.

Lord Hoffmann, who delivered the leading judgment, identified the issue thus: whether the intervention of G's criminal act in the causal relationship between the defendant's breach of duty and the damage to G prevented G from recovering that part of his loss caused by the criminal act. On the one hand, but for the accident and the stress disorder which it caused, G would not have killed and would not have suffered the consequences for which he sought compensation. On the other hand, the killing was a voluntary and deliberate act. The stress disorder diminished G's responsibility but did not extinguish it. By reason of his own responsibility, G committed the serious crime of manslaughter and made himself liable to the sentence of the court.

His Lordship recognised that it was not sufficient to exclude liability that the immediate cause of the damage was the claimant's own deliberate act.[49] Rather, the appellants invoked a special rule of public policy. In its wider form, the rule was that you could not recover for loss which you had suffered in consequence of your own criminal act. In its narrower form, it was that you could not recover for damage which flowed from loss of liberty, fine or other punishment lawfully imposed on you in consequence of your own unlawful act. It was the law which as a matter of penal policy caused the damage, and it would be inconsistent for the law to require you to be compensated for that damage.

The narrower rule, said Lord Hoffmann, was well established and applied in the instant circumstances. It was submitted on behalf of G that his sentence of detention in hospital reflected the fact that he was not really being punished but detained for his own good to enable him to be treated for PTSD. But a sentence imposed by a court for a criminal offence was usually for a variety of purposes, and it would be impossible to make distinctions on the basis of what appeared to be its predominant purpose. It had to be assumed that the restriction order here was what the criminal court regarded as appropriate to reflect the personal responsibility of the accused. As for the approach taken in the Court of Appeal, this treated the whole question simply as one of causation. But the public policy issue was about inconsistency between criminal and civil law. While it was true that even if G had not committed manslaughter, his earning capacity would have been impaired by PTSD, liability on this counter-factual basis was precluded by *Jobling v Associated Dairies Ltd*.[50]

Accordingly, G's claims for loss of earnings following arrest, and general damages for his detention, conviction and damage to reputation all fell foul of the

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49 His Lordship cited *Corr v IBC Vehicles Ltd* [2008] 1 AC 884, holding that an employer whose employee suffered a serious head injury at work was liable for the employee subsequently committing suicide after having become depressed on account of his injury.

50 [1982] AC 794.

narrower version of the rule. But certain additional claims — an indemnity against any claims by the dependants of the deceased, and general damages for feelings of guilt and remorse — were more difficult to bring within this rule. Neither was a consequence of the sentence of the criminal court. So what of the wider rule? This had to be justified on the ground that it was offensive to public notions of the fair distribution of resources that a claimant be compensated for the consequences of his own criminal conduct. However, Lord Hoffmann went on to consider not this question but whether the illegality could be seen as the cause of the damage (about which more below).

The other members of the court, while agreeing in broad terms with Lord Hoffmann, added some observations of their own. Two particular matters deserve mention. First, Lord Phillips (with Lord Rodger and Lord Brown concurring) put in a cautionary word about the case where the sentencing judge made it clear that the defendant's offending behaviour had played no part in the decision to impose a hospital order, for it was then strongly arguable that the order should be treated as being a consequence of the defendant's mental condition and not of the defendant's criminal act. In that event, the defence of *ex turpi causa* would not apply. More difficult was the situation where the criminal act demonstrated the need to detain the defendant but the judge made it clear that he did not consider that the defendant should bear significant personal responsibility for the crime. So he reserved judgment as to whether *ex turpi causa* applied in either of these situations.

Second, Lord Rodger noted that the objection to G's formulation of his claim for loss of earnings was that it proceeded by ignoring what actually happened — that he killed his victim and was detained as a result. The approach might stand in the "uncomfortable company" of *Baker v Willoughby*,[51] where the defendant had to pay damages for causing the plaintiff's stiff leg, even though the leg had actually been amputated as a result of subsequent wrongdoing by another, and Lord Rodger was happy that the application of the *ex turpi causa* doctrine meant that there was no need to review the merits of that case. Lord Brown, by contrast, noted that *Baker* demonstrated if nothing else that on occasion justice would require some modification of the "vicissitudes principle" of *Jobling* — that subsequent events affecting a loss of earnings claim had to be taken into account when assessing what loss was recoverable. But just as *Baker* was held to have no application in *Jobling*, where the victim was overtaken by an unconnected and disabling illness, so too it had no application here, where G's loss had been overtaken before trial by the continuing detention order. Unlike in *Jobling*, this could not be said to be a wholly unconnected disabling event, but the consistency principle plainly defeated G's claim. A claimant could not ignore a vicissitude for which he had been held criminally responsible (if only to a diminished extent). A decision to the contrary surely would be a strange conclusion when one bore in mind that vicissitudes for

51 [1970] AC 467.

which a claimant might be wholly blameless (as in *Jobling)* could take effect to terminate what earlier had appeared recoverable long-term continuing losses.

