Defences
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ILLEGAL PURPOSE (EX TURPI CAUSA NON ORITUR ACTIO)

Two forms of the defence

The Latinism
The Latin phrase, ex turpi causa non oritur actio – ‘no action can be founded upon a wicked act’ – signifies a longstanding, although problematical, defence to negligence. In Holman v Johnson\(^1\) in 1775, Lord Mansfield gave this classic statement: ‘[n]o court will lend its aid to a man who founds his cause of action upon an immoral or illegal act.’ Where applicable, illegality is a complete defence.

Earlier decisions suggested that it was a difficult defence to make out. It was said that the defence’s successful application was ‘rare’ (per National Coal Board v England\(^2\)); that it was a ‘harsh’ defence, to be ‘applied sparingly, so as not to defeat particular claims which were perceived to be just or genuine claims’ (per Standard Chartered Bank v Pakistan National Shipping Corp\(^3\)); and that it required ‘extreme circumstances’ before it could be proven (per Hall v Woolston Hall Leisure Ltd\(^4\)). The Latinism did not impress some either – e.g., in Pitts v Hunt,\(^5\) Balcombe LJ said that it was ‘more likely to confuse than to illuminate’.

However, the landscape changed in 2009, courtesy of two House of Lords’ decisions: Stone & Rolls v Moore Stephens,\(^6\) and Gray v Thames Trains Ltd\(^7\) – where, surprisingly, the defence succeeded in both cases. The more significant decision is that of Gray, for it only concerned the application of ex turpi causa to C’s action in tort (whereas in Stone & Rolls, C’s claim was brought concurrently in contract and in tort). As a result, pre-2009 case law must be treated with a certain degree of caution. Notwithstanding the degree of clarification about the scope of the defence which Gray provided, notably even since then, some judges have expressed concerns that ex turpi causa is ‘a difficult and developing area of the law’ (per Guy v Mace & Jones\(^8\)). Appellate judicial reasoning has not always been consistent either. Of Pitts v Hunt, it has since been said that, while the outcome was unanimous, ‘there was no uniform approach between the three members of the court’;\(^9\) while the three majority members of the House of Lords in Stone & Rolls\(^10\) did not use consistent reasoning either. All of this has led to a frustrating lack of certainty.

In *Gray v Thames Trains Ltd*, Kerrie Gray, C, was involved in the Ladbroke Grove rail disaster caused by Thames Trains’ (D’s) negligence. He suffered minor physical injuries and PTSD, which led to a significant personality change. C had been regularly employed, in a long-term relationship, and a ‘decent and law-abiding citizen’, up to that point. However, two years after the crash, C was irritated by a drunk pedestrian, Mr Boultwood, who stepped out in front of C’s car. They had a scuffle. Enraged, C drove to relatives’ premises, found a knife, searched for Mr Boulwood, and then fatally stabbed him. C was convicted of manslaughter on the grounds of diminished responsibility, and detained in Runwell Hospital. C alleged that D’s negligence caused him to develop psychological problems, which in turn led him to commit manslaughter, and to being legally detained in hospital. C claimed damages for loss of earnings from the date of the train crash and because of the detention, plus general damages for that detention, the conviction, feelings of guilt, and damage to reputation (he also claimed an indemnity against any FAA action brought against him by Mr Boulwood’s dependants). D denied liability on the basis that what C did was criminal. **Held:** the illegality defence succeeded, and applied to both the claim for lost earnings after the date of the manslaughter and to the other claims based directly on the killing and conviction.

The House of Lords revamped the defence of illegality in *Gray*. In particular, two different versions were articulated by Lord Hoffmann (with whom the other members of the House agreed).  

§10.A There are two versions of the illegality defence. Under the *wide* illegality defence, C cannot recover for any damage which is the consequence of C’s own criminal or unlawful act. Under the *narrow* illegality defence, C cannot recover for damage which is the consequence of a sentence, fine or detention imposed upon C for a criminal or unlawful act.

It was emphasised that at the core of the defence are policy concerns. The defence should apply, if it offends ‘public notions of the fair distribution of resources’ that C should be compensated for the consequences of his own criminal conduct. It is no longer necessary to insist upon the legal stricture that C’s unlawful conduct must be closely connected and inextricably bound up with C’s claim for the defence to apply. Rather, the various policy reasons which have underpinned the defence in pre-*Gray* cases must be applied, post-*Gray*, as potential justifications as to why the defence should apply, in any given case.

However, it is fair to say that the current Supreme Court considers the ‘proper approach’ to the defence of illegality to be less-than-clear. In *Jetivia SA v Bilta (UK) Ltd*, Lord Neuberger remarked that ‘the proper approach to the defence of illegality needs to be addressed by this court (certainly with a panel of seven and conceivably with a panel of nine Justices) as soon as appropriately possible’. Until such time, the discussion below seeks to elucidate the relevant current principles.

Before turning to the two versions of the defence, three preliminary matters are worthy of note.

