Case No: F35YM428

IN THE COUNTY COURT SITTING AT CENTRAL LONDON

Thomas More Building
Royal Courts of Justice
Strand
London
WC2A 2LL

Date: 17/02/2022

Before :

HIS HONOUR JUDGE LETHEM

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Between :

MS AMUDALAT ADEFUNMILAYO AGBALAYA **Claimant**

- and -

LONDON AMBULANCE SERVICE **Defendant**

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Shannon Eastwood (instructed by **Bond Turner**) for the **Claimant**
Paul F McGrath (instructed by **Plexus Law**) for the **Defendant**

Hearing dates: 5th January 2022

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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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HIS HONOUR JUDGE LETHEM

His Honour Judge Lethem :

1. On the 8th November 2021 I heard the liability trial, found for the Claimant and adjourned the quantum issues. This judgment addresses quantum and causation.

2. At about 09.25 on the 17th January 2019 the Claimant was driving her Audi A3 registration FT11 YLY, north on the on the inside lane of dual carriageway on the A10, Great Cambridge Road travelling from her home in Shooters Hill Road, London SE18 to her place of work with the Barnet, Enfield and Haringey NHS Trust. On the 8th November 2021 I found that an ambulance responding to an emergency call, veered from the outside lane into the Claimant's carriageway in order to avoid a car that had applied its brakes sharply. In doing so the ambulance collided with the offside of the Claimant's vehicle causing damage to it. I found the Defendant NHS trust to be responsible for the accident. Accordingly quantum is assessed on a full liability basis.

3. The quantum claim falls into two parts, firstly a PSLA claim for personal injury arising out of the accident. The second category are the special damages. These are enumerated in an updated schedule of loss dated the 9th August 2021 as follows:

i)	Hire charges	£145,524.48
ii)	Pre-accident Value	£ 4,4850.00
iii)	Recovery and Storage	£ 1,294.80
iv)	Miscellaneous Expenses	£ 50.00

The Defendant has filed a lengthy counter schedule contesting the quantum of the above damages.[1]

4. The Claimant was nearly 28 at the time of the accident (DoB: 18.02.1991), she was an assistant psychologist and was also studying for a Master's degree and living with her parents in south London.

PSLA

5. The Claimant relies on two medical reports, the first is from Dr. James Francis Lee MBBS dated the 12th March 2019,[2] some seven weeks after the accident. The report records that the Claimant suffered the following soft tissue injuries:

   (i) Pain to the neck – she had 80% normal movements and a prognosis for recovery in 9 months.
   (ii) Lower back pain – 80% normal movement with a prognosis for recovery in 9 months.
   (iii) Pain to the right shoulder – she had 70% movement and a prognosis for recovery in 9 months
   (iv) Travel anxiety with a prognosis for recovery in 9 months

   The pain in all three sites remained severe on examination. In terms of treatment, the Claimant was seen by paramedics at time of accident and taken to North Middlesex

[1] See page [57]
[2] [12 *et seq*]

Hospital. She was discharged and prescribed analgesics which she continued to take at time of examination. The Claimant had an X ray which was clear, as was a second MRI scan. Dr Lee prescribed a referral to physiotherapy and the prognosis was predicated on this. I note that there is no claim for physiotherapy fees and no mention of physiotherapy in the Claimant's witness statement. In the second medical report, Dr Cosker recorded that the Claimant had had telephone consultations but no 'hands on treatment'.[3] I infer that the Claimant failed to take up the treatment for some unknown reason, not explored in evidence.

6. In terms of the effect of the accident, Dr Lee noted that the Claimant had two and half weeks off work and that she was still on restricted hours at time of examination.[4] The Claimant experienced moderate restriction in her personal care and cooking and severe restriction in relation to sleep and shopping. Her driving is recorded as severely restricted, though in oral evidence I was told that she used a hire car to travel to and from work when she returned to work. This detracts from the contents of the report. The Claimant was unable to partake in fitness training and football, her hobbies.

7. The Claimant was involved in a previous accident which was not considered to be relevant.

8. It is plain that the Claimant did not recover in line with Dr Lee's prognosis. The medical records show that she had a consultation with her GP on the 2nd June 2019 (5 months after the accident). The letter from her employer records that she was off work with the injury for a week between the 19th and 23rd August 2019.[5] Accordingly she underwent a further examination by Mr Tom Cosker FRCS on the 3rd November 2020 (some twenty two months after the accident) and who reported on 28th November 2020.[6] He recorded that the Claimant experienced headaches which resolved in 3 months. He confirmed the diagnosis of soft tissue injury and elided the neck and right arm injury. Travel anxiety resolved in nine months. He prescribed twelve sessions of physiotherapy which were unlikely to start until January 2021 (due to Covid). His report on the effects of the injury mirrored those of Dr Lee. The Claimant continued to find some domestic chores difficult such as preparing meals and using the washing machine, she experienced difficulty in sleeping and there was some effect on her social life. He reported that the Claimant could not carry a rucksack at work and was provided with a trolly. She had lost confidence as a driver. His prognosis was for recovery by April 2021. (2 years and 3 months)

9. To complete the background, as 8th August 2021 the Claimant said that there was still some residual pain but does not want further medical opinion.[7]

10. I return to my foregoing observations about physiotherapy. It seems that this was diagnosed but not taken up by the Claimant and I approach the PSLA figure on that basis.

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[3] [143]
[4] In oral evidence the Claimant volunteered that this was an error and she had two weeks off work. This is confirmed by a letter from her employer. [150]
[5] [150]
[6] [133]
[7] See paragraph 58 of the Claimant's witness statement 8th August 2021 [84]

11. Both counsel agree that I should approach the matter on the basis of the Judicial College guidelines, Chapter 7(A)(b)(iii):[8]

Injuries which may have accelerated and/ or exacerbated a pre-existing condition over a shorter period of time, usually less than five years. This bracket will also apply to moderate soft tissue injuries where the period of recovery has been fairly protracted and where there remains an increased vulnerability to further trauma or permanent nuisance type symptoms referring from the neck.	£6,730 to £11,730	**£7,410 to £12,900**

Counsel are agreed that the award will fall at the lower end of the bracket. Mr McGrath for the Defendant suggested a figure of £7,500 for PSLA pointing out that the Claimant returned to work within a couple of weeks and was able to work thereafter. He suggested that this fell at the very lower end bearing in mind that the recovery was only just in excess of the two years. Mr. Eastwood suggested that this was on the parsimonious side. He stressed that this was a multiple site injury and was not limited to neck, thus one had to factor in an increase given the breadth of the injury. He also stressed that there is significant evidence that the injury was still intrusive up to one year after the accident. He drew my attention to the doctor's appointment, the time off work in August 2019 and the contents of Mr. Cosker's report. Taking this together he submitted that a figure of £8,250 was the correct figure.

