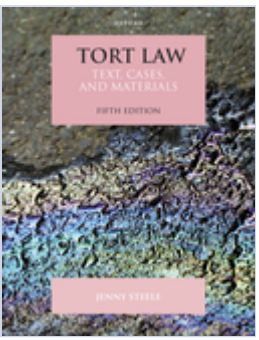

Tort Law: Text, Cases, and Materials (5th edn)
Jenny Steele

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7. Defences to Negligence

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Abstract

All books in this flagship series contain carefully selected substantial extracts from key cases, legislation, and academic debate, providing able students with a stand-alone resource. This chapter explores three defences to negligence which are also defences to other torts: volenti non fit injuria or willing assumption of risk, the illegality defence (also known as ex turpi causa), and contributory negligence. In relation to contributory negligence, the chapter considers responsibility, which involves questions both of causal influence and of fault, before turning to a discussion of apportionment of responsibility between the parties, and proportionality. In relation to illegality, recent decisions of the Supreme Court are examined. Relevant provisions of the Law Reform (Contributory Negligence) Act 1945 are extracted, together with further extracts from significant cases.

Keywords: defences, negligence, torts, volenti non fit injuria, willing assumption of risk, illegality defence, ex turpi causa, contributory negligence, responsibility, apportionment

Central Issues

i) This chapter introduces three key defences. While these are the key defences to negligence claims, each of them is also relevant to at least some other torts. One of them, illegality, is of still greater breadth, applying across a wide range of civil claims. Additional defences are considered in relation to specific torts, in appropriate chapters.

ii) **Contributory negligence** is frequently encountered. Prior to 1945, the claimant's contributory negligence was a complete defence, though the unfairness of this in some cases led the courts to invent a number of unsatisfactory rules for evading its application. Since reform by statute in 1945, if the claimant's own fault has contributed to the damage suffered then the court is instead required to reduce damages on the basis of relative 'responsibility'. Responsibility involves questions both of causal influence, and of fault, and there is no way of achieving a precise balance between these two.

iii) On some occasions, the claimant's role in the injury suffered is not adequately reflected by a reduction in damages. Instead, the action should fail altogether. This may be achieved by deciding that there is no duty of care (Chapter 4); or that the 'chain of causation' has been broken (Chapter 6). In addition, there are further defences which may achieve this outcome.

iv) The first of these is ***volenti non fit injuria*** or willing assumption of risk. This defence requires an agreement to waive the legal consequences of risk, or at least close and active participation in its creation. The defence is now rarely successful in negligence claims, for reasons to be explored. The requirement is that there must be consent *to the negligence*.

v) The **illegality** defence (also referred to as *ex turpi causa*) exists as a matter of public policy: a claim will fail if it arises directly out of the claimant's own 'illegal' act. Only in the last few decades has illegality become established as a defence to tort actions, and the criteria are still evolving. After a period of marked uncertainty, it has been determined that in general, courts should seek to give effect to the policies which underlie the illegality bar and to the policies which underlie the criminal prohibitions themselves; and should not develop inflexible rules. The guiding principle is that the defence serves to bar claims which will undermine public confidence in the law, primarily through inconsistency. Further recent decisions have dealt with the particular issue of how the general approach should be applied within the law of tort. The illegality defence has occupied a significant amount of time from the highest court in recent years.

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1 Defences to Negligence and Defences to Other Torts

The defences considered here are all relevant to the tort of negligence, but each of them is also applicable to a range of other torts. Not all of them apply universally, however. We saw in Chapter 2 that contributory negligence has been held not to be a defence to an action in deceit, nor to trespass to the person, on the basis that the pre-1945 version of the defence did not apply to these torts. At the same time, other torts are qualified by important defences quite distinct from those in negligence. Available defences are part of the balance struck in particular torts between tortfeasor, claimant, and other interests. For this reason, we will deal with specific defences in connection with specific torts, in later chapters.

2 Contributory Negligence

Since 1945, contributory negligence has been a partial, rather than a complete defence. Where the court finds that 'fault' on the part both of the claimant and of the defendant has contributed to the damage suffered, then damages will be reduced to the extent that the court thinks just and equitable.

2.1 Relevant Legislation

Law Reform (Contributory Negligence) Act 1945 ('the 1945 Act')

> 1. —(1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage …
>
> 4. The following expressions have the meanings hereby respectively assigned to them, that is to say—
>
> …
>
> 'damage' includes loss of life and personal injury; … 'fault' means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence;

Until this statutory reform, fault on the part of the plaintiff operated as a complete defence if it was found that the fault contributed to the damage:

Lord Blackburn, *Cayzer, Irvine & Co v Carron Ltd* (1884)
9 App Cas 873, at 881 (HL)

> The rule of law is that if there is blame causing the accident on both sides, however small that blame may be on one side, the loss lies where it falls.

p. 467 ↵ The statutory provisions mark a considerable improvement over the previous common law, in terms not only of fairness but also of simplicity, since the stalemate rule was subject to considerable variation over the years. For example, courts in England devised a 'last opportunity' rule, whereby a plaintiff whose fault had played some part in creating a hazard could still recover damages if the defendant had the last chance to avoid the harm.[1] This rule and the many intricate variations around it need not detain us,[2] because on the whole the move to apportionment on the basis of what the court 'thinks just and equitable' has had the effect of cutting through all this.

The statutory provisions impose an *obligation* on courts to give effect to fairness between the parties when considering relative responsibility for the injury: section 1(1) provides that the claim 'shall not' be defeated by reason of fault on the part of the person suffering the damage. This could be read as excluding any other defences that are justified by reference to the claimant's fault (as in illegality and in some instances *volenti*, discussed later). This interpretation has not been adopted; but there are signs that apportionment is thought by some to be a more appropriate response in the context of the modern law of tort. The availability of a proportionate approach through contributory negligence, operating to reduce damages rather than denying liability altogether, also softens the impact of liability decisions. For example, contributory negligence has operated to reduce damages in some 'advice' cases where courts have found quite extensive damage falls within the scope of the advisor's duty and where risky decisions have nonetheless been made by claimants (Chapter 6.4). Since fairness and justice are the guiding principles for reducing damages under section 1(1), we should note that fairness in *apportionment*, taking into account relative fault and responsibility for damage, might not produce fair *outcomes* once the bigger picture is considered. This is a particular issue in actions for personal injury, especially in those areas where liability insurance is compulsory (as is the case, for example, in respect of road traffic accidents and most injuries at work). The chances are that in these cases the claimant does not carry 'first party' personal insurance, which would cover the insured party's own loss. The portion of damages withheld because of contributory negligence frequently represents loss that the claimant must bear alone. For example, a cyclist who gets too close to a line of parked cars may well have damages reduced if a car driver carelessly opens a door into her path; and a pedestrian who does not take sufficient care in crossing the road may have damages reduced even if the car that hits her is travelling too fast. In each of these cases, since first party insurance is voluntary, it is likely that there will be an element of uncompensated loss that is not covered by insurance. Appealing to claimant fault is one way in which insurers may seek to reduce the cost of providing liability insurance. Such a reduction may have its most significant impact on claimants whose injury is most substantial: in these instances, a greater proportion of damages is attributable to meeting claimants' needs—in the form of costs of care or appropriate accommodation, for example—rather than for 'non-pecuniary' loss in the form of pain, suffering and loss of amenity. These heads of damage are considered in Chapter 9.

2.2 Applying the Statutory Provisions: Section 1(1)

Section 1(1) of the 1945 Act specifies that damages will be reduced where damage is suffered partly as a result of the claimant's fault, and partly as a result of the fault of another party. Clearly, both parties' 'fault' (the meaning of which we consider below) must be *a cause* of the damage suffered.

p. 468 ↵ It is important to be clear that it is the *damage*, not the accident (if any) that must result partly from the fault of each party. Thus, a claimant who fails to wear a seatbelt will have damages reduced if his or her injuries are rendered more severe by that failure, even though failure to wear the belt does nothing to 'cause' the accident itself.

Lord Denning MR, *Froom v Butcher*
[1976] QB 286, at 292

> The question is not what was the cause of the accident. It is rather what was the cause of the damage. In most accidents on the road the bad driving, which causes the accident, also causes the ensuing damage. But in seat belt cases the cause of the accident is one thing. The cause of the damage is another. The *accident* is caused by the bad driving. The *damage* is caused in part by the bad driving of the defendant, and in part by the failure of the plaintiff to wear a seat belt. If the plaintiff was to blame in not wearing a seat belt, the damage is in part the result of his own fault. He must bear some share in the responsibility for the damage: and his damages fall to be reduced to such extent as the court thinks just and equitable.

‘Fault’ and intention

Section 1(1) refers to damage which results partly from the fault of the injured party, and partly from the fault of the defendant. The definition of ‘fault’ in section 4 (extracted above) is much broader than negligence or lack of care. It encompasses any act that may be tortious, or would give rise to a defence of contributory negligence at common law. What if it is not the defendant but the *claimant* who intentionally causes (self-)harm?

Reeves v Commissioner of Police of the Metropolis [2000] 1 AC 360

The police breached a duty of care owed to a prisoner, to keep him under watch in order to guard against a suicide attempt.

The House of Lords thought that this was a rare case where a duty is owed in order to protect a person against self-harm. It would be illogical then to accept that the deceased’s act in killing himself could break the chain of causation (Chapter 6.3). But could the intentional act of suicide amount to ‘contributory negligence’ within the meaning of the 1945 Act? The House of Lords held that it could.

Lord Hope emphasized that ‘one should not be unduly inhibited by the use of the word “negligence” in the expression “contributory negligence”’ (at 383). Section 1 could also apply where the claimant’s fault takes the form of an intentional act.

Lord Hope, *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360, at 382–3

> It has been said that this definition of 'fault' comprises two limbs ... The first limb, which is referable to the defendant's conduct, comprises various acts or omissions which give rise to a liability in tort.
> p. 469 The second limb, which is referable to the plaintiff's conduct, deals with ↵ acts or omissions which would, but for the Act, have given rise to the defence of contributory negligence. The first is directed to the basis of the defendant's liability, while the second is concerned with his defence on the ground that the damage was the result partly of the plaintiff's own negligence ... the question whether the deceased was at fault in this case must be considered with reference to the words used to describe the second limb.
>
> ... It seems to me that the definition of 'fault' in section 4 is wide enough, when examined as a whole and in its context, to extend to a plaintiff's deliberate acts as well as to his negligent acts. This reading of the word would enable the court, in an appropriate case, to reduce the amount of damages to reflect the contribution which the plaintiff's own deliberate act of self-harm made to the loss.

Children

It is clearly possible for children to be contributorily negligent in appropriate circumstances. In *Young v Kent County Council* [2005] EWHC 1342, an action under the Occupiers' Liability Act 1984 (Chapter 12), a child of 12 was found to be contributorily negligent when he jumped on a skylight on the roof of a school. While the school ought to have taken more steps to keep children away from the roof, the claimant should have appreciated the risks associated with the skylight itself. Similarly, in *Honnor v Lewis* [2005] EWHC 747 (QB), damages were reduced by 20 per cent where a child of 11 stepped out into a road without checking for traffic. As we will in *Jackson v Murray* [2015] UKSC 5, the Supreme Court reduced damages by 50% where a 13 year old stepped out from behind a school bus: the trial judge had reduced damages by 90%. As explained in Chapter 3 in relation to the Standard of Care, children will be judged by a standard that is relevant to their age: very young children are unlikely to be found to have been contributorily negligent.