The reasoning in *Gray* concerning both the application of the *ex turpi causa* principle and also the possible difficulty stemming from the fact that the claimant had already suffered a loss of earning capacity prior to his conviction and sentence is well supportable. As regards the former, it is clear that on the principle in *Hall* and *Clunis*, the view taken by the Court of Appeal in *Gray* must be rejected. To hold that a defendant is civilly liable for causing a plaintiff's criminal offending is to subvert the criminal court's finding as to the plaintiff's culpability. However, the objection that recovery in tort is inconsistent with the criminal law is purely policy based, and a plaintiff's criminal conviction does not necessarily constitute a break in the chain of causation. In *British Columbia v Zastowny*,[52] a further decision of the Supreme Court of Canada, the plaintiff was sentenced to imprisonment in circumstances where his substance abuse and criminality had been exacerbated by sexual assaults by the defendant's employee. The Supreme Court held that the plaintiff could not recover damages for wage loss for the time in which he was incarcerated, and affirmed that to hold otherwise would create a clash between the criminal and the civil law. But the plaintiff could be awarded damages for wage loss *after* a period spent in incarceration, where the same policy objection did not apply. In this case, the periods did not overlap. Where they do, raising the latter, supervening cause, argument, it is certainly arguable that Lord Rodger's doubts about *Baker* are not really justified. Any discount on damages for vicissitudes should be made only in respect of adverse contingencies for which the plaintiff would not have been compensated. If the subsequent event is compensable, it is not a speculative "loss" at all and thus is not a relevant vicissitude. Thus, the vicissitudes principle could not have been invoked in *Baker*, and the case was properly argued as one concerning only causation. In *Gray* itself, the subsequent event was of the claimant's own doing, for which he had been held criminally responsible and in respect of which the *ex turpi causa* principle applied. It was not an intervention by someone else, against whom the claimant would have a cause of action. Accordingly, their Lordships were correct in bringing the claimant's subsequent detention for manslaughter into account.

V. Plaintiff's Illegal Behaviour the Cause of the Loss

Gray also leads us to consider how ordinary principles of causation can apply in determining whether the plaintiff's criminal conduct is a cause of his loss. We have seen that the recoverability of certain heads of loss could not be decided by the application of Lord Hoffmann's narrower rule. As regards the wider version,

52 [2008] 1 SCR 27; and *see HL v Canada (Attorney-General)* [2005] 1 SCR 401.

Lord Hoffmann noted that the distinction between causing something and merely providing the occasion for someone else to cause something was familiar in the law of torts. Could one say that although damage would not have happened but for the tortious conduct of the defendant, it was caused by the criminal act of complainant?[53] Or was the position that although the damage would not have happened without the criminal act of the complainant, it was caused by the tortious act of the defendant?[54] However expressed, the wider rule covered the remaining heads of damage. The claimant's liability to compensate the dependants of his victim was an immediate "inextricable" consequence of his having intentionally killed him. The same was true of his feelings of guilt and remorse. So the *ex turpi causa* principle precluded recovery for both loss of earnings and general damages after and in consequence of the killing.

Lord Hoffmann's explanation of the "wider" rule deserves some amplification. In deciding whether, in law, conduct is a cause of harm, a helpful method of approach is to ask whether the plaintiff's loss is within the scope of the risk created by the defendant's conduct. This approach has gathered support in recent times and is now well accepted. In *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)*,[55] Lord Nicholls remarked on the crucial importance of identifying the purpose of the relevant cause of action and the nature and scope of the defendant's obligation in the particular circumstances. The High Court of Australia has spoken in similar terms[56] and so has the New Zealand Court of Appeal.[57] In the present context, we need to apply this kind of approach to the conduct of the plaintiff. We can ask whether the injury suffered by the plaintiff is within or part of the risk created by the plaintiff's own unlawful conduct or, conversely, whether it is a consequence of the plaintiff's unlawful act only in the sense that it would not have happened if the plaintiff had not been committing that act. In *National Coal Board v England*,[58] Lord Asquith gave the example of a case where A and B were proceeding to premises which they intended burglariously to enter, and before they entered them, B picked A's pocket and stole his watch. His Lordship could not prevail on himself to believe that A could not sue in tort. The theft was totally unconnected with the burglary.

Delaney v Pickett[59] provides a good illustration of this kind of reasoning. The claimant was seriously injured in an accident when travelling as a passenger in a car driven by the defendant. The purpose of the journey was the collection and transportation of illegal drugs for resale. The trial judge held that the claimant's action arose directly *ex turpi causa* and should fail, but his decision on this point

53 *Vellino v Chief Constable of Greater Manchester Police* [2002] 1 WLR 218.
54 *Revill v Newbery* [1996] QB 567.
55 [2002] 2 AC 883, [71] and see *Calvert v William Hill Credit Ltd* [2009] Ch 330, [43]–[48].
56 See, for example, *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254, [38]–[40] and *Pledge v Roads and Traffic Authority* (2004) 205 ALR 56, [9]–[10].
57 *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664, 683.
58 [1954] AC 403, 429.
59 [2012] 1 WLR 2149.

was reversed on appeal. Ward LJ said that viewed as a matter of causation, the damage suffered by the claimant was not caused by his or their criminal activity. It was caused by the tortious act of the defendant in the negligent way in which he drove his motor car. In those circumstances, the illegal acts were incidental, and the claimant was entitled to recover his loss.

