Neutral Citation Number: [2018] EWHC 3088 (QB)

Claim No: 2SE90016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
LEEDS DISTRICT REGISTRY
ON APPEAL FROM
THE COUNTY COURT AT SHEFFIELD
Mr Recorder Kirtley

Leeds Combined Court
1, Oxford Row, Leeds, LS1 3BG.

Date: 14/11/2018

Before :

MR JUSTICE MALES

- -

Between :

KELLY WALLETT **(on her own behalf and on behalf of the dependants of Ian Hill (Deceased))**	**Appellant/Claimant**
- and –	
MICHAEL VICKERS	**Respondent/Defendant**

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Mr Darryl Allen QC and **Mr Jason Wells** (instructed by **Malcolm C Foy & Co**) for the **Appellant/Claimant**
Mr Tim Horlock QC, Mr Richard Whitehall and **Mr Andrew Axon** (instructed by **Berrymans Lace Mawer LLP**) for the **Respondent/ Defendant**

Hearing date: 7 November 2018

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Approved Judgment

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

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MR JUSTICE MALES

Mr Justice Males :

Introduction

1. Two motorists drive alongside each other on a dual carriageway at speeds approaching twice the speed limit, each determined to be the first to reach the point where the road narrows to a single lane and refusing to give way to the other. As the road begins to narrow, the motorist in the inner lane loses control of his vehicle and collides with other vehicles on the opposite carriageway, sustaining fatal injuries. His partner brings a claim for damages under the Fatal Accidents Act 1976. In order to succeed it must be shown that the deceased would himself have been entitled to succeed in a claim for damages for negligence against the other driver. Issues of causation, *ex turpi causa* and contributory negligence arise.

2. These in outline are the tragic but perhaps not unusual facts of this case. In the County Court at Sheffield Mr Recorder Kirtley dismissed the claim, holding in an *extempore* judgment that the defendant's driving caused (in the sense that it made a material contribution to) the fatal injuries sustained by the deceased, but that the claim was barred by the principle of *ex turpi causa* because the parties were engaged in the criminal joint enterprise of dangerous driving on a public road.

3. The claimant appeals, contending that a criminal joint enterprise requires not only encouragement or assistance by one defendant in the commission of an offence by the other, but also an intention to encourage or assist, and that there was no valid basis on which the Recorder could conclude that the deceased intended to encourage the defendant to drive dangerously. Mr Darryl Allen QC submits on her behalf that the Recorder was therefore wrong to hold that the claim was barred by the *ex turpi causa* principle; instead he should have held that the deceased's own fault could properly be taken into account by a substantial reduction for contributory negligence.

4. The defendant contends that the question whether the parties were engaged in a criminal joint enterprise is irrelevant. The deceased was himself guilty of a serious criminal offence, namely dangerous driving, which constituted "turpitude" for the purpose of the *ex turpi causa* principle, and that as any claim by him would be founded on this turpitude such a claim would be barred. Alternatively, the Recorder found and was entitled to find that the deceased did intend to encourage the defendant to drive dangerously.

The facts

5. On 16th April 2009 the deceased and the defendant were driving along Bawtry Road in Doncaster, a dual carriageway in an urban residential setting with a 40 mph speed limit. The deceased had two passengers, children then aged 8 and 4 respectively. Driving conditions were good. It was daylight and dry. There was little or no other traffic on the road travelling in the same direction. The defendant in the outer lane was slightly behind the deceased who was in the inner lane but accelerated as if to pass him. The deceased responded by accelerating and as both vehicles drove alongside each other they accelerated to speeds of the order of 70 mph to 80 mph. Each vehicle remained in its lane, neither swerving towards the other. There was no communication between the two drivers who did not know each other. Each was attempting to be the first to reach the point where the road narrowed to a single lane, with neither yielding to the other,

although there was ample opportunity for either of them to have allowed the other to move ahead. As they approached the single lane, the deceased was slightly ahead of the defendant. As he entered the stretch of road where the dual carriageway began to narrow and there was a right hand bend in the road, he lost control of his vehicle and swerved across the central reservation into two vehicles on the opposite carriageway. The deceased sustained fatal injuries. The two children in his vehicle were also seriously injured. The defendant's vehicle was not involved in the collisions.

6. The whole incident lasted no more than a few seconds.

7. The defendant was prosecuted for causing death by dangerous driving. He was acquitted of this offence, but was found guilty of dangerous driving and was sentenced to 6 months imprisonment and disqualification from driving for 12 months.

