Neutral Citation Number: [2024] EWCA Civ 1479

Case No: CA-2023-001869

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY
Mr Justice Martin Spencer
[2023] EWHC 2159 (KB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 December 2024

Before:

LADY JUSTICE MACUR
LADY JUSTICE NICOLA DAVIES
and
LORD JUSTICE STUART-SMITH

- -

Between:

MAJID ALI

Claimant / Appellant

- and –

HSF LOGISTICS POLSKA SP. Z O.O

Defendant / Respondent

- -
- -

Benjamin Williams KC (instructed by **Bond Turner**) for the **Appellant**
Steven Turner (instructed by **DWF**) for the **Respondent**

Hearing date: 17 October 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 4 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Stuart-Smith:

Introduction

1. The Defendant's lorry negligently drove into the Claimant's Volvo when it was parked and unattended on 20 February 2021. The accident caused damage to the Claimant's car, which rendered it undriveable and took some time to repair.

2. The Claimant had been using his car regularly both for work and for social, domestic and pleasure purposes. The Recorder found as a fact that the Claimant had a need for a replacement for his car and he did not have an alternative vehicle available to him that it would have been reasonable for him to use while his vehicle was being repaired. In those circumstances, and expressly without prejudice to the defences of *ex turpi causa* and the "causation defence" being advanced by the Defendant, the Recorder found that it was reasonable for him to hire a replacement vehicle in mitigation of any loss by reason of being unable to use his car because of the accident. While his car was being repaired, he hired a replacement vehicle on credit hire terms. The period of hire was 36 days; the total hire charges were £21,588.72.

3. Only two additional facts need to be mentioned here in describing this entirely commonplace accident. First, there was no evidence that the Claimant's car was in any way unroadworthy prior to the accident. Second, the last MOT for the car had expired some 4 ½ months before. The trial judge, Mr Recorder Charman, said that the Claimant had been "careless"; but (a) he did not find that the Claimant was positively aware that the MOT had expired and (b) there was no evidence that the Claimant intended to obtain a new MOT certificate in the near future.

4. In claiming the hire charges from the Defendant, the relatively standard form Particulars of Claim pleaded that the Claimant had "suffered loss and damage, loss of use and inconvenience." It was alleged that the Claimant, "having been deprived of his own vehicle, needed alternative transport for the period of hire claimed … ." The hire charges were claimed as special damages, as were the more modest costs of the repairs to the Volvo (£2,184.22) and of recovery of the Volvo to the garage (£354.00).

5. The equally standard form Defence admitted negligence on the part of Defendant's lorry driver. There was a general denial of the claim for hire charges. At its most expansive, paragraph 6 pleaded:

> "Save as admitted, the Defendant avers that in hiring a vehicle the Claimant has failed to mitigate their loss in that they hired a vehicle when it was unnecessary to do so, hired for too long a period of time, hired a vehicle at a cost which was excessive, failed to demonstrate a need for a replacement vehicle and hired an inappropriate vehicle."

Paragraph 11 of the Defence then pleaded that:

> "The Defendant avers that the Claimant's accident damaged vehicle did not have a valid MOT during the period of hire, as such the Defendant refers to the case of *Agheampong v Allied Manufacturing (London) Ltd* and states that the claim for hire

> charges are ex turpi causa. The Claimant is put to strict proof as to the existence of a valid policy of insurance and, in the absence of such documentation the Claimants claim for hire charges should be dismissed."

6. In the Courts below and before us, the Defendant's case has rested on the absence of a valid MOT certificate for the Volvo at the time of the accident. That has given rise to two lines of argument. First, the Defendant relied upon the absence of a valid MOT certificate to support a plea of *ex turpi causa.* In addition, the Defendant argues that there is a separate ground of defence, distinct from the issue of *ex turpi causa*, which it describes as a "causation defence." In briefest outline, the "causation defence" asserts that, because there was no valid MOT certificate for the Volvo, the Claimant suffered no compensable loss when the Volvo was rendered unroadworthy by the Defendant's tort. In response, the Claimant submits that he had been using his Volvo to meet his need for transport and that the Defendant's tort made it necessary and reasonable for him to hire a car while the Volvo was off the road. The Defendant counters this argument by submitting that the Claimant's approach draws no distinction between the loss of use of a vehicle in respect of which there was a valid MOT certificate in existence and the loss of use of the Volvo, in respect of which there was none. The Defendant submits that is wrong in principle and that, while awarding the hire charges as a measure of loss may have been a reasonable consequence had there been a valid MOT certificate in place for the Volvo, it is unreasonable and wrong in the circumstances prevailing in the present case. Whether this second line of argument is appropriately to be described as a "causation defence" may be open to question; but it is a label that has stuck so far and I shall adopt it.

7. Though the Defence's pleading of *ex turpi causa* was specific to the recovery of the hire charges, the Recorder considered it in relation to all claimed heads of damage. The Recorder held that the doctrine of *ex turpi causa* did not preclude recovery of any of the three heads of damage. That finding was not challenged on the first appeal to Martin Spencer J (who described the Recorder's application of relevant principles as "impeccable") and is not challenged before us. However, the Recorder accepted the substance of the causation defence and held that the Claimant could not recover the hire charges or any lesser sum in respect of his loss of use of the Volvo, though he could recover the costs of recovery and repair. On the Claimant's first appeal, Martin Spencer J upheld the decision of the Recorder: [2023] EWHC 2159 (KB). The Claimant now appeals to this Court.