Intoxication

It appears that a claimant who is intoxicated is judged, for the purposes of contributory negligence, by reference to their actions, and not by reference to their ability to reflect and behave with due care for their own safety. Subject to this, however, there are circumstances in which defendants are obliged to take into account the possibility of people endangering themselves in this way. So, for example, in *Cameron v Swan* [2021] CSIH 30, a pedestrian who had been lying drunk in the road had damages reduced by 65%, but the court held that there is a duty to take account of pedestrians in the road—even if lying down. The key point here is that a reasonable driver would have seen the claimant and avoided the collision.

2.3 Apportionment

Apportionment of responsibility between the parties ought in principle to be the most difficult aspect of the contributory negligence defence. In practice, it can only be a rough and ready exercise. This reflects the fact that the proportional version of contributory negligence was devised to cut through the legal difficulties by permitting a compromise (see the discussion by Barker and Steele, Further Reading).

By section 1(1), the required apportionment reflects relative 'responsibility' for the damage suffered.
p. 470 'Responsibility' in this context is a question partly of causal influence, and ↵ partly of degree of fault. In practice, courts inevitably arrive at a reduction in a fairly rough and ready way. This exercise does not lend itself well to reconsideration in the appeal courts, and contributory negligence typically operates in the context of first instance decisions and indeed settlement of actions. Nevertheless, apportionment was considered by the Supreme Court in the following case, deciding that the courts below must have made an error in arriving at their apportionment. Essentially, it did not match the reasons given.

Jackson v Murray
[2015] UKSC 5

> The pursuer was thirteen when she stepped from behind a school minibus and was struck by the defender's car. The driver was travelling within the speed limit, but too fast: he did not make allowances for the possibility a child would attempt to cross, and did not keep a proper lookout. If he had taken due care, he would not have hit her. The trial judge assessed the child's contributory negligence at 90 per cent. On appeal, the court reduced this to 70 per cent. Unusually, there was an appeal to the Supreme Court on the question of apportionment. The reduction in damages for contributory negligence was reduced (by a majority) to 50 per cent. The Supreme Court needed to consider the basis on which an appellate court could interfere with the decision of a trial judge on the question of apportionment. It was concluded that there was a contradiction in the analysis of the trial judge which was not resolved in the first appeal; and that the appellate court could therefore legitimately intervene.

Lord Reed (for the majority), *Jackson v Murray*

> ### Review of apportionment
>
> 27 It is not possible for a court to arrive at an apportionment which is demonstrably correct. The problem is not merely that the factors which the court is required to consider are incapable of precise measurement. More fundamentally, the blameworthiness of the pursuer and the defender are incommensurable. The defender has acted in breach of a duty (not necessarily a duty of care) which was owed to the pursuer; the pursuer, on the other hand, has acted with a want of regard for her own interests. The word 'fault' in section 1(1), as applied to 'the person suffering the damage' on the one hand, and the 'other person or persons' on the other hand, is therefore being used in two different senses. The court is not comparing like with like.
>
> 28 It follows that the apportionment of responsibility is inevitably a somewhat rough and ready exercise (a feature reflected in the judicial preference for round figures), and that a variety of possible answers can legitimately be given. That is consistent with the requirement under section 1(1) to arrive at a result which the court considers 'just and equitable'. Since different judges may legitimately take different views of what would be just and equitable in particular circumstances, it follows that those differing views should be respected, within the limits of reasonable disagreement.

Lord Reed makes the point here that the process of apportionment required by the 1945 Act, is simply not
p. 471 *capable* of being 'exact'. He connects this to the preference for use of round ↵ figures: assessments of contributory negligence will take the form of multiples of ten and, sometimes, five. Turning to 'culpability', there is a difference in the type of 'fault' on the part of the claimant and on the part of the defendant. But in addition, there is a need to take account not only of fault, but also of 'causative potency'. These are, simply, different questions.[3] Ultimately, the Supreme Court felt able to assess the validity of the balance struck in this case by asking whether it was consistent in its own terms. As explained in the extract below, it could indeed be concluded that the court below had 'gone wrong'.

Lord Reed, *Jackson v Murray*

40 As the Extra Division recognised, it is necessary when applying section 1(1) of the 1945 Act to take account both of the blameworthiness of the parties and the causative potency of their acts. In relation to causation, the Extra Division based its view that 'the attribution of causative potency to the driver must be greater than that to the pedestrian' on the fact that 'a car is potentially a dangerous weapon'. Like the Court of Appeal in *Eagle v Chambers*, I would take the potentially dangerous nature of a car being driven at speed into account when assessing blameworthiness; but the overall assessment of responsibility should not be affected by the heading under which that factor is taken into account. Even leaving out of account the potentially dangerous nature of a car being driven at speed, I would not have assessed the causative potency of the conduct of the defender as being any less than that of the pursuer. This is not a case, such as *Ehrari v Curry* [2007] EWCA Civ 120; [2007] RTR 521 (where contributory negligence was assessed at 70%), in which a pedestrian steps directly into the path of a car which is travelling at a reasonable speed, and the driver fails to take avoiding action as promptly as he ought to have done. In such a case, the more direct and immediate cause of the damage can be said to be the conduct of the pedestrian, which interrupted a situation in which an accident would not otherwise have occurred. Nor is it a case, such as *Eagle v Chambers* (in which contributory negligence was assessed at 40%) or *McCluskey v Wallace* (where the contributory negligence of a child was assessed at 20%), in which a driver ploughs into a pedestrian who has been careless of her own safety but has been in his line of vision for long enough for him easily to have avoided her. In the present case, the causation of the injury depended upon the combination of the pursuer's attempting to cross the road when she did, and the defender's driving at an excessive speed and without keeping a proper look-out. If the pursuer had waited until the defender had passed, he would not have collided with her. Equally, if he had slowed to a reasonable speed in the circumstances and had kept a proper look-out, he would have avoided her.

41 Given the Extra Division's conclusion that the causative potency of the defender's conduct was greater than that of the pursuer's, their conclusion that 'the major share of the responsibility must be attributed to the pursuer', to the extent of 70%, can only be explained on the basis that the pursuer was considered to be far more blameworthy than the defender. I find that difficult to understand, given the factors which their Lordships identified. As I have explained, they rightly considered that the pursuer did not take reasonable care for her own
p. 472 safety: either she did not look to her left within a reasonable time before stepping out, or she failed to make a reasonable judgment as to the risk posed by the defender's car. On the other hand, as the Extra Division recognised, regard has to be had to the circumstances of the pursuer. As they pointed out, she was only 13 at the time, and a 13 year old will not necessarily have the same level of judgment and self-control as an adult. As they also pointed out, she had to take account of the defender's car approaching at speed, in very poor light conditions, with its headlights on. As they recognised, the assessment of speed in those circumstances is far from easy, even for an adult, and even more so for a 13 year old. It is also necessary to bear

> in mind that the situation of a pedestrian attempting to cross a relatively major road with a 60 mph speed limit, after dusk and without street lighting, is not straightforward, even for an adult.
>
> 42 On the other hand, the Extra Division considered that the defender's behaviour was 'culpable to a substantial degree'. I would agree with that assessment. He had to observe the road ahead and keep a proper look-out, adjusting his speed in the event that a potential hazard presented itself. As the Extra Division noted, he was found to have been driving at an excessive speed and not to have modified his speed to take account of the potential danger presented by the minibus. The danger was obvious, because the minibus had its hazard lights on. Notwithstanding that danger, he continued driving at 50 mph. As the Lord Ordinary noted, the Highway Code advises drivers that 'at 40 mph your vehicle will probably kill any pedestrians it hits'. … that level of danger points to a very considerable degree of blameworthiness on the part of a driver who fails to take reasonable care while driving at speed.
>
> 43 In these circumstances, I cannot discern in the reasoning of the Extra Division any satisfactory explanation of their conclusion that the major share of the responsibility must be attributed to the pursuer: a conclusion which, as I have explained, appears to depend on the view that the pursuer's conduct was far more blameworthy than that of the defender. As it appears to me, the defender's conduct played at least an equal role to that of the pursuer in causing the damage and was at least equally blameworthy.
>
> 44 The view that parties are equally responsible for the damage suffered by the pursuer is substantially different from the view that one party is much more responsible than the other. Such a wide difference of view exceeds the ambit of reasonable disagreement, and warrants the conclusion that the court below has gone wrong. I would accordingly allow the appeal and award 50% of the agreed damages to the pursuer.

Fixed Apportionment

The inexact nature of the apportionment exercise is very clearly illustrated by the existence of 'fixed tariffs' in some circumstances, most famously illustrated by *Froom v Butcher*:

Lord Denning MR, *Froom v Butcher*
[1976] QB 286, at 295–6

> Whenever there is an accident, the negligent driver must bear by far the greater share of responsibility. It was his negligence which caused the accident. It also was a prime cause of the whole of the damage. But in so far as the damage might have been avoided or lessened by wearing a seat belt, the injured person must bear some share. But how much should this be? Is it proper to inquire whether the driver was grossly negligent or only slightly negligent? ↵ Or whether the failure to wear a seat belt was entirely inexcusable or almost forgivable? If such an inquiry could easily be undertaken, it might be as well to do it. In *Davies v. Swan Motor Co. (Swansea) Ltd* [1949] 2 K.B. 291, 326, the court said that consideration should be given not only to the causative potency of a particular factor, but also its blameworthiness. But we live in a practical world. In most of these cases the liability of the driver is admitted, the failure to wear a seat belt is admitted, the only question is: what damages should be payable? This question should not be prolonged by an expensive inquiry into the degree of blameworthiness on either side, which would be hotly disputed. Suffice it to assess a share of responsibility which will be just and equitable in the great majority of cases.

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The solution in *Froom* was to adopt a 'tariff' which would apply to the large majority of seatbelt cases, without having to reopen the particular question of degree of fault in each case. Where injuries would have been avoided altogether by wearing a seatbelt, there should be a reduction in damages of 25 per cent. In a case where injuries would have been less severe had a belt been worn, the reduction in damages would be 15 per cent.

In *Capps v Miller* [1989] 1 WLR 839, the plaintiff suffered severe brain damage when, through the 'atrocious driving' of the defendant, he was knocked off his moped. He was wearing a safety helmet, as was required by regulation,[4] but had not fastened it properly. Failure to wear a helmet was equated with failure to wear a seatbelt. But the Court of Appeal took the view that failure to fasten the helmet involved a lower degree of blameworthiness than failure to wear a helmet at all. Consequently, there should be a smaller reduction in damages than the lower figure in *Froom v Butcher*, and this was set at 10 per cent. The same lenient approach was not applied to a mother who had strapped her three-year-old daughter into a booster seat instead of an age-appropriate child seat in *Hughes v Williams* [2013] EWCA Civ 455: her contribution was assessed at 25 per cent despite the high degree of culpability of the defendant driver, who had been under the influence of drugs. The chief controversy is in applying the contributory negligence 'tariff' to a case concerned with the mother's share of *liability to* her daughter, an issue discussed in Chapter 8.