Preliminary matters

Impact of the Road Traffic Act 1988

§10.B Although D cannot plead the defence of *volenti* against passenger C in a negligently-caused road accident (pursuant to s 149(3) of the Road Traffic Act 1998), that provision does not bar D from relying upon the illegality defence.

On the one hand, drink driver D cannot argue that, by travelling in his vehicle, passenger C willingly accepted the risk of negligence on D’s part. On the other hand, that same drink driver D can plead that C has no cause of action in negligence, because C was engaged in an illegal activity whilst a passenger in D’s vehicle.

It follows from the decision of the Court of Appeal in *Pitts v Hunt*\(^ {13} \) that if the Road Traffic Act precluded the defence of illegality, it would mean that passenger C, in a stolen getaway car being driven recklessly by D away from the scene of a robbery, would be able to recover full damages from the Motor Insurers Bureau (representing D, as an uninsured driver). That could not be the intention of Parliament. It must be possible for D (or, more accurately, the MIB) to plead, by way of defence, that C is precluded from recovering damages because of his own illegal conduct.

In *Pitts v Hunt*,\(^ {14} \) Andrew Pitts, C, 18, sued Mark Hunt, 16, D, for damages for personal injuries received when he was travelling as a pillion passenger on a motor cycle driven by D. The two friends regularly used the bike to go trail bike-riding together. On this occasion, they attended a disco, drank a great deal, and then set off home. Their motorcycle collided with another car, and D was killed, while C was severely injured. During the journey, they had behaved in a reckless, irresponsible and idiotic way, shouting, blowing the horn, and driving at pedestrians on the verge of the road. D’s estate claimed that, by C’s getting on the motorcycle as a pillion passenger, knowing D to be drunk, unlicensed and uninsured, C had voluntarily assumed the risk. **Held:** *volenti* could not apply; but the illegality defence applied to preclude C’s claim for personal injuries sustained in the course of the very serious offences in which he was participating. The public’s attitude to drink driving had ‘changed markedly’, given the frequency of serious accidents and the severe injuries caused. Hence, the ‘public conscience’ was focused on parties such as C, who participated in D’s drink-and-drive escapade.

What if C is of unsound mind?

§10.C The defence of illegality is not available to D, if C was insane at the time of his unlawful or illegal act. However, it is presently unsettled in English law as to whether the illegality defence can be relied upon by D, where C was of unsound mind only (i.e., suffering from a recognised psychiatric injury).

The effect of C’s insanity on the illegality defence is clear. In *Clunis v Camden and Islington HA*,\(^ {15} \) the Court of Appeal stated (in dicta) that the defence would not be available to D, if C was insane at the time of his unlawful or criminal conduct, such that C ‘did not know the nature and quality of his act, or that what he was doing was wrong’.

However, the legal position where C is mentally afflicted with a recognised psychiatric illness (say, depression) at the time of his criminal conduct is less clear. In *Clunis*, C did have the requisite understanding of what he was doing (and he was adjudged not to be insane). In that circumstance, the Court of Appeal held that the defence could apply, to preclude C’s recovery of any compensation, even where C’s mental responsibility was ‘diminished’, so as to give rise to a conviction for manslaughter rather than murder. C was convicted of manslaughter there; and ‘[a] plea of diminished responsibility accepts that the accused’s mental responsibility is substantially impaired, but it does not remove liability for his criminal act.’ In such a case, D can plead the defence of *ex turpi causa*, and avoid paying damages for his tortious act altogether.

In *Clunis v Camden and Islington HA*, Christopher Clunis, C, had been detained for hospital treatment for a mental disorder. He was discharged on 24 September 1992, and failed to attend a number of follow-up appointments. Then, on 17 December, he stabbed Jonathan Zito to death at Finsbury Park tube station. C pleaded guilty to manslaughter on the grounds of diminished responsibility, and was sentenced to indefinite detention in hospital. C sued D, as Health Authority responsible for his care, alleging that it had been negligent in discharging him and by not providing adequate after-care. C claimed damages for the consequences of his loss of liberty. Held: the illegality defence applied, such that C could not recover damages for the consequences of his own unlawful act. Although his responsibility for killing Mr Zito was diminished, C had to be taken to have known what he was doing and that it was wrong.

Uncertainty arises, however, because the Court of Appeal held, in the earlier case of *Kirkham v CC of Greater Manchester*, that the illegality defence could not be relied upon by D, if C was ‘of unsound mind’, in the sense that he was suffering from some recognised psychiatric illness when engaged in the illegal activity. It did not require insanity on C’s part; if C suffered from some recognised psychiatric injury, that would be sufficient to bar D from relying on the defence. To permit the defence, and thereby preclude C from recovery, would ‘affront the public conscience, or shock the ordinary citizen’.