8. The question on this second appeal is whether the Judges below were wrong to reject the claim which was formulated as a claim for the hire charges. The answer to this question is not entirely straightforward; but I think they were.

Relevant legal principles

9. The apparent simplicity of the Claimant's claim for hire charges may be misleading. This is not just because the present case is yet another skirmish-cum-battle in the overall "secular war" between the credit hire industry and defendants' insurers. In order to reach the right answer, it is necessary to bear in mind a number of legal principles, all of which are or may be in play when disentangling the strands and issues that arise on this appeal.

Claims for hire charges

10. In *Lagden v O'Connor* [2003] UKHL 64, [2004] 1 AC 1067 at [27], Lord Hope set out the basic principles underlying a claim for loss of use. There was no evidence that the Claimant would have suffered financial loss as a result of being unable to use his car during the relevant period:

> "But inconvenience is another form of loss for which, in principle, damages are recoverable. So it was open to him, as it is to any other motorist, to avoid or mitigate that loss by hiring another vehicle while his own car was unavailable to him. The expense of doing so will then become the measure of the loss which he has sustained under this head of his claim. It will be substituted for his claim for loss of use by way of general damages. But the principle is that he must take reasonable steps to mitigate his loss. The injured party cannot claim reimbursement for expenditure by way of mitigation that is unreasonable. So the motorist cannot claim for the cost of hiring another vehicle if he had no reason to use a car while his own car was being repaired-if, for example, he was in hospital during the relevant period or out of the country on a package holiday. If it is reasonable for him to hire a substitute, he must minimise his loss by spending no more on the hire than he needs to do in order to obtain a substitute vehicle. If the defendant can show that the cost that was incurred was more than was reasonable if, for example, a larger or more powerful car was hired although vehicles equivalent to the damaged car were reasonably available at less cost the amount expended on the hire must be reduced to the amount that would have been needed to hire the equivalent."

11. To similar effect, Lord Scott of Foscote explained at [76]-[77] that the claim for loss of use of the car caused by the defendant's tort would, if no alternative vehicle was hired, give rise to a claim for general damages, because "he had been deprived of the benefit of having his car available for whatever use he might from time to time decide upon": see also *Dimond v Lovell* [2002] I AC 384, 406C-H per Lord Hobhouse. If a person does not hire a replacement (whether because they have an alternative vehicle or otherwise) it is now usual to compensate them by an award of solatium representing the degree of inconvenience suffered. If an alternative vehicle is hired, the general damages claim typically becomes a special damages claim based on the cost of hire.

12. The position was succinctly summarised by the Court of Appeal (per Aldous LJ) in *Burdis v Livesey* [2003] QB 36 at [147]:

> "The fundamental principle is that a person whose car has been damaged is entitled to compensation for the loss caused. In a case where such loss includes loss of use and he establishes a need for a replacement, he is entitled to the cost of hiring a replacement car … However, the basic principle is qualified by the duty to take reasonable steps to mitigate the loss. What is reasonable will depend on the particular circumstances."

13. Further clarification was provided by Sir Mark Potter P (with whom Dyson and Maurice Kay LJJ agreed) in *Beechwood Birmingham Ltd v Hoyer Group UK Ltd* [2010] EWCA Civ 647, [2011] QB 357 at [48]:

> "… [T]he claim by a corporation for loss of use of a car as a chattel employed in the course of the claimant's business, constitutes a separate class of case from that in which an individual claims in respect of a private vehicle used for convenience rather than profit. … In the former class, an award falls to be made to compensate for financial damage in respect of which the court (which no longer acts with a jury) must do its best to quantify, albeit only by approximation, the loss actually suffered by the business. In the latter class, albeit the court may be concerned with a degree of compensation for fares etc by way of special damage in a case where the owner has been obliged to use public transport rather than his damaged vehicle, the primary element of the award is that of compensation for non-pecuniary loss, ie, the lack of advantage and inconvenience caused by not having the use of a car ready at hand and at all hours for personal and/or family use: see *Lagden v O'Connor* [2004] 1 AC 1067, para 27, per Lord Hope, and *Alexander v Rolls Royce Motor Cars Ltd* [1996] RTR 95, 102, per Beldam LJ."

14. Finally, although the cost of hiring an alternative vehicle is typically adopted as the measure of general damages in a loss of use claim, the need for a replacement car is not self-proving and must be proved by the claimant: see [27] of *Lagden* as set out above. That principle derives from a passage of the speech of Lord Mustill in *Giles v Thompson* [1994] 1 AC 142, 167. Lord Mustill continued that:

> "[although] … it is not hard to infer that a motorist who incurs the considerable expense of running a private car does so because he has a need for it, and consequently has a need to replace it if, as a result of a wrongful act, it is put out of commission, there remains ample scope for the defendant in an individual case to displace the inference which might otherwise arise."

15. In my judgment, when considering these well-established principles and dicta, it is important to bear in mind that the key thing that a claimant has to prove in order to establish a loss of use claim is that, as a consequence of the defendant's tort, they suffered inconvenience which gave rise to a justifiable need for a replacement vehicle. Typically, the inconvenience in question is the inability to satisfy their need to travel conveniently. The remedy is therefore assessed by reference to the claimant's need to obtain convenient transport and the cost of doing so. Proof of that need does not simply depend upon the fact that the claimant had a car which has been damaged; rather it depends upon the claimant proving a need for transport which, as a matter of fact, they were satisfying by using their car until it was damaged by the defendant's tort. That is why the courts have referred to the foundation of the claim being the inconvenience to the claimant caused by the defendant's tort, which sounds in general damages until those general damages are quantified by reference to hire charges and transformed into claims to recover those hire charges as special damages.