12. I concur with counsel that this is towards the lower end of the above bracket. In my judgment Mr. McGrath fails to give proper weight to the fact that this is a multi-site injury and I prefer Mr. Eastwood's approach in that respect, and I factor in that the pain went beyond the neck injury affecting the back and right arm. I am also satisfied that the Claimant was a reliable witness in relation to her injuries and that her evidence was supported by documentary evidence in the form of the medical records and the employer's letter. However, I have some residual concerns that the reporting may have inadvertently exaggerated the severity of the injury in some respects, and I have already noted that there was a tension between the Claimant's oral evidence and the contents of Dr Lee's report in relation to the driving. However, it is plain that this injury was still troubling the Claimant when she went to see her GP and had time off work in August 2019 which suggests a significant degree of severity six months after the accident. Again this is reflected in Mr. Cosker's report. I am troubled by the lack of physiotherapy and that the medical opinions were predicated on the basis that there would be physiotherapy which does not seem to have been taken up. As I have indicated, this was not explored in evidence, and I do not take it into account. I also accept Mr. McGrath's observation that the Claimant returned to work two weeks after the accident. That must be tempered by the fact that adjustments had to be made, for example the trolly mentioned in Mr. Cosker's report and also that the return to work was not untroubled. Weighing these matters together, I assess the PSLA in the sum of £8,000.

13. I turn to the special damages, beginning with the less controversial items.

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[8] Judicial College Guidelines (15th ed) – page 39

RECOVERY & STORAGE

14. These are claimed at £1,294.80 and were accepted by Mr. McGrath. Subject to the issue of illegality and *ex turpi causa* which I address below, I would award the uncontroversial figure of £1,294.80.

MISCELLANEOUS EXPENSES

15. These are put at £50.00 and addressed at paragraph 64 of the Claimant's witness statement.[9] She explained the expenses as having to contact her engineer, storage garage, hirer, solicitors and doctors. There was no further evidence and no documents to support a manifestly approximate figure. Mr. McGrath approached this on the basis that it is a standard claim in actions of this sort, and it simply was not made out on the evidence, especially in these times of 'rolled up' telephone packages where calls are not charged as individual items. Mr. Eastwood pointed out that there were a number of visits to doctors which would have incurred expenses. I award nothing for this item. I agree with Mr. McGrath that this item and quantum seem to crop up with regular monotony in such claims. As with this claim there are rarely evidenced. Such claims should not be advanced as a matter of course. I can dismiss Mr. Eastwood's suggestion of visits to the doctor. This is not the way the claim was put in paragraph 64 of the Claimant's witness statement. Beyond that I have no evidence as to how the figure was arrived at. The burden is on the Claimant, and she has failed to meet that burden.

PRE-ACCIDENT VALUE

16. The parties are agreed that the figure for the pre-accident value is either £5,800 or £4,800, from which a salvage value of £1,300.00 should be deducted with a resultant figure of £4,500 or £3,500.[10] The difference between the parties arises because the Diesel Particulate Filter ('DPF') was recorded as being blocked and that the warning lights on the instrument panel may have been illuminated, as was noted by the Defendant's expert Mr. Dominic Harris. It was observed that the mileage on the Claimant's vehicle was, at that time, the same as when a total loss report was made by Mr. J Quigley on the 8th February 2019.[11] Building on that observation, the experts are agreed that, if the DPF filter needs to be changed then the costs of a genuine Audi part plus labour is £1,694.54 which reduces to £600 to £900 if an aftermarket component is obtained. This gives rise to their agreed reduction of £1,000 if the DPF had to be repaired.

17. Arising from the foregoing there are two issues. First is an issue as to whether the warning lights were illuminated at the time of the accident and the second as to whether the DPF required replacement.

18. In relation to the illumination of the warning lights. It is the Claimant's evidence that the warning light was not illuminated and in support Mr. Eastwood relied upon evidence at the liability trial from one of the paramedics, Daniel Wagner who moved the vehicle to the side of the road following the accident. He could not recall that the light was lit. Against this the joint statement from the experts' records:

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[9] witness statement: [85]
[10] Derived from the Joint Statement of the experts – paragraphs 2.17 and 2.18 [699]
[11] [109]

> "Neither expert is in a position of knowing when the DPF was illuminated in the Audi or whether it will regenerate with forced DPF regeneration. However it is agreed that the mileage at the time of Mr. Quigley's inspection was the same at the time that Mr. Harris inspected the vehicle and, on the balance of probabilities, would suggest that the DPF warning light was illuminated at the time of the material accident"[12]

19. Mr. Eastwood relied on the Claimant's evidence and that she had gone to the car to check on her MoT papers and so it was not just a case of her missing it at the time of the accident. As I have indicated he also relied on the evidence of Daniel Wagner. Mr. McGrath argued that the statement of the experts was clear and that on balance of probabilities, the light was illuminated. He pointed out that the vehicle was taken from the accident site and taken straight to storage. He also relied on the fact that the mileage had not altered between Mr. Quigley's inspection and that of Mr. Harris.

20. On balance I am satisfied that the light was illuminated at the time of the accident. Taken at its height the Claimant's evidence was that she had not noticed the light on. That mirrored the evidence of Mr. Wagner who could not be sure that the light was not illuminated, only that he had not noticed it. I discount Mr. Eastwood's submission concerning the Claimant retuning to the car to collect her paperwork. This do not involve the ignition on the car being activated and the simple exercise of retrieving paperwork does not alter the situation. I have taken into account that I found the Claimant to be a generally honest witness and one might expect her to see the light if it was illuminated.

21. Against that I have the clear evidence of the Defendant's expert, Mr. Harris that the light was illuminated when he inspected the vehicle. I take into account that the mileage was the same as that when Mr. Quigley inspected the car shortly after the accident. This is hardly surprising. All the evidence is that the vehicle was taken from that accident to storage and there it remained. The invoice from H.S.K. Autocentre records that they recovered car.[13] Thus it is unlikely that the vehicle was used after the accident.

22. I have also taken into account the suggestion by Mr. Quigley that simply jump starting the vehicle could have triggered the DPF warning light.[14] This was addressed by both the experts in their joint report, where they agree neither expert was aware of a scenario where this would happen. Mr. Eastwood sought to suggest that this did not mean that Mr. Quigley was wrong. I am against him. The two experts specifically singled out this answer for comment and plainly do suggest that neither of them are aware of a situation where Mr. Quigley's analysis is correct. I prefer the evidence of the two experts.

23. Balancing the evidence, I am satisfied that the DPF warning light was illuminated.

24. Lest I am wrong in the foregoing finding, I would observe that the illumination of the warning light is only indicative of an underlying problem. The real problem was whether the DPF was blocked. Whether or not the warning light was illuminated at the time of the accident, it was illuminated after the vehicle had been recovered, suggesting

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[12] Paragraph 2.13 of the joint statement. [698]
[13] [114]
[14] Reply to part 35 questions 2(d) [707]

that there was an underlying problem with the filter at the time of the accident. Hence I am satisfied that the DPF was blocked.