The approach to apportionment has become well settled in respect of seatbelts and motor-cycle helmets,[5] but what of cycle helmets? The wearing of cycle helmets is not mandatory, but the Highway Code informs cyclists that they 'should' wear a helmet which conforms to current regulations. *Froom v Butcher* applied a reduction for contributory negligence at a time before wearing a seatbelt became mandatory (although even at that time, it was mandatory for seatbelts to be fitted in the front seats of a vehicle). As Lord Denning put it:

Lord Denning MR, *Froom v Butcher*
[1976] QB 286, at 293

> Everyone is free to wear it or not as he pleases. Free in this sense, that if he does not wear it he is free from any penalty by the magistrates. Free in the sense that everyone is free to run his head against a brick wall, if he pleases. He can do it if he likes without being punished by ↵ the law. But it is not a sensible thing to do. If he does it, it is his own fault; and he has only himself to thank for the consequences.
>
> Much material has been put before us about the value of wearing a seatbelt. It shows quite plainly that everyone in the front seats of a car should wear a seatbelt.

p. 474

A reminder that causation is a crucial element of contributory negligence and must be shown on the balance of probabilities is the case of *Stanton v Collinson* [2010] EWCA Civ 81. Here the claimant passenger had suffered very serious head injuries in a collision. The claimant was sharing the front passenger seat with another passenger, and neither was wearing a seatbelt. The judge, however, declined to make a deduction for contributory negligence. The crucial element in this case was the evidence before the court: this suggested that there would still have been a head injury had a seat belt been worn; and the judge concluded that the evidence did not establish that the severity of injury would have been 'significantly less' had that been the case. The Court of Appeal decided not to disturb this conclusion, but noted that the judgment reached was 'a fine one' ([24]). The judge, however, had heard the evidence first hand; and she was entitled to say in this particular case that 'medical evidence' was required to resolve the issues. As it was, the only expert evidence provided was from road accident engineers, expert in collisions, but not in the nature of brain injuries. The Court of Appeal realized that this might undermine the purpose of *Froom v Butcher*—namely, to reduce the time and costs which might be involved in assessing contributory negligence—and emphasized that this was a case involving grave injury in which the need for medical evidence was not disproportionate to the claim.

Cases Raising Diverse Issues

What happens in a more complex case where diverse issues of causation and relative blame have to be balanced? An important example is the case of *Reeves v Chief Commissioner of the Metropolis* [2000] 1 AC 360, which we extracted in Section 2.1.

Lord Hoffmann, at 372

> In my view it would … have been right to apportion responsibility between the commissioner and Mr Lynch in accordance with the Act of 1945. The judge and Morritt L.J. would have apportioned 100 per cent. to Mr Lynch. But I think that this conclusion was heavily influenced by their view, expressed in connection with the question of causation, that Mr Lynch, as a person of sound mind, bore full responsibility for taking his own life. This is of course a tenable moral view. … But whatever views one may have about suicide in general, a 100 per cent. apportionment of responsibility to Mr Lynch gives no weight at all to the policy of the law in imposing a duty of care upon the police. It is another different way of saying that the police should not have owed Mr Lynch a duty of care. The law of torts is not just a matter of simple morality but contains many strands of policy, not all of them consistent with each other, which reflect the complexity of life. An apportionment of responsibility "as the court thinks just and equitable" will sometimes require a balancing of different goals. It is at this point that
> p. 475 I think that Buxton L.J.'s reference to the cases on the Factories Acts is very ↵ pertinent. The apportionment must recognise that a purpose of the duty accepted by the commissioner in this case is to demonstrate publicly that the police do have a responsibility for taking reasonable care to prevent prisoners from committing suicide. On the other hand, respect must be paid to the finding of fact that Mr Lynch was "of sound mind." I confess to my unease about this finding, based on a seven-minute interview with a doctor of unstated qualifications, but there was no other evidence and the judge was entitled to come to the conclusion which he did. I therefore think it would be wrong to attribute no responsibility to Mr Lynch and compensate the plaintiff as if the police had simply killed him. In these circumstances, I think that the right answer is that which was favoured by Lord Bingham of Cornhill C.J., namely to apportion responsibility equally.

This extract again emphasizes the rough and ready nature of apportionment. Causative influences cannot be accurately weighed against degrees of blameworthiness, and the policy reasons which justify a duty to prevent self-harm in this case cannot be scientifically measured against moral feelings concerning the wrongness (assuming sound mind) of self-harm. The court must seek a solution which appears to take into account all of the relevant factors.

Corr v IBC [2008] UKHL 13; (2008) 1 AC 884

Here, the defendant's negligence had caused an accident in which the claimant was physically injured. The accident led to depression which in turn led eventually to his suicide. Because the first instance judge had held against the claimant, there were no substantial findings of fact relevant to contributory negligence. In the House of Lords, there was a wide divergence of opinion over whether a reduction in damages for contributory negligence was justified either in principle, or on the evidence. Lord Bingham assessed contributory negligence at zero per cent.[6]

Lord Bingham, *Corr v IBC*

> 22 . … I do not think that any blame should be attributed to the deceased for the consequences of a situation which was of his employer's making, not his.

Lord Walker agreed. In applying section 1(1) of the 1945 Act, 'the Court has to have regard both to blameworthiness and to what is sometimes called causal potency' (at [44]).

The other three judges approached the matter differently. In assessing whether the claimant's 'fault' as defined in section 4 of the 1945 Act was partially to blame for the accident, they interpreted fault in terms of personal choice: the guiding concept was autonomy rather than culpability. Lord Scott, applying this thinking, would have reduced damages by 20 per cent. He argued that the deceased might have been liable in tort if he
p. 476 had injured a third party when he threw himself from the building; thus his action satisfied the definition of ↵ 'fault' and there should be consistency between these two purposes. Although the remaining judges—Lords Mance and Neuberger—did not think there was sufficient evidence before the court to justify making a deduction in this case, they also seem to have approached the issue as one of 'autonomy' rather than 'culpability'.

Lord Mance, *Corr v IBC*

> 52 The different strands of policy which exist in this area, and the balancing of different goals which is necessary, may therefore make it appropriate not only to hold liable a defendant who causes an accident which leads to depression and suicide, but also to attribute an element of responsibility, small though it may be, to a person who commits suicide, so recognizing the element of choice which may be present even in the case of someone suffering an impairment due to an accident.

Similarly, Lord Neuberger thought that the critical question in any individual case would be 'the extent to which the deceased's personal autonomy has been overborne by the impairment to his mind attributable to the defendant' (at [69]).

Short of automatism, the law is reluctant to absolve individuals of responsibility for their actions on the basis that their actions were in some way caused by others. It may be questioned whether consistency really requires this thinking to be reflected in a reduction in damages here: contributory negligence is a matter of justice and fairness as between claimant and defendant, and explicitly requires consideration of *relative* fault. In other words, it can be argued that different issues may consistently be considered in different areas of the law.

Before the 1945 reform, the idea of legal or proximate cause was the means used to control the potentially savage implications of the complete defence. Recommending the reform, the Law Revision Committee made plain that it did not intend any change in this aspect of the law.[7]

Law Revision Committee 8th Report, *Contributory Negligence*
(Cmd 6032, 1939), 16

> While we recommend that the principle of apportioning the loss to the fault should be adopted at Common Law, we do not recommend any change in the method of ascertaining whose the fault may be, nor any abrogation from what has been somewhat inaptly called the 'last opportunity rule'. In truth there is no such rule -the question, as in all questions of liability for a tortious act, is, not who had the last opportunity of avoiding the last opportunity of causing the mischief, but whose act caused the wrong?'[8]

p. 477 ↵ In practice, the existence of the proportionate defence has encouraged change in the approach to legal causation, and now it need only be shown that the damage was not too remote a consequence of the defendant's breach, so long as that damage fell within the scope of the relevant duty (Chapter 6).[9] The likelihood of this effect was realized very soon after the legislation.

Denning LJ, *Davies v Swan Motor Co (Swansea) Ltd*
[1949] 2 KB 291, 322

> ... the practical effect [of the 1945 Act] is wider than the legal effect.[10] Previously, in order to mitigate the harshness of the doctrine of contributory negligence, the courts in practice sought to select, from a number of competing causes, which was *the* cause -the effective or predominant cause -of the damage and to reject the rest. Now the courts have regard to all the causes and apportion the damages accordingly.

3 *Volenti Non Fit Injuria*: Willing Acceptance of Risk

A defendant will escape liability for the consequences of negligence if the claimant has, expressly or impliedly, agreed to accept the legal risk associated with that negligence.

Volenti—or acceptance of risk—is of very limited application to cases of negligence today, although there have been successful cases which we must seek to explain. But this has not always been the case. There was a time when courts were all too ready to find that plaintiffs had voluntarily accepted the risks in question, particularly where the plaintiff had suffered injury in the course of employment. As explained in the following passage, recognition of the narrow defence we have stated was a hard-won battle:

G. Williams, *Joint Torts and Contributory Negligence* (Stevens & Sons, 1951), 296–8

> … In its heyday, the doctrine [of voluntary assumption of risk] was applied in almost every situation where the plaintiff knew of the risk and yet chose to undergo it rather than to give up on some enterprise on which he was engaged. At least, that was the attitude adopted in the master-and-servant cases. The extreme limit of the doctrine was represented by *Woodley v Metropolitan District Rly* [(1877) 18 QBD 685 at 696 (CA)]. The plaintiff, a workman in the employ of a contractor engaged by the defendants, had to work in a dark tunnel which he knew was rendered dangerous by passing trains. The jury found the company negligent in not stationing a person to warn the workmen of the
> p. 478 approach of trains, and three of the five ↵ judges of the Court of Appeal (including one who was in the majority in the result reached) held that there was evidence of this. Yet three judges of the same court held that the plaintiff could not recover for his injuries, on the ground that he had voluntarily assumed the risk.
>
> It may confidently be asserted that this appalling extension of the doctrine would not now be followed. A change in the judicial attitude took place towards the end of the last century—Beven associated it with the change of feeling represented by the passing of the Employers' Liability Act, 1880[11]—and the modern tendency has been to restrict the defence. A beginning was made in *Thomas v Quartermaine* (1887), when Bowen LJ let fall his celebrated dictum that 'the maxim is not *scienti non fit injuria* but *volenti*.'[12]

It is obvious why the broad version of the defence can be described as unjust and even, in some manifestations, 'appalling'. It rested on a wholly fictional idea of 'consent'. As Scott LJ explained in *Bowater v Rowley Regis* [1944] KB 476, at 479:

> … a man cannot be said to be truly 'willing' unless he is in a position to choose freely, and freedom of choice predicates, not only full knowledge of the circumstances on which the exercise of choice is conditioned, so that he may be able to choose wisely, but the absence from his mind of any feeling of constraint so that nothing shall interfere with the freedom of his will.

Choices in respect of employment are scarcely likely to be made in the absence of any feelings of constraint. Ultimately, the pivotal case of *Smith v Baker & Sons* [1891] AC 325 made clear that a plaintiff who continues with an activity despite knowledge of certain risks associated with it is not thereby to be treated as having accepted those risks. This major turning point left the defence with little application to cases of negligence. As Lord Pearce put it in *ICI v Shatwell* [1965] AC 656, at 686:

> One naturally approaches [the] defence with suspicion. For in the sphere of master and servant its role has been inglorious up to 1891, and, since that date, insignificant. In *SMITH V BAKER & SONS* it was laid down that the defence is not constituted by knowledge of the danger and acquiescence in it, but by an agreement to run the risk and to waive any rights to recompense for any injury in which that risk might result.

p. 479

3.1 The Restricted Nature of the Modern *Volenti* Defence

The brief statement of the *volenti* defence in the quotation from Lord Pearce above contains all the elements set out at the start of this section. A similarly narrow view of the *volenti* defence was adopted by Lord Denning in *Nettleship v Weston* [1971] 2 QB 691.

> Knowledge of the risk of injury is not enough. Nor is a willingness to take the risk of injury. Nothing will suffice short of an agreement to waive any claim for negligence. The plaintiff must agree, expressly or impliedly, to waive any claim for any injury that may befall him due to the lack of reasonable care by the defendant.