Mitigation and betterment

16. It has become conventional to regard the hiring of a replacement vehicle as an act of mitigation, in which case it must be reasonable if the cost is to be recovered from the defendant. This brings into play the second of Harvey McGregor's three rules of mitigation namely that "where the claimant does take reasonable steps to mitigate the loss to him consequent upon the defendant's wrong, he can recover for loss incurred in so doing; this is so even though the resulting damage is in the event greater than it would have been had the mitigating steps not been taken. Put shortly, the claimant can recover for loss incurred in reasonable attempts to avoid loss": see *McGregor on Damages* 22nd Edn at paragraph 10-05. Reasonableness is critical to this analysis. As already outlined, if in truth the claimant would have had no call to use a vehicle and would not have done so during the period that their car was off the road, it would not be reasonable to hire an alternative vehicle and the cost will not be recoverable from the defendant: see *Lagden* at [27], cited at [10] above. Put another way, in such circumstances, the claimant suffers no compensable inconvenience as a consequence of the physical damage to their car over and above the need to repair it. There is therefore no loss to be mitigated during that period. It is the absence of reasonable necessity that underlies the claimant's failure to recover even if the hire charges have been incurred.

17. The principles of mitigation of loss and their close relationship to the principles of betterment in credit hire cases were considered and outlined in *Lagden* by Lord Hope at [32] ff. At [34] he said:

> "It is for the defendant who seeks a deduction from expenditure in mitigation on the ground of betterment to make out his case for doing so. It is not enough that an element of betterment can be identified. It has to be shown that the claimant had a choice, and that he would have been able to mitigate his loss at less cost. The wrongdoer is not entitled to demand of the injured party that he incur a loss, bear a burden or make unreasonable sacrifices in the mitigation of his damages. He is entitled to demand that, where there are choices to be made, the least expensive route which will achieve mitigation must be selected. So if the evidence shows that the claimant had a choice, and that the route to mitigation which he chose was more costly than an alternative that was open to him, then a case will have been made out for a deduction. But if it shows that the claimant had no other choice available to him, the betterment must be seen as incidental to the step which he was entitled to take in the mitigation of his loss and there will be no ground for it to be deducted."

This analysis led to the conclusion in *Lagden* that the claimant was entitled to recover the additional benefits that came with the hire of a car on credit hire terms, since the claimant would have been unable to obtain a replacement car other than by use of a credit hire company which meant that he was not in a position to choose not to receive the additional benefits.

18. After years of litigation, the questions to be asked by the Court when considering a claim for loss of use have been authoritatively established. In *Pattni v First Leicester Buses Ltd* [2011] EWCA Civ 1384, [2012] RTR 17 at [73] Aikens LJ said:

> "To summarise, the questions are: (i) did the claimant need to hire a replacement car at all; if so, (ii) was it reasonable, in all the circumstances, to hire the particular type of car actually hired at the rate agreed; if it was, (iii) was the claimant "impecunious"; if not, (iv) has the defendant proved a difference between the credit hire rate actually paid for the car hired and what, in the same broad geographical area, would have been the BHR for the model of car actually hired and if so what is it; if so, (v) what is the difference between the credit hire rate and the BHR?"

Ex turpi causa

19. The leading authority on the modern law of *ex turpi causa* is *Patel v Mirza* [2016] UKSC 42, [2017] AC 467. Although not a case in tort, the principles established by the Supreme Court are of general application. From the outset, the doctrine has concerned the circumstances in which the court will lend its aid to a person who founds their cause of action upon an immoral or an illegal act: see *Patel* at [1]. It has therefore rested on the foundation of public policy and concentrated primarily on the quality of the claimant's conduct. That remains the case. The two dominant public policy considerations are that (i) a person should not be allowed to profit from his own wrongdoing and (ii) the law should be coherent and not self-defeating. In his analysis of the issues Lord Toulson JSC (with whom the majority of the Supreme Court agreed) said at [101]

> "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."

20. The importance of avoiding "overkill" and ensuring a proportionate response by the civil law was addressed at [104]-[107], including the observation of Bingham LJ in *Saunders v Edwards* [1987] 1 WLR 1116, 1134, that the courts have to steer a middle course between aiding or lending their authority to a person seeking to pursue or enforce an object or agreement which the law prohibits and being unduly precious at the first indication of unlawfulness and refusing all assistance to a plaintiff, no matter how serious their loss or how disproportionate their loss to the unlawfulness of their conduct. At [108] Lord Toulson addressed the need for flexibility and the division of responsibility between the criminal and civil courts and tribunals:

> "Punishment for wrongdoing is the responsibility of the criminal courts and, in some instances, statutory regulators. … The broad

> principle is not in doubt that the public interest requires that the civil courts should not undermine the effectiveness of the criminal law; but nor should they impose what would amount in substance to an additional penalty disproportionate to the nature and seriousness of any wrongdoing."