Let us compare the decision in *Joyce v O'Brien*.[60] The claimant was seriously injured when he fell from the back of a van being driven by his uncle, the first defendant. The two men had stolen some ladders, and at the time of the accident they were seeking to make a speedy escape from the scene of their crime. At the time he fell, the claimant was trying to keep the ladders in the van, by standing on the rear footplate and hanging on to the ladders and the rear of the van. The uncle subsequently pleaded guilty to a charge of dangerous driving. The uncle's insurer, the second defendant, argued that the uncle was not liable in tort to the claimant because both men were at the time involved in a common criminal enterprise. Elias LJ (with Rafferty LJ and Ryder J agreeing) upheld this contention, on the basis that the claimant's criminal wrongdoing was the cause of his injuries. His Lordship examined the established jurisprudence on joint enterprise cases, and was satisfied that in certain cases the injury would still be treated as having been caused by the claimant, even though the direct cause of his injury was his co-defendant. He formulated the principle to be applied as follows:[61]

> Where the character of the joint criminal enterprise is such that it is foreseeable that a party or parties may be subject to unusual or increased risks of harm as a consequence of the activities of the parties in pursuance of their criminal objectives, and the risk materialises, the injury can properly be said to be caused by the criminal act of the claimant even if it results from the negligent or intentional act of another party to the illegal enterprise.

While this did not necessarily exhaust the situations where the *ex turpi causa* principle applied in joint enterprise cases, it would cater for the overwhelming majority of cases.

Applying the test, Elias LJ held that the claim had to fail. Having regard to the joint nature of the criminal enterprise, the trial judge was plainly entitled to conclude that although the damage might not have occurred but for the negligent driving of the first defendant, it was caused by the criminal activity in which the claimant was engaged. The injury resulted both from his personal conduct in placing himself in such a dangerous position and because he took the heightened risk of dangerous driving by his uncle. It was true that in some of the cases where the courts had denied the recovery of damages, the claimant had actively encouraged

60 [2014] 1 WLR 70.
61 *Ibid.*, [29].

the dangerous driving, which did not happen in the instant case. *Pitts v Hunt*[62] fell into that category. But active encouragement was not in all cases necessary. It was enough that the claimant and negligent driver were involved in the criminal enterprise together and that the accident arose out activities which it could be foreseen might be committed in the course of the enterprise. Active encouragement might constitute the evidence of joint enterprise which would otherwise be lacking. But in this case, the evidence of joint enterprise and of the implicit encouragement to bad driving was plain even in the absence of active encouragement.

The decision in *O'Brien* can be seen as similar to that which would have been made in *Miller* had the plaintiff not asked to get out of the car prior to the accident. But the reasoning in *Joyce* in reaching that result very arguably is preferable to that in *Miller*.

Leason[63] is another recent example where a causation test was applied as one possible reason for the decision. It will be recalled that the defendants damaged New Zealand Government property as part of a campaign to show their opposition to what they alleged was unlawful government support for the war in Iraq. They argued that they were justified on the ground, inter alia, that the government was using the land and facilities concerned in breach of New Zealand and international law. But Stevens J thought that if principles of causation were applied, it could not be said that the allegedly illegal activities of the GCSB were the relevant cause of the damage to the radome. Instead, those activities merely provided the motive for the actions the defendants chose to take, in order to make and publicise their protest. The real and effective cause of the loss was the defendants' own actions in trespassing onto the plaintiff's land and inflicting the damage to the GCSB's facilities.

One further point about cause. A conclusion that the plaintiff's illegal conduct is a cause of his injury does not necessarily mean that the defendant's conduct is *not* a cause. If both the plaintiff and the defendant have caused the injury, then the principles of contributory negligence can come into play.

VI. Plaintiff's Claim Inextricably Linked with Illegal Behaviour

In many decisions we can see the courts asking whether the connection between the plaintiff's claim and his criminal conduct is such that the recovery of damages ought to be denied. The test has been expressed in a number of ways. These include whether the injury was an "integral part" of the unlawful act[64] or whether the facts which gave rise to the claim were "closely connected" or "inextricably bound up"

62 [1991] 1 QB 24.
63 *Leason* (n.22).
64 *Revill* (n.54), 571.

or "inextricably linked" with the plaintiff's criminal conduct.[65] This test has a wider compass than simply an inquiry into causation, although it certainly includes that inquiry.

Let us see how the test has been applied. In *Vellino v Chief Constable of Greater Manchester Police*,[66] the claimant, who was well known to the police, was lawfully arrested at his flat, but in circumstances where the evidence was conflicting, he regained his freedom and thereafter, on the trial judge's findings, he was permitted by the police to leap from a bathroom window. This resulted in him fracturing his skull and suffering severe brain damage and tetraplegia. He brought an action against the Chief Constable, alleging that the officers had failed to take care to prevent him from harming himself while under arrest. The Court of Appeal held, in a majority decision, that the police were not liable.

Schiemann LJ considered that a duty to prevent the criminal from escaping and to guard against him suffering foreseeable injury in the course of the escape was self-evidently absurd. The officers should in pursuit of their duty as constables have prevented him from making his escape, but there was no duty of care owed to the claimant in tort. By contrast, Sir Murray Stuart-Smith founded his judgment on the *ex turpi causa* defence rather than on the absence of a duty of care. Here the claimant had to rely on his criminal conduct in escaping lawful custody to found his claim. It was integral to the claim. Escape was a serious common law crime, almost invariably punished by imprisonment. It was plainly sufficiently serious for the purpose of the application of the maxim in the circumstances of the case at hand. Sedley LJ, in dissent, thought that the defence of contributory negligence was a far more appropriate tool for doing justice than the blunt instrument of turpitude. To deny the claimant redress was to make him an outlaw and to reward the misconduct of his captors. He was seeking not to profit by his own wrong, but to be compensated to such extent as was appropriate for the defendant's wrong. His captors illegally gave him the opportunity to jump from a dangerous height, and the claimant himself recklessly and illegally took advantage of that opportunity. The trial judge had taken the view that he was twice as much to blame for his injuries as his captors, and his Lordship concurred with this view.