8. In this action the claimant seeks damages for bereavement and loss of dependency under the Fatal Accidents Act 1976. The quantum of the claim, subject to liability and contributory negligence, is agreed at £215,000. Other claims, including by the injured children, do not fall for consideration in this action.

The issues in the court below

9. It is important to understand how the case was put in the court below.

10. The claimant's pleaded case was that the defendant's dangerous driving, racing with the deceased, caused or contributed to the deceased's loss of control of his vehicle so as to give rise to liability for negligence. The defendant denied liability, contending that (1) his driving did not cause or contribute to the deceased's loss of control, (2) the claim was defeated by the doctrines of (a) *ex turpi causa* and/or (b) *volenti non fit injuria*, and (3) alternatively there should be a substantial reduction in any damages for the deceased's own contributory fault.

11. It is unnecessary to say anything further about *volenti*. This defence has not been pursued.

12. The defence of *ex turpi causa* was further explained in the defendant's opening skeleton argument for the trial. This made clear as I read it that the defendant's sole argument under this heading was dependent on proof of a criminal joint enterprise between the deceased and the defendant whereby the deceased had encouraged the defendant to drive dangerously. Thus the relevant section of the skeleton argument began by accepting that the fact that the deceased had driven dangerously did not bar the claimant's claim:

> "26. The fact that a Claimant is engaged in dangerous driving does not, without more, preclude him from bringing a claim against a defendant, who by reason of his/her breach of duty, causes the claimant injury. Under these circumstances the Claimant's actions give rise to a finding of contributory negligence but do not amount [to] a defence."

13. After citing *McCracken v Smith* [2015] EWCA Civ 380, [2015] PIQR 19 the skeleton argument identified what was described as "the critical question" in the case under a heading, "What is the test in this case?":

> "31. Assuming the court finds the driving of [the defendant] to have been dangerous. The critical question is whether or not that driving impacted upon the actions of [the deceased] such that it was capable of causing or contributing to [the deceased's] accident; and, if it was so capable, whether or not it arose from the criminal joint enterprise."

14. Two questions were then identified. The first, citing [43] of *McCracken*, was whether the conduct of the deceased and/or the defendant amounted to "turpitude". It was submitted that it did. The second, citing [44] of *McCracken*, was whether the deceased's claim against the defendant was "founded on that turpitude so as to provide a defence". It was submitted that the answer was yes, because the allegation that the defendant "was party to and encouraged the excessive speed [the deceased] carried into the bend" was founded on the deceased's own turpitude. Although not using the term itself, that is the language of joint enterprise.

15. In the concluding summary of the defendant's case, the *ex turpi causa* defence was summarised as being that:

> "(d) Once engaged in competitive driving/racing, [the deceased] and [the defendant] are engaged in a joint enterprise of dangerous driving which amounts to turpitude.
>
> (e) While, [the deceased] and [the defendant] owe a duty of care to proximate third parties, any injury sustained which arises from the joint enterprise is not caused by the negligent actions of the other but rather the criminal act for which damages cannot be recovered."

16. The claimant's opening skeleton argument also identified "the central issue" for the purpose of the *ex turpi causa* defence as being "whether the two men were engaged in 'a criminal joint enterprise', such that one cannot recover compensation from the other". If they were, it was accepted that the claim would fail; if not, it was accepted that the damages might be reduced to take account of contributory negligence, but the claim would not be barred by *ex turpi causa*. Again, *McCracken* was cited.

17. I have set all this out because Mr Tim Horlock QC for the defendant, supported by Mr Andrew Axon who appeared for the defendant at the trial, submitted as his primary case that the critical question for the purpose of the *ex turpi causa* defence was not whether the parties had been engaged in a criminal joint enterprise, but rather whether the claim was founded on the deceased's turpitude, a question which he submitted should be answered affirmatively, and moreover that this has always been the defendant's case. I do not doubt the genuineness of counsel's belief that the defendant's case has been consistent, but it is clear in my judgment that the case was argued below on the agreed basis that the decisive question so far as *ex turpi causa* was concerned was whether the parties were engaged in a criminal joint enterprise.

18. It is equally clear that this is how the Recorder understood the position. He stated in terms at [15] that there was "very little between the parties" so far as the legal analysis was concerned and went on at [16] to say that "if the parties, that is to say the deceased and the Defendant, had been engaged in a joint criminal enterprise, then that would defeat the claim". There is no trace in the judgment of any submissions advanced on behalf of the defendant that the *ex turpi causa* defence could succeed independently of

a finding of criminal joint enterprise. I have no doubt that this is because no such case was advanced.