21. Lord Toulson concluded his judgment at [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."

22. *Hewison v Meridian Shipping Services PTE Ltd* [2002] EWCA Civ 1821, 2003 ICR 766 pre-dated *Patel* but was extensively referred to by both sides. The claimant was employed by the defendants as a merchant seaman and crane operator though he suffered from epilepsy, a condition which prohibited him from working in that capacity. He failed to disclose his condition on several occasions, including in answer to direct questions. On each such occasion his conduct amounted to the criminal offence of obtaining a pecuniary advantage by deception, which was punishable on conviction on indictment by a term of up to 5 years imprisonment. In 1995 he suffered serious injuries in an accident at work. In June 1997 he suffered an epileptic seizure at work which led to his being dismissed by the defendants. On his claim for damages for the 1995 accident, his employers admitted liability for the accident but challenged his calculation of damages for loss of earnings which was advanced on the basis that, but for the accident, he would have continued to work as a seaman until normal retirement age. The Judge dismissed that head of claim on the ground that the claimant was debarred on grounds of public policy from recovering for future loss of earnings as it would have involved him in continuing to deceive his employers by fraudulently misrepresenting that he was not suffering from epilepsy. The Court of Appeal by a majority upheld the decision of the trial judge. It held that there was no principle of public policy that prevented the claimant from pursuing his cause of action for damages for negligence or

breach of statutory duty against the defendants; but that he was debarred from recovering any loss in respect of his future earnings as a seaman.

23. Clarke LJ (with whom Tuckey LJ agreed) drew a distinction between cases of *ex turpi causa non oritur actio* (where the illegality barred the entire claim) and what he described as *ex turpi causa non oritur damnum* (where the illegality barred recovery of one or more heads of damage but not the entire action): see, for example [28]. He recognised that the policy basis for each type of case was closely related; and he regarded the facts of *Hewison* as falling into the second category. At [43] having considered the facts of two authorities that we need not consider further here, he made the important observation that:

> "To my mind, both those cases are examples of what may be described as collateral or insignificant illegality. In my judgment an English court should not deprive a claimant of part of the damages to which he would otherwise be entitled because of the defendant's negligence or breach of duty by reason only of some collateral illegality or unlawful act."

On the facts of *Hewison* the illegality was neither collateral nor insignificant. In order to have earned money as a crane operator he would have had to deceive his employers and commit the serious offence of obtaining a pecuniary advantage by deception.

24. Others have given similar guidance on the level of seriousness of the offending required to bring the principle into play, including the observation of Sir Murray Stuart-Smith in *Vellino v Chief Constable of Greater Manchester* [2001] EWCA Civ 1249, [2002] 1 WLR 218 at [70] that "generally speaking a crime punishable with imprisonment could be expected to qualify": see also *Joyce v O'Brien* [2013] EWCA Civ 546, [2014] 1 WLR 70 at [50]-[52]. The flexibility of this approach is now taken up by Lord Toulson's requirement that denial of the claim should be a proportionate response to the illegality: see [19] and [21] above.

25. In my judgment there are two points that emerge from *Hewison* that are relevant for the present appeal:

    i) *Hewison* was a paradigm application of the principles underlying the maxim *ex turpi causa* and demonstrates that those principles may lead to a denial of the entirety of a claimant's claim ("actio") or a part of it ("damnum");

    ii) *Hewison* is a good example of the flexibility of the common law, particularly in relation to its formulation of remedies and the need to adjust to reflect the harmony of the law and its division of responsibility between the criminal and civil courts: see too *Patel* at [108], cited at [20] above.

26. The adaptive flexibility of the common law's remedies in such circumstances is routinely shown in the Court's approach to claims for damages where there is a whiff (or more than a whiff) of illegality about a claimant's conduct. For example, in a case involving criminal joint enterprise, the justification for denying any recovery was analysed in terms of causation because the claimant had taken the heightened risk of dangerous driving by the defendant: see *Joyce*. By way of further example, where a person's "income" is derived from seriously illegal behaviour, as with the career

burglar, they will not recover any damages based upon an assertion that they would have continued to earn from their criminal career: see *Hewison* at [28].

27. At a different level, where a person is disabled by the defendant's tort from carrying out legitimate work but it is discovered that they have not been paying tax on their income from that work, the law's response is not to refuse all recovery; instead it awards the sum that represents the Claimant's loss of income but net of tax: see *Hewison* at [36] per Clarke LJ. This is not based upon an unrealistic assumption that the claimant would have paid tax on the income he would have earned during the period of his loss of earnings; nor does it involve rejecting or ignoring the fact of his previous retention of his earnings gross of the tax that should have been paid. Rather, it reflects a balancing of the rights and obligations of the defendant, who owes a duty of care to the claimant despite the claimant's historic and prospective failure to pay tax, and of the claimant, who is not entitled to profit from his illegal behaviour.

Absence of a current MOT and illegality

28. As is well known, a valid MOT certificate is required to be in force for cars over a certain age. Also, it is not possible to pay for such a car's obligatory vehicle tax unless there is a valid MOT certificate in force when the keeper of the car comes to pay it. The other prerequisite to paying vehicle tax is that there must be a valid policy of insurance in place at the time that the vehicle is taxed. The MOT, the policy of insurance and the vehicle tax will not necessarily expire at the same time: the period of the MOT certificate's validity or the policy period may well expire during the period of the vehicle tax that has been purchased in reliance on them. In addition, the existence of a valid MOT certificate means only that the car passed the MOT test on the date stated: it does not state or imply anything more than that about the condition of the vehicle either at the date of the MOT test or thereafter.