Cross v Kirkby is another example. The claimant, a hunt saboteur, abused and then attacked the defendant, a farmer, with a broken baseball bat. The defendant, in seeking to ward off further blows, grappled with the claimant, wrested the bat from him and hit him on the head, causing him to suffer a fractured skull. The Court of Appeal held that the claimant's claim for assault and battery failed, because the defendant was acting in self-defence and because it was defeated by the defence of illegality. Beldam LJ thought that the claim was so closely bound up with the claimant's own criminal conduct that the court could not allow it to succeed without

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65 *Cross v Kirkby* (English Court of Appeal, 18 February 2000) [76], [103] and *Vellino v Chief Constable of Greater Manchester Police* [2002] 1 WLR 218, [70].

66 *Ibid*.

appearing to condone that conduct. Judge LJ similarly was satisfied that the claim was inextricably linked with the claimant's criminal conduct, but added that if the defendant's behaviour was truly disproportionate, it might be powerful evidence that the claimant's conduct was not sufficiently linked to the injuries so as to attract the defence.

In *Vellino*, Sedley LJ thought that a consistent and defensible explanation of the *ex turpi causa* doctrine was to be found in the judgment of McLachlin J in *Hall*. On this view, as we have seen, an action will fail only if the plaintiff is seeking to gain some benefit arising out of the enterprise itself, as opposed to gaining compensation for injuries suffered during it, or if tort damages are inconsistent with criminal responsibility. But the view taken by the majority, whether on the basis that there was no duty or that there was a good defence, brings in wider factors, including the causal significance of and the degree of turpitude shown by the plaintiff's criminal behaviour. Again, Judge LJ in *Cross* observed that the inquiry into whether the link was sufficient to bar the claim went well beyond questions of causation in a general sense. In *Vakante v Addey and Stanhope School*,[67] Mummery LJ expanded upon the point, saying that matters of fact and degree had to be considered. The circumstances surrounding the applicant's claim and the illegal conduct, the nature and seriousness of the illegal conduct, the extent of the applicant's involvement in it and the character of the applicant's claim were all matters relevant to determining whether the claim was so "inextricably bound up with" the applicant's illegal conduct that, by permitting the applicant to recover compensation, the tribunal might appear to condone the illegality.

In *Gray*, Lord Hoffmann cast doubt on this approach, saying that it might be better to avoid metaphors like "inextricably linked" or "integral part" and treat the question simply as one of causation. But in *Hounga v Allen*,[68] Lord Wilson was not convinced that Lord Hoffmann's causal inquiry was any more likely to secure consistency in decision-making. Every formulation of a requirement to identify the active or effective cause of an event — or an act to which it was inextricably linked — had a potential for inconsistent application driven by subjective considerations. In the case at hand, the appellant (H), when aged about 14, came from Nigeria to the UK under fraudulent arrangements made by the family of the respondent (A) in which H knowingly participated. Pursuant to these arrangements, H achieved entry to the UK by her presentation to the UK immigration authorities of a false identity and their grant to her of a visitor's visa for six months. For the following 18 months, H lived in A's home and looked after A's children, even though she had no right to work and no right to remain in the UK. A then dismissed H, evicted her from the home and dismissed her from her employment. H brought an action complaining, inter alia, of unlawful discrimination relating to her employment, and succeeded before the Employment Tribunal and Employment Appeal tribunal. On

67 [2004] 4 All ER 1056.
68 [2014] 1 WLR 2889.

appeal, the Court of Appeal set aside the order, on the basis that H's complaint was inextricably linked to her own unlawful conduct.[69] But H succeeded on her further appeal to the Supreme Court, although their Lordships' reasoning differed.

Lord Wilson (with whom Lady Hale and Lord Kerr agreed) noted that the Court of Appeal saw H and A as "equal participants" in the illegality and that H was necessarily relying on the fact that she was an illegal immigrant. His Lordship said that if indeed the test applicable to A's defence was that of the inextricable link, he would hold it to be absent. Entry into the illegal contract and its continued operation provided no more than the context in which A perpetrated the acts of physical, verbal and emotional abuse by which, among other things, she dismissed H from her employment. However, the bigger question was whether the test was in fact applicable to A's defence. He thought that the case should be determined on the basis of public policy, to which question we will return. Lord Hughes (with whom Lord Carnwath concurred) did not accept Lord Wilson's public policy reasoning, but he agreed that while the statutory tort in the instant case was set in the context of the claimant's unlawful immigration, there was not a sufficiently close connection between the illegality and the tort to bar H's claim. He contrasted her claim to recover for breach of contract of employment or, by statute, unfair dismissal, when such claims depended on a lawfully enforceable contract of employment, but in the circumstances her whole employment was forbidden and illegal.