25. This leads to the second issue as to whether the DPF required replacement. Mr Quigley opines that:

> "When the DPF light has become illuminated, it is indicative that passive regeneration has failed and that you need to actively regenerate the particular filter. This is done my running the vehicle at a minimum speed of 40 mph for 10 to 15 minutes. It does not mean that the vehicle is unroadworthy. If the DPF fails then the control unit will put the vehicle into low power and minimise the vehicle speed, this clearly did not happen as the vehicle was in use at the time of collision."

Mr. Eastwood thus discounted the suggestion that the DPF would have to be replaced and proposed the higher figure for the pre-accident value. He asked me to rely on this report and suggested that it was more reliable as Mr. Quigley carries out vehicle inspections more frequently and that the joint experts of the parties do not say that the above is wrong. Mr. McGrath urged on me that, insofar as there was a disagreement, I should rely on Mr. Church – Taylor GCGI. IEng. AAE. FIMI. MIRTE. MSOE. and Mr. Harris MITAI. M.Inst.AEA. MFEA. Eng.Tech. MIRTE. MSOE. MIMI as the qualified experts. He further submitted that insofar as there was an agreement that there could be regeneration, it was not clear on balance of probabilities that this would have worked, the burden is on the Claimant to prove her damages, which she had failed to discharge.

26. Both counsel have approached their submissions on the basis that there is an express or implied difference between the witnesses as to whether one can regenerate the DPF as suggested in the extract from Mr. Quigley. Mr. Church-Taylor and Mr Harris have seen the opinion and seem to accept that it is possible to attempt a forced regeneration. I attach some weight to the line. "Neither expert is in a position of knowing…whether it will regenerate with a forced DPF regeneration".[15] This suggests to me that all three witnesses agree that it is possible to achieve a forced regeneration in certain circumstances. The difference in opinion is not connected with the procedure but the likely prospect of success. Mr Quigley seems to suggest in his answers to Part 35 questions that regeneration is a simple procedure and to discount the suggestion of the joint experts that it may not be successful. Plainly this is not the view of the joint experts who are unsure that the procedure would be successful and go into some detail about the cost of replacement, seeing that as a distinct possibility.

27. I prefer the evidence of Mr. Church – Taylor and Mr. Harris. I take into account that they are both highly qualified in the field, whereas Mr. Quigley's qualifications are unclear. I also factor in that Mr. Quigley was instructed by the Claimant's Claims Management Company to inspect the vehicle before these issues were known about. Plainly he has a contractual relationship with the Claimant's advisers and is potentially less independent than the parties' chosen experts. In this respect I find that there is less balance in the answers given by Mr. Quigley and to that extent they appear more partisan. Thus the experts in their joint statement properly acknowledge that they know not if the warning light was illuminated at the time of the accident. Mr Quigley in his replies simply dismisses the possibility with the comment that there was no supporting

[15] Paragraph 2.13 of the joint statement [698]

evidence to suggest it was lit.[16] With a wry smile, I observe that not only was there supporting evidence, but I have found it persuasive. I am also concerned about the accuracy of Mr. Quigley's report. In the Part 35 questions the Defendant noted that he made no mention of the fact that the Claimant's vehicle had no MoT. In his replies he admitted that he checked the MoT but omitted to mention it due to an 'administrative oversight'. Further he seems have included in his estimate for rectification items that could not possibly have arisen from the accident.[17] This detracts from the reliability of his evidence. I also note that both experts have disagreed with Mr. Quigley about the cause of the DPF trip which further undermines the weight that I can attach to the report.

28. Accordingly I am satisfied that the DPF was clogged at the time of the accident, and this was indicated by a warning light on the vehicle console. I am satisfied in accordance with the expert evidence that it is possible to regenerate the DPF using the procedure identified by Mr. Quigley in the above extract. As Mr. Church-Taylor and Mr. Harris opine it is not possible to know on balance of probabilities whether the DPF would regenerate with a forced regeneration. In the event that a replacement DPF filter was required then it is agreed that the effect on the Pre Accident Value is £1,000. Thus I am in a position of knowing that the vehicle had a fault but having insufficient evidence to say that the figure proposed by the Claimant is correct. I accept Mr. McGrath's submission that the burden of proof lies on the Claimant, which she has failed to discharge. I award £3,500 for the pre-accident value.

CREDIT HIRE – GENERAL OBSERVATIONS

29. These are sought at £145,524.48 in the Updated Schedule. Predictably this has been the focus of the dispute between the parties. The following issues arise:

    i) A causation issue. Mr McGrath argued that, in the event that the vehicle had no MoT then the Claimant is seeking compensation for a vehicle she was not permitted to use. Hence there is nothing to compensate.

    ii) Ex turpi causa ('Illegality'). An alternative to the Defendant's primary position was that even if causation were established then the Claimant is not permitted to ground a claim on illegality.

    iii) A third issue which was not mentioned in Mr. McGrath' skeleton was that the Claimant should not be permitted to rely on impecuniosity because she was the director of a limited company and had failed to disclose the bank accounts in breach of an unless order.

    iv) Need. Mr. McGrath says that on any basis the Claimant did not need a car for the first two weeks, and this should be deducted.

    v) There is a predictable argument about the rate of hire based on the written rates evidence.

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[16] Reply 2(f) [707]

[17] See paragraph 2.7 of the joint statement where the experts comment that Mr. Quigley has included the bumper cover and impact absorbers have been included as they relate to damage on the other side of the car and the experts are unable to evidence why they were included. [696]

30. In terms of context there was very little evidential dispute. It was accepted by the Claimant that her vehicle did not have a MoT at the time of the accident. Reference to the MoT records revealed a dismal history in relation to the MoT.[18] Between 22nd June 2016 and 5th December 2016 the Claimant drove her vehicle without a MoT. The following year the car was produced for MoT on the 5th December 2017, when it failed its test. Between the 5th and 14th December 2017 the Claimant continued to drive her car for a further 312 miles before it passed its test on 14th December 2017. That MoT expired on the 13th December 2018 and the accident occurred on the 17th January 2019, over one month later. The Claimant accepted this history, and it is non-controversial. The experts are agreed that the DPF issue means that the car would have failed its MoT, although it was capable of being driven.[19]

31. It is accepted that the Claimant was driving to work at the time of the accident and was not driving directly to a pre-arranged MoT test. Her evidence was that a colleague had mentioned that their car was due a MoT test and that this triggered a realisation in the Claimant that her car was also due a MoT. She told me that she had checked the paperwork in the car and realised that the MoT had expired. As a result she had booked the car in for a MoT test later on the day of the accident with a company, Mr. Clutch. It was her intention to have the car tested during her lunch break. She was unable to provide any supportive evidence of the appointment. There was nothing from the garage because their records were destroyed. She told me that she thought it was permissible to drive the car because a MoT test had been booked. She did confirm that she had driven the car throughout the period between booking the MoT test and the accident. This was similar to the explanation for driving the 312 miles which she blamed on the mechanic at that time who said she could probably get away with driving it. That in her evidence was the opinion of an expert and thus she could lawfully drive the car.