It is important to note three limitations inherent in this statement.

Assumption of Legal Risk, Not Risk of Physical Consequences

There are many cases in which it is tempting to say that a claimant willingly *ran the risk of incurring harm*, but this is not sufficient for a defence of *volenti* to succeed. In the passage above, Lord Denning made clear that there is a difference between accepting *the risk of injury*, and accepting *the legal consequences of the injury.* The facts of *Nettleship v Weston* itself illustrate the contrast. The plaintiff had agreed to give driving lessons to the defendant, a neighbour. It is obvious to an instructor that a learner driver may lose control of her car *in circumstances in which a competent driver would not do so*—in other words, negligently.[13] But this is not enough to satisfy the narrow defence of *volenti*. This is because the instructor does not agree, merely by taking on the role of instructor in the full knowledge of the chance of negligence, to waive any right to *compensation* in the event that this should happen.

In this particular case, the plaintiff had checked that the defendant carried third party insurance, which would indemnify him in the event of injury. This was powerful specific evidence that he did not accept that the legal risk should fall on him. But Lord Denning's point was wider than this.

The *volenti* defence is now excluded from driver and passenger claims in any event:

Road Traffic Act 1988

> **149 Avoidance of certain agreements as to liability towards passengers**
>
> (1) This section applies where a person uses a motor vehicle in circumstances such that under section 143 of this Act there is required to be in force in relation to his use of it such a policy of insurance ... as complies with the requirements of this Part of this Act.
>
> p. 480 (2) If any other person is carried in or upon the vehicle while the user is so using it, any antecedent agreement or understanding between them (whether intended to be legally binding or not) shall be of no effect so far as it purports or might be held—
>
> (a) to negative or restrict any such liability of the user in respect of persons carried in or upon the vehicle as is required by section 145 of this Act to be covered by a policy of insurance, or
>
> (b) to impose any conditions with respect to the enforcement of any such liability of the user.
>
> (3) The fact that a person so carried has willingly accepted as his the risk of negligence on the part of the user shall not be treated as negativing any such liability of the user.

Need for Agreement

The need for agreement is the most severe of the three restrictions to the defence. In the passage from *Nettleship* quoted above, Lord Denning stated that a *volenti* defence will only succeed where there is an *agreement* to waive any claim for injury. A clear statement of this principle is to be found in the speech of Lord Bramwell in the leading case of *Smith v Baker & Sons* [1891] AC 325.

Lord Bramwell

> In the course of the argument I said that the maxim *Volenti non fit injuria* did not apply to a case of negligence; that a person never was *volens* that he should be injured by negligence—at least, unless he specially agreed to it; I think so still.

According to Glanville Williams:

> Consent, in modern law, means agreement, and it would be much better if the latter word replaced the former.

Despite these authorities, *volenti* has succeeded as a defence to negligence in one or two modern cases (including *Shatwell* itself) where there is no express ‘agreement’. We will consider these cases below. In each case, the claimant is closely involved in creation of the risk.

Consent to the Negligence, Not Just the Risk

Quite apart from the requirements above, any consent must be *to the negligence itself*, and not to the general risk of injury. In *Wooldridge v Sumner* [1963] 2 QB 43, Diplock LJ thought that, for this reason alone, *volenti* would generally fail as a defence to negligence. Here, a spectator was injured when a sportsman lost control of
p. 481 his horse. But Diplock LJ's approach ↵ has been decisive in a number of cases where participants in sporting events have themselves been injured. In these cases, English courts have found it possible to dispose of *volenti* with ease. In *Smoldon v Whitworth and Nolan* (17 December 1996, Court of Appeal), an amateur rugby referee was found to have breached a duty of care owed to players (in this instance junior players or 'colts') when he failed to enforce a rule—designed for the safety of players—against collapsing scrums. Although rugby was 'a tough, highly physical game', the *volenti* defence could not succeed:

Lord Bingham of Cornhill CJ, *Smoldon v Whitworth*

> The plaintiff had of course consented to the ordinary incidents of a game of rugby of the kind in which he was taking part. Given, however, that the rules were framed for the protection of him and other players in the same position, he cannot possibly be said to have consented to a breach of duty on the part of the official whose duty it was to apply the rules and ensure so far as possible that they were observed.

Volenti has been found inapplicable for similar reasons in other English cases concerning sports, such as *Wattleworth v Goodwood Road Racing Company Ltd and Others* [2004] EWHC 140. In *Watson v British Boxing Board of Control* [2001] QB 1134, the defendant Board—the sole organization responsible for regulating professional boxing in the UK—was liable in damages to the claimant, a professional boxer, who had incurred serious brain damage. The relevant breaches of duty concerned the prompt treatment of injuries and the provision of proper facilities to deal with head injuries during a fight. Although a boxer clearly consents to being hit by an opponent, it could not be said that the participant was *volens* in respect of these particular breaches of duty. The *volenti* defence in the context of sporting injuries has been justly described as 'otiose'.[14]

The distinction is also illustrated in the different context of an occupier's liability. In the following case, a hotel was liable for the death of a guest who fell from the windowsill of his room, where he had chosen to smoke after a night out. The sash window was too close to the ground and opened at the bottom; it also required to be held open. It invited the risk of falling. Damages were reduced by 60% but the guest's risky decision did not negate the hotel's liability: *White Lion Hotel v James* [2021] EWCA Civ 31. Liability in this case was under the Occupiers' Liability Act 1957, considered in Chapter 13. The decision to run the risk did not amount to 'volenti', which is extended to the statutory liabilities by s.2(5) of the Act. In the extract below, consideration is given to the fact that the deceased was likely not in a state of mind in which he could absolve the defendant of blame. This means that an intoxicated claimant is treated somewhat differently in relation to contributory negligence or volenti, since the emphasis of the latter defence is on 'agreement'. There is an exception, however, in a case such as *Morris v Murray* (below), in which a claimant played a significant role in creating the risk of harm.

p. 482 ***White Lion Hotel v James* [2021] EWCA Civ 31**

> 95. The deceased fell in the early hours of the morning. He had attended a wedding, drunk alcohol, when he returned to the room it is likely that he was hot and tired. He was unable to sleep and felt the need for, at least, fresh air. In assessing his actions and the knowledge of any risk and its consequences, account can properly be taken of the condition of the deceased and his ability to fully appreciate what he was doing and the consequences of it, such as to meet the stringent requirements of the test of volenti.
>
> 96. It is pertinent to observe that the appellant, who owned and managed the hotel, did not appreciate the risk prior to the accident. In the circumstances, to make a finding that the deceased, a visitor, should possess greater knowledge than the occupier of the premises is a considerable step to take.
>
> 97. The findings of the judge … represent knowledge of the general risk which the deceased faced. There is no finding that the deceased was aware of, and expressly or impliedly accepted, that the risk had been created by the appellant's breach of duty and by his actions he was deliberately absolving or forgiving the appellant for creating the risk. There is no finding that in sitting as he did the deceased was waiving his legal right to sue. In my judgment these are findings which provide a basis for the determination of contributory negligence. They do not go sufficiently far to meet the requirements of section 2(5).

3.2 Applications of the *Volenti* Defence

Although we have been careful to set out the limits to the defence of *volenti*, we have also mentioned that there are some exceptional cases where that defence can still succeed in the context of a negligence action.

Passengers, Drivers, and Pilots: *Dann v Hamilton* and *Morris v Murray*

In *Dann v Hamilton* [1939] 1 KB 509, the plaintiff had accepted a lift with the defendant. She allowed him to drive her home, though she knew that he had been drinking over the course of the evening. When the plaintiff was injured, she was held not to have consented to the risk posed by the defendant's drunkenness.[15] Subsequently, *Dann v Hamilton* was mentioned with approval by Lord Denning in *Nettleship v Weston*, and by Diplock LJ in *Wooldridge v Sumner*. As we have seen, the *volenti* defence is now excluded from road traffic actions between passenger and driver by section 149 of the Road Traffic Act 1988. Because of this, there have been few opportunities to consider whether accepting a lift from a person who is clearly incapable of driving safely could in principle be sufficient to give rise to the *volenti* defence.[16] *Morris v Murray* is in effect such a case. Since it involved a light aircraft rather than a road vehicle, it was not caught by the prohibition in the Road Traffic Act.

p. 483 ***Morris v Murray***
[1991] 2 QB 6

> The plaintiff and a friend (Murray) spent an afternoon drinking heavily. The two men decided to take a flight in a light aircraft, with Murray (who was found to have consumed the equivalent of 17 whiskies) at the controls. The plaintiff drove to the airfield and helped to start and refuel the aircraft. The plane crashed, killing Murray and seriously injuring the plaintiff. The *volenti* defence succeeded.

The Court of Appeal in *Morris v Murray* distinguished *Dann*, and argued that the case in hand was closer on its facts to *ICI v Shatwell* (below) than to *Dann v Hamilton*. But if this is so, the difference is not down to the immediacy of the danger. The method of working used in *Shatwell* was certainly dangerous, but the method had been used many times before and (unlike *Murray*) it was far from inevitable that any injury would follow. What other reason might there be for putting *Morris v Murray* with *ICI v Shatwell* into one category, and *Dann v Hamilton* into another?

ICI v Shatwell [1965] AC 656

Two brothers were employed by the appellants as shot-firers. They chose to operate a dangerous means of testing detonators, even though they knew that this method had been forbidden by their employers on safety grounds, and prohibited by regulation for the same reason. There was an explosion, and both brothers were injured. George, who according to Lord Reid bore a greater part of the responsibility for deciding to operate the dangerous and forbidden system, brought an action in negligence and for breach of statutory duty against his employers. He accepted that his damages must be reduced for contributory negligence, but he argued that his employers were vicariously liable for the tortious conduct of his brother, who was partly to blame for his injuries.

The House of Lords held by a majority that the defence of *volenti* should succeed. Lord Reid emphasized that there had been a *deliberate decision* to disobey instructions, rather than a merely careless collaboration between the men.

Lord Reid, at 672–3

> If we adopt the inaccurate habit of using the word 'negligence' to denote a deliberate act done with full knowledge of the risk it is not surprising that we sometimes get into difficulties. I think that most people would say, without stopping to think of the reason, that there is a world of difference between two fellow-servants collaborating carelessly so that the acts of both contribute to cause injury to one of them, and two fellow-servants combining to disobey an order deliberately though they know the risk involved. It seems reasonable that the injured man should recover some compensation in the former case but not in the latter. If the law treats both as merely cases of negligence it cannot draw a distinction. But in my view the law does and should draw a distinction. In the first case only the partial defence of contributory negligence is available. In the second *volenti non fit injuria* is a complete defence if the employer is not himself at fault and is only liable vicariously for the acts of the fellow-servant. If the plaintiff invited or freely aided and abetted his fellow-servant's disobedience, then he was *volens* in the fullest sense. He cannot complain of the resulting injury either against the fellow-servant or against the master on the ground of his vicarious responsibility for his fellow-servant's conduct.

p. 484 ↵ Comparing Lord Reid's analysis with the facts of *Morris v Murray*, it could be said that in the latter case, although the manner in which the deceased was piloting the plane was 'careless', the decision to engage in a glaringly dangerous activity was entirely deliberate. This being so, the case may not fall within the doubts expressed by Diplock LJ in *Wooldridge v Sumner* about the application of *volenti* to 'negligence simpliciter'.