VII. Plaintiff's Serious Turpitude

The purpose of the *ex turpi causa* principle has been said to be to withhold relief from a plaintiff who has been involved in criminal wrongdoing of a sufficiently serious kind.[70] There are many judicial references to the question whether the plaintiff's illegal conduct is of such moral turpitude as to require recovery to be denied on the grounds that the courts should not lend their support to the action. Suggested tests include whether the conduct is "sufficiently anti-social",[71] or whether recovery would be an "affront to the public conscience",[72] or "an affront to the administration of justice",[73] or would "shock the ordinary citizen",[74] or would "offend or shock the conscience of reasonable right thinking members of the community".[75] In *Gray*, as we have seen, Lord Hoffmann asked whether it would be "offensive to public notions of the fair distribution of resources that a claimant be compensated for the

69 *Hounga v Allen* [2012] IRLR 685.
70 *Vellino* (n.65), [70].
71 *Hardy v Motor Insurers' Bureau* [1964] 2 QB 745, 767; *Tallow v Tailfeathers* (1973) 44 DLR (3d) 55, 61 and *Pitts* (n.26), 39–40.
72 *Thackwell v Barclays Bank plc* [1986] 1 All ER 676, 687; *Saunders v Edwards* [1987] 1 WLR 1116, 1132; *Euro-Diam Ltd v Bathurst* [1990] 1 QB 1, 35 and *Bliss v Attorney-General* [2009] NZAR 672, [86].
73 *Betts v Sanderson Estate* (1988) 53 DLR (4th) 675, [40].
74 *Kirkham v Chief Constable of the Greater Manchester Police* [1990] 2 QB 283, 291.
75 *Hall* (n.37), 224.

consequences of his own criminal conduct".[76] In *Hounga*, Lord Hughes referred to the need to consider the gravity of the illegality of which the claimant was guilty and her knowledge or intention in relation to it.[77]

There are many examples of the courts applying a turpitude test, frequently as an alternative to other approaches. They include the plaintiff initiating a criminal affray,[78] encouraging highly dangerous driving,[79] paying a bribe,[80] ignoring building bylaws and illegally excavating and encroaching on a neighbour's land[81] and escaping from lawful custody.[82] In *Gray*, Lord Hoffmann presumably thought that any recovery in the circumstances of that case would be "offensive", although he did not specifically say this. By contrast, sometimes conduct has been seen as falling short of any necessary degree of turpitude. Examples of conduct where the court held that the action could proceed include the plaintiff driving without a licence[83] or while uninsured,[84] contravening industrial safety legislation,[85] carrying on business in breach of planning legislation[86] and giving sexual favours to a doctor in return for drugs.[87] In *Leason*, Stevens J said that if a "conscience" test was adopted, then allowing the plaintiff to succeed would not be an affront to the public conscience. Legal methods of protest were available to the defendants, and declining recovery would be akin to condoning vigilante behaviour.

The turpitude question very frequently appears in the decisions, although not always in explicit terms. For example, in *Saunders v Edwards*,[88] Bingham LJ (as he then was) spoke of the need for the court to steer a middle course between aiding a party seeking to pursue an object which the law prohibits and drawing up its skirts and refusing all assistance to the plaintiff, no matter how serious his loss and how disproportionate his loss to the unlawfulness of the conduct. Again, in the Court of Appeal in *Les Laboratoires Servier v Apotex Inc*,[89] Etherton LJ remarked that the court is able to take into account a wide range of considerations in order to ensure that the illegality defence only applies where it is a just and proportionate response to the illegality involved. However, in the Supreme Court, Lord Sumption (with whom Lord Neuberger and Lord Clarke agreed) said that the disposition of the case

76 *Gray* (n.4) [51].
77 *Hounga* (n.68), [55].
78 *Murphy v Culhane* [1977] QB 94; compare *Green v Costello* [1961] NZLR 1010 and *Lane v Holloway* [1968] 1 QB 379.
79 *Pitts* (n.26), 45–46.
80 *Nayyar v Denton Wilde Sapte* [2010] PNLR 15.
81 *Brown v Dunsmuir* [1994] 3 NZLR 485.
82 *Vellino* (n.65).
83 *Matthews v McCullock of Australia Pty Ltd* [1973] 2 NSWLR 331 and *Preston v Dowell* (1987) 45 SASR 111.
84 *Andrews v Nominal Defendant* (1965) 66 SR (NSW) 85.
85 *National Coal Board v England* [1954] AC 403.
86 *Mills v Baitis* [1968] VR 583.
87 *Norberg v Wynrib* [1992] 2 SCR 226.
88 [1987] 1 WLR 1116.
89 [2013] Bus LR 80.

could not possibly be justified by the considerations put forward by Etherton LJ. Rather, his Lordship thought that "turpitude" had a limited and specific meaning for the purpose of applying the *ex turpi causa* principle.[90]