32. Understandably this was the most defensive phase in the Claimant's evidence, I found her explanations for the multiple breaches of the relevant law unconvincing. She is an intelligent woman who is unlikely to have genuinely believed that she could drive her car in December 2017 because a mechanic thought it was acceptable and repeated this conduct in the time leading up to the accident. This was not credible evidence. Similarly I was concerned at the lack of any collateral evidence that she had indeed booked a MoT test for lunchtime on the 17th January 2019. I would have expected some evidence from the garage and there was nothing to support her version of events. Even if some records had been destroyed, one might have expected some collateral material in the form of text messages or an email confirming the appointment. On balance, I am not satisfied that there was a MoT test booked for that day. To a certain extent this is of limited material value, because on any account it was accepted that the vehicle was not being lawfully driven on the road at the time of the accident.

33. It is also relevant to record that the Claimant's evidence was that she did not purchase a new car when the hire period came to an end. She did not do this because she could not afford a car. I was taken to her bank statements which demonstrated that she was consistently overdrawn and did not seem to have funds to repair or purchase a car.

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[18] MoT history [533]
[19] See joint statement, paragraph 2.13

CREDIT HIRE: CAUSATION

34. Mr. McGrath accepted that the Defendant was liable to compensate the Claimant for damage flowing from being unable to use her car. The kernel of his submission was that she was unable to use this car on the road and thus there was nothing to compensate. He accepted that this argument was only good for the period between the accident and the date when I found that the car could be lawfully used on the road again. Thus if I decided that the car had been booked in for a MoT test on the 17th January 2019 and that it would have passed, then there was little value in the argument. However, if I found that the vehicle would never have received a MoT then there was nothing to compensate. In short the Claimant is seeking compensation for a vehicle she is not permitted to use on the road. On the facts Mr. McGrath asked me to find that the Claimant would not have had the vehicle put into a roadworthy condition. He reminded me of the evidence of the two experts that, on the lowest estimate, this car was going to cost £600 to £900 to repair. Manifestly that was beyond the means of the Claimant given that she had not purchased a replacement car and given the state of her finances. Thus Mr. McGrath concluded that there should be no award for credit hire because causation was not made out.

35. Mr. Eastwood's primary submission was that this was simply the illegality argument in alternative clothing. Essentially the Defendants are arguing that they should not compensate the Claimant because it was illegal to use her car on the road. For reasons I return to he says that the illegality argument is not applicable in this case. He submitted that I should find against the Defendant on the causation argument. In his submission the relevant principle was *restitutio in integrum*. The Claimant was entitled to be put back into the position that she was in prior to the accident. Before the accident she had a driveable car and was entitled to have a driveable car while her car was being repaired or replaced. In this respect the lack of a MoT was a red herring. This vehicle was physically driveable and that was what the Claimant was entitled to expect.

36. In my judgment Mr. Eastwood's argument fails to acknowledge an important distinction between a car that can be driven ('a driveable car') and a car that can be lawfully used on the highway ('a useable car'). As Mr. McGrath reminded me the authorities require the Defendant to recompense the Claimant for loss of use of the car. This is an important distinction because, while the car could plainly be driven, it could not be used on the road because it had no MoT. Mr. McGrath made an important concession that demonstrated the difference between a causation argument and an illegality argument. He conceded that if the car was rendered roadworthy with a MoT then the causation argument ceased at that point. Of course had this been an illegality argument in disguise then it would be of no consequence that the car was later rendered legal, the illegality argument would defeat the entire credit hire claim.

37. The fact of the matter is that the Claimant had a car that was driveable but, to all intents and purposes unusable for the purpose that she needed, namely to drive on the public road. Mr Eastwood suggested that because the vehicle was driveable it could still be used, for example off road or on an estate. That is very true and if there was evidence that this Claimant would have put the vehicle to that use then she would be entitled to damages within that context. However the entire case was advanced on the basis that this Claimant wanted to use her vehicle on the road, particularly to travel to work. Accordingly she is not entitled to recover credit hire until such time as she could have used the car on the road.

38. For the purpose of this consideration it is important that the Claimant was impecunious throughout the period from the accident until trial. I make this as a finding of fact as opposed to deciding that the Claimant was entitled to rely on the fact, by virtue of the directions order. I detected that Mr. McGrath, and I were somewhat surprised to hear from the Claimant that she had not bought a replacement car when the hire came to an end and that she was constrained to catch three trains, a bus and to walk to get to work. She told me that she did not have access to funds to replace the car. As I have indicated, this was confirmed by her financial disclosure.

39. This brings into sharp focus the discussion in relation to the pre-accident value. I return to my findings that there was a problem with the DPF. I have been unable to accept that it could be simply cured by running at low speed as Mr. Quigley suggested and the evidence is that a replacement would have cost at least £600 to £900. I also note that there were a number of additional faults recorded on the engine electronic control unit, though no further detail was provided. It seems that this is not an isolated fault with the car. Thus on balance I am satisfied that the car would not have passed the MoT test had it been presented on the day of the accident. For the reasons that I have rehearsed, on balance it was likely to require a new DPF. The question I have to ask is "when, on the evidence do I find on balance of probability the vehicle would have been rendered legal to drive on the road, so I properly compensate for loss of that use?" At this point the clear evidence from the financial disclosure and the Claimant's oral evidence provide the answer. It is plain from the approach taken by the Claimant to a replacement vehicle that these sums were beyond her means and that she has to endure a tortuous journey to get to work. There is no evidence that the Claimant would ever have been able to render the car useable on the road and accordingly I have come to the conclusion that the causation argument succeeds and thus I award nothing for the credit hire element because there is nothing for the Defendant to compensate.

ILLEGALITY (EX TURPI CAUSA)

40. I refer to my finding on the recovery and storage charge as set out above. Paragraph 12 of the Defence pleads:

> "….The Defendant notes that the said Audi was without a valid MoT at the time of the collision and avers that the claims for hire, recovery and storage are barred by the doctrine of *ex turpi causa* as set out in more detail in the attached counter schedule"[20]

The counter schedule addresses the illegality argument at paragraphs 2-5. In essence reciting the MoT history, noting that the Claimant's witness statement did not address the issue, repeating that the Claimant is barred from claiming hire, recovery and storage and noting that Mr. Quigley failed to mention that the car had no MoT. Although I have accepted the uncontroversial quantum figure for recovery and storage, any award is subject to my finding on *ex turpi causa*. Dependant on my finding, this issue has the potential to provide an additional ground for disallowing the hire charge.