29. The Defendant's "causation" defence rests upon the illegality surrounding the Claimant's use of his Volvo. It is therefore necessary to be entirely clear about the criminal consequences of his not having a valid MOT certificate at the time of the accident.

30. Section 47(1) of the Road Traffic Act 1988 ("RTA 1988") creates a summary criminal offence of using, or causing or permitting to be used, on the road a motor vehicle without an MOT, the maximum penalty for which is £1,000: see Schedule 2 of the Road Traffic Offenders Act 1988 ("RTOA 1988")). It is a 'non-endorsable' offence. Therefore, when using his car on the road without a valid MOT, the Claimant was exposing himself to the risk of prosecution and a fine.

31. Other summary criminal offences may be noted by way of comparison. They include using a car on the road with a defective lamp, or having a defective windscreen wiper, or non-conforming number plate: see section 41(2)(h) RTA 1988 and the Road Vehicle Lighting Regulations 1989, Road Vehicles (Construction and Use) Regulations 1986 and Vehicles Excise and Registration Act 1994 respectively. Each of these is non-endorsable and subject to a maximum fine of £1,000. A person who uses their car on the road when it is not compliant with these provisions exposes themselves to a risk of prosecution in the same way as a person who uses their car without a valid MOT certificate.

32. The penalties for these offences obviously indicate the commission of a less culpable road traffic offence than, for example, in the case of driving without a valid certificate of insurance. In such a case, not only is the offender liable to an unlimited fine, obligatory endorsement of driving licence and discretionary disqualification but, the car may be seized and impounded: see section 165A(3) RTA 1988.

33. There is no general rule or principle to the effect that failure to hold a valid MOT certificate will automatically vitiate any insurance that would otherwise be in place; this will depend upon the terms of the policy. However, even if the policy did include a term entitling the insurer to avoid or cancel the policy, the circumstances in which and extent to which an insurer may avoid liabilities to third parties are strictly limited: see sections 151 and 152 RTA 1988. This issue is therefore irrelevant to the appeal.

Previous decisions on the "causation defence" issue

34. The Defendant pleaded reliance upon the decision of the Central London County Court (HHJ Dean QC) in *Agheampong v Allied Manufacturing (London) Ltd* [2009] Lloyds Rep IR 379. There the Claimant's car was uninsured in respect of third-party risks. The Claimant had been using it regularly for at least 16 months while uninsured after cancellation of his last policy for non-payment of premium; and, on the judge's findings, he would have continued to do so. He was duly convicted in the magistrates' court of an offence of using a motor vehicle on a road without insurance as required by section 133 RTA 1988. HHJ Dean QC referred extensively to *Hewison* and concluded that the case before him fell squarely within the principle *ex turpi causa non oritur damnum*. His reasoning gave prominence to the seriousness of the offence of driving without insurance, both for potential victims (despite the existence of the MIB) and for the law-abiding driving public who have to shoulder the cost of the uninsured driver's liabilities. Since he was depriving the claimant of his damages because of the principles of *ex turpi causa*, the causation defence did not arise.

35. *Jack v Borys* was a decision of the Newcastle Upon Tyne County Court (HHJ Freedman) on 20 December 2019 where the claimant's MOT certificate had expired some 4 ½ months before the accident. On appeal from the District Judge, HHJ Freedman gave short shrift to the defendant's suggestion that the claim was barred by the principles underlying *ex turpi causa*, as had the District Judge. But the District Judge had disallowed the claim for loss of use on the basis that the claimant did not have a "roadworthy" vehicle before the accident, and that he had acquired a roadworthy vehicle as a result of the credit hire agreement. Accordingly "[h]e has placed himself in a vastly improved position as a result." HHJ Freedman held that this was not the correct approach. In his view the correct approach was to start from the standpoint that the claimant was entitled to have a vehicle to replace his because it had been damaged in the accident and it was not possible for him to hire an equivalent car i.e. one without a valid MOT certificate. In HHJ Freedman's view, the approach of the District Judge was to re-introduce *ex turpi causa* by another name. He regarded the element of betterment as marginal, observing that it was common for claimants whose cars are damaged to get a hire car that is marginally better than their own and that betterment was not a reason to refuse all recovery.

36. *Agbalaya v London Ambulance Service* was another decision of the Central London County Court (HHJ Lethem) on 17 February 2022. Even by the standards of credit hire claims, the sums involved were startling: Pre-accident value £4,4850; Recovery and

storage £1,294.80; Miscellaneous expenses £50; Hire charges £145,524.48. The judge held that the claimant's car would not have passed the MOT (because of a fault) on the day of the accident and that the claimant could not have had the fault remedied then or thereafter because of her impecuniosity. The issues raised before HHJ Lethem included both *ex turpi causa* and the "causation defence". On that occasion, the causation defence was simply summarised as being that the claimant was seeking compensation for a vehicle she was not permitted to use: "[h]ence there is nothing to compensate." HHJ Lethem held against the claimant on the claim for hire charges applying the causation defence, drawing a distinction between a car that can be driven ("a driveable car") and a car that can be lawfully used on the highway (which he called "a useable car"). He found against the claimant in relation to the recovery and storage charges and miscellaneous expenses on the basis of *ex turpi causa*, saying that he would also have dismissed the hire charges claim on the basis of *ex turpi causa* had he not already found for the defendant on the causation defence.