A key objection made about a "turpitude" test is that its content cannot be ascertained with any degree of precision and that the application of the defence of illegality is rendered highly uncertain. For example, in *Tinsley*,[91] the House of Lords thought that the "public conscience" was too imponderable a factor and applied the "reliance" test instead. In *Les Laboratoires Servier*, Lord Sumption's solution was to define "turpitude" as meaning acts which engaged the interests of the state or, to put it another way, the public interest, irrespective of the interests or rights of the parties. Although described as a defence, his Lordship maintained that the principle was in reality a rule of judicial abstention. Rather than regulating the consequences of an illegal act, the courts withheld judicial remedies, leaving loss to lie where it fell. The paradigm case was a criminal act. In addition, the rule was concerned with a limited category of acts which, while not necessarily criminal, could conveniently be called "quasi-criminal" because they engaged the public interest in the same way. Leaving aside the special case of contracts prohibited by law, which could give rise to no enforceable rights, the category included cases of dishonesty or corruption, some anomalous categories of misconduct, such as prostitution, and the infringement of statutory rules enacted for the protection of the public interest and attracting civil sanctions of a penal character. Torts (other than those of which dishonesty was an essential element), breaches of contract, statutory and other civil wrongs, offended against interests which were essentially private, not public. There was no reason in such cases for the law to withhold its ordinary remedies. The public interest was sufficiently served by the availability of a system of corrective justice to regulate their consequences as between the parties affected.

His Lordship recognised that there might be exceptional cases where even criminal and quasi-criminal acts would not constitute turpitude, noting Lord Rodger's observation in *Gray*[92] that some offences might be too trivial to engage the defence. But in general the exceptional cases were implicit in the rule itself. So in cases of strict liability arising under statute where the claimant was not privy to the facts making his act unlawful, there was a reason for holding that this was not turpitude at all.

The question at issue in *Les Laboratoires Servier* was whether the infringement of the claimant's patent rights in Canada by the defendant selling a drug in the UK constituted a relevant illegality. Their Lordships held that the illegality defence was not engaged, because the effect of the grant of a patent was simply to give rise to private rights of a character no different in principle from contractual rights or

90 [2014] UKSC 55, [23]–[30].
91 *Tinsley* (n.6).
92 *Gray* (n. 4), [83].

rights founded on tort. The only relevant interest affected was that of the patentee, and there was no public policy which could justify in addition the forfeiture of the defendant's rights.

Lord Sumption has given a helpful explanation of the true meaning of turpitude. We must ask what the public interest requires, irrespective of the private interests of the parties. Yet his Lordship's judgment cannot resolve much of the difficulty in determining whether an allegation of turpitude can be established. The inclusion of conduct which is "quasi-criminal" must create uncertainty as to the boundaries of what should be treated as criminal. Further, the degree of turpitude involved in the commission of different criminal offences of course is widely variable, and not all criminal conduct can or should bar a claimant's action. Lord Sumption himself recognised that some criminal conduct might be too trivial. But what is trivial? Seemingly it will be necessary to take into account factors such as the nature and gravity of the defendant's conduct and the penalty involved. It may indeed be hard to avoid raising issues of proportionality. Certainly, we still need to make a judgment about the degree of turpitude involved. But we have, perhaps, a clearer focus for the inquiry.

VIII. Balancing Policy Concerns

The final approach that we need to consider requires us to identify the public policy involved in upholding or denying the plaintiff's claim. On this view we must engage in a balancing exercise. In *Hounga*,[93] Lord Wilson recognised, citing *Holman*,[94] that the defence of illegality rested on the foundation of public policy. It was 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?"

As regards the first question, Lord Wilson saw a concern to preserve the integrity of the legal system, as in *Hall*, as a helpful rationale, even if McLachlin J's instance — profiting from illegal conduct or evading or gaining a rebate of a criminal penalty — should best be taken as an example rather than the only conceivable application. His Lordship therefore posed and answered the following questions about the fraud to which H was party:

(a) Did the tribunal's award of compensation to Miss Hounga allow her to profit from her wrongful conduct in entering into the contract? No, it was an award of compensation for injury to feelings consequent upon her dismissal, in particular the abusive nature of it.

93 *Hounga* (n.68), [42].
94 *Holman* (n.5).

(b) Did the award permit evasion of a penalty prescribed by the criminal law? No, Miss Hounga has not been prosecuted for her entry into the contract and, even had a penalty been thus imposed upon her, it would not represent evasion of it.

(c) Did the award compromise the integrity of the legal system by appearing to encourage those in the situation of Miss Hounga to enter into illegal contracts of employment? No, the idea is fanciful.

(d) Conversely, would application of the defence of illegality so as to defeat the award compromise the integrity of the legal system by appearing to encourage those in the situation of Mrs Allen to enter into illegal contracts of employment? Yes, possibly: it might engender a belief that they could even discriminate against such employees with impunity.

Accordingly, the considerations of public policy which militated in favour of applying the defence so as to defeat H's complaint scarcely existed.

But what about the second question? It required the court to consider whether A was guilty of "trafficking" in bringing H from Nigeria to the UK and into her home. Lord Wilson referred to the accepted international definition of trafficking contained in the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons (the Palermo Protocol) signed in 2000 and ratified by the UK in 2006, and concluded that if H's case was not one of trafficking on the part of A and her family, it was so close to it that the distinction would not matter for the purpose of what followed. By the 2005 Council of Europe Convention on Action against Trafficking in Human Beings CETS No 197, which had been ratified by the UK, each party was obliged to provide in its internal law for the right of victims to compensation from the perpetrators. In his Lordship's opinion, it would be a breach of the UK's international obligations for its law to cause H's complaint to be defeated by the defence of illegality. The decision of the Court of Appeal upholding A's defence ran strikingly counter to the prominent strain of current public policy against trafficking and in favour of the protection of its victims. The public policy in support of the application of that defence, to the extent that it existed at all, should give way to the public policy to which its application was an affront.