But what of the need for an agreement? This element was not mentioned by Lord Reid, but it was considered by Lord Pearce. Lord Pearce was ready to infer such an agreement from deliberate conduct on the part of the plaintiff:

Lord Pearce, at 688

> In the present case it seems clear that as between George and James there was a voluntary assumption of risk. George was clearly acting without any constraint or persuasion; he was in fact inaugurating the enterprise. On the facts it was an implied term (to the benefit of which the employers are vicariously entitled) that George would not sue James for any injury that he might suffer, if an accident occurred. Had an officious bystander raised the possibility, can one doubt that George would have ridiculed it?

An explanation of *ICI v Shatwell* and *Morris v Murray* can be arrived at by combining the insights of Lords Reid and Pearce. The cases show that *volenti* may succeed in the absence of *express* agreement, provided there is deliberate collusion in the creation of the risk. On the analysis adopted by Lord Pearce, this can be seen in terms of an implied agreement: it would be obvious to both parties that the plaintiff here accepted the risk, at the time of the collaboration.[17] Thus, these cases involve more than mere acceptance of the risk posed by a driver who is already drunk—or, analogously, a faulty window in a hotel.

4 *Ex Turpi Causa Non Oritur Actio*: 'Illegality'

A claim in tort may be barred on the basis that it arises directly out of illegal conduct on the part of the claimant. The meaning of 'illegality' is explored in Section 4.1. Illegality has been described as not strictly a defence because it exists not to protect the defendant but to further the policy of the law itself. The balance it strikes is not a balance between the parties. For this reason, illegality may be raised by the court itself as a reason for dismissing a claim.[18] It is sometimes referred to simply as a 'public policy bar'.

Illegality has been extensively considered in the highest court, with seven decisions of the Supreme Court to
p. 485 date- though far from all of these are tort cases. The general nature of ↵ the defence has been subject to significant disagreement and debate. Its application in the particular field of tort adds a further range of issues.

The underlying general question is whether the defence should operate on the basis of a confined set of clear rules or principles (informed, of course, by the policy that underpins the defence); or whether the courts should appeal more directly to policy in developing a discretionary approach. A series of cases in the Supreme Court has disclosed considerable disagreement on precisely this point. In *Patel v Mirza* [2016] UKSC 42; [2016] 3 WLR 399, the issue was settled in favour of direct policy reasoning. *Patel* is not a tort case, but involves a claim in unjust enrichment. It is now recognized as setting the general approach to the illegality defence: *Henderson v Dorset NHS Foundation Trust* [2020] UKSC 43.

In the following sections, we consider general issues (4.1–4.3), before turning to the somewhat problematic application to tort law (4.4).

4.1 'Illegality'

First, what is meant by 'illegality'? The 'illegality' defence is sometimes captured in the Latin phrase *ex turpi causa non oritur actio*: no action arises from a bad cause. Historically, it has been stated in such a way as to extend not only to illegal but also to *immoral* conduct, perhaps reflecting its early association with enforceability of illegal or immoral contracts.[19] Recent decisions have confined the defence to acts which are criminal or 'quasi-criminal'; so that the language of 'illegality' remains appropriate.

It is clear, however, that not *every* breach of criminal law will suffice. For example, a driver is required by law to wear a seatbelt, and we have already seen that failure to do so may lead to reduction in damages on the basis of contributory negligence (*Froom v Butcher*, Section 2). It will not, however, lead to the claim being barred on grounds of illegality.

We can see, then, that not all misconduct attracting criminal sanctions is caught by the 'illegality' defence. But what of the question whether *only* criminal conduct is within the rule? In *Safeway Stores v Twigger* [2010] EWCA Civ 1472, the Court of Appeal applied the maxim *ex turpi causa* in a case where the relevant conduct (breach of competition law) was regarded as 'quasi-criminal', attracting a very substantial penalty in the nature of a fine. In *Les Laboratoires Servier v Apotex* [2014] UKSC 55; [2015] AC 430, the tort claimant had

infringed the defendant's Canadian patent, while sincerely believing the patent to be invalid (as, indeed, the equivalent European patent held by the same party proved to be). The Supreme Court held that breach of a patent was a civil wrong only, and involved no criminality; thus, the illegality defence could not apply.

Les Laboratoires Servier v Apotex
[2014] UKSC 55; [2015] AC 430

> **Lord Sumption**
>
> **What is 'Turpitude'?**
>
> 23 The paradigm case of an illegal act engaging the defence is a criminal offence. So much so, that much modern judicial analysis deals with the question as if nothing else was relevant. Yet in his famous statement of principle in *Holman v Johnson* 1 Cowp 341 Lord Mansfield CJ spoke not only of criminal acts but of 'immoral or illegal' ones. What did he mean by this? I think that what he meant is clear from the characteristics of the rule as he described it, and as judges have always applied it. He meant acts which engage the interests of the state or, as we would put it today, the public interest. The illegality defence, where it arises, arises in the public interest, irrespective of the interests or rights of the parties. It is because the public has its own interest in conduct giving rise to the illegality defence that the judge may be bound to take the point of his own motion, contrary to the ordinary principle in adversarial litigation …
>
> p. 486
>
> 28 … In my opinion the question what constitutes 'turpitude' for the purpose of the defence depends on the legal character of the acts relied on. It means criminal acts, and what I have called quasi-criminal acts. This is because only acts in these categories engage the public interest which is the foundation of the illegality defence. Torts (other than those of which dishonesty is an essential element), breaches of contract, statutory and other civil wrongs, offend against interests which are essentially private, not public. There is no reason in such a case for the law to withhold its ordinary remedies. The public interest is sufficiently served by the availability of a system of corrective justice to regulate their consequences as between the parties affected.

Clearly then, civil wrongs such as torts and breaches of contract are generally insufficient to amount to 'illegality' within the defence; but Lord Sumption suggests an exception for those torts—such as deceit—where dishonesty is an essential element.

4.2 Underlying Rationale

Illegality has its basis in public policy. The following, much-cited passage refers to cases where there is an illegal or immoral contract, but it has been treated as applying to the illegality defence in all causes of action, including tort.

Lord Mansfield, *Holman v Johnson*
(1775) 1 Cowp 341, at 343

> The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this: *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or 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 that the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis*.

p. 487 ↵ The illegality defence is not about fairness between the parties, and is certainly not applied out of 'tenderness'[20] toward a defendant who (in a case of illegal contract or joint criminal enterprise) may also have acted illegally. The illegality defence is a rule of public policy and it prevents reliance upon the claimant's own illegal act in seeking a remedy. The same is true in cases of contract, trust, or tort.

Law Commission, *The Illegality Defence: A Consultative Report* (Consultation Paper No 189, TSO, 2009)

> ## Conclusion on the Policy Rationales
>
> 2.35 We provisionally recommend that the illegality defence should be allowed where its application can be firmly justified by the policies that underlie its existence. These include: (a) furthering the purpose of the rule which the illegal conduct has infringed; (b) consistency; (c) that the claimant should not profit from his or her own wrong; (d) deterrence; and (e) maintaining the integrity of the legal system.

The Law Commission recommended that in the field of tort, the courts should be relied upon to work towards principles which give effect to these underlying policies. In *Gray v Thames Trains* [2009] UKHL 33, Lord Hoffmann said that *ex turpi causa* 'expresses not so much a principle as a policy'; and that 'that policy is not based upon a single justification but on a group of reasons, which vary in different situations' ([30]). Nevertheless, courts have more recently identified a guiding policy basis in the form of 'consistency', which is the second of the policy grounds identified by the Law Commission in the extract above.

4.3 General Approach: Rules or Direct Policy Reasoning?

The following decision was overruled by the Supreme Court in *Patel v Mirza* [2016] UKSC 42. Until this point, it influenced the development of the law of illegality with its focus on clear rules rather than direct policy reasoning in each case. It is important to outline broadly what was decided, and to explain how the current approach differs from this.

Tinsley v Milligan

Tinsley v Milligan [1994] 1 AC 340 was a claim relating to the acquisition of title to property, in which a narrow and rule-based approach to the illegality defence was established. A claim would fail only if the claimant had to rely upon his or her own illegality. Even before the decision was overruled, it was never altogether clear how, or indeed whether, *Tinsley* ought to apply to tort cases.

The plaintiff and defendant contributed to the purchase price of a house. The house was vested in the sole name of the plaintiff, but on the 'understanding' that the beneficial interest in the property was jointly vested
p. 488 in both plaintiff and defendant. The purpose of this ↵ arrangement was an illegal one: to defraud the Department of Social Security. When the parties quarrelled and the plaintiff moved out, the plaintiff gave the defendant notice to quit and asserted sole ownership. The defendant argued that the property was held on trust for both parties. The Court of Appeal accepted the defendant's argument: there was a 'resulting trust' which was not defeated by the parties' joint illegal purpose in registering the house in the plaintiff's sole name. If the illegality defence were to succeed, it would mean that the plaintiff, relying on her own illegal purpose, could obtain not only the legal title but the beneficial title also.

In the House of Lords, the Court of Appeal's reasoning was disapproved, although the majority agreed, for different reasons, with their conclusion. Lord Browne-Wilkinson explained that although a court will not *enforce* an illegal contract, this did not mean that such a contract had no effect at all in law or equity:

Lord Browne-Wilkinson, at 369

> In particular it is now clearly established that at law … property in goods or land can pass under, or pursuant to, such a contract. If so, the rights of the owner of the legal title … will be enforced, provided that the plaintiff can establish such title without pleading or leading evidence of the illegality.

He went on to explain that the same applied to *equitable* interests in property, such as the beneficial ownership claimed by the defendant. On the facts of this particular case, the defendant had to bring evidence of the *arrangement* between the parties in order to make her claim. But crucially, she *did not have to depend on the* ***illegality*** *of that arrangement*. This was partly down to the 'presumption of resulting trust': the defendant only needed to show agreement to hold in equal shares, and contribution to the purchase price. A trust in her favour would then be presumed. On the contrary, it was the plaintiff who had to plead the illegality, in order to argue that *no* resulting trust should arise, since the presumption was against her. It has been pointed out that

on this approach, whether the defence operates or not depended upon arbitrary factors unrelated to its policy rationale, and that it created a potential windfall to undeserving parties who were no less implicated in illegality than the claimant.

Although the approach in *Tinsley* was supported by the Supreme Court as setting out the correct, rule-based approach to illegality in *Les Laboratoires Servier v Apotex* [2014] UKSC 55; [2015] AC 430 (at [20]), the same Court seemed to take a very different view in *Hounga v Allen* [2014] UKSC 47, decided the same year. The stage was set for a conflict between rule-based, and policy-based approaches, which has since been resolved in favour of policy.

The tension between narrow rules and flexible policy reasoning was resolved in favour of the latter in the case of *Patel v Mirza.* This, plainly, was also not a tort case; but the approach has been held to have direct application to tort.

Patel v Mirza [2016] UKSC 42; [2016] 3 WLR 399

The claimant paid a large sum of money to the defendant, in return for which the defendant was to bet on the movement of shares on the basis of inside information. This was contrary to the prohibition on 'insider
p. 489 trading' in section 52 of the Criminal Justice Act 1993. In the ↵ end, no inside information was received and therefore the agreement was not carried out. The claimant sought the return of his money. In the Supreme Court, the claim was successful; but the Justices were divided in their reasons.

Lord Sumption argued that the sole justification for the defence of illegality was 'consistency' in the law. 'Consistency' was also recognized by the majority view of Lord Toulson as underlying the law. For Lord Sumption, however, consistency required a limited range of rules and principles, without the need for the courts to make direct recourse to policy reasons. The majority of Justices endorsed a more flexible approach, in which courts should weigh relevant policy considerations and determine where the balance lay.