The judgment

19. The defendant did not give evidence in the civil trial before the Recorder, but there was evidence in the form of CCTV footage, transcripts of the evidence in the criminal trial and expert accident reconstruction evidence. The primary facts as I have summarised them were not in dispute.

20. It was inevitably common ground that the deceased and the defendant were both driving dangerously. It is apparent that for each of them the decision to drive in the way they did was deliberate. There was no need for either of them to do so and no benefit to be obtained by being the first to reach the point where the road became a single lane.

21. The Recorder noted at [25] that there were three potential defences to the claim. The first question was one of causation, whether the defendant's dangerous driving had caused or made a material contribution to the deceased's fatal injuries. The Recorder found that it had. This finding is not challenged.

22. The next question was whether the claim failed by reason of *ex turpi causa*. As already indicated, that depended on whether the parties had been engaged in a criminal joint enterprise. As a preliminary objection, the claimant contended that it was not open to the defendant to allege that the parties were engaged in such an enterprise when his defence in the criminal proceedings had been that they were not. However, the Recorder held that it was for him to reach his own conclusion, not bound by the stance adopted by the defendant in the Crown Court or by the decision of the jury applying the criminal standard of proof. Mr Allen for the claimant has not challenged that approach.

23. The conclusion which the Recorder reached was that there was joint criminal activity. He expressed this at [31]:

> "Having reviewed the totality of the evidence, I am satisfied on the balance of probabilities that the two individuals who were responsible for driving the motor vehicles, namely the deceased and the Defendant, had become engaged in a joint criminal activity. I find that each of their driving behaviours effectively encouraged and maintained the driving of the other. On the balance of probabilities, I do not accept that the Defendant was not influenced by the driving of the deceased, and I find that the deceased's driving was affected by that of the Defendant. I find that there was joint criminal activity."

24. It is apparent that the finding of a criminal joint enterprise was solely dependent upon the Recorder's view that the driving of each individual encouraged the dangerous driving of the other. It did not depend on whether either individual intended to encourage such dangerous driving. Having found that there was a criminal joint enterprise, the Recorder went on to deal with the question of intention as a separate topic at [32]:

> "I have considered what I have described as the last of the Claimant's points about whether or not there is sufficient evidence to determine the intention of the parties. For the reasons that I have indicated, I find that there is in fact not just sufficient

but more than adequate evidence to be found through the nature of the factual analysis and the CCTV evidence as to the way in which these vehicles were driven. It follows from my judgment that given that there was a joint criminal enterprise and that the evidence supports the same, the Defendant's contention that the doctrine of *ex turpi causa* is both engaged and effectively extinguishes the claim, succeeds."

25. Thus the Recorder appears to have treated the issue of intention as something of an afterthought, having already decided at [31] that there was a joint criminal enterprise because of the conduct in which the defendant and the deceased were engaged. He understood the claimant as having submitted that, "even if *ex turpi causa* did apply, and there had been a joint enterprise", nevertheless the *ex turpi causa* defence would fail because there was no evidence of intention (see his summary at [21] of the judgment). That was a misunderstanding of the claimant's submission, which was that the mental element was an essential element of any criminal joint enterprise, so that without proof of an intention to encourage dangerous driving, there could be no criminal joint enterprise in the first place.

26. Nevertheless, the Recorder made a finding about intention at [32] in the terms which I have set out. It will be necessary to examine exactly what he found and whether he was entitled to do so.

27. In view of his conclusion that the claim failed by reason of *ex turpi causa* the Recorder did not make any finding about the third question, which was what percentage reduction would have had to be made for contributory fault if the claim had succeeded. The claimant contended for a reduction of 50%. Although the defendant pleaded a case of contributory negligence, he did not specify the percentage for which he would contend.

Permission to appeal

28. In giving permission to appeal Langstaff J observed that the case raises a serious issue of law, "whether in circumstances in which, without any pre-arrangement, two car drivers attempt each to outdo the other by driving faster than the other along a stretch of dual carriageway, at speeds which are dangerous, with a view to reaching an area of single carriageway first, it can be said that the fatal loss of control of the one (in the absence of contact with the other) is an event for which the other is in law responsible".

The parties' submissions on appeal

29. On appeal Mr Darryl Allen QC for the appellant claimant submits in summary that:

(1) Liability as a participant in a criminal joint enterprise requires proof not only of assistance or encouragement in fact but also of the necessary mental element, namely an intention to assist or encourage the commission of the crime.