Lord Hughes was not prepared to go so far. His Lordship thought that the various analyses offered in past cases were, for the most part, different ways of expressing two connected aspects of the basis for the law of illegality. The first was that the law had to act consistently; it could not give with one hand what it took away with another, nor condone when facing right what it condemned when facing left. The second was that before this principle operated to bar a civil claim, and particularly one in tort, there needed to be a sufficiently close connection between the illegality and the claim made. Neither proposition was suggested as a comprehensive test. In reaching the answer in an individual case, the court was likely to need to consider also the gravity of the claimant's illegality, the purpose

of the law which had been infringed and the extent to which to allow a civil claim to proceed would be inconsistent with that purpose. Other factors might arise in individual cases. It was via considerations such as these that the general public policy was to be served. Public policy very obviously underlay the rules upon illegality as it affected civil claims, but the cases did not establish a separate trumping test of public policy.

His Lordship went on to identify a "central feature" of the law. When a court was considering whether illegality barred a civil claim, it was essentially focusing on the position of the claimant vis-à-vis the court from which she sought relief. It was not primarily focusing on the relative merits of the claimant and the defendant. It was in the nature of illegality that, when it succeeded as a bar to a claim, the defendant was the unworthy beneficiary of an undeserved windfall. But this was not because the defendant had the merits on his side; it was because the law could not support the claimant's claim to relief. In the case of human trafficking, the internationally recognised rule was clear. The trafficked victim (assuming that H was such a victim) was not relieved of criminal liability for an offence which she had committed. If, however, she was compelled to commit it as a direct consequence of being trafficked, careful consideration had to be given to whether it was in the public interest to prosecute her. In the instant case, H no doubt was under the influence of A, and that would constitute very real mitigation if punishment was in question. But what the trafficking did not do was take away the illegality of what H knowingly did. It was not possible to read across from the law of human trafficking to provide a separate or additional reason for this outcome. Even if one assumed in H's favour that her treatment by A in England amounted to slavery or forced labour, and even if one assumed that A brought her to England with the purpose of so treating her, she did not appear to have been compelled to commit the immigration offences which she certainly did commit.

Lord Hughes' strictures about the introduction of a separate and trumping test of public policy seem well founded. As his Lordship recognises, the *ex turpi causa* doctrine is not aimed at achieving justice between the parties. Rather, at its core the doctrine allows the courts to refuse their aid to litigants who are guilty of wrongdoing where to do so would condone that wrongdoing. How, precisely, to pin down that idea and to determine whether the doctrine applies is a matter of dispute, but we have the means at hand capable of achieving this purpose. It is very doubtful whether there is or should be room for this extra test. Indeed, the majority approach appears to be inconsistent with that since adopted by an entirely different Supreme Court bench in *Les Laboratoires Servier*.[95]

95 Lord Toulson in *Les Laboratoires Sevier* (n.90), [62], came to the same conclusion as Lord Sumption, but said that he would make no criticism of the Court of Appeal for considering whether public policy considerations merited applying the doctrine of illegality to the facts of the instant case, for in so doing it adopted a similar approach to that of the majority in *Hounga*.

IX. Conclusions

Having considered the various arguments, how should a court approach the question whether the *ex turpi causa* principle applies? Should we throw everything into the pot and see what emerges? Or should we be rather more discriminating? In reaching an answer, we should bear in mind Lord Hoffmann's words in *Gray*, cited at the beginning of this article, that there is no single underlying policy but, rather, a group of reasons which vary in different situations. We need to evaluate these reasons in order to determine whether or when any one can apply.

First, a reliance approach is likely to have a more significant role to play in relation to claims in contract or for unjust enrichment rather than for tort, as it raises the question whether a transaction of some kind can be enforced or a benefit recovered. Yet reliance on illegality, or the lack of it, can be relevant in tort cases. Claims in conversion normally will succeed where the plaintiff has a good title to the property concerned, irrespective of unlawful behaviour in acquiring it, as the plaintiff does not need to rely on that behaviour. If it is unlawful to possess the goods — say, a drugs cache — then the plaintiff's claim to be given possession must on its face be unlawful,[96] but refusing the claim is not reliance based. Again, in a case where there is evidence that the plaintiff intends to use property unlawfully (such as the carving knife example given earlier), refusing any claim for conversion will have to be justified on the basis of that criminal intention, notwithstanding that the plaintiff otherwise has a right to possession. Should the court allow such claims it would be assisting in the commission of an offence, so very arguably the need for consistency with the criminal law (to which principle we shall return below) must bar them. Sometimes, however, a tort claim can be seen to be reliant on unlawful conduct, as in *Stone & Rolls*, and here the reliance principle can provide a rationale for rejecting the claim. But dispute about what it means to say that a litigant must rely on his own illegality, as seen in *Patel*, renders the application of the principle uncertain and casts doubt on its value as a reliable guide. Indeed, it can work arbitrarily, and its application may depend on who is bringing the action.[97]

Second, maybe the impact of a plaintiff's illegal behaviour should be taken into account in determining whether in the circumstances there is a duty to take care or, if the duty exists, in determining whether it has been broken. But denying that there is a duty of care states a conclusion rather than an argument. We still need to know why the illegality should be treated as having this effect. Furthermore, the illegality issue is one of general principle and is not confined to negligence cases involving joint enterprises, and denying that the courts can fix an appropriate standard of care as between joint wrongdoers is simply not true.