Lord Toulson, *Patel v Mirza*
[2016] UKSC 42; [2016] 3 WLR 399

> 120 The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate.

The above statement has become recognised as providing the correct approach to the illegality defence in general. The focus is directly on the purpose of the applicable criminal prohibition; which is then balanced against any other relevant public policy on which the denial of the claim might have an impact. In addition, there is a direct reference to the 'proportionality' of denying the claim. *Patel* has subsequently been applied by the Supreme Court in tort cases, including the following claim in professional negligence.

Stoffel and Co v Grondona [2021] A.C. 540

The claimant had obtained advice from solicitors in order to register her interest in a property. The property was purchased with the support of a mortgage which was fraudulently obtained. The claimant had a good credit rating; but the property was intended for the benefit of M, who would not have been eligible for a mortgage, and who was to pay the mortgage. The solicitors, through their negligence, failed to register the transfer of the property to the claimant nor the lender's charge over the property. As a result, when M defaulted on payments, the lenders could not use the property's value as security. They sought damages from
p. 490 the claimant, who in turn brought an action against the solicitors for negligence. Success in ↵ that action would in turn mean that the lenders would be able to recover their funds; but the claimant's fraud was raised as a defence.

The rôle of Lord Toulson's considerations

The Court emphasised the general significance of Lord Toulson's remarks in *Patel v Mirza*, and the implication that the illegality defence protects the law, rather than focusing on the 'deservingness' or otherwise of the claimant (or defendant).

> 26. It is important to bear in mind when applying the 'trio of necessary considerations' described by Lord Toulson JSC in Patel (at para 101) that they are relevant not because it may be considered desirable that a given policy should be promoted but because of their bearing on determining whether to allow a claim would damage the integrity of the law by permitting incoherent contradictions. Equally such an evaluation of policy considerations, while necessarily structured, must not be permitted to become another mechanistic process. In the application of stages (a) and (b) of this trio a court will be concerned to identify the relevant policy considerations at a relatively high level of generality before considering their application to the situation before the court. In particular, I would not normally expect a court to admit or to address evidence on matters such as the effectiveness of the criminal law in particular situations or the likely social consequences of permitting a claim in specified circumstances. The essential question is whether to allow the claim would damage the integrity of the legal system. The answer will depend on whether it would be inconsistent with the policies to which the legal system gives effect. The court is not concerned here to evaluate the policies in play or to carry out a policy-based evaluation of the relevant laws. It is simply seeking to identify the policies to which the law gives effect which are engaged by the question whether to allow the claim, to ascertain whether to allow it would be inconsistent with those policies or, where the policies compete, where the overall balance lies. In considering proportionality at stage (c), by contrast, it is likely that the court will have to give close scrutiny to the detail of the case in hand. Finally, in this regard, since the overriding consideration is the damage that might be done to the integrity of the legal system by its adopting contradictory positions, it may not be necessary in every case to complete an exhaustive examination of all stages of the trio of considerations. If, on an examination of the relevant policy considerations, the clear conclusion emerges that the defence should not be allowed, there will be no need to go on to consider proportionality, because there is no risk of disproportionate harm to the claimant by refusing relief to which he or she would otherwise be entitled. If, on the other hand, a balancing of the policy considerations suggests a denial of the claim, it will be necessary to go on to consider proportionality.

The bulk of the judgment in *Stoffel* was occupied with applying Lord Toulson's trio of considerations to the case in hand. The following paragraph summarizes the reasons why this was not in the end considered to be a case in which the integrity of the law would be damaged by the award of a remedy. In this case, the negligence claim would allow the claimant to meet a liability to the bank she had defrauded. She would not 'gain' in any other sense. Importantly, this would be of value to the bank (the victim of the fraud), and denying the claim would undermine the law's intention to protect lenders, while also not attaching liability to negligence on the part of the legal representative.

p. 491

> 35. I pause at this point in the process of addressing Lord Toulson JSC's trio of relevant considerations. To permit the respondent's claim in the particular circumstances of this case would not undermine the public policies underlying the criminalisation of mortgage fraud and could, indeed, operate in a way which would protect the interests of the victim of the fraud, i e the mortgagee. Furthermore, to deny the respondent's claim would run counter to other important public policies. It would be inconsistent with the policy that the victims of solicitors' negligence should be compensated for their loss. It would be a disincentive to the diligent performance by solicitors of their duties. It would also result in an incoherent contradiction given the law's acknowledgment that an equitable property right vested in the respondent.

No profit from wrong

In the following paragraph, the Supreme Court dealt with the argument that the claimant would, in this case, be allowed to 'profit from' her wrong. This, the Supreme Court argued, is no longer a key focus for consideration. The focus has shifted.

> 46. There is, however, a more fundamental answer to Mr Pooles' submission. The respondent can indeed be considered to have 'got something' out of her fraudulent transaction; she has an equity of redemption in the property of uncertain value and, if her claim is permitted to succeed, she will acquire the means of meeting a substantial judgment against her. However, even if this could properly be considered profiting from one's own wrong, which in my view it cannot, while profiting from one's own wrong remains a relevant consideration it is no longer the true focus of the inquiry. As Lord Toulson JSC explained in Patel [2017] AC 467, paras 99–101 (cited at para 22 above), adopting the reasoning of McLachlin J in Hall v Hebert [1993] 2 SCR 159, 175–176, the notion that persons should not be permitted to profit from their own wrongdoing is unsatisfactory as a rationale of the illegality defence. It does not fully explain why particular claims have been rejected and it leads judges to focus on the question whether a claimant is 'getting something' out of the wrongdoing, rather than on the question whether to permit recovery would produce inconsistency damaging to the integrity of the legal system. The true rationale of the illegality defence, as explained in Patel and in the judgment of McLachlin J in Hall v Hebert, is that recovery should not be permitted where to do so would result in an incoherent contradiction damaging to the integrity of the legal system. In the present case, to allow the respondent's claim to proceed would not involve any such contradiction, for the reasons I have given.

This illustrates how far the courts have moved towards recognizing a key policy rationale in the form of consistency. We explore the broader picture for tort law in Section 4.4.

Centrality

There remained a question of whether the claimant's 'fraud' was central to her claim against the solicitors, or not.

p. 492

> 40. There is, however, much more substance in Mr Warnock's fourth submission which relates to the centrality of the respondent's illegal conduct. It is undoubtedly the case that it was necessary to retain a solicitor in order to maintain the dishonest pretence that the respondent was borrowing to purchase the property and in order to obtain a loan secured by a mortgage. However, this simply provides the background to the claim by the respondent against her solicitors for negligent breach of their retainer. The appellants' breach of duty related to the registration of title and the way in which the respondent had procured the finance to obtain that title was irrelevant to the appellants' obligation to register the title. Two features of the present case, to which reference has already been made, demonstrate the lack of centrality of the illegality to the breach of duty of which the respondent complains. First, by the time the appellants were required to register the transactions the loan had been advanced and used to discharge the pre-existing BM Samuels charge. The defrauding of Birmingham Midshires had been achieved. Secondly, by that time equitable title to the property had already passed to the respondent. Although legal title could pass to her only on registration of the transfer, she was already the owner in equity because once Mitchell had executed and delivered the Form TR1 he had done everything which he could do in order to effect the transfer of legal title. These matters serve to distance the appellants' negligence from the respondent's fraud.

4.4 Illegality in Tort Cases: Narrow and Wide?

Recent decisions of the Supreme Court (in *Singularis Holdings v Daiwa Capital Markets* [2019] UKSC 50; *Stoffel v Grondona* [2020] UKSC 42, and *Henderson v Dorset Healthcare NHS Trust* [2020] UKSC 43) have confirmed that the approach in *Patel v Mirza* is of general application. Development of illegality in tort cases will have to fit with its statement of general approach. In the following extract, it is emphasized that *Patel v Mirza* did not 'restart the clock' on illegality, nor did it impliedly overrule existing decisions that could be interpreted as consistent with it. Therefore, courts must consider existing authorities on the approach in tort cases.

Henderson v Dorset Healthcare Trust

> 76 . ... Patel concerned a claim in unjust enrichment, but there can be little doubt that it was intended to provide guidance as to the proper approach to the common law illegality defence across civil law more generally. The cases it discusses include tort cases, such as Gray and Hounga v Allen, as well as a number of Commonwealth tort law authorities. The case of Hall v Hebert, on which particular reliance was placed, was a tort case. Tinsley v Milligan, which was not followed, concerned trusts and property rights. At para 99, Lord Toulson JSC identifies the policy reasons for the doctrine of illegality as a defence to a civil claim. The approach set out in paras 101 and 120 is expressed in general and unqualified terms.
>
> 77 Thirdly, that does not mean that Patel represents year zero and that in all future illegality cases it is Patel and only Patel that is to be considered and applied. That would be to disregard the value of precedent built up in various areas of the law to address particular factual situations giving rise to the illegality defence. Those decisions remain of precedential value unless it can be shown that they are not compatible with the approach set out in Patel in the sense that they cannot stand with the reasoning in Patel or were wrongly decided in the light of that reasoning. Lord Toulson JSC made it clear in Patel that the principles he identified were to be were to be found in the existing case law. ...
>
> p. 493 ↵ Some years before the decision in *Patel v Mirza*, the judgment of Lord Hoffmann in *Gray v Thames Trains* set out, in relation to tort, a 'narrow rule' based on 'consistency'; and a 'wide rule'. The status of *Gray* was slightly uncertain after *Patel*, but the Supreme Court has confirmed in *Henderson v Dorset NHS Foundation Trust* that the wide and narrow rules in *Gray* remain relevant in tort cases. *Gray* was in no sense impliedly overruled by *Patel*, because its emphasis on policy reasons was in fact compatible with it. The distinction between narrow and wide rules could, in other words, be seen as a working through of *Patel*'s general approach, in the particular context of the law of tort, though the attempt has now been made—as we will see—to explain both in similar terms.

The Narrow Rule: No Benefit from Illegal Act/No Indemnity for Consequences of Illegal Act

In contractual cases, a 'no benefit' rule has prevented enforcement of a contract where the claimant stands to gain in consequence of his or her illegal act. A true example of this rule is *Beresford v Royal Insurance Co Ltd* [1938] AC 586, decided at a time when suicide was a crime. A life insurance contract was unenforceable where the assured had committed suicide, since otherwise his representative would benefit from his crime.[21] As the Law Commission noted in its 2001 Paper:

> 2.23 ... The tort cases are not strictly speaking cases of 'benefit', at least in the sense that the claimant is seeking a profit he or she hoped to make from his or her illegal activity. They are cases in which what is sought is an indemnity for losses or liabilities he or she has incurred as a result of his or her acts.

Most of the tort cases are thus better explained in terms of a 'no indemnity rule', rather than a 'no benefit' rule. A limited public policy bar based on 'no indemnity' has been justified in Canada on the basis of a threat to consistency or integrity within the law; and this is a close fit with the principle of 'consistency' which was identified as lying behind the illegality defence as a whole, in *Patel v Mirza*.

McLachlin J, *Hall v Hebert*
(1993) 101 DLR (4th) 129, at 179–80

> [There] is a need in the law of tort for a principle which permits judges to deny recovery to a plaintiff on the ground that to do so would undermine the integrity of the justice system. The power is a limited one. Its use is justified where allowing the plaintiff's claim would introduce inconsistency into the fabric of the law, either by permitting the plaintiff to profit from an illegal or wrongful act, or to evade a penalty prescribed by criminal law. Its use is not justified where the plaintiff's claim is merely for compensation for personal injuries sustained as a consequence of the negligence of the defendant.

p. 494 ↵ McLachlin J would not extend the no-indemnity rule to claims for personal injury (some of which arise for consideration in relation to the 'wide rule', below). The relevance of this—if any—to the attempt to treat both as aspects of 'consistency' in the English cases has yet to be thought about.