(2) While it was open to the Recorder to find that the effect of the driving of each driver was to encourage the other to drive more dangerously, so that the conduct element of a joint enterprise was satisfied, he did not find (or alternatively had no proper basis on which to find) that the deceased intended to encourage the defendant to drive dangerously. This submission focused on the Recorder's finding at [32] of his judgment set out above.

(3) The Recorder should therefore have rejected the *ex turpi causa* defence and held that the claim succeeded, subject to a reduction for contributory negligence which, in the circumstances, should be assessed at 50%.

30. Mr Tim Horlock QC for the defendant submits, again in summary, that:

(1) The deceased's own dangerous driving amounted to "turpitude" for the purpose of the *ex turpi causa* principle and was the conduct on which the claim was founded; this was sufficient to defeat the claim, regardless of any participation in a criminal joint enterprise.

(2) Alternatively, the Recorder found and was entitled to find that the deceased intended to encourage the defendant to drive dangerously so that the necessary mental element for a criminal joint enterprise was proved.

(3) Finally, any reduction for contributory negligence should exceed 50% as the deceased's contribution to the accident had greater causative significance than the defendant's.

Legal principles

31. Before turning to the issues arising on the appeal it is convenient to state some legal principles.

Turpitude

32. As already explained, it was common ground in the court below that the principle of *ex turpi causa* would only operate to bar the claim in this case if the parties were engaged in a criminal joint enterprise. The defendant now seeks to contend that the principle operates regardless of any such joint enterprise because the deceased's own dangerous driving, which amounted to the commission of a serious criminal offence, was sufficient to bar the claim. Mr Horlock relies on the wider principle stated by Lord Hoffmann in *Gray v Thames Trains Ltd* [2008] UKHL 33, [2009] 1 AC 1339 at [29], [32] and [51] that "you cannot recover for damage which is the consequence of your own criminal act" because "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".

33. The principle of *ex turpi causa* discussed in *Gray* has nothing to do with any criminal joint enterprise. In *Gray* the claimant suffered post traumatic stress disorder as a result of involvement in a major railway accident for which the defendant was responsible. While suffering from this disorder he killed a man. His plea of guilty to manslaughter by diminished responsibility was accepted and he was detained in a mental hospital. He claimed damages for negligence against the defendant. Lord Hoffmann identified two principles, a narrow principle that damages cannot be claimed for loss of liberty lawfully imposed in consequence of the claimant's own unlawful act and a wider principle that recovery is barred for loss suffered in consequence of the claimant's own criminal act. Applying the wider principle, the claimant's commission of the offence of manslaughter by diminished responsibility, knowing what he was doing and that it was wrong, was sufficient to bar a claim against the defendant who was responsible for causing the claimant's mental disorder.

34. That *Gray* remains binding law despite the approach to questions of illegality adopted by the Supreme Court in *Patel v Mirza* [2016] UKSC 42, [2017] AC 467 was confirmed in *Henderson v Dorset Healthcare University NHS Foundation Trust* [2018] EWCA Civ 1841, another case of manslaughter by diminished responsibility. The claimant's killing of her mother could have been prevented but for the defendant hospital trust's negligent breaches of duty in caring for her, but the claim failed as a result of applying Lord Hoffmann's wider principle.

35. Mr Horlock relied also on statements by Lord Sumption in *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55, [2015] AC 430 at [23] and [25] that for the purpose of the *ex turpi causa* defence, "The paradigm case of an illegal act engaging the defence is a criminal offence" and that:

> "The *ex turpi causa* principle is concerned with claims founded on acts which are contrary to the public law of the state and engage the public interest. The paradigm case is, as I have said, a criminal act."

36. However, Lord Sumption added at [29] that "there may be exceptional cases where even criminal and quasi-criminal acts will not constitute turpitude for the purposes of the illegality defence". He gave as possible examples offences which might be too trivial to engage the defence and cases of strict liability where the claimant was not privy to the facts making his act unlawful.

37. It was unnecessary in *Les Laboratoires Servier* to explore these examples further or to decide what kind of criminal offences would not amount to "turpitude". The case was not concerned with criminal offences. The issue was whether the commission of a civil wrong, infringement of a Canadian patent, would qualify as turpitude for the purpose of the defence. The Supreme Court held that it would not. Similarly in *Gray* and *Henderson*, despite the apparently unqualified statements of principle ("you cannot recover for damage which is the consequence of your own criminal act"), the question whether all criminal offences would constitute turpitude did not arise. Both were concerned with manslaughter by diminished responsibility, which on any view is a very serious offence. It requires proof of an intention to kill, albeit an intention which is affected by an abnormality of mental functioning. On any view, therefore, such offences would amount to turpitude for the purpose of the *ex turpi causa* defence.