In *Kirkham v Anderton*, Mr Kirkham, C, committed suicide at the Remand Centre while suffering depression, and when he had already shown suicidal tendencies. C’s estate sued the police for failing to pass on information about C’s suicidal tendencies to the prison authorities, and for not completing the appropriate form which would have identified to the prison that C was a suicide risk. Held: the illegality defence failed. The fact that suicide was not a crime after 1961 meant that C had not conducted a criminal act in killing himself; but the defence of illegality could nevertheless technically arise, even in the absence of strictly criminal wrongdoing by C. However, D could not rely on the defence here, and C’s estate could recover damages; that would not ‘affront the public conscience’.

Hence, on this important point, the English case law is not ‘of one voice’.

**Contributory negligence**

Even where D is not able to take advantage of the illegality defence, the unlawful conduct, or ‘turpitude’, of C, may constitute contributory negligence, thereby providing D with a partial defence in the circumstances.

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16 [1990] 2 QB 283 (CA) 291 (also called *Kirkham v Anderton*).
In *McCracken v Smith*, facts discussed below, the illegality defence could not be taken advantage of by a negligent mini-bus driver D, but a finding of 65% contributory negligence was found against C, as the passenger illegally riding as a pillion passenger on a trail bike.

Turning now to the two versions of the illegality defence:

**The narrow version of the defence**

§10.D Under the narrow form of the illegality defence, where D acts negligently towards C, and C commits a crime, C cannot recover compensation from D for damage which flowed from the sentence, detention, fine or other punishment which was imposed upon C for that criminal act.

This narrow version of the illegality defence was affirmed in *Gray*, wherein it was described as being ‘well-established’ (i.e., although there was plenty of judicial authority for it pre-*Gray*, even if not described in exactly those terms).

**The elements of *ex turpi causa* (narrow version)**

1. C has committed an unlawful (criminal or illegal) act, either singly or jointly with D.
2. C is sentenced, detained, fined or otherwise punished for that criminal or illegal act.
3. That punishment caused C the damage complained of.

**Element #1: Unlawful conduct**

§10.E The unlawful conduct on C’s part may be criminal, illegal, or amount to some civil wrongdoing (whether tortious or in breach of contract), although C’s conviction for criminal conduct is usually a pre-requisite for the narrow version of the illegality defence to apply for D’s benefit. Further, C’s unlawful conduct may be either a joint illegal enterprise with D, or it can consist of C’s sole wrongdoing (i.e., a joint illegal enterprise is not a pre-requisite for the illegality defence to apply).

Whether considering the wide or the narrow version of the defence, the position is the same: the type of conduct by C that could potentially give rise to *ex turpi causa* is wide-ranging – it requires some form of ‘turpitude’ (per *McCracken v Smith*). It certainly is not confined to criminal conduct on C’s part for which C is convicted (per *Kirkham v CC of Greater Manchester*). C’s wrongdoing may consist of, e.g.: committing a traffic offence (as in *Pitts v Hunt*, and in *McCracken*); engaging in truancy from school or from work; loitering on a road in breach of a by-law; being a burglar on his way to a professional engagement (per *Henwood v Municipal Tramways Trust*); some civil wrongdoing (e.g., the tort of deceit, as in *Stone & Rolls v Moore Stephens*, below); or proof of dishonesty or corruption (per *Les Laboratoires Servier v Apotex*).

In *Stone & Rolls Ltd (in liq) v Moore Stephens (a firm)*, Moore Stephens, chartered accountants, D, audited the accounts of Stone & Rolls Ltd, C. Mr Stojevic owned, controlled and ran C, and

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17 [2015] EWCA Civ 360, [67].
18 [2009] UKHL 33, [41].
19 [2015] EWCA Civ 380, [42].
20 [1990] 2 QB 283 (CA).
22 (1938) 60 CLR 438 (HCA).
fraudulently extracted money from a Czech bank. The bank sued Stone & Rolls, C, in deceit, but C was wound up and could not meet the judgment. C’s liquidator then sued auditors, D, alleging that D had negligently failed to detect the fraudulent scheme and allowed Mr Stojevic’s fraudulent activities to continue. D sought to have the claims of C struck out on the grounds of ex turpi causa, the illegality being the fraud practised by Stone & Rolls (via Mr Stojevic) on the Czech Bank. Held (3:2): the illegality defence applied, so that C’s liquidator could not recover compensation from D for the consequences of Mr Stojevic’s fraudulent conduct. Mr Stojevic owned and ran the company and was responsible for the fraud; and it was not correct to view the company as a separate entity from Mr Stojevic. In McCracken v Smith, Daniel McCracken, C, 16, was a pillion passenger on a trail bike, being driven by Damian Smith, D1, also 16. They crashed into a minibus, being negligently driven by Mr Darren Bell, D2, and both were very seriously injured. Held: the illegality defence did not apply in respect of C’s claim against D2, although the necessary ‘turpitude’ was proven (dangerous driving offence under s 2 of the RTA 1988) as the first element.