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96 In this and no doubt other examples there is likely to be a statutory right of confiscation by the police or other public body.

97 See The Illegality Defence (n.13), paras.2-13–2-15.

Third, the decision in the High Court of Australia in *Miller* shifted the focus of the duty inquiry onto the purpose of the legislation in question, and certainly there are many cases referring to the relevance of statutory purpose. Indeed, the Law Commission for England and Wales considered that the application of the defence could be firmly justified by reference to one or more of the policies underlying its existence, including furthering the purpose of the rule which the illegal conduct had infringed.[98] Yet care is needed in articulating exactly why this purpose is relevant and in determining what the policy underlying it requires. The approach taken in *Miller*, which seems to involve no more than asking whether the infringement of the statute in question requires that the claim should fail, is unlikely to help. Presumably, sometimes it will and sometimes it won't, and unless the statute states that its breach will bar tort claims we are no closer to determining what the court will choose. So we must ask a more focused question. The true relevance of the breach of a criminal statute can be found in a requirement that the courts uphold the integrity of the legal system and maintain consistency with the criminal law, as stated by McLachlin J in *Hall*. This principle, as applied for example in *Clunis* and *Gray*, provides a valuable test. As Lord Hughes recognised in *Hounga*, the law cannot give with one hand what it takes away with another, nor condone when facing right what it condemns when facing left. Awarding compensation in tort in respect of the loss suffered in incurring a criminal penalty certainly offends this rule. The test also can explain when a "reliance" argument can succeed. A plaintiff who necessarily has to rely on his own illegal wrongdoing does indeed ask the court to condone when facing right what it condemns when facing left.

Fourth, the risk or risks that are foreseeable as a consequence of a plaintiff's illegal activity sometimes can bear upon the question whether the illegality can be seen as the cause of his loss. The distinction between causing a loss and providing the opportunity for a loss to happen is a familiar one, although it may of course be difficult to draw. The foreseeable risks, if they eventuate, can be seen as caused by the plaintiff's conduct, the unforeseeable or incidental risks which come about in the course of an enterprise cannot. The two recent decisions in *Delaney* and *Joyce* illustrate the point rather well. However, assuming the illegal conduct is a cause, it does not necessarily follow that the claim should fail. If the defendant's conduct also is a cause, then applying the principles of contributory negligence may provide an appropriate solution. The further notion that the plaintiff's claim is "inextricably connected" with his own criminality suffers from a lack of precision as to what this means. Seemingly, it does not lay down an independent test, but combines a causal inquiry with some or all of the other factors considered in this article. So the test has no particular value in itself, but it may bring into account a factor or factors that are helpful.

If we put aside the idea of a separate, trumping, public policy test put forward by Lord Wilson in *Hounga*, as being more a weighing of the private merits than

98 (n.13).

a determination of the public interest, we are left, finally, with the question of the plaintiff's turpitude. It may be that the claim of a plaintiff guilty of serious turpitude is not, or not clearly, covered by other justifications for invoking the *ex turpi causa* doctrine. Let us return to the classic case of the two safebreakers. In *National Coal Board*,[99] Lord Asquith said that if two burglars, A and B, agree to open a safe by means of explosives, and A so negligently handles the explosive charge as to injure B, B might find some difficulty in maintaining an action against A. Why might this be so? Perhaps A owes B no duty to take care. But we still need a reason for denying a duty beyond the bald assertion that A is engaged in criminal activity. Perhaps, B's claim can be seen as inconsistent with him having committed a breach of the criminal law. Yet B is not claiming to be compensated in respect of a criminal penalty nor relying on his own criminality. He is seeking a compensatory remedy in respect of A's negligence. The case arguably is no different in principle from *Hall*, where the victim's claim was upheld (although reduced for contributory negligence). Maybe B's criminal behaviour can be seen as the cause of his injury. This is possible, depending on whether the criminal enterprise gives rise to a special or increased risk of harm from the handling of explosives, applying the approach in *Joyce*, or whether that handling can be recognised as tortious and actionable in the same way that the negligent driving of the drug dealer in *Delaney* was held to be actionable by his passenger and partner in crime. Or finally, we might say that B suffered an injury in the course of criminal conduct which was of such seriousness that a court should not be seen as condoning the conduct by granting a remedy. Lord Sumption's judgment in *Les Laboratoires Servier* limiting turpitude to criminal and quasi-criminal conduct will cover this case.

So what should we conclude? Perhaps we can say that the problem of a plaintiff's illegal behaviour is best resolved by asking whether allowing the claim would introduce inconsistency as between the criminal and the civil law. If it would not, the question whether the litigant's criminal conduct was a cause of his injury may need answering. But even if it was a cause, we should consider whether the principles of contributory negligence ought to apply. We might also ask the general question whether, at the time of suffering injury or harm, the litigant was engaged in criminal or quasi-criminal activity constituting turpitude of a kind that engages the public interest, such that the courts should withhold judicial remedies and leave the loss to lie where it falls. But for most cases, this principle is unlikely to be needed. Basing the *ex turpi causa* principle on the need to maintain the integrity of the legal system, and applying where appropriate the ordinary defences of contributory negligence and consent, usually will cover the ground in satisfactory fashion.

99 *National Coal Board* (n.85), 429.