38. Towards the other end of the spectrum, careless driving is a criminal offence but nobody would suggest that careless driving by the claimant prevents the recovery of damages (reduced as appropriate on account of contributory negligence) in a road traffic case where both drivers are partly to blame. In such a case the recovery of damages does not offend public notions of the fair distribution of resources and poses no threat to the integrity of the law. On the contrary, the recovery of damages is in accordance with public policy. The claimant is not compensated for the consequence of his own criminal act. Rather, as a result of the reduction for contributory fault, he is compensated only for that part of the damage which the law regards as having been caused by the defendant's negligence.

39. Dangerous driving is a more serious offence. It must be proved that the driving fell far below what would be expected of a competent and careful driver, and that it would be obvious to a competent and careful driver that driving in that way would be dangerous. Nevertheless, although a serious offence which can attract a prison sentence, dangerous

driving is not of the same seriousness as manslaughter by diminished responsibility. For example, an objective standard applies which does not depend on the intention or state of mind of the driver.

40. The question whether dangerous driving should amount to turpitude for the purpose of the *ex turpi causa* defence was considered in *McCracken v Smith* [2015] EWCA Civ 380, [2015] PIQR 19. The claimant (Daniel) was the pillion passenger of a 16-year-old boy (Damian) riding a stolen trials bike at excessive speed when it crashed into a minibus negligently driven by Mr Bell. The case is important for the determination of the present appeal and I shall return to it when dealing with the issue of joint enterprise. Its relevance for present purposes is that Richards LJ considered whether dangerous driving by Damian, the rider of the bike, would engage the *ex turpi causa* principle so as to bar a claim against Bell. He recognised at [49] that this was a question of wide importance:

> "Since Daniel was jointly responsible for the dangerous driving, he is in the same position as Damian, the actual rider of the bike, as regards a claim in negligence against Mr Bell. The question in each case is whether the fact that the bike was being ridden dangerously provides a defence to the claim. The answer to that question is one with potentially wide ramifications, capable of affecting any driver involved in an accident with a negligent third party in circumstances where he or she is driving dangerously or is committing any other road traffic offence of sufficient seriousness to amount to turpitude for the purposes of the *ex turpi causa* defence."

41. The answer to the question was that the claim was not barred. Viewing the issue in terms of a duty of care, "the dangerous driving of the bike had no effect whatsoever on Mr Bell's duty of care or on the standard of care reasonably to be expected of him" (see [50]). Viewing it in terms of causation, there were two causes of the accident, the dangerous driving of the bike and the negligent driving of the minibus (see [51]). The fact that one of those causes was the criminal conduct of the notional claimant (i.e. Damian, the rider of the bike) was not a sufficient reason to bar the claim:

> "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. Our attention has not been drawn to any remotely comparable case where it has in fact succeeded: 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 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.

> 54 …
>
> 55. … The causal contribution of the dangerous riding of the bike for which Daniel was responsible can and should be taken into account in the assessment of his contributory negligence."

42. Christopher Clarke LJ also recognised the potential significance of the issue. He said at [87]:

> "… The basis upon which contributory negligence is assessed, namely by taking account of the relative culpability and causative potency of the negligence in question, provides an acceptable basis for determining what damages properly reflect Mr Bell's culpability and its causative effect. If the position were otherwise, any driver whose road traffic offence constituted turpitude, but who was only partially to blame, would fail to recover from anyone else whose negligence caused the accident. Even if turpitude did not arise unless the offence was punishable with imprisonment, the driver might still fail to recover if, for instance, a relatively modest act of carelessness led to the death of someone—a result which in many cases owes much to chance."

43. Although there was in fact no claim by Damian against Bell, this was an essential part of the court's reasoning in dealing with the claim by the passenger (Daniel) against Bell. In my judgment *McCracken* is a binding authority that in the absence of a criminal joint enterprise between the claimant and the defendant, dangerous driving by the claimant will not bar a claim pursuant to the *ex turpi causa* principle. Rather, such a claim is to be determined in accordance with principles of causation (has the conduct of the defendant made a material contribution to the claimant's injuries?) and contributory negligence (should the damages be reduced by reason of the claimant's own fault?). These principles are sufficient to give effect to the requirements of justice and public policy.