In some cases, C and D have been engaged together in unlawful conduct – and when things all go terribly wrong, and C is injured during that joint unlawful enterprise, the defence has applied for D’s benefit. On the other hand, C may be engaged in a ‘wicked plot’ that is not jointly ‘hatched’ with D at all, but which gives rise to D’s harming C. The defence can arise for D’s benefit in that ‘sole enterprise’ scenario too. Illustrating respectively:

In Pitts v Hunt, facts previously, held: the illegality defence applied. D was riding the motor cycle recklessly and dangerously, and C was encouraging the way in which D was manipulating the controls. C was participating in very serious offences during the course of which he sustained his injuries. In Murphy v Culhane, Mr Murphy, C, made a ‘wicked plot’ with some other men to beat up another man, John Culhane, D. At D’s address, a ‘criminal affray’ took place, and D struck C on the head with a plank, and killed him. D pleaded guilty to manslaughter and was sentenced to 5 years’ imprisonment. C’s widow brought an FAA action against D, on behalf of herself and her baby daughter, for assault and/or negligence. Held: the illegality defence applied, and she could not recover.

The above element applies to both wide and narrow forms of the defence. Turning now to the unique elements of the narrow version:

Elements #2 and #3: Punishment and causation

Where C suffers damage from the detention, fine, or other punishment, then under the narrow form of the illegality defence, D has a complete defence.

Where C suffers damage from the detention, sentence, fine, etc, then it was rationalised by Lord Hoffmann, in Gray, that it is the law, and not D himself, which causes C damage in that event. In other words, it would be inconsistent with that criminal conviction and sentence/detention/fine, to ascribe to the negligent D any responsibility, at law, for the consequences of that detention, etc, which is imposed as a matter of penal policy (per Worrall v British Ruys Board). Hence, that should afford D a complete defence.

In Gray v Thames Trains, Mr Gray, C, could not be compensated for any damage flowing from his lawful detention in Runwell Hospital resulting from the manslaughter. Hence, C was precluded from recovering for: (i) his loss of earnings after his arrest; and (ii) any general damages for his detention, conviction, and damage to reputation. However, the following damages sought by C were not covered by the narrow rule, in that they were not the result of the criminal court’s sentence: (iii) C’s claim for an indemnity against any FAA claims which might be brought by Mr Boulton’s financial dependants; and (iv) any claim for general damages for his feelings of guilt and remorse arising from the killing. However, these damages were also precluded, on the basis of the wider form of the illegality defence (below). In Clunis v Camden and Islington HA, C could not recover damages for his loss of liberty, following his murder of Mr Zito. In Worrall v British Rwys Board, C suffered an injury at his place of work, due to employer D’s negligence. C allegedly suffered a personality change, and committed two sexual assaults on prostitutes, for which he was imprisoned for 6 years. C sued his employer for his loss of earnings while in prison, and subsequently. In both cases, the narrow form of the defence meant that C could not recover for the damages sought.

It does not matter, for the purposes of the narrow form of the defence, whether C was detained for punishment or for medical treatment (i.e., detention in a hospital to enable C to be treated for PTSD) which could ultimately benefit him. As noted in Gray, a criminal sentence is imposed for any one (or more) of a number of reasons: punishment, treatment, reform.

**The comparative corner: A Commonwealth perspective**

In the Canadian case of BC v Zastowny, Mr Zastowny, C, 18, was a drug addict and petty criminal who was imprisoned for various offences. Whilst in prison, C was sexually assaulted by a prison officer. This abuse exacerbated his drug addiction and criminal conduct. C sued the provincial government for vicarious liability for the assaults committed by the prison officer, and claimed damages for loss of earnings during the later imprisonment. Held: the illegality defence applied. Any award of damages for lost income whilst in prison ‘would constitute a rebate of the natural consequence of the penalty provided by the criminal law’, especially where ‘[t]he consequences of imprisonment include wage loss.’

In the Australian case of State Rail Authy of NSW v Wiegold, Mr Wiegold, C, was seriously injured in a work accident caused by his employer’s, D’s, negligence, while doing maintenance work on overhead electrical lines. C received workers’ compensation payments for a while, but when those payments stopped, he supplemented his income by growing and selling marijuana. He was convicted and imprisoned for 8 months, and lost his job. C sued D, claiming compensation for loss of earnings while in prison and subsequently, on the ground that it was all connected to the accident caused by D. Held (2:1): the illegality defence applied. ‘If the law of negligence were to say, in effect, that the offender was not responsible for his actions and should be compensated by the tortfeasor, it would set the determination of the criminal court at nought. It would generate the sort of clash between civil and criminal law that is apt to bring the law into disrepute.’

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32 (1991) 25 NSWLR 500 (CA), also cited in Gray, ibid, [40].
deterrence, or protection of the public against the possibility of further offences. It does not matter what the primary purpose of the detention or other punishment was – C cannot recover for the financial consequences of any of it.

It is not clear, from English authority to date, whether the narrow form of the illegality defence applies for D’s benefit, so as to preclude C from recovering any compensation for his detention, where C is actually acquitted of a criminal offence, but yet is detained on the grounds of insanity. That scenario did not arise in either Clunis or in Gray. In Gray, however, Lord Hoffmann noted that it posed an ‘interesting question about the limits’ of the narrow form of defence.  