37. Two aspects of HHJ Lethem's reasoning on the causation issue bear mentioning. First, the Judge regarded as important a concession by defence counsel that, "if the car was rendered roadworthy with a MOT then the causation argument ceased at that point." His reason for thinking this particularly important appears from what he said next: "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": see [36]. Second, the decisive feature for the Judge appears from [37] where he said: "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." I return to both these points later.

The judgments below - Mr Recorder Charman

38. The Recorder dealt with *ex turpi causa* at [26]-[44]. At [27] he correctly identified the relevant principles by reference to [101] of Lord Toulson's judgment in *Patel*; and, at [28] he reminded himself appropriately of the guidance of Lord Lloyd Jones in *Stoffel & Co v Grondona* [2020] UKSC 42 at [26]: parts (1) and (2) of the *Patel* approach require consideration at a high level of generality, but where (3) is relevant, closer scrutiny of the detail of the particular case will be required. Adopting that approach, from [32] he considered the first two parts at a high level. He held that the underlying purpose of the requirement for an MOT is to ensure that cars on the public roads are roadworthy; and he said that the requirement for an MOT certificate "is linked in many cases to the maintenance of insurance, which is a further legal requirement the purpose of which is to ensure that victims of accidents can be compensated." At [34] he said that the other relevant public policy is that tortfeasors should be required to compensate those damaged by their tortious conduct. In addressing the tension between these relevant public policies he regarded it as significant that the presence of the Claimant's vehicle involved a breach of the relevant law and that the breach was not merely coincidental to that presence. He concluded that allowing the claim "where the presence of the defendant's vehicle on the road amounts to a breach of the criminal law by reason of its not having a valid MOT and may also be uninsured would in principle be harmful to the integrity of the legal system."

39. Turning to the question of proportionality at [37]ff, the Recorder accepted that there was no evidence that the Claimant's car was in fact unroadworthy. At [40]-[41] he considered a submission that "failure to obtain an MOT certificate is not regarded by

Parliament as a serious matter and therefore when it comes to proportionality is not an instance of illegality which should be given great weight" to be a "submission [which] slightly misses the point. It is an offence which, like the others referred to by [the Claimant's counsel] is governed by regulations relating to road traffic and subject to a regime of fines contained in those regulations. That and the fines are not determinative of its importance. The court is concerned with the integrity of the legal system and it is by reference to that integrity that the issue of proportionality falls to be considered."

40. The Recorder concluded his assessment of *ex turpi causa* at [44]. After repeating that it was a "real possibility" that the absence of an MOT certificate meant that the Claimant was uninsured he said: "However, his vehicle was parked at the time of the accident and, as I have observed, there is no evidence that it was otherwise unroadworthy. In my judgment it would be disproportionate in those circumstances to deny his claim by reason of his not having a valid certificate of MOT."

41. Turning to the causation defence, the kernel of the Recorder's reasoning was set out at [48]-[52] as follows:

> "48. [The Defendant's] submission was that it was not possible at the time of the accident for [the Claimant] to lawfully drive his car on the public highway. Therefore it was not a reasonable act of mitigation of his loss to hire a replacement vehicle. In substance, he had no loss of use claim because he did not have a vehicle which he could lawfully use on the roads. Mr Ali was not entitled to be put in the position of having a car which he could legally use on the road while his car was being repaired, because he could not legally use his car on the road at the time of the accident.
>
> 49. [The Defendant] also submitted that there was no evidence that [the Claimant] was about to obtain or would have obtained a valid MOT. I accept that submission so far as it goes. Indeed, nor was there any evidence as to whether or not it would have passed an MOT test.
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> 50. [The Claimant's] main submission in response was that the causation defence was in substance the illegality defence in another form. I disagree. The causation defence is in my judgment a distinct defence which is capable of applying only to the credit hire element of the claim because it is based on the distinct nature of the credit hire claim. The diminution in value claim and the recovery claim are claims for losses caused directly by the accident itself in the case of the former, and an expense necessarily incurred in the case of the latter, because unless the car was recovered it could not be repaired. The credit hire claim is different. It is a claim founded in the principle of mitigation of loss. If it succeeds, it does so because it is an expense reasonably incurred by a claimant in mitigation or avoidance of a claim for loss of use of their vehicle. The question of whether a claimant acts reasonably in hiring a replacement vehicle is separate from any issue of illegality.

> 51. Even more fundamentally, in order for the issue of mitigation to arise, it is necessary for a claimant to have a loss of use claim in the first place. If immediately before the accident, a claimant does not have a vehicle which they were entitled to use on the public highway, they cannot claim for the loss of use of such a vehicle, because they have no such loss. Such a claimant did have a driveable vehicle which they could use on private land only, but very few claimants so use or need to so use their vehicles. It is not suggested that [the Claimant] does.
>
> 52. This is entirely legally distinct from the illegality defence and the fact that it follows from the same facts does not render it otherwise."

42. At [58] the Recorder reiterated that the credit hire claim failed "because he had no loss of use claim, by reason of not having a vehicle which he was entitled to use on the public highway at the time of the accident by reason of the absence of an MOT certificate, and he has not established that he could and would [have] obtained a valid certificate at any time during the hire period. He therefore has no claim for loss of use, so cannot have reasonably [incurred] hire charges to avoid or mitigate such a claim." Had the Claimant been able to show that he had suffered a loss of use, the Recorder would have awarded the amount claimed in respect of credit hire because the period of hire was reasonable as was the replacement vehicle hired. Although he was not to be treated as impecunious there was no evidence of any rate at which he could have hired a replacement vehicle other than the rate he actually paid.