The joint enterprise cases

44. The position is materially different in a case where the parties are participants in a criminal joint enterprise. That is because, as the Supreme Court explained in *R v Jogee* [2016] UKSC 8, [2017] AC 387, each of the parties to such an enterprise is responsible in law for the commission of the offence in question:

> "1. In the language of the criminal law a person who assists or encourages another to commit a crime is known as an accessory or secondary party. The actual perpetrator is known as a principal, even if his role may be subordinate to that of others. It is a fundamental principle of the criminal law that the accessory is guilty of the same offence as the principal. The reason is not difficult to see. He shares the physical act because even if it was not his hand which struck the blow, ransacked the house, smuggled the drugs or forged the cheque, he has encouraged or assisted those physical acts. Similarly he shares the culpability precisely because he encouraged or assisted the offence. No one doubts that if the principal and the accessory are together engaged on, for example, an armed robbery of a bank, the accessory who keeps guard outside is as guilty of the robbery as the principal who enters with a shotgun and extracts the money from the staff by threat of violence. Nor does anyone doubt that the same principle can apply where, as sometimes

> happens, the accessory is nowhere near the scene of the crime. The accessory who funded the bank robbery or provided the gun for the purpose is as guilty as those who are at the scene. Sometimes it may be impossible for the prosecution to prove whether a defendant was a principal or an accessory, but that does not matter so long as it can prove that he participated in the crime either as one or as the other. These basic principles are long established and uncontroversial."

45. Because the accessory or secondary party is equally responsible in law for the crime committed by the principal, an accessory who is injured by the principal's criminal conduct cannot sue the principal to recover compensation for his injuries. As an accessory he stands effectively in the shoes of the principal. If he were allowed to sue the principal, he would be claiming damages for conduct for which in law he is himself responsible. Accordingly he can no more sue the principal than he could sue himself. This is a particular application of the *ex turpi causa* principle which is established by a series of cases.

46. For example, in *McCracken v Smith* [2015] EWCA Civ 380, [2015] PIQR 19 the question arose whether the passenger (Daniel) could have claimed damages from the rider of the stolen bike (Damian). The Court of Appeal, reversing the findings of the trial judge, found that the passenger was party to a joint enterprise with the rider, the essence of which was to ride the bike dangerously. He knew that the bike was likely to be ridden at excessive speed, was encouraging the rider to ride in this way, and was equally responsible with the rider for the dangerous way in which it was being ridden. After reviewing the authorities, Richards LJ held that such a claim would fail pursuant to the *ex turpi causa* principle:

> "47. … Since there was a joint enterprise between Daniel and Damien to ride the bike dangerously, and the increased risk of harm as a consequence of such riding was plainly foreseeable, Daniel's injury can properly be said to have been caused by his own criminal conduct even though it resulted from the negligent act of Damien. Another way of expressing the point is that although as a matter of fact the negligent act was that of Damien, Daniel was jointly responsible in law for it and he cannot bring a claim in respect of his own negligent act.
>
> 48. It follows that I consider the judge to have been wrong to reject the defence of *ex turpi causa* in relation to Daniel's claim against Damien …"

47. This reasoning was applied by Yip J in *Clark v Farley* [2018] EWHC 1007 (QB), another case of injury suffered by a pillion passenger on an off-road motorcycle which collided with another motorcycle being ridden in the opposite direction. The passenger sued both riders, each of whom was riding dangerously. Applying *McCracken*, Yip J held that the decisive question in each case was whether the passenger was involved in a criminal joint enterprise to drive dangerously with the defendant. If so, as she said at [34], the claimant would be "jointly responsible in law for the rider's negligence and could not bring a claim in respect of his own negligent act". On the facts, however, the defence of *ex turpi causa* failed because it was not proved that the claimant was a party to any criminal joint enterprise. He did not in fact encourage the rider to ride dangerously and did not intend to do so.

48. In cases where the claimant is only an accessory, as in the case of a passenger, the *ex turpi causa* principle can only apply if he can be fixed with responsibility for the

criminal conduct pursuant to the principles of joint enterprise. If not, he has not committed any offence, has no responsibility in law for the criminal conduct in question, and is entitled to sue like any other claimant who has suffered injury as a result of a defendant's negligence. It may be, as it was in *Clark v Farley*, that the claim will be reduced for contributory negligence, but the *ex turpi causa* principle will not bar the claim.