The wide version of the defence

§10.G The wide version of the illegality defence potentially applies where C has engaged in unlawful or illegal conduct (whether or not convicted of a criminal offence); and where C claims against D for damages which are consequential upon his conduct, but which are not consequential upon any detention or fine imposed by the court.

Hence, the wider version of the defence is more likely to arise, on any given facts. It has four elements:

The elements of *ex turpi causa* (wide version)

1. C has committed an unlawful (criminal or illegal) act, either singly or jointly with D.
2. For public policy reasons, C should not be compensated for the consequences of his own unlawful conduct.
3. C’s unlawful conduct was inextricably linked with the damage complained of by C (but which damage does not arise by detention or fine).
4. Even if C was acting unlawfully, the outcome of the defence must not be disproportionate.

It follows, from the elements above, that just because C is engaged in something illegal or unlawful which brought about his injury does not automatically mean that the defence of *ex turpi causa* applies. Element 1 (which was discussed above, under the ‘narrow form’ of the defence) is required, but is not sufficient, in and of itself. Dealing with the remaining elements of the wide form of the defence:

Element #2: Public policy favours the defence’s application

§10.H The wide illegality defence applies where, for public policy reasons, C should not be compensated for the consequences of his criminal or unlawful conduct.

In *Gray v Thames Trains*, Lord Hoffmann explained that the defence of *ex turpi causa* is ‘not so much a principle, as a policy’, and that the policy was ‘not based upon a single justification, but on a group of reasons, which vary in different situations.’ This enables a number of differing justifications for the operation of the defence to be drawn in under this element.

A few policy reasons have arisen in the case law to date, which can justify the application of the defence for D’s benefit, although they have not always been treated consistently, judicially-speaking:

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32a [2009] UKHL 33, [42].  
i. **Not wishing to promote illegal or unlawful conduct.** A court will not lend its aid to a litigant who relies on his own criminal or unlawful act (per *Clunis v Camden and Islington HA*[^34^]). Otherwise, if the court did permit C’s claim in light of C’s unlawful behaviour, then it would be taken to have condoned C’s behaviour (per *Cross v Kirkby*[^35^]), or to have encouraged others in similar acts (per *Euro-Diam Ltd v Bathurst*[^36^]). This is especially so, where C has engaged in very serious offences (per *Pitts v Hunt*[^37^]).

This policy reason is not absolute, however – ‘the relative moral culpability of the parties may be relevant in determining whether or not the *ex turpi causa* defence falls to be applied as a matter of public policy’ (per *Saunders v Edwards*[^38^]). This policy reason also invokes a degree of ‘moral turpitude’ – the more serious C’s conduct, the more likely that the illegality defence will be successfully pleaded against him. In *Pitts v Hunt*, Dillon LJ did not favour this policy reason, precisely because it involved ‘grading illegalities according to moral turpitude’.[^39^]

ii. **Distributive justice.** The illegality defence seeks to reflect the ‘public conscience’, in deciding whether C should receive the damages that he is seeking, when he has been engaging in illegal conduct (*Tinsley v Milligan*[^40^]). The court will take a discretionary and ‘pragmatic approach’ (said Dillon LJ in *Pitts v Hunt*[^41^]). On the one hand, ‘genuine wrongs’ to C should be righted; but on the other, the public might be shocked if C were to profit (via damages) from his own wrongdoing (per *Thackwell v Barclays Bank plc*[^42^]).

This was the policy reason noted in *Gray* as being the most relevant – ‘it is offensive to public notions of the fair distribution of resources that [C] should be compensated (usually out of public funds) for the consequences of his own criminal conduct’.[^43^] However, in *Pitts v Hunt*, Balcombe LJ considered this factor ‘difficult to apply’, for who could tell whether the ‘public conscience’ would be affected by matters of an emotional nature (e.g., the ages of C and D there, and the prospect that innocent third parties could have been harmed by C’s conduct), in judging whether C should be compensated, regardless of his unlawful conduct.[^44^]

iii. **The cause of action cannot be proven.** A third policy reason justifying the defence is that the cause of action in negligence simply cannot be proven by C against D.

On the one hand, the court may refuse to recognise that D could be taken to have owed C any duty of care, when both parties are participating in a crime. That was one of the bases upon which illegality succeeded in *Ashton v Turner*[^45^] (a case in which C and D were engaged in a getaway after a burglary, and crashed during their escape, injuring C). In *Pitts v Hunt*, however, Beldam LJ did not approve of this reasoning, given that D’s duty of care as a road-user was not only towards C with whom he was engaged in a joint criminal enterprise, but also to others on or near the road.[^46^]

On the other hand, where D is engaged in a joint illegal activity with C, then the court cannot determine the standard of care to be observed by D towards C as his co-conspirator. Legally, then, there can be no assessment of breach, because it is impossible to measure an appropriate