Through the decision of the House of Lords in *Gray v Thames Trains* and subsequent cases, the consistency principle has now been fully accepted as a matter of principle in English law, but there are applications of the illegality defence outside the ambit of 'no indemnity'.

In *Gray v Thames Trains* [2009] UKHL 33, the claimant had been caught up in a major rail crash, caused through the negligence of the defendants. He suffered minor physical injuries, and more significant psychiatric injury in the form of post-traumatic stress disorder (PTSD). Because of this condition, the claimant suffered reduced earnings. Matters were made much worse when, as a consequence of his PTSD, he obtained a knife and repeatedly stabbed a drunken pedestrian with whom he had had an argument. The pedestrian died as a consequence, and the claimant was detained in hospital pursuant to section 37 of the Mental Health Act 1983, indefinitely. Referring not only to *Hall v Hebert* but also to more recent developments in Canada and New South Wales, the Lords gave strong support to the 'consistency' or 'integrity' argument, which as a result is now a clearly accepted element in English law.[22] Indeed, as we have seen this now stands as the most clearly reasoned area of application of the *ex turpi causa* defence in English tort law, confirmed in cases such as *Patel* and *Stoffel*.

Lord Brown, *Gray v Thames Trains*

> [93] … the integrity of the justice system depends upon its consistency. The law cannot at one and the same time incarcerate someone for his criminality and compensate him civilly for the financial consequences. I shall refer to this henceforth as the consistency principle. It is the underlying rationale for the application of the *ex turpi causa non oritur actio* doctrine in the present context.

The ‘Wide Rule’

Other issues that remained less clear after *Gray* include the extent of this principle (could it deal with all of the issues in this case, for example?), and the nature of any ‘broader’ principle. It appears that only Lord Hoffmann thought that any broader principle was required in this particular case. He thought it was required because certain of the losses claimed could not be said categorically to have been a consequence of the killing and detention. Lord Hoffmann expressed the justification for the broader rule as follows:

Lord Hoffmann, *Gray v Thames Trains*

> [51] I must therefore examine the wider version of the rule, which was applied by Flaux J … It
> p. 495 differs from the narrower version in at least two respects: first, it cannot, as it seems to me, be justified on the grounds of inconsistency in the same way as the narrower rule. Instead, the wide rule has to be justified on the ground that it is offensive to public notions of the fair distribution of resources that a claimant should be compensated (usually out of public funds) for the consequences of his own criminal conduct. Secondly, the wider rule may raise problems of causation which cannot arise in connection with the narrower rule. The sentence of the court is plainly a consequence of the criminality for which the claimant was responsible. But other forms of damage may give rise to questions about whether they can properly be said to have been caused by his criminal conduct.

Lord Hoffmann pointed out that this wider test could give rise to problems of causation which are not raised by the ‘consistency’ principle: was it the illegality which caused the injury, or not? These problems have become familiar and are explored in respect of the third category below. Lord Hoffmann’s references to the older cases in this category have given them additional authority.

Gray v Thames Trains stated the existence of the ‘consistency principle’ as one justification for the illegality defence in English tort law, applying to the ‘narrow rule’. Beyond that, a number of cases where the illegality defence has been applied outside the ‘consistency’ principle and outside Category 1 were cited with approval by Lord Hoffmann, who seemed broadly to approve both the outcomes and the reasoning in those cases. The more recent decision in *Henderson* has approved the approach in *Gray*, including the existence of narrow and wide rules. But at the same time, it has tried to make the justification for the ‘wide rule’ more compatible with the justification for the narrow rule.

***Henderson v Dorset Healthcare NHS Trust*, Lord Hamblen**

> 58 So far as relevant to the present appeal, I would make the following observations on the judgments given in Gray [2009] AC 1339 in so far as they relate to public policy. (1) Both the narrow claim and the wide claim failed on the grounds of public policy. (2) All judges considered that the relevant policy in connection with the narrow claim was the need to avoid inconsistency so as to maintain the integrity of the legal system: « the consistency principle ». (3) Lord Hoffmann did not consider that this applied to the wide claim but held that a related policy did, namely that « it is offensive to public notions of the fair distribution of resources that a claimant should be compensated (usually out of public funds) for the consequences of his own criminal conduct » (para 51). I understand this to mean that allowing a claimant to be compensated for the consequences of his own criminal conduct risks bringing the law into disrepute and diminishing respect for it. It is an outcome of which public opinion would be likely to disapprove and would thereby undermine public confidence in the law: « the public confidence principle ». (4) The public confidence principle is also applicable to the narrow claim. It is related to the consistency principle since one of the reasons that the public would be likely to disapprove of the outcome is the inconsistency which it involves between the criminal law and the civil law. (5) Although Lord Rodger appeared to consider that the consistency principle did not apply to the wide claim, the policy reasons he gives for rejecting the claim reflect that principle. The reason that a person cannot « attribute ... to others » acts for which he has been found criminally responsible, or « seek rebate » of the consequences of those acts, is that it would be inconsistent with that finding of criminal responsibility. If a person has been found criminally responsible for certain acts it
> p. 496 would be inconsistent for the civil courts to absolve that person of such responsibility and to attribute responsibility for those same acts to someone else. (6) Whilst the consistency principle more obviously applies to the narrow claim, on analysis it applies to the wide claim as well. In relation to the narrow claim the inconsistency is with both the criminal court's finding of responsibility and the sentence it has imposed. In relation to the wide claim it is with the former only.

Most personal injury actions where illegality is relevant are likely to fall outside the narrow rule. Though it has had minimal attention in the leading cases discussed so far in this , this is likely to be the largest set of tort cases in which illegality is raised. The comments of the Supreme Court in *Henderson*, extracted above, seek to extend the consistency principle to these cases, but do so in the context of a case very similar to *Gray*, where the claim does not relate to personal injury on the part of the claimant. It remains the case that the area of the 'wide rule' is the most lacking in clear underlying principles. Lord Hoffmann's remarks, some of which were quoted earlier, invoked two key ideas: causation, and an idea that a remedy would be 'offensive to public notions of the fair distribution of resources'. In general terms these two ideas can be identified in decisions of the courts both before and after *Gray* but Lord Hoffmann's judgment provided a focal point. Lord Hoffmann identified, in particular, a distinction between 'causing' the harm, and merely 'providing the occasion for it', which appears still to be relevant following *Patel* and *Henderson*, both of which considered the question in terms of 'centrality'.

Lord Hoffmann, *Gray v Thames Trains*

> 54 This distinction, between causing something and merely providing the occasion for someone else to cause something, is one with which we are very familiar in the law of torts. It is the same principle by which the law normally holds that even though damage would not have occurred but for a tortious act, the defendant is not liable if the immediate cause was the deliberate act of another individual. Examples of cases falling on one side of the line or the other are given in the judgment of Judge LJ in *Cross v Kirby* [2000] CA Transcript No 321. It was Judge LJ, at para 103, who formulated the test of 'inextricably linked' which was afterwards adopted by Sir Murray Stuart-Smith LJ in *Vellino v Chief Constable of the Greater Manchester Police* [2002] 1 WLR 218. Other expressions which he approved, at paras 100 and 104, were 'an integral part or a necessarily direct consequence' of the unlawful act (Rougier J: see *Revill v Newbery* [1996] QB 567, 571) and 'arises directly ex turpi causa': Bingham LJ in *Saunders v Edwards* [1987] 1 WLR 1116, 1134. It might be better to avoid metaphors like 'inextricably linked' or 'integral part' and to treat the question as simply one of causation. Can one say that, although the damage would not have happened but for the tortious conduct of the defendant, it was caused by the criminal act of the claimant? (*Vellino*). Or is the position that although the damage would not have happened without the criminal act of the claimant, it was caused by the tortious act of the defendant? (*Revill v Newbery*).

Lord Hoffmann therefore sought to simplify the applicable principles, reducing them to more familiar and less *ad hoc* language.

The language of 'inextricable link' does continue, however. In *Hounga v Allen* [2014] UKSC 47, the Supreme
p. 497 Court held that the claimant's own involvement in illegality in ↵ entering the country was merely part of the 'context' of the defendant's illegal acts relating to mistreatment of the claimant. Thus, the claim was not 'inextricably linked' with the claimant's own illegality. The language of 'centrality' was used in the more recent decision in *Stoffel*, extracted above, which concerned professional negligence on the part of a solicitor.

***Stoffel v Grandona*, Lord Lloyd-Jones**

> 40. There is, however, much more substance in Mr Warnock's fourth submission which relates to the centrality of the respondent's illegal conduct. It is undoubtedly the case that it was necessary to retain a solicitor in order to maintain the dishonest pretence that the respondent was borrowing to purchase the property and in order to obtain a loan secured by a mortgage. However, this simply provides the background to the claim by the respondent against her solicitors for negligent breach of their retainer. The appellants' breach of duty related to the registration of title and the way in which the respondent had procured the finance to obtain that title was irrelevant to the appellants' obligation to register the title. Two features of the present case, to which reference has already been made, demonstrate the lack of centrality of the illegality to the breach of duty of which the respondent complains. First, by the time the appellants were required to register the transactions the loan had been advanced and used to discharge the pre-existing BM Samuels charge. The defrauding of Birmingham Midshires had been achieved. Secondly, by that time equitable title to the property had already passed to the respondent. Although legal title could pass to her only on registration of the transfer, she was already the owner in equity because once Mitchell had executed and delivered the Form TR1 he had done everything which he could do in order to effect the transfer of legal title. These matters serve to distance the appellants' negligence from the respondent's fraud.

There are reasons therefore to think that the approach in *Gray* will continue in relation to the 'wide rule'. How has this played out to date in personal injury cases?

Two Court of Appeal decisions can be used to illustrate. In *Delaney v Pickett* [2011] EWCA Civ 1532, the claimant had been seriously injured while travelling as a passenger in a car driven by the defendant. Both claimant and defendant were found to be in possession of cannabis. Though the parties disputed it, and Ward LJ doubted it, the first instance judge held that the purpose of their journey was to supply drugs. Applying the test of causation within the 'wide rule', the claim was not barred as arising *ex turpi causa*: the possession of cannabis was incidental to the accident which caused the injury. Ward LJ referred to the approach taken in *Gray v Thames Trains*:

Ward LJ, *Delaney v Pickett*
[2011] EWCA Civ 1532

> 37 Therein lies the answer to the problem in this case. It is not a question of whether or not it is impossible to determine the appropriate standard of care. We are not concerned with the integrity of the legal system. We do not need to ask whether the claim would be an affront to the public conscience. There is no need for an analysis of the pleadings to establish whether or not the claimant is relying on his illegality to found his claim. It is not a question of the claimant profiting from his own wrongdoing. Here the crucial question is whether, on the one hand the criminal activity merely gave occasion for the tortious act of the first defendant to be committed or whether, even though the accident would never have happened had they not made the journey which at some point involved their obtaining and/or transporting drugs with the intention to supply or on the other hand whether the immediate cause of the claimant's damage was the negligent driving. The answer to that question is in my judgment quite clear. 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 first defendant in the negligent way in which he drove his motor car. In those circumstances the illegal acts are incidental and the claimant is entitled to recover his loss.

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It is important to note that this was not sufficient to assist the claimant, for reasons explained at the end of this section.

