a girl’s bottom is an equivocal action.” On the face of it, such conduct might equally have an innocent explanation as an indecent one—for example, horseplay or chastisement. That being so, the most that could be said of the spanking administered by the appellant was that it was capable of being considered indecent. Whether it would be so considered by right-minded persons would depend upon a variety of factors, including the relationship between the parties and—crucially—the reason why the appellant had acted as he did. It followed that the appellant’s statement to the police was admissible in evidence, to show both that his assault was in fact indecent and that he had intended it to be so.

The net effect of Court is that the admissibility of evidence of motive in support of a charge of indecent assault now turns on whether or not the assault is capable of being considered indecent. If it is, evidence of motive is admissible to show that the assault was in fact indecent and was intended to be so; if it is not, evidence of motive is inadmissible. The problem, of course, is that while this issue may seem like simplicity itself in the abstract, it is likely in practice to cause a great deal of judicial head-scratching. An analysis of previous decisions either expressly approved or not disapproved in Court only serves further to complicate matters. So it appears that an assault by spanking a girl on her buttocks over her shorts is capable of being indecent; but that an assault by removing her shoe (R. v. George, supra) or by touching or rubbing the hem of her skirt (R. v. Thomas, supra) is not.

It is difficult to refute the argument that Court is likely in practice to generate more problems than it solves. There is accordingly a great deal to be said for the dissenting speech of Lord Goff, who would have maintained established learning by denying that evidence of indecent motive may ever be adduced on a charge of indecent assault. According to his Lordship, such a charge can be established only if the prosecution show that the assault in question was “objectively indecent,” that is, indecent either in itself or in combination with the circumstances in which it was committed. If they cannot do this, “they are not allowed to fortify their case by calling evidence of a secret indecent intention on the part of the defendant” (at 1091). These are genuinely simple propositions, likely in practice to produce acceptable results; but unfortunately they no longer represent the law.

ROBERT WARD.

TAMING THE WILDERNESS: DIAMONDS, INSURANCE AND ILLEGALITY

When his back garden goes out of control and turns into a jungle,
the most unwilling gardener will sooner or later decide that it is time to do something about it. In *Euro-Diam Ltd v. Bathurst* [1988] 2 W.L.R. 517 the Court of Appeal, following earlier attempts, took a welcome bill-hook to the luxuriant growth represented by the maxim *ex turpi causa non oritur actio.* The result, if not a bowling green, is at least a rather tidier patch of ground.

Euro-Diam sent diamonds on sale or return to Verena GmbH in Germany. There they were stolen, and Euro-Diam claimed on their insurance. The insurers thereupon raised a troublesome quibble. At Verena’s request, Euro-Diam had deliberately under-invoiced the diamonds to them by some $90,000; as Euro-Diam probably knew, Verena’s object in asking for this to be done was to deceive the German taxman and save about $150. And this, said the insurers, activated the maxim *ex turpi causa* and prevented Euro-Diam claiming anything.

The Court of Appeal, upholding Staughton J. ([1987] 2 W.L.R. 1368, noted by C. F. Forsyth at [1987] C.L.J. 404), disagreed. Kerr L.J. succinctly reduced the case-law on when an action would be barred under *ex turpi causa* to the following propositions:

(i) A plaintiff would fail
   (a) if he had to rely on an illegal contract or transaction to assert his right (*Re Emery* [1959] Ch. 410; *Bowmakers v. Barnet Instruments* [1945] K.B. 65, 71);
   (b) if to let him recover would enable him to benefit directly from illegal conduct (*In the Estate of Crippen* [1911] P. 108; *Geismar v. Sun Alliance* [1978] Q.B. 383);
   (c) even assuming neither (a) nor (b) applied, if to let him recover would encourage illegality in future and be an “affront to the public conscience.”

(ii) even if (i) applied, *ex turpi causa* might be overriden in suitable cases (*Shelley v. Paddock* [1979] Q.B. 120, though not mentioned by his Lordship in this connection, is a good example).

None of these applied here. Although Kerr L.J. accepted—quite rightly, in this era of international co-operation—that the procurement of illegality in Germany was to be treated in the same way as illegality in England, Euro-Diam were not relying on any illegal transaction: the only person who stood to benefit from the deception was Verena, and even the most fastidious conscience would be unlikely to be affronted if Euro-Diam could claim.

This judgment is admirable for a number of reasons.

First, it is obviously sensible; it is difficult to think of any considerations of public policy, or anything else, that justify wholly invalidating someone’s insurance merely because he has helped someone else defraud the German tax authorities of a trifling sum.
Secondly, it encapsulates the applicable principles simply, succinctly and understandably, and ought to do away with the necessity to cite a plethora of earlier authorities in illegality cases.

Thirdly, it attempts a general synthesis of *ex turpi causa* in relation to all obligations; the development of this part of the law has been retarded by over-concentration on the law of illegal contracts.

Fourthly and most importantly, while reducing the law to relatively simple propositions, it preserves a degree of certainty and predictability in it. Although Kerr L.J. agreed that the normal rules might be overridden in particular cases (e.g. where in *Shelley v. Paddock* a relatively innocent party to an undoubtedly illegal arrangement to purchase property abroad recovered his money from a fraudulent seller), he seems to have accepted that these exceptions were, indeed, exceptional; normal cases would, as elsewhere in the law, be governed by stated rules. This matters. Apart from other things, it gives protection against the jejune suggestion that the only way to deal with the undergrowth of *ex turpi causa* is to take a flame-thrower to it and reduce it all to the case-by-case discretion of the court (cf. New Zealand's Illegal Contracts Act 1970). Such a solution is unacceptable, and not only because the jungle would doubtless soon grow again. A more serious reason is that, however little sympathy one may have for the guilty party in an illegal transaction, the innocent party has a right to be able to know what his chances are of successfully pleading illegality. To tell him that if he does so he must wait upon the unfettered discretion of the court and risk large amounts in costs if he loses is simply unacceptable; particularly as the matter may be out of his hands in that the court must take the point of illegality even if he does not.

*ANDREW TETTENBORN.*

**CONTRACTUAL RIGHTS AND DUTIES AFTER AN UNACCEPTED ANTICIPATORY REPUDIATION**

The material facts in *Fercometal S.A.R.L. v. Mediterranean Shipping Company S.A. (The Simona)* as they emerged in the Court of Appeal [1987] 2 Lloyd's Rep. 236, and in the House of Lords [1988] 3 W.L.R. 200, were that a charterparty stipulated that if a ship was not ready to load by the end of a stated period of laydays the charterers had the option of cancelling the contract. Before the period of laydays commenced, the charterers wrongfully repudiated the contract and thereafter continued to manifest an intention not to perform it. Although the shipowners treated the contract as still alive, their ship was not ready to load the cargo before the end of the laydays. The