[^34^]: [1998] QB 978 (CA) 987 (Beldam LJ).
[^35^]: (CA, 18 Feb 2000) [76].
[^36^]: [1988] 2 WLR 517 (CA) 526 (Kerr LJ).
[^38^]: [1987] 1 WLR 1116 (CA) 1127.
[^42^]: [1986] 1 All ER 676 (QB) 687 (Hutchison J).
standard of care in such a joint illegal enterprise (per Pitts v Hunt\textsuperscript{47}). Subsequently, in Joyce v O’Brien,\textsuperscript{48} in a case of C and D jointly engaged in the theft of goods and where C was harmed by D’s negligent driving in the getaway vehicle, Cooke J considered that the law would not recognise the existence of any duty of care owed by D to C, where these two parties were ‘participants in the same crime’. D, the negligent driver, ‘cannot owe a duty of care to his co-conspirator [C], and it is not possible to set a standard of care as to how fast the van should be driven, in circumstances where speed is necessary to get away, and there is a need for the other co-conspirator to hang on desperately to the stolen items and the back of the open van in order to effect their joint objective of a speedy escape’. The defence succeeded there, but ostensibly, it was because the negligence action could not be proven.

Since Gray, it seems to have been expected that one or more of these policy reasons will be necessary to justify the defence’s application – and where the defence has failed, none of these policy reasons has been successful for D (e.g., in Delaney v Pickett,\textsuperscript{49} the court said: ‘[n]or do I see any affront to the public conscience in an award of damages against [D] in favour of [C]’).

**Element #3: Causation**

The wide illegality defence applies for D’s benefit, where C’s illegal or unlawful conduct was inextricably linked to his damage. However, if C suffered harm or injury, but C’s unlawful conduct was incidental only, then the defence will fail.

Whether D caused C’s injury, or whether C caused it himself via his unlawful activities, has not been a straightforward matter. The mere fact that C was behaving unlawfully or criminally when his cause of action in tort arose is not enough to trigger the defence; the *facts giving rise to C’s claim* must be inextricably linked with his criminal conduct (per Cross v Kirkby\textsuperscript{50}). This has variously been called the ‘close connection’ or the ‘inextricable link’ test, although in Gray,\textsuperscript{51} Lord Hoffmann recommended that these metaphors be ‘stripped away’, so as to leave the essential question: did C’s conduct cause the damage of which he complains?

The defence applies (such that D is not liable) if the immediate cause of C’s injury or harm was his own deliberate unlawful or criminal wrongdoing; whereas the defence will not apply for D’s benefit, if C’s criminal or unlawful activity merely gave the occasion for D’s tortious act (per Gray v Thames Trains Ltd\textsuperscript{52}).

D could not rely on the defence in the following scenarios, because of no inextricable causal link between C’s unlawful conduct and the damage for which he was suing – C’s unlawful activity merely gave the occasion for D to commit negligence and to injure C:

In *Delaney v Pickett*,\textsuperscript{53} Sean Delaney, C, was passenger with driver Shane Pickett, D, in a powerful Mercedes 500 SL sports car, when it crashed head-on into another car near Coventry. C suffered severe head and bodily injuries, a personality change, and permanent disabilities. It was agreed (for the purposes of appeal) that C and D were driving for the purposes of collecting, selling and transporting cannabis. Quantities were found on each of them following the accident, but they


\textsuperscript{48} [2012] EWCA Civ 1532, [2012] 1 WLR 2149, [73], and cited in: Joyce, *ibid*, [33].

\textsuperscript{49} (CA, 18 Feb 2000) [102]–[102].

\textsuperscript{50} [2009] UKHL 33, [48].

\textsuperscript{51} [2009] 1 AC 1339 (HL) [53], citing: Vellino v CC of Greater Manchester [2002] 1 WLR 218 (CA) [70].

\textsuperscript{52} [2011] EWCA Civ 1532, [2012] 1 WLR 2149, [37], [73].

claimed that it was for personal use. **Held (trial):** the illegality defence applied; C could not recover damages. **Held (CA):** the illegality defence could not apply for D's benefit. Viewed as a matter of causation, the damage suffered by [C] was not caused by his or their criminal activity. It was caused by the tortious act of [D] in the negligent way in which he drove the car. ... the illegal acts [were] incidental, and [C] is entitled to recover his loss. Furthermore, there was no relevant nexus between the illegality upon which [C] was engaged, and the tortious conduct of [D] which gave rise to his injuries. In **McCracken v Smith**, facts previously, if Daniel McCracken's, C's, claim against the rider of the trail bike, Damian Smith, D1, had been under consideration, then the defence would have applied. However, in respect of C's claim against Mr Bell, D2, who was driving his minibus negligently and was involved in the accident, held: the defence of illegality failed, and D2 could not take advantage of it. C's injury had two causes, his own criminal conduct and D2's negligent driving, but where D2 was not remotely connected to the criminal joint enterprise in which C was involved. In those circumstances, it was not possible to establish a causal link between C's illegal activity as a pillion passenger and his damage.