The judgments below - Martin Spencer J

43. As I have said, there was and is no challenge to the Recorder's finding on the issue of *ex turpi causa*. As set out by the Judge, the arguments advanced on the causation issue largely centred on the distinction drawn by the Defendant between a vehicle that is usable and one which is *lawfully* usable.

44. At [16]-[17], the Judge drew a distinction between two different forms of illegality. On the one hand, he regarded *ex turpi causa* as "an all-encompassing defence which deprives a claimant of any form of redress." The Judge regarded the application of the maxim as "a form of punishment, perhaps, derived from the circumstances in which the claim was born"; and as an "all-embracing form of illegality which deprives the Claimant of all claims arising from the accident": see [16]. On the other hand there was what he regarded as "a second, more targeted, form of illegality which can be directed towards a particular aspect of the claim being made." This second form of illegality was said not to involve considerations of public policy or proportionality because, by its nature, it allows the courts to distinguish between "meritorious" and "unmeritorious" claimants. Where a claim was unaffected by the absence of a valid MOT, the claimant will recover in full – for example, for the recovery and repair costs. Where a claim is affected by the lack of a valid MOT (which, in the Judge's view, includes a claim for hire charges arising from the loss of the ability to drive the car on the public roads), the court can ask itself "questions raised by the law of causation: for how long would, but for the accident, the car have remained without a valid MOT and therefore could not lawfully have been driven on the road": see [17].

45. The Judge's judgment as originally drafted did not refer to *Hewison*. Counsel for the Claimant properly drew the Judge's attention to this fact and the Judge added to his draft in the light of *Hewison*. Having adopted the analysis of *Hewison* by HHJ Dean QC in *Agheampong*, the Judge set out [26]-[29] of the judgment of Clarke LJ and then said at [20]:

> "This passage demonstrates, in my judgment, that, as I have determined, there is a form of illegality relating not to the whole action but to the loss or damage claimed and which is not the result of an application of public policy. It is but a small step to ally this form of illegality to the principles of causation as was done by the Judge below and, before him, by Judge Lethem [in *Agbalaya*]."

46. Mr Turner, who appears for the Defendant before us, stated that the Judge's analysis did not represent the Defendant's case on the appeal; and he did not seek to support the reasoning in [17] or the Judge's analysis of *Hewison*. In my judgment he was right to take that position, for reasons that I will attempt to explain below.

Discussion and resolution

47. In my judgment there is a fatal flaw at the heart of the Defendant's submissions on the causation defence, which is the assertion that the Claimant has suffered no loss as a result of the Defendant's tort. The error stems from a failure to appreciate the nature of a claim for "loss of use". As explained by *Lagden* at [27] the loss which falls to be compensated in such a case is inconvenience: see [10] above. Or, to adopt what was said in *Beechwood* at [48], a claimant's loss is the lack of advantage and inconvenience caused by not having the use of a car ready at hand and at all hours for personal and/or family use: see [13] above. The defendant's tort causes the claimant to be deprived of the use of an item of property, which causes inconvenience in the form of inability to use it for private transport. The fact that a claimant does not have a valid MOT certificate for the car does not alter the fact that they have been deprived of its use or the fact that this deprivation would have caused inconvenience but for the hiring.

48. Leaving on one side, for a moment, the absence of a valid MOT, there can be no doubt whatsoever that the Defendant's tort caused the Claimant to suffer the inconvenience of being unable to satisfy his need for convenient transport. That is clear from and established by the Recorder's finding that, but for his acceptance of the causation defence, he would have awarded the amount claimed in respect of credit hire because the period of hire was reasonable as was the replacement vehicle hire. As a matter of *loss* that is not affected by the absence of a valid MOT. What the absence of the valid MOT means is that, when satisfying his need for convenient transport, he had been committing an offence and exposing himself to the risk of prosecution.

49. The Recorder's finding that the Claimant's claim for hire charges was not barred by the principles of *ex turpi causa* is, to my mind, not merely unchallenged but clearly right. My only reservation would be that he could have expressed his findings more forcefully. I consider that it is self-evidently true that the criminal offence of failing to obtain an MOT certificate is regarded and established by Parliament to be a relatively minor offence which does not carry very great weight when considering proportionality: see, by way of contrast, *Vellino* and *Joyce*, mentioned at [24] above. It

is no answer to say that it is one of many offences governed by regulations relating to road traffic and subject to a regime of fines: not having a valid test certificate is treated as on a par with having defective windscreen wipers, or a defective lamp, or a non-conforming number plate, with the maximum penalty being a level 3 fine and no possibility of endorsement or disqualification. It incurs a lesser penalty than using a car on the road without insurance; or than having a bald tyre, with its obvious safety connotations, for which the maximum penalty is a level 4 fine (£2,500), obligatory endorsement with 3 penalty points and discretionary disqualification per tyre. Thus, while I would accept that allowing the claim for hire charges in the present case may just about be said to tend towards being harmful to the integrity of the legal system, any harm is in my view strictly limited, leading clearly to the conclusion that it would be disproportionate to have refused the Claimant's claim on the grounds of *ex turpi causa*.