41. Mr. McGrath submitted that the Claimant should not be permitted to recover the hire charge by reason of her illegality arising from the use of her car on the road at the time of the accident without a valid MoT certificate. He conceded that "The illegality, or

[20] [32]

immorality, of the claimant's own actions must be regarded as both serious and related to the events from which the claim to a remedy arises". [21] He referred me to Clerk & Lindsell's summary:

> 'At its simplest it is a matter of public policy that a claimant is not permitted to ground a claim on illegality', and note that this too might apply to part of a claim rather than defeating the entire cause of action (*Hewison v Meridian Shipping Pte Ltd* [2002] EWCA Civ 1821; [2003] ICR 766.)

He attached some importance to the judgment of Tuckey LJ in *Hewison* at paragraph 51;

> 51.. On this analysis there is no fundamental difference of approach between the two judgments. Ward L.J's discussion is illuminating but I think there is a risk that it invites an over structured approach to the question. Illegality may affect a tort claim in many ways ranging from an essential part of the story giving rise to liability to some remote aspect of quantum. For this reason I favour a broad test of the kind proposed by Clarke L.J. viz: is the claim or the relevant part of it based substantially (and not therefore collaterally or insignificantly) on an unlawful act? Such a broad test has the merit of simplicity. It does not involve the judge having to make very specific and difficult value judgments about precisely how serious the misconduct is or whether it would result in imprisonment or whether the claimant's loss is disproportionate to his misconduct. I agree with what McLachlin J. said in the passage cited by Ward L.J. in para. —
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> > … the law must aspire to be a unified institution, the parts of which — contract, tort, the criminal law — must be in essential harmony. For the courts to punish conduct with the one hand while rewarding it with the other would be to "create an intolerable fissure in the laws conceptually seamless web".
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> A broad test enables this objective to be achieved; a more structured one might not.
>
> 52.. But whatever test or tests one applies I cannot agree with Ward L.J.'s conclusion on the facts of this case. The question is not whether the appellant's claim as a whole is based on an illegality. It is not. Nor does any question arise as to whether the money he earned working for the respondents has to be repaid. The alleged illegality arises specifically in relation to his claim for future loss of earnings. This part of the appellant's claim can only be based on the assertion that he would have gone on working at sea by continuing to deceive his employers into believing that he was not suffering from epilepsy. Whether this would have amounted to one or more criminal offences does not really matter. The fact is that (however understandable) the appellant's future employment was dependent upon his continuing deceit of his employers. This deceit was not therefore collateral but essential to establish this part of the claim and could not possibly be described as insignificant in view of the risks involved to the appellant, those with whom he would work and his employers."

Applying the above to a similar situation Mr. McGrath referred to *Agheampong v Allied Manufacturing (London) Limited* [2009] Lloyds IR (2008, unreported, transcript) in which HHJ Dean QC applied the decision in *Hewison* to a situation where the Claimant was driving without insurance. Closer to the facts of this case is the decision in *Morgan*

[21] Clerk & Lindsell On Torts (23rd ed.) – paragraph 3-02

v Bryson [2018] MIQB 12, Burgess J, where the High Court of Northern Ireland barred a claim where a person was driving without a MoT and that could have affected the insurance cover. The court held:

> "9. While the court accepts that these offences are not at the most serious end of the legal calendar, nevertheless they are not insignificant offences. One addresses the roadworthiness of car, which if not roadworthy can cause injury and even death. The requirement for insurance is recognised as important, to underwrite any indemnity for a loss incurred by other parties, and it is recognised in being part of an offence of causing grievous bodily harm or death by dangerous driving without insurance."

Additionally Mr. McGrath has referred me to the decision of HHJ Catherine Brown, in *Owusu v Greencore Group Limited* (unrep. Canterbury CC, 20 July 2020). He explained that the court considered all the above authorities (including *Jack v Borys* which is relied on by the Claimant) and dismissed the claim for hire charges based on the principle of *ex turpi causa* and that the continued use of the vehicle would be illegal without a valid MoT.

42. Core to Mr. McGrath's argument was the existence of a nexus between the illegality and the action itself. Thus he suggested "it is generally enough to identify the illegal act and demonstrate the dependence of the cause of action upon the facts making it illegal"[22] (see *Patel v Mirza* [2016] UKSC 42; [2017] AC 467). He has referred me to paragraph 120 of *Patel*:

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

42. Turning to the facts of this case, Mr. McGrath referred to the fact that this car was some eight years old and had a recorded mileage of 99,257[23]. He took me through the unfortunate MoT history as I have described it and emphasised that the evidence suggested that the car would not have secured a MoT test had it been presented on the day of the accident. He addressed the three aspects identified in *Patel*. In terms of the underlying purpose of the prohibition he submitted that this was to ensure the regular

[22] See Defendant's skeleton – paragraph 32.
[23] See inspection report of Mr. Quigley. [109]

testing of vehicles and that vehicles that were not roadworthy were driven on the roads. He stressed the direct link between the prohibition and the fact that this was an unroadworthy car being driven on the road. To allow the claim would undermine the very purpose of the prohibition. He suggested that this also encompasses the public policy engaged. Finally and in relation to proportionality he addressed this in his skeleton argument in the following passage:

> "if she (Claimant) succeeds in her claim she will recover the value of her vehicle, have had the benefit of a substantial period in a virtually new prestigious Mercedes, recover consequential losses to assist with her accident management including vehicle recovery and storage and impose the cost of the lengthy and prestigious hire on to the NHS. The denial of a claim for loss of use is a proportionate response."

43. For the Claimant. Mr. Eastwood relied on his skeleton and his predecessor's skeleton. His point of departure was that this was a matter of public policy as opposed to a defence *per se*. It is a principle relating to public policy and is there not for the defendant's convenience. The Claimant's argument is that *ex turpi causa* "acts as a measure of last resort to deprive litigants of any legal address where it is necessary to do so to prevent the law itself being brought into disrepute."[24] As such he typified the defence as being opportunistic and trying to use illegality to achieve a wholly disproportionate end. In this respect that Claimant relied upon the words of caution contained in *Saunders v. Edwards* [1987] 1 W.L.R. 1116:

> "Where issues of illegality are raised, the courts have (as it seems to me) 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 seeking to pursue or enforce an object or agreement which the law prohibits. On the other hand, it is unacceptable that the court should, on the first indication of unlawfulness affecting any aspect of a transaction, draw up its skirts and refuse all assistance to the plaintiff, no matter how serious his loss nor how disproportionate his loss to the unlawfulness of his conduct.
>
> … I think that on the whole the courts have tended to adopt a pragmatic approach to these problems, seeking where possible to see that genuine wrongs are righted so long as the court does not thereby promote or countenance a nefarious object or bargain which it is bound to condemn. Where the plaintiff's action in truth arises directly ex turpi causa, he is likely to fail… Where the plaintiff has suffered a genuine wrong, to which allegedly unlawful conduct is incidental, he is likely to succeed."