On the other hand, the requisite close connection between C’s illegal conduct and the damage which he suffered was proven in other leading cases, and the illegality defence applied, e.g.:

In **Joyce v O’Brien**, David Joyce, C, 20, was holding onto the back of a Ford Transit van that was being driven by his uncle, Edward O’Brien, D, along small side streets in Croydon, when he fell off, and suffered severe head injuries. C claimed that the accident was caused by D’s negligent driving. However, D’s insurer argued that, at the time of the accident, both C and D were engaged in a joint criminal enterprise, because they had stolen extending ladders from the front garden of a house, and were making their getaway when the accident occurred. The ladders, because of their length, could not fit inside the van with the doors closed, so they protruded out of the back, and C stood on the bumper bar to hold them. The illegality defence applied for D's benefit. C and D were participating in a criminal enterprise, which involved the theft of the ladders, speed was of the essence of the getaway, and C's actions in holding the stolen items at the rear of the van, were an essential part of the joint enterprise. C's actions were 'as causative of his injuries as the driving, both of which were part of the criminal activity in which they were both engaged.' In **Gray v Thames Trains**, C's claims for an indemnity against any FAA claims which might be brought by Mr Boulwood's dependants, and for general damages for feelings of guilt and remorse, were caused by C's fatal actions. They were not a consequence of the sentence of the criminal court (and hence, were not caught by the narrow rule), but they were directly and inextricably linked to the manslaughter which C committed, and were precluded by the wide version of the illegality defence. In **Vellino v CC of the Greater Manchester**, Mr Vellino, C, was trying to escape from police custody (a criminal offence), when he jumped from a second-floor window, and was injured. C sued the police for damages, alleging that D had not taken reasonable care to prevent him from escaping. The illegality defence applied, because C's own criminal act caused his damage.

§10.1 The illegality defence cannot succeed for D, if C's unlawful conduct is ‘the very thing’ which D was under a duty of care to prevent. To hold the defence effective in that case would empty the duty of all content.

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It will be recalled that this ‘very thing’ principle applied as a distinct element under the defence of *volenti* (per *Reeves v Commr of Police* 56).

In *Reeves*, Buxton LJ opined, in dicta, that the ‘very thing’ principle would absolutely preclude the defence of *ex turpi causa* as well (dicta, because at that time, suicide was not a crime). That is, if D was under a duty of care to prevent C from acting unlawfully, then to hold that D could take advantage of C’s acting unlawfully – by C’s doing that very unlawful act – would be to use the defence to empty the duty of any content. That cannot be permitted, and the defence would fail.

In *Stone & Rolls*, the majority members of the House 57 preferred to consider the ‘very thing’ principle as relevant to causation – but not something that would, of itself, negate the defence from applying for D’s benefit. As such, the ‘very thing’ element cannot be considered to be an element of the defence of *ex turpi causa* in its own right, but merely a matter to be considered under the ‘causal’ element. If C did the very thing that D was supposed to exercise reasonable care to prevent, then D’s tort was the predominant cause of C’s loss, and the illegality defence will fail.

In *Stone & Rolls*, the liquidator, C, argued that auditors D were under a duty to prevent the commission of fraud, the very wrongdoing which Mr Stojevic committed. C argued that D could not rely on the fraud which they were supposed to prevent, to avoid liability in negligence. *Held*: the illegality defence succeeded. The ‘very thing’ principle did not apply here (according to the majority), where an auditor’s duty is owed for the benefit of a company’s shareholders (and not for benefit of its creditors), and where the sole shareholder here was the proponent of the fraud (or, as counsel for D submitted, it was irrational to hold D liable, ‘when the entire shareholder body and the entire management is embodied in a single individual who knows everything because he has done everything’).

### Element #4: Disproportionate injury or harm
§10.K  

Even if C was engaged in sole unlawful conduct when he suffered the injury for which he blames the negligent D, the defence may not be available to D, if that outcome would be disproportionate.

In its consideration of the illegality defence, the English Law Commission noted that ‘courts take into account a wide range of considerations, to ensure the defence only applies where it is a just and proportionate response to the illegality involved’. 58 Where D’s negligent infliction of injury on C is out of all proportion to the unlawful conduct in which C was engaged, then the defence will be disappplied. The disproportionate effect may be assessed by having regard to: the relative ages of C and D, the injuries which C ultimately suffered because of D’s tortious conduct (although C’s death does not necessarily render the defence unavailable to D), and the seriousness of the criminal or unlawful activity by C.