50. I use the phrase "just about" because there is another aspect of the *ex turpi causa* doctrine still to be brought into account, namely the proper division of responsibility between the criminal and civil courts and tribunals: see *Patel* at [108] cited at [20] above. Allowing recovery of the hire charges in the present case does not undermine the effectiveness of the criminal law; but there is a real risk that denying recovery (whether pursuant to the principles of *ex turpi causa* or the causation defence) may amount in substance to an additional penalty disproportionate to the nature and seriousness of any wrongdoing. Refusing a claim for just over £21,000 because of the absence of a valid MOT which exposes the Claimant to a potential fine of £1,000 raises immediate and troubling questions of proportionality. Questions of proportionality are properly raised and of central importance when considering *ex turpi causa*: but it is a surprising feature of the causation defence as advanced by the Defendant that questions of proportionality do not appear to be engaged at all. This seems to me to be contrary to the proper approach that the common law should adopt when considering the strengths and weaknesses of a novel defence. At such a time the Court should bear in mind Bingham LJ's wise counsel that it should not be unduly precious at the first indication of minor infractions of the criminal law.

51. I have said that Mr Turner was right not to support the reasoning of the Judge on the first appeal. There is no basis for an assertion that *ex turpi causa* is a doctrine which, if applicable, deprives a claimant of any and all forms of redress: to the contrary, *Hewison* makes plain that *ex turpi causa* is a flexible doctrine that may bar the action ("non oritur actio") as a whole or a head of claim ("non oritur damnum"). Indeed there is no reason in principle why it may not affect part only of a head of claim if the facts indicated that the illegality upon which reliance is placed would cease to be operative or effective at some point.

52. It follows that I consider HHJ Lethem was wrong to assert as part of his reasoning on the causation defence that, if it was an *ex turpi causa* argument in disguise "the illegality argument would defeat the entire credit hire claim": see [37] above. It is not entirely clear whether the Recorder in the present case considered that *ex turpi causa* was an all or nothing defence. If he did, he was not obviously led into error on that account.

53. The finding by the Recorder that the Claimant's claim was not barred by the doctrine of *ex turpi causa* included the finding that it would be disproportionate to bar the claim on that basis. As already indicated, I agree; and, as I have said, I consider that the Defendant's reasoning is fatally flawed. I also consider that it is necessary to have a clear appreciation of the implications of the causation defence.

54. If the Defendant's case on the causation defence is right, it cannot be confined to cases involving the lack of an MOT. It would logically apply to cases involving an absence of insurance, which may arguably be said to be a more serious offence; and to a case involving one or more bald tyres, of which the same could be said. But it would also apply to other cases where, because of some feature of the car or the claimant's personal arrangements, the claimant's use of their car on the road would involve the commission of a criminal offence. There is no obvious distinction to be drawn between use of a car in the absence of a valid MOT but in respect of which there is no evidence that it is not roadworthy, on the one hand, and cases of cars not otherwise shown to be unroadworthy but having (a) a defective light or (b) defective windscreen wipers or (c) having a non-conforming number plate. Nor, in the febrile atmosphere of credit hire claims can there be any confidence that, if the causation defence were permitted in principle, anything less than scrupulous attention would be paid by defendants' insurers to such relatively trivial defects. The absurdity of such an outcome itself suggests that the causation defence is misconceived, as I would hold it to be. When stripped to its bare essentials, the argument underlying the causation defence is not that the claimant has suffered no loss of use, but that damages ought not to be recovered for loss of use where the use of the original vehicle would have had adverse legal consequences for the claimant as a matter of criminal law. This is the stuff of *ex turpi causa*, not causation.

55. I am quite unable to accept that the causation defence is a proportionate response to the problem of claimants who have claims based on inconvenience and the need for suitable transport but who have, in one way or another, committed minor offences in relation to their damaged vehicle. In my judgment the causation defence is *ex turpi causa* by another name but without the essential requirement of proportionality.

56. Turning to the questions to be asked, as set out in *Pattni* (see [18] above), I would answer them as follows: (i) yes, the Claimant needed to hire a replacement car (as found by the Recorder); (ii) yes, it was reasonable in all the circumstances, to hire the particular type of car actually hired at the rate agreed (as contingently found by the Recorder); (iii) no, the Claimant was not impecunious (as found by the Recorder) but (iv) no, the Defendant has not proved a difference in rates (as found by the Recorder); and so question (v) does not arise.

57. For these reasons I would allow the Claimant's appeal on the central issue of the causation defence.

58. Where I can accept that there may be relevant arguments to be had in other cases is in relation to the issue of reduction of damages to reflect the chance of criminal prosecution and/or fine and disqualification. However, the present appeal did not raise the question whether, or in what circumstances, the fact that a claimant did not have a valid MOT should lead to a different approach to the quantum of loss where a claimant has suffered inconvenience as a result of the defendant's tort, whether that loss is treated as a claim for general or special damages. This case was pleaded on an all or nothing basis and since the issue has not been either raised or argued, I say nothing more about it.

59. Evidently applying the well-established principles that I have briefly summarised at [10] ff above, the Recorder in the present case made the findings (albeit on a contingent basis) that I have set out at [42] above. On the basis of those findings, the Claimant in the present case should be entitled to recover the hire charges in full.

Lady Justice Nicola Davies

60. I agree.

Lady Justice Macur

61. I also agree.