Thus the mere existence of illegality is not enough *per se* to engage the doctrine of *ex turpi causa*. There has to be more than that.

44. In Mr. Eastwood's submission illegality can only be relied upon in limited circumstances and referred me to the guidance in *Vellino v Chief Constable of Greater Manchester* [2001] EWCA Civ 1249 [pgs. 72 – 90] in which Sir Murray Stuart Smith summarised the principles as follows:

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[24] Supplemental Skeleton – 5.12.21 – paragraph 3.

"From these authorities I derive the following propositions:

1. The operation of the principle arises where the claimant's claim is founded upon his own criminal or immoral act. The facts which give rise to the claim must be inextricably linked with the criminal activity. It is not sufficient if the criminal activity merely gives occasion for tortious conduct of the Defendant.

2. The principle is one of public policy; it is not for the benefit of the Defendant...

3. In the case of criminal conduct this has to be sufficiently serious to merit the application of the principle. Generally speaking a crime punishable with imprisonment could be expected to qualify. If the offence is criminal, but relatively trivial, it is in any event difficult to see how it could be integral to the claim. …"

The Claimant suggested that this represents a high threshold which, properly prevents the floodgates opening and the law being brought into disrepute in failing to provide any remedy against a person who has been found to be a wrongdoer as a tortfeasor. Mr Eastwood relied on the decision in *Delaney v Pickett* [2011] EWCA Civ 1532, where the purpose of the Claimant's journey was the illegal transportation of illegal drugs for the purpose of being trafficked. He argued that this perfectly demonstrated the distinction between the public policy and the benefit to the unmeritorious Defendant. The court found:

> "Viewed as a matter of causation, the damage suffered by the claimant was not caused by his or their criminal activity. It was caused by the tortious act of the defendant in the negligent way in which he drove his motor car. In those circumstances the illegal acts are incidental and the claimant is entitled to recover his loss."

He further relied on the case of *Jack v Boryz* (19/12/2019, unrep, Newcastle Upon Tyne County Court) in which HHJ Freedland described that "It is a novel proposition that somebody who does not have an MOT certificate for their car which they are driving is thereby guilty of a serious criminal offence.". He found that *ex turpi* would only arise where there was serious criminal behaviour.

45. In Mr. Eastwood's submission the Supreme Court in *Patel* and, more recently, in *Stoffel & Co v Grondona* [2020] UKSC 42 demonstrate that the highest courts are taking a more restrictive view of the application of the doctrine, as the doctrine failed in both cases. In his submission the central issue is whether an application of the rule would damage the integrity of the legal system itself.

46. Applying this jurisprudence to the facts of the case, the Claimant submitted;

i) The underlying policy under s.47 Road Traffic Act 1988 would not be enhanced by the dismissal of the Claimant's relevant claims.

ii) That the Claimant was not acting deliberately but was merely guilty of oversight unlike the Claimant in *Agheampong*.

iii) To deny the claim would undermine an equally important policy that drivers should drive on the road with the skill and care of the reasonable driver. The law of tort should not be used as a substitute for criminal penalties which are the province of the criminal courts.

iv) Additionally it was argued that the rights of innocent third parties such as the credit hire company would be affected, they hire cars in all innocence and should not have their recovery impaired by matters they knew nothing of. This is a paradigm case, where the Claimant would recover her damages for personal injury and yet the innocent credit hire company would lose their more significant outlay.

v) Perhaps in some contradiction to the foregoing point, Mr. Eastwood argued that the hire company would have little redress and that the refusal of the claim would probably bankrupt the Claimant. In his submission this would be a wholly disproportionate response.

vi) The lack of the MoT was not central to the claim and is entirely irrelevant. In this respect the Claimant is not seeking to 'profit' from her wrong, merely be compensated for the loss occasioned her by the negligent driving of the Defendant's ambulance.

vii) As Mr. Eastwood suggested in his skeleton, having no MoT, "is the sort of error which can be commonly made in the course of one's lifetime even if someone is of good character. In any event, failing to possess an MOT is not an imprisonable offence and does not pass the high threshold of criminal conduct required for censure".

47. In resolving this issue I recognise that this is an issue of public policy, that much was made clear in *Patel* and *Stoffel*. The focus of the enquiry is not whether the Defendant has a defence but whether to permit the Claimant to recover from the tortfeasor damages that she would otherwise be entitled to. In short whether to permit recovery would damage the integrity of the legal system producing inconsistency and disharmony. The application of the doctrine is not to visit some punishment on the Claimant for her failure to procure a MoT certificate. Since the decisions in *Patel* and *Stoffel* it is plain that the court should conduct an examination of the policy considerations applying the trio of necessary considerations identified by Lord Toulson in *Patel* at paragraph 101,

> "So how is the court to determine the matter if not by some mechanistic process? In answer to that question I would say that one cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without a) considering the underlying purpose of the prohibition which has been transgressed, b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality. We are, after all, in the area of public policy. That trio of necessary considerations can be found in the case law."

Further guidance was provided in *Stoffel* at paragraph 26

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

This provides helpful guidance as to the nature of the enquiry at each of the three stages of the consideration. Save where I indicate to the contrary, I am not assisted by the refence to the caselaw that pre-dated the decision in *Patel.* Prior to that decision the courts were seeking to find a common framework for the analysis of the application of the doctrine and producing different answers to that vexed question. It is only with *Patel* that we have guidance from the Supreme Court as to how to resolve the issue.

48. The first consideration is the purpose of the transgressed prohibition and whether it would be enhanced by the application of *ex turpi causa*. As *Stoffel* makes clear, this is a relatively high level consideration. In this respect I am assisted by the observations of the court in *Morgan* at paragraph 9. Burgess J recognised that the focus of the policy was on the roadworthiness of the vehicle and made the observation that unroadworthy vehicles can cause injury or even death to innocent road users and bystanders. I adopt these observations. I would go slightly further. An important component of the MoT test relates to the emissions from the vehicle. This is a later addition to the requirements of the test. It recognises that air quality, especially in cities such as London, is a matter

of concern going to the general health of all the residents. As such, cars which emit excessive quantities of noxious fumes have the potential to harm each and every person in the city. Indeed there has been a well publicised case of a child whose death certificate recorded air quality as a cause of death. Another aspect of emissions are the global warming issues. I make these observations because Mr. Eastwood sought to argue that modern cars are generally roadworthy and thus the policy is less important. In his submissions he said "undoubtedly, with the dramatic improvements in production and vehicle safety MOTs are not quite as important as at the time of the regulatory offence was created under the Road Traffic Act 1988."[25] I reject that approach. The seriousness of emissions is recognised in London by the increasingly onerous provisions of the Ultra Low Emission Zone. This is plainly an aspect of the policy.