In *Cross v Kirkby*, 59 Mr Cross, C, was a vehement anti-hunting lobbyist, who frequently disrupted fox-hunts. Mr Kirkby, D, was a farmer whose land was used for fox hunts. C disputed with D about

57 [2009] UKHL 39, [2009] 1 AC 1391, [33], [63], [86] (Lord Phillips, noting that the other Law Lords did not adopt Lord Scott’s view on this point), [183] (Lord Walker), [204] (Lord Brown), [263] (Lord Mance, who ultimately joined Lord Scott in dissenting overall), and with quote in case description at [71].
the hunts one day, and then attacked D with a baseball bat, with verbal threats that he would kill D. D wrested the bat from C, hit him on the side of the head, and fractured C’s skull, leaving him with severe epilepsy. C sued D in battery and in negligence. **Held:** the illegality defence succeeded. It was not disproportionate to do so, given that D had been assaulted, and had been threatened with death. In *Lane v Holloway*, C, 63, and D, 23, got into a fist fight. C sued D for assault and battery (not in negligence). D argued that both C and D were engaged in illegality; and therefore there could be no cause of action in respect of the injuries inflicted by D on C. **Held:** the illegality defence failed. The defence was ‘academically’ arguable, but ‘absurd’. ‘To say that this old gentleman was engaged jointly with [D] in a criminal venture is a step which ... I feel wholly unable to take.’ In any event, their ages were so disparate, and C’s injuries so severe, that it was not tenable for the defence to apply for D’s benefit.

However, *Lane v Holloway* was a case of a singular illegal enterprise (and also was brought in battery, and not in negligence). Whether a ‘principle of proportionality’ applies to the illegality defence, in cases in which C and D were engaged in a joint illegal enterprise, is very doubtful. In *Joyce v O’Brien*, Cooke J noted that ‘[i]f the question is one of causation, there is no room for the operation of any considerations of the disproportionate injury suffered as against the heinousness of the crime committed’, \(^{61}\) and that the principle cannot assist C, when he is involved in a conspiracy to commit a criminal act with D.

Hence, it appears that proportionality remains an element of the illegality defence, but only where C was embarking on sole unlawful conduct, and not on a joint illegal enterprise with D.

**Theoretical bases for the defence**
Quite what the theoretical basis for *ex turpi causa* is, or should be, remains elusive. Various justifications, or conceptual foundations, for the defence have been proposed.

i. The fact that the defence is centred in public policy, in that a court cannot be seen to be condoning C’s illegal conduct by assisting him in his claim, has already been noted (per *Clunis*); \(^{62}\)

ii. The defence has been said to act as a form of waiver – so that, where C has participated in unlawful or illegal activity, then C has deprived himself of a cause of action, because C has taken upon himself the risk of participating in criminal conduct and of the risk of what may happen to him (per *Murphy v Culhane*). The prospect that *ex turpi causa* actually represents a voluntary assumption of risk also derived some support in *Vellino*; \(^{64}\)

iii. As discussed previously, the illegality defence may render one or more of the elements of the negligence action not satisfied (whether because a duty of care is not owed to C, or because the court cannot determine the particular standard of care to be observed by D, where he is engaged in a joint illegal enterprise with C) (although recently, in *McCracken v Smith*, Richards LJ noted that ‘there has been a shift of focus away from duty of care or standard of care and towards causation’);

iv. Alternatively, in *Meah v McCreamer (No 2)*, Woolf J suggested that C’s claim for damages was too remote at law to be compensable, where C’s conduct was illegal or unlawful;


\(^{63}\) [1977] QB 94 (CA). \(^{64}\) *Vellino v CC of Greater Manchester* [2002] 1 WLR 218 (CA) [35].

v. Finally, the defence has been viewed as ‘essentially a question of procedure’, defined by the ‘reliance principle’. If C needs to ‘rely on’ evidence, relating to his unlawful conduct, in order to prove his claim, then the defence of ex turpi causa will fail; but if C can prove his case without relying on such evidence, ‘then regardless of the substantive involvement of any serious illegality’ on C’s part, the defence can succeed (per the English Law Commission67).

In summary, where C has engaged in unlawful behaviour, the difficulties posed for the court were perhaps no better expressed than by Bingham LJ in Saunders v Edwards:

Where issues of illegality are raised, the courts have ... to steer a middle course between two unacceptable positions. On the one hand, it is unacceptable that any court of law should aid or lend its authority to a party [C] seeking to pursue or enforce an object or agreement which the law prohibits. On the other hand, it is unacceptable that the courts should, on the first indication of unlawfulness affecting any aspect of a transaction, draw up its skirts, and refuse all assistance to [C], no matter how serious his loss nor how disproportionate his loss to the unlawfulness of his conduct.68

This tension has been acknowledged in recent appellate, and law reform, consideration of the issue.

The law reform corner: Ex turpi causa

In The Illegality Defence (2010), the English Law Commission noted that, over time, the defence of ex turpi causa had been applied with generally ‘just results’. However, when applied to tort claims, courts were not sufficiently transparent, and it was ‘rare for the court to refer explicitly to any of the policy reasons that justified the application of the defence’. This gave the defence an impression of operating indiscriminately. It was up to the common law to develop incrementally, and ensure that cases permitting the illegality defence explicitly stated the policy reasons justifying that outcome. The EWLC recommended that legislation regarding the defence’s application to tort law was not necessary.69

67 The Illegality Defence (2010) [1.4], [3.7].
68 [1987] 1 WLR 1116 (CA) 1134.
69 (Rep 320, 2010) [3.8]–[3.10], [3.41].