49. The present case is different because both the deceased and the defendant were undoubtedly guilty of dangerous driving as principals. For the defendant, Mr Horlock focused on the deceased's driving, submitting that this constituted turpitude on which the claim was founded which was sufficient to provide a defence of *ex turpi causa*. That submission, however, runs counter to the decision in *McCracken*. Just as the rider Damian could have sued the negligent minibus driver despite his own dangerous riding, the fact that the deceased in this case was driving dangerously does not in itself prevent a claim against the defendant to recover damages for the consequence of the defendant's negligent or dangerous driving. If the defendant was only negligent and leaving aside any issue of criminal joint enterprise, *McCracken* would be indistinguishable on the point. The fact that the defendant's driving was dangerous, that is to say worse than merely negligent, can hardly put the defendant in a better position.

50. For the purpose of considering the issue of criminal joint enterprise what matters is the defendant's dangerous driving. The question is whether the deceased was a party to a joint enterprise for the defendant to drive dangerously. If he was, the reasoning in *McCracken* and in *Clark v Farley* means that he was equally responsible with the defendant for the defendant's dangerous driving and therefore cannot sue to recover damages for the consequences of that driving.

51. The question whether the deceased was guilty as an accessory of dangerous driving by the defendant is of course somewhat artificial. It is hard to imagine circumstances in which, if he had survived, the deceased would be prosecuted as an accessory to the defendant's dangerous driving. He would be prosecuted for his own dangerous driving. Nevertheless, the principle established by *McCracken* is clear.

The mental element of a criminal joint enterprise

52. As also explained in *R v Jogee* [2016] UKSC 8, [2017] AC 387, liability as a party to a joint enterprise requires proof of both a conduct and a mental element:

> "7. Although the distinction is not always made in the authorities, accessory liability requires proof of a conduct element accompanied by the necessary mental element. Each element can be stated in terms which sound beguilingly simple, but may not always be easy to apply.
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> 8. The requisite conduct element is that D2 has encouraged or assisted the commission of the offence by D1.
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> 9. Subject to the question whether a different rule applies to cases of parasitic accessory liability, the mental element in assisting or encouraging is an intention to assist or encourage the commission of the crime and this requires knowledge of any existing facts necessary for it to be criminal …"

53. The Supreme Court went on to decide that there is no different rule in cases of parasitic accessory liability, an expression which in the light of the decision can probably be consigned to the history books.

Advancing a new case on appeal

54. As already explained, the primary case which the defendant seeks to advance is that the defence of *ex turpi causa* applies to defeat the claim because the claim is founded on the deceased's own dangerous driving regardless of whether the deceased was party to any criminal joint enterprise. Mr Allen for the claimant objected to that new case, which (as I have shown) was not run below, being advanced for the first time on appeal. If the analysis which I have set out is correct, the new case will fail because of the principle established by *McCracken*: in the absence of a criminal joint enterprise, dangerous driving by the claimant will not bar a claim pursuant to the *ex turpi causa* principle.

55. In principle, however, I consider that it would be wrong to allow this new case to be advanced for the first time on appeal. The parties prepared for and conducted the trial on the agreed basis that participation in a criminal joint enterprise was the decisive question so far as the defence of *ex turpi causa* was concerned. That has remained the position and even now there is no Respondent's Notice. Moreover, the basis upon which Mr Horlock seeks to advance this case is not that the defendant should be allowed now to advance a new case, but that this has always been the way the defendant put the case. As I have indicated, I do not accept that.

56. I consider that it would be wrong on appeal in effect to jettison the way the case was conducted at the trial and to start over again, in effect acting as a court of first instance. To do so would frustrate the parties' reasonable expectations and, moreover, would at least arguably require consideration of the policy questions identified in *Patel v Mirza* [2016] UKSC 42, [2017] AC 467. It was common ground that these questions do not arise if criminal joint enterprise is the decisive issue. However, they may do so if a broader consideration of *ex turpi causa* is necessary, at any rate if the defendant's new way of putting the case does not fall foul of the decision in *McCracken*. However, the Recorder has made no findings about those questions and was not asked to do so.

Was there a criminal intent for the purpose of joint enterprise?

57. I come, therefore, to the questions arising on the claimant's appeal. What did the Recorder actually decide about the deceased's intention? If he decided that the deceased intended to encourage the defendant to drive dangerously, was that a finding which he was entitled to make?

58. For ease of reference I set out once again what the Recorder said about this at [32] of his judgment:

> "I have considered what I have described as the last of the Claimant's points about whether or not there is sufficient evidence to determine the intention of the parties. For the reasons that I have indicated, I find that there is in fact not just sufficient but more than adequate evidence to be found through the nature of the factual analysis and the CCTV evidence as to the way in which these vehicles were driven. It follows from my judgment that given that there was a joint criminal enterprise and that the evidence supports the same, the Defendant's contention that the

doctrine of *ex turpi causa* is both engaged and effectively extinguishes the claim, succeeds."