49. A further aspect of the MoT relates to the insurance of vehicles. In *Morgan* Burgess J referred to the juxtaposition of the MoT Certification and insurance cover. In *Morgan* the insurance policy of the Claimant "provided that the contract of motor insurance did not cover claims arising from any accident, injury, loss or damage that happened while the insured car was being kept or used without the current Department of Transport Test certificate, if one was needed." Thus there will be situations where the absence of a MoT certificate will affect the insurance cover of the driver. Before me this led to a sterile argument about whether that situation pertained in this case. It seems that the Claimant had not, for whatever reason, disclosed her policy of insurance. In my judgment that is not relevant to the first stage of *Patel*. In terms of recognising policy it is enough to note that there will be insurance policies that do depend on the roadworthiness of the car as evidenced by the MoT certificate. One can understand why a prudent insurer would, as in *Morgan*, require that the vehicle was roadworthy in order to insure it. Thus an aspect of public policy is to recognise that, in some cases, the absence of MoT ineluctably leads to persons driving on the road without insurance, with the attendant difficulties and restrictions on recovery for some heads of damage.

50. In this particular case, the focus of the prohibition in question is the protection of the public in the forms that I have identified. It is important that vehicles used on the road meet minimum standards. In my judgment there is a tension between saying on the one hand that the public require protection, but on the other hand a transgressor will be compensated and on occasions, such as this case, profit from the fact that their car was being illegally driven on the road. It is illogical to say, at a relatively high level, that those who expose the public to risk should not have the consequences of that situation visited upon them. I take into account that this was the view of the court in *Morgan*. Of course this will not be the outcome in every case, as the third of the trio considerations permits the court to consider the proportionality in the individual case and I make it clear that this observation is cast in general terms.

51. I go on to consider the other relevant public policies that might be undermined by an application of *ex turpi causa*. Again this is a relatively high level consideration as *Stoffel* makes clear. Mr. McGrath submitted that there was no countervailing public policy. The public policy urged on me by Mr. Eastwood is that tortfeasors should be required to compensate an innocent party for the consequences of their negligence. He argued that this principle should not be eroded by the happenstance of factors that engage *ex turpi causa.* Mr. Eastwood submitted, "The public conscious would not be offended if the court merely allowed the Claimant to be put back in the position she

[25] Claimant's second skeleton; 5.12.21 paragraph 14(iv)

was before the accident occurred." I find it impossible to distinguish this case from the underlying tort in *Stoffel*. That case was based on the negligence of the solicitor. The court observed:

> "Important countervailing public policies in play in the present case are that conveyancing solicitors should perform their duties to their clients diligently and without negligence and that, in the event of a negligent breach of duty, those who use their services should be entitled to seek a civil remedy for the loss they have suffered. To permit solicitors to escape liability for negligence in the conduct of their clients' affairs when they discover after the event that a misrepresentation was made to a mortgagee would run entirely counter to these policies. While denial of a remedy may sometimes be justified in such circumstances, this should only be on the basis that to afford a remedy would be legally incoherent." (paragraph 32)

I am against Mr. McGrath. Altering references to 'drivers' for 'solicitors', the background is indistinguishable and there is plainly a public policy in expecting drivers to drive diligently and without negligence. Where they do not, public policy requires that they compensate their victim. As the above extract makes clear, it is permissible to deny the remedy but only where it would be incoherent to afford a remedy.

52. I am conscious that a consideration of the factual matrix largely belongs to the third consideration. However the relationship of the illegality to the damage suffered is likely to illuminate the coherence or otherwise of invoking the doctrine in any given circumstance. Thus in *Delaney* the Claimant was using his vehicle for the purpose of transportation of the drugs. As the court observed, there was no link between the transportation of the drugs and the damage caused. In such circumstances it would be incoherent to deny an innocent party compensation according to law, for a matter of context unconnected with the tort committed. In this case Mr. Eastwood submitted that this case was akin to *Delaney* and that the use of the car was irrelevant for the purpose of compensation. Mr. McGrath saw the use of the car as central. In my view Mr. McGrath's view is to be preferred. In *Delaney* the use of the car was entirely incidental to the commission of the tort. In this case the illegal presence of the vehicle on the road was central to the damage that resulted. This is demonstrated by the fact that the damages sought in relation to *ex turpi causa* are all vehicle related damages. Unlike *Stoffel* the vehicle is central to this case. In short allowing compensation is to reward a driver for using a vehicle when she should not. This is indicative of a degree of incoherence. It is suggested that the Claimant is not relying on her illegality to establish her cause of action. I do not accept that insofar as it must be recognised that but for her illegality she would have suffered no loss.

53. This is not an end to the policy considerations. In the Claimant's first skeleton it is argued,

> "A further countervailing public policy which would arise is the effect that a refusal of the remedy to the Claimant would have on the rights of others, in particular the credit hire company which hires a vehicle to Claimant without notice of whether she had a valid MOT on her own vehicle or any thought

> that such might deny her the remedy of claiming for her losses thereby arising"[26]

I am afraid that I do not consider that this is a significant countervailing policy. In truth I am not sure that I can disentangle the self interest of the credit hire company from the alleged public policy in the above extract. It is perfectly simple for the credit hire company to address this issue. All they have to do is require that the potential hirer to produce their MoT certificate, insurance policy document and such other paperwork as the potential hirer requires in relation to the damaged car. Then the credit hire company can satisfy themselves that the car was lawfully on the road before hiring the car to the user on credit. I can see that the scrutiny might not accord with their business model, but it is certainly open to them. Indeed this would be a further advantage of imposing the doctrine of illegality in relation to cases of this nature. In many cases, those who should not have been driving on the road would not be able to access credit hire arrangements and potentially profit from their misdeed. Thus there is a degree of consistency in the approach.

54. Plainly there is a tension between the two public policies that I have identified. Both seek to promote desirable aims, for the reasons I have outlined, I consider that, providing the application of the policy is proportionate then, in circumstances such as this the doctrine of *ex turpi causa* should apply.

55. The approach outlined in *Patel* and *Stoffel* permits the court to descend from the high level considerations engaged in the first two necessary considerations to the facts of the case itself. This permits the court to consider the proportionality of the application of illegality in each case. The law will be drawn into disrepute if a slavish application of the policy leads to disproportionate results. The consideration of the relevant factors is, of necessity, multi-faceted.