McCracken v Smith was a further case involving a criminal joint enterprise. The claimant teenager was seriously injured while riding pillion on a stolen trials bike, which was driven negligently and at excessive speed, when it collided with a minibus. The minibus was also driven negligently. In the Court of Appeal, Richards LJ expressed the view that on the authority of *Joyce v O'Brien*, the claim against the driver of the stolen bike should be seen as barred for illegality: the claimant was party to a joint criminal enterprise, to ride the bike dangerously. However, this did not bar the claim against the driver of the minibus.

Richards LJ, *McCracken v Smith*
[2015] EWCA Civ 380; [2015] PIQR P19

> 51 … In my view the situation cannot be accommodated neatly within the binary approach of Lord Hoffmann in *Gray*. One cannot say that 'although the damage would not have happened but for the tortious act of the defendant, it was caused by the criminal act of the claimant'; but equally one cannot say that 'although the damage would not have happened without the criminal act of the claimant, it was caused by the tortious act of the defendant'. The accident had two causes, properly so called—the dangerous driving of the bike and the negligent driving of the minibus—and it would be wrong to treat one as the mere 'occasion' and the other as the true 'cause'. Daniel's injury was the consequence of both, not just of his own criminal conduct and not just of Mr Bell's negligence.
>
> 52 I do not think that the fact that the criminal conduct was one of the two causes is a sufficient basis for the ex turpi causa defence to succeed. … for reasons I have explained, cases involving a claim by one party to a criminal joint enterprise against another party to that joint enterprise are materially different. In my judgment, the right approach is to give effect to both causes by allowing Daniel to claim in negligence against Mr Bell but, if negligence is established, by reducing any recoverable damages in accordance with the principles of contributory negligence so as to reflect Daniel's own fault and responsibility for the accident.
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> 53 Lord Sumption has spelled out in *Les Laboratoires Servier* that the ex turpi causa defence is
p. 499 rooted in the public interest. The public interest is served by the approach I have indicated. It takes into account both the negligent driving for which Mr Bell is responsible and the dangerous driving for which Daniel is responsible. It enables damages to be recovered for the negligence of Mr Bell but not for Daniel's own criminal conduct. I see no reason why the court should instead apply a 'rule of judicial abstention' (Lord Sumption in *Les Laboratoires Servier* at [23]) and withhold a remedy altogether.

'Proportionality'

The final point raised by Richards LJ in the extract above illustrates judicial recognition of a need to be proportionate, which is also present in *Patel v Mirza* (extracted above). Even in a case of serious criminal intent, it is not appropriate to treat the criminal as beyond the reach of tort law, so that *anything* may be done without legal consequence. *Revill v Newbery* [1996] QB 567 embraced the proposition that even the trespasser with criminal intent is not beyond the protection of the law. The plaintiff had intended to break into a shed on an allotment with a view to stealing from it. The defendant, who was sleeping in the shed with a shotgun because he planned to deter burglars, fired through a hole in the door and unintentionally injured the plaintiff. The plaintiff brought an action in negligence (and under the Occupiers' Liability Act 1984)[23] against the defendant. A defence of illegality was rejected by the Court of Appeal. Proportionality of effect is now an express element of the general approach to illegality, spelled out in *Patel v Mirza* (Section 4.3).

Insurance

The source of compensation for tort claimants may itself be affected by issues of illegality and *ex turpi causa*. Most personal injury damages, and almost all road traffic liabilities, are paid by liability insurers, and many would be unrecoverable in the absence of insurance. *Delaney v Pickett* raised a particular problem for the claimant. The defendant driver had liability cover in place; but this was 'avoided' by the insurer because of his failure to declare his drug use. This meant that the defendant was treated as uninsured and the claimant, having succeeded in his tort claim for the reasons already explored, was dependent on being compensated according to the terms of the MIB's Uninsured Drivers Agreement 2009. The Agreement entitles the MIB to refuse to satisfy a tort judgment where the claimant knew or ought to have known that the vehicle insured was being used 'in the course or furtherance of a crime'. The trial judge held that this criterion was fulfilled; and the Court of Appeal (Ward LJ dissenting) upheld his judgment on this point. Though the claimant was successful in tort because his illegal acts were peripheral or incidental, he failed to secure compensation, because a very different approach to the effect of his supposed knowledge was taken within the terms of the MIB Agreement. In this instance, insurers were able to use the claimant's 'incidental' unlawful conduct to bar his claim for compensation, even though in tort it was irrelevant.[24] Subsequently, in *Delaney v Secretary of State for Transport* [2015] EWCA Civ 172, it was held that the 'crime exception' in the relevant MIB agreement was in breach of the UK's obligations under a number of EC Directives, and that the breach was sufficiently serious to merit an award of damages to the claimant. For argument, prior to the latter decision, see Merkin and Steele, Further Reading.

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5 Conclusions

i. There has been growing interest in the operation of tort law defences (see the Further Reading section in this Chapter). In relation to contributory negligence, key questions include how we should understand the unusually 'rough and ready' nature of the apportionment exercise required of the courts. Equally tricky is the combination of quite different factors—culpability and 'causal potency'—that must be weighed in reaching an apportionment. This raises the spectre of arbitrariness in apportionment, which is of particular significance where a claimant is seriously injured, since here the majority of damages are aimed at meeting the Claimant's needs. The decision of the Supreme Court in *Jackson v Murray* illustrates that judicial analysis of how responsibility is to be apportioned must be coherent, and there remains scope for appellate courts to question the apportionments that have been arrived at.

ii. The frequent application of contributory negligence as a partial defence has led some to question whether total defences to negligence are too draconian, and perhaps outdated. This does not reflect the full picture of tort defences, however. This is illustrated by the defence of illegality, which has been much litigated in recent years. The recent history of this defence illustrates the potential for tension between clear rules, and flexible judicial discretion, in the law of tort. It is clear that the courts are aware of the need to restrict the operation of the defence to cases where it genuinely serves public policy, and is not disproportionate in its impact on claimants. In tort law, and perhaps particularly in personal injury claims, this emphasis on proportionality is essential, since few if any tort claimants will

be seeking to profit from their crimes; rather, the taint of illegality is more likely to be raised to prevent a compensatory remedy, or an 'indemnity' against liability that is designed to protect others. Recent developments serve to restrict the defence to cases where its application is justified, and to avoid rules which may themselves result in arbitrary distinctions.

Further Reading

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p. 501 ↵ Goudkamp, J., and Nolan, D., 'Contributory Negligence in the Court of Appeal: An Empirical Study' (2016) 79 MLR 575.

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Merkin, R., and Steele, J., *Insurance and the Law of Obligations* (Oxford, 2013), chapter 11.

Steele, J., 'Collisions of a Different Sort'—*Tort Law and the Legislature.*

Virgo, G., 'The Illegality Revolution', in S. Worthington, A. Robertson, and G. Virgo (eds), *Revolution and Evolution in Private Law* (Hart Publishing, 2018).

p. 502 Williams, G., *Joint Torts and Contributory Negligence* (London: Stevens & Sons, 1951). ↵

Notes

[1] *Davies v Mann* (1842) 152 ER 588.

[2] See G. Williams, *Joint Torts and Contributory Negligence* (Stevens & Sons, 1951), chapter 9.

[3] For an argument that 'causative potency' should play no part in apportionment, see J Goudkamp and L Klar, 'Apportionment of Damages for Contributory Negligence: the Causal Potency Criterion' (2016) 15 *Alta L Rev* 1–14.

[4] Motor Cycles (Protective Helmets) Regulations 1980.

[5] Though note the issue raised by *Stanton v Collinson*, later in this section.

[6] Arguably, it would be better to say that the claimant bore no causal responsibility, so that s 1(1) had no application: see the last part of this section, 'Causal Questions'.

[7] For fuller discussion see J. Steele, 'Law Reform (Contributory Negligence) Act 1945: Collisions of a Different Sort', in T. T. Arvind and J. Steele, *Tort Law and the Legislature* (Hart Publishing, 2013).

[8] See also *The Boy Andrew v The St Rognvald* [1948] AC 140, where Lord Simon found one of the parties to be the sole cause, and did not apportion damages. This was a collision at sea, not covered by the 1945 Act, but governed by apportionment rules which had themselves inspired the legislation.

[9] For discussion of broader effects see J. Goudkamp, 'Rethinking Contributory Negligence', in G. A. Pitel, J. W. Neyers, and E. Chamberlain (eds), *Tort Law: Challenging Orthodoxy* (Hart Publishing, 2013).

[10] P. Atiyah, 'Common Law and Statute Law' (1985) 48 MLR 1, argues that the 'practical' effect referred to by Denning LJ is real but also, in fact, a further 'legal effect'. It is simply an unintended legal effect.

[11] This statute limited the scope of the 'doctrine of common employment'. By that doctrine, it was implied into any contract of employment that the employee consented to the risks associated with the work, including the risks posed by the negligence of fellow workers. The 1880 Act only excluded the operation of the doctrine in respect of negligence on the part of a superior worker with supervisory or managerial responsibilities. But this was a significant turning point and the remainder of the defence was abolished by the Law Reform (Personal Injuries) Act 1948, s 1. Indeed enhanced duties have long been recognized as associated with the employment relationship: Chapter 10.

[12] Knowledge (*scienti*) does not amount to consent (*volenti*).

[13] This is an application of the 'objective standard of care': Chapter 3.

[14] D. McArdle and M. James, 'Are You Experienced? "Playing Cultures", Sporting Rules and Personal Injury Litigation after *Caldwell v Maguire*' (2005) Tort L Rev 193, at 210.

[15] Writing later in (1953) LQR 317, Lord Asquith (who decided *Dann v Hamilton* as Asquith J) explained that contributory negligence, then a complete defence, had not been pleaded; he thought that if it had been pleaded, the defence would probably have been successful. This is confirmed by *Owens v Brimmell* [1977] QB 859, where the Court of Appeal reduced damages payable to a plaintiff who had accepted a lift from a drunk driver.

[16] In *Pitts v Hunt* [1991] 1 QB 24, the plaintiff pillion passenger was closely involved in encouraging the wildly irresponsible driving of the deceased motorcyclist. Beldam LJ thought that the *volenti* defence would have succeeded if it had not been for s 149 of the Road Traffic Act 1988. Since the defence could not succeed, he did not give a full account of the reasons why this would be so.

[17] In the extract above, Lord Pearce refers to the 'officious bystander'. This is a shorthand reference to the test for implying terms into a contract, derived from the judgment of MacKinnon LJ in *Shirlaw v Southern Foundries Ltd* [1939] 2 KB 206: it is clear that both parties would have regarded the term as too obvious to merit discussion.

[18] For a recent example of this position being stated, see *Al Hassan-Daniel v Revenue and Customs Commissioners* [2010] EWCA Civ 1443, [9]: 'This is the basis of what we have called the criminality defence (though, since it is a point which the court itself will if necessary take, it is more correctly understood as a control on jurisdiction)'.

[19] Note the much-cited dictum of Lord Mansfield, *Holman v Johnson* (1775) 1 Cowp 341, Section 4.2.

[20] Schiemann LJ, *Sacco v Chief Constable of the South Wales Constabulary*, Court of Appeal, 15 May 1998.

[21] Suicide is no longer a crime: note the successful actions in *Kirkham* and *Reeves* (discussed earlier).

[22] This was not previously the case: see the Law Commission's 2009 Paper at para 2.14.

[23] Chapter 12.

[24] In *McCracken v Smith,* at first instance, the same result was achieved on the simpler basis that the claimant was aware that the bike was being driven uninsured, so that the MIB escaped liability; there was no appeal on this point.