59. Unfortunately, although the Recorder said that there was sufficient evidence to determine the intention of the parties, he did not spell out what he found the parties' (and in particular the deceased's) intention to be. This may have been because of his mistaken view that the issue of intention was only an additional point rather than an essential element in determining whether there was a criminal joint enterprise at all. At all events, there is no finding here of what the deceased's intention was.

60. It seems probable from the Recorder's reference to "the last of the Claimant's points" that he intended to refer back to his earlier description of the claimant's case on intention. He dealt with that at [21] of the judgment, describing "an additional limb of the Claimant's submissions, to the effect that even if *ex turpi* did apply and there had been a joint enterprise, then there was insufficient evidence to suggest that there was any intention that the deceased and the defendant engaged in any common goal". Unfortunately, and without wishing to be unkind to an *extempore* judgment, that was not an accurate description of the claimant's case, which as already explained was that the mental element was an essential element of any criminal joint enterprise. Moreover, the Recorder did not say what he understood that the parties' common goal was, let alone that the deceased intended to encourage the defendant to drive dangerously.

61. The result, therefore, is that there is no express finding in the judgment that the necessary mental element for the deceased's accessory liability to the defendant's dangerous driving had been proved.

62. The Recorder did use the language of racing, as did some of the eye witnesses to the incident. He adopted the description of the sentencing judge in the criminal proceedings against the defendant, who had described the driving as "Two men, not yielding to each other, side-by-side, driving at speeds approximately double the legal speed limit". He referred also at [14] to "what almost appears a drag race-style mentality". Mr Horlock founded on this language to submit that, if the deceased intended to race, he must have intended to have somebody to race against, and therefore intended the defendant to drive at racing speed. In my judgment, that is to read much more into the terminology of racing than the language can properly bear.

63. It seems highly probable that what the Recorder understood by racing and by referring to a common goal was merely that each of the two drivers intended to be the first to reach the point where the road narrowed. No doubt that is true, but that is not a common purpose or intent in the sense in which that phrase is used in the law of criminal joint enterprise. Rather than working together or encouraging each other to achieve a shared objective, each man was seeking to achieve his own objective which would necessarily mean frustrating the other. Far from wishing the other to drive dangerously, it seems highly probable that each would have preferred that the other should slow down and give way. I would acknowledge that intention and desire are not necessarily the same thing (see *Jogee* at [91]) but there is no basis here for any finding that the deceased intended to encourage the defendant to drive dangerously.

64. In my judgment, therefore, the most that can be said is that each man intended to drive in a way which would beat the other to the point where the road narrowed. In relation to an incident that lasted only seconds, that is as far as it is possible to go. Although the

Recorder found that this had the effect of encouraging the other to drive dangerously, I conclude that he did not make a finding that this was what the deceased intended and, moreover, that if he had done so such a finding would not have been justified.

65. It follows that the Recorder's finding of a criminal joint enterprise cannot stand and that the appeal must be allowed.

Contributory fault

66. It remains to deal with the issue of contributory fault. It was common ground that, although the Recorder had made no finding, I am in as good a position as he was to determine the appropriate percentage reduction if the issue arises, as I have held that it does, and that I should do so.

67. The difference between the parties is a narrow one. For the claimant Mr Allen submits that the deceased and the defendant were equally to blame and that each made an equal causative contribution to the deceased's loss of control of his vehicle. Accordingly the damages should be reduced by 50%.

68. For the defendant Mr Horlock submits that the deceased bears a greater share of the blame and also that his conduct had the greater causative potency. He points out that in the final moments before the collision, the defendant was travelling more slowly than the deceased and that it was the deceased, not the defendant, who lost control of his vehicle. He submits that the damages should be reduced by 60%.

69. I consider that the deceased bears a greater responsibility for the collision, both in terms of blameworthiness and causative potency. He was responsible for his decision to drive dangerously and it was incumbent on him to maintain control of his vehicle. He failed to do so. While the defendant was also driving dangerously and culpably, at least he did so in a way which enabled him to maintain control. Moreover, although he left it until the very last moment, he did at least permit the deceased to pull ahead when the road did narrow (or at any rate did not prevent him from doing so). I conclude that the damages should be reduced by 60%.

Disposal

70. For the reasons which I have given the appeal will be allowed and there will be judgment for the claimant for £86,000, i.e. 40% of the agreed quantum of £215,000.

71. I am grateful to all counsel for their assistance in a case which, despite the apparent simplicity of its facts, raised some intricate questions.