56. Before turning the to individual factors I would make some preliminary observations. Naturally Mr. Eastwood has sought to characterise the Claimant's conduct as oversight that was to be rectified on the day of the accident. I do not accept this analysis. The harsh truth is that this Claimant was a serial offender. I have already set out the lamentable history of her MoT testing. I have not accepted that her car was booked in for a test on the day in question and the evidence suggests that the car would not have passed its MoT had it been presented on the day in question. In submissions Mr. Eastwood submitted that it was relevant that this was an act of omission as opposed to a deliberate act. I accept that this is the case. While Mrs Agbalaya may have been somewhat cavalier with MoTs, I do not consider that she was deliberately breaching the law. However the effect on public policy and the possible risks that I have already identified are present, whether or not the acts are ones of commission as opposed to omission.

57. I make the further observation that the size of the claim is not necessarily an overriding consideration in relation to proportionality. This case demonstrates the point. Mr. Eastwood was at great pains to emphasise the size of the credit hire claim and that it would be wholly disproportionate to disallow a claim of over £145,000 for a moment's inadvertence. The reality is that I have already dismissed the credit hire claim for other reasons and thus this aspect of the claim is only directly relevant to £1,294.80. In short

[26] Claimant's first skeleton; 7.11.21 paragraph 6(c)

less than 1% of the claim. If the size of the claim were the major consideration then one might say that the application of the doctrine of illegality was proportionate to 1% of the claim but not to a claim representing over 95% of the claim. Plainly this is nonsense, a consideration should not be subject to the vicissitudes of quantum. Thus I have to step back and take into account that there is a sizeable credit hire claim and that the doctrine of *ex turpi causa* could represent an additional reason for disallowing the credit hire claim, but this is only a part of the consideration.

58. In relation to the issue of whether the Claimant is seeking to profit from her illegality As the Supreme Court observed in *Stoffel;*

> "For one branch of the law to enable a person to profit from behaviour which another branch of the law treats as criminal or otherwise unlawful would tend to produce inconsistency and disharmony in the law and so cause damage to the integrity of the legal system

I am of the view that this Claimant made a significant profit from the credit hire and I take that into account. This is contrary to the submissions of Mr. Eastwood who suggested that, "The Claimant does not seek to profit from her wrongdoing she seeks restitution. This is a founding principle of tort law and all those who come before the law should be treated equally. The Claimant has already been found to be the innocent victim of this accident and, therefore, ought to be entitled to put back in the position she was pre-accident"[27]. I have already alluded to my view that the Claimant did profit from the accident and I consider the above analysis is flawed in that it fails to recognise the illegality of the Claimant using her vehicle on the road.. The difficulty arises from Mr. Eastwood's insistence that a car that could not be lawfully drive on the road was the equivalent of a hire car that could be driven on the road. In short making no distinction between a driveable car as opposed to a useable vehicle. The evidence in this case is stark. The Claimant's car had no MoT, and the experts consider that her car would not have passed a MoT test. I have found that she would have had to spend somewhere between £600 and £900 on repairing the car. We know from the Claimant's bank accounts and her actions that she did not have the required money. Thus, when the hire ceased the Claimant had to catch three trains, a bus and to walk to get to work. For the entire period of hire she was relieved of this burden and able to use a car lawfully on the road, whereas before the accident she had no vehicle that she could legally use on the road. That represented a significant benefit to her, and it is not possible to disentangle her illegal actions from that benefit. Thus I conclude that the Claimant did profit from her illegality.

59. In consideration of proportionality, I have been addressed at length about the fact that the failure to have a MoT was not an imprisonable offence and does not pass the high threshold of criminal conduct worthy of censure. I am instinctively cautious about an attempt to grade the seriousness of an offence in the way in which Mr. Eastwood has suggested. I cannot see that there is anything in *Patel* or *Stoffel* that would require the court to embark on such and exercise. Indeed I note the comments of Lord Sumption at paragraph 245 of *Patel,*

> "I would also reject the dicta, beginning with *Tappenden v Randall* (1801) 2 B&P 467 , 470 and *Kearley v Thomson* (1890) 24 QBD 742 , 747, to the

[27] Claimant's second skeleton; 5.12.21 paragraph 14(iii)

> effect that there may be some crimes so heinous that the courts will decline to award restitution in any circumstances. There are difficulties about distinguishing between degrees of illegality on what must inevitably be a purely subjective basis."

This echoes the concerns that the court had in *Hewison* about trying to apply value judgments about precisely how serious the conduct must be. I also observe that the seriousness of the offence was one of the factors proposed by Professor Burrows and rejected by the Supreme Court. I do not lose sight of the concession made by Mr. McGrath, that the criminality had to be serious and the *dicta* in some pre *Patel* cases that found this concession. However it seems to me that this misses the focus of the *Patel* decision. The public policy behind the application of the illegality doctrine is concerned with a consistency and coherence of approach within the law. The gravity or otherwise of the illegality is not central to that consideration. Indeed the focus of the first consideration, the reason for the public policy, saps that importance of gravity to the consideration. I would not go so far as to say that an obvious case of a very technical breach of the law could not be taken into account, however I content myself with saying that it will rarely be an important consideration and it is not a relevant consideration for this case. The public policy is clear and the Claimant's illegal conduct was intimately connected with the tort in question.

60. I return to the observations in *Stoffel* what really matters is the end product and that court should strive for a degree of conformity and coherence on the law while keeping a close eye on proportionality. The reality of this case is that there is in place a policy of requiring vehicles to be tested across the battery of requirements of the MoT test. The object is to protect the public. Not for the first time, the Claimant flouted those rules and in doing so potentially put the public at risk. I recognise that she was the innocent victim of the accident. However, had she remained within the bounds of the law, she would not have suffered any injury. As it was, she operated outside the law and made a significant profit from that situation. The hire company have it in their power to ensure that the profit is not obtained, by simply checking that the innocent victim was permitted to drive, before hiring a car on credit hire. Stepping back I do not consider that the application of the doctrine of *ex turpi causa* is disproportionate given the facts of this case. The application achieves a degree of coherence in the law and I thus apply it and disallow the recovery and storage charge. I also observe that, had I not found for the Defendant on the causation issue in relation to credit hire, I would have dismissed the claim applying *ex turpi* causa.

61. That concludes my consideration of the heads of damage and I am not required to consider the additional arguments and the application for relief from sanctions. The outcome is that I award damages as follows:

i)	PSLA	£ 8,000.00
ii)	Hire charges	£ 0.00
iii)	Pre-accident Value	£ 3,500.00
iv)	Recovery and Storage	£ 0.00
v)	Miscellaneous Expenses	£ 0.00

Thus the total award of damages is £11,500.00. I ask counsel to liaise to seek to agree interest. The judgment will be handed down as set out on the face of this draft. The attendance of counsel and solicitors is excused and I will set a further date of one hour to address costs and any other matters. If this can be agreed out of court I will vacate the hearing on the written confirmation of both parties. It only remains for me to thank counsel for their assistance which I now do.